Court File No. 38381

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

B E T W E E N:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant
(Appellant)

-and-

PROVINCIAL COURT JUDGES' ASSOCIATION OF BRITISH COLUMBIA

Respondent
(Respondent)

Court File No. 38459

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

BETWEEN:

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

Appellant
(Appellant)

and

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

Respondent
(Respondent)

and

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

Interveners

FACTUM OF THE INTERVENER
CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION
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FACTUM OF THE INTERVENER
CANADIAN SUPERIOR COURTS JUDGES ASSOCIATION

PART I – OVERVIEW

1. The Canadian Superior Courts Judges Association (the "**Association**") represents federally appointed judges from across Canada.[1] Drawing on its experience before the federal Judicial Compensation and Benefits Commission (the "**Quadrennial Commission**"), the Association intervenes in these appeals (the "**Appeals**") to submit that judicial review of government rejections of recommendations made by judicial compensation commissions should be meaningful, ensure a level playing field between the parties, and be uniform in terms of the evidence available to the judiciary and the government.

2. The above three characteristics mean the following in the context of access to cabinet documents for judicial review proceedings, applying the test in *Bodner*[2]:

(a) Meaningful. The constitutional principle of judicial independence requires that any judicial review of a government response to a compensation commission not be artificially constrained by the four corners of the government response. In that sense, the judicial review must be meaningful.

(b) Level playing field. The evidentiary rules applicable to judicial review of a government response must ensure that there is parity and a level playing field between the parties. Since this Court has held in the past that the government can choose to present favourable evidence in support of its response, it must be the case that, in principle, it can also be compelled to disclose unfavourable evidence.

(c) Uniform. Judicial review should not vary as a function of the specific model adopted by various jurisdictions across the country, under which the government response may be provided by different bodies: the legislature, cabinet or the governor-in-council, or a minister.

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1 Affidavit of Stephanie Lockhart at paras 4–7, 15–16, Motion for Leave to Intervene of the Canadian Superior Courts Judges Association.

2 *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 (AG); Minc v Quebec (AG),* 2005 SCC 44 at paras 31–38 [***Bodner***].

3. In light of the above, the *Bodner* test should not be used to modify the usual determination of relevance and create an obstacle for litigants acting on behalf of the judiciary which does not exist for other litigants. As for documents that are purportedly confidential, the *Bodner* test should not be used to render more deferential the existing criteria to determine whether a given cabinet document should be excluded from the evidentiary record on judicial review.

4. As an intervener, the Association takes no position on the facts at issue in the disputes giving rise to the Appeals.

PART II – POSITION ON THE QUESTIONS IN ISSUE

5. The issues raised by the Appellants[3] can be expressed through two questions: first, whether documents submitted to cabinet are relevant to determine if the *Bodner* test for the rationality of a government response has been met; and second, whether public interest privilege applies to the documents in this case and, if so, how the privilege should be applied by a court reviewing a government response.

6. The Association intervenes to propose an approach to the compellability of evidence in judicial review of government responses to compensation commissions which (a) ensures that the judicial review is meaningful, (b) ensures a level playing field between governments and the judiciary, and (c) is uniform across the country. The Association takes no position on the disposition of the Appeals.

PART III – ARGUMENT

A. Lessons Learned

7. In considering these Appeals, lessons must be drawn from experience at the federal level. The current Quadrennial Commission replaced the failed Triennial Commission. That failure is widely acknowledged to have been caused by the latter's recommendations not being implemented by successive federal governments.[4] This experience calls for the test in *Bodner* to

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3 Factum of the Attorney General of Nova Scotia at para 27; Factum of the Attorney General of British Columbia at para 44.

4 Canada, Judicial Compensation and Benefits Commission, *Report and Recommendations*, (Ottawa: JCBC 2012) at para 92 [**JCBC 2012**].

be applied rigorously, and any attempt to make it more deferential would risk seriously undermining the continued viability of the commission process.

