SCC 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)

AND

SCC File No. 38459

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

B E T W E E N:

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 COURT JUDGES ASSOCIATION

Respondent
(Respondents)

FACTUM THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Andrew Lokan (LSO #31629Q)
Lauren Pearce (LSO #70713H)
Tel.: 416.646.4324
Fax: 416.646.4301
email: andrew.lokan@paliareroland.com

**Counsel for the Intervener,
Canadian Civil Liberties Association**

Dentons Canada LLP
99 Bank Street, Suite 1420
Ottawa, ON K1P 1H4

Corey Villeneuve
Tel.: 613.783.9699
Email: corey.villeneuve@dentons.com

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

	Counsel	**Agent**
TO:	**Gudmundseth Mickelson LLP** 2525 - 1075 West Georgia Street Vancouver, British Columbia V6E 4H3 **Stein K. Gudmundseth, Q.C.** **Andrew D. 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 (Court File 38381)**	**Gowling WLG (Canada) LLP** 160 Elgin Street, Suite 2600 Ottawa, Ontario K1P 1C3 **Jeffrey W. Beedell** Tel.: 613.786.0171 Fax: 613.788.3587 email: jeff.beedell@gowlingwlg.com
AND TO:	**Arvay Finlay LLP** 1512-808 Nelson Street Vancouver, British Columbia V6Z 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 (Court File 38381)**	**Supreme Advocacy LLP** 100- 340 Gilmour Street Ottawa, Ontario K2P 0R3 **Marie-France Major** Tel.: 613.695.8855 Ext: 102 Fax: 613.695.8580 email: mfmajor@supremeadvocacy.ca

	Counsel	Agent
AND TO:	**Attorney General of Nova Scotia** 1690 Hollis Street, 8th Floor Halifax, Nova Scotia 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 for the Governor in Council (Court File 38459)**	**Gowling WLG (Canada) LLP** 160 Elgin Street Suite 2600 Ottawa, Ontario K1P 1C3 **D. Lynne Watt** Tel.: 613.786.8695 Fax: 613.788.3509 email: lynne.watt@gowlingwlg.co
AND TO:	**Norton Rose Fulbright Canada LLP** 1, Place Ville Marie Bureau 2500 Montréal, Quebec 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 Canadian Superior Court Judges Association (Court File 38381)**	**Norton Rose Fulbright Canada LLP** 45 O'Connor Street Suite 1500 Ottawa, Ontario K1P 1A4 **Matthew J. Halpin** Tel.: 613.780.8654 Fax: 613.230.5459 E-mail: matthew.halpin@nortonrosefulbright.com

	Counsel	Agent
AND TO:	**Myers LLP** 724-240 Graham Avenue Winnipeg, Manitoba R3C 0J7 **Susan Dawes** **Kristen Worbanski** Tel.: 204.926.1501 Fax: 204.956.0625 E-mail: 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 (Court File 38459)**	**Supreme Advocacy LLP** 100- 340 Gilmour Street Ottawa, Ontario K2P 0R3 **Marie-France Major** Tel.: 613.695.8855 Ext: 102 Fax: 613.695.8580 E-mail: mfmajor@supremeadvocacy.ca
AND TO:	**Borden Ladner Gervais LLP** Bay Adelaide Centre, East Tower 3400 - 22 Adelaide Street West Toronto, Ontario M5H 4E3 **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**	**Borden Ladner Gervais LLP** 1300-100 Queen Street Ottawa, Ontario K1P 1J9 **Karen Perron** Tel.: 613.787.3562 Fax: 613.230.8842 email: kperron@blg.com
AND TO:	**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 **Counsel for the Intervener, Canadian Association of Provincial Court Judges**	

	Counsel	Agent
AND TO:	**Attorney General of Alberta** 9th Floor Peace Hills Trust Tower 10011-109 Street Edmonton, Alberta 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**	**Michael J. Sobkin** 331 Somerset Street West Ottawa, Ontario K2P 0J8 Tel.: 613.282.1712 Fax: 613.288.2896 email: msobkin@sympatico.ca
AND TO:	**Attorney General of Canada** Ontario Regional Office 120 Adelaide Street West, Suite 400 Toronto, Ontario 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**	**Department of Justice** 50 O'Connor Street Suite 500 Ottawa, Ontario K1A 0H8 **Christopher Rupar** Tel.: 613.670.6290 Fax: 613.954.1920 email: christopher.rupar@justice.gc.ca
AND TO:	**Attorney General of Ontario** 720 Bay Street, 4th Floor Toronto, Ontario 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**	**Juristes Power** 130 rue Albert, bureau 1103 Ottawa, Ontario K1P 5G4 **Maxine Vincelette** Tel.: 613.702.5573 Fax: 613.702.5573 email: mvincelette@powerlaw.ca

