SCC File No. 38381

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(APPELLANT)

-and-

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

RESPONDENT
(RESPONDENT)

APPELLANT'S FACTUM

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The issue on this appeal is whether confidential Cabinet documents are relevant and subject to routine disclosure in judicial reviews of governments' responses to judicial compensation commissions' recommendations.

2. The governing authorities, which are this Court's decisions in the *PEI Reference*[1] and *Bodner*[2], do not contemplate routine disclosure. Those decisions direct that judicial review be focussed on the government's or legislature's public response to the commission's recommendation; be limited in scope; and be deferential to government's constitutional responsibility for management of the public purse.[3]

3. In the *PEI Reference* this Court required that private salary negotiations with judges be replaced by a public process involving independent commissions making public recommendations on judicial compensation, followed by a public response to those recommendations by government or the legislature. In *Bodner*, this Court confirmed that a commission's work must have a "meaningful effect", but that its recommendations need not be binding. Rather, the concept of "meaningful effect" refers to the public process, which contemplates that if the government or legislature decides to depart from the commission's recommendations, it must publicly justify its decision with legitimate reasons which rely upon a reasonable factual foundation.[4]

4. The process is one of public justification.

5. On judicial review of a governmental decision rejecting, in whole or in part, the recommendations of a commission, a deferential standard of review is applied which recognizes

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[1] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the "***PEI Reference***")
[2] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice)*, [2005] 2 S.C.R. 286, 2005 SCC 44 ("***Bodner***")
[3] *Bodner* at para. 30
[4] *Bodner* at paras. 19-20, 25 and 31

government's unique position and accumulated expertise in relation to the management of the province's financial affairs.[5]

6. The reviewing court must consider the government's or legislature's response from a "global perspective" and must weigh the "whole of the process" in order to assess whether government has engaged in a meaningful way with the commission process and has given a rational answer to its recommendations. This Court in *Bodner* recognized that it is impossible to draft a complete code for governmental responses, and that reliance must be placed on government's good faith.[6]

7. The courts in British Columbia have misinterpreted *Bodner* and the *PEI Reference*. They have determined that the "global perspective" analysis involves looking behind the public response at confidential Cabinet documents prepared before the government tabled its proposed public response in the Legislative Assembly (the "**Legislature**"). Accordingly, they have ordered that the Attorney General of British Columbia disclose a submission to Cabinet relating to judicial compensation (the "**Cabinet Submission**").

8. This expands the scope of judicial review, which will not be limited to the public reasons as was the case in *Bodner*, but will include a review of how those reasons were formulated within government, and whether confidential Cabinet documents reveal any impropriety on the part of Cabinet or other members of the executive in the formulation of the public reasons.

9. If upheld, the decisions of the British Columbia courts will result in routine disclosure of Cabinet documents, as the judges' association did not plead any allegations other than a failure on the part of government and the legislature to satisfy the *Bodner* test. The pleadings, and the affidavits filed in support, make no mention of Cabinet or its role and make no allegation of any misconduct or bad faith on the part of Cabinet or the Attorney General.

10. Routinizing the production of Cabinet documents is an unnecessary intrusion upon Cabinet confidentiality, and the scope of that intrusion could be broader than a single document. The disclosure of one Cabinet document may necessitate the disclosure of others to provide context,

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[5] *PEI Reference* at paras. 183-84; *Bodner* at paras. 29-30
[6] *Bodner* at paras. 38-39

and perhaps evidence of participants will be required to explain how the submission to Cabinet was used and why the public response adopted or rejected any recommendations contained in the Cabinet submission. The analysis moves away from the limited form of review contemplated in the *PEI Reference* and *Bodner* and becomes an unwieldy search for misconduct on the part of the executive absent a specific pleading of misconduct. The need to preserve judicial independence, which all parties embrace, does not require this evolution in the law.

11. The law of public interest immunity has never confronted the prospect of routine disclosure of Cabinet documents in a class of case. It is an extraordinary notion that absent pleadings demonstrating a clear basis for production, Cabinet documents will be routinely producible in proceedings before the court. The impacts on candour within government communications and upon Cabinet confidentiality, both of which are important values recognized by this Court in *Carey*[7] and *Babcock*[8], will be significant.

B. Factual Background

(1) The *Judicial Compensation Act*[9]

12. The *Judicial Compensation Act* (the "**Act**") governs the judicial compensation process in British Columbia. It provides for the formation of an independent Judicial Compensation Commission ("**JCC**") every three years.[10] The JCC's mandate is to report to the Attorney General of British Columbia (the "**AGBC**") and the Chief Judge of the Provincial Court with recommendations on all matters respecting the remuneration, allowances and benefits of Provincial Court judges for the ensuing three-year period.[11]

13. When making its recommendations, the JCC must be guided by the need to provide reasonable compensation for judges in British Columbia. The factors that the JCC must consider in making its recommendations are set out in s. 5(5) of the Act:

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[7] *Carey v. Ontario*, [1986] 2 S.C.R. 637
[8] *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, 2002 SCC 57
[9] S.B.C. 2003, c. 59 (the "**Act**")
[10] Act, s. 2
[11] Act, s. 5

(a) the need to maintain a strong court by attracting highly qualified applicants;

(b) changes, if any, to the jurisdiction of judges or judicial justices;

(c) compensation provided in respect of similar judicial positions in Canada, having regard to the differences between those jurisdictions and British Columbia;

(d) changes in the compensation of others paid by provincial public funds in British Columbia;

(e) the generally accepted current and expected economic conditions in British Columbia;

(f) the current and expected financial position of the government over the 3 fiscal years that are the subject of the report.

14. The Act requires the AGBC to lay the JCC's report before the Legislature.[12] However, the JCC's recommendations are not binding on the Legislature. The Legislature may resolve to accept or reject one or more of the recommendations and set the remuneration and benefits for judges.[13]

15. If the Legislature rejects any of the JCC's recommendations, it must provide public reasons for doing so in accordance with this Court's decision in *Bodner*. Recommendations that are not rejected automatically take effect commencing April 1 of the year following the appointment of the JCC.[14] Substituted recommendations instituted by the Legislature take effect on the date stipulated in the resolution.

(2) The 2016 Judicial Compensation Commission Process

16. The report of the 2016 JCC was issued on October 27, 2016 (the "**Report**"). The JCC made ten recommendations relating to Provincial Court judges' salaries and benefits for the period from April 1, 2017 to March 31, 2020.

