**S.C.C. 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)

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# FACTUM OF THE RESPONDENT, PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

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

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## PART I - CONCISE OVERVIEW OF POSITION AND CONCISE STATEMENT OF FACTS

### A. OVERVIEW

1. The Attorney General of British Columbia ("**AGBC**") appeals from the unanimous decision of the British Columbia Court of Appeal[1] that upheld the decisions of both Master Muir[2] and Chief Justice Hinkson[3] and concluded that the submission that was before the executive branch of government ("**Cabinet**") must be produced to the Provincial Court Judges' Association of British Columbia (**"Association**") in this proceeding that concerns judicial review of judicial remuneration. AGBC argues the Cabinet submission is not relevant or is subject to public interest immunity ("**PII**").

2. The issues in this appeal are narrow. They centre on the content of the record on a judicial review of judicial remuneration. The position of the Association is that in BC, the record should include the submission made to Cabinet because the Cabinet plays a critical role in the ultimate decision by the Legislative Assembly ("**LA**") whether to accept or reject the recommendations of the Judicial Compensation Commission ("**JCC**").

3. AGBC says that there has been too much litigation in this area. It attributes this to the courts in BC misinterpreting the third prong of the *Bodner*[4] test and in particular in determining the content of the record.[5]

4. This is not the case to determine the nature and cause of litigation in BC or its solution. Whether such litigation would be avoided by a scheme which would require the government to be bound by the recommendations of the JCC - as some have argued - or whether the process should

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[1] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 394 [***CA Reasons***], Appellant's Record ("**AR**") 34-41

[2] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCSC 1193 [***Muir Reasons***], AR 1-9

[3] *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2018 BCSC 1390 [***Hinkson CJ Reasons***], AR 13-30

[4] *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. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44 [***Bodner***]

[5] AGBC Factum, ¶¶48 and 77

allow more informal negotiations or mediation - as others have suggested - is beyond the scope of the issues in this appeal.

5. However, the Association rejects that the disclosure of the Cabinet submissions in two of the last three successful judicial reviews has, in any way, caused litigation. That disclosure occurred in the context of judicial reviews that were extant. To the extent disputes about the producibility of the Cabinet documents have caused the litigation to become more protracted than it otherwise would be, that problem will be remedied by a clear direction from this Court either in favour or against the appellant.

6. As noted: this appeal concerns the content of the record in this type of judicial review. The content of the record should not depend on the Cabinet submission being a "smoking gun". It is inconceivable it would not be relevant given the role Cabinet invariably plays in the process in BC.

7. The relevance of Cabinet submissions in light of this process was not considered by this Court in *Bodner* as the issue simply did not arise. However, the lower courts' decisions on this point are consistent with this Court's direction in *Bodner* to weigh the whole or totality of the process engaged in by government. The decisions are also consistent with the rationales articulated by this Court as underlying the *Bodner* test, and in particular, transparency.

8. Transparency is particularly important where judges are concerned. Ensuring transparency in the whole process will have a salutary effect on the legitimacy of the JCC process from the perspective of the judiciary and the public. It is needed to ensure that judicial compensation is not inappropriately politicized and to avoid even the perception that it could be. In the wake of the last three JCC reports (2010, 2013 and 2016), four resolutions of government to reject the salary and pension recommendations of the JCC have been unanimously accepted by all parties in the LA. This is not a common occurrence when other bills are debated. Yet on each occasion where that resolution has been the subject of a judicial review, the Courts have either remitted the matter to the LA for reconsideration, or – more exceptionally – directed that the JCC recommendations be implemented.

9. In the context of such a judicial review, access to the Cabinet submission may reveal – as it already has in BC – that government has not respected the process or given meaningful effect to the JCC's recommendations. In that scenario transparency or "sunlight" is said to be the best of disinfectants.[6] One would expect that such conduct, once exposed, would not recur. In time increased transparency should therefore result in less litigation. In time disclosure should enhance trust and accountability between the judiciary and the government. It may, in some cases, obviate the need for litigation or limit its scope.

10. The Cabinet submission may be relevant to each stage of the *Bodner* analysis, whether or not bad faith is alleged or proved. At the first stage, the Cabinet submission may reveal the rationales considered by Cabinet in formulating its response. These rationales may or may not be set out in the motion tabled in the LA and may disclose what government chose to prioritize in formulating its response. At the second stage, the Cabinet submission usually includes a cost-benefit analysis for each option considered by government. At the third stage, the Cabinet submission is likely to reveal whether the process was politicized and respected.

11. On the issue of PII, the lower courts were correct to summarily dismiss this claim based on the existing, well-established and well-understood jurisprudence, including *Carey*.[7] The PII argument failed because AGBC led no evidence of a specific public interest that requires non-disclosure. There is no basis for the Court to depart from *Carey* as the AGBC contends

## B. STATEMENT OF FACTS

### i. The JCC Process

12. The constitutional implications of the principle of judicial independence make the establishment of judicial salaries and benefits of more than usual delicacy. Judges are appointed by the executive branch on the authority of legislation enacted by the legislative branch, but are

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[6] Brandeis, *Other People's Money and How Bankers Use It* (New York: Frederick A. Stokes Company, 1914), p. 92

[7] *Carey v. Ontario*, [1986] 2 S.C.R. 637 [***Carey***]

constrained from direct discussion with those branches on those subjects in the interests of the constitutional commitment to separation of powers and institutional independence.[8]

13. In BC, a JCC is the independent tribunal formed every three years with a mandate under the *JCA*[9] to report to AGBC and the Chief Judge on all matters respecting remuneration, allowances and benefits of Provincial Court Judges ("**PCJ**"), and to make recommendations with respect to those matters. Meaningful and effective JCC proceedings are constitutionally mandated; their purpose is to protect the public interest in an independent judiciary by depoliticizing the setting of judicial remuneration.[10]

14. A preliminary report with recommendations must be delivered to AGBC and the Chief Judge, and thereafter a final report must be laid before the LA for response by the LA, all on a timetable established by the *Act*. Any response of the LA is by resolution. The LA may reject one or more recommendations and make a substitution, failing which the recommendations become the result. Thus, the final decision on judicial compensation is made by the LA.[11]

15. First, and significantly, in BC, Cabinet formulates the government's proposed response to the JCC report. Cabinet does this after receiving a briefing note from AGBC.[12]

16. The proposed response is tabled in the legislature, debated, and the LA makes its decision. The *Act* directs payments from the consolidated revenue fund according to the resolution of the LA or the JCC report, whichever pertains.