	Counsel	Agent
AND TO:	**McCarthy Tétrault LLP** Suite 5300, Toronto Dominion Bank Tower Toronto, Ontario M5K 1E6 **Adam Goldenberg** **Amanda D. Iarusso** Tel.: 416.601.8200 Fax: 416.868.0673 email: agoldenberg@mccarthy.ca **Counsel for the Intervener, Canadian Taxpayers Federation**	**Power Law** 130 Albert Street Suite 1103 Ottawa, Ontario K1P 5G4 **Darius Bossé** Tel.: 613.706.1091 Fax: 613.706.1091 E-mail: DBosse@juristespower.ca
AND TO:	**Procureure générale du Québec** 1200, Route de l'Église 3e étage Québec, Quebec 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 Québec**	**Noël & Associés** 111 rue Champlain Gatineau, Quebec J8X 3R1 **Sylvie Labbé** Tel.: 819.771.7393 Fax: 819.771.5397 email: s.labbe@noelassocies.com
	Attorney General for Saskatchewan Legal Services Division 900 - 1874 Scarth Street Regina, Saskatchewan 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 of Saskatchewan**	**Gowling WLG (Canada) LLP** 160 Elgin Street Suite 2600 Ottawa, Ontario K1P 1C3 **D. Lynne Watt** Tel.: 613.786.8695 Fax: 613.788.3509 email: lynne.watt@gowlingwlg.com

I N D E X

Page

PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The production of cabinet documents is an important democratic safeguard in modern constitutional litigation. The Appellants have asked this Court to consider whether the cabinet documents at issue are irrelevant and, in any event, should be exempted from disclosure on the basis of public interest immunity. In answering these questions, the Intervener, the Canadian Civil Liberties Association (the "CCLA"), makes the following submissions.

2. First, while the judicial review of judicial compensation decisions is relatively narrow, that does not automatically restrict the scope of relevant evidence to a government's public reasons. The *Bodner* test requires the Court to assess the reasons, factual foundation, and process leading to the government's decision to reject a commission's recommendations. Cabinet submissions – which will often set out the background and context of the issue under consideration, various options for addressing it, and the advantages and disadvantages of each option – may provide important evidence relevant to all three branches of the *Bodner* test.

3. Second, cabinet submissions can be highly probative of the matters at issue in constitutional litigation, particularly where the government must justify a given decision or enactment. This Court's decision in *Carey v Ontario* sets out the factors to be considered where there is a claim that, despite the relevance of the requested documents, they should be exempted from disclosure to protect a countervailing public interest. The *Carey* factors appropriately emphasize the identification of the specific public interest that would be harmed by the disclosure of the specific documents at issue. This Court, like it did in *Carey*, should reject the historical notion that cabinet documents are immune from disclosure as a class due to generalized concerns of cabinet candour.

B. Statement of Facts

4. The CCLA is an organization dedicated to the furtherance of civil liberties in Canada. The CCLA is involved in a wide range of constitutional litigation. In its advocacy, the CCLA focuses on the reconciliation of civil liberties and competing public interests. It therefore has a special interest in ensuring that governments make decisions in an open and transparent manner.

5. The CCLA takes no position on any disputed issues of fact.

PART II. STATEMENT OF ISSUES

6. The CCLA submits that:

(a) Cabinet submissions often contain precisely the kind of information and analysis that is relevant to the determination of a justificatory test, such as the test at issue in a review of a decision to reject judicial compensation recommendations.

(b) The *Carey* test works well and should be confirmed. Recalibrating its application to provide greater emphasis on cabinet confidentiality and candour would provide inadequate weight to the strong public interest in the administration of justice, particularly in constitutional litigation.

PART III. STATEMENT OF ARGUMENT

A. The Relevance of Cabinet Submissions

7. The separation of powers requires that government decisions with respect to judicial compensation be depoliticized. This requires that an independent commission be appointed to make recommendations to the government on remuneration matters.[1] If the government chooses to depart from those recommendations, the government must justify its choice under the *Bodner* test by showing that:

(a) it has legitimate reasons for declining to implement the recommendations;

(b) its decision was based upon a reasonable factual foundation; and

[1] *PEI Reference*, [1997] 3 SCR 3, 1997 CanLII 317 (SCC), para. 133.

(c) viewed globally, the commission process has been respected and the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved. [2]

8. The government's decision is reviewed on a standard of "simple rationality". This is a deferential standard. Nevertheless, this is also a justificatory test, similar in principle to other tests in constitutional litigation, such as the test for justifying a *Charter* infringement under s.1, or for justifying an infringement of aboriginal rights under s.35. The *Bodner* test ensures that non-implementation is not dictated by the political tides of the day, but is justified on the basis of legitimate and objectively reasonable grounds, supported by a reasonable factual basis, in a manner that respects the overall commission process.

