

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

BETWEEN:

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

**APPELLANT  
(Appellant)**

-and-

**PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA**

**RESPONDENT  
(Respondent)**

-and-

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO,  
ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF SASKATCHEWAN,  
ATTORNEY GENERAL OF ALBERTA, CANADIAN SUPERIOR COURTS JUDGES  
ASSOCIATION, CANADIAN BAR ASSOCIATION, CANADIAN ASSOCIATION OF  
PROVINCIAL COURT JUDGES, CANADIAN TAXPAYERS FEDERATION AND  
CANADIAN CIVIL LIBERTIES ASSOCIATION**

**INTERVENERS**

---

SCC File No. 38459

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

BETWEEN:

**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)

-and-

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO,  
ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF SASKATCHEWAN,  
ATTORNEY GENERAL OF ALBERTA, CANADIAN SUPERIOR COURTS JUDGES  
ASSOCIATION, CANADIAN BAR ASSOCIATION, CANADIAN ASSOCIATION OF  
PROVINCIAL COURT JUDGES, CANADIAN TAXPAYERS FEDERATION AND  
CANADIAN CIVIL LIBERTIES ASSOCIATION**

INTERVENERS

---

---

**FACTUM OF THE INTERVENER,  
ATTORNEY GENERAL OF CANADA**

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

---

---

Department of Justice Canada  
120 Adelaide Street West,  
Suite #400  
Toronto, ON M5H 171

**Per: Michael H. Morris  
Dayna S. Anderson**

Tel: (647) 256-7539 / (204) 984-6961  
Fax: (416)952-4518  
Email: Michael.Morris@justice.gc.ca  
Dayna.Anderson@justice.gc.ca

**Counsel for the proposed Intervener,  
Attorney General of Canada**

Department of Justice Canada  
Nathalie Drouin  
Deputy Attorney General of Canada  
50 O'Connor Street  
Ottawa, ON K1A 0H8

**Per: Christopher Rugar**

Tel: (613) 670-6290  
Fax: (613) 954-1920  
Email: crugar@justice.gc.ca

**Agent for the proposed Intervener,  
Attorney General of Canada**

Registrar  
Supreme Court of Canada  
301 Wellington Street  
Ottawa, Ontario  
K1A 0J9

Gudmundseth Mickelson LLP  
2525 - 1075 West Georgia Street  
Vancouver, British Columbia  
V6E 4H3

**Per: Stein K. Gudmundseth, Q.C.**  
**Andrew D. Gay, Q.C.**  
**Clayton J. Gallant**

Telephone: (604) 685-6272  
Fax: (604) 685-8434  
E-mail: [skg@lawgm.com](mailto:skg@lawgm.com)

**Counsel for the Attorney General of  
British Columbia**

Arvay Finlay LLP  
1512-808 Nelson Street  
Vancouver, British Columbia  
V6Z 2H2

**Per: Joseph J. Arvay Q.C. / Alison  
Latimer**

Telephone: (604) 696-9828  
Fax: (888) 575-3281  
E-mail: [jarvay@arvayfinlay.ca](mailto:jarvay@arvayfinlay.ca)

**Counsel for the Provincial Court  
Judges' Association of British  
Columbia**

Gowling WLG (Canada) LLP  
160 Elgin Street  
Suite 2600  
Ottawa, Ontario  
K1P 1C3

**Per: Jeffrey W. Beedell**

Telephone: (613) 786-0171  
Fax: (613) 788-3587  
E-mail: [jeff.beedell@gowlingwlg.com](mailto:jeff.beedell@gowlingwlg.com)

**Agent for the Attorney General of  
British Columbia**

Attorney General of Nova Scotia  
1690 Hollis Street, 8th Floor  
Halifax, Nova Scotia  
B3J 2L6

**Per: Edward A. Gores, Q.C.**

Telephone: (902) 424-4024  
Fax: (902) 424-1730  
E-mail: [edward.gores@novascotia.ca](mailto:edward.gores@novascotia.ca)

**Counsel for the Attorney General of  
Nova Scotia representing Her Majesty  
the Queen in Right of the Province of  
Nova Scotia and the Governor in  
Council**

Myers LLP  
724-240 Graham Avenue  
Winnipeg, Manitoba  
R3C 0J7

**Per: Susan Dawes / Kristen  
Worbanski**

Telephone: (204) 926-1501  
Fax: (204) 956-0625  
E-mail: [sdawes@myersfirm.com](mailto:sdawes@myersfirm.com)

**Counsel for the Judges of the  
Provincial Court and Family Court of  
Nova Scotia, as represented by the  
Nova Scotia Provincial Judges  
Association**

Gowling WLG (Canada) LLP  
160 Elgin Street  
Suite 2600  
Ottawa, Ontario  
K1P 1C3

**Per: D. Lynne Watt**

Telephone: (613) 786-8695  
FAX: (613) 788-3509  
E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**Agent for the Attorney General of  
Nova Scotia representing Her  
Majesty the Queen in Right of the  
Province of Nova Scotia and the  
Governor in Council**

