SCC File No. 38459

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF NOVA SCOTIA)

B E T W E E N:

THE ATTORNEY GENERAL OF NOVA SCOTIA REPRESENTING HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA AND THE GOVERNOR IN COUNCIL

APPELLANTS
(Appellants/Cross-Respondents)

-and-

THE JUDGES OF THE PROVINCIAL COURT AND FAMILY COURT OF NOVA SCOTIA, AS REPRESENTED BY THE NOVA SCOTIA PROVINCIAL JUDGES' ASSOCIATION

RESPONDENTS
(Respondents/Cross-Appellants)

FACTUM OF THE RESPONDENTS, THE JUDGES OF THE PROVINCIAL COURT AND FAMILY COURT OF NOVA SCOTIA, AS REPRESENTED BY THE NOVA SCOTIA PROVINCIAL JUDGES' ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

MYERS LLP
Barristers and Solicitors
724 - 240 Graham Avenue
Winnipeg, MB R3C 0J7

Susan Dawes
Kristen Worbanski
Telephone: (204) 926-1501
Facsimile: (204) 956-0625
Email: sdawes@myersfirm.com

Counsel for the Respondents

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Telephone: (613) 695-8855
Facsimile: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondents

ATTORNEY GENERAL OF NOVA SCOTIA
Legal Services Division
1690 Hollis Street, 8th Floor
Halifax, NS B3J 2L6

Edward A. Gores, Q.C.
Telephone: (902) 424-4024
Facsimile: (902) 424-1730
Email: edward.gores@novascotia.ca

Counsel for the Appellants

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600

D. Lynne Watt
Telephone: (613) 786-8695
Facsimile: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Agent for the Appellants

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

(a) Overview of Position

1. Fundamentally, this appeal is an attempt to limit and undermine the well-established judicial review ("JR") process applicable to government decisions to reject judicial compensation commission ("JCC") recommendations. The Appellants seek to restrict the record on JR to the "public reasons" provided by the government for rejecting JCC recommendations,[1] and invite a retrenchment of the test applicable on JR established by this Honourable Court. Alternatively, the Appellants ask this Court to revisit the application of the doctrine of public interest immunity ("PII") in the judicial compensation context. The Motion Judge and the Nova Scotia Court of Appeal ("NSCA") unanimously decided against the Appellants on both issues. The Respondents respectfully submit that this Honourable Court should similarly dismiss this appeal.

2. The unique form of JR applicable to government decisions setting judicial remuneration was formulated by this Honourable Court in *PEI Reference*[2] and *Bodner*[3]. The "*Bodner* test"[4] has since been consistently applied by lower Courts across Canada, including the Nova Scotia Courts. The content of the record on JR must facilitate the application of the *Bodner* test by the reviewing court, and reflect the principles which define the record in JRs more generally.

3. The Courts below held that, with the exception of certain sections protected by solicitor-client privilege, the Report and Recommendation of the Attorney General and Minister of Justice dated December 19, 2016 (the "R&R") was relevant and producible as forming part of the record on the JR. The R&R was before the Government decision-maker and was expressly referred to in Order in Council 2017-24 (the "OIC"), whereby the Governor in Council rejected the salary

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[1] Appellants' Factum, pp. 2, 9, paras. 2, 29

[2] *Reference re Remuneration of Judges of The Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of the Provincial Court of Prince Edward Island; R v Campbell; R v Ekmecic; R v Wickman; Manitoba Provincial Judges' Association v Manitoba (Minister of Justice)*, [1997] 3 SCR 3, ("*PEI Reference*")

[3] *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*")

[4] *Bodner*, *supra* note 3, paras. 31, 38

recommendations set out in the Report of the Provincial Judges' Salaries and Benefits Tribunal dated November 18, 2016 (the "Tribunal Report").

4. The Appellants' position that the record on JR is limited to the Tribunal Report and the Government's decision rejecting the Tribunal's salary recommendations (i.e. the OIC) - thereby excluding the R&R - relies upon an unduly narrow version of the *Bodner* test and a disregard for the jurisprudence defining the parameters of the record on JR more generally. If the Appellants' position were accepted, the reviewing court would be prevented from performing its task and the JR would be rendered ineffective. Additional evidence, including evidence relied on by the Government, is required in order for the reviewing court to examine the legitimacy of the Government's reasons, the factual foundation underlying the Government's decision, and Government's participation in the whole of the process. The R&R, a document that was before the Government decision-maker and informed the Government's decision, is clearly relevant to this analysis.

5. The approach to disclosure proposed by the Appellants, whereby evidence of bad faith and/or misconduct on the part of Cabinet is required as a condition precedent to disclosure of Cabinet documents like the R&R, runs contrary to a government's obligation to justify its decision to depart from JCC recommendations in court.[5] The Appellants' approach compromises the effectiveness of the process for setting judicial compensation by allowing governments to control the record on JR and withhold the full foundation of their decisions respecting JCC recommendations and the totality of the process from the reviewing court.

6. The R&R itself, in this case, might disclose bad faith or a politicization of the process for setting judicial compensation, but it need not contain such revelations to be relevant. At the very least, the R&R will constitute background information and contribute to showing the Government's consideration of the Tribunal Report. The R&R only needs to be relevant to the *Bodner* test in order to form part of the record on JR and thereby be subject to disclosure, contingent upon considerations of privilege.

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[5] *PEI Reference*, *supra* note 2, para. 133

7. The Appellants' focus on the level of deference accorded to the government in applying the *Bodner* test is also ill-conceived, since the degree of deference owed in applying the test is not determinative of the content of the record. Once the record is established, the level of deference to be accorded to government in applying the *Bodner* test depends upon, and is proportional to, the degree to which government has participated in and engaged with the process.[6] That stage of the analysis has yet to come.

8. With respect to PII, the Courts below applied the legal test set out in *Carey*,[7] the leading case from this Court on PII, in ordering disclosure of the R&R. Once a Cabinet document is determined to be relevant, and thereby necessary for the fair adjudication of issues in litigation, the law of PII requires the government to justify its non-disclosure based on the public interest. The obligation exists irrespective of whether the request is novel or routine. The Appellants raise the spectre of routine production of Cabinet documents as a basis for this Court to revisit *Carey* in the judicial compensation context. The Appellants submitted no evidence of any specific harm to the public interest that would result from the disclosure of the R&R. Instead, they rely on the "heavily batter[ed]"[8] candour argument, which is antithetical to the objective of an "open and transparent public process" for the setting of judicial compensation.[9] Disclosure is favoured both by a discretionary weighing of the *Carey* factors, or pursuant to the alternative approach proposed in a journal article relied on by the Appellants, which has never been judicially adopted.

9. The unanimous result reached by the Courts below is critical to ensuring that the complete record and all relevant evidence is before the court on JR, to facilitate application of the *Bodner* test. The Appellants should not be permitted to shield the R&R from disclosure on JR. As such, the Respondents respectfully submit that this appeal should be dismissed.

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[6] *Bodner*, *supra* note 3, para. 83; *Manitoba Provincial Judges' Association v. Manitoba*, 2012 MBQB 79 ("*MBQB 2012*"), p. 20, para. 44; *Judges of the Provincial Court (Man.) v. Manitoba et al.*, 2013 MBCA 74 ("*MBCA 2013*"), paras. 65-67; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 ("*BCSC 2012 – JR*"), para. 46; *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140 ("*NLSC 2018*"), paras. 120-121
[7] *Carey v. Ontario*, [1986] 2 S.C.R. 637
[8] *Carey*, *supra* note 7, para. 48
[9] *Bodner*, *supra* note 3, para. 63

(b) Statement of Facts

(i) The 2016 Nova Scotia JCC Process

10. The Nova Scotia Provincial Judges' Salaries and Benefits Tribunal (the "Tribunal") is an independent tri-partite, triennial, tribunal appointed in accordance with sections 21A – 21N of the *Provincial Court Act* (the "*Act*").[10] Prior to 2016, the Tribunal's recommendations were binding. Following 2016 amendments, the Governor in Council may confirm, vary or reject the Tribunal's recommendations, with reasons.[11]

11. The Tribunal Report, dated November 18, 2016, contains unanimous recommendations regarding judicial salaries and other benefits for the period April 1, 2017 to March 31, 2020, including a recommendation that judges' salaries increase by about 9.5% spread over three years.[12]

12. On February 2, 2017, the OIC was issued, whereby the Governor in Council, *inter alia*, rejected the salary recommendations set out in the Tribunal Report.[13] For the Tribunal's recommended increase of 9.5% over three years, the OIC substituted an increase of 1%, to take effect in 2019-2020, the last year of the reviewed period. The OIC opened with the following statement:

> The Governor in Council on the report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016…hereby confirms recommendations 2 to 5 and varies recommendation 1 of the Nova Scotia Provincial Judges' Salaries and Benefits Tribunal… (emphasis added)[14]

13. On March 7, 2017, the Respondents filed a Notice for JR, requesting JR of the OIC on numerous grounds, including a failure to meet the three stages of the *Bodner* test, and seeking

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[10] *Provincial Court Act,* RSNS 1989, c 238 (the "*Act*")
[11] The *Act,* ss. 21J and 21K
[12] Reasons for Judgment of the Supreme Court of Nova Scotia, dated March 6, 2018 ("NSSC Judgment"), Appellants' Record ("AR"), Vol. I, Tab A, p. 6, paras. 3, 5
[13] NSSC Judgment, AR, Vol. I, Tab A, p. 6, para. 4
[14] NSSC Judgment, AR, Vol. I, Tab A, p. 29, para. 80

various orders and declarations.[15] While the Respondents did not expressly allege bad faith or misconduct by the Government, they did allege, *inter alia*, that the Government acted on the basis of political considerations, in order to bolster its position in ongoing public sector bargaining.[16]

14. In the Notice for JR, the Respondents described the record to be produced as including the R&R, which report is referred to in the first sentence of the OIC and clearly informed the OIC.[17] The Respondents also stated their intention to rely upon the Affidavit of the Honourable James H. Burrill, Judge of the Provincial Court, dated June 2, 2017 (the "Burrill Affidavit").[18]

15. On May 5, 2017, the Appellants filed the record, which included only the OIC and the Tribunal Report.[19] The R&R was not included and was not referred to by the Appellants.

