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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

APPLICANT
(Appellant)

- and -

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

RESPONDENT
(Respondent)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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**MEMORANDUM OF ARGUMENT OF THE RESPONDENT,
PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA**

PART I. STATEMENT OF FACTS

A. Overview

1. The Attorney General of British Columbia ("**AGBC**") says that the BC Court of Appeal's decision is now amongst several that expand the role of reviewing courts in a manner that increases the scope of litigation, politicizes the process of setting judicial remuneration, and threatens the separation of powers. Those decisions all relied on *PEI Reference*,[1] *Bodner*,[2] and *Carey*,[3] and were not successfully appealed.

2. The BC Court of Appeal upheld the decisions of both Master Muir[4] and Chief Justice Hinkson[5] and concluded that documents that were before the executive branch of government ("**Cabinet**") must be produced to the Provincial Court Judges' Association of British Columbia (**"Association**") in this proceeding that concern judicial review of judicial remuneration. AGBC argues the Cabinet documents are not relevant or are subject to public interest immunity.

3. On relevance, AGBC says that unless the pleadings put Cabinet's actions or put the Cabinet documents in issue, even if Cabinet is the decision-maker, *Bodner* requires examination of only government's public response to the JCC process. First, the Court of Appeal was correct that the pleadings in this case put Cabinet's actions and the Cabinet documents in issue. An issue like this that turns on the particular pleadings in a case is not of national or public importance.

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[1] *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***]

[2] *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***]

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

[4] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCSC 1193 [**Muir Reasons**]

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

4. Second, even if the pleadings failed to do so, the lower courts were correct that the Cabinet documents are relevant in light of the particular process followed in British Columbia. The relevance of Cabinet documents in light of this process was not considered by this Court in *Bodner*. 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.

5. If AGBC seeks to have this Court reconsider *Bodner*, there is no basis for that. The lower courts rightly recognized that primacy must be placed on the need to ensure, as much as possible, transparency in the process for determining judicial remuneration; and to ensure that all relevant material is available for the purpose of judicial review. In British Columbia, because of the role Cabinet invariably plays in that process, the need for transparency extends to ensuring that Cabinet may not shield its own participation in the process from scrutiny on judicial review. A leave application that is premised on there being anything other than transparency in the Judicial Compensation Commission ("**JCC**") process is no matter of public importance.

6. On the issue of public interest immunity, the lower courts were correct to summarily dismiss this claim based on the existing well-established and well-understood jurisprudence.

7. The application for leave to appeal should be dismissed.

B. Statement of Facts

i. The JCC Process

8. 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 constrained from direct discussion with those branches on those subjects in the interests of the constitutional commitment to separation of powers and institutional independence.[6]

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

9. In British Columbia, a JCC is the independent tribunal formed every three years with a mandate under the *JCA*[7] to report to AGBC and the Chief Judge on all matters respecting remuneration, allowances and benefits of Provincial Court Judges ("**PCJs**"), 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.[8]

10. A preliminary report with recommendations must be delivered to AGBC and the Chief Judge, and thereafter a final report must be laid before the Legislative Assembly ("**LA**") for response by the LA, all on a timetable established by the *Act*. Any response of the LA is by resolution. It 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.[9] However, as noted above, the decision of the Cabinet plays a routine role in shaping the government's response to the recommendations of the JCC.

ii. Procedural History

The First Judicial Review

11. The present judicial review must be situated in the broader context of the remuneration of provincial court judges ("**PCJs**") in British Columbia dating back to at least 2010. This particular judicial review is the fourth consecutive judicial review of the government's various responses to JCC reports since 2010.

12. In the *First JR*,[10] the Association applied for production of Cabinet documents. AGBC objected on the basis, among others, of relevance. AGBC argued that the focus of the judicial

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[7] *Judicial Compensation Act*, S.B.C. 200 3, c. 59, s. 5 [***JCA*** or the ***Act***]
[8] Muir Reasons, ¶¶2, 4; Hinkson CJ Reasons, ¶5; *PEI Reference*, ¶133
[9] *Third JR_CA*, ¶7; Hinkson CJ Reasons, ¶5
[10] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 [***First JR***]

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.[11]

13. 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.[12]

14. 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:

> 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.[13]

15. The Cabinet submission was not exhibited to the affidavit.[14]

16. 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.[15]

17. 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 legislature 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.[16] Ultimately that Cabinet document was disclosed.

