

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURTS OF APPEAL OF NOVA SCOTIA AND BRITISH
COLUMBIA)**

BETWEEN:

**ATTORNEY GENERAL OF BRITISH COLUMBIA
APPELLANT (Appellant)**

- and -

**PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA
RESPONDENT (Respondent)**

AND 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)**

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PART I: OVERVIEW

1. The disclosure of cabinet documents is the core of this appeal. The Attorney General for Saskatchewan (“Saskatchewan”) submits that there are two aspects which must be considered:
 - (a) The principle of the separation of powers, as it applies to Cabinet confidences;
 - (b) The interpretation of the test set out in *Carey v. Ontario*¹ in the context of judicial compensation commissions.

2. This case gives this Court the opportunity to provide guidance on how the *Carey* factors should be weighed in determining whether a public interest requires the disclosure of the documents over which an immunity is claimed. In particular, the *Carey* test should be reviewed for its application to disputes between different branches of the government, in light of the principles governing the separation of powers. *Carey* is not simply a test of relevancy of documents.

3. Saskatchewan respectfully submits that when the dispute in question is between two branches of government, the executive and the judicial, there is an extremely high need for deference on the part of the judiciary in considering whether to order the disclosure of Cabinet documents which relate directly to that dispute. The constitutional principles of Cabinet solidarity and Cabinet confidence have heightened roles to play in the analysis.

PART II: POSITION ON APPELLANTS’ QUESTIONS

4. As an intervener, Saskatchewan does not take a specific position on the outcome in these appeals. Rather, Saskatchewan wishes to make submissions on the issue of public interest privilege and the separation of powers, when the litigation dispute is directly between the judicial and executive branches. Saskatchewan’s submissions will comment on the principles which relate to Questions 2 and 3 posed by the Attorney General of Nova Scotia, and Question (b) posed by the Attorney General of British Columbia.²

¹ *Carey v. Ontario*, [1986] 2 SCR 637 [“*Carey*”].

² Factum of the Attorney General of Nova Scotia, para. 27; Factum of the Attorney General of British Columbia, para. 44.

PART III: ARGUMENT

A. The Separation of Powers in Canadian Constitutional Law

5. The Nova Scotia Court of Appeal began its decision by highlighting that this case is based on the separation of powers.³ The Attorney General for Saskatchewan agrees with that starting point, but also submits that a more nuanced analysis is required than was put forth by the Nova Scotia Court of Appeal. The Nova Scotia Court of Appeal appears to have taken the view that the separation of powers only applies to support the position of the judiciary in this litigation. Saskatchewan respectfully disagrees.

6. The separation of powers does not just protect the judiciary. The separation of powers is based on the concept that all three branches of government have guaranteed constitutional functions. When litigation concerns a dispute between two branches of government, it is necessary to analyse the separation of powers from the perspective of both branches of government, not simply from the perspective of the judiciary.

7. This Court has repeatedly held that the separation of powers is a fundamental organising principle of the Constitution of Canada.⁴ While the separation of powers is not as strict as under constitutions such as that of the United States,⁵ this Court has relied on the separation of powers as a guiding principle for the interpretation and application of the Constitution. The Court's reliance on the separation of powers is not restricted solely to the case of judicial compensation.

³ Nova Scotia Court of Appeal, Reasons for Judgment, para. 1; Nova Scotia Appellants' Record, Vol. I, p. 121.

⁴ *Fraser v Public Service Staff Relations Board*, [1985] 2 SCR 455, paras. 39-40; *The Queen v Beauregard*, [1986] 2 SCR 56, para. 18; *New Brunswick Broadcasting Co. v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319, pp. 354-357, 359, 371, 379, 387-389; *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 SCR 3 ["*Reference re Remuneration of Judges*"], paras. 125-126, 130, 138-139, 111, 118, 125, 130-131, 138-139, 141, 239; *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405 ["*Mackin*"], paras. 35, 37, 39, 69; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 SCR 3, paras. 26-31; *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, [2018] 2 SCR 765, paras. 2, 32, 35, 52, 83-84, 88, 102-103, 115-116, 118-119, 139-141, 148, 153, 160-164, 169-171.

⁵ *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 15.

