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

AND:

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

Respondent

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL FOR 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 ALBERTA
(Pursuant to Rule 42 of the *Rules Supreme Court of Canada)*

Attorney General of Alberta
Counsel
Doreen Mueller and Josh de Groot
Alberta Justice and Solicitor General
9th floor, Peace Hills Trust Tower
10011 – 109 Street
Edmonton, AB T5J 3S8
Telephone: (780) 427-1295
Fax: (780) 427-1230
Email: doreen.mueller@gov.ab.ca

Agent
Michael Sobkin
Barrister and Solicitor
331 Somerset Street W.
Ottawa, ON K2P 0J7
Telephone : (613) 282-1712
Fax: (613) 288-2896
Email : msobkin@sympatico.ca

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

AND:

THE JUDGES OF THE PROVINCIAL COURT AND FAMILY COURT OF NOVA SCOTIA, as represented by the NOVA SCOTIA PROVINCIAL JUDGES ASSOCIATION

Respondents

AND:

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL FOR 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

Party: Attorney General of British Columbia

Counsel
Stein K. Gudmundseth, Q.C.
Andrew D. Gay, Q.C.
Clayton J. Gallant
Gudmundseth Mickelson LLP
2525 – 1075 West Georgia Street
Vancouver, BC V6E 4H3
Telephone: (604) 685-6272
Fax: (604) 685-8434
Email: skg@lawgm.com

Agent
Jeffrey W. Beedell
Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 783-8817
Fax: (613) 788-3500
Email: jeffrey.beedell@gowlingwlg.com

Party: Attorney General of Nova Scotia

Counsel
Edward A. Gores, Q.C.
Attorney General of Nova Scotia
Legal Services Division
1690 Hollis Street, 8th Floor
Halifax, NS B3J 2L6
Telephone: (902) 424-4024
Fax: (902) 424-1730
Email: edward.gores@novascotia.ca

Agent
D. Lynne Watt
Gowling WLG (Canada) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Party: Provincial Court Judges' Association of British Columbia

Counsel
Joseph J. Arvay, O.C., Q.C.
Alison Latimer
Arvay Finlay LLP
1512 – 808 Nelson Street
Box 12149 Nelson Square
Vancouver, BC V6Z 2H2
Telephone: (604) 696-9828
Fax: (888) 575-3281
Email: jarvay@arvayfinlay.ca

Agent
Marie-France Major
Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, Ontario K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Party: The Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges' Association

Counsel
Susan Dawes
Kristen Worbanski
Myers LLP
724 – 240 Graham Avenue
Winnipeg, MB R3C 0J7
Telephone: (204) 926-1501
Fax: (204) 956-0625
Email: sdawes@myersfirm.com

Agent
Marie-France Major
Supreme Advocacy LLP
340 Gilmour Street, Suite 100
Ottawa, Ontario K2P 0R3
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Party: Canadian Superior Courts Judges Association

Counsel
Pierre Bienvenu
Azim Hussain
Andres C. Garin
Jean-Simon Schoenholz
Norton Rose Fulbright Canada LLP
1, Place Ville Marie, Bureau 2500
Montreal, QC H3B 1R1
Telephone: (514) 847-4747
Fax: (514) 286-5474
Email: pierre.bienvenu@nortonrosefulbright.com

Agent
Matthew J. Halpen
Norton Rose Fulbright Canada LLP
45 O'Connor Street, Suite 1500
Ottawa, ON K1P 1A4
Telephone: (613) 780-8654
Fax: (613) 230-5459
Email: matthew.halpin@nortonrosefulbright.com

Party: Canadian Bar Association

Counsel
Guy J. Pratte
Nadia Effendi
Ewa Krajewska
Neil Abraham
Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
3400 – 22 Adelaide Street West
Toronto, ON M5H 4E3
Telephone: (416) 367-6000
Fax: (416) 367-6749
Email: gpratte@blgcanada.com

Agent
Karen Perron
Borden Ladner Gervais LLP
1300 – 100 Queen Street
Ottawa, ON K1P 1J9
Telephone: (613) 369-4795
Fax: (613) 230-8842
Email: kperron@blg.com