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[11] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244 [***First Cabinet Decision***], ¶¶10-11
[12] *First Cabinet Decision*, ¶8
[13] *First Cabinet Decision*, ¶9
[14] *First Cabinet Decision*, ¶9
[15] *First Cabinet Decision*, ¶¶10-11, 16
[16] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCCA 157 [***First Cabinet Decision_CA***], ¶¶14-15

18. 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. It is not open, however, to Cabinet, in doing so, to then shield its own participation in the process from scrutiny upon judicial review.
>
> …
>
> [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.[17]

19. The Cabinet document highlighted the estimated cost of accepting the JCC recommendations in light of other groups linked to judges' salaries. 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.[18] Macaulay J.

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[17] *First JR*, ¶¶14, 16, 50-52 (emphasis added)
[18] *First JR*, ¶¶55-56, 60

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."[19] 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."[20]

20. Macaulay J. ordered special costs against AGBC and noted that the Cabinet submission was the aggravating feature warranting special costs.[21] Macaulay J. directed the return of the matter to government and to the LA for reconsideration in accordance with his reasons.

The Second Judicial Review

21. 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.[22] There was also no affidavit referring to any specific Cabinet documents informing the LA's second decision.

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[19] *First JR*, ¶68
[20] *First JR*, ¶¶80-81 (emphasis added)
[21] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1420, ¶¶12-13, 16
[22] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2013 BCSC 1302, ¶¶14, 26

22. 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 public interest immunity.[23] Nevertheless, Savage J. (as he then was), found the Cabinet documents to be relevant and they were produced.[24] They are described in and informed Savage J.'s judgment.[25]

23. The Association successfully appealed the decision of Savage J. on the merits of the *Second JR*. 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.[26]

The Third Judicial Review

24. There was a third judicial review, this one of the 2013 JCC Report and no request was made for Cabinet documents. The third judicial review was again ultimately resolved in the Court of Appeal in favour of the Association.

The Present Judicial Review

25. 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. On October 25, 2017, AGBC moved that the LA reject some of those.

26. On December 20, 2017, the within petition was served on AGBC. On January 15, 2018, AGBC sought particulars of the allegation that "the Government's 2017 Response failed to comply with each of the three above mentioned constitutionally mandated criteria." On January 21, 2018, the Association provided such particulars.[27] On March 1, 2018, AGBC delivered the within response to petition.

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[23] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336 [***Second JR***], ¶¶20-22
[24] *Second JR*, ¶¶29-30
[25] *Second JR*, ¶¶63-67, 136-43
[26] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2015 BCCA 136 [***Second JR Appeal***], leave to appeal refused [2015] 3 SCR v.
[27] Affidavit of Lyna Lay made October 26, 2018, Ex. A, [Tab 2].

27. On March 2, 2018, the petitioner requested disclosure of the Cabinet documents. On March 5, 2018, counsel for the AGBC asked counsel for the petitioner how the Cabinet documents were relevant to the petition or the response. Counsel for the petitioner responded by saying, "In the event it impacts our position and submissions." The brevity of the response is understandable because this is the fourth judicial review of substantially similar issues between the same parties, most frequently represented by the same counsel and which have been continuously under review since 2012. On March 19, 2018, AGBC took the position that the petitioner was not entitled to the Cabinet documents.

28. On April 4, 2018, the Association filed a notice of application seeking production of the Cabinet documents. The application was not heard until June 28, 2018. However brief the petitioner's initial explanation of the relevance of the Cabinet documents, AGBC's counsel acknowledged before Master Muir that AGBC had sufficient notice of the petitioner's position on relevance in advance of the application. It was not disputed, and Master Muir found, that the government response is routinely informed by a detailed submission to Cabinet. There was no evidence that such a submission was not done in this instance.[28] On July 16, 2018, Master Muir ordered AGBC to produce a copy of the Cabinet documents.