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[8] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 63 [***Third JR_CA***], ¶1

[9] *Judicial Compensation Act*, S.B.C. 2003, c. 59 [***JCA*** or the ***Act***]

[10] *Muir Reasons*, ¶¶2, 4, AR 2; *Hinkson CJ Reasons*, ¶5, AR 14; ***Ref re Remuneration of Judges of the Prov. Court of P.E.I.***; ***Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.***, [1997] 3 S.C.R. 3 [***PEI Reference***], ¶133

[11] *Third JR_CA*, ¶7; *Hinkson CJ Reasons*, ¶5, AR 14

[12] *CA Reasons*, ¶3, AR 35; *Muir Reasons*, ¶9, AR 3; *Hinkson CJ Reasons*, ¶31, AR 22; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336 [***Second JR***], ¶5; see also *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 [***First JR***], ¶¶4, 12-16, 50-52, 80-81; also *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244 [***First Cabinet Decision***], ¶15 citing *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, [1998] B.C.J. No. 1230 (BCCA)

### ii. Procedural History

17. It is important to situate the present judicial review in the broader context of the remuneration of provincial court judges in BC dating back to at least 2010.[13]

#### (a) The First Judicial Review ("First JR")

18. In the First JR, the Association applied for production of the Cabinet submission. AGBC objected on the basis, among others, of relevance. AGBC argued that the focus of the judicial review is on the response of the LA, not on considerations of Cabinet because, like today, it was the LA who had decision-making authority, not Cabinet.[14]

19. Macaulay J. reviewed the petition and saw that the Association made various allegations about the problems with the government's response to the JCC report. The petition plead in part:

> 9. The Government's rejection of the recommended salary increase for judges was also based, in part, on the cost consequences to the Government of a 12-year collective agreement with the Crown Counsel Association which provides for annual salary increases based on what judges obtain through the JCC process plus 1.27%, which consideration was irrelevant and inappropriate given that it formed no part of the JCC proceedings or Government's Response to the JCC Report.
>
> …
>
> 14. The Government's change to the recommendation by the JCC that long-term disability be extended to age 75, so as to commence April 1, 2013 was based on an absolute net-zero policy, without regard to the actual cost, benefit, fairness or reasonableness of the recommendation.
>
> …
>
> 19. The Government's change to the recommendation by the JCC that judges be enrolled in the flexible benefits plan, so as to commence April 1, 2013, is based on an absolute net-zero policy, without regard to the actual cost, benefit, fairness or reasonableness of the recommendation.[15]

20. As well, in the First JR, AGBC tendered an affidavit of Mr. Neil Reimer who managed the government's participation in the 2010 JCC process. Mr. Reimer had deposed in part as follows:

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[13] *Muir Reasons*, ¶¶13-17, AR 4-7
[14] *First Cabinet Decision*, ¶¶10-11
[15] *First Cabinet Decision*, ¶8

> I then drafted a detailed submission to Cabinet for the Attorney General's consideration and signature. The submission addressed all of the Commission's recommendations and provided options, with estimated costs, for each recommendation. The submission was taken to Cabinet by the Attorney General, and Cabinet made the ultimate decision regarding which recommendations to accept and which to reject.[16]

21. The Cabinet submission was not exhibited to the affidavit.[17]

22. Based on the alleged failings set out in the petition, Mr. Reimer's evidence and various authorities, discussed in the legal analysis below, the Court found the Cabinet submission to be relevant and ordered that it be produced.[18]

23. AGBC appealed. The Court of Appeal noted that the Association sought to test the government's assertions of good faith and commitment to the review process by examining the factual foundations of AGBC's position, and ultimately the basis on which the legislative assembly was asked to act. The Cabinet submission prepared by Mr. Reimer was put forward as a basis on which the government's response could be supported.[19] Ultimately that Cabinet submission was disclosed.

24. On the merits of the First JR, Macaulay J. explained the significance of the role Cabinet plays in BC:

> [14] In fact, the Cabinet plays, and did play in this case, an important role in the process. After receiving a submission from the Attorney General, Cabinet considered and formulated the government response to the final report of the 2010 JCC.
>
> …
>
> [16] … As I have already pointed out, s. 6(2) does not require a response from Cabinet on behalf of the government, although nothing in the *JCA* precludes Cabinet from formulating and advising the LA of the government's response to assist the latter in reaching a statutory decision. <u>It is not open, however, to Cabinet, in doing so, to then shield its own participation in the process from scrutiny upon judicial review.</u>
>
> …

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[16] *First Cabinet Decision*, ¶9
[17] *First Cabinet Decision*, ¶9
[18] *First Cabinet Decision*, ¶¶10-11, 16
[19] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCCA 157 [**First Cabinet Decision_CA**], ¶¶14-15

> [50] … I am alive to the different roles in the process that may be assigned to the executive, or Cabinet, and the LA by the legislation in the particular jurisdiction. I recognize that, in this province, the LA is ultimately responsible for determining the salaries and benefits of PCJs.
>
> [51] However, it is Cabinet that developed the government response to the report of the JCC. The Attorney General then placed that response before the LA, along with the report. The LA accepted and thereby, in my view, clearly adopted the response as its basis for departing from the recommendations of the JCC.
>
> [52] As a result, the three-part *Bodner* test must focus on the government response to the JCC report that Cabinet developed and the LA ultimately adopted. The requisite good faith and commitment on the part of both the Cabinet and the LA necessarily applies to the whole of the process. Accordingly, it is relevant to consider the evidence respecting what took place before Cabinet.[20]

25. As Macaulay J. explained, that evidence established that the Cabinet submission highlighted the estimated cost of accepting the JCC recommendations in light of other groups linked (through different statutes or negotiations) to judges' salaries:

> [55] The document is entitled "Cabinet Submission - Request for Decision" and is signed by Mr. Reimer and the Attorney General. The submission is comprehensive in nature and commences, under the heading "Implications and Considerations," by stating:
>
> > 1. The process for judicial compensation is different from collective bargaining. Government and the judiciary are constitutionally prohibited from negotiating over compensation. They instead make submissions to an independent commission under a process governed by the *Judicial Compensation Act*. Government's response to commission reports is reviewable by the superior courts and must satisfy constitutional requirements.
> >
> > 2. Other groups are linked by statute or negotiated agreements to judges' salaries: Crown and legal counsel; Officers of the Legislature, and Masters of the Supreme Court. However, government's response to the commission recommendations must address only judges' compensation.
> >
> > 3. The commission's recommendations and government's required response will have fiscal (and possibly precedential) impacts that extend beyond the current public sector compensation mandate.
>
> The next heading is "Background / Context".
>
> [56] Under "Background / Context", the brief addresses costs, as follows:

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[20] *First JR*, ¶¶14, 16, 50-52 (emphasis added)