Supreme Advocacy LLP  
100- 340 Gilmour Street  
Ottawa, Ontario  
K2P 0R3

**Per: Marie-France Major**

Telephone: (613) 695-8855 Ext: 102  
Fax: (613) 695-8580  
E-mail: [mfmajor@supremeadvocacy.ca](mailto:mfmajor@supremeadvocacy.ca)

**Agent for the Judges of the  
Provincial Court and Family Court  
of Nova Scotia, as represented by  
the Nova Scotia Provincial Judges  
Association**

Norton Rose Fulbright Canada LLP  
1, Place Ville Marie  
Bureau 2500  
Montréal, Quebec  
H3B 1R1

**Per: Pierre Bienvenu**  
**Azim Hussain**  
**Andres C. Garin**  
**Jean-Simon Schoenholz**

Telephone: (514) 847-4747  
FAX: (514) 286-5474  
E-mail:  
[pierre.bienvenu@nortonrosefulbright.com](mailto:pierre.bienvenu@nortonrosefulbright.com)

**Counsel for Canadian Superior Courts  
Judges Association**

Norton Rose Fulbright Canada LLP  
45 O'Connor Street  
Suite 1500  
Ottawa, Ontario  
K1P 1A4  
Telephone: (613) 780-8654  
FAX: (613) 230-5459

**Per: Matthew J. Halpin**

E-mail:  
[matthew.halpin@nortonrosefulbright.com](mailto:matthew.halpin@nortonrosefulbright.com)

**Agent for Canadian Superior Courts  
Judges Association**

Borden Ladner Gervais LLP  
Bay Adelaide Centre, East Tower  
3400 - 22 Adelaide Street West  
Toronto, Ontario  
M5H 4E3

**Per: Guy J. Pratte**  
**Nadia Effendi**  
**Ewa Krajevska**  
**Neil Abraham**

Telephone: (416) 367-6000  
FAX: (416) 367-6749

E-mail: [gpratte@blgcanada.com](mailto:gpratte@blgcanada.com)

**Counsel for Canadian Bar Association**

Borden Ladner Gervais LLP  
1300-100 Queen Street  
Ottawa, Ontario  
K1P 1J9

**Per: Karen Perron**

Telephone: (613) 369-4795  
FAX: (613) 230-8842

E-mail: [kperron@blg.com](mailto:kperron@blg.com)

**Agent for Canadian Bar Association**

Goldblatt Partners LLP  
20 Dundas Street West  
Suite 1039  
Toronto, Ontario  
M5G 2C2

**Per: Steven Barrett  
Colleen Bauman**

Telephone: (416) 977-6070

FAX: (416) 591-7333

E-mail: [sbarrett@goldblattpartners.com](mailto:sbarrett@goldblattpartners.com)

**Counsel for Canadian Association of  
Provincial Court Judges**

Attorney General of Alberta  
9th Floor Peace Hills Trust Tower  
10011-109 Street  
Edmonton, Alberta  
T5J 3S8

**Per: Doreen Mueller**

Telephone: (780) 427-1295

FAX: (780) 427-1230

E-mail: [doreen.mueller@gov.ab.ca](mailto:doreen.mueller@gov.ab.ca)

**Counsel for Attorney General of  
Alberta**

**Michael J. Sobkin**  
331 Somerset Street West  
Ottawa, Ontario  
K2P 0J8

Telephone: (613) 282-1712

FAX: (613) 288-2896

E-mail: [msobkin@sympatico.ca](mailto:msobkin@sympatico.ca)

**Agent for Attorney General of  
Alberta**

Attorney General of Ontario  
720 Bay Street, 4th Floor  
Toronto, Ontario  
M7A 2S9

**Per: Sarah Kraicer  
Andrea Bolieiro**

Telephone: (416) 894-5276  
FAX: (416) 326-4015

E-mail: [sarah.kraicer@ontario.ca](mailto:sarah.kraicer@ontario.ca)

**Counsel for Attorney General of  
Ontario**

Juristes Power  
130 rue Albert  
bureau 1103  
Ottawa, Ontario  
K1P 5G4

**Per: Maxine Vincelette**

Telephone: (613) 702-5573  
FAX: (613) 702-5573

E-mail: [mvincelette@juristespower.ca](mailto:mvincelette@juristespower.ca)

**Agent for Attorney General of  
Ontario**

McCarthy Tétrault LLP  
Suite 5300, Toronto Dominion Bank  
Tower  
Toronto, Ontario  
M5K 1E6

**Per: Adam Goldenberg  
Amanda D. Iarusso**

Telephone: (416) 601-8200  
FAX: (416) 868-0673

E-mail: [agoldenberg@mccarthy.ca](mailto:agoldenberg@mccarthy.ca)

**Counsel for Canadian Taxpayers  
Federation**

Power Law  
130 Albert Street  
Suite 1103  
Ottawa, Ontario  
K1P 5G4

**Per: Darius Bossé**

Telephone: (613) 702-5566  
FAX: (613) 702-5566

E-mail: [DBosse@juristespower.ca](mailto:DBosse@juristespower.ca)

**Agent for Canadian Taxpayers  
Federation**

Procureure générale du Québec  
1200, Route de l'Église  
3e étage  
Québec, Quebec  
G1V 4M1

