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

APPLICANT
(APPELLANT)

-and-

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

RESPONDENT
(RESPONDENT)

APPLICATION FOR LEAVE TO APPEAL
(ATTORNEY GENERAL OF BRITISH COLUMBIA, APPLICANT)
(Pursuant to section 40(1) of the *Supreme Court Act,* R.S.C., 1985, c. S-26)

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PART I: OVERVIEW OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

A. Overview of Public Importance

1. Are judges' associations entitled to routine disclosure of cabinet documents when they seek judicial review of judicial compensation decisions made by legislatures or governments? This question involves issues of public importance regarding the interaction of the legislative, executive and judicial branches of government and the intersection of previous cases from this Court dealing with judicial compensation and public interest immunity.

2. The courts of appeal of British Columbia and Nova Scotia recently addressed this issue, both concluding that confidential submissions to cabinet must be produced to the judges in proceedings concerning judicial remuneration. In British Columbia, the Legislature was the decision-maker, while in Nova Scotia it was cabinet, but the result was the same because of the interpretation which both courts gave to this Court's decision in *Bodner*.

3. This Court's decisions in the *PEI Reference*[1] and *Bodner*[2] allowed deference to government and sought to limit litigation between judges and governments. The decisions from the courts in British Columbia and Nova Scotia will have the opposite effect. Rather than judicial reviews of limited scope, judicial reviews will likely encompass inquiries into the *bona fides* of cabinet conduct, thus altering the role of the reviewing court and fostering further disputes between government and judges.

4. If the British Columbia and Nova Scotia decisions stand, confidential cabinet documents will be subject to production in every dispute concerning judicial compensation based simply on the assertion by the judges' associations that they are inherently relevant to the three-part *Bodner* test; a test against which every judicial compensation decision in this country is measured. No specific allegation of bad faith or misconduct on the part of cabinet is required.

5. The opportunity to address these issues is ripe. Without this Court's intervention, the role of reviewing courts will expand as the focus shifts from the public process of commission

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[1] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the "***PEI Reference***")

[2] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice),* 2005 SCC 44 ("***Bodner***")

recommendations and governmental responses, to the confidential process of how governmental responses are formulated. Disputes between judges and governments will take on a new and unwelcome dimension.

6. This case presents an opportunity for this Court to clarify the task of the reviewing court and to define the scope of the record on judicial reviews of judicial compensation decisions. These are matters of importance to governments and judges in every province. It also allows this Court to address concerns regarding systemic and unnecessary disclosure of confidential Cabinet documents that have arisen since this Court's decision in *Carey*[3].

B. Factual Background

(1) The 2016 Judicial Compensation Commission Process [4]

7. Pursuant to the *Judicial Compensation Act*[5] (the "**Act**") a Judicial Compensation Commission ("**JCC**") is formed every three years with a mandate to make recommendations to the Chief Judge of the Provincial Court and the Attorney General of British Columbia ("**AGBC**") on all matters respecting the remuneration, allowances and benefits of Provincial Court judges.[6]

8. The Act requires the AGBC to lay the JCC's final report before the Legislative Assembly (the "**Legislature**").[7] The JCC's recommendations are not binding. The Legislature may resolve to accept or reject one or more of the recommendations and set the remuneration and benefits for judges.[8] However, the Legislature must provide public reasons for rejecting any of the recommendations in accordance with this Court's decision in *Bodner*. Recommendations that are not rejected take effect commencing April 1 of the year following the appointment of the JCC.[9]

9. On October 25, 2017, the AGBC tabled the report in the Legislature and moved that the Legislature resolve to accept eight and reject two of the 2016 JCC's recommendations concerning the period from April 1, 2017 to March 31, 2020. The reasons were set out in the government's

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[3] *Carey v. Ontario*, [1986] 2 S.C.R. 637 ("***Carey***")
[4] See Affidavits of Ingrid Eiermann and Neil Reimer sworn February 27, 2018 **[Tabs 4B & 4C]**
[5] S.B.C. 2003, c. 59 (the "**Act**")
[6] Act, ss. 2 and 5
[7] Act, s. 6(1)
[8] Act, s. 6(2)
[9] Act, s. 6(3)

proposed response to the JCC's recommendations (the "**Government's Proposed Response**"), which was also tabled.

10. Before the matter was tabled in the Legislature, cabinet received and considered a confidential submission, signed by the Attorney General, concerning the JCC's recommendations (the "**Cabinet Submission**") along with a copy of the JCC report. The Cabinet Submission was not before the Legislature.

11. The motion was debated and voted upon in a minority Legislature, whose members unanimously resolved to adopt the Government's Proposed Response.

(2) The Underlying Judicial Review [10]

12. The Provincial Court Judges Association of British Columbia (the "**PCJA**") brought an application for judicial review to quash the resolution of the Legislature claiming that the Government's Proposed Response failed to comply with the three-part test this Court articulated in *Bodner*. The alleged non-compliance with the *Bodner* test was the only basis pleaded for the application. The PCJA did not advance allegations of bad faith or misconduct on the part of Cabinet. The pleadings do not connect the alleged non-compliance with the *Bodner* test to the actions of Cabinet or to the preparation of the Cabinet Submission.

13. None of the materials the AGBC filed in response to the application for judicial review put Cabinet's actions or the Cabinet Submission in issue.