16. On May 8, 2017, the Respondents filed a Notice of Application respecting a constitutional challenge to the 2016 amendments to the *Act* that removed the long-standing binding Tribunal process in Nova Scotia.[20] Through that separate Application, which is not before this Honourable Court, the Respondents contend that a non-binding process is not sufficient to protect judicial independence, proposing that *PEI Reference* and *Bodner* should be revisited in that regard.[21]

17. This appeal concerns the first of two preliminary motions brought by the Respondents to the Motion Judge for determination.[22] The second preliminary motion is not before this Honourable Court. By the first motion, the Respondents sought, *inter alia*, a declaration that the

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[15] Notice for JR, AR, Vol. II, Tab A. The Appellants assert, incorrectly, that adherence to the first step of the *Bodner* analysis is not in issue (Appellants' Factum, p. 19, para 60).

[16] Notice for JR, AR, Vol. II, Tab A, p. 3, para. 2(c)(iii)
[17] Notice for JR, AR, Vol. II, Tab A, p. 5
[18] Notice for JR, AR, Vol. II, Tab A, p. 5
[19] NSSC Judgment, AR, Vol. I, Tab A, p. 9, para. 11
[20] NSSC Judgment, AR, Vol. I, Tab A, p. 8-9, paras. 8-9
[21] NSSC Judgment, AR, Vol. I, Tab A, pp. 104-106, paras. 344-346
[22] The second motion sought consolidation, *inter alia,* of the two applications: NSSC Judgment, AR, Vol. I, Tab A, pp. 10-11, para. 16

R&R is part of the record on JR and an order that the Appellants produce the R&R.[23] The Appellants provided a sealed copy of the R&R to the Motion Judge. The Respondents' first motion also sought an order that they be permitted to introduce the Burrill Affidavit, as evidence beyond the record.[24]

(ii) <u>The Decision of the Motion Judge ("NSSC")</u>

18. On March 3, 2018, the Motion Judge issued a decision, followed by an Order dated April 6, 2018. She held, *inter alia,* that: (1) the R&R, less certain passages that she determined were protected from disclosure by solicitor-client privilege, should form part of the record on JR and therefore must be produced by the Appellants; and (2) the Burrill Affidavit was admissible to augment the record on JR, with the exception of certain paragraphs (and related Exhibits) that she considered to be irrelevant.[25]

19. The Motion Judge accepted that the JR of a government decision regarding judicial compensation includes not only an assessment of the legitimacy of, and the reasonableness of the factual foundation for, the government's reasons, but also a *global review* of the whole of the tribunal process, which global review is "necessary in order…to determine whether the government's participation and response in the totality of the process demonstrates good faith and meaningful participation."[26] She declined to adopt the unduly "limited" form of review advocated for by the Appellants, who argued that the record on JR was restricted to the Government's response to the Tribunal Report (the "Response") and the Tribunal Report itself.[27] Contrary to the Appellants' submission[28], the Motion Judge considered the relevance of the R&R in light of both the *Bodner* test[29] and the principle, well-settled in Nova Scotia jurisprudence,[30] that "any document that was before a decision-maker and relied on by it in reaching its decision, should form part of the record on judicial review"[31]. The R&R, a document referred to in the

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[23] Notice of Motion, AR, Vol. II, Tab D, pp. 24-25
[24] Notice of Motion, AR, Vol. II, Tab D, p. 25
[25] NSSC Judgment, AR, Vol. I, Tab A, pp. 99-100, paras. 331-333
[26] NSSC Judgment, AR, Vol. I, Tab A, p. 25, para. 71; *Bodner, supra* note 3, paras. 31, 38
[27] NSSC Judgment, AR, Vol. I, Tab A, pp. 25-26, 33, paras. 72, 94
[28] Appellants' Factum, p. 6, para. 20
[29] NSSC Judgment, AR, Vol. I, Tab A, p. 28-29, paras. 74-78
[30] NSSC Judgment, AR, Vol. I, Tab A, pp. 29-30, 35, 36, paras. 81-82, 103-105, 108
[31] NSSC Judgment, AR, Vol. I, Tab A, p. 36, para. 108

OIC, which was before the decision-maker and informed the reasons for the decision, was thereby relevant, formed part of the record, and had to be produced.

20. The Motion Judge determined that the R&R was not protected from disclosure by operation of the doctrine of deliberative secrecy, as the Appellants argued, since it does not chronicle discussions of Cabinet members, but is rather a report from a senior solicitor to Cabinet.[32] The points identified by the Appellants as matters that the Motion Judge did not address in relation to this issue, such as the names appearing under the "Approvals" heading in the document,[33] are irrelevant to the determination of whether the R&R is in the nature of a deliberative or informative/advisory document.

21. The Motion Judge thoroughly canvassed the undisputed leading cases regarding the doctrine of PII[34] and conducted a "meticulous"[35] analysis of the *Carey* factors. In her discretion, she determined that the balance of these factors favoured disclosure of the R&R, noting "[m]ost of the content of the document is background information."[36] In particular, the Motion Judge held that the importance of producing the document to the administration of justice favoured disclosure, in that "[t]he judicial review of the OIC is highly important and it is imperative that this Court has all relevant material available to it when conducting the judicial review."[37] The "need to ensure, as much as possible, transparency in the process for determining judicial remuneration" pointed to disclosure.[38] She went on to find that certain sections of the R&R were protected from disclosure by solicitor-client privilege.[39]

22. The Motion Judge also determined that most of the Burrill Affidavit was admissible as relevant evidence to augment the record on JR, based on established exceptions to the general

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[32] NSSC Judgment, AR, Vol. I, Tab A, p. 38, para. 116
[33] Appellants' Factum, p. 7, para. 21
[34] NSSC Judgment, AR, Vol. I, Tab A, pp. 39-48, paras. 118-143
[35] Reasons for Judgment of the Nova Scotia Court of Appeal, dated October 30, 2018 ("NSCA Judgment"), AR, Vol. I, Tab C, p. 134, para. 46
[36] NSSC Judgment, AR, Vol. I, Tab A, p. 58, para. 184
[37] NSSC Judgment, AR, Vol. I, Tab A, p. 57, para. 181
[38] NSSC Judgment, AR, Vol. I, Tab A, p. 57, para. 181; citing *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244 ("*BCSC 2012*"), para. 23
[39] NSSC Judgment, AR, Vol. I, Tab A, pp. 58-62, paras. 185-202

rule that new evidence is usually not considered. These exceptions were applied in light of the *Bodner* test, by taking into account what evidence was required in order to apply it.[40]

(iii) <u>The Decision of the Court of Appeal</u>

23. The NSCA heard the Appellants' appeal and the Respondents' cross-appeal on October 2, 2018. In its October 30, 2018 decision, the NSCA unanimously upheld the findings of the Motion Judge that the R&R was relevant, not shielded from disclosure by either deliberative secrecy or PII, and therefore formed part of the record for JR, dismissing the Appellants' appeal on these points. The NSCA also dismissed the Appellants' appeal seeking to exclude the entirety of the Burrill Affidavit, instead admitting one further paragraph of the Affidavit on the Respondents' cross-appeal. The Respondents' cross-appeal relating to solicitor-client privilege was dismissed and they did not seek leave to appeal that decision to this Court.

24. As they do here, the Appellants argued before the NSCA that the R&R is irrelevant, as the record for JR is limited solely to the Tribunal Report and the Response. The NSCA rejected the Appellants' submission that the R&R is irrelevant for two reasons: (1) the R&R is relevant to the assessment of the reasonableness of the factual foundation relied upon by the Government pursuant to the second stage of the *Bodner* test, since the OIC explicitly states that the Governor in Council's decision is "on" the R&R; and (2) the third stage of *Bodner* states that the reviewing court "must weigh the whole of the process *and* the response", which necessarily implies that the whole process extends beyond just the Response.[41] Fichaud J.A., writing for the NSCA, held: "The R&R is integral to that process."[42]

25. The NSCA cited many authorities to support its conclusion that the JR record is not so limited as the Appellants asserted, and that material considered by Cabinet is admissible on the JR of a government's response.[43] The NSCA explained that the requirement that a government's reasons for rejecting JCC recommendations must be stated in its Response and that the legitimacy of the reasons is the focus of the JR, did not translate, as the Appellants argued, to the conclusion that the only admissible items of evidence on JR are the Tribunal's Report and the

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[40] NSSC Judgment, AR, Vol. I, Tab A, pp. 65-97, paras. 212-315
[41] NSCA Judgment, AR, Vol. I, Tab C, p. 130, paras. 32-34
[42] NSCA Judgment, AR, Vol. I, Tab C, p. 130, para. 34
[43] NSCA Judgment, AR, Vol. I, Tab C, p. 130-131, para. 35

Response. The NSCA stated: "The application of *Bodner*'s tests – particularly the second and third stages – may involve the consideration of evidence outside the four corners of those two documents."[44]

26. The NSCA agreed with the Motion Judge's findings that the R&R is information to Cabinet, but is neither a minute nor record of Cabinet deliberations, nor a draft of Cabinet's response to the Tribunal Report.[45] The NSCA accordingly rejected the Appellants' submission that the R&R is shielded by deliberative secrecy. The Appellants now object that the NSCA did not address the fact that the R&R is submitted to Cabinet after a process of review by civil servants.[46] This fact is irrelevant to the NSCA's determination that the R&R is not a deliberative document, but rather merely informed Cabinet's deliberations.

