

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

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Appellant)

and

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

Respondent
(Respondent)

and

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

Interveners

AND

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

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA REPRESENTING
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA
AND GOVERNOR IN COUNCIL

Appellants
(Appellants)

and

JUDGES OF THE PROVINCIAL COURT AND FAMILY COURT OF NOVA SCOTIA,
AS REPRESENTED BY THE NOVA SCOTIA PROVINCIAL JUDGES ASSOCIATION

Respondents
(Respondents)

and

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO,
ATTORNEY GENERAL OF QUÉBEC, ATTORNEY GENERAL OF SASKATCHEWAN,
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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Having addressed the general process for setting judges' compensation in *PEI Reference* (et al.) and confirmed the applicable test for judicial review of compensation decisions in *Bodner* (et al.), this Court is now called upon to identify the nature and extent of disclosure obligations that attach to this process.

2. As noted by this Court in *PEI Reference*, judicial independence guarantees two essential facets of the administration of justice in this country. It maintains public confidence in the impartiality of the judiciary and, in doing so, ensures that those coming to court know that their cases will be decided based on the law.¹ The achievement of these objectives is premised on the idea that the public has no reason to doubt that judges act independently from the state. In other words, the preservation of judicial independence necessarily assumes that the public is able to confirm that judges enjoy independence. Section 11(d) of the *Charter* confirms as much.

3. A judicial compensation decision-making framework that tolerates decisions by governments made behind closed doors is anathema to the preservation of the public's confidence in the independence of the judiciary. If the public has no way to confirm that judicial compensation decisions are being made objectively and dispassionately—because the decision-making process is shrouded in secrecy—it may come to doubt the government's motivations. Thus, it is plain that limited disclosure is inconsistent with the fundamental purpose of the judicial compensation review process. Limited disclosure for judicial reviews of compensation decisions inevitably thwarts full assessment of the government's approach to compensation and renders it impossible to fully verify why judges get paid what they do. Such an opaque approach is fundamentally inconsistent with the principle of judicial independence.

¹ *Reference re Remuneration of Judges of the Provincial Court of PEI* (“*PEI Reference*”), [1997] 3 SCR 3, at para. 10.

4. Consequently, because judicial independence is clearly implicated in a court's review of a judicial compensation decision:

- a) full disclosure ought to be presumed; and
- b) claims of Cabinet confidentiality ought to be subject to strict scrutiny by the reviewing court when asserted.

5. The CBA accepts the facts as outlined by the British Columbia Court of Appeal and Nova Scotia Court of Appeal, respectively.

PART II – POSITION

6. The CBA intervenes in these appeals to submit that:

- (1) Where judicial independence is implicated in an administrative decision, the attendant disclosure obligations must be consistent with as much transparency as is required to depoliticize the process and preserve public confidence;
- (2) Disclosure in judicial compensation proceedings ought to be presumptively complete; and
- (3) Claims of Cabinet confidentiality ought to be assessed in light of the need to avoid politicizing judicial compensation decisions by ensuring the fullest disclosure possible, which is consistent with ensuring judicial independence.

PART III – ARGUMENT

A. Transparency is required to depoliticize compensation decisions and preserve public confidence in the independence of the judiciary

7. The constitutional principle of judicial independence demands that transparency, rather than secrecy, ought to guide judicial compensation proceedings. Conducting compensation proceedings in secret is fundamentally inconsistent with maintaining public confidence. Such secrecy prevents the public from verifying that judges' remuneration is determined objectively. Whether or not the government's decision was ill-intentioned, a secret process reasonably causes

the public to speculate about the government’s motivations and question whether the decision was political rather than objective. This is directly at odds with a key aim of the framework set out in *PEI Reference* and *Bodner*, and contrary to the objective of preserving judicial independence—or the perception of such independence —itself.²