17. On October 25, 2017, the AGBC tabled the Report in the Legislature and moved that the Legislature resolve to accept eight and reject two of the 2016 JCC's recommendations (the "**Motion**"). In the Motion, the AGBC proposed that:

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[12] Act, s. 6(1)
[13] Act, s. 6(2)
[14] Act, s. 6(3)

(a) the government reject the JCC's recommended salary increase of 11.5% over three years in favour of a 7.02% increase;

(b) the government reject the JCC's recommendation that the government reimburse all of the Provincial Court Judges' Association of British Columbia's (the "**PCJA**") legal costs for the JCC process, and instead proposed that reimbursement be capped at 100% of the costs up to $30,000 and two-thirds of the costs between $30,000 and $150,000 (the maximum payable under s. 7.1(2) of the Act, absent a regulation providing for a different amount); and

(c) the government accept all of the JCC's other recommendations, which concern judicial pensions and other benefits.[15]

18. The government's reasons in support of the Motion were attached in an appendix to the Motion entitled "*Government's Proposed Response to the Report of the 2016 Judicial Compensation Commission*" (the "**Government's Public Response**") and accordingly were available to all members of the Legislature. The Government's Public Response explained the importance of judicial independence, the factors the JCC report was required to consider under the Act and the obligation on the Legislature to provide reasons if it wishes to reject a recommendation of the JCC based on this Court's decisions in the *PEI Reference* and *Bodner*.[16]

19. The Government's Public Response provided reasons explaining why two of the JCC's recommendations should be rejected. The government proposed to reject the JCC's recommended salary increase of 11.5% because, in the government's view, the JCC did not give due consideration to the factors set out in the Act respecting the "current and expected financial position of government" and "changes in the compensation of others paid by public funds" in the province.[17] By comparison, the evidence before the JCC was that other individuals paid by public funds would be receiving salary increases of 1.5% to 2%, on average, and some would be receiving no increases at all. In the government's view, the JCC's failure to properly consider these factors

[15] Appellant's Record ("**AR**"), Tab 13(C), p. 184
[16] AR, Tab 13(A), pp. 162-163
[17] AR, Tab 13(A), pp. 168-174; Act, ss. 5(5)(d) and (f)

led to higher salary recommendations than the government believed were appropriate in light of the government's financial position and its program of expenditure management.

20. The government proposed to reject the recommendation that the PCJA's legal costs be fully indemnified on the basis that the recommendation was not in accordance with the Act.[18] The costs proposed by the government are the maximum amount that can be paid under the Act unless a regulation passed by the Lieutenant Governor in Council provides for a higher amount.[19] No such regulation has been enacted.

21. When the Motion came before the Legislature for debate, the AGBC spoke of the importance of judicial independence, describing it as a cornerstone of Canada's justice system and democracy.[20] He advised the Legislature that it was not bound to accept the JCC's recommendations, but that if the recommendations were to be rejected, reasons must be given which are rational and rest upon a factual foundation.[21]

22. The Motion was debated and put to a vote in a minority Legislature, whose members unanimously resolved to adopt the Motion for the reasons set out in the Government's Public Response (the "**Resolution**").

(3) The Underlying Judicial Review

23. The PCJA brought a petition for judicial review to quash the Resolution of the Legislature. The only ground of judicial review is an allegation that the Government's Public Response failed to comply with the three-part test this Court set out in *Bodner*.[22]

24. The PCJA did not make any allegation of bad faith or misconduct against government or Cabinet. The petition and supporting affidavits did not connect the alleged non-compliance with the *Bodner* test to the actions of Cabinet or to any information placed before Cabinet.

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[18] AR, Tab 13(A), pp. 176-177
[19] Act, s. 7.1
[20] AR, Tab 13(B), p. 180
[21] AR, Tab 13(B), p. 180
[22] AR, Tab 8, pp. 57-58

25. The AGBC's response to the petition opposed the relief sought on the basis that the Government's Public Response complied with all applicable constitutional and statutory principles and satisfied the simple rationality standard of review established by this Court.[23] Neither the response to the petition nor the affidavit filed in support of the response put Cabinet's actions or any information placed before Cabinet in issue. Indeed, neither party made any mention of Cabinet.

(4) Request and Application for Production of the Cabinet Submission

26. After the AGBC filed its response to the petition, the PCJA requested that the AGBC produce a copy of "the cabinet submission that led to the government's response".[24]

27. A Cabinet submission had been disclosed in prior litigation between the parties arising out of the 2010 JCC report.[25] That was the first and only time prior to the current litigation that there was a dispute over the production of a Cabinet submission.

28. In that case, however, the conduct of Cabinet had been put in issue by the PCJA's petition, and the Cabinet submission had been expressly referred to and relied on in an affidavit filed in support of the AGBC's response.[26] On this basis, the chambers judge determined that the Cabinet submission was relevant and should be disclosed.[27] The decision was upheld by the Court of Appeal, which held that "relevance for the purposes of this judicial review is to be determined by the issues that arise from the petition, and from the Attorney General's response to the petition".[28] There is no equivalent pleading and no equivalent evidence in the case at bar.

29. In the case at bar, the AGBC asked the PCJA for an explanation as to how the Cabinet Submission could be relevant to the judicial review.[29] The PCJA responded "In the event it

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[23] AR, Tab 9, p. 63
[24] AR, Tab 14, p. 197
[25] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244 ("***PCJA 2012***")
[26] *PCJA 2012* at paras. 7-10
[27] *PCJA 2012* at para. 16
[28] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCCA 157 at para. 12 ("***PCJA 2012 CA***")
[29] AR, Tab 14, p. 199

impacts our position and submissions".[30] No further basis for relevance was provided. Accordingly, the AGBC declined to produce the Cabinet Submission.

30. The PCJA subsequently brought an application for production of the Cabinet Submission. In its application, the PCJA alleged that the details of the Cabinet Submission "are likely omitted from the Government Response" and "may reveal that political considerations entered into the ultimate decision as to which recommendations to accept and which to reject".[31] No evidence supported these unpleaded allegations, and nothing in the Government's Public Response was alleged to give rise to these concerns.

C. Judicial History

31. In the courts below, two issues were argued: (i) whether the Cabinet Submission was relevant to the application for judicial review; and (ii) if it was relevant, whether it was nonetheless shielded from production on the basis of public interest immunity.

32. The Cabinet Submission was not viewed by any of the lower courts. It has not been produced as the courts below have granted successive stays pending further appeal.[32]

33. On August 20 and 21, 2018, the underlying judicial review was heard in the Supreme Court of British Columbia by Chief Justice Hinkson. Hinkson C.J. reserved his decision until a decision is rendered regarding disclosure of the Cabinet Submission and stipulated that further submissions would be permitted if the Cabinet Submission is produced.