Party: Canadian Association of Provincial Court Judges

Counsel
Steven Barrett
Colleen Bauman
Goldblatt Partners LLP
30 Metcalfe Street, Suite 500
Ottawa, ON K1P 5L4
Telephone: (613) 235-5327
Fax: (613) 235-3041
Email: sbarrett@goldblattpartners.com

Party: Attorney General of Canada

Counsel
Michael H. Morris
Dayna S. Anderson
Attorney General of Canada
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1
Telephone: (647) 256-7539
Fax: (416) 952-4518
Email: Michael.morris@justice.gc.ca

Agent
Christopher Rupar
Department of Justice
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Telephone: (613) 670-6290
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca

Party: Attorney General of Ontario

Counsel
Sarah Kraicer
Andrea Bolieiro
Attorney General of Ontario
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Telephone: (416) 894-5276
Fax: (416) 326-4015
Email: sarah.kraicer@ontario.ca

Agent
Maxine Vincelette
Juristes Power
130 rue Albert, bureau 1103
Ottawa, ON K1P 5G4
Telephone: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@juristespower.ca

Party: Canadian Taxpayers Federation

Counsel
Adam Goldenberg
Amanda D. Iarusso
McCarthy Tetrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6
Telephone: (416) 601-8200
Fax: (416) 868-0673
Email: agoldenberg@mccarthy.ca

Agent
Darius Bossé
Power Law
130 Albert Street, Suite 1103
Ottawa, ON K1P 5G4
Telephone: (613) 702-5566
Fax: (613) 702-5566
Email: dbosse@juristespower.ca

Party: Attorney General of Quebec

Counsel
Stéphane Rochette
Robert Desroches
Brigitte Bussières
Procureure générale du Québec
1200, Route de l'Église
3e étage
Québec, QC G1V 4M1
Telephone: (418) 643-6552, ext. 20734
Fax: (418) 643-9749
Email: stephane.rochette@justice.gouv.gc.ca

Agent
Sylvie Labbé
Noël & Associés
111 rue Champlain
Gatineau, QC J8X 3R1
Telephone: (819) 771-7393
Fax: (819) 771-5397
Email: s.labbe@noelassocies.com

Party: Attorney General for Saskatchewan

Counsel
Thomson Irvine, QC
Kyle McCreary
Attorney General for Saskatchewan
Legal Services Division
900 – 1874 Scarth Street
Regina, SK S4P 4B3
Telephone: (306) 787-6307
Fax: (306) 787-9111
Email: tom.irvine@gov.sk.ca

Agent
D. Lynne Wat
Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Party: Canadian Civil Liberties Association

Counsel
Andrea K. Lokan
Paliare, Roland, Rosenberg, Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1
Telephone: (416) 646-4324
Fax: (416) 646-4301
Email: Andrew.lokan@paliareroland.com

Agent
David R. Elliott
Dentons Canada LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4
Telephone: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliott@dentons.com

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PART I - OVERVIEW OF ARGUMENT

1. This Court's decisions in *Bodner* and in *Carey* recognize the deference due under the Constitution to the executive branch, particularly when it is exercising its political decision-making role. Courts are reluctant to review or interfere with the executive decision making process, or require it to disclose confidences, in these circumstances.

2. The courts below in these appeals have not sufficiently recognized the deference owed to the role of the executive when it is acting in the political sphere regarding the allocation of public resources and the intended separation of that role from the judicial compensation process. In this context, submissions to Cabinet for the purpose of formulating a response to recommendations of a judicial compensation commission should have no role in the limited form of judicial review contemplated in *Bodner*. Such submissions should also generally remain confidential in these circumstances because the public interest in promoting fulsome debate and optimal decision making by government through the maintenance of Cabinet confidences would outweigh the public interest in disclosure in civil litigation when that balancing is done as contemplated by *Carey*.

PART II - QUESTIONS IN ISSUE

3. The issue on these appeals concerns whether a submission to Cabinet for the purpose of assisting it in formulating a response to recommendations made by a judicial compensation commission should be disclosed. Is a Cabinet submission part of the evidentiary record on the limited form judicial review authorized by this Court in *Bodner*? If so, how does the reviewing court assess a claim for public interest immunity in respect of the Cabinet submission?