**Per : Stéphane Rochette**  
**Robert Desroches**  
**Brigitte Bussières**

Telephone: (418) 643-6552 Ext: 20734  
FAX: (418) 643-9749

E-mail:  
[stephane.rochette@justice.gouv.qc.ca](mailto:stephane.rochette@justice.gouv.qc.ca)

**Counsel for Attorney General of  
Quebec**

Attorney General for Saskatchewan  
Legal Services Division  
900 - 1874 Scarth Street  
Regina, Saskatchewan  
S4P 4B3

**Per: Thomson Irvine, Q.C.**  
**Kyle McCreary**

Telephone: (306) 787-6307  
FAX: (306) 787-9111

E-mail: [tom.irvine@gov.sk.ca](mailto:tom.irvine@gov.sk.ca)

**Counsel for Attorney General of  
Saskatchewan**

Noël & Associés  
111 rue Champlain  
Gatineau, Quebec  
J8X 3R1

**Per : Sylvie Labbé**

Telephone: (819) 771-7393  
FAX: (819) 771-5397

E-mail: [s.labbe@noelassociés.com](mailto:s.labbe@noelassociés.com)

**Agent for Attorney General of  
Quebec**

Gowling WLG (Canada) LLP  
160 Elgin Street  
Suite 2600  
Ottawa, Ontario  
K1P 1C3

**Per: D. Lynne Watt**

Telephone: (613) 786-8695  
FAX: (613) 788-3509

E-mail: [lynne.watt@gowlingwlg.com](mailto:lynne.watt@gowlingwlg.com)

**Agent for Attorney General of  
Saskatchewan**



Paliare, Roland, Rosenberg, Rothstein,  
LLP  
155 Wellington Street West  
35th Floor  
Toronto, Ontario  
M5V 3H1

**Per: Andrew K. Lokan**

Telephone: (416) 646-4324  
FAX: (416) 646-4301

E-mail: [andrew.lokan@paliareroland.com](mailto:andrew.lokan@paliareroland.com)

**Counsel for Canadian Civil Liberties  
Association**

Dentons Canada LLP  
99 Bank Street  
Suite 1420  
Ottawa, Ontario  
K1P 1H4

**Per: David R. Elliot**

Telephone: (613) 783-9699  
FAX: (613) 783-9690

E-mail: [david.elliott@dentons.com](mailto:david.elliott@dentons.com)

**Agent for Canadian Civil Liberties  
Association**

**INDEX**

PART I – OVERVIEW AND STATEMENT OF FACTS ..... 1

    A. Overview ..... 1

    B. Statement of Facts ..... 1

PART II – QUESTIONS IN ISSUE ..... 2

PART III – STATEMENT OF ARGUMENT ..... 2

    A. The content of the evidentiary record must be informed by constitutional principles ..... 2

        i. Judicial independence supports the exclusion of Cabinet confidences from the  
           evidentiary record..... 2

        ii. Responsible government supports the exclusion of Cabinet confidences from the  
           evidentiary record..... 3

    B. Judicial review of a government’s judicial compensation decision is focussed on its  
       public reasons for decision ..... 4

    C. The principles governing judicial review do not require disclosure of Cabinet confidences  
       in a rationality review ..... 6

        i. Judicial review of judicial compensation decisions is based on a deferential review of  
           the rationality of the government’s public decision ..... 6

        ii. The review of Cabinet confidences inappropriately expands the rationality standard .... 8

        iii. Exceptional collateral evidence is admissible in limited circumstances ..... 9

PART IV - SUBMISSIONS ON COSTS ..... 10

PART V - NATURE OF ORDER SOUGHT ..... 10

PART VI - TABLE OF AUTHORITIES ..... 11

APPENDIX “A” – STATUTES RELIED ON ..... 13

## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. The rationality standard set out by this Court in *Bodner*<sup>1</sup> provides for a careful balance of principles guiding judicial review of government decisions on judicial compensation. Careful application of that deferential standard ensures respect for judicial independence and Cabinet confidentiality while recognizing that the executive and legislative branches play a critical role in the responsible management of public funds.

2. The principles governing judicial review in a judicial compensation context do not require disclosure of Cabinet confidences in a rationality review. In a judicial review, the focus is on scrutiny of a government's public response. Whether Cabinet considered additional factors that were not ultimately included in the public response is irrelevant to whether the response is rational.

3. In the decisions under appeal, the lower courts erred in conflating a deferential rationality review of a public judicial compensation process, carried out in the public interest, with a judicial review process in which the courts review Cabinet Minister's confidential deliberations. The reasons of the courts below are inconsistent with the deferential rationality standard, and risk overturning the careful balance of principles protecting financial security, set out by this Court in the *PEI Reference*<sup>2</sup> and *Bodner*.<sup>3</sup>

### B. Statement of Facts

4. The Attorney General of Canada (AGC) adopts and relies upon the facts as set out by the Attorneys General of British Columbia and Nova Scotia in their facta.<sup>4</sup>

---

<sup>1</sup> *Provincial Court Judges' Assn (New Brunswick) v New Brunswick (Minister of Justice)*, [2005 SCC 44](#) [*Bodner*].

