SCC FILE NO. 38381

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

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 OF SASKATCHEWAN, ATTORNEY GENERAL FOR ALBERTA, CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION, CANADIAN BAR ASSOCIATION, CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES, CANADIAN TAXPAYERS FEDERATION, and CANADIAN CIVIL LIBERTIES ASSOCIATION

INTERVENERS

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FACTUM OF THE INTERVENER,
CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

AND BETWEEN:

SCC FILE NO. 38459

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

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

RESPONDENT

- and -

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

INTERVENERS

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

Steven Barrett
Colleen Bauman
Tel: (613) 235-5327
Fax: (613) 235-3041
Email: sbarrett@goldblattpartners.com
cbauman@goldblattpartners.com

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

GUDMUNDSETH MICKELSON LLP
2525 – 1075 West Georgia Street
Vancouver, BC M6E 4H3

Stein K. Gudmundseth, Q.C.
Andrew E. 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) INC.
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

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

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

ARVAY FINLAY LLP
1512 – 808 Nelson Street
Vancouver, BC V6A 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 Counsel for the Respondent, Provincial Court Judges' Association of British Columbia (38381)

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 Governor in Council (38459)

GOWLING WLG (CANADA) INC.
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

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

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

MYERS LLP
724 – 240 Graham Avenue
Winnipeg, MB R3J 0J7

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

Counsel for the Respondent, 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.ca

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

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 (38381 & 38459)

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

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

Sarah Kraicer
Andrea Bolieiro
Tel: (416) 894-5276
Fax: (416) 326-4015
Email: sarah.kraicer@ontario.ca

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

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

Maxine Vincelette
Tel: (613) 702-5573
Fax: (613) 702-5573
Email: mvincelette@powerlaw.ca

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

ATTORNEY GENERAL OF QUEBEC
1200, Route de l'Église, 3e étage
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 (38381 & 38459)

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

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

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

ATTORNEY GENERAL OF 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 of Saskatchewan (38381 & 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 Counsel for the Intervener, Attorney General of Saskatchewan (38381 & 38459)

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, Attorney General of Alberta (38381 & 38459)

MICHAEL J. SOBKIN
331 Somerset Street West
Ottawa, ON K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

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

NORTON ROSE FULBRIGHT CANADA LLP
1, Place Ville-Marie, Bureau 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 (38381 & 38459)

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

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
3400 – 22 Adelaide Street West
Toronto, ON M5H 4E6

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 (38381 & 38459)

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

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

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

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

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

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 (38381 & 38459)

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

David R. Elliot
Tel: (613) 783-9699
Fax: (613) 783-9690
Email: david.elliot@dentons.com

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

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PARTS I and II – OVERVIEW AND POSITION ON QUESTIONS AT ISSUE

1. As the national body representing provincial and territorial court judges across Canada, with its primary responsibility being protecting and maintaining the principle of judicial independence, the Canadian Association of Provincial Court Judges (CAPCJ) intervenes in these appeals to make the following submissions:

a) The Appellants advance an overly restrictive approach to the scope of the record, which is based on their assertion of an extremely deferential approach to a court's role in judicially reviewing an executive or legislative determination to reject a Commission compensation recommendation. If accepted by this Court, the Appellants' approach would seriously undermine constitutional imperatives that decisions respecting judicial compensation be made independently, be based on objective and not politicized factors, and be effective and have a meaningful impact on judicial compensation. To accept the Appellants' position would be to return to the situation prior to the *PEI Reference*, where judicial compensation was highly politicized, marked by unilateral government edicts, and structured and incentivized to encourage inappropriate interactions between the judicial and executive branches of government - all outcomes which the *PEI Reference* was deliberately intended to avoid and overcome (see paras 2 to 10 below).

b) While this Court has, to this point, rejected the principle that Commission compensation decisions are binding, this Court should not foreclose the possibility of reconsidering, in an appropriate case, whether or not, in order to ensure the effectiveness of Commission decisions and prevent inappropriate politicization of and negotiations involving judicial compensation, it is now necessary that Commission decisions be binding (see paras 11 to 15 below).

c) In any event, whatever standard of review applies to judicial review of executive or legislative rejections of compensation Commission recommendations, the courts below were correct to direct that the Cabinet submissions be included as part of the record (see paras 16 to 23 below).