8. Saskatchewan submits that one of the core principles of the separation of powers is that it protects a guaranteed zone of autonomy for all three branches, particularly in the decision-making and deliberative process for each branch.⁶ Each branch of government needs to have a guaranteed sphere of deliberation, linked to the particular function which that branch plays in our constitutional system. This need for a guarantee of deliberative autonomy is especially significant when the dispute is between two branches of government. Intrusion by one branch into the deliberative process of another branch is not consistent with the separation of powers.

B. The Separation of Powers and the Executive Branch

9. In the Westminster cabinet system, Cabinet solidarity and Cabinet confidentiality are core principles for the operation of the executive branch. Cabinet solidarity is based on the principle that all members of the Cabinet will support the Cabinet's decision, once it is made.⁷ As a corollary to the principle, it is essential that all members of Cabinet have an opportunity for full and free discussion of the issues at the Cabinet table. Each Cabinet minister must be able to speak their mind freely, but once the Cabinet decision is made, all ministers must support that decision. Once a decision is made, regardless of the initial discussions, it is the decision of Cabinet as a whole. Unlike the judicial process, in the Westminster Cabinet system there are no dissents.

10. The operation of Cabinet solidarity in turn requires Cabinet confidentiality. For Cabinet solidarity to be effective, ministers need to know that the position they took in Cabinet discussions will not become public. If there were a disagreement in Cabinet that becomes public, that could undermine Cabinet solidarity.⁸ Lack of confidentiality in Cabinet could force members of cabinet to individually position their arguments within the cabinet room to avoid

⁶ For the judicial branch, see *The Queen v Beaugard*, [1986] 2 SCR 56, para. 21 and *Reference re Remuneration of Judges*, paras. 110-130. For the legislative branch, see *New Brunswick Broadcasting Co.*, pp. 379, 387-389 and *Mikisew Cree First Nation*, paras. 2, 32, 34-35, 84, 102-103, 117-118, 164, 169.

⁷ Andrew Heard, *Canadian Constitutional Conventions* (2nd ed.) (Don Mills: Oxford University Press, 2014), at 106-107.

⁸ Heard, at 106, 109-110.

political criticism when those discussions become public, which in turn politicises the Cabinet discussion in a very public way.

11. The twin principles of Cabinet solidarity and Cabinet confidentiality themselves have constitutional status. They are rooted in the Preamble to the *Constitution Act, 1867*, which provides that Canada is to have "... a Constitution similar in Principle to that of the United Kingdom".⁹ Cabinet government, like judicial independence, is part of our constitutional inheritance from the United Kingdom.

12. While *Carey* is the leading decision from this Court on access to Cabinet documents in the course of litigation, *Carey* does not expressly address the separation of powers in its analysis. That is likely because the dispute in *Carey* was not between two different branches of government, but between the executive branch and a private citizen. In that situation, where the court is acting as an arbiter between the government and a citizen, the separation of powers issue is perhaps not so relevant.

13. The courts cannot intrude into the core function of the executive, any more than the executive can intrude into the core function of the judiciary. Both are protected by the separation of powers. Where the dispute is squarely between two branches of government, as in these cases, the separation of powers issue comes very much to the fore. The *Carey* analysis needs to take that into account, with the need for a more deferential analysis.

C. Control of Finances is a Core Executive Function

14. In both *New Brunswick Broadcasting Co.* and *Mikisew Cree First Nation*, this Court recognised that the legislative function is at the heart of the legislative branch. That core function includes steps prior to the introduction of legislation, as held in *Mikisew Cree First Nation*.¹⁰ The separation of powers therefore precludes judicial oversight of the legislative process of the legislative branch.

⁹ *Constitution Act, 1867*, Preamble.

¹⁰ *Mikisew Cree First Nation*, paras. 2, 32, 34-35, 102-103, 160-161, 164.

15. Saskatchewan submits that the same analysis applies to the internal decision-making process of the executive branch in relation to financial and budgetary decisions, particularly those which have the potential to attract considerable public attention and raise high-level issues of public policy and the constitutional relations between the branches of government.

