S.C.C. File No. 38381
S.C.C. File No. 38459

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

B E T W E E N :

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

[Style of cause continued on next page.]

FACTUM OF THE INTERVENER, CANADIAN TAXPAYERS FEDERATION

(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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

Adam Goldenberg
Stephanie Willsey

Tel.: (416) 601-8200
Fax: (416) 868-0673
E-mail: agoldenberg@mccarthy.ca

Counsel for the Intervener, Canadian Taxpayers Federation

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

Darius Bossé

Tel.: (613) 702-5566
Fax: (613) 702-5566
E-mail: dbosse@juristespower.ca

Ottawa Agent for Counsel for the Intervener, Canadian Taxpayers Federation

[Style of cause continued from previous page.]

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

B E T W E E N :

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

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

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

Stein K. Gudmundseth, Q.C.
Andrew D. Gay, Q.C.
Clayton J. Gallant

Tel: (604) 685-6272
Fax: (604) 685-8434
E-mail: skg@lawgm.com

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

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

Jeffrey W. Beedell

Tel: (613) 786-0171
Fax: (613) 788-3587
E-mail: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Appellant (38381)

ARVAY FINLAY LLP
808 Nelson Street
Suite 1512
Box 12149 Nelson Square
Vancouver, BC V6Z 2H2

Joseph J. Arvay, Q.C.
Alison Latimer

Tel: (604) 696-9828
Fax: (888) 575-3281
E-mail: jarvay@arvayfinlay.ca

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

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

Marie-France Major

Tel: (613) 695-8855 ext. 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Respondent (38381)

ATTORNEY GENERAL OF NOVA SCOTIA
1690 Hollis Street
8th Floor, P.O. Box 7
Halifax, NS B3J 2L6

Edward A. Gores, Q.C.

Tel: (902) 424-3297
Fax: (902) 424-1730
E-mail: edward.gores@novascotia.ca

Counsel for the Appellants (38459)**, Attorney General of Nova Scotia *et al.***

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

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel to the Appellants (38459)

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

Susan Dawes
Kristen Worbanski

Tel: (204) 926-1501
Fax: (204) 956-0625
E-mail: sdawes@myersfirm.com

Counsel for the Respondents (38459)**, Judges of the Provincial Court and Family Court of Nova Scotia *et al.***

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

Marie-France Major

Tel: (613) 695-8855 ext. 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Respondents (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
E-mail: michael.morris@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

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

Christopher Rupar

Tel: (613) 670-6290
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Ottawa Agent for Counsel for the Intervener, Attorney General of Canada

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
E-mail: sarah.kraicer@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

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

Maxine Vincelette

Tel.: (613) 702-5573
Fax: (613) 702-5573
E-mail: mvincelette@juristespower.ca

Ottawa Agent for Counsel for the Intervener,
Attorney General of Ontario

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

Stéphane Rochette
Robert Desroches

Tel.: (418) 643-6552 ext. 20734
Fax: (418) 643-9749
E-mail: stephane.rochette@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Quebec

NOEL & ASSOCIES
111 rue Champlain
Gatineau, QC J8X 3R1

Sylvie Labbé

Tel.: (819) 771-7393
Fax: (819) 771-5397
E-mail: s.labbe@noelassocies.com

Ottawa Agent for Counsel for the Intervener,
Attorney General of Quebec

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

Thomson Irvine, Q.C.
Kyle McCreary

Tel.: (306) 787-6307
Fax: (306) 787-9111
E-mail: tom.irvine@gov.sk.ca

Counsel for the Intervener,
Attorney General for Saskatchewan

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

D. Lynne Watt

Tel.: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener,
Attorney General for Saskatchewan

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

Doreen Mueller

Tel.: (780) 427-1295
Fax: (780) 427-1230
E-mail: doreen.meuller@gov.ab.ca

Counsel for the Intervener,
Attorney General of Alberta

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

Michael J. Sobkin

Tel.: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Ottawa Agent for Counsel for the Intervener,
Attorney General of Alberta

NORTON ROSE FULBRIGHT CANADA LLP
1, Place Ville Marie
Bureau 2500
Montréal, QC H3B 1R1

Pierre Bienvenu
Azim Hussain
Andres C. Garin
Jean-Simon Schoenholz

Tel.: (514) 847-4747
Fax: (514) 286-5474
E-mail: pierre.bienvenu@nortonrosefulbright.com

