S.C.C. FILE NO. 38381

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

B E T W E E N:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Appellant)

- and -

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

RESPONDENT
(Respondent)

(style of cause continued on the next page)

FACTUM OF THE RESPONDENT, PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA, IN REPLY TO THE INTERVENER FACTUMS

(Pursuant to the Order of Moldaver J. revised September 12, 2019)

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A. Improper Attempt to Raise New Issues

1. Moldaver J. ordered "[**t**]**he interveners are not entitled to raise new issues…"** [bold emphasis in original]. Notwithstanding that direction, the Canadian Taxpayers Federation ("**CTF**") has done just that. The factum of the CTF should be struck or disregarded.

2. The primary argument advanced by CTF, upon which all of its other arguments hinge, is that if a government's decision to reject a JCC recommended increase in judicial compensation is consistent with a broader policy of expenditure control, this consistency should show the decision is *prima facie* justified, or to put it differently it "should be sufficient and conclusive on judicial review."[1] From this, CTF argues that Cabinet documents would be irrelevant because they could not detract from this link between the rejection and the policy.[2]

3. These submissions are a not so veiled attempt to amend the *Bodner* test for judicial review of JCC recommendations – an issue that has not been raised by any party to this appeal. This Court has held that Government may reject or vary the recommendations of a JCC, provided that "legitimate" reasons are given. In *Bodner,* this Court clarified that for a response to be "legitimate" "[t]he commission's recommendations must be given weight,"[3] the response "must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission"[4] and "[t]he response must be tailored to the commission's recommendations."[5] All of the parties accept these requirements in the present appeal. Yet on CTF's formulation, as long as one reason for the rejection of the JCC recommendation is tied to government's fiscal policy, no matter what happened at the JCC, judicial review must fail.

4. This formulation strips *Bodner* of any meaning. First, the government's policy on public expenditures should be, and almost invariably is raised before and considered by the JCC. In BC, such consideration is mandated by the *Act*.[6] Thus, to the extent that government raised its fiscal

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[1] CTF Factum, ¶¶7, 17, 19, 24
[2] CTF Factum, ¶¶8, 25, 27
[3] *Bodner*, ¶23
[4] *Bodner*, ¶23
[5] *Bodner*, ¶24
[6] *JCA*, s. 5

policy before the JCC (which it almost invariably will have done), and this issue was considered by the JCC, it cannot simply reiterate the existence of the policy and meet the constitutional requirement for the JCC process to be meaningful and effective. This form of continued invocation and repetition by government at all stages of the process of its fiscal policy was one of the primary grounds upon which the BC Government's 2010 Response was found to be neither legitimate nor rational by the application judge who determined that judicial review.[7]

5. Second, if in some exceptional case government failed to raise its policy on expenditure control before the JCC, this would still not be a legitimate reason to depart from JCC recommendations. A reason given by the government for departing from a commission recommendation will *prima facie* not be regarded as legitimate or rational if it represents a rationale that could have been but was not raised before and submitted to the commission during its deliberations. In other words, the government cannot save its best argument for rebuttal in the political forum of the legislature and in effect "blindside" the judges and the commission itself with a reason that has not been subjected to scrutiny and rational analysis as part of the commission process.[8] To hold otherwise, would frustrate the very purpose of the JCC process which Lamer C.J. described in *PEI Reference* as serving as an "institutional sieve" or a "structural separation" between the judiciary and the government. In its place, government would have the first and last word on judicial remuneration, unhinged from the JCC's recommendations.[9]

6. It is telling that not a single AG has advanced the position advocated by CTF that would render a fiscal policy of restraint a veritable trump card in the consideration of judicial remuneration. The simple reason why no AG has advanced that position is that to do so would completely undermine the constitutional requirements that the JCC processes be meaningful and effective.

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[7] *Provincial Court Judges Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022, ¶¶73-74

[8] *Judges of the Provincial Court of Manitoba et al. v. Her Majesty The Queen*, 2012 MBQB 79

[9] A change in circumstances can legitimately be raised by the government as a justification for departing from a JCC recommendation: *Bodner*, ¶26; *Aalto v. Canada (Attorney General)*, 2010 FCA 195.

7. In all the circumstances, the Provincial Court Judges' Association of British Columbia (the **"Association**") objects to the factum of CTF and ask that it be struck or disregarded.

B. Points in Reply

8. The Association has reviewed the reply submissions of the Nova Scotia Provincial Judges' Association and adopts those same submissions, without repetition, here. The Association adds the following points in reply.