<sup>2</sup> *Provincial Court Judges Assn (Manitoba) v Manitoba (Minister of Justice)*, [\[1997\] 3 SCR 3](#) [*PEI Reference*].

<sup>3</sup> *Bodner*, [supra](#).

<sup>4</sup> Factum of the Attorney General of British Columbia, file 38381 at [paras 12-43](#); Factum of the Attorney General of Nova Scotia, file 38459 at [paras 9-14](#) and [16-26](#).

## PART II – QUESTIONS IN ISSUE

5. The AGC will address the issue of whether an effective review of the rationality of a government's public response to the recommendations of an independent judicial compensation commission (Commission) requires production of Cabinet confidences.

## PART III – STATEMENT OF ARGUMENT

### A. The content of the evidentiary record must be informed by constitutional principles

6. The appropriate content of the evidentiary record in a judicial review of a government's public response to a Commission's recommendation requires consideration of the applicable procedural rules and the values and principles governing judicial review and the Constitution. These include the rule of law, democracy, responsible government and the separation of powers.<sup>5</sup> In the judicial compensation context specifically, two unwritten, but fundamental constitutional principles require particular consideration: judicial independence and responsible government, the latter of which includes the convention of Cabinet confidentiality.

#### *i. Judicial independence supports the exclusion of Cabinet confidences from the evidentiary record*

7. Financial security for the judiciary is driven by the constitutional imperative that the relationship between the judiciary and the other branches of government must be depoliticized. Commissions are intended to depoliticize the setting of judicial compensation, ensuring that judges are free and appear to be free from political interference through economic manipulation by the other branches of government. They also ensure that judges are not entangled in the politics of remuneration from public funds.<sup>6</sup> Looking behind public government responses to review underlying Cabinet deliberations, in all but the most exceptional circumstances, would further politicize the process, undermining the very purpose of having a Commission mediate the relationship between the judicial and executive branches.

8. Absent legislation providing that Commission recommendations are binding, the executive and legislature retain the power to depart from the recommendations.<sup>7</sup> Nonetheless, Commission

---

<sup>5</sup> *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at [paras 27](#); *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 [*TWN*] at [para 84](#).

<sup>6</sup> *PEI Reference*, *supra* at paras [131](#) and [147](#).

<sup>7</sup> *Bodner*, *supra* at [para 21](#); *PEI Reference*, *supra* at para [176](#).

reports must have a “meaningful effect” on the determination of judicial remuneration.<sup>8</sup> Should the executive or legislature choose not to accept one or more of the recommendations, it must publicly justify its decision with rational reasons through the government’s public response.<sup>9</sup>

9. Cabinet’s internal deliberations are irrelevant to whether the government’s public response is rational. Examination of Cabinet confidences – based on speculative assumptions of bad faith – risks undermining the core purpose of the financial security guarantee by politicizing the judicial compensation process and increasing friction between the branches of government. Overall, this would detract from public confidence in the judicial compensation process and its participants, including the judiciary.<sup>10</sup>

*ii. Responsible government supports the exclusion of Cabinet confidences from the evidentiary record*

10. Cabinet confidentiality is in the public interest, not that of the Crown litigant.<sup>11</sup> Cabinet confidentiality exists so that ministers can deliberate and express their opinions in a full and frank manner<sup>12</sup> to ensure that, once a government decision is made, Cabinet speaks in solidarity with one voice in public. Cabinet confidentiality allows ministers to fulfill their obligations to be individually and collectively responsible to the Houses of Parliament, and in particular to the House of Commons whose confidence they must maintain. This is a key feature of Canada’s system of responsible government. This system of responsible government has been characterized by Peter Hogg as the “most important non-federal characteristic of the Canadian Constitution.”<sup>13</sup>

---

<sup>8</sup> *Bodner, ibid.* at paras [18-21](#); *PEI Reference, ibid.* at para [175](#).

<sup>9</sup> *Conférence des juges de paix magistrats du Québec v Québec (Attorney General)*, 2016 SCC 39 [*Conference*] at [para 35](#); *Bodner, supra* at [para 21](#); *PEI Reference, supra* at para [180](#).

<sup>10</sup> *Mackin v New Brunswick (Minister of Justice)*, 2002 SCC 13, [2002] 1 SCR 405 at [para 116](#) (in dissent); *Conference, supra* at [paras 32](#) and [85](#); *Bodner, supra* at paras [4 and 6](#); *Ell v Alberta*, 2003 SCC 35 at [para 29](#); *PEI Reference, supra* at [paras 9](#) and [193](#).

<sup>11</sup> T.G. Cooper, *Crown Privilege* (Ontario: Canada Law Book, 1990) at pp 2-3, **Attorney General of Canada’s Book of Authorities [AGC Auth], Tab 1.**

<sup>12</sup> *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3 [*Babcock*] at [para 18](#).

<sup>13</sup> Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. looseleaf (Toronto: Carswell, 2007-) at 9.3, **AGC Auth, Tab 2.**

11. Cabinet confidentiality extends to all documentation of Cabinet’s process during the deliberative process.<sup>14</sup> This ensures protection of the ministers’ collective decision-making,<sup>15</sup> thereby supporting ministerial solidarity. Just as the courts are entitled to deliberative secrecy, Cabinet is entitled to a measure of secrecy, including when considering judicial compensation.

