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)

APPLICANT'S REPLY
(ATTORNEY GENERAL OF BRITISH COLUMBIA, APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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APPLICANT'S MEMORANDUM OF ARGUMENT IN REPLY

A. National or Public Importance

1. The PCJA asserts that there are no issues of national or public importance raised on this proposed appeal. However, the PCJA's own responding materials demonstrate the contrary.

2. The PCJA admits that neither *PEI Reference* nor *Bodner* considered the relevance of cabinet documents or the disclosure of cabinet documents in the context of judicial reviews regarding judicial compensation.[1] The PCJA also acknowledges that such judicial reviews are "constitutionally mandated", "unique" and engage "the political, constitutional and legal aspects of the relationship between the executive, legislative and judicial branches of government".[2] This Court's consideration, for the first time, of the proper boundaries of this unique form of judicial review is surely important and extends beyond the particular parties to this dispute.

3. With respect to the issue of public interest immunity, the PCJA is silent on the central concern identified by the AGBC in the application for leave to appeal: the routinization of disclosure of confidential cabinet documents, and the impact of this on candour of communications. Routine disclosure was not at issue in *Carey*, or indeed in any Canadian case, and thus presents another issue of first instance for this Court to consider.

B. Reply to Pleadings and "Unique British Columbia Process" Submissions

4. The PCJA says this case turns on the particulars of the pleadings. It also says this case is unique to British Columbia.[3] Neither proposition is accurate.

5. The courts below did not base their determination that the Cabinet Submission was relevant on the pleadings in this case. Indeed, the AGBC argued at each level of court that the relevance of the Cabinet Submission should be determined by the pleadings. That argument was rejected.

6. Instead, Master Muir, with whom Chief Justice Hinkson agreed, held that the Cabinet Submission was inherently relevant to the third stage of the *Bodner* analysis, which considers "the

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[1] PCJA Memorandum of Argument at paras. 37-40
[2] PCJA Memorandum of Argument at paras. 9 and 41
[3] PCJA Memorandum of Argument at paras. 3-5, 32-36 and 39

whole or totality of the process".[4] The BC Court of Appeal expressly agreed with that reasoning.[5] The court went on to hold that the declaratory relief sought in the pleading made the Cabinet Submission relevant, but this was ancillary to the court's conclusion that the Cabinet Submission was inherently relevant to the third stage of the *Bodner* analysis.[6]

7. If cabinet documents are inherently relevant to the third stage of the *Bodner* analysis, then they are producible in every judicial compensation case in every province in the country, no matter what is pleaded, subject only to the doctrine of public interest immunity. This issue goes beyond the parties and the pleadings in this case.

8. There is nothing unique about the process followed in British Columbia. The involvement of Cabinet in all matters of spending is a ubiquitous reality in all provinces. It does not matter whether Cabinet or the Legislature is the decision maker. Cabinets across the country are routinely informed by submissions or reports prepared by senior civil servants and by Cabinet Ministers.

9. In fact, the same issues that the AGBC asks this Court to address are mirrored in the application for leave to appeal filed by the Attorney General of Nova Scotia.[7] The British Columbia and Nova Scotia cases involve different pleadings and different statutes which rest decision-making power in different branches of government. Nonetheless, both cases resulted in decisions which rest upon the same essential misinterpretation of this Court's decision in *Bodner*. The AGBC therefore asks that both applications for leave to appeal be considered together by the same panel of this Court.

C. Reply to Transparency Submission

10. The PCJA argues that the judicial compensation process is meant to be "as transparent as possible".[8] They submit that this flows from *Bodner* and was "rightly recognized" by the lower courts in this case. Even if they are correct, the limits of court-imposed "transparency" is an issue

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[4] Chambers Reasons at paras. 18-20; SC Appeal Reasons at para. 34
[5] CA Appeal Reasons at paras. 13-15
[6] CA Appeal Reasons at para. 16
[7] *Attorney General of Nova Scotia representing Her Majesty the Queen in right of the Province of Nova Scotia, et al. v. Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges Association*, SCC File No. 38459
[8] PCJA Memorandum of Argument at paras. 5, 41-42 and 49

of significant public importance, going to the relationship between the judicial and executive branches.