4. The Attorney General of Alberta (AGAB) will address the following questions in this factum:

a. What documents comprise the evidentiary record on the limited form judicial review under *Bodner*?

b. Giving appropriate weight to the importance of Cabinet confidentiality, should courts order disclosure of submissions made for Cabinet deliberations in this context where they are of current significance and concern the allocation of public resources?

PART III - STATEMENT OF ARGUMENT

A. Record on Limited Form Judicial Review under Bodner

5. These appeals concern the content of the record on the limited form judicial review of a government's response to judicial compensation commission recommendations. The AGAB submits that the content of the record must be determined by reference to the three-stage analysis in *Bodner* and should be limited to the commission's report, the government's response including any factual foundation, and evidence of the public process between the government and the commission.

6. This Court has consistently recognized that the issue of judicial compensation requires a balancing of two important constitutional principles: the responsibility of the executive or the legislature to allocate public resources and the constitutional requirement for judicial independence, specifically the financial security of the judiciary.[1] This Court struck this balance by: a) interposing a judicial compensation commission between the judiciary and the other branches of government[2] and b) allowing only "a limited form of judicial review by the superior courts" of the government's response to the recommendations of a judicial compensation commission.[3]

7. Due to the unique nature of this limited form of judicial review, there is no meaningful comparison between the record admissible in the context of judicial review of a government's response to a commission's recommendations and either discovery in a civil action or the record on a traditional judicial review application. Reliance on the legal tests for the scope of document production in those proceedings would inappropriately expand the scope of the court's review and encroach on the responsibility of the government to allocate public resources.

8. In each type of proceeding, the scope of the evidentiary record is determined by the purpose of the proceeding. In a civil action, the court makes determinations of facts on all of the evidence before it in order to determine liability and damages. In order to facilitate this "search for truth",

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[1] *Reference re Remuneration of Judges of the Provincial Court (PEI)*, [1997] 3 SCR 3 ["***PEI Reference***"], at para 147; *Provincial Court Judges' Assn. of New Brunswick v New Brunswick (Minister of Justice)* 2005 SCC 44 ["***Bodner***"], at para 22-23

[2] *PEI Reference*, at para 166

[3] *PEI Reference*, at para 183; *Bodner*, at para 29

this Court has held that the test for disclosure in a civil action is relevance.[4] In *Glegg*, this Court found: "In the context of an examination on discovery or a disclosure of evidence that takes place while a case is being readied for trial, the concept of relevance is interpreted broadly."[5]

9. In a civil action, relevance is determined "in relation to the allegations set out in the pleadings" and facilitates disclosure of evidence between adversarial parties to enable the litigants to clarify the strength of their claim and to allow a court to make the required findings of facts in a fair and efficient manner.[6] The test applied for document production in civil actions; namely a "search for truth" by reference to pleadings drafted in an adversarial context, is inappropriate in the context of the limited form judicial review contemplated by *Bodner*. The goal under *Bodner* is a depoliticized judicial review to avoid confrontation between the government and the judiciary.[7]

10. The scope of the evidentiary record before a court on a traditional judicial review application has always been more limited than in a civil action. Again, this is due to the purpose of the proceeding. On a traditional judicial review, the purpose is to review a tribunal's decision for reasonableness or correctness. As such, the admissible evidence is the record that was before the decision-maker.

11. "There is no right to discovery in an application for judicial review."[8] In *Milner Power*, Slatter JA stated that "a judicial review application [does not] provide for any examination for discovery. […] There is generally no ability to supplement the return on judicial review by an examination of the tribunal on issues relating to how the decision was reached, or what material was relied on."[9]

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[4] *Imperial Oil v Jacques*, 2014 SCC 66 at paras 30-31; *Glegg v Smith & Nephew Inc.*, 2005 SCC 31 ["***Glegg***"], at para 23
[5] *Glegg*, at para 23
[6] *Glegg*, at para 22
[7] *Bodner*, at para 3
[8] *Sosiak v Canada (Attorney General)*, 2003 FCA 205 at para 26; see also *Waverley (Village) v Nova Scotia (Acting Minister of Municipal Affairs)*, [1994] NSJ No 84 [NSCA]
[9] *Milner Power Inc v Alberta (Energy & Utilities Board)*, 2007 ABCA 265 at para 42 (Reasons of Slatter JA, concurring in part)

12. As explained in S. Blake, *Administrative Law in Canada*:

> "Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal."[10]