12. In *Babcock*, this Court affirmed the importance of Cabinet confidentiality, describing it as essential to the effective operation of our system of government.<sup>16</sup> This Court also affirmed that section 39 of the *Canada Evidence Act*, which permits the Clerk of the Privy Council or a minister to object to the disclosure of a Cabinet confidence, is constitutional.<sup>17</sup> It does not offend the rule of law, the independence of the judiciary or the separation of powers.<sup>18</sup> In the federal judicial compensation context, the Clerk or a minister may therefore object to the disclosure of Cabinet confidences.

**B. Judicial review of a government’s judicial compensation decision is focussed on its public reasons for decision**

13. The government’s decision is subject to a limited form of judicial review. As in the administrative law context, the starting point for the court’s analysis is the decision-maker’s reasons.<sup>19</sup> In the judicial compensation context, where the entire process is motivated by the constitutional imperative of depoliticizing the remuneration process, the court reviews the government’s response according to a standard of rationality.<sup>20</sup>

14. Governments’ reasons for judicial compensation decisions are contained in their public responses.<sup>21</sup> If a government departs from a Commission’s recommendation, it must include

---

<sup>14</sup> Nicholas D’Ombain, “Cabinet Secrecy” (Canadian Public Administration), Vol 47, No 3 (Fall 2004) [*D’Ombain*] at pp 335-336, 340 and 352, **Appellant’s Book of Authorities in 38459 [AGNS Auth], Vol 1, Tab 2**; T.G. Cooper, *Crown Privilege* (Ontario: Canada Law Book, 1990) at pp 47-50, **AGC Auth, Tab 1**.

<sup>15</sup> D’Ombain, *supra* at pp 335-336, **AGNS Auth, Vol I, Tab 2**.

<sup>16</sup> *Babcock*, *supra* at [para 18](#).

<sup>17</sup> *Ibid.* at [paras 60-61](#).

<sup>18</sup> *Ibid.* at [para 54](#).

<sup>19</sup> *TWN*, *supra* at [para 70](#); *Dunsmuir*, *supra* at [para 48](#); *NLNU v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at [paras 11-14](#).

<sup>20</sup> *Conference*, *supra* at [para 35](#); *Bodner*, *supra* at [paras 21, 24-27](#) and [29-31](#) and [62](#); *PEI Reference*, *supra* at [paras 180-181, 183](#).

<sup>21</sup> *Bodner*, *supra* at [paras 23-27](#) and [62](#).

rational reasons in its public response that justify its decision.<sup>22</sup> Specifically, the public response must demonstrate that the government gave weight to the Commission's recommendations by responding to the recommendations themselves, and not simply reiterating government submissions that were made to and substantively addressed by the Commission.<sup>23</sup>

15. The government's public response must provide legitimate reasons<sup>24</sup> which rely on a reasonable factual foundation.<sup>25</sup> It must clearly articulate the grounds for rejection or variation in a manner that reveals a consideration of the judicial office and an intention to deal with it appropriately.<sup>26</sup> The reasons given must preclude any suggestion of attempting to manipulate the judiciary and must reflect the underlying public interest in depoliticizing the remuneration process and preserving judicial independence.<sup>27</sup>

16. As this Court examined in *Bodner*, the government's response can take several forms depending on the statutory framework. In the federal context, the Minister of Justice is required by the *Judges Act* to respond to judicial compensation reports and bring forward legislation to implement the government's response.<sup>28</sup> In practice, the Minister publishes the government's response to each Commission report<sup>29</sup> and then ensures introduction of the necessary legislative amendments to implement the response.<sup>30</sup> This follows from the constitutional requirement that Parliament establishes the compensation of superior court judges.<sup>31</sup>

17. It is significant that in spite of the wide variety of public responses reviewed by this Court, it has never required access to Cabinet confidences in order to assess the rationality of a response. There is no need to review Cabinet confidences in order to determine whether the government's

---

<sup>22</sup> *Ibid.* at [para 21](#).

<sup>23</sup> *Ibid.* at [paras 23-25](#).

<sup>24</sup> *Ibid.* at [paras 24-25](#).

<sup>25</sup> *Ibid.* at [para 26](#).

<sup>26</sup> *Ibid.* at [para 25](#).

<sup>27</sup> *Ibid.* at [paras 25, 27](#).

<sup>28</sup> *Judges Act*, RSC, 1985, c J-1, s 26(7).

<sup>29</sup> See for example <https://www.justice.gc.ca/eng/rp-pr/cp-pm/cr-rc/res15-rep15/index.html>.

<sup>30</sup> *Judges Act*, s 26(7). See, for example, [Bill C-44, An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures, 1<sup>st</sup> Sess., 42<sup>nd</sup> Parl. \(assented to June 22, 2017\) at Division 10](#).