16. Executive control over the public finances is set out in the Constitution itself. The *Constitution Act, 1867* provides that a bill for the spending of public money can only be introduced in the House of Commons if it is accompanied by the royal recommendation in favour of the expenditure. Without the royal recommendation, the House cannot even vote on a spending bill.¹¹ Like Cabinet solidarity and Cabinet confidence, this requirement is also part of the principle that Canada is to have a Constitution "... similar in Principle to that of the United Kingdom."¹²

17. This Court has repeatedly recognised that budget policy and fiscal expenditures are the purview of the executive branch. Lamer CJC made this point expressly in *Reference re Remuneration of Judges*, the foundational case for judicial compensation commissions:

... decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. The expenditure of public funds, as I said above, is an inherently political matter.¹³

¹¹ *Constitution Act, 1867*, s. 54.

¹² Section 54 has its origins in a standing order of the British House of Commons, which dates back to 1713. To ensure executive control over the public finances, the House of Commons passed an order requiring the royal recommendation for any spending measure. That principle continues to be part of the Standing Orders of the British House of Commons: Gordon et al. (eds.), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 20th ed. (London: Butterworths, 1983) at 762. In Canada, that principle was given constitutional status in s. 54 of the *Constitution Act, 1867*.

¹³ *Reference re Remuneration of Judges*, para. 176. See also discussion at paras. 142-146.

18. More recently, this Court has recognised that expenditure decisions are solely a matter for the executive in relation to court-appointed counsel. The courts can order the appointment of counsel in appropriate cases for unrepresented accuseds, because that is an essential part of the judicial role: to ensure a fair trial.¹⁴ However, the courts cannot take the next step and set the rates of remuneration for court-appointed counsel: that is the exclusive purview of the executive branch.¹⁵

19. Saskatchewan submits that the control over public finances is one of the core functions of the executive branch of government. The internal decision-making process of Cabinet on a current financial issue is therefore protected from judicial oversight by the separation of powers, in the same way as the legislative process is not subject to judicial oversight. Cabinet documents which record the internal decision-making process, as well as internal deliberations and advice received, prior to the executive's final public decision on a question of financial expenditures, should be treated with considerable deference by the courts. This concern is particularly high in the case of litigation involving an inter-branch dispute, as in this case.

20. The decision whether to accept the recommendation of a judicial compensation commission on judicial salary goes directly to the constitutional responsibility of the executive branch. That point strongly suggests that the courts should exercise considerable deference under the *Carey* test before compelling disclosure of Cabinet documents relating to this particular type of spending decision.

21. This submission does not mean that the final decision of Cabinet is immune from judicial review. Like any other statutory decision, particularly one with a significant constitutional component, the final decision of the executive on the question of judicial compensation is subject to judicial review. The Government is fully accountable for its decision.¹⁶ However, the Cabinet documents which record the Cabinet's internal decision-making process should not be subject to

¹⁴ *Ontario v Criminal Lawyers' Association of Ontario*, paras. 46, 47

¹⁵ *Ontario v Criminal Lawyers' Association of Ontario*, paras. 60, 64, 69-70, 72-73, 77, 79, 82-83.

¹⁶ *Reference re Remuneration of Judges*, paras. 180-183; *Mackin*, para. 57; *Bodner*, para. 28-41.

judicial oversight. It is the decision and supporting reasons which are crucial,¹⁷ not the internal deliberations of the executive branch.

D. Depoliticization of the Judicial Compensation Process

22. Saskatchewan submits that this analysis is particularly relevant to the goal of depoliticizing the judicial compensation process, which this Court has consistently stated is one of the key goals of the commission process.¹⁸ This foundational principle actually counts against court-ordered disclosure of Cabinet documents leading up to a Cabinet decision whether to accept the recommendations of a judicial compensation commission.

23. Saskatchewan submits that requiring Cabinet to disclose its internal documents on a sensitive issue such as this one could well have the opposite effect than this Court has sought. Far from depoliticizing the judicial compensation process, requiring the executive to disclose its internal deliberations and advice received on the commission process could well *increase* the political attention which the Cabinet decision may attract, thereby politicizing the salary issue.

24. A decision on judicial compensation easily could attract critical comment from the public. This concern is particularly significant if the Cabinet documents disclose that Cabinet was divided on whether to accept a commission recommendation. That could well attract political commentary in the legislature and in the public, requiring the government to defend not just its decision, but also the process by which it reached the decision. Such a possibility counts against ordering disclosure of Cabinet documents on this matter.