27. The NSCA observed that the Appellants did not suggest on appeal that the Motion Judge misstated the law with respect to PII, nor did they directly challenge her application of the *Carey* factors to the R&R. Rather, they argued that the Motion Judge erred by not properly considering the candour rationale for Cabinet confidentiality. The NSCA cited the cautionary note sounded by this Court in *Carey*: "I am prepared to attach some weight to the candour argument <u>but it is very easy to exaggerate its importance</u>."[47]

28. The NSCA noted that the Government knew that its response would be subject to JR pursuant to the *Bodner* criteria and that the JR would focus on matters vital to the administration of justice: the proper functioning of the Executive and the relationship between two branches of government.[48] The NSCA held that, to the extent the R&R speaks to those significant topics, its production for the JR is, on balance, in the public interest and is well supported by this Honourable Court's decision in *Carey*.

29. The Appellants made the same argument to exclude the Burrill Affidavit that they did to oppose disclosure of the R&R: that under *Bodner*, the reviewing Court may only examine the

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[44] NSCA Judgment, AR, Vol. I, Tab C, p. 131, para. 36
[45] NSCA Judgment, AR, Vol. I, Tab C, p. 131, para. 37
[46] Appellants' Factum, p. 8, para. 25
[47] NSCA Judgment, AR, Vol. I, Tab C, p. 134, para. 44; *Carey*, *supra* note 7, para. 46, emphasis added
[48] NSCA Judgment, AR, Vol. I, Tab C, p. 134, para. 45

Tribunal Report and the Response.[49] The NSCA rejected this submission, referring to numerous examples of similar JRs in which the reviewing courts considered evidence extrinsic to the Tribunal Report and Response.[50]

30. The Appellants do not appeal the findings of the Courts below with respect to the admissibility of the Burrill Affidavit, creating an inconsistency in their present position. On the one hand, they maintain their argument that *Bodner* requires examination of only the Tribunal Report and the Response, but they no longer contest the decision of the Courts below to admit much of the Burrill Affidavit. The admissibility of the Burrill Affidavit exemplifies the broader scope of evidence that may be relevant to a reviewing court on the JR of government responses to JCCs in accordance with *Bodner*.[51] There is no principled reason why the Government should be permitted to shield the R&R, another plainly relevant document, from the Court's review.

(iv) **The BCCA Consistently Applied The Same Established Legal Principles**

31. The BC Court of Appeal ("BCCA") upheld a decision of the Chief Justice of the BC Supreme Court, which in turn upheld a decision of a Master, [52] that a submission to Cabinet, which informed the BC Government's response to the report of the JCC, was relevant to the JR and not protected from disclosure by PII. This decision is one of a line of cases in BC (the "BC Cases"), which have consistently held that the JR record is not limited solely to the Tribunal Report and the Response, and that material considered by Cabinet when formulating the Response, is relevant and admissible for the application of the *Bodner* test.[53]

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[49] NSCA Judgment, AR, Vol. I, Tab C, p. 139, para. 69
[50] NSCA Judgment, AR, Vol. I, Tab C, pp. 130-131, 139, paras. 35, 71-72
[51] *Bodner*, *supra* note 3, paras. 36, 60-64
[52] *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2018 BCSC 1193 ("*BCSC 2018 – Master*"); *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2018 BCSC 1390 ("*BCSC 2018*"); *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 394 ("*BCCA 2018*")
[53] *BCSC 2012*, *supra* note 38, paras. 4-11, 16, upheld on appeal: *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, 2012 BCCA 157 ("*BCCA 2012*"); *BCSC 2012 – JR*, *supra* note 6, paras. 50-54, 61-62, 68, 80-83; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336 ("*BCSC 2014*"), paras. 31, 44-49, 63-67, 136-43, overturned on other grounds: 2015 BCCA 136,

PART II – QUESTIONS IN ISSUE

32. The Respondents agree that the **first issue** in this appeal is whether the R&R, a document that the Appellants concede was before the Government when it made its decision and informed the Response,[54] is relevant to the application of the *Bodner* test and thus forms part of the record on JR of the Response (i.e. the OIC). Based on the analysis of this Honourable Court in *Bodner* itself, the well-established and consistent interpretation of the *Bodner* test in the jurisprudence from across Canada, and the general principles of what constitutes the record on JR more broadly, the R&R must be included in the record for JR, subject to questions of privilege.

33. The Respondents submit that the second and third issues articulated by the Appellants are not clearly distinguished in their argument and should be restated as a single **second issue**: if this Court affirms that the R&R is relevant based on *Bodner*, resulting in "routine demands" for production, does this provide any basis for the Court to overrule its decision in *Carey* and revisit the doctrine of PII in so far as it is applied to Cabinet documents in the context of JRs of government decisions respecting judicial compensation? The short answer is no.

34. Firstly, according to the principles established in *Carey,* the application of PII always turns on the facts, including whether the government submits evidence of a specific public interest that requires non-disclosure (none was submitted in this case). The decisions below, which followed *Carey,* did not purport to apply the *Carey* factors to any case other than the present one, and in no way foreclose the discretionary weighing of those factors in future cases.

35. Secondly, even if requests for disclosure of Cabinet documents become routine in circumstances in which such documents inform government decisions respecting judicial compensation, the Appellants offer no compelling rationale for revisiting *Carey*, either in general or in this specific context. The Appellants simply repeat their submission, rejected by the Courts below, that the candour argument should receive more weight, and rely on a critique of *Carey* which proposes an alternative approach to the application of PII that would not change the result reached by the Courts below.

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leave to appeal refused: 2015 CanLII 69435 (SCC); *BCSC 2018 – Master*, *supra* note 52; *BCSC 2018*, *supra* note 52; *BCCA 2018*, *supra* note 52

[54] Appellants' Factum, p. 4, para. 12; NSSC Judgment, AR, Vol. I, Tab A, pp. 34, 36, paras. 102, 107

36. Thirdly, in relation to this issue specifically and throughout their submission generally, the Appellants suggest that the R&R should be treated by this Court as though the doctrine of deliberative secrecy applies to it or that it is a deliberative document.[55] This is despite that they did not appeal the findings of the Courts below on this point, and describe the R&R, themselves, as an advisory and informative document rather than one which records the Governor in Council's deliberations.[56] To the extent that the Appellants' arguments are premised on a characterization of the R&R as a deliberative document, they are misbegotten.

37. Underlying the Appellants' issues is their submission that allegations of Executive misconduct and/or bad faith should be a prerequisite to any obligation to produce a Cabinet document that was before the decision-maker and informed the decision under JR in judicial compensation cases. Imposing this requirement would be inconsistent with this Court's mandate for an open and transparent process, and could force reviewing Courts to proceed with the JR based on an incomplete record at the government's prerogative. Moreover, it fails to recognize that Judges are not practically situated to advance such allegations prior to disclosure of the complete record. In the Respondents' respectful submission, this approach would exacerbate conflict between the Judicial and Executive branches of government and would fail to protect against a politization of the process for setting judicial compensation, thereby threatening judicial independence. An open and transparent process is essential to ensuring public confidence in the independence of the judiciary.

38. The Appellants' assertion that the doctrine of PII would be undermined in the absence of a requirement for such allegations, reveals their mischaracterization of the purpose of that doctrine. The public interest, rather than government secrecy, is accorded paramountcy under the doctrine. If a Cabinet document is relevant, then the administration of justice weighs heavily in favour of its disclosure in the judicial compensation context, unless the government submits evidence of a realistic risk of harm to the public interest flowing from such disclosure.

39. There is no conflict between *Bodner* and *Carey* that requires resolution. This Court established in *Carey* that Cabinet documents need only be relevant in order to trigger the

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[55] Appellants' Factum, pp. 9, 11, 17, 22 paras. 28, 33, 52; p. 22, 70

[56] Appellants' Factum, p. 4, para. 12; NSSC Judgment, AR, Vol. I, Tab A, pp. 34, 36, paras. 102, 107

balancing exercise that determines whether the public interest favours disclosure for a fair adjudication of the issues.[57] Litigants are not required to further establish that the documents would assist their case or damage the case of opposing parties.

PART III - ARGUMENT

(a) The *Bodner* Test Requires Evidence Beyond The JCC Report And The Government's Response

40. Contrary to the Appellants' assertions, the Courts below did not misinterpret *PEI Reference* and *Bodner* in concluding that the R&R is relevant and properly forms part of the record on JR. The Courts below interpreted the *Bodner* test in a manner that accords with the decisions of this Honourable Court and of lower courts across Canada which have applied the *Bodner* test. Disclosure of the R&R is not only consistent with the open and transparent process mandated for the setting of judicial remuneration and the requirement that the Government's reasons be public, but openness and transparency require its disclosure.[58]

41. The Respondents respectfully submit that the Appellants' claim that the record is limited to the Tribunal Report and Response thereto is untenable given the task of the reviewing court to apply the *Bodner* test, a fact implicitly acknowledged by the Appellants' failure to appeal to this Court the NSCA's decision to admit into the record much of the Burrill Affidavit.

42. In *PEI Reference*, the majority of this Court held that independent, objective and effective JCCs are constitutionally required, to act as an "institutional sieve" to depoliticize the setting of compensation to the greatest extent possible.[59] Further, it held that the recommendations of the JCC with respect to judicial remuneration, if not binding on the Executive or the Legislature, should not be set aside lightly. The JCC's recommendations must have a "meaningful effect" on the determination of judicial compensation.[60] If the Executive or the Legislature chooses to depart from them, it must provide reasons and justify its decision -- if

[57] *Carey*, *supra* note 7, para. 105
[58] *Bodner*, *supra* note 3, paras. 62-63
[59] *PEI Reference*, *supra* note 2, paras. 133, 170-185
[60] *PEI Reference*, *supra* note 2, para. 175

necessary, in a court of law.[61]

43. In *Bodner*, this Court found that its goal of reducing friction and depoliticizing the setting of judicial compensation had not been achieved by the test set out in *PEI Reference* and that "… more is needed".[62] The Court added a third stage to the earlier two-stage test, setting out the following analysis (the "*Bodner* test").