> The estimated cost of accepting all of the commission's salary and benefit recommendations over the three-year period is $6.867 million in respect of judges alone, and $13.840 million for judges and other groups whose compensation is tied to that of judges.
>
> The estimated cost of accepting the recommended responses in this cabinet submission over the three-year period is $2.984 million in respect of judges alone, and $5.210 million for judges and the other groups.[21]

26. Macaulay J. held the refrain in that document was unusual and questionable and the submission appeared to intend to remind Cabinet to take into account information it was prohibited from considering and not to include it in the government response that would ultimately be publically disclosed.[22] Macaulay J. observed that "[n]ot surprisingly, much of the information in the Cabinet submission was not included as part of the government justification in its response."[23] Macaulay J. held:

> [80] I must go a step further respecting the third stage of the *Bodner* test. Good faith participation in the constitutional process by government is essential if the goals of judicial independence and preservation of the Rule of Law are to be achieved. In British Columbia, the role of the Attorney General is vital to ensuring that Cabinet properly understands its role in the process with respect to formulating the government response.
>
> [81] Accordingly, the Attorney General has the responsibility of advising Cabinet as to its constitutional obligations in formulating the government response to a JCC report. The Cabinet briefing document, signed by the Attorney General, evidenced, at best, a lack of good faith commitment to the constitutional process. At worst, it is a deliberate information shell game. The inappropriate emphasis on the costs associated with linked outcomes for some other non-judicial public sector employees appears intended as a "silent" answer to the commission's conclusion that "judicial compensation forms such a small part of Government expenditure that increases in that compensation will always be affordable."[24]

27. Macaulay J. ordered special costs against AGBC and noted that the Cabinet submission was the aggravating feature warranting special costs.[25] Macaulay J. directed the return of the matter to government and to the LA for reconsideration in accordance with his reasons.

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[21] *First JR*, ¶¶55-56 (emphasis added)
[22] *First JR*, ¶¶55-56, 60
[23] *First JR*, ¶68
[24] *First JR*, ¶¶80-81 (emphasis added)
[25] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1420, ¶¶12-13, 16

### (b) The Second Judicial Review

28. After that reconsideration, the next government response was also subject to judicial review, the "Second JR". On the Second JR, the legal basis of the petition was nearly identical to the legal basis in the present petition and Loo J. dismissed an application for particulars.[26] There was also no affidavit referring to any specific Cabinet submission informing the LA's second decision.

29. In the Second JR, again, Government took the position that the Cabinet submissions were not admissible: both because they were not relevant and protected by PII.[27] Nevertheless, as Hinkson CJ noted,[28] Savage J. (as he then was), found the Cabinet submissions to be relevant and they were produced.[29] They are described in and informed Savage J.'s judgment.[30]

30. Ultimately, the Court of Appeal declared that PCJs are entitled to the recommendations in the 2010 JCC report. The treatment of the Cabinet submissions was not commented upon by the Court of Appeal.[31]

### (c) The Third Judicial Review

31. There was a third judicial review, this one of the 2013 JCC Report and no request was made for the Cabinet submission. That judicial review was again ultimately resolved in the BC Court of Appeal, the government response was set aside and the matter was remitted for reconsideration by the LA.[32]

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[26] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2013 BCSC 1302, ¶¶14, 26
[27] *Second JR*, ¶¶20-22
[28] *Hinkson CJ Reasons*, ¶29, AR 21
[29] *Second JR*, ¶¶29-30
[30] *Second JR*, ¶¶63-67, 136-43
[31] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136 [***Second JR_CA***]
[32] *Third JR_CA*

### (d) The Present Judicial Review

32. The JCC delivered its final report to AGBC and the Chief Judge on October 27, 2016. The JCC made 16 recommendations, 10 of which pertained to PCJs addressing salary and benefits for 2017-2019.

33. Cabinet formulated the government response to the JCC report dated October 23, 2017.[33]

34. On October 25, 2017, AGBC moved that the LA reject some of those. On the same date, the LA adopted the government's response to both the 2013 JCC Report and the 2016 JCC Report. The Hansard debates reveal that at least some members of the Legislature misunderstood the role of the judiciary and the LA's constitutional obligations. Specifically, the Honourable Leader of the Opposition Wilkinson described Provincial Court Judges as "public servants" and stated his view that in dealing with the JCC recommendations, AGBC had presented a "compromise position, as has been the case in the past."[34]

35. On December 20, 2017, the Association's petition for judicial review was served on AGBC. On March 1, 2018, AGBC delivered his response to petition.

36. On March 2, 2018, the Association requested disclosure of the Cabinet submission. The AGBC also sought and obtained particulars of the petition which included that the 2017 Response:

> e) is incomplete, does not respond to the recommendations themselves, rests on purely political reasons, reiterates earlier submissions that were made to and substantively addressed by the JCC;[35]

37. On March 19, 2018, AGBC took the position that the Association was not entitled to the Cabinet submission.

38. On April 4, 2018, the Association filed a notice of application seeking production of the Cabinet submission. On July 16, 2018, Master Muir ordered AGBC to produce a copy of the Cabinet submission.

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[33] Affidavit of Ingrid Eiermann sworn December 19, 2017 ("**Eiermann Affidavit**"), Ex. ZZ, Respondent's Record ("**RR**") 1-16
[34] Eiermann Affidavit, Ex. BBB, p. 1739, RR 24
[35] Affidavit of Lyna Lay made October 26, 2018 ("**Lay Affidavit**"), Ex. A, RR 31

39. On August 16, 2018, Hinkson CJ dismissed the appeal from Master Muir's order and ordered costs in any event of the cause.

40. On October 23, 2018, the Court of Appeal dismissed the appeal holding in part:

> [15] I agree in substance with the reasoning of Chief Justice Hinkson generally and it is not necessary to add much to that analysis.
>
> …
>
> [20] The appellant strongly urges that the Court rein in judicial review of the government's response to the JCC recommendations, arguing that looking "behind the public response to confidential cabinet communications" is not part of the task of the reviewing court under the *P.E.I. Reference* and *Bodner*. In my view, accepting the appellant's urging would artificially limit the scope of review to one based on what the government of the day decided to make public. Imposing such limits would be a decidedly odd way to embrace "transparency". Again, in my view, the traditional limits on judicial review and in particular those limiting resort to material beyond the "record" offer sufficient safeguards against the potential abuses cited by the appellant.[36]

41. On August 20-21, 2018, the hearing of the petition proceeded before Hinkson CJ in the absence of the Cabinet submission. Argument on the petition will not conclude, and judgment will not be given, until the within appeal is resolved and, if applicable, the Cabinet submission addressed.

## PART II - POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

42. The Cabinet submission is relevant and admissible.

43. AGBC's claim of PII must fail.

## PART III - STATEMENT OF ARGUMENT

### A. CABINET SUBMISSION IS RELEVANT

#### i. Cabinet's Actions and Cabinet Submission Raised on the Pleadings

44. AGBC seems to concede that the relevance of Cabinet's actions or the Cabinet submission may be raised on the pleadings in a particular case.