E. Public Interest Immunity

25. The *Carey* test requires consideration for the separation of powers and confirms that adjudicating a claim of public interest immunity involves consideration of multiple factors. These include but are not necessarily limited to the level of the decision maker, the nature of the

¹⁷ *Reference re Remuneration of Judges*, paras. 180-181.

¹⁸ *Reference re Remuneration of Judges*, paras. 131, 140-142, 146-147, 166, 239; *Mackin*, paras. 54, 60, 69, 121, 123; *Bodner*, paras. 10, 25, 31, 43-44, 56, 67, 97, 124, 131, 133.

policy at issue, the content of the documents, the timing of the request, allegation of government misconduct, and the administration of justice.¹⁹

26. The purpose of public interest immunity is to ensure that the proper functioning of government is balanced against the administration of justice. The administration of justice must be weighed against the public interest in protecting certain information. As outlined above, there is a public interest in protecting Cabinet information.

27. In this Court's jurisprudence on third party records, parties seeking production must provide an evidentiary foundation to support their request.²⁰ While it is accepted that Government must provide an evidentiary foundation to ground an assertion of public interest immunity with respect to Cabinet information, parties seeking production of such information should similarly be expected to provide an evidentiary foundation to assist in consideration of the *Carey* factors.

28. Caution should be used in disclosing documents that advise or emanate from Cabinet to ensure that the separation of powers is respected. In all circumstances, only documents that are truly necessary to ensure the proper administration of justice should be ordered disclosed.

29. Finally, aside from Cabinet information, the doctrine of public interest immunity is used to determine parties' access to other sensitive information such as investigative records.²¹ As such, any test for determining a claim of public interest immunity must be sensitive to the context and content of information, in addition to its relevance to litigation.

F. Closing

30. In closing, the Attorney General notes that the points in issue in these cases are considerably different from the dispute in *Carey*. There, the issue was a single contract, between

¹⁹ *Carey*, paras. 79-80.

²⁰ *R. v. O'Connor*, [1995] 4 SCR 411; *R. v. Gubbins*, 2018 SCC 44, [2018] 3 SCR 35.

²¹ *Regina (City) Police Commissioners v. Saskatchewan Government Insurance*, 2007 SKCA 106 (CanLII), 286 DLR (4th) 755 (SK CA), at paras. 16-24.

a private party and the government, which this Court characterised as "... a low level policy that has long become of little public interest...". It was not a current matter, dating back thirteen years, so there was little likelihood of "keen public interest in the subject matter." As well, the Ontario government had raised an objection to disclosure based on the general class of Cabinet documents, rather than raising an objection to disclosure of a specific type of document or documents relating to a particular transition.²²


31. Here, the conflict is between two branches of government. It concerns judicial independence, which protects the core constitutional function of the judicial branch, but it also concerns the expenditure of public funds, a core constitutional function of the executive. It is a current dispute, raising an issue of current public policy, namely the executive's fiscal and budgetary obligations. The objections from the two Attorneys General are not general class-based objections, but are based on the specific nature of the dispute and the type of documents.

32. Saskatchewan submits that these differences are significant. When the point in dispute in litigation is the relationship between the two branches of government, there is a greatly heightened need for judicial deference to the effect which a disclosure order could have on the principles of Cabinet solidarity and Cabinet confidentiality. It is also important to consider the effect a disclosure order could have on the goal of depoliticizing the process for judicial compensation. All of these factors need to be considered in the analysis under *Carey*.

PART IV: COSTS

33. Saskatchewan submits it is neither eligible for costs, nor liable for costs, except as set out in the Order of Moldaver J. dated September 12, 2019.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, October 22nd, 2019, at Regina, Saskatchewan.


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²² *Carey*, paras. 79-82.

PART VII: TABLE OF AUTHORITIES & STATUTES

CASES	PARAGRAPH OF FACTUM
<i>Carey v. Ontario</i>, [1986] 2 SCR 637	1, 2, 12, 20, 25, 30, 32
<i>Fraser v Public Service Staff Relations Board</i>, [1985] 2 SCR 455	7
<i>Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick</i>, [2002] 1 S.C.R. 405, 2002 SCC 13	7, 21, 22
<i>Mikisew Cree First Nation v. Canada (Governor General in Council)</i>, 2018 SCC 40, [2018] 2 SCR 765	7, 8, 14
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