<sup>31</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), s 100.

public response is rational. The response must be rational on its face. It must: “...provide a response to the commission’s recommendations that is sufficient to inform the public, members of the legislature and the reviewing court of the facts on which the government’s decision is based and to show them that the process has been taken seriously.”<sup>32</sup> The emphasis is on the sufficiency of the response from a public perspective – since it is public confidence that stands to be undermined. Governments are not permitted to bolster a decision being judicially reviewed with justifications and reasons that were not included in its public response.<sup>33</sup> Whether Cabinet considered additional factors that were not ultimately included in the public response is therefore irrelevant to the question of whether the response is rational.

**C. The principles governing judicial review do not require disclosure of Cabinet confidences in a rationality review**

*i. Judicial review of judicial compensation decisions is based on a deferential review of the rationality of the government’s public decision*

18. In *Dunsmuir*, the Court affirmed the purpose of judicial review in reviewing administrative decisions is the preservation of the rule of law.<sup>34</sup> Each branch of government, including the courts, must respect the role of the other branches of government in Canada’s constitutional framework.<sup>35</sup> There is no presumption that a decision contains errors – the onus rests with an applicant to demonstrate that a decision is so flawed that a court should exercise its remedial discretion to intervene. Likewise in the judicial compensation context, the reviewing court plays a critical but limited role. It does not engage in fact finding. It reviews decisions made by those who are empowered to make them, and determines whether those decisions are in keeping with the applicable standard of review, which in the circumstances is the standard of rationality.<sup>36</sup> This standard acknowledges the Government’s unique responsibility for the management of public money.

19. In the judicial compensation context, a deferential stance is particularly appropriate in light of the unique and limited form of judicial review (“rationality”) that this Court decided is

---

<sup>32</sup> *Bodner*, *supra* at [para 63](#).

<sup>33</sup> *Ibid.* at [para 62](#).

<sup>34</sup> *Dunsmuir*, *supra* at [para 27](#)

<sup>35</sup> *Ibid.* at [para 27](#); Paul Daly, *A Theory of Deference in Administrative Law* (Cambridge: Cambridge University Press, 2012) [*Theory of Deference*] at page 1, **AGNS Auth, Vol I, Tab 5**

<sup>36</sup> *TWN*, *supra* at [para 85](#).



appropriate.<sup>37</sup> The rationality standard is deferential because the executive and legislative branches have constitutional responsibility for and accumulated expertise in the management and expenditure of public funds,<sup>38</sup> and because setting judicial compensation is a public interest process in which the executive and legislative branches play a legitimate and critical role. Each is required to “show proper deference for the legitimate sphere of activity of the other.”<sup>39</sup>

20. In determining whether a government’s public response is rational, the reviewing court does not determine the adequacy of judicial remuneration. Rather, it must review the government’s public response to determine whether the Commission’s purpose has been achieved.<sup>40</sup> In particular, the court must apply the following three-stage analysis:

- a. Has the government articulated a legitimate reason for departing from the recommendations?
- b. Do the government’s reasons rely upon a reasonable factual foundation?
- c. Viewed globally, has the Commission process been respected and have the Commission’s purposes been achieved (preserving judicial independence and depoliticizing the setting of judicial remuneration)?<sup>41</sup>

21. Stage 1 is a screening mechanism, in which the court ascertains whether the reasons themselves are bald rejections, or guided by the public interest and not based on purely political considerations.<sup>42</sup> Cabinet confidences are not required to inform this question. In *Bodner*, this Court applied the Stage 1 analysis to judicial compensation decisions by reviewing the governments’ public reasons and, in one case, the Commission’s report.<sup>43</sup> No Cabinet confidences were reviewed.

22. At Stage 2, the court does not require that the legislature or executive establish exceptional circumstances to justify a departure from the recommendations. Rather, the court considers

---

<sup>37</sup> *Bodner*, *supra* at [para 29](#); *PEI Reference*, *supra* at [paras 183-184](#).

<sup>38</sup> *Ibid.* at [paras 30](#) and [40](#).

<sup>39</sup> *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at [389](#); *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 at [para 24](#).

<sup>40</sup> *Bodner*, *supra* at [para 30](#).

<sup>41</sup> *Ibid.* at [para 31](#).

<sup>42</sup> *Ibid.* at [paras 23-27](#), [32](#) and [66](#).

<sup>43</sup> *Ibid.* at [paras 65-68](#) (New Brunswick), [95-97](#) (Ontario), [122-126](#) (Alberta), [157-165](#) (Quebec).

whether the government's public response has explained the factual foundation of its reasons and whether, on the face of the evidence, it was rational for the government to rely on those facts.<sup>44</sup> This may, as addressed below, involve the review of some exceptional collateral evidence. In *Bodner*, this Court applied the Stage 2 analysis by reviewing the governments' public reasons, the Commissions' reports and some exceptional collateral evidence.<sup>45</sup> Again, review of Cabinet confidences was not required.

23. At Stage 3, the court continues to "play a limited role".<sup>46</sup> It weighs the whole of the Commission process and the government's public response to determine whether the government engaged with the Commission process in a meaningful way and gave a rational answer to its recommendations.<sup>47</sup> In *Bodner*, this Court applied the Stage 3 analysis by reviewing governments' public reasons, the Commissions' reports and some exceptional collateral evidence.<sup>48</sup> Once again, no Cabinet confidences were required.