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[36] *CA Reasons*, ¶¶15, 20

45. The Court of Appeal was correct in holding the relevance of the Cabinet submission was raised on the pleadings in this case:

> While the petition does not mention the Cabinet submission, one pleads material facts, not the evidence by which the facts will be proved: *Supreme Court Civil Rules* 3-1(2)(a), 3-7(1). And in any event, when the petition specifically seeks a declaration that the governmental response "did not conform to the standards set out in the [*Act*] and embodied in the constitutional principle of judicial independence for rejecting the recommendations of a judicial compensation commission", one asks how could the Cabinet submission that informed that response not be relevant on the face of the pleadings?...[37]

46. Just as in the Second JR, the petition makes specific reference to Cabinet's involvement:

> The constitutional principle of judicial independence dictates that the Government and the Legislative Assembly must not reject or vary the recommendations of the JCC unless:
>
> a. the Government articulates a legitimate reason for departing from the Commission's recommendations;
>
> b. the Government's reasons rely upon a reasonable factual foundation; and
>
> c. viewed globally, the Commission process has been respected and the purposes of the Commission - preserving judicial independence and depoliticizing the setting of judicial remuneration - have been achieved.[38]

47. As noted, AGBC also sought and obtained particulars of the;[39]

48. Relevance is also determined by the statutory scheme as applied in the province, the issues that arise from the petition, the response to the petition, the evidence led and the particular history of this case.[40]

49. Most importantly, the process followed in BC makes the Cabinet submission relevant. As each of the Court of Appeal, Hinkson CJ, Master Muir, Macaulay J. and Savage J. observed, and

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[37] *CA Reasons*, ¶16 (emphasis in original), AR 39-40
[38] Petition, Part 3, ¶2 (emphasis added), AR 57
[39] Lay Affidavit, Ex. A, RR 31 (emphasis added)
[40] *Hinkson CJ Reasons*, ¶¶26-28, AR 20-21; *First Cabinet Decision_CA*, ¶12

as set out in more detail above, in BC before the LA makes a decision in respect of judicial remuneration, Cabinet formulates the government's proposed response.[41]

50. Consistent with this invariable practice, AGBC conceded in these proceedings that the Cabinet submission was signed by him and provided to Cabinet prior to its motion which led to the LA's impugned resolution.[42] The suggestion in AGBC's factum that Cabinet had no provable role in the process is not open to AGBC in light of that concession.[43]

51. In light of Cabinet's role in the process of providing the government's Response to the LA it is clear that the key submission to Cabinet by AGBC or his staff is relevant on any proper definition of that term.

52. AGBC conceded in the courts below that its argument did not depend on the LA being the *de jure* decision maker and that it would make the same the submission even if Cabinet was the decision-maker. That was a proper concession given the critical role that Cabinet plays in the process of the final decision by the LA. It now seems that AGBC has resiled to some extent from that position.[44]

### ii. No Misinterpretation of *PEI Reference* or *Bodner*

53. AGBC is forced to argue that even if the Cabinet submission is relevant on basic evidentiary or logical grounds it is somehow made irrelevant or inadmissible by his interpretation of the standard of simple rationality articulated in *PEI Reference* and applied in *Bodner*.

54. The standard of "simple rationality" is a somewhat more textured concept than it may appear on its face. What it means in this particular context is given shape by the three part test set out in *Bodner*:

> 31 In the *Reference*, at para. 183, a two-stage analysis for determining **the rationality** of the government's response is set out. We are now adding a third stage which requires

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[41] *CA Reasons*, ¶3, AR 35; *Muir Reasons*, ¶9, AR 3; *Hinkson CJ Reasons*, ¶31, AR 22; *Second JR*, ¶5; see also *First JR*, ¶¶4, 12-16, 50-52, 80-81; also *First Cabinet Decision*, ¶15 citing *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, [1998] B.C.J. No. 1230 (BCCA)
[42] *CA Reasons*, ¶3, AR 35
[43] AGBC Factum, ¶41
[44] AGBC Factum, ¶85

> the reviewing judge to view the matter globally and consider whether the overall purpose of the commission process has been met. The analysis should be as follows:
>
> (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?[45]

55. The evidence that is relevant and not rendered inadmissible by the PII doctrine may be reviewed at each stage of this three prong test.

56. "Legitimacy" is now to be determined in accord with this Court's decision in *Bodner*[46] which has more rigour than the phrase "simple rationality" might evoke:

> 23 The commission's recommendations must be given weight. They have to be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.
>
> 24 The response must be tailored to the commission's recommendations and must be "legitimate" (*Reference*, at paras. 180-83), which is what the law, fair dealing and respect for the process require. The government must respond to the commission's recommendations and give legitimate reasons for departing from or varying them.
>
> 25 The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the

[45] *Bodner*, ¶31
[46] *First JR*, ¶37; *Bodner*, ¶32

> depoliticization of the remuneration process and the need to preserve judicial independence.
>
> 26 The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained. If a new fact or circumstance arises after the release of the commission's report, the government may rely on that fact or circumstance in its reasons for varying the commission's recommendations. It is also permissible for the government to analyse the impact of the recommendations and to verify the accuracy of information in the commission's report.
>
> 27 The government's reasons for departing from the commission's recommendations, and the factual foundations that underlie those reasons, must be clearly and fully stated in the government's response to the recommendations. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon…[47]

57. The second stage of the review consists of an inquiry into the reasonableness and sufficiency of the factual foundation relied upon by government in rejecting or varying the JCC's recommendations. This requires government to indicate the factual basis upon which it acted, and whether on the face of the evidence before the Court, it was rational to rely on such facts.[48]

58. This Court elaborated on the third part of the test in *Bodner* as follows:

> 38 At the third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the <u>whole of the process and the response</u> in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, 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. <u>The focus shifts to the totality of the process and of the response.</u>[49]

59. The Cabinet submission may be relevant to each stage of the *Bodner* analysis, whether or not bad faith is alleged. At the first stage, the Cabinet submission may reveal the rationales

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[47] *Bodner*, ¶¶23-27
[48] *Bodner*, ¶¶33-37
[49] *Bodner*, ¶38

considered by Cabinet in formulating its response. These rationales may or may not be set out in the motion tabled in the LA and may disclose what government chose to prioritize in formulating its response. At the second stage, the Cabinet submission usually includes a cost-benefit analysis for each option considered by government. At the third stage, the Cabinet submission is likely to reveal whether the process was politicized.