(1) Supreme Court of British Columbia (Master Muir)[33]

34. The application for production of the Cabinet Submission initially came before Master Muir, who ordered that the AGBC produce it to the PCJA.

35. The Master reasoned that because the PCJA pleaded that the Government's Public Response does not rely upon a reasonable factual foundation (i.e. part two of the *Bodner* test), the

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[30] AR, Tab 14, p. 198
[31] AR, Tab 10, pp. 66-67
[32] 2018 BCCA 338; and 2018 BCCA 477
[33] 2018 BCSC 1193 ("**Chambers Reasons**"), AR, Tab 1

"global perspective" test at the third stage of *Bodner* is engaged. The Master reasoned that this entitles the PCJA to "investigate the factual underpinnings of the decisions made", including the Cabinet Submission.[34] As a result, the Cabinet Submission was held to be relevant to the third stage of the *Bodner* test.

36. The Master also held that public interest immunity does not shield the Cabinet Submission from production. The Master did not independently weigh the factors set out in *Carey*. Instead, she held that since *PCJA 2012* and the present case were "dealing with the same process", the considerations on public interest immunity were "virtually identical".[35] Finally, the Master dismissed the AGBC's concern that ordering production simply because non-compliance with the *Bodner* test is pleaded would make production of Cabinet submissions routine. In the Master's view, the "need to ensure transparency" in the JCC process "must trump the potential impact of routine disclosure on the candidness of the persons involved".[36] The Master did not explain what this "transparent" process includes.

(2) Supreme Court of British Columbia (Hinkson C.J.)[37]

37. On appeal, Hinkson C.J. upheld the order for production of the Cabinet Submission.

38. With respect to relevance, Hinkson C.J. accepted the AGBC's submission that the material the PCJA filed on the judicial review "fails to offer any basis upon which the Cabinet submission would or could be relevant."[38] Nonetheless, Hinkson C.J. held that the Master did not err in her application of *Bodner*, as the Cabinet Submission "was nonetheless a relevant factor to be considered in weighing the whole or totality of the process engaged in by Government that led to the motion placed before the Legislature by the Attorney, and the response to the recommendations of the JCC".[39]

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[34] Chambers Reasons at paras. 19-20, AR, Tab 1, p. 7
[35] Chambers Reasons at para. 23, AR, Tab 1, p. 8
[36] Chambers Reasons at para. 27, AR, Tab 1, p. 8
[37] 2018 BCSC 1390 ("**SC Appeal Reasons**"), AR, Tab 3
[38] SC Appeal Reasons at paras. 27-28, AR, Tab 3, pp. 20-21
[39] SC Appeal Reasons at para. 34, AR, Tab 3, p. 23

39. Hinkson C.J. further held that the public interest immunity considerations favoured production. In doing so, Hinkson C.J. accepted that routine production of Cabinet documents would likely become the norm, but stated that this was due to the fact that a submission to Cabinet "routinely informed the government's response".[40]

(3) Court of Appeal for British Columbia (Bauman C.J.B.C, Harris and Dickson JJ.A)[41]

40. The Court of Appeal dismissed the AGBC's appeal.

41. Chief Justice Bauman, writing for the Court of Appeal, agreed with Hinkson C.J. that the Cabinet Submission is relevant to the "whole of the process and the response" as described by *Bodner*.[42] The Court of Appeal further determined that Cabinet plays an "integral part" in shaping the Government's Public Response to the JCC recommendations after being informed by the Cabinet Submission.[43] Since the petition put the validity of the Government's Public Response in issue, the Cabinet Submission that informed the Government's Public Response was relevant.[44] There was no evidence before the court of Cabinet's role in the process.

42. On the issue of public interest immunity, the Court of Appeal agreed with the decision of Hinkson C.J.

43. Finally, the Court of Appeal referenced the "record" on an application for judicial review, and in doing so analogized Cabinet to an administrative tribunal. The Court of Appeal held that the record comprises "the evidence that was before the administrative decision-maker".[45] Chief Justice Bauman reasoned that as Cabinet is "a primary actor" in the process, the Cabinet Submission "is clearly 'evidence which was before the administrative decision-maker'".[46]

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[40] SC Appeal Reasons at para. 50, AR, Tab 3, p. 29
[41] 2018 BCCA 394 ("**CA Reasons**"), AR, Tab 5
[42] CA Reasons at paras. 14-15; AR, Tab 5, p. 39
[43] CA Reasons at para. 9, AR, Tab 5, pp. 37-38
[44] CA Reasons at para. 16, AR, Tab 5, pp. 39-40
[45] CA Reasons at paras. 17-18, AR, Tab 5, p. 40
[46] CA Reasons at para. 19, AR, Tab 5, p. 40

PART II: QUESTIONS IN ISSUE

44. The following are the questions in issue in the appeal:

(a) **Relevance:** Is the Cabinet Submission relevant to the question of whether the *Bodner* test has been met?

(b) **Public Interest Immunity:** If the Cabinet Submission is relevant based on *Bodner*, resulting in routine demands for production, how should this impact the reviewing court's consideration of public interest immunity?

PART III: STATEMENT OF ARGUMENT

Issue 1: Relevance of the Cabinet Submission

A. Overview of the AGBC's Position

45. The lower courts ordered production of the Cabinet Submission based on a misinterpretation of the *PEI Reference* and *Bodner*. They held that the Cabinet Submission is relevant to the reviewing court's assessment of the "whole of the process and the response" and that no allegation beyond a failure to satisfy the *Bodner* test need be pleaded to make the Cabinet Submission relevant.

46. The approach of the lower courts reflects an interpretation of *Bodner* that will expand the role of the reviewing court in a way not contemplated by *Bodner* and in a way that will be detrimental to the process of setting judicial remuneration.

47. Part three of the *Bodner* test was added to staunch the flow of litigation between governments and judges. It reaffirms the "limited form of judicial review" created in the *PEI Reference* which promotes deference to the government's or legislature's public response. If the decisions from the courts below are allowed to stand, judicial review will not be limited to the content of the public response but will become a broader inquiry, the boundaries of which are not defined, into how the response was formulated within government and in the Cabinet room.

48. The lower courts have blurred the boundaries of the record on judicial review, thereby increasing the scope for disputes and protracted litigation between the parties. If anything in a confidential Cabinet document differs from the content of the public response, government will have to disclose further confidential information to provide the necessary context or explanation.

B. Judicial Compensation Cases from this Court

(1) *PEI Reference:* the Public Process

49. The courts below held that the Cabinet Submission is relevant to the "whole of the process", as that phrase is used in *Bodner*. Accordingly, it is necessary to address what that concept entails.