(3) Request and Application for Production of the Cabinet Submission [11]

14. After the AGBC filed its petition response, the PCJA requested that the AGBC produce a copy of "the cabinet submission that led to the government's response". When asked how the Cabinet Submission could be relevant to the judicial review, the PCJA responded "In the event it

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[10] See Petition of PCJA dated December 19, 2017 **[Tab 4A]**; and Response to Petition dated March 1, 2018 **[Tab 4D]**

[11] See Notice of Application of PCJA dated April 4, 2018 **[Tab 4E]**; Application Response of AGBC dated May 9, 2018 **[Tab 4G]**; and Affidavit of Zdenka Hecimovic sworn May 8, 2018 **[Tab 4F]**

impacts our position and submissions". No further basis for relevance was provided. The AGBC declined to produce the Cabinet Submission.

15. The PCJA subsequently brought an application for production of the Cabinet Submission. The PCJA stated that it sought to determine whether there were additional reasons for the government's rejection of the JCC recommendations which were not set out in the Government's Proposed Response. In other words, this was a search for what the PCJA thought were the 'true' reasons which they contended would be found in the Cabinet Submission.

16. The two issues the court dealt with on the application were: (i) whether the Cabinet Submission was relevant to the application for judicial review; and (ii) if it was relevant, whether it was nonetheless shielded from production on the basis of public interest immunity.

17. The Cabinet Submission was not viewed by the court at the time of the initial application or on appeal. The Cabinet Submission has not been produced in the underlying judicial review as the courts below have granted successive stays pending further appeal.[12]

C. Judicial History

(1) Supreme Court of British Columbia (Master Muir) [13]

18. Master Muir ordered that the AGBC produce the Cabinet Submission to the PCJA. The Master determined that once the PCJA pleads that the Government's Proposed Response does not rely upon a reasonable factual foundation (i.e. part two of the *Bodner* test), the "global perspective" part of the *Bodner* test is engaged, which entitles the PCJA to "investigate the factual underpinnings of the decisions made", including the Cabinet Submission.[14]

19. The Master also held that public interest immunity did not shield the Cabinet Submission from production. In the Master's view, the "need to ensure transparency" in the JCC process outweighed the AGBC's concern that ordering production of the Cabinet Submission, simply because non-compliance with the *Bodner* test is pleaded, would make production routine.[15]

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[12] 2018 BCCA 338 **[Tab 4H]**; and 2018 BCCA 477 **[Tab 4I]**
[13] 2018 BCSC 1193 ("**Chambers Reasons**") **[Tab 2A]**
[14] Chambers Reasons at paras. 19-20 **[Tab 2A]**
[15] Chambers Reasons at para. 27 **[Tab 2A]**

(2) Supreme Court of British Columbia (Hinkson C.J.) [16]

20. On appeal, Chief Justice Hinkson upheld the order for production of the Cabinet Submission. With respect to relevance, Hinkson C.J.S.C. accepted the AGBC's submission that the material the PCJA filed on the judicial review "fails to offer any basis upon which the Cabinet submission would or could be relevant."[17] Nonetheless, Hinkson C.J.S.C. held that the Master did not err in her application of the principles set out in *Bodner*, as the Cabinet Submission "was nonetheless a relevant factor to be considered in weighing the whole or totality of the process engaged in by Government that led to the motion placed before the Legislature by the Attorney, and the response to the recommendations of the JCC".[18]

21. On the issue of public interest immunity, Hinkson C.J.S.C. agreed with the Master that a review of the public interest immunity considerations favoured production. In doing so, Hinkson C.J.S.C. appeared to accept that routine production of cabinet documents would likely become the norm, but stated that this was due to the fact that the Cabinet Submission "routinely informed the government's response".[19]

(3) Court of Appeal for British Columbia (Bauman C.J., Harris and Dickson JJ.A) [20]

22. The Court of Appeal dismissed the AGBC's appeal. The division agreed with Hinkson C.J.S.C. that the Cabinet Submission was relevant to the "whole of the process and the response" as described by *Bodner*.[21] The division further determined that Cabinet plays an "integral part" in shaping the Government's Proposed Response to the JCC recommendations after being informed by the Cabinet Submission.[22] Since the petition put the validity of the Government's Proposed Response in issue, the Cabinet Submission that informed the Government's Proposed Response was relevant.[23]

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[16] 2018 BCSC 1390 ("**SC Appeal Reasons**") **[Tab 2C]**
[17] SC Appeal Reasons at para. 27 **[Tab 2C]**
[18] SC Appeal Reasons at para. 34 **[Tab 2C]**
[19] SC Appeal Reasons at para. 50 **[Tab 2C]**
[20] 2018 BCCA 394 ("**CA Appeal Reasons**") **[Tab 2E]**
[21] CA Appeal Reasons at paras. 14-15 **[Tab 2E]**
[22] CA Appeal Reasons at para. 9 **[Tab 2E]**
[23] CA Appeal Reasons at para. 16 **[Tab 2E]**

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

24. Finally, the Court of Appeal addressed the concept of the "record" on an application for judicial review in this context, and in doing so analogized cabinet to an administrative tribunal. The division held that the record comprises "the evidence that was before the administrative decision-maker".[24] As Cabinet is "a primary actor" in the impugned Response, the Cabinet Submission "is clearly 'evidence which was before the administrative decision-maker'".[25]

D. Parallel Proceedings in Nova Scotia

25. The same issue recently arose in Nova Scotia, where Cabinet has the authority to set judicial compensation.[26] Both at the trial[27] and appellate[28] level, the courts determined that a confidential Cabinet document was relevant and should form part of the record on judicial review.