> (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?[63]

44. The **<u>first stage</u>** was described as a screening mechanism, which requires the government to provide a "legitimate" reason for any departure from the JCC's recommendations, which is "what the law, fair dealing and respect for the process require."[64] This Court's description of what constitutes a legitimate reason informs the evidence that must be before a reviewing court:

- the JCC's recommendations must be given weight;
- the Response "must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission";
- "[r]easons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality";
- the government must deal with the issues at stake in good faith;
- the government must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation.
- the reasons should "reveal a consideration of the judicial office and an intention to deal with it appropriately" and

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[61] *PEI Reference*, *supra* note 2, paras. 133, 180
[62] *Bodner*, *supra* note 3, para. 3
[63] *Bodner*, *supra* note 3, paras. 31
[64] *Bodner*, *supra* note 3, paras. 24, 32

- "[t]he reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence."[65]

45. This Court described the **second stage** of the review as an inquiry into the reasonableness and sufficiency of the factual foundation actually relied upon by the government in rejecting or varying the JCC's recommendations. Accordingly, evidence which supports or calls into question the factual foundation of the Response must be admissible on review.[66] Contrary to the Appellants' assertion, the evidence is not restricted to what the government might choose to rely on to support its Response.[67]

46. The **newly added third stage** requires evidence concerning the "totality of the process" and the government's participation therein. This Court outlined the task of a reviewing court in assessing whether the JCC process was respected, as follows:

> 38 At the third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, the court must weigh and assess the government's participation in the process and its response in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues. The focus shifts to the totality of the process and of the response.

47. The R&R does not chronicle deliberations but was before and provided information to the Government decision-maker. A document like the R&R is not part of a "different, deliberative process conducted by Cabinet"[68], but is information provided to the decision-maker as part of the whole of the process under review. The focus of the JR remains the Response,[69] but the Response is assessed in light of the *Bodner* test in the context of a complete record. The

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[65] *Bodner*, *supra* note 3, paras. 23-27
[66] *Bodner*, *supra* note 3, paras. 33-37
[67] Appellants' Factum, p. 13, para. 39; p. 15, para. 47
[68] Appellants' Factum, p. 16, para. 49
[69] Contrary to the Appellants' Factum, p. 22, para 70

"totality of the process and the Response" involves consideration of the process from stem to stern.

48. Requiring production of the R&R also does not "dismiss the required deferential standard of review"[70]. The applicable standard does not determine the scope of the record on JR or, in particular, limit the record to the Tribunal Report and Response. In *Bodner,* the Court was clear that the degree of deference owed in any given case, depends on, and is proportional to, the government's participation in the process.[71] In all four cases considered in *Bodner*, this Court concluded that the relevant governments had acted in good faith in relation to their respective JCC processes, with the result that significant deference was owed to those governments when the *Bodner* test was applied to their response.[72] In subsequent cases, where lower courts applied the *Bodner* test, some governments were found not to have acted in good faith, with the result that a much lower degree of deference was accorded them.[73] Those courts did not extend or broaden the test articulated in *Bodner*, but rather applied the principles set out therein to the factual circumstances before them. The lower degree of deference applied in these cases had no impact on the scope of the record, or *vice versa*.

49. Depending on what the government chose to consider in making its decision, it is readily apparent that the JCC Report and Response alone may not provide a reviewing Court with the evidence necessary to conduct the *Bodner* analysis. A non-exhaustive list of the evidence that is likely to be necessary in order for the *Bodner* test to be applied in any given case includes:

(i) evidence of the submissions made to the JCC in order that the Court can assess whether they were substantively addressed by the JCC itself and, in turn, whether the government engaged with and responded to the JCC's reasoning;[74]

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[70] Appellants' Factum, p. 16, para. 49
[71] *Bodner*, *supra* note 3, para. 83; *MBQB 2012*, *supra* note 6, p. 20, para. 44*; MBCA 2013*, *supra* note 6, paras. 65-67; *BCSC 2012 – JR*, *supra* note 6, para. 46; *NLSC 2018*, *supra* note 6, paras. 120-121
[72] *Bodner, supra* note 3, paras. 59, 69, 81, 83, 98-102, 124, 128, 131, 133, 159-160, 165; summarized in *BCSC 2012 – JR*, *supra* note 6, paras. 41-42
[73] *Bodner*, *supra* note 3, para. 83; *MBQB 2012*, *supra* note 6, p. 20, para. 44*; MBCA 2013*, *supra* note 6, paras. 65-67; *BCSC 2012 – JR*, *supra* note 6, para. 46; *NLSC 2018*, *supra* note 6, paras. 120-121
[74] *Bodner*, *supra* note 3, para. 23-25

(ii) evidence which shows whether the government's conduct throughout the process demonstrated the requisite good faith and respect for the process;[75]

(iii) evidence which demonstrates whether the government's reasons are based on facts and sound reasoning;[76]

(iv) evidence addressing the question of whether the government has engaged in a meaningful way in and with the process of the JCC;[77] and

(v) evidence which describes the "totality of the process", thereby permitting the court to weigh "the whole of the process and the response."[78]

50. This Court recognized in *Bodner* that the record required on JR to facilitate application of the *Bodner* test may be more expansive than the record in a typical administrative JR, in that government may be entitled to adduce new evidence to, *inter alia*: 1) go into the specifics of the factual foundation relied upon by the government; 2) show how calculations were made and what data were available; 3) contribute to showing the consideration given to the JCC's recommendations; and 4) illustrate government's good faith and its commitment to taking the process seriously.[79] It would be an absurdity if governments were entitled to put forward evidence as part of the record on JR that bolsters their position and, at the same time, were permitted to withhold from disclosure relevant evidence that informed their decision to depart from JCC recommendations. To allow such a contradiction would be wholly inconsistent with the stated objective, in *Bodner*, of an open and transparent process.[80]

51. Indeed, given the allegations raised in the Respondents' Notice of JR and the reasons expressed in the OIC, the broad scope of evidence set out in the Burrill Affidavit was permitted to augment the record on JR in this particular case. This type of evidence was before the Court in *Bodner* itself,[81] and is consistent with other decisions that have applied the *Bodner* test, and

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[75] *Bodner*, *supra* note 3, paras. 38
[76] *Bodner*, *supra* note 3, para. 26
[77] *Bodner*, *supra* note 3, para. 38
[78] *Bodner*, *supra* note 3, para. 38
[79] *Bodner*, *supra* note 3, paras. 36, 60-64, 91-92, 103
[80] *Bodner*, *supra* note 3, para. 63
[81] See for example, *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice)*, 2002 NBQB 156, pp. 25-28, 36-38, 40, 42-44 (which decision was appealed and heard as one of the cases decided in *Bodner*). Also see *Newfoundland Association of Provincial Court Judges v. Newfoundland & Labrador,* 2003 NLSCTD 117, paras. 2, 3, 27, 28, 45, 81, 88, which decision pre-dated *Bodner* and applied the test set out in *PEI Reference*.

which are replete with references to similar types of evidence.[82] Thus, there is no question that the record on JR necessary to facilitate application of the *Bodner* test, goes beyond the four corners of the Tribunal Report and the Response. Again, the Appellants have not appealed the NSCA's decision to admit most of the Burrill Affidavit.[83]

(b) **The R&R Is Relevant And Required For Application Of The *Bodner* Test In This Case**

52. The relevance and admissibility of Cabinet documents akin to the R&R was not expressly considered in *Bodner*, since these issues were not squarely engaged on the facts of the underlying litigation.[84] However, both the second stage of the *Bodner* test, which requires the reviewing court to assess whether the Response is based on a reasonable factual foundation, and the newly added third stage, which entails looking at the Response from a global perspective in order to determine if the government engaged in a meaningful way with the process, necessarily mean that the R&R, a document that was before and informed the decision-maker when it formulated the Response, is relevant and producible in such a JR.[85] The R&R may also be relevant to the first stage of the *Bodner* test, as it could inform the Court about the government's good faith, and its intention to deal with the judicial office appropriately, through a depoliticized remuneration process.[86]

53. Contrary to the Appellants' assertion that the Courts below made their decision on relevance without reference to the pleadings,[87] the Courts below were clearly alive to the pleadings, as well as the governing statute, both of which contemplate application of the *Bodner*

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[82] *Provincial Judges' Assn. v. The Province of New Brunswick*, 2009 NBCA 56, paras. 17-22, 34-37; *MBQB 2012*, *supra* note 6, paras. 16, 20, 25, 68-73, 74, 98, 99, 111, upheld on appeal: *MBCA 2013*, *supra* note 6; *BCSC 2014, supra* note 53, paras. 32-34, 44-62; *NLSC 2018*, *supra* note 6, paras. 6-37, 40, 77, 107-115, 118, 123-135, 150, 157

[83] NSSC Judgment, AR, Vol. I, Tab A, pp. 76-97, paras. 240-315; NSCA Judgment, AR, Vol. I, Tab C, pp.138-142, 145-146, paras. 67-79, 85-88

[84] Contrary to the Appellants' Factum, p. 19, para. 59

[85] NSSC Judgment, AR, Vol. I, Tab A, pp. 28-36, paras. 74-78, 80-108; NSCA Judgment, AR, Vol. I, Tab C, pp. 130-131, paras. 32-36; the BC Cases, *supra* note 53

[86] See paragraph 44 above and *Bodner*, *supra* note 3, paras. 23-27

[87] Appellants' Factum, pp. 16-17, para. 51

test.[88] Particularly, as the R&R is referenced in the OIC as a basis for the Government's decision, it is relevant to, and must be reviewed in applying the *Bodner* test.