24. All three of the *Bodner* stages are concerned with the rationality of the government's public response, and whether the government meaningfully engaged in and respected the Commission process. None of the stages require the court to breach Cabinet confidentiality to look behind a government's public response and review Cabinet's deliberative process.

***ii. The review of Cabinet confidences inappropriately expands the rationality standard***

25. The effect of the decisions below is to elevate the standard of review from simple rationality to one with little to no deference. These decisions erred by upholding a process in which the parties undertake a searching review for evidence of bad faith decision-making, despite a government response that is rational on its face. The result will be a license for fishing expeditions whenever a recommendation is not fully accepted. Even the less-deferential standard of reasonableness does not require such a review.<sup>49</sup>

---

<sup>44</sup> *Ibid.* at [paras 33-37](#).

<sup>45</sup> *Ibid.* at [paras 69-82](#) (New Brunswick), [98-99](#) (Ontario) and [127-129](#) (Alberta).

<sup>46</sup> *Ibid.* at [paras 100, 130](#).

<sup>47</sup> *Ibid.* at [para 38](#).

<sup>48</sup> *Ibid.* at [paras 83-84](#) (New Brunswick), [100-102](#) (Ontario) and [130-131](#) (Alberta).

<sup>49</sup> *Irving Pulp and Paper Ltd v CEP, Local 30*, 2013 SCC 34 at [para 54](#).

26. The rule of law requires that decision-makers are held accountable for their exercises of power. This prevents decisions from being immunized from review. The purpose of the evidentiary record is to ensure that the reviewing court is able to carry out its analysis on the applicable standard of review.<sup>50</sup> If the reasons and record do not enable the reviewing court to meaningfully assess the impugned decision on the applicable standard of review, the decision may be quashed.<sup>51</sup>

27. Generally, the evidentiary record that was before the decision-maker constitutes the entire evidentiary record on judicial review.<sup>52</sup> However, withholding Cabinet confidences from a reviewing court does not immunize the decision from review.<sup>53</sup> The Federal Court of Appeal has held that in many cases the court can conduct a meaningful review of a Cabinet decision even if the entire record of Cabinet deliberations before the decision-maker is withheld.<sup>54</sup>

*iii. Exceptional collateral evidence is admissible in limited circumstances*

28. Exceptionally, collateral affidavit evidence may be admissible in a judicial review. In the judicial compensation context, the government may be permitted to expand on the factual foundation contained in its response by providing details in affidavits. Affidavits containing evidence of government's commitment to the process, such as information relating to the study of the impact of the Commission's recommendations, may also be admissible.<sup>55</sup>

29. This does not mean that the government may advance affidavit evidence containing reasons other than those set out in its public response<sup>56</sup> or otherwise bolster its response with justifications that were not previously mentioned.<sup>57</sup> The government's public reasons must be complete, but need not set out and refer to every single particular upon which the stated reasons are based.<sup>58</sup>

---

<sup>50</sup> *TWN, supra* at paras [51](#), [73-79](#) and [166](#).

<sup>51</sup> *Ibid.* at [para 79](#).

<sup>52</sup> *Ibid.* at [paras 86-87](#).

<sup>53</sup> *Ibid.* at [para 52](#).

<sup>54</sup> *Ibid.* at [paras 52](#), [56](#) and [166](#).

<sup>55</sup> *Bodner, supra* at [para 36](#).

<sup>56</sup> *Ibid.* at [paras 27](#) and [64](#).

<sup>57</sup> *Ibid.* at [paras 27](#), [62](#) and [64](#).

<sup>58</sup> *Ibid.* at [paras 27](#), [36](#), [63](#) and [103](#).

30. Whether exceptional collateral evidence is *admissible* is a separate question from whether a party is *required to produce* exceptional collateral evidence.<sup>59</sup> In the instant appeals, the Respondents argue that the Cabinet submissions are relevant (i.e., admissible) and therefore must be produced. These are separate concepts that must be considered independently.<sup>60</sup>

31. As set out in detail above, the principles underlying judicial review generally – and governments’ public responses to Commissions particularly – do not support a requirement to produce Cabinet confidences, no matter the form of the public response. The focus in such judicial reviews must remain firmly on the rationality of the government’s public reasons.

#### **PART IV - SUBMISSIONS ON COSTS**

32. The AGC is not seeking costs and no costs should be ordered against him.

#### **PART V - NATURE OF ORDER SOUGHT**

33. The AGC makes no submissions respecting the proper disposition of the appeals.

#### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated at Toronto this 22<sup>nd</sup> day of October, 2019.

---

MICHAEL H MORRIS

---

DAYNA ANDERSON

Of Counsel for the Attorney General of  
Canada

---

<sup>59</sup> *TWN*, *supra* at [para 119](#).

<sup>60</sup> *Ibid*.