26. The Court of Appeal held that the Cabinet document was relevant for two reasons.[29] First, the Cabinet document was relevant to determine whether the public response was based on a reasonable factual foundation, since the Cabinet document was expressly referenced in the public response.[30] Second, the Cabinet document was "integral" to the "whole of the process" that must be weighed on judicial review. The Court of Appeal went on to reject public interest immunity as a basis for non-disclosure following consideration of the relevant factors.[31]

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[24] CA Appeal Reasons at paras. 17-18 **[Tab 2E]**
[25] CA Appeal Reasons at para. 19 **[Tab 2E]**
[26] *Provincial Court Act*, R.S.N.S. 1989, c. 238, s. 21K(2)
[27] *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13
[28] *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83 ("**NSCA Reasons**")
[29] NSCA Reasons at paras. 32-36
[30] The Order in Council constituting the public response recited aspects of the factual foundation for the response and stated that the Government's position was "on the report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016"
[31] NSCA Reasons at paras. 38-46

PART II: QUESTIONS IN ISSUE

27. The AGBC seeks leave to appeal in respect of the following issues of public and national importance:

> **Issue 1:** Are confidential cabinet records relevant in an application for judicial review examining the government's response to a JCC report following the procedure established in *PEI Reference* and expanded upon in *Bodner*? Put another way, when determining if the *Bodner* test has been met, is it the task of the reviewing judge to look behind the government's public rationale by also considering the private cabinet process which informed it?
>
> **Issue 2:** If confidential cabinet records are relevant based on the test set out in *Bodner*, resulting in routine demands for production by the Provincial Court judges in judicial reviews of this nature, how do such routine requests for disclosure impact a reviewing judge's consideration of the public interest immunity factors set out in *Carey* and the tradition of cabinet confidentiality recognized in *Babcock*[32]?

PART III: STATEMENT OF ARGUMENT

Issue 1: The Relevance of Cabinet Documents based on *PEI Reference* and *Bodner*

28. The lower courts ordered production of the Cabinet Submission based on a misinterpretation of the *PEI Reference* and *Bodner*. They held that the Cabinet Submission is relevant to the reviewing court's assessment of the "whole of the process and the response", even though this Court has only ever considered the process under review to be the public process of recommendation and response.

29. This interpretive issue has significant consequences for reviewing courts across the country as well as the parties. The approach to part three of the *Bodner* test taken by the courts below expands the role of the reviewing court in a way not contemplated by *Bodner* and in a way that will be detrimental to the process of setting judicial remuneration.

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[32] *Babcock v. Canada (Attorney General)*, 2002 SCC 57 ("***Babcock***")

30. The lower courts have blurred the boundaries of the record on judicial review, thereby increasing the scope for disputes and protracted litigation between the parties. This approach is likely to cause prejudice to the government if anything in a confidential cabinet document differs from the content of the public response or otherwise requires explanation, as government may have to disclose further confidential information to provide context or explanation.

31. The *Bodner* test was designed to staunch the flow of litigation between governments and judges and to create a limited form of judicial review which promotes deference to the government's response. The decisions from the courts below will have the opposite effect. A "limited form of judicial review", as this Court called it, threatens to become an inquiry of indeterminate scope, not limited to the content of the government's response, but to how that response was formulated within government and in the Cabinet room. Guidance from this Court is needed on the issue.

A. Judicial Compensation Cases from This Court

(1) *PEI Reference:* the Public Process

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

33. The modern approach to setting judicial compensation was developed by this Court in the 1997 *PEI Reference*. Chief Justice Lamer, writing for the majority, held that it is constitutionally impermissible for governments and judges to negotiate directly over compensation.[33] Instead, judicial independence requires the establishment of "independent, objective and effective" commissions that are tasked with making recommendations on judicial compensation to the government.[34] While the commission's recommendations need not be binding on the Legislature or government, they must have a "meaningful effect".[35] Accordingly, the Legislature or government is required to justify any deviation from the recommendations through reasons that are judicially reviewable.

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[33] *PEI Reference* at paras. 186-191
[34] *PEI Reference* at para. 147
[35] *PEI Reference* at para. 175

34. The Legislature's or government's reasons for rejecting the recommendations are judicially reviewable on the standard of "simple rationality", which requires that the Legislature or government provide a legitimate reason for why it has chosen to depart from the recommendation of the commission. In articulating this standard of review, Lamer C.J. emphasized that a "reviewing court does not engage in a searching analysis of the relationship between ends and means which is the hallmark of a s. 1 analysis" under the *Charter*.[36] Rather, the standard of simple rationality is meant to screen out decisions on judicial compensation that are based on purely political considerations, and ensure that decisions are based on a reasonable factual foundation.

35. In other words, the process contemplated by the *PEI Reference* entails public recommendations, public reasons from government responding to the recommendations if those recommendations are not adopted, and if the Legislature is the decision-maker, then public debate and a public vote in the Legislative Assembly. Thereafter, if necessary, the public process may be followed by a deferential form of judicial review of the public reasons issued by government or the Legislature. This is the process that has replaced direct negotiation between governments and judges.

36. Despite the deferential standard of review articulated by Lamer C.J., in the years following the *PEI Reference* litigation replaced direct negotiation as the forum for resolving judicial compensation disputes. The courts hearing the cases struggled to determine what level of review this Court had mandated.[37] Some courts held that the government needed to demonstrate "extraordinary circumstances" before departing from a commission's recommendations.[38] Others purported to apply simple rationality, but in practice reviewed the government's reasons with

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[36] *PEI Reference* at para. 183

[37] Peter Hogg, "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries" in *Judicial Independence in Context* eds. Adam Dodek and Lorne Sossin (Toronto: Irwin Law, 2010) at p. 34 **[Tab 5C]**

[38] Lori Sterling & Sean Hanley, "The Case for Dialogue in the Judicial Remuneration Process" in *Judicial Independence in Context* eds. Adam Dodek and Lorne Sossin (Toronto: Irwin Law, 2010) at p. 42 ("**Sterling**") **[Tab 5D]**

heightened rigour.[39] Only the Ontario courts actually adopted a deferential approach.[40] Uncertainty over the proper approach to be followed ultimately led this Court to revisit the issue.