60. AGBC chose to emphasize portions of the passage above at paragraph 58 to suggest that the third part of the test was really only for the benefit of the government. AGBC's factum states:

> 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".[50]

61. This sentence is based on the opinion of government lawyers who authored the article cited at footnotes 79 and 82.

62. The Association rejects the suggestion that in order to stem the flow of the litigation, the third stage of *Bodner* operates or ought to operate only to the advantage of the government. Instead, the requirement to "weigh the whole of the process ***and*** the response,"[51] necessarily extends the process beyond the formal response and in BC, encompasses the Cabinet submission.

63. Once the content of the record is established, the level of deference to be accorded to government in applying the *Bodner* test depends upon, and is proportional to, the degree to which government has participated in and engaged with the process.[52] That stage of the analysis has yet to come.

64. In *Bodner*, the Court held that a "meaningful effect" requires an "open" and "transparent public process" of recommendation and response.[53] That process becomes illusory if government

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[50] AGBC Factum, ¶63
[51] *Bodner*, ¶83
[52] *Bodner*, ¶¶82-83; *Judges of the Provincial Court of Manitoba et al. v. Her Majesty The Queen*, 2012 MBQB 79, ¶44; *Judges of the Provincial Court (Man.) v. Manitoba et al*., 2013 MBCA 74, ¶¶65-67; *First JR*, ¶46; *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140, ¶¶120-21
[53] *Bodner*, ¶¶19, 63

can conceal some of the real work on the basis the dubious claim that the document is irrelevant. AGBC argues it is the "public nature of the process that renders it transparent."[54] That argument begs the question as to what ought to be public or not concealed from the court on judicial review.

65. Fundamentally, as Macaulay J. observed the key principle at stake in this unique kind of case which "engages the political, constitutional and legal aspects of the relationships between the executive, legislative and judicial branches of government as they relate to determining judicial remuneration" is **transparency**. He held:

> [22] For the reasons set out above, I consider the content of the Cabinet submission relevant, although I take into account that it is background information for consideration by the Cabinet in formulating the Response and, ultimately, the resolution that the Attorney General placed before the Legislative Assembly for a vote.
>
> [23] Most important, in my view, in the administration of justice, is the need to produce the document, having regard to the high level of importance to be accorded to the case; the need to ensure, as much as possible, transparency in the process for determining judicial remuneration; and, finally, to ensure that all relevant material is available for the purpose of judicial review.
>
> [24] I take into account the ever present need to reinforce public confidence in the independence of the judiciary as a means of safeguarding the respective constitutional positions of the three branches of government and to maintain confidence in the administration of justice. Given the inherently political decisions that are a necessary part of the process of setting judges' remuneration and related matters, confidence requires as much transparency as possible. In *Bodner*, the Supreme Court emphasized the important objective of "an open and transparent process" for determining judicial remuneration and related matters (para. 63). The *PEI Reference* recognized that the executive, or the legislature, as applicable, must be prepared to justify a decision not to accept any recommendation in court if necessary (para. 180). Accordingly, the need for transparency extends here, subject to necessary restraint, to the judicial review process as well. Directing the release of the Cabinet submission assists in achieving that goal.[55]

66. While *Bodner* did not expressly deal with the relevance of a briefing to Cabinet there is nothing in *Bodner* that suggests such a document may not be relevant. The references to the process being in its "totality" and being an "open" and "transparent" and "public" one fully support the decisions of the courts below.

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[54] AGBC Factum, ¶68

[55] *Muir Reasons*, ¶¶22-24, citing *Babcock v. Canada (Attorney General)*, 2004 BCSC 1311 (emphasis added), AR 7-8

67. The requirement for transparency should not turn on the record adduced by government. Nor should disclosure be contingent on proof or even a claim of bad faith. Master Muir recognized the pleadings and evidence in this case are on a different footing than the First JR. AGBC has learned not to refer expressly to the Cabinet submission in its affidavit evidence. Again, that development is no basis upon which to shield what should be a public process from scrutiny.

### iii. No Deleterious Effects Requiring Transparency When Cabinet Participates in the Process

68. AGBC's suggestion that disclosure of the Cabinet submission adds a fourth stage to the *Bodner* analysis because it "compares the government's public response with its private deliberative documents" misses the mark.[56] It assumes the Cabinet submission *should be* private. BC need not involve Cabinet in that process. It could, for example, have a regime where the JCC recommendations are binding. Having instead crafted a process that involves Cabinet, *Bodner* precludes a claim of privacy over the Cabinet submission absent some specified public interest, none of which is even asserted here.

69. There is no merit to AGBC's suggestion that transparency in the ***whole*** process, including Cabinet's participation if it continues to participate in that process, "incentivizes litigation".[57] What incentivizes litigation is the routine rejection of the JCC recommendations and a process made opaque to the public and to the Association.

70. AGBC worries that the Cabinet submission will be unable to inform the courts on the "motives" of the LA.[58] AGBC argues that "[i]t 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."[59]

71. The respondents, however, are not in search of motive. They are in search of reasons. In this particular process where Cabinet plays such a critical role in the ultimate decision of the LA, the submission of the AG to Cabinet has such an institutional quality that its relevance to the

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[56] AGBC Factum, ¶76
[57] AGBC Factum, ¶77
[58] AGBC Factum, ¶82
[59] AGBC Factum, ¶82 (emphasis added)

reasons of the government's response cannot be denied even if it might not in itself be determinative.

72. What is significant about the decision of Macaulay J. is that not every MLA in the LA who voted on the resolution might have had the information in the Cabinet submission. He held it nonetheless relevant and producible.

73. All MLAs supported the resolution and would have done so likely in light of the constitutional convention of party discipline which requires the Members to do so. In fact, in *Wells v. Newfoundland,*[60] this Court stated "[t]he Court should not be blind to the reality of Canadian governance that, except in certain rare cases, the executive frequently and *de facto* controls the legislature."[61] Likewise, in *Attorney General of Quebec v. Blaikie*, this Court stated:

> Indeed, it is the Government which, through its majority, does in practice control the operations of the elected branch of the Legislature on a day to day basis, allocates time, gives priority to its own measures and in most cases decides whether or not the legislative power is to be delegated and, if so, whether it is to hold it itself or to have it entrusted to some other body.[62]

74. The fact that the resolutions in the case at bar were passed in a minority government likewise does not detract from the relevance of the Cabinet submission. The Cabinet submission is relevant because the Cabinet submission may contain facts or information that influenced those who read it or may contain facts or information that others in the LA did not read and yet are entitled to and if disclosed could have affected the outcome.

75. Even if the contents of the Cabinet submission would not have affected the outcome; the contents of the Cabinet submission need not be a "smoking gun" (as they were in the First JR). It need only be relevant and it is impossible to understand how a document that provided the basis for the government's response could not be relevant. At the very least it will always be context or background as Savage J held in the *Second JR*. Its disclosure will always enhance transparency and accountability.