Counsel for the Intervener,
Canadian Superior Courts Judges Association

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
E-mail: matthew.halpin@nortonrosefulbright.com

Ottawa Agent for Counsel for the Intervener,
Canadian Superior Courts Judges Association

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Suite 3400
Toronto, ON M5H 4E3

Guy J. Pratte
Nadia Effendi
Ewa Krajewska
Neil Abraham

Tel.: (416) 367-6000
Fax: (416) 367-6749
E-mail: gpratte@blgcanada.com

Counsel for the Intervener,
Canadian Bar Association

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

Karen Perron

Tel.: (613) 369-4795
Fax: (613) 230-8842
E-mail: kperron@blg.com

Ottawa Agent for Counsel for the Intervener,
Canadian Bar Association

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

Steven Barrett
Colleen Bauman

Tel.: (416) 977-6070
Fax: (416) 591-7333
E-mail: sbarrett@goldblattpartners.com

Counsel for the Intervener, Canadian Association of Provincial Court Judges

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

Andrew Lokan

Tel: (416) 646-4324
Fax: (416) 646-4301
E-mail: andrew.lokan@paliareroland.com

Counsel for the Intervener, Canadian Civil Liberties Association

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

David Elliott

Tel: (613) 783-9699
Fax: (613) 783-9690
E-mail: david.elliott@dentons.com

Ottawa Agent for Counsel for the Intervener, Canadian Civil Liberties Association

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PART I—OVERVIEW

A. Position Respecting Issue of Public Importance

1. These appeals turn on the limits of the judicial role in reviewing government decisions about judicial compensation. Specifically, they require this Court to determine whether the scope of judicial review is sufficiently broad that courts can and should order governments to produce Cabinet documents in defence of spending decisions, where these decisions affect judicial compensation.

2. The Canadian Taxpayers Federation (the "**CTF**") intervenes to submit that, where there is evidence that a government's decision to reject an increase in judicial compensation is consistent with a broader policy of expenditure control, the disclosure of Cabinet documents can only unduly expand the ambit of judicial review. It will be neither necessary nor appropriate to order the disclosure of Cabinet documents in these circumstances.

3. Judicial independence imposes a constitutional restriction on how the legislature and the executive can allocate and disburse public money: governments cannot use the power of the purse to politicize or manipulate the judiciary. Political judgments about spending are otherwise beyond the reach of curial scrutiny, unless they are unconstitutional or illegal in some other way. The general non-justiciability of budgetary decisions ensures that Canadian taxpayers can hold elected officials accountable for waste, misplaced priorities, or ill-advised austerity, as the case may be.

4. Proper respect for the legislature's role and for democratic accountability requires judicial forbearance. Reviewing courts must police the limits of their own functions in second-guessing government spending decisions.

5. These parameters apply when courts review government decisions about judicial compensation. They also determine what is relevant in such litigation; a more focused form of judicial review means a narrower range of relevant information.

6. The CTF makes two submissions in this regard.

7. First, limiting the increase of judicial remuneration will be *prima facie* justified if it is consistent with a broader policy of expenditure control. The Court has said as much with respect to cuts to judicial compensation. It should extend that reasoning to any downward departure

from a judicial compensation commission's recommendation. To defend such a departure, the government need only adduce sufficient evidence to establish that it is subjecting judicial officials to the same sort of spending discipline as others on the public payroll. If it does so, then there will be no reason for the reviewing court to consider any of the government's other possible or alleged reasons for rejecting the recommendation.

8. Second, if the evidence, on its face, establishes that the government's impugned judicial compensation decision is consistent with a broader policy of expenditure control, then confidential information that does not pertain to the nexus between the decision and the policy will be *prima facie* irrelevant on judicial review. The Court should endorse a threshold for relevancy similar to the "*Palmer* test" that applies to fresh evidence on appeal. Since ensuring consistency with a policy of fiscal restraint is a sufficient reason to reject a commission's recommendation, confidential information like the Cabinet documents sought in these appeals cannot, in the face of such a policy — and in the language of *Palmer* — "bear[] upon a decisive or potentially decisive issue" on judicial review.[1] The reviewing court should consider the record and, if the court is satisfied that the government has made the requisite showing with respect to consistency with a broader fiscal policy, refuse to compel further disclosure.