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

37. In the 2005 *Bodner* decision, this Court unanimously re-affirmed the deferential "simple rationality" standard of review.[41] That standard involves a three-stage analysis, 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?[42]

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

39. The judicial review involves an analysis of the public JCC process and the government's public response. The government's reasons for rejecting the JCC recommendations "must be clearly and fully set out in the government's response to the recommendations" and "[i]f 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".[43] The only other material that the government is expressly permitted to put forward on judicial review is more detailed information regarding "the factual foundation [the government] has relied upon", such as economic and actuarial data and calculation, or studies of the impact of the JCC's recommendations to show good faith and commitment to the process.[44] But the material put forward may not advance new reasons for departing from the JCC recommendations beyond those given in the government's response.[45]

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[39] Sterling at p. 43 **[Tab 5D]**
[40] Sterling at p. 44 **[Tab 5D]**
[41] Sterling at p. 43 **[Tab 5D]**
[42] *Bodner* at para. 31
[43] *Bodner* at para. 27
[44] *Bodner* at paras. 27, 36
[45] *Bodner* at paras. 64, 103

40. At multiple points in *Bodner*, this Court emphasized that the reviewing court plays a "limited role" on a judicial review of the government's response, including at the third stage.[46] This is consistent with Lamer C.J.'s comment in *PEI Reference* that the reviewing court is not to engage in a "searching analysis of ends and means".[47] Rather, this Court contemplated a "deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs."[48] The government's ability to adduce additional affidavit evidence to explain its factual foundation and commitment to the process is consistent with this deferential approach to the government's unique position and accumulated expertise.

41. The addition of the third stage reinforces the requirement that deference be shown to the government on judicial review.[49] The focus of the reviewing court shifts to the "whole of the process and the response" in order to determine whether the commission process has been respected and its purposes have been achieved.[50] This "sets a significantly higher threshold since it requires that the government decision be upheld unless a reasonable person would perceive an interference with judicial independence".[51] Minor errors or omissions in a government's response therefore do not provide a valid basis for judicial review.

42. This Court's treatment of the specific cases before it in *Bodner* demonstrates the deferential manner in which the third stage was intended to be applied. Both the New Brunswick and Alberta government's responses were found unsatisfactory in several respects. Nonetheless, on a global view of the process and these governments' responses, it was apparent that the governments took the process seriously and their responses were upheld on judicial review.[52]

43. At no point in *Bodner* did this Court indicate that the third stage of the analysis may require the reviewing court to go beyond an assessment of the public JCC process and government's public response to undertake a review of Cabinet's private deliberative process or a review of confidential

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[46] *Bodner* at paras. 29, 42, 100, 130 and 159
[47] *PEI Reference* at para. 183
[48] *Bodner* at para. 30
[49] Sterling at p. 43 **[Tab 5D]**
[50] *Bodner* at para. 38
[51] Sterling at p. 43 **[Tab 5D]**
[52] *Bodner* at paras. 81-83 and 129-131

submissions made to Cabinet. This Court was able to determine whether the commission process was respected and its purposes were achieved without doing so in all three specific cases before the Court in which the Court analyzed the third stage of the test: New Brunswick, Ontario and Alberta.[53] Under the judicial compensation statutes in all three of those provinces, Cabinet is actually the branch of government that makes the final decision on judicial compensation.[54] Yet the documents that may have been before Cabinet in coming to the final decision were not discussed as relevant components of the judicial review process.

B. The Misinterpretation of *Bodner* Leads to Negative Consequences

44. Several fundamental misconceptions regarding the *PEI Reference* and *Bodner* underlie the lower courts' decisions to order production of the Cabinet Submission. Those misconceptions and the consequent order for production lead to negative consequences which have not yet received consideration from this Court.

45. According to the lower courts, submissions to Cabinet are relevant to the third stage of the *Bodner* analysis because those submissions form part of the "whole of the process" of setting judicial remuneration. According to the lower courts, no specific allegation of bad faith or wrongdoing on the part of Cabinet or the executive is required to make the Cabinet Submission relevant to the judicial review, even in a context where the Cabinet Submission was not before the decision-maker (the Legislature). All that is required is an allegation that the Government's Proposed Response does not meet the *Bodner* test.

46. Similarly, in the case of those provinces where Cabinet is the decision-maker, the deliberations, including written submissions to Cabinet, should not be relevant on judicial review. The examination of such documents was not contemplated by *Bodner*.

47. The three-stage *Bodner* test is the standard by which all government responses to JCC recommendations are measured across the country. Accordingly, if the simple allegation that the *Bodner* test has not been satisfied entitles the judges to view confidential submissions to Cabinet,

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

[54] *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 22.06; *Provincial Judges and Masters in Chambers 2017 Compensation Commission Regulation*, Alta. Reg. 62/2017, s. 8; and *Framework Agreement on Judges' Remuneration*, O. Reg. 407/93, ss. 27, 30-33

then they will be sought and likely produced in every judicial review of this nature. This is subject to this Court taking an approach to public interest immunity which recognizes the harms of routine disclosure of cabinet records, which is a matter that this Court has never addressed. The lower courts accepted that routine production of cabinet records would be the result of their decisions, but did not grapple with the implications of that.

48. Asking the reviewing court to engage in a routine review of cabinet documents politicizes the process. It implies that governments may be fulfilling their constitutional obligations in public but shirking those obligations in private. As a result, judges' associations are effectively given a supervisory role to scrutinize the documents involved in the private deliberations of the executive branch to assess the government's participation in the whole of the process.

