SCC File No.: 38381

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

APPELLANT
(Appellant)

AND:

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

RESPONDENT
(Respondent)

SCC File No.: 38459

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

AND BETWEEN:

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 INTERVENER THE ATTORNEY GENERAL OF ONTARIO

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

ATTORNEY GENERAL OF ONTARIO
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Sarah Kraicer
Andrea Bolieiro
Tel.: 416-894-5276
416-906-0738
Fax: 416-326-4015
Email: sarah.kraicer@ontario.ca
andrea.bolieiro@ontario.ca

Counsel for the
Attorney General of Ontario

JURISTES POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel: 613-702-5573
Fax: 613-702-5573
mvincelette@juristespower.ca
cetter@juristespower.ca

Agent for the
Attorney General of Ontario

ORIGINAL TO:

THE REGISTRAR OF THE SUPREME COURT OF CANADA
301 Wellington Street
Ottawa, ON K1A 0J1

Tel: 613-996-8666
Fax: 613-996-3063
Email: Registry-greffe@scc-csc-gc.ca

AND COPIES TO:

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

Edward A. Gores, Q.C.
Tel: 902-424-4024
Fax: 902-424-1730
Email:edward.gores@novascotia.ca

Counsel for the Appellants, Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia and for the Governor in Council (38459)

GOWLING WLG (CANADA) LLP
160 Elgin street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email:lynne.watt@gowlingwlg.com

Ottawa Agent for the Appellants, Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia, and the Governor in Council (38459)

GUDMUNDSETH MICKELSON LLP
2525 - 1075 West Georgia Street
Vancouver, BC, V6E 4H3

Stein K. Gudmundseth, Q.C.
Andrew D. Gay, Q.C.
Clayton J. Gallant
Tel.: (604) 685-6272
Fax: (604) 685-8434
Email: skg@lawgm.com

Counsel for the Appellant, Attorney General of British Columbia (38381)

GOWLING WLG (CANADA) LLP
160 Elgin street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: 613- 786-0171
Fax: 613- 788-3587
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for the Appellant, Attorney General of British Columbia (38381)

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

Susan Dawes
Kristen Worbanski
Tel: 204-926-1501
Fax: 204-956-0625
Email: sdawes@myersfirm.com

Counsel for the Respondents, Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges Association (38459)

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel.: 613-695-8855 Ext. 102
Fax.: 613-695-8580
Email: mfmajor@supremeadvocacy.com

Ottawa Agent for the Respondents, Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges Association (38459)

ARVAY FINLAY LLP
1512-808 Nelson Street
Vancouver, BC, V6Z 2H2

Joseph J. Arvay Q.C.
Alison Latimer
Tel.: 604-696-9828
Fax: 888-575-3281
Email: jarvay@arvayfinlay.ca

Counsel for the Respondent, Provincial Court Judges' Association of British Columbia (38381)

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON, K2P 0R3

Marie-France Major
Tel.: 613-695-8855 Ext: 102
Fax: 613-695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Respondent, Provincial Court Judges' Association of British Columbia (38381)

NORTON ROSE FULBRIGHT CANADA LLP
1 Place Ville Marie, Suite 2500
Montreal, QC, H3B 1R1

Pierre Bienvenu
Azim Hussain
Andres C. Garin
Jean-Simon Schoenholz
Tel.: 514-847-4747
Fax: 514-286-5474
Email:
pierre.bienvenu@nortonrosefulbright.com

Counsel for the Intervener, Canadian Superior Courts Judges Association (38459 & 38381)

NORTON ROSE FULBRIGHT CANADA LLP
45 O'Connor Street, Suite 1500
Ottawa, ON, K1P 1A4

Matthew J. Halpin
Tel.: 613-780-8654
Fax: 613-230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Ottawa Agent for the Intervener, Canadian Superior Courts Judges Association (38459 & 38381)

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
3400 - 22 Adelaide Street West
Toronto, ON, M5H 4E3
Guy J. Pratte
Nadia Effendi
Ewa Krajewska
Neil Abraham
Tel.: 416-367-6000
Fax: 416-367-6749
Email: gpratte@blgcanada.com

Counsel for the Intervener, Canadian Bar Association (38459 & 38381)

BORDEN LADNER GERVAIS LLP
1300-100 Queen Street
Ottawa, ON, K1P 1J9

Karen Perron
Tel.: 613-369-4795
Fax: 613-230-8842
Email: kperron@blg.com

Ottawa Agent for the Intervener, Canadian Bar Association (38459 & 38381)