B. Statement of Facts

9. On March 28, 2019, this Court granted leave to appeal from the judgments of the Court of Appeal for British Columbia[2] and the Nova Scotia Court of Appeal.[3] In each case, the organization representing the province's provincial court judges had brought an application for judicial review of a decision — by the Legislative Assembly in British Columbia, and by the Governor in Council in Nova Scotia — not to accept certain recommendations of a provincial judicial compensation commission. In approving a more limited increase in judicial compensation that the commissions had recommended, each province pointed to a government-

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[1] *Palmer v. The Queen*, [1980] 1 S.C.R. 759 ["***Palmer***"], at 775.

[2] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 394 ["**B.C. C.A. Reasons**"**]**.

[3] *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83 ["**N.S. C.A. Reasons**"].

wide policy of expenditure control.[4]

PART II—STATEMENT OF ARGUMENT

A. Limiting Judicial Compensation To Control Expenditure Is *Prima Facie* Justified

10. This Court has long recognized that, as Lamer C.J. put it in the *P.E.I. Reference*, "judicial salaries must ultimately be fixed by … the executive or the legislature, and … the setting of remuneration from the public purse is, as a result, inherently political".[5] This reflects what the Court, in *Bodner*, referred to as "the government's … constitutional responsibility for management of the province's financial affairs".[6] The expenditure of public funds is generally a matter for legislative, rather than judicial, determination.[7]

11. Recognizing the limits of the judicial role constrains judicial oversight of governments' judicial compensation decisions. These are reviewable only on a "limited" basis. The general non-justiciability of budgetary decisions ensures that Canadian taxpayers can hold elected officials accountable for waste, misplaced priorities, or other ill-advised spending decisions, as

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[4] See *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCSC 1390 ["**B.C. S.C. Reasons**"], ¶¶11-12; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCSC 1193 ["**B.C. Master Reasons**"], ¶¶6, 8; British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, Issue No. 43, 2nd Sess., 41st \ Parl., October 25, 2017, at 1386-88 (Hon. D. Eby), S. C. C. 38381, Appellant's Record, Tab 13(B), pp. 178-183; Province of British Columbia, *Government's Proposed Response to the Report of the 2016 Judicial Compensation Commission in Respect of Provincial Court Judges* (October 23, 2017) ["**B.C. Response**"], at 10-12, S.C.C. 38381, Appellant's Record, Tab 13(A), pp. 171-173; N.S. C.A. reasons, ¶7; N.S. S.C. reasons, ¶5; Nova Scotia, Executive Council Office, *Order in Council 2017-24* (February 2, 2017) ["**N.S. Response**"], S.C.C. 38459, Appellant's Record, Vol. 2, Tab 002(A), pp. 9-19.

[5] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3 ["***P.E.I. Reference***"], ¶146.

[6] *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General)*, 2005 SCC 44 ["***Bodner***"], ¶30.

[7] See D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Thomson Reuters, 2017), at § 2:2421-22. Book of Authorities of the Canadian Taxpayers Federation ["**BOA**"], Tab 1.

the case may be.[8] As described in *Bodner*, judicial review of these decisions is "deferential"; it recognizes the government's unique position, expertise, and authority for the management of the province's financial affairs.[9]

12. In this case, by contrast, the lower courts' expansive interpretation of *Bodner* would grant reviewing courts an unprecedented, unconstitutional, and ultimately detrimental power to determine judicial remuneration. This Court should say so.

13. By counselling deference to government on judicial compensation decisions, this Court has been appropriately mindful of the budgetary context in which such decisions are made. In the *P.E.I. Reference*, which arose out of judicial salary reductions in three provinces, Lamer C.J. remarked that:

> Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational. For example, an across-the-board reduction in salaries that includes judges will typically be designed to effectuate the government's overall fiscal priorities, and hence will usually be aimed at furthering some sort of larger public interest. By contrast, a measure directed at judges alone may require a somewhat fuller explanation, precisely because it is directed at judges alone.[10]

14. Similarly, in *Bodner*, the Court accepted that a government policy of "fiscal restraint", in which "many areas [we]re facing reduction", justified a provincial government's rejection of a commission-recommended increase in judges' pension benefits.[11] This was because, as Lamer C.J. observed in the *P.E.I. Reference*, "[n]othing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times".[12]

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[8] *Bodner* (S.C.C., 2005), *supra* note 6, ¶29, citing *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶¶183-84; see also *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 60, ¶33; *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at 162-63; *Cabana v. Newfoundland and Labrador*, 2016 NLCA 39, ¶24.