54. The Appellants make the unfounded claim that the Courts below offered no explanation of what the reviewing Court is to do with submissions to Cabinet or how the advice given to Cabinet is material to the "whole of the process" at the third stage of the *Bodner* test.[89] In fact, the Courts below explained that the R&R provides background information, provides specifics of the factual foundation relied upon by the Government, and contributes to showing Government's consideration of the Tribunal Report.[90] The Courts below did not "effectively add…an additional stage to the *Bodner* analysis"[91], as asserted by the Appellants. Rather, they ordered production of the R&R based on its relevance to the existing second and third stages of the *Bodner* test.

55. As governments are required to engage in the process and make their decisions regarding JCC recommendations in good faith,[92] reviewing courts must have all the material that was before the government decision-maker and informed the decision included in the record on JR, in order to satisfy themselves that the response to the JCC recommendations reflects the real reasons for the government's decision. The overriding concern cannot be, as asserted by the Appellants, that subjecting such relevant material to review "would imply that while governments fulfill their constitutional obligations in public, they might fail those obligations in private".[93] Indeed, this is precisely the type of politicization and mischief that the process articulated in *PEI Reference* and *Bodner* is designed to prevent. The overriding concern is, and must be, to ensure that constitutional obligations are properly discharged in order to protect judicial independence.

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[88] Notice for JR, AR, Vol. II, Tab A, pp. 2-4; the *Act*, ss. 21A to 21M; NSSC Judgment, AR, Vol. I, Tab A, p. 5-8, 25-27, para. 1-7, 71-73; NSCA Judgment, AR, Vol. I, Tab C, pp. 121-122, 130-131, paras. 4, 8, 33-36
[89] Appellants' Factum, p. 18, para. 55
[90] NSSC Judgment, AR, Vol. I, Tab A, p. 58, para. 184; NSCA Judgment, AR, Vol. I, Tab C, pp. 130-131, paras. 33-36
[91] Appellants' Factum, p. 17, para. 52
[92] *Bodne*r, *supra* note 3, paras. 24-25
[93] Appellants' Factum, p. 17, para. 52

56. Disclosing the R&R does not expose the Executive to "unwarranted intrusion by the Judicial Branch into its collaborative, advisory, and policy making role."[94] As in any JR of government action, the courts are responsible for reviewing government decisions and actions in light of constitutional and other requirements. This review process is not "unwarranted". Rather, it is critical to the administration of justice and to ensuring that judicial independence is protected.

57. The BC Cases provide further support for the Respondents' position that the R&R is relevant to the reviewing court's application of the *Bodner* test. The Appellants' seek to distinguish the BC Cases on the basis that, in the first set of those cases, the BC government attempted to deny access to a document that it had already indicated was relevant to the proceeding, since the existence of a Cabinet submission was referred to in an affidavit filed on the government's behalf as having informed the government's response.[95] Apart from general principles, in the case at bar, where the R&R is itself referred to directly in the Response itself as a basis for the decision, there is an even stronger justification for production.

58. That aside, the subsequent cases from BC ordering disclosure of Cabinet submissions were not decided on the basis that the government referred to the existence of such submissions in affidavits filed in support of its decision regarding judicial compensation.[96] Rather, consistent with the finding of the Nova Scotia Courts, the Cabinet submissions were held to be relevant to the application of the *Bodner* test because, for example, they "contribute[d] to showing the government's consideration of the…JCC Report and some of the factual foundation for the…Response."[97]

59. The decisions of the Courts below ensure that the complete record and all relevant evidence will be before the reviewing court to facilitate the application of the *Bodner* test. Adopting the Appellants' interpretation of what is relevant to the *Bodner* analysis would require

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[94] Appellants' Factum, p. 9, para. 29

[95] Appellants' Factum, pp. 22-23, paras. 71-72; *BCSC 2012*, *supra* note 38, upheld on appeal: *BCCA 2012*, *supra* note 53

[96] *BCSC 2014*, *supra* note 53, paras. 20, 26-31; *BCSC 2018 - Master*, *supra* note 52, paras. 18-21

[97] *BCSC 2014*, *supra* note 53, paras. 30-31

disregarding *Bodner* itself, as well as the body of jurisprudence that has followed and applied it. Notably, that body of jurisprudence is effectively ignored by the Appellants.

(c) Basic Norms of JR Support Inclusion of The R&R In The Record

60. The Appellants fail to address the findings of the Courts below that the R&R, which is referred to in the first line of the OIC as a basis for the Governor in Council's decision, is producible pursuant to generally accepted principles that the record on JR includes documents that were expressly referred to in the decision under review and/or were before the decision-maker.[98] The Appellants provide no contrary authorities on this point.

61. In the leading Nova Scotia cases regarding these principles, documents comparable to the R&R were produced as forming part of the record without objection by the respondent government in litigation regarding government decisions, including, *inter alia*, a report and recommendation to Cabinet and briefing material provided to the Minister.[99]

62. Similarly, in *Anti-Inflation Reference*, which case was referenced by this Court in relation to the second stage of the *Bodner* test,[100] this Court considered not only the legislation under challenge, but also the material which Parliament had before it at the time when it enacted the legislation under review. This principally included the "White Paper" tabled by the Minister of Finance. The Tribunal Report is not the closest analogy to the White Paper, as the Appellants contend. The closest comparator is the R&R. The Response replied to the Tribunal Report, but it was the R&R which was before the Government decision-maker and informed the Response. As such, the R&R is the better analogy to the White Paper. Moreover, this Court stated in *Anti-Inflation Reference* that, in determining the challenge to the impugned legislation, it was "not only permissible but essential to give consideration to the material which Parliament had before it at the time when the statute was enacted for the purpose of disclosing the circumstances which

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[98] *Village Commissioners of Waverley v. Nova Scotia (Minister of Municipal Affairs)*, 1994 CanLII 4136 (NSCA) ("*Waverley*"), p. 14; leave to appeal to SCC denied: [1994] S.C.C.A No. 411; *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 332 ("*IMP Group*"), paras. 21, 24
[99] *Waverley*, *supra* note 98, p. 13; *IMP Group*, *supra* note 98, para. 13
[100] *Bodner*, *supra* note 3, paras. 33-37

prompted its enactment."[101] In the context of reviewing the Response, such material, by admission,[102] includes the R&R.

63. The principle that the record includes any documents referred to in the primary documents under review, is consistent with the purpose of JR, which is not a re-hearing or fresh determination of the matters underlying the decision under review, but rather a review of the decision itself.[103] If a document was before the decision-maker and is referred to in the primary documents then it necessarily informed the decision and logically forms part of the record. As the Appellants concede that the R&R is a mechanism of advice,[104] it clearly informed the Response. The R&R was properly ordered to be disclosed based on these well-established legal principles.

64. Contrary to the Appellants' assertion, the NSCA did not find that "Cabinet cannot be analogized to an adjudicative tribunal."[105] In the context of determining the admissibility of the Burrill Affidavit, the NSCA found that "the principles that govern admissibility in this case are <u>like</u> those that apply to a typical administrative JR and to an appeal, but they operate independently", due to the distinctions between the Government's consideration of the Tribunal Report as a political actor and a typical administrative tribunal.[106] Nevertheless, the NSCA held that "the appropriate scope of the material for this unique type of judicial review should reflect basic norms."

65. These "basic norms", and the general principles regarding the parameters of the record on JR applied by the Courts below, explain why disclosure was not sought of any transcript of Cabinet deliberations, as queried by the Appellants.[107] The established principles regarding what constitutes the record on JR also provide a complete answer to the Appellants' concern that

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[101] *Re: Anti-Inflation Act*, [1976] 2 SCR 373, p. 437
[102] NSSC Judgment, AR, Vol. I, Tab A, pp. 28-36, paras. 74-78, 80-108; NSCA Judgment, AR, Vol. I, Tab C, pp. 130-131, paras. 32-36; Appellants' Factum, pp. 4, 18, paras. 12-13, 57
[103] *IMP Group*, *supra* note 98, para. 21; quoting Sara Blake, *Administrative Law in Canada*, 5th ed. (LexisNexis, 2011)
[104] Appellants' Factum, p. 18, para. 57
[105] Appellants' Factum, p. 17, para. 53
[106] NSCA Judgment, AR, Vol. I, Tab C, p. 140, para. 74, emphasis added
[107] Appellants' Factum, p. 18, para. 53

disclosure of the R&R would encourage fishing expeditions.[108] The Courts below clearly found that the R&R was not a deliberative document, which determination the Appellants did not appeal. The Courts below also applied solicitor-client privilege to exclude from disclosure sections of the R&R containing legal advice. This case presents no slippery slope, as the Appellants suggest.

66. The Appellants point to the legal distinction between Cabinet and the Governor in Council and argue that the Courts below did not account for it in their analyses, notwithstanding that this point was not argued in the Courts below.[109] The distinction is one without a difference in the context of this case. By convention, the Governor in Council implements the decisions of Cabinet, resulting in there being a formal, but no practical, distinction between the two.[110] Any legal distinction does not impact the application of the "basic norms" regarding the content of the record on JR or the constitutional imperatives that heighten the importance that all relevant documents before the decision-maker and referenced in the decision be included therein. The R&R was information to Cabinet, informed the Response, and is therefore integral to a complete record on JR.

67. The Appellants' own authorities explain why the distinction between the informal, political Cabinet and the formal Executive function of the Governor in Council cannot be relied upon to oppose disclosure of the R&R. As explained by Nicholas D'Ombrain in his article *Cabinet Secrecy*, oft-cited by the Appellants, the significance of this distinction, from the perspective of litigants, is that the political process of Cabinet is not likely to be relevant in the preponderance of litigation.[111] The Respondents take no issue with the proposition that, for litigants generally, the views and opinions expressed by individual Cabinet members expressed around the Cabinet table will ordinarily have little utility, and that disclosure of same risks a negative impact on the collective responsibility and candour of Cabinet. However, that proposition has no application to the R&R.