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1039
Toronto, ON, M5G 2C2

Steven Barrett
Tel.: (416) 977-6070
Fax: (416) 591-7333
Email: sbarrett@goldblattpartners.com

Counsel for the Intervener, Canadian Association of Provincial Court Judges (38459 & 38381)

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Intervener, Canadian Association of Provincial Court Judges (38459 & 38381)

ATTORNEY GENERAL OF ALBERTA
9th Floor Peace Hills Trust Tower
10011-109 Street
Edmonton, AB, T5J 3S8

Doreen Mueller
Tel.: 780-427-1295
Fax: 780-427-1230
Email: doreen.mueller@gov.ab.ca

Counsel for the Intervener, the Attorney General of Alberta (38459 & 38381)

Michael J. Sobkin

331 Somerset Street West
Ottawa, ON, K2P 0J8

Tel.: 613-282-1712
Fax: 613-288-2896
Email: msobkin@sympatico.ca

Ottawa Agent for the Intervener, the Attorney General of Alberta (38459 & 38381)

ATTORNEY GENERAL OF CANADA
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON, M5H 1T1

Michael H. Morris
Dayna S. Anderson
Tel.: 647-256-7539
Fax: 416-952-4518
Email: michael.morris@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada (38459 & 38381)

DEPARTMENT OF JUSTICE
50 O'Connor Street, Suite 500
Ottawa, ON, K1A 0H8

Christopher Rupar
Tel.: 613-670-6290
Fax: 613-954-1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for the Intervener, Attorney General of Canada (38459 & 38381)

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON, M5K 1E6

Adam Goldenberg
Tel.: (416) 601-8200
Fax: (416) 868-0673
Email: agoldenberg@mccarthy.ca

Counsel for the Intervener, Canadian Taxpayers Federation (38459 & 38381)

JURISTES POWER LAW
130 Albert Street, Suite 1103
Ottawa, ON, K1P 5G4

Darius Bossé
Tel.: (613) 702-5566
Fax: (613) 702-5566
Email: DBosse@juristespower.ca

Ottawa Agent for the Intervener, Canadian Taxpayers Federation (38459 & 38381)

ATTORNEY GENERAL OF QUEBEC
1200 Route de l'Église, 3rd Floor
Québec, QC, G1V 4M1

Stéphane Rochette
Robert Desroches
Brigitte Bussières
Tel.: 418-643-6552 Ext: 20734
Fax: 418-643-9749
Email:
stephane.rochette@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Quebec (38459 & 38381)

NOËL & ASSOCIÉS
111 Champlain Street
Gatineau, QC, J8X 3R1

Sylvie Labbé
Tel.: 819-771-7393
Fax: 819-771-5397
Email: s.labbe@noelassocies.com

Agent for the Intervener, Attorney General of Quebec (38459 & 38381)

ATTORNEY GENERAL FOR SASKATCHEWAN
Legal Services Division
900 - 1874 Scarth Street
Regina, SK, S4P 4B3

Thomson Irvine, Q.C.
Kyle McCreary
Tel.: 306-787-6307
Fax: 306-787-9111
Email: tom.irvine@gov.sk.ca

Counsel for the Intervener, Attorney General for Saskatchewan (38459 & 38381)

GOWLING WLG (CANADA) LLP
160 Elgin street, Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: 613-786-8695
Fax: 613-788-3509
Email:lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General for Saskatchewan (38459 & 38381)

PALIARE, ROLAND, ROSENBERG, ROTHSTEIN, LLP
155 Wellington Street West, 35th Floor
Toronto, ON, M5V 3H1

Andrew K. Lokan
Tel.: 416-646-4324
Fax: 416-646-4301
Email: andrew.lokan@paliareroland.com

Counsel for the Intervener, Canadian Civil Liberties Association (38459 & 38381)

DENTONS CANADA LLP
99 Bank Street, Suite 1420
Ottawa, ON, K1P 1H4

David R. Elliott
Tel.: 613-783-9699
Fax: 613-783-9690
Email: david.elliott@dentons.com

Ottawa Agent for the Intervener, Canadian Civil Liberties Association (38459 & 38381)