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[60] *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 [***Wells***]
[61] *Wells*, ¶54
[62] *Attorney General of Quebec v. Blaikie et al.*, [1981] 1 S.C.R. 312, at 320

76. AGBC's suggestion that disclosure of the Cabinet documents is likely to cause prejudice to the government if the content differs from the content of the public response or otherwise requires explanation is without merit.[63] AGBC is free to argue that nothing can be made of such differences on any possible judicial review.[64]

77. However, on the two occasions recently when the Cabinet submission was disclosed there was no suggestion that it put the government or Court in the position of an incomplete or distorted record.

78. Secondly, if explanation of the differences is required, government is able to adduce additional affidavit evidence to explain its factual foundation and commitment to the process consistent with the deferential approach articulated in *PEI Reference* and *Bodner*.[65] For example, in *Bodner*, Ontario retained PricewaterhouseCoopers ("**PwC**") to determine the cost of implementing the JCC's recommendations. Ontario's "public" reasons for rejecting the JCC's recommendations made no reference to it having done so nor to any alleged error or incompleteness in costings made by the JCC. Nevertheless, on judicial review in support of its position, and over the judge's association objections, Ontario filed affidavits from Owen M. O'Neil of PwC detailing PwC's work for the government. This Court held that these affidavits were proper and did not add a new position. They "merely illustrate Ontario's good faith and its commitment to taking the Commission's recommendations seriously. The fact that [Ontario's response did] not refer to Ontario's engagement of PwC is irrelevant."[66]

79. If such background information is relevant to *justify* government's "public response," then it must also be relevant when the Association seeks similar evidence in the course of a judicial review of the public response. It would undermine confidence in the process if government could, in its sole discretion, determine whether or not to disclose relevant evidence on the basis of whether or not it bolsters government's position.

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[63] AGBC Factum, ¶¶10, 80-82
[64] AGBC Factum, ¶80
[65] AGBC Factum, ¶¶81-82
[66] *Bodner*, ¶¶91-92, 103

80. The possibility that leading such evidence might require disclosure of further *confidential* information to provide context or explanation[67] is based on a faulty premise when one considers that the factual foundation and process itself is not meant to be confidential, but rather meant to be as transparent as possible.

81. That said if in a hypothetical case disclosure of the Cabinet submission would require disclosure of other documents in order to provide the full context, and if disclosure of all or some of those documents would truly harm the public interest, then that is where the plea of PII should be advanced.

82. Nevertheless, the respondents submit that disclosure and admission of Cabinet submissions in evidence should be the norm in proceedings such as this. Only exceptionally or rarely should such documents be shielded from disclosure and only when the government can make out a claim of PII. Cabinet submission is Not Subject to Public Interest Immunity

**iv. AGBC Failed to Establish Public Interest Immunity**

83. PII is a common law doctrine, preserved by ss. 9(2) and (3) of the *Crown Proceeding Act*.[68] It must be established on a case-by-case basis by balancing the public interest in maintaining Cabinet confidentiality against the public interest in disclosure. Factors to consider in the balancing process were identified in *Carey*.[69] Turning to the relevant factors in this case:

84. "**The nature of the policy concerned.**" Here the protection of judicial independence in the context of government's decision to vary the salary recommendation made by the JCC is of the utmost importance. This criteria favours disclosure.[70]

85. "**The particular contents of the document.**" Here, AGBC's claim must fail because there is no evidence led of a specific public interest that requires non-disclosure.[71] That is the basis on

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[67] AGBC Factum, ¶¶84-86
[68] *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 9
[69] *Muir Reasons*, ¶22, AR 7-8, citing *Carey* and summarized in *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681 (ABQB), at 689
[70] *Hinkson CJ Reasons*, ¶42, AR 26; *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13 [***NSPJA***], ¶144
[71] *Carey*, ¶40

which the claim for PII was dismissed by the courts in the First and Second JR.[72] Nothing in the record suggests there is the kind of sensitive material concerning national security, national defence or diplomatic negotiations referenced by the Court in *Carey*. This favours disclosure.[73]

86. "**The level of the decision making process.**" We do not seek the minutes of Cabinet's discussions or deliberations, but rather a submission made by a bureaucrat in the Ministry of the Attorney General. This factor favours disclosure.[74] As Burnyeat J. held in *Health Services and Support–Facilities Subsector Bargaining Association v. British Columbia,* as referred by the Court of Appeal in *BCTF*:

> Ninth, the documents which will be disclosed by my Order do not disclose what was discussed by the Cabinet. Rather, the documents relate to what was before Cabinet when decisions were taken by it. Accordingly, the disclosure of the documents should in no way impede the active debate that one would expect at the Cabinet table.[75]

87. "**The timing of the disclosure.**" This factor favours disclosure. The government has made its decision. This is not a situation where there is a decision pending.[76]

88. **"The importance of producing the documents in the administration of justice."** This factor is of particular importance and weighs heavily in favour of disclosure. The "need to ensure, as much as possible, transparency in the process for determining judicial remuneration" points to disclosure.[77]

89. "**Any allegation of improper conduct by the executive branch towards a citizen.**" Having not seen the Cabinet submission, there can be no allegation of improper conduct in this case. But it is relevant that in the First JR, the Cabinet submission revealed improper conduct warranting special costs and which would not have been discoverable but for disclosure of the Cabinet submission. This factor may be neutral or in favour of disclosure.

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[72] *Second JR*, ¶¶24-29
[73] *Hinkson CJ Reasons*, ¶¶42-43, 46, AR 26-28
[74] *Hinkson CJ Reasons*, ¶¶42, 47, AR 26, 28; *NSPJA*, ¶177
[75] *Health Services and Support–Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509 [***Health Services***]; *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 185 [***BCTF***], ¶5
[76] *NSPJA*, ¶178
[77] *NSPJA*, ¶¶179-81; *First JR*, ¶¶23-24; *Second JR*, ¶29

90. **"The probative value of the information in the Cabinet submission."** Without reviewing the Cabinet submissions, the probative value of the information contained in it and the effect of its non-disclosure cannot be assessed. However, the previous judicial reviews suggest the contents of the document are useful to the courts on judicial review.[78]

91. Master Muir and Hinkson CJ rightly rejected AGBC's argument that disclosure was undesirable because it would result in routine production of the Cabinet submission in judicial reviews of government responses to JCC reports. Their essential and correct finding was that would only be the case if the *Carey* factors pointed in the same direction – i.e. it turns on the facts.[79] So long as the legislation remains the same and the government's practice of providing a response that is informed by a submission to Cabinet remains the same, then there is no reason to exclude the Cabinet submission from disclosure because it becomes routine. In other words, disclosure should be routine unless exceptional circumstances exist.