8. ***The principle of judicial independence.*** The constitutional principle of judicial independence is a key guarantor of the constitutional separation of powers and ensures that parties before a tribunal can rest assured that their disputes will be adjudicated according to law and not political whim.³ In performing this safeguarding function, judicial independence is “fundamental ... to individual and public confidence in the administration of justice”.⁴ As this Court has confirmed, “judicial independence belongs not to judges, but to the public.”⁵

9. One essential condition of judicial independence is financial security.⁶ As this Court explained in *Valente*, “the right to salary and pension should be established by law and not subject to arbitrary interference by the Executive in a manner that could affect judicial independence”.⁷

10. Where there are doubts as to judges’ financial security, the public’s perception of the judiciary may be compromised. The threshold for identifying whether such doubts lie is: would a reasonable and informed person perceive the tribunal to enjoy financial security?⁸ We can therefore understand that preserving confidence in the independence of the judiciary requires that a reasonable and informed member of the public be in a position to satisfy herself that compensation decisions for judges are made objectively and dispassionately.

11. ***The politicization of judicial compensation.*** As it is a constitutional imperative that the public be able to satisfy itself that judicial compensation is not managed in a manner that undermines judicial independence, failure to do so must be the threshold where judicial

² *Bodner v Alberta* (“**Bodner**”), 2005 SCC 44, at paras. 10, 25; *Mackin v New Brunswick (Minister of Finance)* (“**Mackin**”), 2002 SCC 13, at para. 54.

³ *PEI Reference*, at para. 10; *Conférence des juges de paix magistrats du Québec v Québec (Attorney General)* (“**Conférence des juges de paix**”), 2016 SCC 39, at para. 31.

⁴ *Valente v The Queen* (“**Valente**”), [1985] 2 SCR 673, at 689.

⁵ *Conférence des juges de paix*, at para. 33.

⁶ *Valente*, at 704; *Conférence des juges de paix*, at para. 33.

⁷ *Valente*, at 704.

⁸ *Conférence des juges de paix*, at para. 33.

compensation processes cease being neutral and become political. Thus, where a government's approach casts doubts on the neutrality of the compensation process, and where any such doubts held by a reasonable and informed public cannot be assuaged, the process becomes politicized as questions over the propriety of government decisions linger unanswered.

12. This Court has already confirmed that avoiding politicization of the financial independence of the judiciary is part and parcel of the constitutional imperative of judicial independence:

the elements of financial independence at the institutional level results from the constitutional imperative that...the relationship between the judiciary and the other two branches of government should be depoliticized. This imperative makes it necessary for the judiciary to be protected against political interference...and for it to be seen to be so protected.⁹ (emphasis in original)

13. Judicial compensation decisions by the executive branch of government, for example, run a very real risk of calling into question the financial independence of the judiciary if they are managed in a manner that precludes verification. If the actual reasons for a compensation decision are kept secret, then both judges and the public are left in the dark. Affected judges, the reviewing court, and the observing public would have no ability to assess the decision for legitimacy. A transparent process for judicial compensation ensures that the public will be left with no questions about improper links between the judiciary and other branches of government. This imperative is precisely what led to the framework developed in *PEI Reference* and *Bodner*.

14. ***Depoliticization and disclosure.*** Adequate disclosure in any proceeding—including judicial reviews of judicial compensation decisions—is what makes it possible for positions and decisions to be scrutinized effectively.

15. The information relied upon by a government making a compensation decision is what grounds the legitimacy of its decision—“legitimacy” being the threshold for assessing whether the decision is justified.¹⁰ Considered in light of this Court's recent discussion in *Conférence des juges de paix*, a legitimate decision—which is one that must accord with the public interest in an apolitical compensation scheme¹¹—ought to be one that permits an informed member of the public

⁹ *Mackin*, at para. 54.

¹⁰ *PEI Reference*, at paras. 180-183; *Bodner*, at para. 24.