[9] *Bodner* (S.C.C., 2005), *supra* note 6, ¶30, citing *P.E.I. Reference* (S.C.C., 1997), *supra* note 5.

[10] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶184 (emphasis added); see also *ibid.*, ¶¶201, 203, 219; cf. *ibid.*, ¶237.

[11] *Bodner* (S.C.C., 2005), *supra* note 6, ¶¶96-99.

[12] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶196.

15. Any perception that judges had "engaged in … behind-the-scenes lobbying", or made "secret deals" or "secret commitments", would be corrosive to the very principle of judicial independence that commissions exist to ensure.[13] As the Federal Court of Appeal held, in upholding the federal government's rejection of a Commission-recommended increase in compensation for Prothonotaries following the 2008 economic crisis: "[T]o exempt the Prothonotaries from the statutory pay restraints imposed on the federal public service … could create the impression that the Government was favouring judicial officers in order to benefit itself as a frequent litigant in the Federal Court".[14]

16. None of the foregoing is limited to justifying reductions in judicial compensation. Just as "the danger of political interference through economic manipulation can arise not only from reductions in the salaries of … judges, but also from increases and freezes in judicial remuneration",[15] so too can less-than-recommended increases find *prima facie* justification in a broader policy of expenditure control. As the Newfoundland Court of Appeal has held:

> [J]udges cannot claim to be immune from the impact of economic measures deemed necessary by the government of the day to properly discharge their governmental responsibilities relative to fiscal and economic matters…. [A] salary reduction or freeze applied to judges will be justifiable if carried out in accordance with the applicable constitutional strictures. Judges may legitimately be required to share in the pain of economic measures affecting the community generally.[16]

17. In the *P.E.I. Reference*, this Court concurred with the Court of Appeal's determination that the legislature has the power to reduce judicial salaries as a part of an "overall public economic measure" designed to meet a legitimate government objective,[17] so long as the objective and the means of achieving it are proportional.[18] Nothing in the jurisprudence

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[13] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶158, quoting W.N. Renke, *Invoking Independence: Judicial Independence as a No-cut Wage Guarantee* (Edmonton: Centre for Constitutional Studies, 1994), at 19, BOA, Tab 2.

[14] *Aalto v. Canada (Attorney General)*, 2010 FCA 195 ["***Aalto***"], ¶11.

[15] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶159 (emphasis added; original emphasis omitted); see also *R. v. Newfoundland Association of Provincial Court Judges*, 2000 NFCA 46 ["***Newfoundland Ass'n***"], ¶¶86-87.

[16] *Newfoundland Ass'n* (Nfld. C.A., 2000), *supra* note 15, ¶147 (emphasis added).

[17] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶27.

[18] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶182.

excludes "economic measure[s]" that come in the form of budgetary limits on spending growth, rather than as freezes or cuts. These, too, can constitute "[a]cross-the-board measures which affect substantially every person who is paid from the public purse".[19] As such, a government's rejection of a commission-recommended increase in judicial compensation in favour of a lesser increase that reflects a policy of expenditure constraint — a policy that, by its nature, "further[s] … [the] larger public interest", in the government's judgment — should equally be considered "*prima facie* rational", and thus justified.[20]

18. This will equally be so if the expenditure control measures are contained in the government's fiscal plan, rather than in a more narrowly defined policy of fiscal restraint or austerity. Unless there is some "indication that the government's policy … constituted measures directed at judges alone",[21] insisting on a specific type of expenditure control would elevate form over substance, and ignore this Court's instruction that "[c]hanges to or freezes in remuneration can … be justified for reasons which relate to the public interest, broadly understood".[22]

19. It follows that it is "*prima facie* rational", and thus justified, to reject a commission's compensation recommendation in favour of a more limited increase when that lesser increase reflects the level of expenditure contemplated in the government's fiscal policy. A commission recommendation is not a master key to the public treasury; a government should always be able to justify rejecting a commission recommendation when doing so is "rationally connected … with its overall efforts" to manage the province's fiscal situation.[23]

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[19] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶184.

[20] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶184.

