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)

-and-

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STATEMENT OF ARGUMENT IN REPLY[1]

A. Introduction

1. The four interveners who support production of the Cabinet Submission (the "**Interveners**") ignore the role of pleadings and the likely consequences of routine production. They variously argue that *Bodner* supports production of the Cabinet Submission, that the Cabinet Submission is producible as part of the "record" before the "administrative decision-maker" and that the broader approach to evidence in s. 1 *Charter* cases should be applied in this context. In their view, disclosure of the Cabinet Submission will reveal the "real reasons" which they imply cannot be found in governments' public responses. Each of these notions should be rejected.

B. Standard of Review and Scope of the Record

2. The Interveners argue that the Appellants conflate the deferential standard of review with the scope of the record on judicial review. While acknowledging the deferential rationality standard and the limited role of the reviewing court, the Interveners argue that the record producible on judicial review must consist of "all relevant material that was before the government decision-maker", including submissions to Cabinet.[2]

3. The administrative law concept of the "record" has little application in the present context. The central purpose of the record on judicial review is to allow the reviewing court to determine whether a decision is reasonable or correct, depending on the applicable standard of review.[3] In judicial compensation cases, the underlying *decision* of the government is not subject to review "as decisions about the allocation of public resources belong to legislatures and to the executive".[4] The reviewing court "is not asked to determine the adequacy of judicial remuneration" or to determine whether remuneration decisions are *reasonable*.[5] Instead, the reviewing court is asked to undertake a limited and deferential review of the sufficiency of the government's public *reasons*.

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[1] The AGBC relies on the definitions and citations for cases cited in its main factum.
[2] Factum of the Canadian Civil Liberties Association at paras. 8-9 and 13; Factum of the Canadian Association of Provincial Court Judges at paras. 17-22
[3] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* [2011] 3 S.C.R. 708, 2011 SCC 62 at para. 15; *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 26
[4] *Bodner* at para. 20
[5] *Bodner* at para. 30

The issue is whether the government has provided legitimate, rational reasons, not whether the underlying spending decision is reasonable.[6] The deliberative process by which the reasons were formulated is not the subject of judicial review under *Bodner* and is not the subject of any pleading in the British Columbia proceeding. Further, even if it were appropriate to focus the analysis on the "record", in British Columbia the decision-maker is the Legislature, not Cabinet.[7]

4. The Canadian Civil Liberties Association notes at para. 8 of its factum that there are other justificatory tests in constitutional litigation, "such as the test for justifying a *Charter* infringement under s. 1". Section 1 of the *Charter*, however, imposes a "very rigorous standard of justification" that requires the reviewing court to evaluate the proportionality of the means the government has chosen to meet an important objective, including whether the means minimally impair the right or freedom in question.[8] Even within the s. 1 jurisprudence, the "rigorous standard" is applied contextually, and even mere "reason and logic" may suffice.[9]

5. By contrast, in judicial compensation cases, the reviewing court does not engage in a "searching analysis of the relationship between ends and means".[10] Further, the s. 1 analysis proceeds after a finding that *Charter* rights have been violated. In the context of judicial remuneration, there is no equivalent. A departure from the Commission's recommendations is not, *per se*, an infringement on judicial independence, and the spending decision has been recognized by this Court as a political matter.[11]

C. Evidence Outside the Government's Public Response

6. According to *Bodner*, on judicial review the government may tender evidence supporting the factual foundation contained in its public response. On this basis, the Interveners argue that the AGBC should be forced to produce the Cabinet Submission.[12] The Interveners also point to

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[6] *Bodner* at para. 27; *PEI Reference* at paras. 182-184. For this reason, the decision in *SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611*, 2011 BCCA 353, cited in the CA Reasons at paras. 17-18, does not resolve the issue in the present case.
[7] *Judicial Compensation Act,* S.B.C. 2003, c. 59, s. 6
[8] *PEI Reference* at para. 182
[9] *R. v. Bryan*, [2007] 1 S.C.R. 527, 2007 SCC 12 at paras. 10-19, 28-29 and 38-44
[10] *Bodner* at paras. 31-38; *PEI Reference* at para. 182
[11] *PEI Reference* at paras. 142 and 176
[12] Factum of the Canadian Superior Court Judges Association at paras. 19-21

other evidence that has been referenced in judicial compensation cases, such as legislative debates, to argue that the judicial review cannot be confined to the "four corners" of the public response.[13]

7. The AGBC does not argue that the reviewing court is barred from examining information outside the Legislature's public response. However, the relevance of extrinsic evidence in the judicial compensation context is determined by the limited nature of the judicial review as set out in *Bodner* and by the allegations contained in the pleadings. The cases cited by the Interveners in which extrinsic evidence was produced and relied upon are consistent with this approach.

8. In *Newfoundland and Labrador Judges*,[14] the court accepted affidavits from the government adducing evidence about the province's financial situation as they did not "add to the reasons given in the Government's response" and instead supported the "factual foundation relied upon by the Government".[15] The court also looked to legislative debates evidencing the history of delays and the politicization of the process in setting judicial compensation in coming to its decision.[16] Notably, these documents formed part of the public process within which the response is to be evaluated under *Bodner* and were also relevant to the grounds of review as pleaded.[17]

9. *Cameron*[18] considered whether the Yukon Government was obligated to disclose: (i) documents that the government used in formulating its submissions to the JCC; and (ii) communications between the government and the Territorial Court Judges. According to the court, "[r]elevancy should still be determined by reference to the grounds for judicial review set out in the application".[19] The pleadings alleged that impermissible negotiations took place between the government and the Territorial Court, and there was support for this allegation in the joint submission made to the JCC.[20] Therefore, the court ordered disclosure of the communications.