50. The modern approach to setting judicial compensation was developed by this Court in the 1997 *PEI Reference*. Chief Justice Lamer, writing for the majority, held that it is constitutionally impermissible for governments and judges to negotiate directly over compensation.[47] Instead, judicial independence requires the interposition of "independent, objective and effective" commissions between the judiciary and the other branches of government.[48] The task of these commissions is to make recommendations on judicial compensation to the government.

51. The commission's recommendations need not be binding, as decisions about the allocation of public resources are generally within the realm of government and implicate general public policy.[49] However, they must have a "meaningful effect" on the determination of judicial salaries.[50] A meaningful effect is achieved where the executive or the legislature, whichever is vested with the authority to set judicial remuneration, provides a formal response to the commission's recommendations.[51] The response must publicly justify the decision to depart from any of the commission's recommendations.[52]

52. The standard of justification required of the response is one of "simple rationality" – a deferential standard under which the legislature or executive must articulate a "legitimate reason

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[47] *PEI Reference* at paras. 186-191
[48] *PEI Reference* at paras. 166 and 169
[49] *PEI Reference* at paras. 142 and 176
[50] *PEI Reference* at para. 175
[51] *PEI Reference* at para. 179
[52] *PEI Reference* at para. 180

for why it has chosen to depart from the recommendation of the commission".[53] In articulating this standard of review, Lamer C.J. emphasized that a "reviewing court does not engage in a searching analysis of the relationship between ends and means which is the hallmark of a s. 1 [*Charter*] analysis".[54] Rather, the standard of simple rationality is meant to screen out decisions on judicial compensation that are based on purely political considerations, and ensure that decisions are based on a reasonable factual foundation.[55]

53. As Lamer C.J. recognized, "remuneration from the public purse is an inherently political concern, in the sense that it implicates general public policy".[56] But decisions about judicial remuneration must be depoliticized in the sense that they are not used as means of political interference through economic manipulation of judges. Avoidance of this type of political manipulation was the key issue that led this Court to create the commission process.

54. While the legislature or executive must justify any departure from the recommendations of the commission, measures that "pose less of a danger of being used as a means of economic manipulation, and hence of political interference" will satisfy the standard of review more easily than others.[57] For example, Lamer C.J. noted that across-the-board measures affecting substantially every person who is paid from the public purse will be *prima facie* rational, as they will typically be "designed to effectuate the government's overall fiscal priorities" and aimed at furthering the larger public interest.[58] By contrast, measures directed at judges alone "may require a somewhat fuller explanation".[59]

55. Despite the deferential standard of review articulated by Lamer C.J., in the years following the *PEI Reference* litigation replaced direct negotiation as the forum for resolving judicial compensation disputes. The courts hearing the cases struggled to determine what level of review

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[53] *PEI Reference* at para. 183
[54] *PEI Reference* at para. 183
[55] *PEI Reference* at para. 183
[56] *PEI Reference* at paras. 142-144 and 146
[57] *PEI Reference* at para. 184
[58] *PEI Reference* at para. 184
[59] *PEI Reference* at para. 184

this Court had mandated.[60] Some courts held that the government needed to demonstrate "extraordinary circumstances" before departing from a commission's recommendations, and that on judicial review "a court must conduct a thorough and searching examination of the reasons proffered".[61] Others purported to apply the simple rationality standard, but in practice reviewed the government's reasons with heightened rigour.[62] Only the Ontario courts appeared to adopt the deferential approach contemplated by the *PEI Reference*.[63] Uncertainty over the proper approach to judicial review ultimately led this Court to revisit the issue in *Bodner*.

(2) *Bodner*: a Limited and Deferential Form of Judicial Review

56. In the 2005 *Bodner* decision, this Court unanimously reaffirmed that "simple rationality" was to be a limited and deferential standard of review.[64] That standard involves a three-stage analysis:

(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?[65]

The first two stages of the analysis were adopted from the *PEI Reference*. The third stage was added in *Bodner*.

57. This Court confirmed that the commission's recommendations need not be binding in order for them to have a meaningful effect on judicial remuneration. The government retains the power

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[60] Peter W. Hogg, "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries" in *Judicial Independence in Context*, eds. Adam Dodek and Lorne Sossin (Toronto: Irwin Law, 2010) at p. 34

[61] Lori Sterling & Sean Hanley, "The Case for Dialogue in the Judicial Remuneration Process" in *Judicial Independence in Context*, eds. Adam Dodek and Lorne Sossin (Toronto: Irwin Law, 2010) at p. 42 ("**Sterling**")

[62] Sterling at p. 43

[63] Sterling at p. 44

[64] *Bodner* at paras. 29-30

[65] *Bodner* at para. 31

to depart from the recommendations, as "decisions about the allocation of public resources belong to legislatures and to the executive".[66] What is instead required is "a public and open process of recommendation and response".[67]

58. The government must, however, justify its decision to depart from the commission's recommendations with "rational reasons" that are "clearly and fully set out" in a "complete" public response.[68] The response must respond to the recommendations and not simply reiterate earlier submissions that were made to and addressed by the commission. It must show that the recommendations have been taken into account, and rely upon a reasonable factual foundation.

59. If the reasons are subjected to judicial review, the government "may not advance reasons other than those mentioned in its response".[69] The response must therefore contain all the reasons upon which the government relies in rejecting the commission's recommendations.[70] It is enough, for the purposes of the open and transparent public process, that the government's reasons provide a response to the commission's recommendations which is "sufficient to inform the public, members of the legislature and the reviewing court of the facts on which the government's decision is based and to show them that the process has been taken seriously."[71]

60. The only other material that the government is expressly permitted to put forward on judicial review is more detailed information regarding the factual foundation the government relied upon.[72] That is because the "objective of an open and transparent public process would not be furthered if governments were required to answer commission recommendations by, for example, producing volumes of economic and actuarial data".[73] But the material put forward may not advance new reasons for departing from the commission's recommendations beyond those given in the government's response.[74]

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[66] *Bodner* at paras. 20-22 and 42
[67] *Bodner* at paras. 18-19
[68] *Bodner* at paras. 21-27
[69] *Bodner* at para. 27
[70] *Bodner* at para. 62
[71] *Bodner* at para. 63
[72] *Bodner* at paras. 27, 36
[73] *Bodner* at para. 63
[74] *Bodner* at paras. 64, 103

61. At numerous points in *Bodner*, this Court emphasized that the response is subjected to a "limited form of judicial review" and that the reviewing court plays a "limited role", including at the third stage of the analysis.[75] This is consistent with Lamer C.J.'s comment in *PEI Reference* that the reviewing court is not to engage in a searching analysis of ends and means.[76] Rather, this Court contemplated a "deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs."[77]