¹¹ *Bodner*, at para. 24.

to confirm that the decision-making was objective and dispassionate, with no hint of political interference.¹² Public justifiability is required “to ensure public confidence in the justice system”.¹³

16. In *Bodner*, this Court moved beyond the more limited informational requirements suggested in *PEI Reference*. This is because the Court in *Bodner*—responding to ongoing litigation in the aftermath of *PEI Reference*—recognized that additional factors ought to be considered in judicial reviews of compensation decisions in order to impose stricter parameters on governments. Thus, this Court in *Bodner* clarified that a legitimate decision is one that can be verified not just on the basis of having a recorded rationale, but one whose rationale is consistent with preserving judicial independence and the perception of that independence by the public.¹⁴

17. A legitimate compensation decision that is consistent with the public interest is one that is based “on facts and sound reasoning”.¹⁵ Where the source material for those facts is kept hidden, the actual facts and reasoning remain unverifiable. This is why disclosure is a critical component for preserving the neutrality of the judicial compensation process. Absent disclosure, the decision-making process is untestable, contrary to the clear teachings in *Bodner*. Where there is inadequate disclosure, the public will be unable to scrutinize the process and will instead be left to speculate as to the actual reasons for the government’s compensation decision. While the appellants suggest that broad disclosure is not required under the *Bodner* framework, this cannot be the established rule. Disclosure is the lynchpin for assessing the legitimacy of the government’s explanation.

18. Yet, it has been suggested¹⁶ that broad disclosure on judicial review will politicize the judicial compensation process and therefore ought to be avoided. It has further been suggested that governments ought to be able to control what is disclosed publicly so as to prevent the public from being privy to how the government has weighed competing financial decisions in any manner that has consequences for judicial compensation. The argument is that disclosure of such information

¹² *Conférence des juges de paix*, at para. 33.

¹³ *PEI Reference*, at para. 180.

¹⁴ *Bodner*, at para. 31.

¹⁵ *Bodner*, at para. 25.

¹⁶ Memorandum on Leave to Intervene of the Attorney General of Ontario; Memorandum on Leave to Intervene of the Attorney General of Saskatchewan.

could blur the lines between the judiciary and other branches of government as the public gains knowledge of how judicial compensation is assessed against other spending priorities.

19. The crux of that argument is that *more knowledge* will undermine the public's confidence in the independence of the judiciary. But that could only be so if that increased knowledge reveals that the government has made decisions that call into question the relationship between the judiciary and other branches of government. If that is the case, then the constitutional principle of judicial independence and the imperative that the public be in a position to assess that independence demands that such information be available. It cannot be that the parameters for disclosure are to be dictated by the very government bodies under scrutiny.

B. To ensure depoliticization and preserve public confidence in the independence of the judiciary, presumptively full disclosure is required

20. These proceedings provide an opportunity for this Court to clarify how disclosure ought to be assessed in administrative proceedings where fundamental constitutional principles are engaged.¹⁷ Ensuring respect and conformity with a fundamental constitutional principle must be a guiding rule. In matters like the present where constitutional principles are implicated—in this case judicial independence—the CBA submits there should be a presumption of full disclosure given both the nature and impact of the impugned decision.

21. *Disclosure in light of judicial independence being engaged.* The scope of required disclosure in administrative proceedings is typically determined according to the framework set out in *Baker*.¹⁸ The CBA submits that two of the *Baker* factors—the nature of the decision and the importance of the decision—are illustrative here, even if only by analogy. Understood in light of the fundamental public importance of preserving the independence of the judiciary, those two factors point to the highest level of disclosure of relevant facts and reasons that led to the executive's decision on judicial compensation.

¹⁷ Note: Section 7 of the *Charter* has been considered separately in the jurisprudence. See, e.g., *May v Ferndale*, 2005 SCC 82.

¹⁸ *Baker v Canada (Minister of Citizenship)* (“*Baker*”), [1999] 2 SCR 817, at paras. 20-28.

22. Judicial compensation decisions are not simply decisions about livelihood. These are decisions touch directly on the sanctity of the separation between the judiciary and other branches of government—a concern that goes to the heart of the administration of justice in Canada.