8. The manner in which governments comply with the constitutional obligation to respond to commission recommendations also directly affects the long-term viability of the commission process.[5] Even after the establishment of the Quadrennial Commission, the Association had experience with the federal Government issuing a second response rejecting the Quadrennial Commission's recommendations, after a previous Government had already accepted those same recommendations.[6] The Association expressed to subsequent panels of the Quadrennial Commission its grave concerns about such conduct and the impact on the long-term effectiveness of the commission process generally.[7]

9. These Appeals represent an opportunity for the Court to reaffirm that judicial review of government responses must be a meaningful exercise that acts as a safeguard for the long-term viability of the commission process and, by extension, for judicial independence, both in fact and in the perception of the public.[8]

B. Meaningful Review of Government Responses

10. The test set out in *Bodner* contemplates judicial review to ensure that government responses that reject commission recommendations meet the standard of rationality.[9] The standard of rationality will be met where the reasons for the rejection are "complete" and deal with the recommendations in a "meaningful" way.[10]

11. The Association submits that the judicial review of government responses likewise must be meaningful, and that for it to be meaningful, the reviewing court must be able to consider relevant evidence that falls outside the four corners of government responses. Without relevant evidence that can provide a full understanding of the government response, there is a risk that the

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5 See *e.g. Provincial Court Judges' Association et al v The Province of New Brunswick*, 2009 NBCA 56 at para 2.

6 See Canada, Judicial Compensation and Benefits Commission, *Report and Recommendations*, (Ottawa: JCBC 2008) at paras 39–45.

7 *Ibid*. See also JCBC 2012, *supra* note 4 at paras 92, 121.

8 *Bodner, supra* note 2 at para 1.

9 *Ibid* at para 29.

10 *Ibid* at paras 18, 19, 20, 25, 38, 100.

reviewing court will not be able to determine whether the government response itself has dealt with the commission recommendations in a meaningful way.

12. While this Court in *Bodner* referred to the judicial review exercise in the context of government responses to commission recommendations as "limited" and "deferential",[11] it did not constrain the review to the four corners of the government response. The reference to "limited" and "deferential" is a reference to the standard of review, not the scope of the evidentiary record on judicial review. The distinction is crucial.

13. The Appellants submit that judicial review of government responses should normally go no further than the government's public reasons, considered in light of the Commission's recommendations.[12] The review being limited to the public process, no disclosure would be necessary according to them.[13] The Association submits that the reference in *Bodner* to "limited" and "deferential" does not preclude the relevance and potential disclosure of documents submitted to cabinet.

14. This Court's specification in *Bodner* that judicial review entails not only a focus on the government's response, but also a focus on "whether the purpose of the commission process has been achieved",[14] supports the Association's point that judicial review of a government response cannot be constrained to the four corners of the response.

15. In the case law arising from the judicial review of government responses to compensation commissions, courts have relied on evidence falling outside the government response and the process before the commission in reaching a conclusion as to the constitutionality of a particular government response. As set out in the examples discussed in the paragraphs below, courts have relied on the content of legislative debates, media statements made by ministers, delays in the government response, and correspondence between government and judges' associations. These forms of evidence have played a role in the courts reaching a conclusion as to whether the government response was constitutionally valid.

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11 *Ibid* at paras 29, 30.

12 Factum of the Attorney General of Nova Scotia at paras 2, 5, 6, 29, 49, 58; Factum of the Attorney General of British Columbia at paras 2, 4, 8, 70–71.

13 Factum of the Attorney General of Nova Scotia at paras 2, 39, 49; Factum of the Attorney General of British Columbia at para 2.

14 *Bodner, supra* note 2 at para 30.