62. Minor errors or omissions in a government's response therefore do not provide a valid basis for judicial review. Instead, "reliance has to be placed on [the government's] good faith".[78]

63. The addition of the third stage reinforces the requirement that deference be shown to the government on judicial review.[79] The focus of the reviewing court shifts to the "whole of the process and the response" in order to determine whether the commission process has been respected and its purposes have been achieved.[80] Although the reviewing court may find fault with certain aspects of the government's response, the court must weigh and assess the government's participation in the process and its response "in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues."[81] This new stage of the analysis should be regarded as setting a "significantly higher threshold since it requires that the government decision be upheld unless a reasonable person would perceive an interference with judicial independence".[82]

64. This Court's treatment of the specific cases before it in *Bodner* demonstrates the deferential manner in which the third stage was intended to be applied. Both the New Brunswick and Alberta government's responses were found unsatisfactory in several respects. At the third stage, however,

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[75] *Bodner* at paras. 29, 42, 100, 130 and 159
[76] *PEI Reference* at para. 183
[77] *Bodner* at para. 30
[78] *Bodner* at paras. 39-40
[79] Sterling at p. 43
[80] *Bodner* at para. 38
[81] *Bodner* at para. 38
[82] Sterling at p. 43

this Court examined the public responses "globally and with deference" to determine whether the governments had taken the process seriously.[83] This Court determined that they had, and their responses were accordingly upheld on judicial review.

C. The Cabinet Submission is not Relevant to the *Bodner* Test

(1) Relevance is Determined by the Pleadings

65. Relevance is determined by the issues raised in the pleadings.[84] A document is relevant if it assists the court and the parties in determining those issues.[85] In this case, the only allegation in the pleading is that the Government's Public Response did not satisfy the three-part *Bodner* test. Accordingly, the question in issue is whether the Cabinet Submission is relevant on the basis of that test alone.

66. The lower courts answered this question in the affirmative. In their view, the Cabinet Submission is relevant to the third stage of the *Bodner* analysis because it formed part of the "whole of the process" of setting judicial remuneration. In ordering production, they emphasized the need to embrace "transparency" in the process for setting judicial remuneration. A bare allegation that the Government's Public Response did not meet the three-part *Bodner* test was therefore sufficient to justify production of the Cabinet Submission. No specific allegation of bad faith or wrongdoing on the part of government was required.

67. The three-stage *Bodner* test is the standard by which all government responses to commission recommendations are measured across the country. Accordingly, if the simple allegation that the *Bodner* test has not been satisfied entitles the PCJA to view confidential submissions to Cabinet, then they will be sought and have to be produced in every judicial review of this nature. The lower courts accepted that routine production of Cabinet records would be the result of their decisions, but did not grapple with the implications of that result.[86]

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[83] *Bodner* at paras. 81-83 and 129-131
[84] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2011] 3 S.C.R. 535, 2011 SCC 56 at para. 41 ("***Lax Kw'alaams Indian Band***"); *PCJA 2012 CA* at para. 12
[85] *Lax Kw'alaams Indian Band* at paras. 41-42
[86] See SC Appeal Reasons at paras. 49-50, AR, Tab 3, p. 29

(2) The "Whole of the Process" is Not a Basis for Relevance

68. The decisions below rested on a misinterpretation of what the "whole of the process" and "transparency" entail. The "whole of the process" refers to the open and public process that was established in the *PEI Reference* to replace closed-door negotiations directly between judges and government. It entails public recommendations of the commission, public reasons from government responding to the recommendations, and if the Legislature is the decision-maker, then public debate and a public vote in the Legislature. The public nature of the process is what renders it transparent.

69. *Bodner*'s requirement that the reviewing court "weigh the whole of the process and the response" to determine whether the government has meaningfully engaged with the process is simply a direction that the government's response must be reviewed in its proper context. The government is responding to the commission process and the recommendations that arose out of that process. The government was also a participant and made submissions in that process. The response must be reviewed in that light.

70. At no point in *Bodner* did this Court indicate that the third stage of the analysis may require the reviewing court to go behind the government's public response to undertake a review of Cabinet's private deliberative process or a review of confidential submissions made to Cabinet. This Court was able to determine whether the commission process was respected and its purposes were achieved without doing so in all three specific cases before the Court in which the Court analyzed the third stage of the test: New Brunswick, Ontario and Alberta.[87] Under the judicial compensation statutes in all three of those provinces, Cabinet makes the final decision on judicial compensation, unlike in British Columbia, where it is the Legislature.[88] Yet even in those cases, the documents that may have been before Cabinet were not discussed as requisite components of the process.

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[87] *Bodner* at paras. 83, 100 and 130-131

[88] *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 22.06; *Justices of the Peace Compensation Commission Regulation*, Alta. Reg. 8/2000, s. 5; and *Framework Agreement on Judges' Remuneration*, O. Reg. 407/93, ss. 27 and 30-33

(3) The Focus of the Judicial Review is on the Public Response

71. Both the *PEI Reference* and *Bodner* emphasized that the focus of the judicial review is on the government's public response. The response must be complete, meaning that it contains all the reasons upon which the government relies in rejecting the commission's recommendations. When the government is asked to justify its reasons in a judicial review, the government is precluded from bolstering its response with any additional justifications. It can only add data to explain the facts contained in the public reasons, which saves the government from having to include volumes of economic information and calculations in the public response.

72. The position set out in the PCJA's application for production of the Cabinet Submission is antithetical to the notion of a complete public response. It seeks production of the Cabinet Submission, not to discern the economic or actuarial data on which the Government's Public Response relies, but rather out of suspicion that the public response does not reflect the government's true motivations, which the PCJA suggests may be expressed in the Cabinet Submission. In other words, the PCJA's application starts from the premise that the Government's Public Response is incomplete and "likely" omits relevant information that may only be found in the Cabinet Submission.[89] According to the PCJA, the omitted information "may reveal that political considerations entered into the ultimate decision", or may reveal that some of the JCC's recommendations were rejected "for reasons which differ from the government's formal response".[90]

73. The PCJA's position is entirely speculative. It is an unsupported implied allegation of bad faith and deceptive behaviour on the part of Cabinet, which has been made without any evidentiary support or basis in the pleadings.

74. Assuming that the government may have engaged in such behaviour is at odds with *Bodner* and other authorities. *Bodner* directs that "reliance has to be placed on [the government's] good faith".[91] Reliance on the government's good faith was shown, in part, through the restrictions this Court placed on the available remedies for a government's failure to comply with the *Bodner* test.