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[108] Appellants' Factum, p. 18, para. 55
[109] Appellants' Factum, p. 18, para. 53
[110] Peter W. Hogg, *Constitutional Law of Canada*, 5th Edition (Carswell), 9.4 — The executive branch, (b) — The cabinet and the Privy Council
[111] Nicholas D'Ombrain, "Cabinet Secrecy" (Canadian Public Administration) Vol. 47, No. 3 (Fall 2004) ("D'Ombrain"), pp. 351-352 [Appellant's Book of Authorities, "ABOA", Tab 2]

68. Firstly, D'Ombrain is clear that Cabinet secrecy does not encompass factual material, which is generally what litigants and the administration of justice require for fair adjudication.[112] Disclosure of the facts contained in the R&R, which the Courts below described as largely comprising background information to Cabinet,[113] accordingly poses no threat to Cabinet secrecy. Secondly, the Courts below were clear that the R&R is neither a minute nor record of Cabinet deliberations; the findings of the Courts below, that the document was not shielded by deliberative secrecy, were not appealed and should not be disturbed. Thirdly, while the Appellants seem to be asserting that the ability to categorize the R&R as a "briefing documen[t]" is determinative of whether it contains Cabinet secrets that should be shielded from disclosure, [114] D'Ombrain argues against this type of "shopping list" approach to questions of disclosure.[115] He favours instead a substantive approach that considers the contents of the particular document, in line with the *Carey* analysis. Finally, unlike in the "preponderance of litigation" contemplated by D'Ombrain, Cabinet has constitutional obligations in formulating the government Response to the Tribunal Report, and the Attorney General is responsible for advising Cabinet of same.[116] The formal R&R is unquestionably relevant to the JR of the Response in this context, and clearly distinguishable from the views and opinions individual Cabinet members may have expressed in the deliberations process.

(d) <u>Government Should Not Be Permitted To Shield The Foundation Of Its Response</u>

69. Lamer CJC, as he then was, made it clear in *PEI Reference* that if the government chooses to reject or vary JCC recommendations, it must be prepared to justify its decision.[117] According to the *Bodner* test, Government's conduct and good faith throughout the Tribunal process, viewed globally, is necessarily under scrutiny.[118] Accordingly, just as the Appellants

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[112] D'Ombrain, *supra* note 111, p. 352 [ABOA, Tab 2]
[113] NSSC Judgment, AR, Vol. I, Tab A, p. 58, para. 184; NSCA Judgment, AR, Vol. I, Tab C, p. 131, para. 37
[114] Appellants' Factum, p. 26, para. 80
[115] D'Ombrain, *supra* note 111, p. 352 [ABOA, Tab 2]
[116] *BCSC 2012 – JR*, *supra* note 6, para. 81
[117] *PEI Reference, supra* note 2, para. 180
[118] *Bodner, supra* note 3, paras. 23-40

insist that reviewing Courts cannot simply assume governments have engaged in conduct which contravenes *Bodner*, neither can the opposite be assumed.[119]

70. The Appellants argue that the Courts below ought to have required a specific allegation of bad faith or wrongdoing on the part of Cabinet as a prerequisite to finding that the R&R is relevant to the JR,[120] relying on the direction in *Bodner* that "[i]t is impossible to draft a complete code for governments, and reliance has to be placed on their good faith".[121] This was stated in the context of explaining that there could be no immutable set of rules constraining governments in their responses to JCC recommendations and that the purpose on JR was not to parse the government's reasons for minor, inconsequential errors. This statement cannot mean that governments are entitled to dictate the record on JR so as to omit relevant materials, absent *prima facie* evidence of bad faith. Moreover, the Appellants' position ignores the reality that Judges are not practically able to tender evidence of bad faith without disclosure of the complete record, and/or that bad faith inherent in the Response may not become evident until documents like the R&R are disclosed and reviewed.[122]

71. The Appellants argue that Cabinet's conduct and the advice it receives should not be the subject of JR "unless the government puts that conduct and advice in issue"[123] and, failing that, to admit such evidence would be to politicize the process. To accept this, would allow the Appellants to control the record on review and shield part of the foundation of the Government's decision and the totality of the process from the reviewing court. In decided cases, had the record on JR been confined to the Tribunal Report and Response, the governments' bad faith and/or politicization of the process would never have come to light.[124] That is clearly an unacceptable outcome, and a negative consequence of the Appellants' proposed approach.

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[119] Appellants' Factum, p. 20, para. 62
[120] Appellants' Factum, pp. 23-24, para. 74
[121] *Bodner, supra* note 3, para. 39
[122] *BCSC 2012 – JR*, *supra* note 6; NSSC Judgment, AR, Vol. I, Tab A, pp. 73-76, paras. 230-237 NSCA Judgment, AR, Vol. I, Tab C, p. 139, paras. 71-72
[123] Appellants' Factum, p. 17, para. 52
[124] *BCSC 2012 – JR*, *supra* note 6; *MBQB 2012*, *supra* note 6, pp. 43, 58, paras. 114, 163: affidavit evidence exposed the process of the government's response to be a "total sham" and "mere window dressing"; *NLSC 2018*, *supra* note 6, paras. 77, 101-10, 123-34

72. Contrary to the Appellants' claim, Cabinet documents were not at issue in MBQB 2012.[125] In that case, the reasons offered by the Manitoba government for its rejection of the JCC recommendations stressed the government's commitment to the commission process and lauded the importance of the goals of preserving judicial independence and depoliticizing the setting of judicial remuneration. Oliphant J. found that these statements could not "pass muster" in the face of the government's conduct at a Standing Committee of the Legislature which was tasked with considering the JCC report and adopting a motion to be voted upon by the Legislature. Hansard of the Committee's meeting was included in affidavit evidence submitted by the judges' association (which affidavit also contained other evidence similar to that contained in the Burrill Affidavit).[126]

73. The Appellants hypothesize that disclosure of Cabinet documents in the nature of the R&R could give rise to a need for governments to tender evidence to explain any differences between such documents and the Response, resulting in further erosion of Cabinet confidentiality.[127] Firstly, as discussed above, *Bodner* already expressly contemplates that governments may proffer additional affidavit evidence on JR in some circumstances. Notably though, no additional evidence was tendered in the first of the BC Cases, even when the cabinet document which was disclosed, was ultimately found to be, at worst, a "deliberate information shell game".[128] Secondly, both the factual foundation relied upon by governments and its engagement in the process are supposed to be as open and transparent as possible, not confidential.

(e) <u>Routine Production Is Not Itself Contrary to the Public Interest: Evidence of Specific Harm Is Required</u>

74. The concern raised by the Appellants that the disclosure of the R&R will result in routine production of Cabinet documents is based on a fundamental mischaracterization of the policy rationale underlying PII. In the context of the adjudication of legal rights, relevant Cabinet documents, like other evidence, must be disclosed, unless disclosure would be contrary to the

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[125] Appellants' Factum, para 25
[126] *MBQB 2012*, *supra* note 6, p. 44, para. 116. Similarly in *NLSC 2018*, *supra* note 6, paras. 77, 101-10, 123-34
[127] Appellants' Factum, p. 18, para. 56
[128] *BCSC 2012 – JR*, *supra* note 6, para. 81

public interest (not the government's interests). Whether the public interest favours disclosure is determined pursuant to a balancing of the factors outlined in *Carey*.[129] According to *Carey*, it is open to a government, in every case, to submit evidence identifying any specific harm to the public interest that would result from the disclosure of a Cabinet document.[130] The Appellants did not do so here. Nor did the BC Government in any of the BC Cases, where the absence of such evidence was specifically noted and relied upon.[131]

75. The Appellants have conflated the convention of Cabinet secrecy, which they describe in detail,[132] with the doctrine of PII. Whether the public interest in Cabinet confidentiality outweighs the public interest in disclosure of confidential documents in a particular case, is determined pursuant to a balancing of the factors identified in *Carey*, which the Appellants acknowledge to be the leading case on PII.[133] In other words, a government's assertion that a document should not be disclosed based on PII claims must always turn on the facts.

76. The degree of judicial deference owed to the Response under *Bodner* and the limited deference to the Executive in relation to PII are distinct issues, which do not conflict.[134] The former pertains to the standard of review on JR and the latter to questions of disclosure, which will inform the content of the record available to the reviewing Court on JR.