49. The parties in this case are not typical litigants. They are branches of government that have "distinct institutional capacities and play critical and complementary roles in our constitutional democracy".[55] All three branches must be permitted to "play their proper role" without interference, and each branch must "show proper deference for the legitimate sphere of activity of the other".[56] This is necessary to preserve the fundamental principle of the separation of powers.[57]

50. How Cabinet conducts itself in private and the advice it receives should not be the subject of judicial review. Allowing the judges' associations to assume an oversight role over Cabinet's private processes through routine disclosure of deliberative documents constitutes an unjustified intrusion by the judiciary into Cabinet's role. It threatens to "undermine 'the web of institutional relationships . . . which continue to form the backbone of our constitutional system'", which this Court previously warned against.[58]

51. Routine disclosure of submissions to Cabinets also significantly expands upon the role of the reviewing court. In addition to analyzing the public process and public response for compliance with *Bodner*, the reviewing court is now tasked with analyzing private cabinet

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[55] *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43 at para. 29
[56] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319 at 389
[57] *PEI Reference* at para. 138
[58] *PEI Reference* at para. 8

documents to determine whether cabinet acted in bad faith. That effectively turns the reviewing court into a fact-finder, which would be exceptional for any judicial review, let alone a judicial review that this Court has repeatedly described as "limited".

52. The task set for the reviewing court by the lower courts effectively adds an additional stage to the *Bodner* analysis – a stage four – which requires a review of how the public response was formulated. This is done under the guise of considering the "whole of the process". It is for this Court to decide whether such an expansion is appropriate.

53. The additional stage runs counter to the goals of *Bodner*, which include deference, since it prejudices the government. For example, in the present case the PCJA seeks to reveal discrepancies between the Cabinet Submission and the public response, but if such discrepancies exist there will be no explanation for them absent government tendering further evidence of other confidential communications to explain the differences. All of this expands the role of the reviewing court and compromises Cabinet confidentiality.

54. Bauman C.J.B.C. sought to address the AGBC's concern about the expansion of judicial review in this area by analogizing Cabinet to an administrative tribunal. Only the "record" before the administrative decision-maker would be admissible as evidence on a judicial review of this nature.[59] Presumably, this means that submissions to cabinet must be produced but not the evidence of cabinet ministers.

55. However, as the Nova Scotia Court of Appeal recognized in the parallel proceeding, Cabinet cannot be analogized to an adjudicative tribunal.[60] Cabinet's decision of what proposal to put before the Legislature is in part a political one in the sense described in the *PEI Reference*, involving matters such as fiscal management, spending priorities, and the disbursement of monies from the public purse. Cabinet neither received "evidence", nor conducted a "hearing" amongst competing parties, nor were its sources confined to a particular "record".

56. Placing limits on what cabinet documents are producible does not address the problem created by the lower court decisions. The advice contained in the Cabinet Submission will likely

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[59] CA Appeal Reasons at paras. 17-19 **[Tab 2E]**
[60] NSCA Reasons at para. 74

have been preceded by work performed by executive officials, and then will be debated and may or may not be acted upon by Cabinet, depending on Cabinet's view of the matter. The lower courts have offered no explanation of what the reviewing court is to do with submissions to Cabinet, or how the advice given to Cabinet, by itself, is material to the "whole of the process". The "whole of the process" within government and within the Cabinet room is clearly broader than the submission to Cabinet, and in any event is not what the Legislature considered.

57. In summary, the interpretation given to *Bodner* by the lower courts expands the scope of judicial review and, subject to the doctrine of public interest immunity discussed below, makes production of cabinet submissions routine. It is unprecedented for cabinet documents to be *prima facie* producible in every case of a certain type, and such routine production represents a significant erosion of cabinet confidentiality.

58. Routine production of cabinet documents puts the concern for candour in government communications into sharp focus. It is not healthy for the executive branch to have to draft advice to cabinet knowing that, as a matter of routine, whatever is drafted will be scrutinized by the judges' association for use in litigation. The interpretation of *Bodner* adopted by the lower courts thus presents a challenge to the existing approach to public interest immunity: can the spectre of routine production of cabinet documents be addressed through modifications to *Carey*, or is the spectre of routine production merely confirmatory that the lower courts have misinterpreted *Bodner*?

Issue 2: Public Interest Immunity in the Context of Routine Disclosure of Cabinet Documents

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

A. *Carey* Abolishes Absolute Cabinet Confidentiality

60. *Carey* is the leading case from this Court on public interest immunity. It involved a claim for damages against the Government of Ontario. Before trial, the plaintiff served the Secretary of the Ontario Cabinet with a subpoena ordering him to attend trial and to bring all Cabinet documents

related to the case. The Government of Ontario then applied to quash the subpoena based on public interest immunity.

61. Justice La Forest, writing for the Court, analyzed two rationales for non-disclosure of Cabinet documents. The first was the "candour argument", which provides that disclosure of Cabinet documents "would lead to a decrease in completeness, in candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest."[61] While La Forest J. was prepared to attach "some weight" to the candour argument, he found that its importance was "easy to exaggerate", as he doubted that "the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation".[62]

62. The second rationale for non-disclosure of Cabinet documents was based on the "political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only".[63] The substance of this rationale was captured by Lord Reid, who stated that:

> The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.[64]

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

63. As such, this Court developed a list of criteria to strike a balance between the competing interests of preventing harm to the public service and the public interest in the administration of justice.[65] Those criteria are: the nature of the policy concerned; the contents of the documents; the level of the decision-making involved; the timing of the disclosure; the importance of producing the documents to the administration of justice; and any allegation of improper conduct by the

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[61] *Carey* at para. 44
[62] *Carey* at para. 46
[63] *Carey* at para. 49
[64] *Carey* at para. 49, citing *Conway v. Rimmer*, [1968] A.C. 910 at 952
[65] *Carey* at para. 22

executive branch towards a citizen.[66] It is for the government to demonstrate that non-disclosure is necessary in the public interest.