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[89] AR, Tab 10, p. 66
[90] AR, Tab 10, pp. 67-68
[91] *Bodner* at para. 39

When that occurs, the matter generally must be sent back to Legislature for reconsideration.[92] Reliance on the government's good faith is also consistent with the general principle, previously expressed by this Court, that good faith is to be presumed unless the party alleging bad faith proves otherwise.[93]

75. The PCJA has put forward no basis for rebutting the presumption that the government acted in good faith. It simply seeks disclosure of the Cabinet Submission in order to test whether bad faith or deceptive behaviour *may* have occurred, solely on the basis of an allegation that the *Bodner* test has not been met. A pleading which merely alleges a failure to satisfy the *Bodner* test is not a basis for demanding the production of Cabinet records to test government's good faith.

76. Disclosure of the Cabinet Submission in these circumstances significantly expands the scope of what was to be a "limited" form of judicial review. Indeed, it effectively adds a fourth stage to the *Bodner* analysis, which compares the government's public response with its private deliberative documents to determine whether they exhibit evidence of bad faith. This is done under the guise of considering the "whole of the process".

77. The additional stage incentivizes litigation to challenge otherwise valid public responses on the basis that, once a Cabinet submission is produced, differences between its content and the content of the public response, if any, may invalidate the public response.[94] This is harmful in circumstances where, as stated in *Bodner*, litigation is to be discouraged.[95]

78. Both the *PEI Reference* and *Bodner* stressed that the reviewing court was to engage in a limited and deferential form of judicial review, not a searching analysis of ends and means. This Court expressly declined to create a complete code for what is required of governments' responses.[96] The third stage of *Bodner* reaffirms that deference was to be afforded to government.

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[92] *Bodner* at para. 44
[93] *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 at para. 35; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf, updated to July 2017) at topic 15:2443
[94] See, by analogy, *Potter v. New Brunswick Legal Aid Services Commission*, [2015] 1 S.C.R. 500, 2015 SCC 10 at para. 63
[95] *Bodner* at para. 12
[96] *Bodner* at para. 39

79. By contrast, the third stage has been relied upon by the lower courts in this case to significantly expand the scope of judicial review. In addition to analyzing the public process and public response for compliance with *Bodner*, the reviewing court is now tasked with analyzing confidential Cabinet documents as part of the "whole of the process" to determine whether Cabinet acted in bad faith. No guidance has been provided as to how the reviewing court is to conduct this task.

80. If Cabinet submissions contain recommendations which differ from the public governmental response, it is unclear what use the reviewing courts can make of this. The differences may reflect debate amongst members of Cabinet, whose intent will not be in evidence barring a further intrusion on Cabinet confidentiality.

81. There will be no explanation for such differences absent the government tendering additional evidence of other confidential deliberative communications.[97] This would further erode Cabinet confidentiality, expand the scope of judicial review and risk rancour in the relationship between the executive and the judiciary. The government should not be forced to tender evidence of Cabinet's confidential deliberations to attempt to explain the content of the public response on the basis of a bald allegation that it has failed to meet the *Bodner* test.

82. Neither the production of the confidential Cabinet document nor the tendering of additional evidence from the government is likely to assist the reviewing court in understanding the "real" reasons why the recommendations of the JCC were rejected. As this Court has previously stated, the motives of a legislative body, composed of numerous persons, are "unknowable except by what it enacts".[98] That observation was made in a case in which no reasons were expressed for the legislative act, a municipal resolution. In the case at bar, the 'motives' of the Legislature are set out in written reasons appended to the Resolution. It is not conceivable that a submission to Cabinet is a better reflection of the motives of the Legislative Assembly, or indeed Cabinet, than the Resolution which was adopted by a vote of the members.

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[97] See, by analogy, *British Columbia Teachers' Federation v. Attorney General of British Columbia*, 2008 BCSC 1699 at para. 80; *Brar v. College of Veterinarians of British Columbia*, 2011 BCSC 215 at para. 19 ("***Brar***")

[98] *Consortium Developments (Clearwater) Ltd. v. Sarnia (City)*, [1998] 3 S.C.R. 3 at para. 45

83. Further, Cabinet did not enact the Cabinet Submission. The Cabinet Submission is not a submission *of* Cabinet which articulates its reasons and motivations, but rather a submission *to* Cabinet to aid in its deliberations. The Legislature enacted the Resolution for the reasons set out in the Government's Public Response, and it is that public response alone that provides the justification for the rejection of two of the JCC's recommendations and is subject to judicial review.

84. Chief Justice Bauman sought to address the AGBC's concern about the expansion of judicial review in this area by analogizing Cabinet to an administrative tribunal. Only the "record" before the administrative decision-maker would be admissible as evidence on a judicial review of this nature.[99] Presumably, this means that submissions to Cabinet must be produced but not necessarily other confidential deliberative communications.

85. However, as the Nova Scotia Court of Appeal recognized in the companion case, Cabinet cannot be analogized to an adjudicative tribunal.[100] Cabinet is a political body, not an adjudicative one. Cabinet's proposals relating to spending are political in the sense described in the *PEI Reference*, involving matters such as fiscal management, priorities and the disbursement of funds from the public purse. Cabinet neither received "evidence", nor conducted a "hearing" amongst competing parties, nor were its sources confined to a particular "record".[101] In the case of British Columbia, Cabinet made no decision. The decision was instead made by the Legislature as required under the Act.

86. Placing limits on what Cabinet documents are producible in the first instance does not address the problem created by the lower court decisions. The "whole of the process" within government and within the Cabinet room is clearly broader than the Cabinet Submission. The advice contained in the Cabinet Submission will likely have been preceded by work performed by executive officials, and then is likely to be discussed at the Cabinet table and may or may not be acted upon by Cabinet, depending on Cabinet's view of the matter. None of this was before the Legislature when the Motion was passed. If government is put in the position of having to explain

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[99] CA Reasons at paras. 17-19, AR, Tab 5, p. 40
[100] *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83 ("***NSCA Reasons***")
[101] *NSCA Reasons* at para. 74

differences between the content of the Cabinet Submission and the content of the public response, this additional information may be necessary regardless of the Court of Appeal's view of the limits of the "record".

D. Proposed Approach to Production of Cabinet Documents

87. A determination that the Cabinet Submission is not relevant to the *Bodner* test is sufficient to dispose of the appeal. However, there may be a case in which production of confidential Cabinet documents is appropriate. Accordingly, in the interests of assisting the Court, the AGBC proposes the following approach to the production of Cabinet documents in such cases.

88. Production of Cabinet documents in a judicial review of this nature will be appropriate where two conditions are met. First, the pleadings must disclose an issue, the resolution of which would be assisted by production of the Cabinet documents. This may include allegations of inappropriate conduct in connection with the formulation of the government's public response.