PART III – STATEMENT OF ARGUMENT

A. COMPELLING NEED FOR EFFECTIVE COMMISSION RECOMMENDATIONS

2. As forcefully expressed in the *PEI Reference* and *Bodner*, an independent, objective and effective Commission process is required, in order to depoliticize the determination of judicial compensation, and ensure public confidence in the impartiality of the judiciary. It is the effectiveness of Commission

decisions that is the key to providing an institutional sieve between the executive and judicial branches of government in establishing judicial compensation. Absent that necessary degree of effectiveness, Judges' remuneration would be determined in the political sphere, thereby enhancing the risk of both political manipulation and judicial entanglement in the politics and negotiation of remuneration.[1] In other words, the underlying rationale and intention was that Commissions, and not the executive or reviewing courts, would play the effective role in establishing judicial compensation.

3. However, in CAPCJ's submission, importing the high level of deference proposed by the Appellants into all aspects of the test for reviewing the constitutionality of rejection of Commission recommendations (including shielding disclosure of the evidentiary basis for rejecting recommendations) cannot help but seriously undermine the constitutional requirement for an independent, effective and objective Commission process. Under the Appellants' proposed approach, a highly deferential standard for assessing the legitimacy of the formal public reasons provided for rejection is combined with an opaque and impenetrable shield preserving the materials in possession of the government that are relevant to the decision, including considerations and factors upon which the rejection decision is based. Such a restrictive approach may well discourage litigation - by effectively giving the executive *carte blanche* to reject Commission recommendations - but this would inevitably be at the expense of the independence of the judiciary, the effectiveness of the Commission process, and public confidence in our system of justice. It would signal to the executive and legislative branches of government that, despite independent and objective Commission determinations as to appropriate compensation, they can nonetheless ignore them with virtual impunity (as they could prior to the *PEI Reference*). This in turn would only serve to intensify and politicize conflict between the executive and the judiciary.

4. The *Bodner* decision was intended to respond to and reduce the post-*PEI* increase in conflict between the judicial and executive/legislative branches of government. However, to the extent that the result has been to reduce the capacity of Commissions to effectively determine judicial compensation, and embolden the executive/legislative branches of government to reject Commission

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[1] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 [***PEI Reference***] at paras. 131, 133, 138, 147, 166-185; *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] 2 SCR 286 [***Bodner***] at paras. 3, 10, 11, 12, 16, 18.

recommendations based on politicized rather than objective considerations, it may be necessary and appropriate for this Court to revisit and recalibrate the balance in order to restore a more effective Commission process.

5. In order to appreciate the implications of accepting the Appellants' overly restrictive and deferential approach, it is important to return to the underlying reasons and principles that led to the constitutional requirement for effective Commissions. Prior to the *PEI Reference*, judicial compensation was generally determined by unilateral decisions of the executive or legislative branches of government, sometimes following direct or indirect negotiations with the judiciary. Where non-binding Judicial Compensation Commissions existed, their recommendations were routinely ignored. In this respect, the entire process by which judicial compensation was established was highly politicized and often the product of political expediency, undue interference, and economic manipulation. This is what led this Court to constitutionalize an effective Commission process in the *PEI Reference*.

6. One of this Court's overriding concerns in both the *PEI Reference* and *Bodner* was that the process of determining salaries be depoliticized, i.e., that salaries be determined on an objective basis so that no question of governmental manipulation or interference could arise in the public's mind. To give effect to this constitutional imperative, the Court found that setting judicial compensation must involve recourse to an independent Commission, which makes recommendations based on objective factors and criteria. Indeed, the purpose and role of the Commission is to present "an objective and fair set of recommendations dictated by the public interest" rather than political expediency (para 173).