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[13] Factum of the Canadian Superior Court Judges Association at paras. 15-17
[14] *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140 ("***Newfoundland and Labrador Judges***")
[15] *Newfoundland and Labrador Judges* at para. 88
[16] *Newfoundland and Labrador Judges* at paras. 154-171
[17] *Newfoundland and Labrador Judges* at para. 66
[18] *Cameron v. Yukon*, 2010 YKSC 58 ("***Cameron***")
[19] *Cameron* at para. 12
[20] *Cameron* at paras. 2, 5 and 19

10. The court declined to order production of the first category of documents, as "the Petitioner has not established how going behind the submissions to the material used to formulate them would assist the reviewing Court on the issues raised in the Petition."[21] The court rejected the argument that the rules concerning document discovery should be "broadly interpreted" because judicial compensation cases are constitutional in nature. In the court's view, that could not mean that the rules "should be interpreted as providing a right to discovery of all documents in the possession of the decision-maker; only documents relevant to the grounds for judicial review are producible".[22]

D. Transparency and the Routine Production of Cabinet Submissions

11. The Interveners argue that the Cabinet Submission must be produced in order to further the objective of "transparency".[23] They argue that without production of Cabinet submissions, the judges will not know the "real reasons" for government's rejection of a JCC recommendation.[24]

12. In past cases, reviewing courts have been able to determine whether government responses met all three parts of the *Bodner* test without disclosure of confidential submissions that informed Cabinet's deliberations. This Court in *Bodner* was able to conduct such a review. The same is true of numerous other cases from the lower courts.[25]

13. The existing framework has allowed judges' associations to make and substantiate allegations of improper politicization, where appropriate. In *Newfoundland and Labrador Judges*, the judges' association substantiated allegations that the debates in the Legislative Assembly had impermissibly politicized the process. In *Manitoba Judges*[26], the judges' association was able to demonstrate disregard for the process because of how the hearing was conducted before the Standing Committee responsible for responding to the commission's recommendations.[27]

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[21] *Cameron* at para. 20
[22] *Cameron* at para. 20
[23] Factum of the Canadian Superior Court Judges Association at paras. 10-14; Factum of the Canadian Bar Association at paras. 7-19
[24] Factum of the Canadian Association of Provincial Court Judges at para. 21; Factum of the Canadian Bar Association at paras. 13 and 17
[25] See the cases cited in the Factum of the Attorney General of Ontario at paras. 22-33
[26] *Judges of the Provincial Court (Man.) v. Manitoba et al.*, 2013 MBCA 74 ("***Manitoba Judges*"**)
[27] *Manitoba Judges* at para. 69

14. The AGBC's model for production of Cabinet documents would allow judges' associations to explore allegations of government impropriety where those allegations are pleaded and have a factual basis.[28] It precludes disclosure in cases where the judges' association is engaged in a fishing expedition based on the unfounded speculative notion that the government's "real" reasons may be found in confidential Cabinet documents.

15. This Court in *Bodner* recognized that more information does not equate to more "transparency". The only mention of transparency in *Bodner* is in relation to documents that the government was justified in *not* producing: that 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".[29]

16. Similarly, the objectives of openness and transparency would not be furthered through routine disclosure of Cabinet submissions. First, it would divert the focus away from the public process and the government's public response to the advice received or not received during Cabinet's deliberative process.

17. Second, the result of the Interveners' position is that production will be routine in every judicial review. As this Court has recognized, 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".[30] If Cabinet documents are producible in every case, then it is difficult to see how the documents would not be drafted with that in mind. In this sense, routine production does not foster increased transparency.

18. Third, a submission <u>*to*</u> Cabinet, by definition, cannot be an expression of Cabinet's decision or an articulation of Cabinet's collective reasoning. The formulation of Cabinet's collective reasoning takes place at the Cabinet table.

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[28] Factum of the Attorney General of British Columbia at paras. 87-93
[29] *Bodner* at para. 63
[30] *Babcock* at para. 18; *John Doe* at para. 45

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2019

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TABLE OF AUTHORITIES

Case Law	**Para(s).**
Babcock v. Canada (Attorney General), [2002] 3 S.C.R. 3, 2002 SCC 57	17
Cameron v. Yukon, 2010 YKSC 58	9-10
Delios v. Canada (Attorney General), 2015 FCA 117	3
John Doe v. Ontario (Finance), [2014] 2 S.C.R. 3, 2014 SCC 36	17
Judges of the Provincial Court (Man.) v. Manitoba et al., 2013 MBCA 74	13
Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador, 2018 NLSC 140	8, 13
Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board), [2011] 3 S.C.R. 708, 2011 SCC 62	3
Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice), 2005 SCC 44	1, 3, 5-8, 12, 15
R. v. Bryan, [2007] 1 S.C.R. 527, 2007 SCC	4
Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3	4-5
SELI Canada Inc. v. Construction and Specialized Workers' Union, Local 1611, 2011 BCCA 353	3
Legislative Enactments	
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