TABLE OF CONTENTS

PART I. OVERVIEW OF POSITION AND STATEMENT OF FACTS OF THE ATTORNEY GENERAL OF ONTARIO....1

A. Overview of Position....1

B. Statement of Facts....2

PART II. ONTARIO'S POSITION ON THE QUESTIONS IN ISSUE....2

PART III. STATEMENT OF ARGUMENT....2

A. The Existing Judicial Remuneration Process Strikes An Appropriate Balance....2

B. Routine Disclosure and Scrutiny of Cabinet Documents in the Judicial Review Stage Would Disrupt the Balance....4

C. Ontario Courts Have Not Required Routine Disclosure of Background Cabinet Documents 6

PART IV. SUBMISSIONS ON COSTS....10

PART V. ORDER SOUGHT....10

PART VI. TABLE OF AUTHORITIES....11

PART I. OVERVIEW OF POSITION AND STATEMENT OF FACTS OF THE ATTORNEY GENERAL OF ONTARIO

A. Overview of Position

1. The routine scrutiny of Cabinet documents by courts conducting judicial reviews of government reasons for rejecting remuneration commission recommendations would be an unwarranted and unprecedented change to the judicial remuneration process. It would sweep aside the careful balance this Court has struck between the executive and judicial branches in determining judicial compensation.
2. This Court has established a carefully calibrated multi-stage process for setting judicial compensation that safeguards the constitutional principle of judicial independence while respecting the government's constitutional responsibility for management of financial affairs including the payment of judicial salaries from the public purse.[1]
3. An independent commission, the government and the courts all lead different stages of this process, and there are important checks and balances at each stage to ensure that government cannot use remuneration as a form of economic manipulation of the judiciary, and that the judiciary cannot determine its own compensation from public funds.
4. The final stage of the process is a special form of limited and deferential judicial review of the rationality of the written reasons that a government must publicly give for departing from an independent commission recommendation. Requiring routine disclosure of Cabinet documents to judicial associations for inclusion in the evidentiary record would transform this special form of judicial review into a broad and searching inquiry with an unprecedented focus on the internal Cabinet decision-making process rather than on Cabinet's decision and reasons.
5. There is no need to alter the existing judicial remuneration process by expanding the scope of the judicial review stage in this manner. Courts should review the government's reasons on their own merits without delving into the internal Cabinet processes that led to them being issued.

---

[1] *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI,* [1997] 3 SCR 3 [*PEI Reference*]; *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, [2005] 2 SCR 286 [*Bodner*].

6. The significant expansion of the scope and impact of the judicial review stage of the judicial remuneration process that would result from the routine compelled disclosure of Cabinet documents would disrupt the careful balance between judges, governments and the reviewing court that the current process achieves and would result in the judicial remuneration process becoming increasingly litigious and politicized.
7. No Ontario judicial associations have requested disclosure of background Cabinet documents when seeking judicial review. Ontario's experience demonstrates that the existing process affords judicially reviewing courts the ability to effectively review the rationality and legitimacy of publicly articulated government reasons, and whether the purposes of the commission process have been respected, without the need to access background Cabinet documents.

B. Statement of Facts

8. The Attorney General of Ontario ("Ontario") takes no position on the facts.

PART II. ONTARIO'S POSITION ON THE QUESTIONS IN ISSUE

9. Ontario's intervention addresses the following issue:
    - Relevance: The judicial review stage of the constitutionally-mandated judicial remuneration process should not routinely require disclosure and scrutiny of Cabinet documents underlying Cabinet consideration of commission recommendations and government responses to those recommendations.

PART III. STATEMENT OF ARGUMENT

A. The Existing Judicial Remuneration Process Strikes An Appropriate Balance

10. This Court's judicial independence jurisprudence has consistently struck a careful balance between safeguarding the independence of judges and courts from executive and legislative interference, and respecting government's constitutional responsibility for the administration of justice and the management of public finances.[2]
11. In its most recent decision in *Quebec Justices of the Peace*, this Court demonstrated this balanced approach in interpreting the requirements of the remuneration commission process in the context of court reform initiatives that created a new judicial office. This Court held

[2] *Bodner*, *supra* note 1 at para 30.

that prior review of the initial salary level by a commission was not required, and that retroactive review was sufficient. In doing so, this Court acknowledged that the requirements of judicial financial security need to be balanced against the legislatures' constitutional role in the administration of justice, and the need for governments to have flexibility to implement court reforms:

> In this context, requiring that the initial remuneration of the new office be subject to a retroactive review by a committee within a reasonable time is a sufficient safeguard for the financial security guarantee. It ensures that remuneration will be reviewed in a timely enough fashion to correct any deficiency if it is found to be below the constitutional minimum. At the same time, it enables legislatures to full their constitutional role effectively.
>
> Such a requirement provides governments with flexibility, while not imposing unwarranted barriers to the effective implementation of court reform initiatives. [3]

12. This Court has carefully delineated the multi-stage and multi-forum process that is constitutionally required for determining judicial compensation in its foundational decisions *PEI Reference* and *Bodner*. Each stage contains internal checks and limits to ensure that each stage has a balanced and appropriate role in setting judicial salaries.