13. However, the purpose of the court's review in the judicial compensation context is different again from the purpose of a traditional judicial review. The court is not reviewing the record before the decision-maker to assess the reasonableness or correctness of the decision that is the subject of the traditional judicial review application. Rather, the purpose of the limited form judicial review is to determine whether the government's response meets the standard of simple rationality as applied in the three-stage *Bodner* analysis. The limited form judicial review contemplated under *Bodner* takes into account the fact that the decision maker is the executive or the legislative branch. For that reason, as stated by this Court in *Bodner*:

> "This is a deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs."[11]

14. At the first stage of the *Bodner* analysis, the court asks whether the government has articulated a legitimate reason for departing from the commission's recommendations.[12] The focus at this stage is only on the government's reasons expressed in the response, viewed in the context of the commission's recommendations. As this Court stated in *Bodner*, at this stage "[r]easons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality."[13]

15. At the second stage, the court asks whether the reasons rely upon a reasonable factual foundation. While this Court noted that the government may expand on the factual foundation in the response by way of affidavit evidence,[14] it may not add to the reasons provided in the response. If the factual foundation and information referenced or incorporated into the response is insufficient

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[10] S. Blake, *Administrative Law in Canada*, (5th ed.), at pg. 204
[11] *Bodner*, at para 30
[12] *Bodner*, at para 31
[13] *Bodner*, at para 25
[14] *Bodner*, at para 36

or unreasonable on its face, the government has not satisfied the second stage test. If it is sufficient and reasonable on its face, the government has met the test. The scope of evidence is therefore defined by the response. Cabinet submissions and deliberations that may precede the government's response are not the response or properly considered part of its factual foundation.

16. At the third stage, the court asks "Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?"[15] The courts below appear to have ordered production of Cabinet submissions at this stage.[16]

17. In this deferential limited form judicial review, the process to be evaluated has to be the public interaction between the government and the commission. This Court explained the reasoning behind the third stage:

> "… [the court] must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations." [emphasis added][17]

18. The decision of the Manitoba Court of Appeal in *Judges of the Provincial Court (Man.) v Manitoba et al*[18] is illustrative of the proper scope of the "whole of the process" analysis. In that case, the Manitoba Court of Appeal summarized the third stage of the *Bodner* test as follows:

> "Although a court may find fault with certain aspects of the process followed, the court must weigh and assess the government's participation in the process and its response in totality, and determine whether the government has respected the purposes of the committee: preserving judicial independence and the depoliticization of the remuneration process. In other words, has the government engaged in a meaningful way with the process of the commission?" [emphasis added][19]

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[15] *Bodner*, at para 31
[16] *Nova Scotia (Attorney General) v Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83 ["***Nova Scotia***"], at paras. 34-36; *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General),* 2018 BCCA 394 ["***BC***"], at paras 34-35
[17] *Bodner*, at para 38
[18] *Judges of the Provincial Court (Man.) v Manitoba et al*, 2013 MBCA 74 ["***Manitoba Judges***"]
[19] *Manitoba Judges*, at para 54

19. In Manitoba, the Minister must table the commission's report in the legislative assembly, which then refers it to a Standing Committee of the Legislature. The Standing Committee then makes a report accepting or rejecting the commission's recommendations.[20] In *Manitoba Judges*, the Standing Committee heard a presentation from counsel for the judges. Immediately following this presentation, the Standing Committee passed a motion that had been prepared in advance, rejecting portions of the commission's recommendations. The Court of Appeal upheld the ruling of the superior court that this act showed "disregard for the process"[21] as it revealed that the Committee had decided in advance that it would not consider the submissions of counsel for the judges.

20. This evidence of the Standing Committee's motion was producible at the third stage because it spoke to how the government publicly engaged with the process of the commission. Of note, the internal deliberations of the Standing Committee in drafting its motion were not referenced nor necessary. Similarly, Cabinet submissions and deliberations that lead to the government response do not speak to how the government engaged with the process of the commission and are not needed for the limited form judicial review contemplated by *Bodner*. They are simply not relevant.

B. Misapplication of Carey Test

21. Even if Cabinet submissions could be considered relevant in the limited form judicial review under *Bodner*, should they be disclosed when public interest immunity is properly claimed and assessed under *Carey*? The AGAB considers it important that the executive branch have the ability to assert the public interest in maintaining Cabinet confidentiality in appropriate cases.