[21] *Bodner* (S.C.C., 2005), *supra* note 6, ¶68, quoting *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick*, 2002 NBQB 156, ¶58; see also *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140 ["***Newfoundland and Labrador Ass'n***"], ¶¶102-103, 108-111, 115, 149.

[22] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶184 [emphasis added].

[23] See *Newfoundland and Labrador Ass'n* (N.L. S.C., 2018), *supra* note 21, ¶148.

B. If Judicial Compensation Has Been Limited To Control Expenditure, Cabinet Confidences Will Be *Prima Facie* Irrelevant On Judicial Review

20. The CTF takes no position on the outcome of these appeals. For the sake of illustration, however, the CTF notes that, in the courts below, there was evidence that the government of each province rejected a commission-recommended increase in judicial remuneration because the commission's recommendation was inconsistent with the provincial government's fiscal policy.

21. In British Columbia, the provincial government proposed that the Legislative Assembly approve a lesser increase in compensation than the commission had recommended. It did so because "both judges and civil servants may have to participate in sharing the burden of government's expenditure management". It noted that, though "the fiscal situation in the province is improved … [,] expenditure management remains a focus of government and compensation increases must be assessed within that context".[24]

22. Nova Scotia's Cabinet, meanwhile, pointed to "the lower salary and funding increases to be received by other Nova Scotians receiving remuneration out of public funds including, for example, physicians, Crown Attorneys and public sector workers". It stated that "[t]he Tribunal's recommendation on salary is not within the growth capacity of the [government's] fiscal plan", which "does not contemplate making a special exception for the wages of Provincial Court Judges".[25]

23. These reasons are of the sort that may be considered "*prima facie* rational", as discussed above. If, "on the face of the evidence before the Court, it was rational for the government to rely on [the] facts" of its fiscal policy to reject the commission's recommendations — *i.e.*, because the recommendation was not aligned with the government's broader approach to expenditure control — then the rejection of the recommendation should survive judicial scrutiny.[26]

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[24] B.C. Response, *supra* note 4, at 10 and 13.

[25] N.S. Response, *supra* note 4.

[26] See *Bodner* (S.C.C., 2005), *supra* note 6, ¶35; see also *Judges of the Provincial Court (Man.) v. Manitoba*, 2013 MBCA 74, ¶¶81-83; *Newfoundland and Labrador Ass'n* (N.L. S.C., 2018), *supra* note 21, ¶¶99-100.

24. Put differently, evidence that at least one of the government's reasons for rejecting a commission's recommendation was that the recommendation was inconsistent with the government's approach to public spending should be sufficient and conclusive on judicial review. If the government can satisfy *Bodner*'s requirements with respect to this reason, then it should not be necessary — and it would thus be inappropriate — for the reviewing court to consider any others.[27]

25. Since it is not only *prima facie* rational, but also sufficient, to reject a commission recommendation on the basis of a policy of expenditure control, evidence that cannot detract from the link between the rejection and the policy — such as the Cabinet confidences at issue here — should be considered *prima facie* irrelevant, and thus not subject to compelled disclosure. Where the government can establish a nexus between its spending policy and its rejection of a recommendation, confidential information that pertains to other matters cannot "bear[] upon a decisive or potentially decisive issue" in the litigation.[28] That should justify non-disclosure.

26. This threshold for compelled disclosure is taken from the "*Palmer* test" for the admission of fresh evidence on appeal. It imposes an elevated standard for relevance, one that requires more than mere reference to the issues defined by the pleadings.[29] It is appropriate here because, just as it is inappropriate to expand the scope of an appeal by admitting fresh evidence that does not bear on a decisive or potentially decisive issue, so too should it be considered inappropriate to widen the scope of judicial compensation litigation — which this Court has now sought twice to limit, first in the *P.E.I. Reference*,[30] and then again in *Bodner*[31] — by ordering the disclosure of confidential information that, in the circumstances, cannot be decisive.