92. It is the recent practice of BC, perhaps even a trend, to disclose such documents when relevant in litigation, but to seek a confidentiality order. This also weighs in favour of disclosure.[80]

93. In the final analysis the Cabinet submission, like other evidence, must be disclosed unless such disclosure would harm with the public interest. The level of decision-making is only a variable to take into account. The important and unique constellation of factors in judicial compensation cases are even more important as the importance of producing the documents affects the administration of justice and the rule of law. The public interest favours disclosure.

94. There can be no credible suggestion that the Court of Appeal misapplied either the *Crown Proceeding Act* or the jurisprudence of this Court in *Carey* or the cases that followed it.

### v. No Basis to Depart from *Carey*

95. AGBC argues that under no circumstances will a submission to Cabinet be relevant in a judicial review of a decision by the LA to reject recommendations of the JCC. In the alternative,

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[78] *Hinkson CJ Reasons*, ¶¶44-45, AR 27-28
[79] *Hinkson CJ Reasons*, ¶50, AR 29; *Muir Reasons*, ¶¶24-25, AR 8; *CA Reasons*, ¶22, AR 41
[80] See e.g. *BCTF*, ¶6; also Order of Bowden J. made May 29, 2018 in *Li v. BC*, SCBC Vancouver Action No. S-168644, Respondent's Book of Authorities, Tab 1

AGBC argues such a document may be relevant if it meets the two part test set out at AGBC Factum, paragraphs 87-89. AGBC argues if both of these positions are rejected by this Court and if *Bodner* makes relevant submissions to Cabinet, this will result in the routine disclosure of such documents such that the decision of this Court in *Carey* must be "revisited in this context."[81]

96. In other words, AGBC seems to say that if this Court agrees with the Association about the importance of transparency in the whole of the process that nevertheless this Court should then deny or limit this quest for transparency unless the Association can meet a more rigorous test for disclosure of documents over which a claim of PII is made than has long been the law in BC, and indeed most of the country.

97. That new test, AGBC argues, should be as propounded by Prof. Campagnolo in a recent law review article.[82] Prof. Campagnolo claims that this Court in *Carey* gave insufficient weight to the rationales behind Cabinet confidentiality.[83] This concern is hardly the basis for this Court to reconsider *Carey*, a case that is well-understood and consistently applied across the country.

98. AGBC has not met the test articulated by this Court in *Bedford* and affirmed in *Comeau* that governs when this Court may depart from its own precedents. Specifically, no change in the circumstances or evidence that fundamentally shifts the parameters of the debate has been alleged.[84] Nor are any "new legal issues" raised "as a consequence of significant developments in the law".[85] *Carey* was affirmed in *Babcock* which post-dated the *PEI Reference.*[86] Transparency in the process of government's response to JCC recommendations was first required by this Court in *PEI Reference*.[87] This Court's clarification of the requirements of "legitimacy" and the addition of the third stage in the test in *Bodner* that required consideration of the entire process globally, is not a new legal issue or significant development in the law requiring reconsideration of *Carey* (or *Babcock).* It is simply a slightly different framework in which a claim for PII may be raised.

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[81] AGBC Factum, ¶97
[82] AGBC Factum, ¶¶107-08
[83] AGBC Factum, ¶107
[84] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [***Bedford***], ¶44; *R. v. Comeau*, 2018 SCC 15 [***Comeau***], ¶¶29-31
[85] *Bedford*, ¶44; *Comeau*, ¶¶29-31
[86] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 [***Babcock***], ¶¶18-19
[87] *PEI Reference*, ¶180

99. AGBC exaggerates the impact of routine disclosure of Cabinet submissions in the specific context of the JCC process. This is a process that only arises every three years.

100. As noted above, this case does not concern Cabinet deliberations.

101. AGBC relies on the article by Prof. Campagnolo to argue that *Carey* fails to strike the proper balance among competing interests, leading to repeated and unnecessary disclosures of Cabinet documents.[88] Leaving aside what might be described as uninformed readings of the subsequent trial decision in *Carey*, Prof. Campagnolo's article defeats AGBC's claim in this case.

102. Prof. Campagnolo's approach is to first require the applicants to demonstrate that the Cabinet documents are *prima facie* relevant.[89] AGBC at this stage of the argument is taken to have conceded the relevance of the Cabinet submission if this Court accepts our interpretation of *Bodner*. According to Prof. Campagnolo the onus then shifts to the government to justify its claim of non-disclosure. Further, for Prof. Campagnolo, "[w]hether the objection will succeed depends on the cogency of the reasons articulated to justify it."[90]

103. Prof. Campagnolo argues those reasons should include a sufficient description of the documents,[91] an assessment of the degree of relevance,[92] and an assessment of the degree of injury that could be sustained as a result of the documents' production. Issues of candour, efficiency, and solidarity will not suffice to deprive the court of *prima facie* relevant evidence. Instead, government must explain "why, in the particular circumstances of the case, production of Cabinet documents would injure the public interest. The degree of injury depends on the contents of the documents and the timing of their production. The dichotomy between core and non-core secrets is critical."[93]

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[88] Campagnolo, "A Rational Approach to Cabinet Immunity under the Common law" (2017) 55:1 *Alta. L. Rev.* 43, Appellant's Book of Authorities ("**ABoA**"), Tab 5
[89] Campagnolo, pp. 68-71, ABoA, Tab 5
[90] Campagnolo, p. 73, ABoA, Tab 5
[91] Campagnolo, p. 73, ABoA, Tab 5
[92] Campagnolo, pp. 73-74, ABoA, Tab 5
[93] Campagnolo, p. 74, ABoA, Tab 5

104. For Prof. Campagnolo, there are three possible outcomes at the end of the objection stage: the onus of justification can be discharged in full, in part, or not at all.[94] In cases (such as this) where government fails to make a *prima facie* valid objection because it fails to provide an affidavit or certificate that provides a sufficient (or any) description of the documents, an assessment of their degree of relevance, or an assessment of the degree of injury that would result from production, Prof. Campagnolo argues the onus is not discharged at all.[95]

105. Thus, Prof. Campagnolo's approach would lead to an identical result as that reached by the lower courts in the case at bar who followed *Carey*[96] and found AGBC's claim failed in part because there was no evidence led of any specific public interest that requires non-disclosure.[97] That was also the basis on which the claim for PII was dismissed by the lower courts on the *First JR* and *Second JR*.[98]

106. While Prof. Campagnolo has some criticism of *Carey* in that he claims the evidence there was not sufficiently probative (an assertion he makes mostly because the plaintiffs lost the case on the merits),[99] he concedes *Carey* has been widely applied by courts across Canada and he is not in a position to claim that the disclosures in those cases were not "necessary for a fair disposition of those cases."[100]