22. In *Carey* this Court observed that it was appropriate to shift the emphasis from the public interest in keeping certain information regarding government activities confidential to the interest in providing litigants all evidence that may be of assistance to the fair disposition of issues arising in litigation because of the expansion of state activities from the political sphere to increased government action in the commercial sphere.[22] However, while this Court decided that in those circumstances a blanket prohibition of disclosure of Cabinet documents as a class is no longer

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[20] *The Provincial Court Act*, CCSM c C275
[21] *Manitoba Judges*, at para 69
[22] *Carey v Ontario*, [1986] 2 S.C.R. 637 at pages 647, 648 [***"Carey"***]

appropriate, it recognized that revelation of Cabinet discussions and planning at the policy development stage, or other circumstances when there is keen public interest in the subject matter, might seriously inhibit the proper functioning of government.[23]

23. This Court continues to recognize that Cabinet confidentiality is essential to good government, stating:[24]

> "The British democratic tradition which informs the Canadian tradition has long affirmed the confidentiality of what is said in the Cabinet room, and documents and papers prepared for Cabinet discussions. The reasons are obvious. Those charged with the heavy responsibility of making government decisions must be free to discuss all aspect of the problems that come before them and to express all manner of views, without fear that what they read, say or act on will later be subject to public scrutiny: ... If Cabinet members' statements were subject to disclosure, Cabinet members might censor their words, consciously or unconsciously. They might shy away from stating the unpopular. … In addition to ensuring candour in Cabinet discussions, the Court in *Carey v Ontario* … recognized another important reason for protecting Cabinet documents, namely to avoid "creat[ing] or fan[ning] ill-informed or captious public or political criticism". Thus, ministers undertake by oath as Privy Councillors to maintain the secrecy of Cabinet deliberations and the House of Commons and the courts respect the confidentiality of Cabinet decision making." [emphasis added]

24. Protected Cabinet documents include records of what is said in the Cabinet room and necessarily extends to records of submissions made to Cabinet containing advice, options, and alternative positions. In *Crown Privilege*[25] the authors described the nature and purpose of submissions made to Cabinet:

> "… The reports and memoranda supplied to the Cabinet should contain opinions derived from every perspective from which the issue under discussion can be viewed. Likewise, the individual Cabinet members should conduct their deliberation from alternative approaches. The product of this exercise must, however, represent a single conclusion. The government cannot put forth a policy which contains a multitude of positions. The absolute necessity for Cabinet solidarity in policy formulation requires the compromise of certain of the positions taken in the memoranda and notes and by the individual Cabinet members. In this

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[23] *Carey*, page 659, 671
[24] *Babcock v Canada (Attorney General)*, 2002 SCC 57 at paras 15, 18
[25] Cooper, T.G., *Crown Privilege,* Canada Law Book, pp. 48, 49

> respect policy formulation operates after the fashion of the adversarial method of dispute resolution. Disclosure of tentative or 'devil's advocate' opinions taken by individual Cabinet members at the pre-decisional stages may present a distorted view – indeed the very opposite perspective – of the Cabinet's conclusion." [emphasis added]

25. In the interests of good government and to encourage full consideration of options and viewpoints, there will and should be cases where it is clear that Cabinet documents should be kept confidential. Indeed, in *Carey* this Court observed that if the claim that disclosure of certain cabinet documents will harm the public interest is properly made in a particular case (i.e. that the documents relate to or would affect matters such as national security or diplomatic relations), the court can agree that the documents be withheld even without inspection.[26]

26. The AGAB submits that contemporaneous consideration of the allocation of public resources by Cabinet is a subject within the exclusive domain of the executive that is similar in nature to national security or diplomatic relations. "Governments must be afforded wide latitude to determine the proper distribution of resources in society".[27] Within the specific context of judicial compensation, this Court has specifically acknowledged that remuneration from the public purse is an inherently political issue.[28]

27. Where immunity is claimed over Cabinet submissions on subjects within the political sphere, courts should be particularly cautious about authorizing disclosure. Inspection may not be necessary; however if there is any doubt, the court is required to inspect the documents and balance the competing interests. The inspection requirement is rooted in recognition of the value in maintaining cabinet confidentiality and deference to the executive:

> "[Inspection] permits the court to make certain that no disclosure is made that unnecessarily interferes with confidential government communications. Given the deference owing to the executive branch of government, Cabinet documents ought not to be disclosed without a

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[26] *Carey*, page 671. In *Province of New Brunswick v Enbridge New Brunswick Limited Partnership et al*, 2016 NBCA 17 at para 51 [***"Enbridge"***], the NBCA, held that valid public interest immunity claims are not limited to matters of national security or diplomatic relations, rather can be extended to other subjects if it is shown that disclosure would inhibit the proper functioning of Cabinet, or impede the development of government policy.
[27] *Eldridge v BC* [1997] 3 SCR 624 at para 85
[28] *PEI Reference* at paras 134, 146; *Mackin v NB* [2002] 1 SCR 405 at para 55

> preliminary inspection to balance the compelling interests of government confidentiality and the proper administration of justice."[29]

28. In *Carey*, this Court determined that if inspection is necessary, the court goes on to conduct a contextual analysis that weighs and balances various factors (subject, timeliness, importance to the legal proceeding) to assess the gravity of the risk to the public interest that would be caused by disclosure, and balances that risk against the risk to the administration of justice that would be caused by denial of the evidence to the litigants.[30]

29. Notwithstanding the test established in *Carey* to assist courts in assessing when the public interest in disclosure outweighs the public interest in maintaining confidentiality, it has been noted in academic commentary that lower courts appear to require only a demonstration of simple relevance before ordering the disclosure of Cabinet records.[31] Courts have similarly[32] acknowledged "a general trend" towards disclosure of Cabinet documents and a "dilution of public interest immunity". Courts appear to give insufficient weight to the public interest in maintaining Cabinet confidences, especially where the executive is acting in the political as opposed to commercial sphere.

30. The decisions of the courts below on these appeals exemplify an undue simplification of the contextual balancing of the public interests engaged that is required by *Carey*. The courts below ordered the disclosure of submissions to Cabinet, in one case without even inspection of documents, in the face of considerations that should militate against production:

a. The government decision making was at the highest level - by Cabinet.

b. The nature of the decision concerns the allocation of public resources - a subject matter that warrants utmost deference from the courts.[33] It is not government action in the commercial sphere.

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[29] *Carey,* page 674.
[30] Hogg, Monahan & Wright, *Liability of the Crown* (4th ed), page 114
[31] Campagnola, *Cabinet Immunity under the Common Law*, pages 66, 67
[32] *Enbridge,* at para 53; *Alberta (Provincial Treasurer) v Pocklington Foods Inc.,* 1993 ABCA 69 at para 42; Horsman & Morley, *Government Liability Law and Practice* (Canada Law Book, 2017) at page 12-34, 12-35
[33] Brown and Evans, *Judicial Review of Administrative Action in Canada*, at pages 2-30, 2-31

c. The Cabinet submissions and deliberations were contemporaneous with the legal proceeding and still politically sensitive. It could not be fairly said that the submissions were merely of historic interest.

d. The proceedings are civil, not criminal. This is a limited form of judicial review application designed to respect the constitutional roles of both the judicial and executive branches. The underlying proceeding did not involve an allegation of improper conduct by the executive branch towards a citizen.

31. These appeals provide an opportunity for this Court to affirm the importance of conducting the full contextual analysis required by *Carey*, including inspection of the documents if necessary prior to ordering disclosure. The analysis needs to give due weight to the value of facilitating fulsome debate and optimal decision making by the executive through the maintenance of cabinet confidentiality in appropriate cases. Disclosure of Cabinet documents should not become routine.

PART IV – SUBMISSIONS REGARDING COSTS

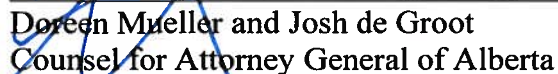
32. The AGAB does not seek costs, and asks that no award of costs be made against it.

PART V – ORDER SOUGHT

33. The AGAB does not seek any order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 22 day of October, 2019.

Alberta Justice and Solicitor General



Doreen Mueller and Josh de Groot
Counsel for Attorney General of Alberta

PART VI – TABLE OF AUTHORITIES

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