27. At the very least, for the purpose of determining whether Cabinet confidentiality should yield in judicial compensation litigation, the irrelevance of the confidential information to any

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[27] *Aalto* (Fed. C.A., 2010), *supra* note 14, ¶¶3-4.
[28] *Palmer* (S.C.C., 1979), *supra* note 1, at 775.
[29] Cf. *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, ¶41.
[30] See *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶¶7-8.
[31] See *Bodner* (S.C.C., 2005), *supra* note 6, ¶¶10-12, 28, 39.

issue that could be decisive should militate against disclosure. Once the government has established that rejecting the commission's recommendation was consistent with the government's broader fiscal policy, information about the Cabinet's deliberations are unlikely to be useful.[32] It will not be necessary to "produc[e] [such information] to ensure that [the case] can be adequately and fairly presented".[33] For this reason, "producing the documents" will not be "importan[t] … to the administration of justice".[34]

28. Implementing this approach will require the court to assess the evidence pertaining to the merits of the government's case at an early stage of the proceedings. This is neither unprecedented in practice nor problematic in principle.

29. In practice, courts commonly consider the evidentiary record in deciding issues of production and disclosure. To apply the "innocence at stake" exception to informer privilege, for example, the court must determine whether there is "a basis on the evidence for concluding that disclosure of the informer's identity is necessary".[35] Similarly, to pierce solicitor-client privilege and compel disclosure of otherwise privileged information on the basis of the "crime-fraud exception", the court must be satisfied that there is "*prima facie* evidence" to "give colour" to the allegation that the exception applies.[36]

30. These evidentiary standards — "a basis on the evidence" and "*prima facie* evidence" — govern situations in which the court is asked to set aside secrecy in the interests of justice, and where the public interest in non-disclosure is sufficiently weighty to require more than mere assertion or speculation to overcome it. So it is with the disclosure of confidential information in judicial compensation litigation; the confidentiality of government deliberations

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[32] *Wang v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 493, ¶37, quoting *Khan v. R.*, [1996] 2 F.C. 316 (T.D.), ¶25.

[33] *Carey v. Ontario*, [1986] 2 S.C.R. 637, ¶79.

[34] *New Brunswick v. Enbridge Gas New Brunswick Limited Partnership*, 2016 NBCA 17, ¶47.

[35] *R. v. Leipert*, [1997] 1 S.C.R. 281, ¶21 (emphasis added).

[36] *O'Rourke v. Darbishire*, [1920] A.C. 581 (H.L.), at 604, per Viscount Finlay; *Goldman, Sachs & Co. v. Sessions*, 1999 CanLII 5317 (B.C. S.C.), ¶20; *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, 2011 ABQB 339, ¶41; *Dublin v. Montessori Jewish Day School of Toronto* (2007), 85 O.R. (3d) 511 (S.C.), ¶43.

should not be compromised, and the scope of the litigation should not be expanded, unless warranted.

31. Nor are the "basis in the evidence" and "*prima facie*" evidentiary standards far removed from the one that applies to the merits of judicial remuneration review, namely, "a reasonable factual foundation … on the face of the evidence".[37] If asked to order the disclosure of confidential information, a court can assess whether, on the face of the evidence, the government's rejection of the commission-recommended increase in judicial compensation was consistent with its broader fiscal policy. If such a "reasonable factual foundation" is before the court, then compelling disclosure will neither be necessary nor appropriate.

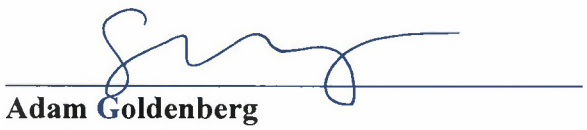
32. In principle, the Court's approach to evidence in reviewing governments' judicial compensation decisions should seek to discourage "litigation … between two primary organs of our constitutional system — the executive and the judiciary".[38] It should also aim to minimize judicial intervention in fiscal matters, which are the legislature's constitutional responsibility.[39]

33. Limiting the scope of curial review, including by limiting the scope of the evidentiary record,[40] is essential to both objectives. It can be achieved by allowing the government to foreclose a request for disclosure of confidential information by demonstrating that the government's rejection of a commission-recommended increase in judicial remuneration was consistent with a broader policy of expenditure control.

PART III—SUBMISSIONS CONCERNING COSTS

CTF requests that no costs be awarded either for or against it.

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



Adam Goldenberg
Stephanie Willsey

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[37] *Bodner* (S.C.C., 2005), *supra* note 6, ¶¶31, 35.
[38] *P.E.I. Reference* (S.C.C., 1997), *supra* note 5, ¶7.
[39] *Bodner* (S.C.C., 2005), *supra* note 6, ¶30.
[40] *Bodner* (S.C.C., 2005), *supra* note 6, ¶¶62-64.

PART IV—TABLE OF AUTHORITIES

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