89. Second, there must be some basis in the government's public response or in the evidence to justify such a pleading. Requiring a limited evidentiary foundation is appropriate to preclude fishing expeditions and due to both the seriousness of the allegations being made and the importance of Cabinet confidentiality. In addition, a bald allegation made in the hopes of obtaining confidential Cabinet documents, without any evidentiary foundation, may constitute an abuse of process.[102]

90. The foregoing approach is similar to the one that courts apply when considering whether to lift deliberative secrecy and compel production of private documents from administrative tribunals to address allegations of breach of natural justice or procedural fairness.[103] Courts on judicial review will allow for the production of such documents when there are valid reasons for

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[102] *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paras. 42-46; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34; *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at para. 5

[103] *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952 ("***Tremblay***"); *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2019 BCCA 60 at paras. 47-49 ("***Eastside Pharmacy***"); *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 2007 NSCA 37 at paras. 12-22 and 32-37; *Brar* at paras. 15-21

believing that the process followed did not comply with the rules of natural justice or procedural fairness.[104] Valid reasons must be based on evidence, not speculation.[105]

91. While Cabinet is not a tribunal, a similar test is appropriate here because deliberative secrecy and Cabinet confidentiality are based on similar underlying principles. As Professors Jones and de Villars have observed in the deliberative secrecy context, some business is better conducted in private, and the confidentiality of that business should be maintained.[106] In addition, consultation and debate in the context of the decision-making process are important and should be protected to prevent a chilling effect.[107] Finally, in both circumstances, the reviewing court is concerned with an allegation that something improper happened in private, and production is necessary to reveal whether the allegation has merit.[108]

92. Once the two conditions set out above are established, the Cabinet document may be produced to the reviewing court for private inspection. The reviewing court can then assess whether the Cabinet document is probative of the issues in the judicial review and may be capable of explaining the reasons why the government has chosen to reject the JCC's recommendations, such that it should be produced to the judges' association.

93. Proceeding in this manner is consistent with the courts' approach to documents that may be subject to public interest immunity. As this Court stated in *Carey*, a court should generally inspect Cabinet documents in cases where it is not clear that the balance of public interest is in favour of confidentiality.[109]

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[104] *Tremblay* at p. 966
[105] *Eastside Pharmacy* at paras. 50-51; *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)*, [1994] N.S.J. No. 84 (C.A.) at para. 5
[106] D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (6th ed. 2014), at p. 474; see also *Carey* at para. 46
[107] *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221, 2001 SCC 4 at paras. 52-55 ("***Ellis-Don***")
[108] *Ellis-Don* at paras. 52 and 54
[109] See also P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 125.

Issue 2: Impact of Routine Production on Public Interest Immunity

A. Potential Conflict Between *Bodner* and *Carey*

94. This Court has never previously considered the doctrine of public interest immunity in a context where, but for an immunity, disclosure of Cabinet documents will be routine. The present case therefore provides the opportunity for this Court to consider public interest immunity in circumstances where the rationales supporting the doctrine are most pronounced.

95. Routine production of Cabinet documents puts the concern for candour in government communications into sharp focus. The executive branch is unduly constrained if it must draft advice to Cabinet knowing that, as a matter of routine, whatever is drafted will be scrutinized by the judges' association for use in litigation.

96. In the courts below, the PCJA took the position that the doctrine of public interest immunity remains as a guard against routine production of Cabinet submissions because, in future cases, the *Carey* factors might militate against production despite the lower courts finding that the Cabinet submission is relevant to part three of the *Bodner* test.

97. This position highlights the potential for conflict between the two lines of cases. If disclosure of a submission to Cabinet is important to part three of the *Bodner* test, it is difficult to see how a court would ever refuse its production under *Carey*. Production will be routinized, a matter which either calls out for *Carey* to be revisited in this context, or which demonstrates that the lower courts' interpretation of *Bodner* should be rejected.

B. *Carey* Abolishes Absolute Cabinet Confidentiality

98. *Carey* involved a claim for damages against the Government of Ontario. Before trial, the plaintiff served the Secretary of the Ontario Cabinet with a subpoena ordering him to attend trial and to bring all Cabinet documents related to the case. The Government of Ontario then applied to quash the subpoena on the basis of public interest immunity.

99. Justice La Forest, writing for the Court, analyzed two rationales for non-disclosure of Cabinet documents.

100. The first rationale was the "candour argument", which provides that disclosure of Cabinet documents "would lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest."[110] While La Forest J. was prepared to attach "some weight" to the candour argument, he found that its importance was "easy to exaggerate", as he doubted that "the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation".[111]

101. The second rationale for non-disclosure of Cabinet documents was based on the "political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only".[112] The substance of this rationale was captured by Lord Reid, who stated that:

> The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.[113]

Justice La Forest agreed with these concerns, but disputed the "absolute character of the protection accorded [Cabinet's] deliberations or policy formulation".[114]

102. As such, this Court developed a list of criteria which was intended to strike a balance between the competing interests of preventing harm to the public service and the public interest in the administration of justice.[115] Those criteria are: the nature of the policy concerned; the contents of the documents; the level of the decision-making involved; the timing of the disclosure; the importance of producing the documents to the administration of justice; and any allegation of improper conduct by the executive branch towards a citizen.[116] It is for the government to demonstrate that non-disclosure is necessary in the public interest.[117]

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[110] *Carey* at para. 44
[111] *Carey* at para. 46
[112] *Carey* at para. 49
[113] *Carey* at para. 49, citing *Conway v. Rimmer*, [1968] A.C. 910 at 952
[114] *Carey* at para. 50
[115] *Carey* at para. 22
[116] *Carey* at paras. 79-80
[117] *Carey* at paras. 107-109

C. Systematic Production of Cabinet Documents Following *Carey*

103. It has been argued that the approach articulated in *Carey* failed to strike the proper balance among competing interests, leading to repeated and unnecessary disclosure of confidential Cabinet documents.[118]

104. This is apparent from the *Carey* case itself. Following this Court's decision in *Carey*, the matter was sent back to the Ontario High Court of Justice. The Ontario High Court of Justice inspected the documents and ordered their production.[119] Cabinet documents were subsequently filed at the trial, Ministers testified and the substance of their deliberations was published in newspapers.[120] However, none of the documents ultimately contained material or probative evidence, and the allegations against the Government of Ontario were dismissed on the merits.[121]

105. Since *Carey* was decided in 1986, courts have "almost systematically ordered the production of Cabinet secrets".[122] The main criterion for production has been the relevance of the information. If the documents are found to be relevant by the court, production has typically been ordered. Yet it is "unclear whether the production of Cabinet documents was necessary to the fair disposition of any of these cases".[123]

106. These issues have been linked to several concerns with the *Carey* framework, which were identified by Professor Yan Campagnolo.