7. Most importantly, however, as emphasized in the *PEI Reference*, "the commission must also be effective" (para. 174). CAPCJ recognizes that the Court determined that binding Commission decisions were not, on the record before it, constitutionally required in order to remedy the deficiencies of the pre-*PEI Reference* processes. Nonetheless, in CAPCJ's submission, the underlying constitutional principles established in *PEI* require that the test for rejecting Commission recommendations, both in terms of the standard of review and the scope of the evidentiary record, must facilitate an effective Commission process. This is reflected in this Court's explicit injunction in the *PEI Reference* and *Bodner* -- rooted in the dual requirements of objectivity and effectiveness -- that

Commission decisions must be "taken seriously", must have a "meaningful impact" on the determination of judicial compensation; and "cannot be lightly set aside "(paras. 133 and 178).

8. CAPCJ is very concerned that permitting the executive or legislative branches of government to easily and readily reject Commission recommendations, on the basis of reviewing courts adopting a hands-off minimal scrutiny of the reasons for rejection and particularly if reinforced by a record that is restricted to the formal public reasons for rejection, will inevitably have the effect of re-inserting judicial compensation into the political process. This would leave judicial compensation to be resolved on the basis of political expediency, rather than objective criteria. Moreover, to the extent that the judiciary would be justified in concluding that this would leave governments with the ability to routinely reject Commission decisions, there is every reason to be concerned that judges will be placed back in the same position as they were prior to the *PEI Reference*, perceiving themselves as being "subject to political interference through economic manipulation by the other branches of government", and "entangled in the politics of remuneration" (para. 131). Of course, this was the very outcome that this Court was seeking to redress in the *PEI Reference* and *Bodner*.

9. No doubt, the Appellants' approach to this appeal would reduce litigation between the judiciary and the executive/legislative branches of government. They propose a standard of review so deferential, and a record so restrictive, that any minimally plausible reasons proffered by government for not adopting Commission recommendations could pass constitutional muster. However, as submitted above, this approach entirely fails to give effect to the overriding constitutional requirements expressed in the decisions in the *PEI Reference* and *Bodner*, i.e., that an effective Commission process be established so as to depoliticize compensation determinations, ensure public confidence in the impartiality of the judiciary and preclude negotiation and conflict between government and the judiciary.

10. A second approach, which in CAPCJ's submission is more consistent with the purposes for having independent, objective and effective Commissions, would be for this Court to direct that the starting point for Commission recommendations is that they are presumed to be based on objective non-politicized factors. As such, the executive and legislative branches must treat them with considerable weight and respect. Under this approach, Commission recommendations could only be rejected where the government demonstrates legitimate reasons for doing so, with legitimacy understood to require countervailing and overriding public policy considerations, which objectively

justify a departure from the Commission determination. On this approach, mere disagreement with a Commission's findings or reasons would not constitute a legitimate basis for the executive to reject its recommendations, since it is the Commission's primary role to weigh the positions of the parties and to provide independent and objective recommendations in light of competing evidence and contentions. Equally important for the purposes of this appeal, under this approach, in seeking to reverse a Commission recommendation, government would, of necessity, be required to disclose to a reviewing court all of the materials in its possession relevant to its decision, including Cabinet submissions. While this test would not preclude litigation, it would appropriately and considerably lessen the instances of conflict, and the role of reviewing courts in resolving that conflict. It would also reduce the likelihood of judicial compensation being politicized, and diminish the risk of the judiciary becoming entangled in the politics and negotiation of their own remuneration.[2]

11. A third approach, not directly at issue in this appeal but raised in the companion Nova Scotia constitutional challenge currently proceeding in the courts in that province,[3] would be for this Court to apply the underlying rationale for independent, objective and effective Commissions requiring that Commission decisions be binding. While this Court found otherwise in the *PEI Reference* and in *Bodner*, in CAPCJ's submission, this Court should be open to finding, on the basis of an examination of the experience since *PEI* and *Bodner*, that Commission decisions are so routinely or readily rejected that it is now necessary, if they are to be effective, that they must be given binding effect. Of course, it would remain open for either the government or judges' associations to seek judicial review of Commission decisions in the normal way.