16. The Supreme Court of Newfoundland and Labrador, in setting aside a government response, looked to the debate at the provincial House of Assembly leading to the resolution rejecting the salary recommendation as demonstrating how political the process of the government response had become.[15] In Quebec, one of the considerations that led the Superior Court to conclude that the provincial government had not respected its constitutional obligations was the delay in its formulation of a government response.[16] In an earlier decision, the Superior Court relied on statements made by the Premier of Quebec in concluding that the Government had failed to meet the *Bodner* standard.[17]

17. The Supreme Court of Yukon granted an application for production of documents made on behalf of the Senior Presiding Justice of the Peace, concluding that the correspondence between the Yukon Government and Territorial Court Judges was relevant to the third stage of the *Bodner* test. The conclusion on the merits was that the correspondence did not evidence constitutionally prohibited negotiations.[18]

C. Parity of Available Evidence and Level Playing Field

18. In all instances, governments control and draft their responses to commission recommendations. While a government response does not have to set out or refer to all the particulars upon which it is based, the reasons must be sufficient to show the facts on which the decision is based and to show that the process has been taken seriously.[19]

19. Where a government response is challenged in court, the government may file evidence to "provide more detailed information with regard to the factual foundation it has relied upon".[20] This was a contested point in *Bodner*, and the Court agreed with the position of the governments

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15 *Newfoundland and Labrador Association of Provincial Court Judges v Newfoundland and Labrador*, 2018 NLSC 140 at paras 159–71.

16 *Conférence des juges du Québec v Québec (AG)*, 2007 QCCS 2672 at paras 97, 104–117.

17 *Conférence des juges du Québec v Québec (AG)*, 2000 CanLII 18079 (Sup. Ct.) at paras 40, 41, 50, 92, 95, 96, 100, 102; rev'd in part to compel government compliance with the salary recommendation instead of referral back for reconsideration, 2000 CanLII 6948 (CA).

18 *Cameron v Yukon*, 2010 YKSC 58 at paras 7, 17, 19 (application); 2011 YKSC 35 at para 74 (merits). On the prohibition of negotiations, see *Reference re Remuneration of Judges of the Provincial Court of PEI; Reference re Independence and Impartiality of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 at para 134 [***PEI Reference***].

19 *Bodner, supra* note 2 at para 63.

20 *Ibid* at para 27, see also paras 36, 64, 101.

of New Brunswick and Ontario that evidence arising subsequent to the commission's recommendations could be adduced to support the government response.[21]

20. *Bodner*'s silence on the question of compelled disclosure should not be interpreted as implying that no such obligation exists. The reasons in *Bodner* are permissive: the government may submit relevant affidavit evidence. That the Court in *Bodner* only pronounced on governments' opportunity to present such evidence must be understood in a context where the issue was whether governments could present post-commission evidence in support of their decision to reject commission recommendations.

21. Proper application of the *Bodner* standard for judicial review of a government response requires parity as between the parties in respect of both favourable and unfavourable relevant evidence in the possession of the government. If a government can adduce evidence to support the rationality of its response, it should not be permitted, subject to existing rules of what might be globally called cabinet confidentiality (confidences, privilege, immunity, etc.), to withhold relevant evidence that is unfavourable to its position. This is consistent with the ordinary rules of disclosure which require governments, like other litigants, to produce all relevant documents, subject to rules such as cabinet confidentiality.[22]

22. If a government can rely upon hitherto internal documents as evidence falling outside its response in order to justify the response, as this Court has found, parity of treatment requires that parties challenging the constitutionality of a government response can obtain internal documents that were submitted as part of the decision-making process leading to the response.

23. Access to all relevant information is essential to ensuring that courts are able to properly adjudicate on the constitutionality of government action. This Court has considered – where section 1 of the *Charter* was concerned – that refusing disclosure of relevant documents on the basis of cabinet confidentiality may, in some cases, undermine attempts by government to justify its actions.[23] Similarly, the government must also meet a standard of justification in formulating

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21 *Ibid* at paras 60–64 (New Brunswick), 91, 101–103 (Ontario).

22 Andrew K Lokan & Michael Fenrick, *Constitutional Litigation in Canada* (Toronto: Carswell, 2006) (loose-leaf updated 2018, release 3), ch 9 at 9.1–9.3.