13. The first stage is recourse to an independent, objective and effective commission that makes recommendations to government. By introducing an independent commission into the process, "[c]ourts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes."[4] The counterbalancing check on the role of the commission is that its recommendations need not be binding (unless a province chooses to make it so) because the democratically-responsible branches of government are ultimately responsible for determining public expenditures: "[T]he Constitution does not require that commission reports be binding, as decisions about the allocation of public resources belong to legislatures and to the executive".[5]

14. The second stage is a public response by the government if the government chooses to depart from the commission's recommendations. The response must include clear, complete, responsive and legitimate reasons that meet the "standard of rationality". The public nature of

---

[3] *Conférence des juges de paix magistrats du Québec v Quebec (Attorney General)*, 2016 SCC 39 at paras 50-51, [2016] 2 SCR 116.

[4] *Bodner*, *supra* note 1 at para 11.

[5] *PEI Reference*, *supra* note 1 at para 176; *Bodner*, *supra* note 1 at para 20.

these reasons, and the requirement that the content of the reasons meets the standard of rationality, are counterbalancing factors that safeguard against economic manipulation by the government.[6]

15. The third stage is a "limited form of judicial review"[7] by the superior courts. Both the *PEI Reference* and *Bodner* emphasized that because this special form of judicial review deals with the setting of judicial compensation, the court must have a "limited role"[8]. A reviewing court is not to "engage in a searching analysis of ends and means" but instead should conduct a "deferential review" as to whether the government's response and reasons are justified on a standard of "simple rationality".[9] These limits on the court's role were explicitly imposed by this Court in acknowledgement of "both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs".[10] Without these limits, the superior court's review could inappropriately encroach on the government's "exclusive jurisdiction to allocate funds from the public purse and set judicial salaries".[11]

B. Routine Disclosure and Scrutiny of Cabinet Documents in the Judicial Review Stage Would Disrupt the Balance

16. The routine disclosure of Cabinet documents to judicial associations that seek judicial review of government compensation responses would transform this limited and deferential judicial review into a broad and searching inquiry with an unprecedented focus on the internal Cabinet process rather than its decision.

17. The Attorney General of Ontario agrees with the Appellants' submissions that routine access to Cabinet documents would greatly expand the evidentiary record at the judicial review stage with irrelevant evidence of Cabinet's unstated "motives" and would divert the focus away from the actual decision and reasons.[12]

---

[6] *PEI Reference*, *supra* note 1 at paras 180-183; *Bodner*, *supra* note 1 at paras 22-27.
[7] *PEI Reference*, *supra* note 1 at para 183; *Bodner*, *supra* note 1 at para 29.
[8] *PEI Reference*, *supra* note 1 at para 183; *Bodner*, *supra* note 1 at para 100.
[9] *PEI Reference*, *supra* note 1 at para 183; *Bodner*, *supra* note 1 at paras 29-30, 35, 38, 40, 42.
[10] *Bodner*, *supra* note 1 at para 30.
[11] *Bodner*, *supra* note 1 at para 42.
[12] Factum of the Attorney General of British Columbia dated June 21, 2019, SCC File No. 38391 at paras 46-48; Factum of the Attorney General of Nova Scotia dated June 24, 2019, SCC File No. 38485 at paras 29, 70.