23. The nature of the decision being reviewed is therefore of the utmost importance to the rule of law and Canada’s constitutional order. Judicial compensation decisions by a government are checkpoints over time that allow the public to understand how it is that judges are paid and, crucially, whether the process is free of political interference. Such decisions have a clear constitutional dimension. Accordingly, they ought to be made on the basis of a robust and verifiable record. The underlying purpose for the process set in *PEI Reference* and *Bodner* was to remove opportunities for political interference. It would be paradoxical to preclude broad disclosure in the circumstances: political interference cannot be checked if the reasons for the decision are not fully ascertainable.

24. Similarly, the impact of the decision is also significant. Judicial independence “belongs...to the public”.¹⁹ A compensation decision affecting the judiciary inevitably impacts whether the public is in a position to remain confident in the independence of the judiciary.

25. Limited disclosure is antithetical to the public being able to draw conclusions about the propriety of government decisions that involve judicial independence. Where a government can base its decisions on numerous factors but only discloses some of those factors, observers are only provided with part of the story. In those circumstances, the public’s perception of the independence of the judiciary and the administration of justice cannot help but be affected, for the worse.

26. Given the foundational nature and impact of judicial compensation decisions on the public’s perception of the administration of justice, disclosure must therefore fall on the high end of the spectrum. While it is true that “the public” is not a party to the proceedings in the typical manner, a reviewing court’s task in judicial compensation reviews is to ensure that the government’s decision is in accordance with the public interest.²⁰ The public interest is front and centre in the proceedings.

¹⁹ *Conférence des juges de paix*, at para. 33.

²⁰ *Bodner*, at para. 25.

27. *The appropriate scope of disclosure.* In consideration of the central importance of preserving judicial independence, there ought to be a presumption of full disclosure in judicial compensation proceedings. This presumption of full disclosure flows directly from the constitutional requirement to preserve judicial independence: only full disclosure will satisfy the public that judicial independence has been scrupulously respected. Indeed, placing the legal burden to justify non-disclosure on the government is consistent with *Bodner*, in which this Court held that it is the government's burden to demonstrate the legitimacy of its compensation decision.²¹

28. The government is effectively the gatekeeper for all of the crucial information relating to judicial compensation: it controls access to the information required to assess whether it has met its obligations to uphold judicial independence. To ensure consistency with the government's constitutional obligation not to interfere with judicial independence, this gatekeeper role must be avoided. Full disclosure should be presumed and the government's role should be to justify non-disclosure, rather than to pick and choose what is to be disclosed on the basis of how it decides to structure its formal decision.

29. Any lower standard leaves the door open to increased politicization of judges' compensation as the public is left in doubt as to why compensation decisions have been made, and why the government feels it appropriate to hide aspects of its decision-making.

C. Claims of Cabinet confidentiality ought to be assessed in light of the constitutional imperative to depoliticize the judicial compensation process

30. The objective of the regime established in *PEI Reference* and *Bodner* is transparency of process in order to preserve public confidence in the independence of the judiciary. Where Cabinet labels as confidential the information it considered when assessing judicial compensation, it acts counter to the constitutional imperative that obliges the government to respect the division of powers. Such secrecy precludes a reviewing court from accomplishing its mandate to verify whether the government is committed to actually depoliticizing judicial compensation and preserving judicial independence.²²

²¹ *Bodner*, at para. 24.

²² *Bodner*, at para. 31.

31. Accordingly, a claim of Cabinet confidence over materials related to judicial compensation proceedings ought to be considered *prima facie* inconsistent with the executive's constitutional obligations. An opaque approach to judicial compensation decision-making is incompatible with the constitutional imperative of judicial independence, and thus valid assertions of Cabinet confidence must be the very rare exception. The burden must be on the government to justify such anomalies, validated by a court of law. That is the only way to guarantee that judicial independence is not only a desideratum, but a constitutional reality.

32. As noted recently by the Supreme Court of the United Kingdom when it invalidated the government's request for prorogation, adherence to constitutional principles requires that reviewing courts be empowered to verify executive action when those very constitutional principles are at stake: it is improper for the executive to chart a course that "has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions."²³ Similarly here, the executive should not generally be allowed to shield its true reasons for judicial compensation behind a blanket claim of Cabinet confidence.