77. Even if disclosure were to become routine in this unique form of JR, that is not a reason to exclude the R&R from disclosure in this case, unless disclosure can be said to be contrary to the public interest. The Appellants argue that routine disclosure would create a future environment where the Executive would be incentivized to craft its briefing documents in a manner that would support their ultimate argument.[135] This "candour" concern, discussed below,

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[129] *Carey, supra* note 7, paras. 79, 80, 84
[130] *Carey, supra* note 7, para. 40
[131] *BCSC 2012*, *supra* note 38, para. 16, 21; *BCCA 2012*, *supra* note 53, para. 18; *BCSC 2014*, *supra* note 53, para. 29; *BCSC 2018 – Master*, *supra* note 52, para. 23; *BCSC 2018*, *supra* note 52, para. 43
[132] Appellants' Factum, pp. 25-26, paras. 77-81
[133] Appellants' Factum, p. 28, para. 85
[134] Appellants' Factum, p. 10, para. 32
[135] Appellants' Factum, pp. 21-22, para. 68; this same argument was described as "troubling" in *BCSC 2018*, *supra* note 52, para. 50

is inconsistent with the open and transparent process described in *Bodner*. The process ought not to allow for the Government's real reasons or concerns to be shielded from scrutiny on JR. As recognized by the NSCA, the Government knew it was obliged to justify its decision.[136]

78. There are other litigation contexts in which disclosure of Cabinet documents has become commonplace, if not routine, without imperilling the functioning of the Executive. For example, a wide category of Cabinet documents have been regularly ordered by Courts to be produced in cases in which government conduct and legislation were alleged to have infringed upon the freedom of association and collective bargaining rights of public sector workers, contrary to s. 2(d) of the *Charter*.[137] The R&R is in line with the types of documents that have been ordered disclosed to litigants in s. 2(d) *Charter* challenges, including:

- submissions to Cabinet, preparation materials or directives with respect to preparation of submissions to Cabinet, and notes or minutes of Cabinet discussions;[138]

- Cabinet documents, such as briefing notes and memoranda and slide presentations made to Cabinet, setting out the options and strategic issues to be considered by Cabinet, with the exception of those documents subject to solicitor-client privilege, which included draft legislation;[139] and

- documents that either were prepared for Cabinet, or emanated from Cabinet, and as such contained information that may have been presented to Cabinet and therefore discussed at Cabinet meetings.[140]

79. Courts weighing the balance between disclosure and immunity pursuant to the *Carey*

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[136] NSCA Judgment, AR, Vol. I, Tab C, p. 134, para. 45
[137] *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2002 BCSC 1509 ("*Health Services*"); *British Columbia*, 2010 BCSC 961 ("*BCTF No. 1*"); *British Columbia Teachers' Federation v. British Columbia*, 2013 BCSC 1216 ("*BCTF No. 2*"); *Nova Scotia Teachers Union v Nova Scotia (Attorney General)*, 2019 NSSC 176 ("*NSTU*")
[138] *Health Services*, *supra* note 137, para. 1; *NSTU*, *supra* note 137, paras. 50-69
[139] *BCTF No. 2*, *supra* note 137, para. 53, referring to *BCTF No. 1*, *supra* note 137; *NSTU*, *supra* note 137, paras. 50-69
[140] *BCTF No. 2*, *supra* note 137, para. 74; *NSTU*, supra note 137, paras. 50-69

factors in the s. 2(d) *Charter* challenge context have consistently held that, in light of the constitutional subject matter of the litigation, the effect of non-disclosure on the public perception of the administration of justice is the overriding factor favouring disclosure.[141] The very same conclusion was reached in the BC cases and in the decisions of the Courts below in Nova Scotia.[142]

(f) <u>Openness and Transparency Outweighs the Candour Argument</u>

80. The Appellants seek to elevate the so-called "candour argument" to an independent consideration above all other factors set out in *Carey*, including the factor which considers the importance of producing the documents to the administration of justice. The Appellants' contention that the Courts below did not "respect" the principles they outline regarding PII,[143] is really an argument that the Courts below declined to give these principles the weight the Appellants would prefer in the PII balancing exercise.

81. In *Carey* itself, this Court cautioned against placing undue reliance on the candour argument in circumstances in which the documents which were sought to be disclosed emanated from or were records of Cabinet discussions, describing the argument as "the old fallacy" and "grotesque". It also noted that "it is very easy to exaggerate its importance" and that "it has received heavy battering in the courts."[144]

82. The *Babcock* case, once again relied on by the Appellants in this appeal,[145] dealt with statutory confidentiality under the *Canada Evidence Act*. PII in the present case must be determined pursuant to the common law balancing test from *Carey*.[146]

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[141] *Health* Services, *supra* note 137, paras. 38-40; *BCTF No. 2*, *supra* note 137, paras. 62, 87; *NSTU*, supra note 137, paras. 43-44, 70
[142] *BCSC 2012*, *supra* note 38, paras. 23-24; *BCSC 2014*, *supra* note 53, paras. 28-31; *BCSC 2018 – Master*, *supra* note 52, paras. 23-27; *BCSC 2018*, *supra* note 52, paras. 43, 48-52; *BCCA 2018*, *supra* note 52, para. 20
[143] Appellants' Factum, p. 26, para. 82
[144] *Carey*, *supra* note 7, paras. 46, 48
[145] Appellants' Factum, p. 29, para. 90
[146] *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, para. 19; NSCA Judgment, AR, Vol. I, Tab C, p. 134, paras. 38-41

83. The Appellants also rely on this Court's discussion of the purpose of exempting advice or recommendations within government institutions, from access to information requests in *John Doe,* which involved the interpretation of a statutory provision in Ontario's freedom of information legislation. While the context is obviously different, it is noteworthy that this statutory scheme expressly contemplated disclosure in circumstances in which a compelling public interest clearly outweighs the purpose of the secrecy or where the decision-maker cited the document as a basis for the decision.[147] Both of these circumstances exist here.

84. It is antithetical to the very process that is underway for the Government to rely on the "candour argument" and seek to withhold certain of its considerations from the reviewing Court's scrutiny. In the first of the BC Cases, it was the "candour" contained in the Cabinet submission, which was omitted from the reasons expressed by Government, that revealed the Government's bad faith.[148]

85. Since the R&R does not contain the Government's deliberations, the candour argument is especially weak in this case. In *Carey*, this Court referred to the Cabinet documents at issue as being in the following categories: those prepared for Cabinet; those that emanated from Cabinet; and those that recorded Cabinet's proceedings or those of its committees.[149] There was affidavit evidence adduced by the government that some of the documents sought were notes of Cabinet discussions at Cabinet meetings, but the evidence was that the notes did not purport to be complete nor did they indicate the basis upon which any individual member formed a decision. The evidence led by the government was that if the notes of Cabinet discussions were produced, they could lead to a distorted, incomplete, and inaccurate impression of the nature of the actual discussion that took place, and thereby legitimately threaten frank discussion at the Cabinet table.[150]

86. By contrast, documents that were either prepared for Cabinet, or emanated from Cabinet, contain information that may have been presented to Cabinet and discussed at Cabinet meetings. However, this is not the same as notes of who said what around the Cabinet table, i.e., Cabinet

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[147] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36, paras. 34, 37
[148] *BCSC 2012 – JR*, *supra* note 6, paras. 81-82
[149] *Carey*, *supra* note 7, para. 12
[150] *Carey*, *supra* note 7, para. 13

discussions or deliberations.[151] Indeed, Courts applying *Carey* have considered it a factor weighing in favour of production, when the documents were before Cabinet when decisions were made, and set out options and strategies to be considered by Cabinet, but did not chronicle Cabinet discussions. As such, disclosure would not impede Cabinet debate.[152]

87. That the R&R is not a record of deliberations among individual Cabinet members also undermines the analogy drawn by the Appellants between the disclosure of Cabinet documents akin to the R&R and the hypothetical disclosure of a Judge's private deliberations, records of discussions of the law among Judges, or private conversations.[153] Additionally, the sections of the R&R which the Courts below determined constituted legal advice to Cabinet were withheld from disclosure on the basis of solicitor-client privilege.

88. Finally, the "candour argument" is the rationale often expressed to support a "class claim" for PII, as opposed to a "contents claim".[154] It is clear that the Appellants are advancing a class claim in relation to the R&R, since they have submitted no evidence of specific harm to the public interest that would result from its disclosure. In *Carey*, this Court stated: "Generally speaking, a claim that a document should not be disclosed on the ground that it belongs to a certain class has little chance of success".[155] Further, the authorities recognize that the self-interest of members of government in asserting a class claim is evident and warrants close scrutiny.[156]

89. Courts applying PII in JRs of government decisions respecting judicial remuneration have consistently determined that the key principle and overriding factor at stake is the importance of producing the documents at issue to the administration of justice. There is an ever-present need to reinforce public confidence in the independence of the judiciary as a means of safeguarding the respective constitutional positions of the three branches of government and to maintain confidence in the administration of justice. In *Bodner*, this Court emphasized the

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[151] *BCTF No. 2*, *supra* note 137, para. 74
[152] *Health Services*, *supra* note 137, para. 39; *BCTF No. 2*, *supra* note 137, paras. 67-69, 74; *NSTU*, *supra* note 137, paras. 53, 55, 60, 62, 65, 67, 70
[153] Appellants' Factum, p. 27, para. 83
[154] E.g. *Carey*, *supra* note 7, paras. 12-13, 43-44
[155] *Carey*, *supra* note 7, para. 43
[156] *Carey*, *supra* note 7, paras. 65-66; *BCSC 2018*, *supra* note 52, para. 46

important objective of "an open and transparent public process" for determining judicial compensation.[157] Primacy must therefore 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 assessing the validity of the Government's Response through the JR.[158] Production of the R&R accordingly serves, rather than injures, the public interest.[159]

90. The legislative and judicial trend is that litigants should have full access to all relevant information in order to ensure fair proceedings.[160] Given the principles at stake, it is very important not to depart from this trend in this case.