12. To be clear, CAPCJ fully recognizes and endorses the principle that it is a fundamental feature of our constitutional structure that judges are not employees of government, and cannot and should not engage in negotiations over their compensation.[4] As this Court recognized in the *PEI Reference* (para. 189), while judges may be disadvantaged in comparison with civil servants (who are able to lobby, negotiate and even withdraw their services), at the same time, the core characteristics of judicial independence "provide a range of protections to members of the judiciary to which civil servants are

[2] See the discussion in *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140 (CanLII), at para 91-93.
[3] See Nova Scotia Respondent's factum, para 16.
[4] On the constitutional inappropriateness and concerns with the judiciary engaging in constitutional negotiations, see *PEI Reference*, paras 186-189, and 246.

not constitutionally entitled" (*PEI*, para 143). Nonetheless, this constitutional protection did not extend to make Commission decisions binding, in large measure because of the *PEI* Court's view that "salaries must ultimately be fixed by one of the political organs of the Constitution, the executive or the legislature" (para. 146).

13. However, in CAPCJ's view, in considering what should now be required to ensure that Commission decisions are effective, this Court should take into account the constitutional principle, as established in *Saskatchewan Federation of Labour v. Saskatchewan,* 2015 SCC 4, that under s. 2(d) of the *Charter*, employees providing essential services - who for different reasons, but like judges, cannot engage in constitutionally protected withdrawal of their services – must be afforded an "adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses", i.e. some form of independent and binding arbitration (*SFL*, para 96). In other words, this Court has now recognized that, at least when it comes to essential service employees, recognition of their constitutional rights requires that their compensation (and other working conditions) be determined by independent and binding arbitration.

14. In CAPCJ's submission, given both the importance of and constitutional basis for judicial independence, the judiciary should, as a matter of constitutional principle, be afforded no less an effective constitutionally protected process for having their compensation determined. In this respect, *SFL* has now established that there is no constitutional basis for a concern that binding arbitration would usurp the role of the executive or legislative branches in establishing compensation,[5] since binding arbitration is constitutionally required for employees who are deemed essential and who, like judges but for different reasons, cannot withdraw their services.

15. To be clear, CAPCJ acknowledges that this appeal does not directly raise the question as to whether this Court should reconsider its holding that Commission decisions need not be binding in order to be effective. However, given the extent to which the Appellants have linked their position on the limited scope of the record to their submission on the high degree of deference applicable to judicial review of government decisions to reject Commission recommendations, CAPCJ believes it is

[5] On this point, see also discussion in *Reference Re Public Service Employee Relations Act (Alta.),* [1987] 1 SCR 313 (Dickson C.J. in dissent) at paras. 113-115.

important that the Court recognize, on this appeal, that accepting such a highly deferential standard of review may well be inconsistent with other applicable constitutional principles and protections.

B. ON ANY APPROACH, THE RECORD MUST INCLUDE MORE THAN REASONS

16. In any event, in CAPCJ's submission, even on the most deferential standard of review of a government decision to reject Commission recommendations proposed by the Appellants, there is no basis for restricting the record to the formal, public reasons provided in the government's response. Quite the contrary, without a full record, a deferential standard of review is liable to reduce the court's exercise of its constitutionally entrenched supervisory jurisdiction to a mere formality. And when, as in the present appeal, the protection of judicial independence is at stake, the Appellants' position is little short of alarming.