107. According to Professor Campagnolo, *Carey* gave insufficient weight to the rationales behind Cabinet confidentiality. Justice La Forest accepted that the possibility that disclosure would encourage "ill-informed or captious public or political criticism" justified Cabinet confidentiality. But no consideration was given to the principle of collective ministerial

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[118] Yan Campagnolo, "A Rational Approach to Cabinet Immunity under the Common law" (2017) 55:1 Alta. L. Rev. 43 at pp. 65-67 ("**Campagnolo**")
[119] *Carey v Ontario*, [1988] O.J. No 1252 (H. Ct. J.), aff'd [1991] O.J. No. 1819 (C.A.) ("***Carey HCJ***")
[120] Campagnolo at p. 66
[121] Campagnolo at p. 66; *Carey HCJ*
[122] Campagnolo at p. 66
[123] Campagnolo at p. 67

responsibility, which is the "main reason for protection of Cabinet secrecy".[124] Collective ministerial responsibility is the notion "that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made".[125]

108. In addition, *Carey* provided "litigants a master key to unlock the doors of the Cabinet room".[126] All that litigants must do is allege government misconduct in order to obtain production of confidential Cabinet documents. Accordingly, in Professor Campagnolo's view, "the allegations of government misconduct should be supported by some *prima facie* evidence" and "the courts should distinguish between various types of government misconduct with different degrees of gravity (from breach of contract or tortious conduct, to unlawful conduct or a criminal offence)" when assessing whether the public interest favours disclosure of Cabinet documents.[127]

109. This Court re-affirmed the importance of, and rationales behind, public interest immunity in *Babcock.*

110. *Babcock* primarily dealt with public interest immunity under s. 39 of the *Canada Evidence Act*.[128] However, Chief Justice McLachlin, writing for the majority, also recognized the importance of the common law tradition of Cabinet confidentiality at para. 18:

> The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: see *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at paras. 21-22. If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. The rationale for recognizing and protecting Cabinet confidences is well summarized by the views of Lord

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[124] Campagnolo at p. 65
[125] *Commonwealth v. Northern Land Council* (1993), 112 A.L.R. 409 at 412-414 (H.C.A.)
[126] Campagnolo at p. 65
[127] Campagnolo at p. 66
[128] R.S.C. 1985, c. C-5

Salisbury in the *Report of the Committee of Privy Counsellors on Ministerial Memoirs* (January 1976), at p. 13:

> A Cabinet discussion was not the occasion for the deliverance of considered judgements but an opportunity for the pursuit of practical conclusions. It could only be made completely effective for this purpose if the flow of suggestions which accompanied it attained the freedom and fulness which belong to private conversations — members must feel themselves untrammelled by any consideration of consistency with the past or self-justification in the future. . . . The first rule of Cabinet conduct, he used to declare, was that no member should ever "Hansardise" another, — ever compare his present contribution to the common fund of counsel with a previously expressed opinion. . . .

The process of democratic governance works best when Cabinet members charged with government policy and decision-making are free to express themselves around the Cabinet table unreservedly. In addition to ensuring candour in Cabinet discussions, this Court in *Carey v. Ontario*, [1986] 2 S.C.R. 637, at p. 659, recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision-making.

111. More recently in *John Doe*[129], a case arising in the freedom of information context, this Court again recognized the effect that disclosure of confidential advice provided to Cabinet has on the candour of the advice:

> […] The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.[130]

D. Impact of Routine Production on Public Interest Immunity

112. The candour rationale was given diminished weight in *Carey* based on doubt that government officials would be afraid to communicate candidly because of the "off-chance" or "remote" prospect of production of confidential Cabinet documents in litigation.[131]

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[129] *John Doe v. Ontario (Finance)*, [2014] 2 S.C.R. 3, 2014 SCC 36 ("***John Doe***")
[130] *John Doe* at para. 45
[131] *Carey* at paras. 46-47

113. However, off-chance production is not what is at issue in the present case. The lower courts determined that confidential submissions to Cabinet are part of the "whole of the process" to be reviewed under the *Bodner* test, and on this approach they will be subject to production in all future judicial reviews arising out of the judicial compensation process. Routinizing production increases the risk that candour in government communications will be impaired in a manner not contemplated by this Court in *Carey*.

114. Routine disclosure of Cabinet documents in judicial compensation cases also creates an increased possibility of "ill-informed" criticism from "those ready to criticise without adequate knowledge of the background".[132] As the submission to Cabinet is merely part of a broader process by which decisions are made, or by which recommendations to the Legislature are developed, its production will leave an incomplete picture which may then be used by others to unjustifiably criticize and invalidate the government's public response.

115. On the AGBC's interpretation of *Bodner*, there is no basis for production of Cabinet documents absent pleadings and evidence that justify it. If the AGBC's approach is correct, there is no need to revisit *Carey* out of a concern for the impacts of routinizing the disclosure of Cabinet documents. On the contrary, if the PCJA's interpretation of *Bodner* is preferred, then the concerns which McLachlin C.J. described as "obvious" in *Babcock* become particularly pronounced.

PART IV: SUBMISSIONS ON COSTS

116. The AGBC seeks its costs in this Court and in the courts below.

PART V: ORDER SOUGHT

117. The AGBC respectfully requests that this appeal be allowed with costs in this Court and in the courts below, and that the order for production of the Cabinet Submission be overturned.

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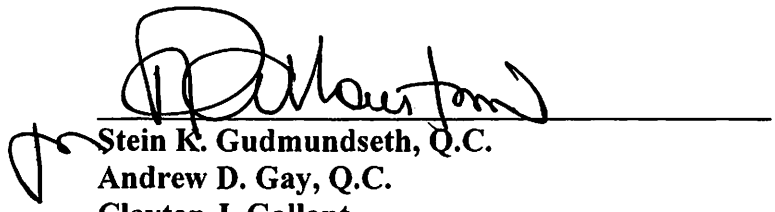
[132] *Carey* at para. 49; *Babcock* at para. 18

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2019



Stein K. Gudmundseth, Q.C.
Andrew D. Gay, Q.C.
Clayton J. Gallant
Counsel for the Appellant,
Attorney General of British Columbia

PART VI: SUBMISSIONS ON CONFIDENTIALITY

The AGBC advises that there is no sealing or confidentiality order, nor is there any publication ban on any information in the file or any classification of information in the file as confidential under legislation or restriction on public access to information in the file that could impact on the Court's reasons in the appeal.

PART VII: TABLE OF AUTHORITIES

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