91. In *Carey*, this Court concluded its summary of the principles applicable to PII in this same vein:

> 85 Divulgence is all the more important in our day when more open government is sought by the public. It serves to reinforce the faith of the citizen in his governmental institutions. This has important implications for the administration of justice, which is of prime concern to the courts…it has a bearing on the perception of the litigant and the public on whether justice has been done. (Emphasis added)

92. While a Court must be cautious before ordering relevant documents to be produced from the highest level of government, in the absence of harm to the public interest, such documents must be disclosed.[161] The Appellants' emphasis on candour and the possibility of "ill-informed" criticism of government above all other considerations,[162] is anachronistic and inconsistent with the guiding principles established by this Court in both judicial compensation and PII cases.[163]

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[157] *Bodner*, *supra* note 3, para. 63
[158] *BCSC 2012*, *supra* note 38, paras. 23-24; *BCSC 2014*, *supra* note 53, paras. 29-31; *BCSC 2018 – Master*, *supra* note 52, paras. 23-28; *BCSC 2018*, *supra* note 52, paras. 43, 48-52; *BCCA 2018*, supra note 52, para. 20
[159] NSSC Judgment, AR, Vol. I, Tab A, p. 57, paras. 179-181, 184; NSCA Judgment, AR, Vol. I, Tab C, p. 134, para. 45
[160] *Carey, supra*, note 7, para. 85
[161] *Carey, supra* note 7
[162] Appellants' Factum, p. 32, paras. 93-94
[163] *Bodner*, *supra* note 3; *Carey*, *supra* note 7

(g) No Compelling Basis For Revisiting *Carey*

93. The Appellants rely heavily on an article by Professor Campagnolo, which has received no previous judicial consideration, to argue that this Court's long-standing decision in *Carey* must be revisited in the judicial compensation context. However, they argue this only if this Court rejects the Appellants' unduly narrow interpretation of *Bodner* and the resulting limited and superficial record.[164] The Appellants are only concerned with the purported "weaknesses" that Campagnolo identified in the *Carey* decision,[165] to the extent that an application of the *Carey* factors results in an obligation to disclose the R&R as a relevant document pursuant to *Bodner*.[166]

94. It is respectfully submitted that even adoption of the approach to PII proposed by Campagnolo, would properly result in disclosure of the R&R. Evidence of a specific harm to the public interest which would require non-disclosure of the Cabinet document at issue is a fundamental requirement, pursuant to both the present jurisprudence respecting PII and the approach proposed by Campagnolo. As noted, no facts were set out in the affidavit submitted by the Appellants to support why disclosure of the R&R would be injurious to the public interest.[167]

95. Under Campagnolo's approach, when *prima facie* relevant Cabinet documents, like the R&R, are identified, the onus is on the government to explain why they should be withheld.[168] According to Campagnolo, whether the objection will succeed depends on the cogency of the reasons articulated to justify it. Campagnolo states that these reasons should include: a detailed description of the documents; an assessment of each document's degree of relevance, which depends on both its factual and legal relevance; and an assessment, for each document, of the degree of injury that could be sustained as a result of its production.[169]

96. Campagnolo is clear that the rationales behind Cabinet secrecy (candour, efficiency, and solidarity) will not suffice to deprive the court of *prima facie* relevant evidence. Rather, to

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[164] Appellants' Factum, p. 33, para. 97
[165] Appellants' Factum, p. 31, para. 92
[166] Appellants' Factum, p. 83, para. 97
[167] Affidavit of Jeannine Legasse, sworn July 5, 2018, AR, Vol. III, Tab 4
[168] Yan Campagnolo, "A Rational Approach to Cabinet Immunity under the Common law" (2017) 55:1 Alta. L. Rev. 43 ("*Campagnolo*"), p. 73
[169] *Campagnolo*, *supra* note 168, pp. 73-74

achieve non-disclosure, the government must explain "why, in the particular circumstances of the case, production of Cabinet documents would injure the public interest."[170] The dichotomy between what Campagnolo describes as "core and non-core secrets", is critical to the degree of injury that is likely to result from disclosure.[171] On Campagnolo's analysis, and based on the description of the document by the Courts below, the R&R would be a "non-core" rather than a "core" secret.[172] Regardless, since the Appellants failed to adduce <u>any</u> evidence of harm to meet the proposed "executive onus of justification", their objection to disclosure would be dismissed.[173]

97. The Appellants also seek to distinguish *Carey*, on the basis that it involved an allegation of unconscionable behavior on the part of the government, whereas there is no similar such allegation in the present case. Whether litigation involves an allegation of government wrongdoing is, indeed, one of the *Carey* factors, which must be weighed along with the other five factors in determining a PII claim. The Respondents have not alleged tortious or criminal wrongdoing by government, but have alleged that the Appellants failed to meet their constitutional obligations with respect to the setting of judicial compensation. As preserving judicial independence and depoliticizing the setting of judicial compensation are of profound gravity, this allegation is not one to be taken lightly, as recognized by the Courts below in their canvassing of the *Carey* factors.[174]

98. The determination as to what constitutes relevant evidence will be made in every case, on the basis of the pleadings and the statutory context, taking into account *Bodner*, with the benefit of the consistent line of decisions that have applied it, and the established principles respecting the content of the record on JR. In assessing the application of PII, the Cabinet confidentiality interests at stake must be balanced against the need for the document to be included in the JR record. This analysis is precisely that which was undertaken by the Courts below and the Appellants have presented no compelling rationale to revisit it.

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[170] *Campagnolo*, *supra* note 168, p. 74
[171] *Campagnolo*, *supra* note 168, p. 74
[172] *Campagnolo*, *supra* note 168, p. 65
[173] *Campagnolo*, *supra* note 168, p. 78
[174] NSSC Judgment, AR, Vol. I, Tab A, pp. 57-58, paras. 182-183; NSCA Judgment, AR, Vol. I, Tab C, p. 134, para. 45

(h) <u>Conclusion</u>

99. In sum, the Respondents respectfully submit that the R&R must be disclosed in order for the reviewing Court to be in a position to properly apply the *Bodner* test to the Response on the basis of a complete record. Permitting the unduly narrow record proposed by the Appellants, which is informed by their mischaracterization of the *Bodner* test, would lead to an ineffectual JR process for Responses, which in turn would undermine the effectiveness of the JCC process as a whole and threaten judicial independence.

100. Further, there is no need to revisit this Court's decision in *Carey* in the context of JRs of government responses to JCC recommendations regarding judicial compensation. The Appellants have identified no factor or principle relevant to PII that is absent from the *Carey* analysis. Instead, they seek to ascribe paramountcy to the candour argument in order to avoid being required to disclose the R&R. Justifying non-disclosure on the basis of the candour rationale, in the absence of evidence led by the Appellants of any specific public interest that requires non-disclosure, is directly contrary not only to *Carey*, but also to the objective of an open and transparent process for determining judicial remuneration articulated by this Court.

101. The stated intention of this Honourable Court in both *PEI Reference* and *Bodner* was to reduce litigation and friction between branches of government, which is indeed a laudable and necessary goal. This goal is yet to be achieved. The Appellants argue that disclosure of the R&R will "open the door to further and protracted litigation"[175] and propose, as a solution, to weaken the JR process by asking this Court to confirm their limited and superficial interpretation of the *Bodner* test and give governments *carte blanche* to control the record on JR. The Respondents urge this Honourable Court to reject the Appellants' proposed retrenchment on the important principles that were established in *PEI Reference* and *Bodner*, and have since been consistently applied by lower courts across the country. A reviewing court must have a complete record before it to facilitate its assessment of whether the Government's Response meets the *Bodner* test.

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[175] Appellants' Factum, p. 2, para. 6

102. Disputes over the evidence that may be before the reviewing court in this unique form of JR have been the exception, not the rule.[176] Confirmation that the Courts below have properly defined the scope of the record in this unique form of JR would reduce the need for procedural motions of the type that are before the Court. Such confirmation will not, however, bring an end to this type of litigation between the branches of government.

103. The post-*Bodner* case law involving the different branches of government arises from the decisions of governments to reject the recommendations of JCCs and the consequent need for government to justify those decisions, if required to, in light of the *Bodner* test. The solution to the fact of unrelenting litigation, at least in some areas of the country, is not to weaken the JR process as the Appellants propose. Rather, the Respondents respectfully submit that, in an appropriate case, this Honourable Court ought to revisit its decision that the JCC recommendations are non-binding. In their second on-going application, which is not before this Court, the Respondents will argue that in order to protect the "constitutional lifeblood" that is judicial independence, a legislature's spending power can properly be required to be delegated to an independent and objective tribunal. One author has recently proposed that a binding process should be required subject to the opportunity for either branch of government to seek judicial review of the tribunal's report itself, on a standard of reasonableness.[177] The Respondents respectfully submit that such an approach, if adopted at an appropriate time in the future, would ensure that the process for setting judicial remuneration is depoliticized, judicial independence is protected, and that the instances of litigation between the branches of government are dramatically reduced.

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[176] In all but three of the post-*Bodner* decided cases involving a JR of a government's response, there was no dispute over the evidence admitted before the reviewing court: see *BCSC 2012*, *supra* note 38, and the instant cases.

[177] Dr. Paul Thomas, "Judicial Independence, Judicial Compensation and Responsible Government: Finding A More Appropriate Balance" (Discussion Paper prepared for the Canadian Association of Provincial Court Judges, December 2018) online: Canadian Association of Provincial Court Judges <http://judges-juges.ca/files/cover/Judicial-compensation.pdf>

PART IV – SUBMISSIONS CONCERNING COSTS

104. The Respondents request their costs on this appeal.

105. The Appellants requested their costs on this appeal and in the courts below. The Motion Judge made no determination on costs, but indicated that the parties could speak to the issue of costs in the absence of agreement.[178] Given the mixed success on the two motions that were before the Motion Judge, the parties agreed to bear their own costs. For its part, the Court of Appeal ordered costs in the amount of $5,000, in the cause.[179] In the circumstances, the Respondents contend that the parties' agreement and the decision of the NSCA should not be disturbed.

PART V – ORDER SOUGHT

106. The Respondents request that this appeal be dismissed, with costs on this appeal.

PART VI – SUBMISSIONS ON CONFIDENTIAL INFORMATION

107. The Respondents confirm that there is no sealing or confidentiality order, publication ban, classification of information in the file as confidential under legislation, or restriction on public access to information in the file that could impact the Court's reasons in this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Winnipeg, in the Province of Manitoba, this 19th day of August, 2019.

Susan Dawes   Kristen Worbanski
Counsel for the Respondents The Nova Scotia Provincial Judges' Association

[178] NSSC Judgment, AR, Vol. I, Tab A, p. 117. para. 385
[179] NSCA Judgment, AR, Vol. I, Tab C, p. 146, para. 92

PART VII – TABLE OF AUTHORITIES

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