17. First, leaving aside the special constitutional context of Commission recommendations, as in other judicial review contexts, all relevant material that was before the government decision-maker should be put before the reviewing court, in order that the Government's reasons can be subjected to the required level of scrutiny.[6] As explained by the Ontario Court of Appeal, ensuring that the "full and accurate record of what went on before the [decision-maker is] put before the court," is "an aspect of the superior court's inherent powers of judicial review", and prevents a decision-maker subject to judicial review from "immuniz[ing] itself or its process by arriving at decisions on considerations that are not revealed by the record it files with the court."[7] Shielding an aspect of the

[6] This is subject to any special claims of public interest immunity or deliberative secrecy, which should be assessed having regard to the important constitutional principles of judicial independence that are at stake. On this issue, CAPCJ adopts the submission of the Respondents.

[7] *Payne v. Ontario Human Rights Commission* (2000), 2000 CanLII 5731 (ON CA) at para. 161. See also *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (CanLII) at para. 19; *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13 at para. 108: "any document that was before a decision-maker and relied on by it in reaching its decision, should form part of the record on judicial review;" Rule 317, *Federal Courts Rules,* SOR/98-106, and discussion of Rule 317 ("relevant material…in [its] possession") in Brian J. Saunders et al., Federal Courts Practice 2019, (Toronto: Thomson Reuters, 2018) at pp. 760 - 765.

government's decision from review "is no mere trifle" but "offends the principle that all holders of public power should be accountable for their exercises of power" and "the accountability and transparency of the process."[8] Similarly, "broad discretion over the content of the record in certain non-adjudicative settings could effectively allow the decision maker to immunize its decisions from meaningful scrutiny."[9] Moreover, in administrative law, the standard of review (correctness or reasonableness), does not determine or limit the scope of the record. In this respect, the Appellants wrongly conflate the (public) reasons for the decision under review with the appropriate scope of the record. They are not the same.

18. Second, given the critical issues of constitutional law and judicial independence at stake in these appeals, if anything, it is even more important that the record ensure that any and all relevant materials before the decision-maker or informing the decision are placed before the reviewing court. As a result, contrary to the Appellants' submissions that requiring disclosure of background materials would unduly expand the judicial role and judicial scrutiny, and be insufficiently deferential to government's right to reject Commission recommendations (*NS, paras 6, 29; BC, paras 46, 76*), in CAPCJ's submission, even if the standard of review of decisions rejecting Commission recommendations were as highly deferential as they contend, this should have no bearing on the contents of the record for the purposes of the review, and does not support the Appellants' argument the record should be limited to the public reasons provided.

19. Third, given that this Court has mandated, and the Appellants acknowledge, the requirement for an "open and transparent public process" (*Bodner*, para 63) with respect to judicial compensation, there is considerable irony in the Appellants objecting to a requirement that government place before the reviewing court all the materials that was before it, and that may have informed its decision. In this respect, contrary to the Appellants' suggestion that the related constitutional requirements of effectiveness and transparency are met primarily if not exclusively through a public response to those recommendations formally purporting to justify rejection (*NS, paras. 2, 58; BC, paras. 8, 51, 57, and 68*), these requirements must extend through the entirety of the process, including the government's obligation to justify rejection of Commission recommendations in a court of law. Similarly, the third stage of the test for reviewing government rejection of Commission recommendations established in

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[8] *Slansky v. Canada (Attorney General),* 2013 FCA 199 at paras. 313 and 315 (Stratas J. in dissent).
[9] Wihak and Oliphant, "Evidentiary Rules in a Post-*Dunsmuir* World: Modernizing the Scope of Admissible Evidence on Judicial Review," (2015) 28 C.J.A.L.P 323 at p. 340.

Bodner -- namely the requirement to "view globally" whether the Commission process been respected and whether the purposes of having an effective Commission process have been achieved -- also supports the requirement that the full record of the process be placed before a reviewing court. In short, a transparent and global assessment necessarily requires a full and complete record.