23 *RJR-MacDonald v Canada (AG)*, [1995] 3 SCR 199 at para 166 (McLachlin J), para 101 (La Forest J, dissenting but not on this point) [***RJR-MacDonald***]. See also *Irwin Toy Ltd v Quebec (AG),* [1989] 1 SCR 927 at 985.

a response that rejects a compensation commission's recommendations.[24] Given the public interest at stake in these constitutional matters, "the government should remain non-adversarial and make full disclosure".[25]

24. To allow governments to shield relevant information from scrutiny, while they selectively deploy other information to support their responses, would prevent the reviewing court from having a complete and relevant record upon which the factual foundation of the government response can be assessed. An assessment based on a full factual foundation is necessary to preserve judicial independence. It follows that judicial independence, which mandates "a public and open process of recommendation and response"[26] in the compensation-determination process, requires a level playing field in the event that a response is subject to judicial review.

D. Uniformity of Approach across Canada

25. In deciding the Appeals, the Court should adopt the same pan-Canadian approach that it took in the *PEI Reference* and *Bodner*. While acknowledging that relevance and cabinet confidentiality must be considered in individual cases, this Court's guidance on judicial review in the context of the judicial compensation process should apply consistently across the country. Otherwise, governments could shield themselves from disclosure of relevant information by amending their statutory regimes one way or another.

26. There are various models of legislative regimes used in Canada that govern the formulation of government responses to recommendations made by a judicial compensation commission. The factum for the Attorney General of British Columbia in the present matter notes the distinction between the model in the cases in *Bodner*, where the executive branch in New Brunswick, Ontario, and Alberta responded to the compensation commission, and the model in British Columbia, where it is the legislature that responds.[27] Both Appellants try to assign significance to the fact that there are

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24 *PEI Reference, supra* note 18 at paras 182–84.
25 *RJR-MacDonald, supra* note 23 at para 186 (Iacobucci J, concurring).
26 *Bodner, supra* note 2 at para 19.
27 Factum of the Attorney General of British Columbia at para 70.

different state bodies involved in the response process under their respective models, with only one being ultimately responsible for issuance of the response.[28]

27. The analysis of whether documents submitted to cabinet may become part of the record in a judicial review should not vary as a function of whether it is the legislature, cabinet, cabinet minister, or governor-in-council, or a combination thereof, that ultimately issues the response to the commission recommendations. Regardless of the model adopted, cabinet will inevitably be involved in the response.

28. Some models, including the one adopted in British Columbia, provide that the authority to respond rests with the legislature.[29] In others, either the minister of justice, cabinet or the governor-in-council, as in Nova Scotia,[30] has the authority to respond and adopt the commission's recommendations. In Saskatchewan, the commission's recommendations may be accepted by the Minister of Justice but may only be rejected by resolution of the Legislative Assembly moved by the Minister.[31] In Manitoba, a standing committee of the Legislative Assembly will issue a report addressing the recommendations, and providing reasons for any proposed rejections; rejection requires a vote of the Assembly, absent which the recommendations must be implemented.[32]

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28 Factum of the Attorney General of British Columbia at paras 82–86; Factum of the Attorney General of Nova Scotia at paras 53–54, 58.

29 *Judicial Compensation Act*, SBC 2003, c 59, s 6(2). See also for Newfoundland & Labrador, Prince Edward Island and Quebec: *Provincial Court Act*, SNL 1991, c 15, s 28.2(3); *Provincial Court Act*, RSPEI 1988, c P-25, s 4.9; *Courts of Justice Act*, CQLR c T-16, s 246.44.

30 *Provincial Court Act*, RSNS 1989, c 238, s 21K(2). See also Alberta, New Brunswick, and Ontario: *Provincial Judges and Masters in Chambers 2017 Compensation Commission Regulation*, Alta Reg 62/2017, s 9(2); *Provincial Court Act*, RSNB 1973, c P-21, s 22.06(1); *Framework Agreement on Judges' Remuneration*, O Reg 407/93, ss 27–33 (pension recommendations are subject to cabinet approval). In Yukon, the Commissioner in Executive Council has the power to fix the remuneration if the recommended value does not comply with a statutory formula, *Territorial Court Act*, RSY 2002, c 217, s 17. In Nunavut, the Commissioner in Executive Council "shall consider" the commission's recommendations, *Justices of the Peace Act*, SNWT (Nu) 1998, c 34, s 16(4). In Northwest Territories, the recommendations are binding, *Territorial Court Act*, RSNWT 1988, c T-2, s 12.91.