9. The Attorney Generals of Canada ("**AGC**"), Saskatchewan ("**AGS**"), Ontario ("**AGO**"), and Quebec ("**AGQ**") argue disclosure of cabinet documents would result in a process that is increasingly fractious, politicized, and one that undermines public confidence in the independence of the courts.[10]

10. The Association has answered this concern at paragraphs 8-9 of their main Factum. In reply, they add two points: (a) the very best way of ensuring that the process not be politicized is to disclose the foundational document that reveals that the government is not politicizing the process; and (b) if on the other hand disclosure does reveal such politicization, then discouraging litigation at the cost of the independence of the judiciary and the effectiveness of the JCC process, is not a principled or beneficial end to pursue. Transparency and accountability in the process, including at the stage where government formulates its response and is called to justify its rejection of JCC recommendation in a court of law, are entirely consistent with this Court's reasoning in *Bodner* and also with the rule of law.[11]

11. The AGC says that "Cabinet's internal deliberations are irrelevant to whether the government's public response is rational."[12] Leaving aside the important fact that the Cabinet submission at issue on this appeal does not involve internal deliberations, it is the very fact that there can be a significant disconnect between the government's real and secret reason and its proffered public response that disclosure is required. Yet as we note in our main factum, a request for disclosure of Cabinet documents is not premised on an assumption of bad faith.[13]

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[10] AGC Factum, ¶¶7, 9; AGS Factum, ¶¶22-24; AGO Factum, ¶¶6, 18, 33; AGQ Factum, ¶¶4, 26
[11] *Bodner*, ¶63
[12] AGC Factum, ¶9
[13] AGC Factum, ¶9, 25; AGQ Factum, ¶25

Cabinet documents may be relevant at all three branches of the *Bodner* test absent any allegation or finding of bad faith. At the first stage, they may reflect government prioritization in respect of multiple objectives. At the second stage, they may reveal factual considerations before Cabinet. At the third stage, they may illuminate government's overall respect for the JCC process. All of this is *relevant*, whether or not bad faith is alleged or revealed.

12. There should therefore be no requirement that parties like the Association lead any evidentiary foundation of bad faith before Cabinet documents may be disclosed. Such a requirement would, in any event, be completely impracticable.

13. The AGS relies heavily on the separation of powers doctrine. This is advanced in support of the proposition that on matters of the expenditure of public funds the courts must exercise deference to the decisions of government rejecting the recommendations of a JCC. On that point *Bodner* is a complete answer so this is not even in issue in this appeal. This argument also confuses the relevance of the Cabinet submission with the issue of what deference may ultimately be owed to the government rejecting the recommendations of the JCC.

14. To the extent that the separation of powers doctrine is advanced to deny the relevance of the Cabinet submission, *Carey* is a complete answer. The suggestion that the *Carey* analysis must be applied more deferentially in order to respect the separation of powers when the context for a claim of privilege involves a dispute between two branches of government, has no merit. What the AGS fails to appreciate is that what is at stake in this type of litigation is not the constitutional right of judges to have more or better compensation, but the constitutional right of the members of the public to have an independent judiciary.[14] Protecting their constitutional rights is at the very core of the judiciary's function within the separation of powers.

15. As this Court recently held: "…. judicial independence belongs not to judges, but to the public. The guarantees are not intended to be a means for judges to improve their working conditions."[15]

16. Nor are Cabinet documents concerning consideration of the allocation of public resources

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[14] *Conférence des juges de paix magistrats du Québec v. Quebec (Attorney General)*, 2016 SCC 39 [***Conférence des juges***], ¶33

[15] *Conférence des juges*, ¶33; see also *PEI Reference*, ¶190; *Bodner*, ¶6

akin to documents addressing national security or diplomatic relations.[16] This submission ignores that a number of such documents have been produced in related judicial reviews in BC revealing their often banal, though still relevant, content. Further, the simple answer to this concern is that in this case AGBC's claim failed because there was no evidence led of a specific public interest that required non-disclosure.[17] If any Cabinet documents did raise such serious concerns in respect of their disclosure in a different case, certainly it would fall to the Attorney General to say so.

17. The AGO says that no Ontario judicial associations have requested disclosure of background Cabinet documents when seeking judicial review.[18] That may be and that may continue to be the case depending on the circumstances. The Association did not seek disclosure in its application for judicial review of the government's 2014 response[19] as it did not seem necessary. More to the point, the AGO exaggerates the significance of requiring disclosure of one key document in the preparation of the government's response. In the BC context, this did not "transform this special form of judicial review into a broad and searching inquiry" [20] as the AGO claims will happen. It was but one document that in one of the judicial reviews was dispositive[21] and in another gave relevant context or background.[22] It is simply hyperbole to claim, as the AGO does, that requiring disclosure of this submission to Cabinet "would sweep aside the careful balance this court has struck between the executive and judicial branches in determining judicial compensation."[23] Rather, in our submission, it would help perfect it.

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

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[16] AGA Factum, ¶¶25-26¶
[17] *Carey*, ¶40
[18] AGO Factum, ¶7
[19] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2016 BCSC 1420
[20] AGO Factum, ¶4
[21] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244, ¶¶4, 12, 14, 16, 50-52, 80-81
[22] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336, ¶5
[23] AGO Factum, ¶1

Table of Authorities