20. Fourth, contrary to the submissions of the Appellants ((*NS, paras 6, 30, 53-54; BC, paras 84-85*), shielding government reasons from scrutiny by permitting it to hide the background materials, facts, analysis and recommendations upon which it relied makes it much more likely that the setting of judicial compensation will be politicized -- the exact opposite of what this Court sought to achieve in the *PEI Reference* and *Bodner*. By contrast, requiring access to the full record increases openness and transparency and reduces the risk of judicial compensation decisions secretly being made on the basis of inappropriately politicized factors. Disclosure is necessary precisely to guard against rejection of Commission decisions being based on inappropriately politicized considerations.

21. Fifth, to the extent that the Appellants assert that there should be no record for review beyond the public reasons, because to require more would permit an inquiry into the *bona fides* of Cabinet conduct (*NS factum, paras 6, 52; BC factum, para 8*), in CAPCJ's submission, on any standard of review, the decision to reject Commission recommendations must be made in good faith (a critical factor in judicial review of government action since this Court's seminal decision in *Roncarelli v. Duplessis*[10]). As a result, it is of overriding importance that a reviewing court be satisfied that government has acted in good faith throughout the entirety of its decision-making process.[11] On this basis alone, it is imperative that all materials presumptively considered by government must be before the Court, so that it may verify that the reasons proffered by government are the real reasons for its decision. Moreover, while the Appellants suggest that there must be some evidence of bad faith before the materials before Cabinet should be produced, judges' associations are not realistically in a position to allege or adduce such evidence, and requiring them to do so would be inconsistent with the goal of avoiding politicization of their relationship with the other branches of government.

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[10] *Roncarelli v. Duplessis*, [1959] SCR 121.

[11] Notably, in para 75 of their factum, the Nova Scotia appellants recognize that genuine bad faith conduct may be exposed on review of Cabinet documents.

22. Sixth, while the Appellants acknowledge that, as held in *Bodner* (paras. 27, 36, 60-64, 91, 103), government can expand the record on review by supplementing the public reasons (*NS, para 47; BC, para. 60*), they assert that this is a one-way entitlement. On their view, government can selectively include materials relied upon in deciding to reject a Commission recommendation, but the judges and the reviewing court are precluded from having access to all of the materials including those contained in Cabinet submissions. However, allowing such an asymmetrical approach to the record on judicial review would effectively immunize government from meaningful scrutiny of the materials considered in its decision to reject Commission recommendations, falling short both of transparency and fundamental fairness, and permitting government to manipulate and politicize the process.

23. Finally, it is expected that some interveners may suggest that where government rejects Commission recommendations in order to control or manage expenditures, this is sufficient to justify both the government decision itself and a restrictive record on review. In CAPCJ's submission, if the goal of managing expenditures were in and of itself sufficient to justify rejection of Commission recommendations, the Commission process would be effectively rendered futile, since government always can and will claim it is pursuing a policy of fiscal restraint. This is why reviewing courts have recognized that this objective, standing alone, is not sufficient to justify rejection of Commission recommendations. Rather, issues relating to judicial compensation must be considered on their own merits, and not merely out of a desire to keep increases within the general parameters of fiscal or public sector labour relations policy.[12]

PARTS IV and V – COSTS AND ORDER SOUGHT

24. CAPCJ does not seek costs and asks that no costs be ordered against it, nor does it request any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Ottawa, this 23rd day of October, 2019

Steven M. Barrett / Colleen Bauman

[12] *Bodner*, para. 160; *PEI Reference*, para 220; *Judges of the Provincial Court of Manitoba et al. v. Her Majesty The Queen*, 2012 MBQB 79 (CanLII), paras 77-79, 168, upheld on appeal 2013 MBCA 74 (CanLII), paras 81 to 84; BC 73-74, 78-82; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 (CanLII), paras 73-74, 78-82.

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