## PART VI - TABLE OF AUTHORITIES

Tab	Cases	Paragraph cited
1.	<i>Babcock v Canada (Attorney General)</i> , <a href="#">2002 SCC 57</a> , [2002] 3 SCR 3	10, 12
2.	<i>Canada (House of Commons) v Vaid</i> , <a href="#">2005 SCC 30</a> , [2005] 1 SCR 667	19
3.	<i>Conférence des juges de paix magistrats du Québec v Quebec (Attorney General)</i> , <a href="#">2016 SCC 39</a> , [2016] 2 SCR 116	8, 9, 13
4.	<i>Dunsmuir v New Brunswick</i> , <a href="#">2008 SCC 9</a> , [2008] 1 SCR 190	6, 13, 18
5.	<i>Ell v Alberta</i> , <a href="#">2003 SCC 35</a> , [2003] 1 SCR 857	9
6.	<i>Irving Pulp and Paper Ltd v CEP, Local 30</i> , <a href="#">2013 SCC 34</a> , [2013] 2 SCR 458	25
7.	<i>Mackin v New Brunswick (Minister of Justice)</i> , <a href="#">2002 SCC 13</a> , [2002] 1 SCR 405	9
8.	<i>New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)</i> , <a href="#">[1993] 1 SCR 319</a>	19
9.	<i>NLNU v Newfoundland and Labrador (Treasury Board)</i> , <a href="#">2011 SCC 62</a> , [2011] 3 SCR 708	13
10.	<i>Provincial Court Judges Assn (Manitoba) v Manitoba (Minister of Justice)</i> , <a href="#">[1997] 3 SCR 3</a>	7-9, 13, 19
11.	<i>Provincial Court Judges' Assn (New Brunswick) v New Brunswick (Minister of Justice)</i> , <a href="#">2005 SCC 44</a> , [2005] 2 SCR 286	8, 9, 13-17, 19-25, 28, 29
12.	<i>Tsleil-Waututh Nation v Canada (Attorney General)</i> , <a href="#">2017 FCA 128</a> <i>Tsleil-Waututh Nation v Canada (Procureur Général)</i> , <a href="#">2017 CAF 128</a>	6, 13, 18, 26-28, 30
<b>SECONDARY SOURCES</b>		
13.	T.G. Cooper, <i>Crown Privilege</i> (Ontario: Canada Law Book, 1990), pp 2-3, 47-50.	10, 11

Tab	Cases	Paragraph cited
14.	Paul Daly, <i>A Theory of Deference in Administrative Law</i> (Cambridge: Cambridge University Press, 2012) [ <i>Theory of Deference</i> ] at page 1	18
15.	Peter W. Hogg, <i>Constitutional Law of Canada</i> , 5th ed. looseleaf (Toronto: Carswell, 2007-) at 9.3.	10
16.	Nicholas D’Ombraïn, “Cabinet Secrecy” (Canadian Public Administration), Vol 47, No 3 (Fall 2004) pp 335-336, 340 and 352	11
<b>STATUTES, AUTHORITIES AND LEGISLATION</b>		
17.	<a href="#"><u>Constitution Act, 1867. 30 &amp; 31 Victoria, c. 3</u></a> (U.K.), <a href="#"><u>s 100</u></a>	16
18.	<a href="#"><u>Judges Act, RSC 1985, c J-1, s 26(7).</u></a>	16
19.	<a href="#"><u>Bill C-44, An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures, 1<sup>st</sup> Sess., 42<sup>nd</sup> Parl.</u></a> (assented to June 22, 2017) at <a href="#"><u>Division 10</u></a>	16

**APPENDIX “A” – STATUTES RELIED ON**

1. [Constitution Act, 1867. 30 & 31 Victoria, c. 3 \(U.K.\), s 100](#)
2. [Judges Act, RSC 1985, c J-1, s 26\(7\).](#)

*Constitution Act, 1867. 30 & 31 Victoria, c. 3 (U.K.), s 100*

<p>Salaries, etc., of Judges</p> <p><b>100.</b> The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.</p>	<p>Salaires, etc. des juges</p> <p><b>100.</b> Les salaires, allocations et pensions des juges des cours supérieures, de district et de comté (sauf les cours de vérification dans la Nouvelle-Écosse et le Nouveau-Brunswick) et des cours de l'Amirauté, lorsque les juges de ces dernières sont alors salariés, seront fixés et payés par le parlement du Canada.</p>
--	--

*Judges Act, RSC 1985, c J-1, s 26(7).*

<p><b>Response to report</b></p> <p><b>26(7)</b> The Minister of Justice shall respond to a report of the Commission within four months after receiving it. Following that response, if applicable, he or she shall, within a reasonable period, cause to be prepared and introduced a bill to implement the response.</p>	<p><b>Suivi</b></p> <p><b>26(7)</b> Le ministre donne suite au rapport de la Commission au plus tard quatre mois après l'avoir reçu. S'il y a lieu, il fait par la suite, dans un délai raisonnable, établir et déposer un projet de loi qui met en oeuvre sa réponse au rapport.</p>
--	---

3. Bill C-44, *An Act to implement certain provisions of the budget tabled in Parliament on March 22, 2017 and other measures*, 1<sup>st</sup> Sess., 42<sup>nd</sup> Parl. (assented to June 22, 2017) at [Division 10](#)  
<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8874160>  
<https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=8874160&Language=F>