29. On August 17, 2018, Chief Justice Hinkson dismissed the appeal from Master Muir's order and ordered costs in any event of the cause. Chief Justice Hinkson concurred with Master Muir's assessment that the Cabinet submission was "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."[29]

30. On October 23, 2018, the Court of Appeal unanimously dismissed the appeal of Chief Justice Hinkson's order.

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[28] Muir Reasons, ¶9
[29] Hinkson CJ Reasons, ¶34

PART II. STATEMENT OF QUESTION IN ISSUE

31. There is no question of national or public importance or any other issue of such nature or significance warranting leave to appeal. In particular:

a. The relevance of a document in a particular lawsuit governed by particular provincial legislation does not raise an issue of national or public importance. The applicants claim that the decision of the courts below is contrary to either the *PEI Reference* or *Bodner* is without merit.

b. No novel public interest immunity issue is engaged on the facts of this case nor has the applicant identified any criteria that would justify this Court to overrule its decisions in *Carey*, a decision which is well-understood by lower courts that routinely apply it. Nor is there any conflict between *Bodner* and *Carey*.

PART III. STATEMENT OF ARGUMENT

A. Cabinet's Actions and Cabinet Documents Raised on the Pleadings

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

33. The Court of Appeal was correct in holding the relevance of the Cabinet documents 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 <u>not</u> be relevant on the face of the pleadings?...[30]

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[30] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 394 [**CA Reasons**], ¶16 (emphasis in original)

34. Just as in the *Second JR*, in this case 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.[31]

35. As noted, AGBC also sought and obtained particulars of the petition which included that the 2017 Response:

> … 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;[32]

36. An issue like this that turns on the sufficiency of a pleading is not an issue of national or public importance.

B. No Misinterpretation of *PEI Reference* or *Bodner*

37. The lower courts did not misinterpret *PEI Reference* or *Bodner* in finding that the Cabinet documents are relevant and ordering their production.

38. Not only is there no inconsistent appellate authority on point, the Nova Scotia Court of Appeal recently came to the same conclusion as the BC Court of Appeal.[33]

39. As noted above, each of Hinkson CJ, Master Muir, Macaulay J. and Savage J. observed that in British Columbia, before the LA makes a decision in respect of judicial remuneration,

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[31] Petition, ¶2 (emphasis added)
[32] Affidavit of Lyna Lay made October 26, 2018, Ex. A, [Tab 2].
[33] *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, ¶¶38-47 upholding *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13

Cabinet formulates the government's proposed response.[34] AGBC has admitted in this case, like those preceding it, that the government response was informed by a detailed submission to Cabinet.[35]

40. Neither *PEI Reference* nor *Bodner* squarely considered this process. Nor did either case include an application for disclosure of such Cabinet documents. But what is much more important is the fundamental principle in *Bodner* which requires the reviewing court to consider the government's response from a global perspective and it must weigh the whole of the process and the response to see if they demonstrate that government has engaged in a meaningful way with the process.[36] In light of the importance of the "whole of the process" it simply cannot credibly be asserted that the decision of the Court of Appeal in this case offends any principle asserted in either the *PEI Reference* or *Bodner*.

41. As Justice Macaulay 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.[37]

42. Transparency ensures that the process of determining judicial compensation is not subject to improper politicization or manipulation of the judiciary.

43. The Cabinet documents may contain facts or information that are not in the public domain but have nonetheless influenced those who are privy to it or alternatively may contain facts or information that others in the LA are not aware of but are entitled to and if disclosed could have affected the outcome.

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[34] Muir Reasons, ¶9; Hinkson CJ, ¶31; *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)

[35] Muir Reasons, ¶9

[36] *First Cabinet Decision*, ¶14; *Bodner*, ¶¶36, 38; CA Reasons, ¶¶14-15; Hinkson CJ Reasons, ¶34; Muir Reasons, ¶¶18-20

[37] *First Cabinet Decision*, ¶¶12, 22-24

44. Cabinet documents may contain a "smoking gun" (as they did in the *First JR*), and given that recent history it is wrong for AGBC to bristle at the suggestion that "governments may be fulfilling their constitutional obligations in public but shirking those obligations in private."[38]

45. In any event, the Cabinet documents need not be a "smoking gun". 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 Justice Savage held in the *Second JR*.