107. He acknowledges that for the most part *Carey* has been properly applied:

> While *Carey* has weakened Cabinet immunity at the provincial level, the doctrine remains pertinent. This conclusion is based on two considerations. First, in the period post-*Carey*, it appears that the courts primarily ordered the production of Cabinet documents recording non- core secrets (that is, factual and background information submitted to Cabinet during the decision-making process), and production was ordered only after the government had made the underlying decision public. The courts thus seem to have resisted the urge to order the production of core secrets (that is, Cabinet discussions and deliberations):

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[94] Campagnolo, p. 77, ABoA, Tab 5
[95] Campagnolo, pp. 77-78, ABoA, Tab 5
[96] *Carey*, ¶40
[97] *Carey*, ¶40; *Muir Reasons*, ¶23, AR 8; *Hinkson CJ Reasons*, ¶¶43-47, AR 27-28
[98] *Second JR*, ¶¶24-29
[99] Campagnolo, p. 67, FN 151, ABoA, Tab 5
[100] Campagnolo, p. 66-67, FN 151, ABoA, Tab 5

> [T]he documents which will be disclosed by my Order do not disclose what was discussed by the Cabinet. Rather, the documents relate to what was before Cabinet when decisions were taken by it. Accordingly, the disclosure of the documents should in no way impede the active debate that one would expect at the Cabinet table.[101]

> … It is therefore possible that the courts will limit the non-deferential approach to non-core secrets, although this distinction was not made explicit in *Carey*.[102]

108. Second, Prof. Campagnolo refers to the practice followed for some time in BC a point we make above at paragraph 92:

> Second, in some of the cases after *Carey*, the courts imposed conditions to preserve the secrecy of Cabinet documents when production was ordered. Under these conditions, the documents were marked confidential and access was restricted, the evidence was heard in camera, and the litigants and their counsel signed confidentiality undertakings and agreed to return the documents at the end of the litigation. Conditions are a means of giving litigants access to the documents they need to make their case while limiting the scope of the documents' publication. Conditions should be imposed each time the courts conclude that the interest of justice outweighs the interest of good government, so as to minimize the degree of injury. The courts' handling of core secrets, and their readiness to impose conditions to protect the secrecy of Cabinet documents, suggest that Cabinet immunity is still relevant in Canada.[103]

109. Third, Prof. Campagnolo acknowledges different interests emerge depending on the case.

> With respect to the litigant's interest, a distinction can be made between three types of proceedings. First, in civil proceedings of a private nature, the litigant's interest can be weighed in terms of economic and reputational value. If the litigant is deprived of the proper means to present his or her case, there is a danger of expropriation without compensation. In such cases, the interest at stake can be assigned a value (low, moderate, or high) in relation to the amount of money claimed. Second, in civil proceedings of a public nature, in addition to the litigant's interest, the public interest in upholding the rule of law will arise. If the litigant is deprived of the proper means to present his or her case, there is a danger of abuse of power or unlawful action. In such cases, the interest at stake will vary from moderate to high.[104]

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[101] see ¶86 above
[102] Campagnolo, p. 67, ABoA, Tab 5
[103] Campagnolo, p. 67, ABoA, Tab 5
[104] Campagnolo, p. 76, ABoA, Tab 5

110. Here, the interests at stake could not be higher as the constitutionality of the independence of the judiciary is at stake.

111. Nor does *John Doe*[105] support AGBC's argument that transparency in this constitutionally mandated process will result in loss of candour in the Cabinet submission. At issue in *John Doe*, was an access to information request made by John Doe to the Ministry of Finance. It was a statutory interpretation case as to the meaning of "advice" within the meaning of s. 13(1) of the *Freedom of Information and Protection of Privacy Act*. The records in question were the opinions of public servants on the advantages and disadvantages of alternative effective dates of legislative amendments. The case does not decide whether those opinions would have to be disclosed if sought in litigation where the common law test of PII was engaged. Even in the context of a request for information under the *Freedom of Information and Protection of Privacy Act* there is no absolute protection of this type of advice. The statutory scheme expressly contemplates disclosure in circumstances in which a compelling public interest clearly outweighs the purpose of the secrecy or where the decision-maker cited the document as a basis for the decision. Both apply here.

112. Likewise, AGBC's heavy reliance on this Court's judgment in *Babcock* is misplaced. At issue in *Babcock* was the scope of s. 39 of the *Canada Evidence Act*. AGBC argues that this general discussion "re-affirmed the importance of, and rationales behind" PII.[106] No party to this appeal disputes the importance of Cabinet confidentiality in some general sense. In the paragraph immediately following those cited by AGBC, this Court recognized that the common law recognizes that Cabinet confidentiality is not absolute, citing *Carey* with approval:

> At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield: see *Carey v. Ontario*, *supra*. Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the courts did this

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[105] *John Doe v. Ontario (Finance)*, 2014 SCC 36 [***John Doe***]
[106] AGBC Factum, ¶¶109-10

> applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey, supra*.[107]

113. It is the very balancing referred to by this Court in *Babcock*, and more saliently in *Carey*, that defeats AGBC's claim of PII in this case.[108]

114. In the end, AGBC argues the value of candour in the very limited circumstances that present here trumps all other valid values and concerns, and in particular "the interest of justice".[109] This would be a most regressive step in the jurisprudence were it to be accepted by this Court. A similar claim was considered and rejected by Burnyeat J. in *Health Services*:

> [36] … If non-disclosure is sought on the basis that the candidness of confidential communications between senior civil servants and the Cabinet would be compromised, then I adopt the statements made in *Carey*, *Rogers*, and *Burmah Oil Co., supra*, that such a "candour argument" is an "old fallacy", is "grotesque", and of exaggerated importance. If non-disclosure is sought on some other bases, then that should have been set out in the Affidavits.[110]

## PARTS IV AND V - SUBMISSIONS CONCERNING COSTS AND ORDERS SOUGHT

115. The appeal is dismissed, with costs.

## PART VI – SUBMISSIONS ON CASE SENSITIVITY

116. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on the Court's reasons in the appeal.

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[107] *Babcock*, ¶19

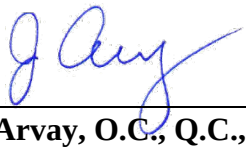
[108] Ironically, Prof. Campagnolo calls for the repeal of s. 39 of the *Canada Evidence Act*, arguing at p. 90 it is "inconsistent with any conception of the rule of law requiring that executive action be subject to meaningful judicial review, and are thus antithetical to the rational approach proposed in this article."

[109] Campagnolo, p. 59, ABoA, Tab 5

[110] *Health Services*, ¶36

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: August 16, 2019



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