B. Systematic Production of Cabinet Documents Following *Carey*

64. It has been argued that the approach articulated in *Carey* failed to strike the proper balance among competing interests, leading to repeated and unnecessary disclosure of confidential Cabinet documents.[67]

65. Since *Carey* was decided in 1986, courts have "almost systematically ordered the production of Cabinet secrets".[68] The main criterion for production has been the relevance of the information. If the documents were deemed relevant by the court, production typically ensued. However, it is "unclear whether the production of Cabinet documents was necessary to the fair disposition of any of these cases".[69] While the Court in *Carey* intended to dispel the notion that Cabinet confidentiality was absolute, this Court did not intend to do away with it entirely.

66. Indeed, this Court re-affirmed the importance of, and rationales behind, public interest immunity in *Babcock*. *Babcock* primarily dealt with public interest immunity under s. 39 of the *Canada Evidence Act*.[70] However, McLachlin C.J., writing for the majority, also recognized the importance of the common law tradition of cabinet confidentiality at para. 18:

> The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspects of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny […] If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating unpopular positions, or from making comments that might be considered politically incorrect. […]

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[66] *Carey* at paras. 79-80
[67] Yan Campagnolo, "A Rational Approach to Cabinet Immunity under the Common law" (2017) 55:1 Alta. L. Rev. 43 at pp. 65-67 ("**Campagnolo**") **[Tab 5B]**
[68] Campagnolo at p. 66 **[Tab 5B]**
[69] Campagnolo at p. 67 **[Tab 5B]**
[70] R.S.C. 1985, c. C-5

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

67. The reluctance of lower courts to apply the immunity has been tied to three weaknesses in the *Carey* decision. The first is that the Court's definition of "Cabinet documents" – which includes "documents prepared for Cabinet, or that emanated from Cabinet, or that record its proceedings or those of its committees" – fails to differentiate between "core" and "non-core" secrets.[71] Disclosure of core secrets has the potential to extinguish collective ministerial responsibility, i.e. that "that the members of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made".[72] Yet in *Carey,* which featured both core and non-core secrets, all documents were treated the same and ultimately disclosed in the litigation.[73]

68. Second, *Carey* gave insufficient weight to the rationales behind Cabinet confidentiality. La Forest J. accepted that the possibility that disclosure would encourage "ill-informed or captious public or political criticism" justified Cabinet confidentiality. However, no consideration was given to the principle of collective responsibility, mentioned above, which is the "main reason for protection of Cabinet secrecy".[74]

69. Third, *Carey* is said to have given "litigants a master key to unlock the doors of the Cabinet room"[75] All litigants must do is allege government misconduct in order to obtain production of confidential Cabinet documents. Accordingly, academic commentary has suggested that "the allegations of government misconduct should be supported by some *prima facie* evidence" and

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[71] *Carey* at para. 12; Campagnolo at p. 65 **[Tab 5B]**
[72] *Commonwealth v. Northern Land Council* (1993), 112 A.L.R. 409 at 412-414 (H.C.A.) **[Tab 5A]**
[73] Campagnolo at pp. 65-66 **[Tab 5B]**
[74] Campagnolo at p. 65 **[Tab 5B]**
[75] Campagnolo at p. 65 **[Tab 5B]**

"the courts should distinguish between various types of government misconduct with different degrees of gravity (from breach of contract or tortious conduct, to unlawful conduct or a criminal offence)" when assessing whether the public interest favours disclosure of Cabinet documents.[76]

70. The current case presents this Court with an opportunity to address these concerns with *Carey* and to revisit the confidentiality of Cabinet documents in a context where the rationales for non-disclosure are centrally engaged.

71. The candour rationale was given diminished weight in *Carey* based on doubt that government officials would be afraid to communicate candidly based on the "off-chance" or "remote" prospect of production of confidential Cabinet documents for the purposes of litigation.[77] However, off-chance production is not what is at issue in the present case. The lower courts determined that confidential submissions to Cabinet are inherently relevant to the *Bodner* test, and accordingly they will be subject to production in all future judicial reviews arising out of the judicial compensation process. Routinizing production increases the risk that candour in government communications will be impaired in a manner not contemplated by this Court in *Carey*.

72. In addition, routine disclosure of Cabinet documents in judicial compensation cases creates an increased possibility of "ill-informed" criticism from "those ready to criticise without adequate knowledge of the background".[78] As the submission to cabinet is merely part of a broader process by which decisions are made, or by which recommendations to the Legislature are developed, its production will leave an incomplete picture which may then be used by others to criticize and invalidate the government's public response.

73. Finally, this case presents a striking example of the third weakness in the *Carey* case, discussed above. No allegation of misconduct on the part of Cabinet has been made. Nor has evidence been led to support such an allegation. Rather, the submission to Cabinet has been sought by the PCJA based on mere speculation that it might reveal improper conduct on the part of

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[76] Campagnolo at p. 66 **[Tab 5B]**
[77] *Carey* at paras. 46-47
[78] *Carey* at para. 49; *Babcock* at para. 18

government. If this is permissible, it incentivizes the commencement of proceedings to obtain this form of discovery in the hope that it may provide fodder for argument.

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

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

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

76. These are issues of both public and national importance, impacting the relationship between the three branches of the state, and concerning the role of the court on applications for judicial review.