31 *Provincial Court Act*, SS 1998, c P-30.11, ss 43, 45(1).

32 *Provincial Court Act*, CCSM, c C275, s 11.1(27)–(29).

Federally, the *Judges Act* imposes on the federal Minister of Justice the obligation to respond to the Quadrennial Commission.[33]

29. While the Court has recognized that either branch of government may be responsible for the formulation and implementation of government responses, it developed a single standard for their review.[34] The Constitution requires that judicial independence receive the same protection and that government responses satisfy the same test of rationality irrespective of whether it be legislative or executive action that is challenged. In other words, the specific model chosen by a given province or by the federal Parliament for the government response should not modify the nature of the review to be carried out when courts are required to determine whether the government has satisfied the test set out in *Bodner*.

30. This Court has recognized that constitutional rights should not be given different levels of protection depending on which body has been entrusted to exercise a given state power.[35] If constitutional requirements must remain the same, it follows by extension that relevance – as defined by these same constitutional requirements – must be applied in a consistent manner.

31. Whether it is the legislative or executive branch that is responsible for the formulation and implementation of a government response should not be a consideration for the scope of disclosure. In either case, as described above, evidence that is relevant should be amenable to disclosure.

32. In the analysis, it cannot be ignored that in the Westminster model, the executive branch usually controls the legislative agenda, a reality that this Court has described as "the essential role of the executive in the legislative process of which it is an integral part."[36] Therefore, a decision-making process under a commission model that involves the legislature issuing a response to commission recommendations should be seen for the continuum that it is given that it is the government of the day

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33 *Judges Act,* RSC 1985, c J-1, s 26(7).

34 *PEI Reference, supra* note 18 at paras 179–80.

35 *Doré v Barreau du Québec*, 2012 SCC 12 at para 5; *Loyola High School v Quebec (AG),* 2015 SCC 12 at para 113; *Law Society of British Columbia v Trinity Western University,* 2018 SCC 32 at paras 57 (majority); 116 (McLachlin CJ, concurring); 164–65, 175, 198 (Rowe J, concurring); 304 (Brown and Côté JJ, dissenting, but not on this point).

36 *Reference re Canada Assistance Plan (BC),* [1991] 2 SCR 525 at 559.

that seizes the legislature with the issue, either through a resolution, motion, or a bill. The conduct of both the executive and the legislative branches must be relevant under such a model.

E. *Bodner* and the Criteria for Confidentiality of Cabinet Documents

33. As explained above, the test in *Bodner* does not support the proposition that judicial review should be constrained to the four corners of the government response to commission recommendations.

34. As for the issue of confidentiality (namely grounds of cabinet confidences, privilege or public interest immunity) applying to documents submitted to cabinet as part of the formulation of a response to commission recommendations, there is nothing in the test set out in *Bodner* that would justify applying the existing criteria, whether statutory[37] or at common law,[38] more deferentially in the case of judicial review of government responses to commission recommendations as compared to judicial review of other government action.

PART IV – SUBMISSIONS REGARDING COSTS

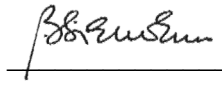
35. The Association seeks no order as to costs and asks that no costs be ordered against it.

PART V – ORDER SOUGHT

36. The Association takes no position on the disposition of the Appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Montréal, October 23, 2019



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37 See *e.g. Babcock v Canada (AG)*, 2002 SCC 57 at paras 22–28, interpreting the *Canada Evidence Act*, RSC 1985, c C-5, s 39.

38 *Carey v Ontario,* [1986] 2 SCR 637 at 670–71.

PART VI –TABLE OF AUTHORITIES

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