33. This means that the government respondent must justify any claim of Cabinet confidence on the basis of public interest to ensure that the reviewing court can effectively verify that the constitutional imperative of judicial independence has been honoured. Because of the high public interest in transparency, this must be a high burden to meet. The reviewing court should have the power to review the documents over which Cabinet confidence is claimed to ensure that the claim is actually justified, and that only those documents (or parts thereof) whose secrecy is essential to ensure that the public interest is not compromised, notwithstanding the constitutional imperative of judicial independence, be undisclosed.²⁴

34. This approach can be reconciled with this Court's decision in *Babcock*. In that decision, this Court confirmed that Cabinet confidence can be lifted where it is shown that there are "improper motives" for its issuance in the first place.²⁵ As noted above, Cabinet secrecy is fundamentally inconsistent with ensuring judicial independence. Assertions of Cabinet confidence

²³ *Miller, R (on the application of) v The Prime Minister* ("**Miller**"), 2019 UKSC 41, at paras. 34, 50, 51.

²⁴ *Carey v Ontario* ("**Carey**"), [1986] 2 SCR 637, at para. 86.

²⁵ *Babcock v Canada (Attorney General)* ("**Babcock**"), 2002 SCC 57, at para. 39.

can reasonably be seen as attempts to deny access to the actual basis for judicial compensation decisions, which is directly at odds with the requisite transparency and this Court's instructions in *Bodner* that the government must demonstrate its commitment to the objectives of the independent judicial compensation regime.²⁶ Therefore, a claim of Cabinet confidence in judicial compensation proceedings ought to be presumptively treated as improperly motivated for being inconsistent with the very purpose of the regime. On that basis, the government's burden to justify its decision would be triggered.

35. Similarly, blanket claims of privilege over documents that informed a government's judicial compensation decision ought to be rigorously assessed by a court to ensure that the government is not improperly managing and labelling its source information in an effort to avoid scrutiny.

PART IV – SUBMISSIONS ON COSTS

36. The CBA seeks no costs on the appeals and asks that no costs be ordered against it.

PART V – PERMISSION TO PRESENT ORAL ARGUMENT

37. By Order dated September 12, 2019, Moldaver J. granted the CBA permission to present oral argument not exceeding five minutes at the hearing of the appeals.

PART VI – SUBMISSIONS ON PUBLICATION

38. The CBA does not object to publication.

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

Per: 

Guy J. Pratte, Nadia Effendi,
Ewa Krajewska, Neil Abraham

²⁶ *Bodner*, at para. 31.

PART VII – AUTHORITIES

NO.	AUTHORITY	PARAGRAPH REFERENCE
1.	<i>Babcock v Canada (Attorney General)</i> , 2002 SCC 57	34
2.	<i>Baker v Canada (Minister of Citizenship)</i> , [1999] 2 SCR 817	21
3.	<i>Bodner v Alberta</i> , 2005 SCC 44	1, 7, 13, 15, 16, 17, 23, 26, 27, 30, 34
4.	<i>Carey v Ontario</i> , [1986] 2 SCR 637	33
5.	<i>Conférence des juges de paix magistrats du Québec v Quebec (Attorney General)</i> , 2016 SCC 39	8, 9, 10, 15, 24
6.	<i>Mackin v New Brunswick (Minister of Finance)</i> , 2002 SCC 13	7, 12
7.	<i>May v Ferndale Institution</i> , 2005 SCC 82	20
8.	<i>Miller, R (on the application of) v The Prime Minister</i> , 2019 UKSC 41	32
9.	<i>Reference re Remuneration of Judges of the Provincial Court of PEI</i> , [1997] 3 SCR 3	1, 2, 7, 8, 13, 15, 16, 23, 30
10.	<i>Valente v The Queen</i> , [1985] 2 SCR 673	8, 9