46. AGBC is also wrong to suggest that such a finding gives the Association a "supervisory role" over Cabinet.[39] As with any judicial review, *the Courts* and not the parties, ultimately review the process for compliance with constitutional and other norms. Such supervision by the Superior Courts is not properly characterized as an "interference" or "unjustified intrusion" with the executive or legislative branch of government.[40] Instead, it is essential to ensure compliance with the rule of law, confidence in the administration of justice, and preservation of the appearance of justice.

47. 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.[41] As AGBC himself acknowledges, the government's ability to adduce additional affidavit evidence to explain its factual foundation and commitment to the process is consistent with the deferential approach articulated in *PEI Reference* and *Bodner*.[42]

48. For example, in *Bodner*, Ontario retained PricewaterhouseCoopers ("**PwC**") to determine the cost of implementing the JCC's recommendations. Ontario's 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

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[38] AGBC Memorandum of Argument, ¶48
[39] AGBC Memorandum of Argument, ¶48
[40] AGBC Memorandum of Argument, ¶49
[41] AGBC Memorandum of Argument, ¶30
[42] AGBC Memorandum of Argument, ¶40

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. The Supreme Court of Canada 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."[43]

49. The possibility that leading such evidence might require disclosure of confidential information to provide context or explanation[44] lacks any air of reality 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. Any leave application that is premised on there being anything other than transparency in the JCC process is no matter of public importance.

50. Finally it open to the LA to amend the *JCA* or the process followed in making its decision. Such an amendment might change the result on relevance. However, the LA has so far declined to do so. Insofar as Cabinet continues to play a central role in that process, its participation should not be shielded from public scrutiny.

C. Public Interest Immunity

i. No Basis to Depart from *Carey*

51. In both the First JR appeal and this one, the Court of Appeal summarily dismissed AGBC's claim of public interest immunity.

52. In British Columbia, public interest immunity is a common law doctrine, preserved by ss. 9(2) and (3) of the *Crown Proceeding Act*.[45] It must be established on a case-by-case basis by balancing the public interest in maintaining Cabinet confidentiality against the public interest in

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[43] *Bodner*, ¶¶91, 92, 103
[44] AGBC Memorandum of Argument, ¶30
[45] *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 9

disclosure. Factors to consider in the balancing process were identified in *Carey* and summarized in *Leeds*.[46]

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

54. As such the decision of the Courts below to reject the government's claim to public interest immunity with respect to this single document cannot raise an issue of public or national importance.

55. AGBC relies on no jurisprudence to support his leave application in respect of the claim of public interest immunity. Instead he relies heavily on an article by Professor Campagnolo to argue that *Carey* fails to strike the proper balance among competing interests, leading to repeated and unnecessary disclosure of confidential Cabinet documents.[47]

56. Prof. Campagnolo's suggested (and never judicially adopted) approach to claims of public interest immunity would not support AGBC's assertion of public interest immunity in this case for the fundamental reason that AGBC has led no evidence of any specific public interest that requires non-disclosure. Such a foundation is key under both the current jurisprudence and under Prof. Campagnolo's suggested approach to public interest immunity claims as we explain here.

57. Prof. Campagnolo argues that to make a claim of public interest immunity in respect of *prima facie* relevant Cabinet documents (such as those at issue in this case), government bears the onus to explain why they should be withheld. Further, for Prof. Campagnolo, "[w]hether the objection will succeed depends on the cogency of the reasons articulated to justify it."[48]

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[46] Muir Reasons, ¶22 citing *Carey* and summarized in *Leeds v. Alberta (Minister of the Environment)* (1990), 69 D.L.R. (4th) 681 (Alta. Q.B.) [***Leeds***], at 689
[47] AGBC Memorandum of Argument, ¶¶64-73
[48] Campagnolo, p. 73