18. Contrary to this Court's admonition that litigation between the government and judiciary over judicial remuneration should be rare, allowing routine access to Cabinet documents would increase the likelihood of litigation and broaden the scope of potential disputes between the judiciary and the government.[13] It would divert the focus of the judicial review away from assessing the rationality of what **is** stated in the government's public reasons to conducting an investigation of internal Cabinet deliberations in order to uncover what may **not** be stated in those reasons – a much wider, and potentially unlimited, scope of inquiry.
19. A further consequence of expanding the scope of the judicial review would be to give a more powerful role to the superior courts in the third stage of the determination of judicial compensation. Because courts would be reviewing Cabinet's background information and internal deliberative processes, the judicial branch would have a significantly increased supervisory role over the executive branch in matters of judicial compensation than it does in any other sphere of judicial review.
20. This Court has held that the appropriate remedy on this special form of judicial review is to allow the government to revise its response to correct the shortcomings identified by the judicially reviewing court, consistent with the overall deference to be accorded to government in judicial compensation matters. Broadening the judicial review to allow an inquiry into Cabinet documents and processes would reduce this remedial deference: wider judicial review remedies will give the courts more control over how governments ultimately can set judicial compensation; and will impose greater constraints on government decision-making processes when governments attempt to revise responses in response to judicial reviews.
21. Expanding the scope of judicial review to include routine scrutiny of Cabinet documents would disrupt the balanced remuneration process by tipping the scales toward the judicially reviewing court and away from the government in the setting of judicial compensation. Such a development in the law would not be consistent with the government's ultimate constitutional responsibility for public expenditures and would risk undermining public confidence in how judicial remuneration is determined.

---

[13] *PEI Reference*, *supra* note 1 at para 7; *Bodner*, *supra* note 1 at paras 12, 43, 133.

C. Ontario Courts Have Not Required Routine Disclosure of Background Cabinet Documents

22. While there have been occasions in which Ontario judicial associations have sought judicial review of the government's responses to commissions, confidential Cabinet documents have never been sought to be disclosed or included in an evidentiary record in any of these judicial reviews. Ontario courts have effectively reviewed the rationality and legitimacy of the publicly articulated government reasons to ensure that they are consistent with the constitutional principle of judicial independence without the need to access background Cabinet documents relating to those reasons.

23. Since 2002, there have only been four judicial reviews of the government's responses to judicial remuneration commissions, starting with *Ontario Judges' Assn v. Ontario,*[14] one of the appeals heard by this Court in *Bodner.* Applying the framework set out by this Court in *PEI Reference* and *Bodner*, Ontario courts have upheld the government's response fully in three of these cases and found the response partially to fail to meet the constitutional standard of rationality in one.

24. In *Bodner*, this Court agreed with the conclusions of the Ontario Court of Appeal and Divisional Court in *Ontario Judges' Assn v. Ontario*, that the government's publicly articulated reasons for rejecting the commission's recommendations to improve the judges' pension plan met the constitutional standard of rationality.[15] The government's response was a letter that set out seven reasons for rejecting the pension recommendations, including that the binding 28 percent increase in judges' salaries awarded by the commission, which was appropriate, automatically increased the value of the pension.[16] Both Ontario courts described the government's reasons as "clear, logical, relevant and consistent with the Government's position taken before the Commission".[17] This Court examined the reasons and held that they were not "political or discriminatory"[18] but instead "reveal[ed] a consideration of the judicial office and an intention to deal with it appropriately".[19]

---

[14] *Ontario Judges' Assn v Ontario (Management Board)* (2003), 67 OR (3d) 641, 233 DLR (4th) 711 (CA), aff'd in *Bodner* [*Ontario Judges' Assn*].
[15] *Bodner*, *supra* note 1 at paras 95-102.
[16] *Bodner*, *supra* note 1 at para 95.
[17] *Ontario Judges' Assn*, *supra* note 14 at para 85.
[18] *Bodner*, *supra* note 1 at para 96.
[19] *Bodner*, *supra* note 1 at para 97.

25. This Court also held that Ontario's retainer of the actuarial firm Pricewaterhouse Cooper (PwC) to provide the government with advice on the cost of the commission's recommendations was appropriate, and that in responding to a judicial review challenging Ontario's response, Ontario was permitted to file evidence from PwC to justify its response.[20] As noted by the Court of Appeal, "it was entirely appropriate for the Government to place before the reviewing court both the fact of its engagement of PwC and the role PwC's advice played in its decision-making process".[21] The fact that the PwC advice informed the government response, but was not specifically mentioned in the response, did not make the government's process "secretive, ex post facto and unauthorized" as argued by the judicial association.[22] The focus of the judicial review was on the reasons given, not on the advice received that may have informed the reasons:

> The PwC retainer is not advanced as a key reason for rejecting the Commission's pension recommendations. The reasons which are relevant are those contained within the Letter itself. These reasons met the "rationality" test.[23]