11. The concept of transparency or openness discussed in *Bodner* concerned the need for a public process – that is, the process of a public commission with public recommendations, a public response from the government and, where the Legislative Assembly makes the decision, public debate and a public vote.[9] The concept was never used to describe the confidential work or deliberations of government and for good reason.

12. If the typically confidential work of the executive branch is meant to be "transparent", then the issue is much broader than the disclosure of submissions to cabinet. The issue extends to cabinet's deliberative process and the work of the Attorney General or senior civil servants in preparation for cabinet meetings, all of which intrudes on the core of cabinet confidentiality.

13. The PCJA suggests that such material would be disclosable to provide context or explanation, and that the AGBC's concern about disclosure of this material "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".[10] This suggests that everything that occurred behind the scenes supporting the development of the government's or Legislature's response to the Commission should be disclosed in the name of "transparency".

14. On the PCJA's interpretation of *Bodner*, there is no room for the doctrine of public interest immunity as "transparency" is paramount. Public interest immunity exists largely out of a recognition that there is value in allowing cabinet to receive advice and conduct deliberations in secret. If there is no basis for secrecy, then there is little basis for cabinet confidentiality. Whether to embrace an interpretation of *Bodner* which has this effect is a matter of public interest that will impact every provincial government in Canada.

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[9] *Bodner* at paras. 19 and 63
[10] PCJA Memorandum of Argument at para. 49

D. Reply to Factual Mischaracterizations

15. Parts of the PCJA summary of prior judicial reviews involving these parties are inaccurate.

16. The PCJA states that in the second judicial review before Mr. Justice Savage, "government took the position that the Cabinet submissions were not admissible; both because they were not relevant and protected by public interest immunity."[11] That is not accurate.

17. The second judicial review before Savage J. involved the same 2010 JCC process that was at issue before Macaulay J. in the first judicial review, which resulted in an order for disclosure of a cabinet submission. As a result of the decision of Macaulay J., the matter was remitted to the Legislature for reconsideration. The Legislature reconsidered its response, and in turn that response was judicially reviewed in proceedings before Savage J.

18. Prior to the matter coming before Savage J., the AGBC voluntarily disclosed the cabinet submission to the PCJA, but reserved the right to argue that it should not be admitted into evidence. The context for the voluntary disclosure was Justice Macaulay's finding that government had acted in bad faith.

19. The AGBC did not argue the issue of relevance in that context, but argued that the cabinet submission should not be admitted into evidence on the ground of public interest immunity.[12] Mr. Justice Savage concluded upon a review of the cabinet submission that it was relevant simply as "background" information, but it did not inform the result in the case.

20. The PCJA also states that an appeal from the judicial review arising out of the 2013 JCC Report was resolved in favour of the PCJA, which is not accurate.[13] While the BC Court of Appeal remitted the matter back to the Legislative Assembly for reconsideration, it found no fault with government, dismissed the PCJA's cross appeal, and only quashed the Legislature's resolution because of the unforeseen impacts of an earlier court decision on the process.[14] In recognition of

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[11] PCJA Memorandum of Argument at para. 22
[12] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336 at paras. 22 and 24-26
[13] PCJA Memorandum of Argument at para. 24
[14] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2017 BCCA 63 at para. 4 ("***Third JR***")

the fact that the government could not be faulted for what it had done in an "unprecedented situation", the court expressly set aside the portion of the chambers judge's order that would have remitted the matter to the Legislative Assembly for reconsideration "*in accordance with the ... Reasons for Judgment*" of the chambers judge.[15]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2019

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[15] *Third JR* at paras. 4, 20 and 24

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Case Law	At Para(s)
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