PART IV: SUBMISSIONS ON COSTS

77. The AGBC seeks costs in the cause.

PART V: ORDER SOUGHT

78. The AGBC respectfully requests that leave to appeal be granted with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of December, 2018

Stein K. Gudmundseth, Q.C.
Andrew D. Gay, Q.C.
Clayton J. Gallant
Counsel for the Applicant,
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Campagnolo, Yan, "A Rationale Approach to Cabinet Immunity Under the Common Law" (2017) 55:1 Alta. L. Rev. 43	64, 65, 67, 68, 69
Hogg, Peter, "The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries" in *Judicial Independence in Context* eds. Adam Dodek and Lorne Sossin (Toronto: Irwin Law, 2010)	36
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Canada Evidence Act, R.S.C. 1985, c. C-5

Objection relating to a confidence of the Queen's Privy Council

39 (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

Definition

(2) For the purpose of subsection (1), ***a confidence of the Queen's Privy Council for Canada*** includes, without restricting the generality thereof, information contained in

(a) a memorandum the purpose of which is to present proposals or recommendations to Council;

(b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;

(c) an agendum of Council or a record recording deliberations or decisions of Council;

(d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and

(f) draft legislation.

Definition of *Council*

(3) For the purposes of subsection (2), ***Council*** means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Exception

(4) Subsection (1) does not apply in respect of

(a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or

(b) a discussion paper described in paragraph (2)(b)

(i) if the decisions to which the discussion paper relates have been made public, or

(ii) where the decisions have not been made public, if four years have passed since the decisions were made.

***Loi sur la preuve au Canada*, LRC 1985, c C-5**

Opposition relative à un renseignement confidentiel du Conseil privé de la Reine pour le Canada

39 (1) Le tribunal, l'organisme ou la personne qui ont le pouvoir de contraindre à la production de renseignements sont, dans les cas où un ministre ou le greffier du Conseil privé s'opposent à la divulgation d'un renseignement, tenus d'en refuser la divulgation, sans l'examiner ni tenir d'audition à son sujet, si le ministre ou le greffier attestent par écrit que le renseignement constitue un renseignement confidentiel du Conseil privé de la Reine pour le Canada.

Définition

(2) Pour l'application du paragraphe (1), un ***renseignement confidentiel du Conseil privé de la Reine pour le Canada*** s'entend notamment d'un renseignement contenu dans :

a) une note destinée à soumettre des propositions ou recommandations au Conseil;

b) un document de travail destiné à présenter des problèmes, des analyses ou des options politiques à l'examen du Conseil;

c) un ordre du jour du Conseil ou un procès-verbal de ses délibérations ou décisions;

d) un document employé en vue ou faisant état de communications ou de discussions entre ministres sur des questions liées à la prise des décisions du gouvernement ou à la formulation de sa politique;

e) un document d'information à l'usage des ministres sur des questions portées ou qu'il est prévu de porter devant le Conseil, ou sur des questions qui font l'objet des communications ou discussions visées à l'alinéa d);

f) un avant-projet de loi ou projet de règlement.

Définition de *Conseil*

(3) Pour l'application du paragraphe (2), ***Conseil*** s'entend du Conseil privé de la Reine pour le Canada, du Cabinet et de leurs comités respectifs.

Exception

(4) Le paragraphe (1) ne s'applique pas :

a) à un renseignement confidentiel du Conseil privé de la Reine pour le Canada dont l'existence remonte à plus de vingt ans;

b) à un document de travail visé à l'alinéa (2)b), dans les cas où les décisions auxquelles il se rapporte ont été rendues publiques ou, à défaut de publicité, ont été rendues quatre ans auparavant.

***Judicial Compensation Act*, S.B.C. 2003, c. 59**

Judicial Compensation Commission

2 (1) On or before March 1, 2016 and on or before March 1 in every 3rd year after that, 5 individuals must be appointed, in accordance with subsection (2), to form the Judicial Compensation Commission.

(2) The individuals forming the Judicial Compensation Commission must be appointed as follows:

(a) the minister must appoint 2 individuals;

(b) the chief judge, after consulting with the Provincial Court Judges' Association of British Columbia and the Judicial Justices Association of British Columbia, must appoint 2 individuals;

(c) the individuals appointed under paragraphs (a) and (b) must appoint one other individual to the commission to chair that commission.

[…]

Report and recommendations

5 (1) Not later than October 1 following its formation, the commission must, in a preliminary report to the minister and chief judge,

(a) report on all matters respecting the remuneration, allowances and benefits of judges and judicial justices, and

(b) make recommendations with respect to those matters for each of the next 3 fiscal years.

(2) Within 14 days of receiving the preliminary report, the minister or chief judge may apply to the commission for a clarification of a matter in the report or in respect of a matter the commission did not address in the report.

(3) If an application is made under subsection (2), the commission must make a final report to the minister not later than October 30 following its formation.

(4) If an application is not made under subsection (2), the preliminary report is the final report.

(5) In preparing a report, the commission must be guided by the need to provide reasonable compensation for judges and judicial justices in British Columbia over the 3 fiscal years that are the subject of the report, taking into account all of the following:

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

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

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

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

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

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

(5.1) The report of the commission must demonstrate that the commission has considered all of the factors set out in subsection (5).

(5.2) The commission may consider factors it considers relevant that are not set out in subsection (5), but if it relies on another factor, the report of the commission must explain the relevance of the factor.

(6) Before preparing a report, the commission may

(a) write and receive submissions,

(b) hold hearings in the manner the commission may decide, and

(c) with the approval of the minister, engage and retain consultants the commission considers necessary.

Reports before the Legislative Assembly

6 (1) The minister must lay the final report of the commission before the Legislative Assembly, and must advise the Legislative Assembly about the effect of subsection (3),

(a) within 7 sitting days of the Legislative Assembly after the date on which the minister receives the report, and

(b) if the Legislative Assembly is prorogued or dissolved within 16 sitting days after the date on which the report is laid before the Legislative Assembly and the Legislative Assembly has not passed a resolution under subsection (2), within 7 sitting days after the opening of the next session.