26. There is no parallel between the actuarial evidence Ontario adduced in the judicial review in *Bodner* and the Cabinet submission evidence at issue in these appeals. As noted by this Court in *Bodner*, the accounting evidence did not "add a new position" and was not "advanced as a key reason for rejecting the Commission's pension recommendations".[24] As this Court recognized, the actuarial evidence simply demonstrated the factual foundation underlying the government's reasons – how calculations were made and what data were available.[25]

27. This Court recognized in *Bodner* that the government's public reasons would become unwieldy and inaccessible if they were required to set out all of the underlying factual economic data. Instead, therefore, this Court expressly permitted filing supplementary detailed evidence if the factual foundation were challenged.[26] There is no analogous reason to permit, let alone require, Cabinet documents relating to judicial remuneration decisions to be disclosed to judicial associations in order to become part of the judicial review record. Further, requiring disclosure of Cabinet submissions in this context raises significant confidentiality,

---

[20] *Bodner*, *supra* note 1 at paras 101, 103.
[21] *Ontario Judges' Assn*, *supra* note 14 at paras 42-43, 60.
[22] *Ontario Judges' Assn*, *supra* note 14 at para 32.
[23] *Bodner*, *supra* note 1 at para 103.
[24] *Bodner*, *supra* note 1 at para 103.
[25] *Bodner*, *supra* note 1 at para 64.
[26] *Bodner*, *supra* note 1 at paras 63-64.

politicization and public interest immunity concerns that do not arise where the government chooses to adduce actuarial evidence to demonstrate a factual foundation for its reasons.

28. In the second Ontario judicial review decision, *Ontario Deputy Judges Assn. v. Ontario* (2009),[27] the Divisional Court upheld the government's reasons for rejecting the commission's recommendations to increase the per diem rate for deputy judges.[28] The Divisional Court concluded that the government had "provided a detailed response to the Commission's report and gave legitimate reasons when it departed from the recommendations".[29] In particular, the court accepted that there was a basis in the commission's own report to support the government's chosen rate as being "fair and reasonable", and that the government was entitled to weigh factors which the commission chose not to consider.[30]

29. The court also held that the government's reasons were "detailed and supported by factual material", including economic and labour relations data.[31] Similar to *Bodner*, the Divisional Court held that the government was entitled to rely on new factual information about economic conditions in the application for judicial review that arose after the commission hearing, provided that information was relied on by the government in making its response (but not where the facts arose after the response): "[The government] can provide more detailed information with regard to the factual foundation in a court proceeding to review its response".[32]

30. In the third Ontario judicial review decision, *Association of Justices of the Peace of Ontario v. Ontario,*[33] the Divisional Court upheld the government's reasons for rejecting the majority recommendation of the commission as to what Industrial Aggregate Index (IAI) rate should be used to index salaries for Justices of the Peace. The court accepted the government's two stated reasons: 1) the majority did not answer the question put to it (because the commission

---

[27] *Ontario Deputy Judges Assn v Ontario* (2009), 98 OR (3d) 89, 251 OAC 241 (Div Ct) [*Ontario Deputy Judges Assn*].
[28] *Ontario Deputy Judges Assn*, *supra* note 27 at para 23.
[29] *Ontario Deputy Judges Assn*, *supra* note 27 at para 65.
[30] *Ontario Deputy Judges Assn*, *supra* note 27 at paras 40-42.
[31] *Ontario Deputy Judges Assn*, *supra* note 27 at paras 53, 56-59.
[32] *Ontario Deputy Judges Assn*, *supra* note 27 at para 60.
[33] *Association of Justices of the Peace of Ontario v Ontario*, 2014 ONSC 6130 (Div Ct), leave to appeal to CA dismissed May 11, 2015 [*Association of Justices of the Peace of Ontario (2014)*].

recommended a compromise between two IAI rates, rather than selecting one or the other actual IAI rates) and 2) the majority did not consider certain objective criteria that it was required to consider under the applicable Regulation. In reaching its conclusion, the Divisional Court carefully reviewed and assessed all of the government's detailed reasons. While the Court found that one aspect of the response was mistaken, the response nevertheless "explain[ed] in detail why the government disagreed with the majority's weighing of some of the criteria in…the regulation and its failure to deal with others"[34], and set out "detailed and legitimate" reasons why it preferred the recommendations of the minority.[35]

31. In the fourth Ontario judicial review decision, *Association of Justices of the Peace of Ontario v. Ontario,*[36] the Divisional Court granted the judicial review in part: it upheld the government's reasons for rejecting the salary recommendations, but found that the reasons for rejecting the benefit recommendations did not meet the standard of rationality. In that case, the commission recommended an overall 16.4% salary increase and that certain changes to benefit plans be deferred to the next commission. On the salary issue, the court found that Ontario "explained in detail why it disagreed with the Majority's conclusion"[37] and that the "detailed evidence"[38] the government provided supported the legitimacy of its reasons.