58. Prof. Campagnolo argues that those reasons should include a sufficient description of the documents,[49] an assessment of the degree of relevance,[50] 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."[51]

59. 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.[52] In cases (such as this) where government fails to make a *prima facie* valid objection because it fails to provide 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.[53]

60. Thus, Prof. Campagnolo's approach would lead to an identical result as that reached by the lower courts on the case at bar who followed *Carey*[54] in finding that AGBC's claim failed in part because there was no evidence led of any specific public interest that requires non-disclosure.[55] That was also the basis on which the claim for public interest immunity was dismissed by the lower courts on the *First* and *Second JR*.[56]

PARTS IV AND V. COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

61. The respondent asks that the application for leave to appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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[49] Campagnolo, p. 73
[50] Campagnolo, pp. 73-74
[51] Campagnolo, p. 74
[52] Campagnolo, p. 77
[53] Campagnolo, pp. 77-78
[54] *Carey*, ¶40
[55] *Carey*, ¶40; Muir Reasons, ¶23; Hinkson CJ Reasons, ¶¶43-47
[56] *Second JR*, ¶¶24-29

Dated at the City of Vancouver, Province of British Columbia, the 30th day of January, 2019.

Joseph J. Arvay, O.C., Q.C. and
Alison M. Latimer
Counsel for the Respondent

PART VI. TABLE OF AUTHORITIES

	Paragraph(s)
British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia, 2018 BCSC 1390	2, 9-10, 29, 33, 39-40, 60
Carey v. Ontario, [1986] 2 S.C.R. 637	1, 31, 52-53, 60
Leeds v. Alberta (Minister of the Environment) (1990), 69 D.L.R. (4th) 681 (Alta. Q.B.)	52
Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia, 2018 NSCA 83, upholding *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13	38
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Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General), 2018 BCCA 394	33
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	1, 9, 31, 37, 40, 47

PART VII. STATUTES RELIED ON

	Paragraph(s)
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Judicial Compensation Act, S.B.C. 2003, c. 59 [***JCA*** or the ***Act***], s. 5	9-10, 50

ARVAY FINLAY LLP

File No. 20145

21 January 2018

VIA EMAIL

Gudmundseth Mickelson LLP
2525 – 1075 West Georgia Street
Vancouver, BC V6E 3C9

Attention: Andrew D. Gay, Q.C.

This is Exhibit A referred to in the Affidavit of Lyna Lay sworn before me on October 26, 2018.

A Commissioner for taking Affidavits for British Columbia

Dear Sir:

Re: ***Provincial Court Judges' Association of British Columbia v. Attorney General of British Columbia***
SCBC Action No. S1711757, Vancouver Registry

Thank you for your letter of January 15, 2018.

The Petition sets out the grounds in Part 3. What you are seeking is "argument" and that is not required. We refer you to the judgment of Justice Loo in the previous proceeding: *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2013 BCSC 1302.

Nevertheless, and while we do not agree that we have failed to comply with the requirements of the *Judicial Review Procedure Act*, RSBC 1996, c. 241, to state the grounds for judicial review, in an effort to move this matter expeditiously forward, we provide you with the following particulars. The 2017 Response to the Judicial Compensation Commission ("JCC"):

a) consisted of irrational and unreasonable arguments that were inconsistent with the content of the JCC Report;

b) failed to rely on a reasonable factual foundation, failed to justify departure from the JCC recommendations, and failed to justify giving different weights to relevant factors;

c) relies on substantially similar reasoning that has been rejected by the courts in the first, second and third judicial review and, for the same reasons, cannot successfully be relied on now;

d) failed to consider or grapple with the JCC's rationales;

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;

f) reflects a continuation of the unfortunate posture Government has taken in its last several responses to JCC recommendations – that is a pattern of routine dismissal of JCC recommendations that the SCC warned against; and

g) such other particulars as counsel may advise.

While we agreed to a reasonable extension of time for you to file your response and any supporting materials in light of the holidays, we require these materials by the end of January.

Yours truly,

ARVAY FINLAY LLP

Per:

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AML/ie