(c)[Repealed 2012-6-6.]

(2) The Legislative Assembly may, by a resolution passed within 16 sitting days after the date on which a report is laid before the Legislative Assembly under subsection (1),

(a) reject one or more of the recommendations made in the report, and

(b) set the remuneration, allowances or benefits that are to be substituted for the remuneration, allowances or benefits proposed by the rejected recommendations.

(3) If a recommendation is not rejected by the Legislative Assembly within the time limited by subsection (2), the judges or judicial justices are entitled to receive the remuneration, allowances and benefits proposed by that recommendation beginning on April 1 of the year following the year referred to in, or applicable under, section 2 (1).

(4) If the Legislative Assembly does resolve to reject a recommendation under subsection (2) (a), the judges or judicial justices are, in respect of that recommendation, entitled to receive the remuneration, allowances and benefits set by the resolution under subsection (2) (b) beginning on April 1 of the year following the year referred to in, or applicable under, section 2 (1).

(5) If the 16 sitting days specified in subsection (2) end after April 1 of the year for which the recommendations in the report, subject to subsection (2), were to apply, the recommendation applicable under subsection (3) or the resolution applicable under subsection (4) is retroactive to the extent necessary to give effect to the recommendation or resolution on April 1 of that year.

(6) If a resolution referred to in subsection (2) or a recommendation referred to in subsection (3) conflicts with a provision of this Act, the resolution or recommendation prevails over that provision to the extent of the conflict.

(7) A resolution referred to in subsection (2) or a recommendation referred to in subsection (3) may set different salaries for different responsibilities.

***Provincial Court Act*, R.S.N.S. 1989, c. 238**

Duties of Governor in Council

21K (1) Within forty-five days of receipt of the report prepared by a tribunal pursuant to subsection (1) of Section 21E, the Minister shall forward the report to the Governor in Council.

(2) The Governor in Council shall, without delay, confirm, vary or reject each of the recommendations contained in the report referred to in subsection (1).

(3) Upon varying or rejecting the tribunal's recommendations in accordance with subsection (2), the Governor in Council shall provide reasons for so doing to both the tribunal and the Association.

(4) The Governor in Council shall, without delay, cause the confirmed and varied recommendations to be implemented, and the recommendations have the same force and effect as if enacted by the Legislature once implemented and are in substitution of any existing legislation relating to those matters.

***Provincial Court Act*, R.S.N.B. 1973, c. P-21**

Action on Commission's report

22.06 (1) The recommendations of the Commission in the report

(a) may be accepted, in which case they shall be implemented with due diligence, or

(b) may be rejected in whole or in part, in which case the Minister shall advise the Commission and the Legislative Assembly as to the recommendations or the parts of the recommendations that are not being implemented.

22.06 (2) The recommendations are deemed to have been accepted if the Minister does not advise the Commission and the Legislative Assembly, on tabling the report as required by subsection 22.021(3), that the recommendations have been rejected in whole or in part.

***Loi sur la cour provinciale*, LRN-B 1973, c P-21**

Mesures prises à la suite du rapport de la Commission

22.06 (1) Les recommandations faites par la Commission dans son rapport

a) peuvent être acceptées, et dans ce cas elles doivent être appliquées avec diligence, ou

b) peuvent être rejetées en tout ou en partie, auquel cas le Ministre doit faire part à la Commission et à l'Assemblée législative des recommandations ou des parties de recommandations qui ne seront pas appliquées.

22.06 (2) Les recommandations sont réputées avoir été acceptées si le Ministre n'avise pas la Commission et l'Assemblée législative lors du dépôt du rapport exigé par le paragraphe 22.021(3), que les recommandations ont été rejetées en tout ou en partie.

Provincial Judges and Masters in Chambers 2017 Compensation Commission Regulation, Alta. Reg. 62/2017

Lieutenant Governor in Council's decision on the report

8(1) On receiving the report, the Minister shall present it to the Lieutenant Governor in Council in adequate time for subsection (2) to be met.

(2) Within 120 days after the presentation of the report under section 6 or, where that report is amended under section 7, that amended report, the Lieutenant Governor in Council shall make an order containing the decisions on the recommendations made by the Commission and, if any of those recommendations are not accepted, providing reasons for the non‑acceptance.

Framework Agreement on Judges' Remuneration, O. Reg. 407/93

Binding and Implementation

27. The recommendations of the Commission under paragraph 13, except those related to pensions, shall come into effect on the first day of April in the year following the year the Commission began its inquiry, except in the case of salary recommendations which shall come into effect on the first of April in the year in which the Commission began its inquiry and shall have the same force and effect as if enacted by the Legislature and are in substitution for the provisions of any schedule

made pursuant to this Agreement and shall be implemented by the Lieutenant Governor in Council by order-in-council within sixty days of the delivery of the Commission's report pursuant to paragraph 15.

[…]

30. The parties agree that the recommendations with respect to pensions, or any reconsideration under paragraph 28 of a matter relating to pensions, shall be presented to the Management Board of Cabinet for consideration.

31. The parties agree the recommendations and report of the Commission following a discretionary inquiry pursuant to paragraph 14 shall be presented to the Chair of Management Board of Cabinet.

32. The parties agree that the recommendations of the Commission in consequence of an inquiry pursuant to paragraph 14 shall be given every consideration by Management Board of Cabinet, but shall not have the same force and effect as recommendations referred to in paragraph 13.

33. The parties agree that if the Management Board of Cabinet endorses recommendations referenced in paragraph 30 or 31, or some variation of those recommendations, the Chair of Management Board shall make every effort to implement them at the earliest possible date, following subsequent approval from Cabinet.