32. However, the court held that the part of Ontario's response dealing with the benefit changes "does not withstand scrutiny, even on a deferential rationality standard of review"[39] and did not respect the purpose of the commission process. The government reasons "[had] not engaged with the Commission's conclusion that the issue of benefits was too complex to deal with in a timely manner".[40] In addition, the government had not adequately explained in its reasons why the issue should not be deferred to the next commission, and why it chose to make benefit changes for justices of the peace and not provincial judges or case management

---

[34] *Association of Justices of the Peace of Ontario (2014), supra* note 33 at para 17.
[35] *Association of Justices of the Peace of Ontario (2014), supra* note 33 at paras 21, 23.
[36] *Association of Justices of the Peace of Ontario/L'Association des juges de paix de l'Ontario v Ontario*, 2016 ONSC 6001, 134 OR (3d) 584 (Div Ct), leave to appeal to CA dismissed March 20, 2017 [*Association of Justices of the Peace of Ontario (2016)*].
[37] *Association of Justices of the Peace of Ontario (2016), supra* note 36 at para 44.
[38] *Association of Justices of the Peace of Ontario (2016), supra* note 36 at para 48.
[39] *Association of Justices of the Peace of Ontario (2016), supra* note 36 at para 60.
[40] *Association of Justices of the Peace of Ontario (2016), supra* note 36 at paras 61, 63.

masters.[41] The court concluded that the government's response did not provide rational reasons that justified implementing the benefit changes before first receiving the input of a commission.[42]

33. These Ontario decisions and their divided outcomes illustrate that judicial review of compensation decisions and reasons without recourse to background Cabinet documents is effective and consistent with the deferential, depoliticized and balanced judicial remuneration process established by this Court in *Bodner*. By carefully scrutinizing the government's publicly articulated reasons, the factual foundation underlying those reasons, and government's participation in the commission process, Ontario courts have avoided engaging in an inquiry into internal Cabinet decision-making, while at the same time identifying instances where the government's reasons have not meaningfully engaged with the commission process. If this Court were to uphold routine disclosure of Cabinet documents in this litigation, it would significantly and adversely change the scope and nature of judicial reviews of Ontario judicial compensation decisions without providing any corresponding benefit to judicial independence or the depoliticization of the setting of judicial remuneration.

PART IV. SUBMISSIONS ON COSTS

34. Ontario does not seek costs in relation to its intervention in these appeals.

PART V. ORDER SOUGHT

35. The Attorney General of Ontario takes no position with respect to the Orders sought by the parties in these appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2019.

Sarah Kraicer

Andrea Bolieiro

[41] *Association of Justices of the Peace of Ontario (2016)*, *supra* note 36 at para 64.
[42] *Association of Justices of the Peace of Ontario (2016)*, *supra* note 36 at paras 65-68.

PART VI. TABLE OF AUTHORITIES

JURISPRUDENCE	**Paragraph(s) Referred to in Factum**
Association of Justices of the Peace of Ontario v Ontario, 2014 ONSC 6130 (Div Ct)	30
Association of Justices of the Peace of Ontario/L'Association des juges de paix de l'Ontario v Ontario, 2016 ONSC 6001, 134 OR (3d) 584 (Div Ct)	31, 32
Conférence des juges de paix magistrats du Québec v Quebec (Attorney General), 2016 SCC 39, [2016] 2 SCR 116	11
Ontario Deputy Judges Assn v Ontario (2009), 98 OR (3d) 89, 251 OAC 241 (Div Ct)	28, 29
Ontario Judges' Assn v Ontario (Management Board) (2003), 67 OR (3d) 641, 233 DLR (4th) 711 (CA)	23, 24, 25
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, [2005] 2 SCR 286	2, 10, 13, 14, 15, 18, 24, 25, 26, 27
Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI, [1997] 3 SCR 3	2, 13, 14, 15, 18