9. In the present appeals, the Appellants resist the production of cabinet submissions concerning the compensation commissions' recommendations,[3] which they say are irrelevant to the narrow review dictated by *Bodner*. However, the standard of review does not define the scope of production. While judicial review of a decision not to implement a compensation commission's recommendations is limited to "simple rationality", it does not follow that the record before the reviewing court must be confined to the government's public reasons.

10. The Appellants also emphasize that neither of the Respondent judicial associations pleaded bad faith on the part of the government. However, an allegation of bad faith conduct is not a pre-requisite to the production of cabinet material, nor should it be one. It would be unfortunate if judicial associations were forced to allege and establish a *prima facie* case of bad

[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 (Attorney General)*, [2005] 2 SCR 286, 2005 SCC 44 ("*Bodner*"), para. 31.

[3] The specific cabinet documents at issue in *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2012 BCSC 1022, is described by the court at paras. 54-62.

faith by the executive or legislative branches in any case where they sought production of relevant government documents.

11. Cabinet submissions are prepared to assist cabinet in decision-making. They typically set out one or more objectives underlying the decision. They may also provide options for achieving those objectives, and provide a cost-benefit analysis of the advantages and disadvantages of each option. They may also contain a recommendation as to which option is most likely to achieve the desired objective(s), as well as other information relevant to cabinet's decision.[4]

12. Cabinet submissions may be relevant to all three branches of the *Bodner* test:

(a) **Legitimate reasons**. The objectives identified in the cabinet submission with respect to any assessment of the commission's recommendations may or may not coincide with the reasons publicly expressed by the government. A disparity between the two may undermine the legitimacy of the government's public reasons, but is not limited to a review for bad faith. The cabinet submission may also reflect multiple objectives, and may therefore reveal what the government chose to prioritize. A need to balance competing objectives may even enhance the case for deference to the government's decision.

(b) **Reasonable factual basis**. The cabinet submission will indicate what factual considerations were before cabinet at the time the decision was made. A cost-benefit analysis of each option may provide details, including financial and other data, as to the advantages and disadvantages of implementing the commission's recommendations, or not. This will assist the reviewing court in determining whether a reasonable factual basis was present for the government's decision. Again, this is not limited to a review for bad faith. As this Court stated in *Bodner*:

> the reviewing court must determine whether the government has explained the factual foundation of its reasons in its response. Absent new facts or circumstances, as a general rule, it is too late to remedy that foundation in the

[4] See, for example, the cabinet submissions described in *Can Am Simulation Ltd v Newfoundland*, 1994 CanLII 10473, 118 Nfld & PEIR 35 (SC (TD)) ("*Can Am*"), paras. 19, 46, 50; *Ontario Public Service Employees Union v Ontario (Management Board of Cabinet)*, 1998 CanLII 18408 (ON LRB), para. 34.

> government's response before the reviewing court. Nevertheless, the government may be permitted to expand on the factual foundation contained in its response by providing details, in the form of affidavits, relating to economic and actuarial data and calculations. Furthermore, affidavits containing evidence of good faith and commitment to the process, such as information relating to the government's study of the impact of the commission's recommendations, may also be admissible.[5]

The information in the cabinet submission will likely relate to the government's study of the impact of the commission's recommendations, and may well be relevant to the government's commitment to the process.

(c) **Respect for the commission process.** A cabinet submission may shed light on the government's overall respect for the commission process where it has decided to depart from a commission's recommendations. Undue politicization of the process may well be evident from a cabinet submission, whether or not such politicization rises to the level of a failure to act in good faith.

13. Even under the deferential "simple rationality" standard, the court must look at "the soundness of the facts in relation to the position the government has adopted in its response".[6] The government should not have an effective monopoly in determining what evidence forms part of the record for the reviewing court. In *Re Anti-Inflation Act*, this Court admitted conflicting evidence adduced by a number of parties to determine whether the simple rationality standard had been met.[7] The court and opposing parties should be permitted to probe "the soundness of the facts" relied upon by the government, including, in appropriate cases, by considering the factual information that was before cabinet when the government decided not to implement the commission's recommendations.

---

[5] *Bodner*, paras. 35-36.

[6] *Bodner*, para. 37.

[7] *Re Anti-Inflation Act*, [1976] 2 SCR 373, 1976 CanLII 16 (SCC), pp. 386-7 (describing extrinsic evidence), 392 (ruling that it was properly before the Court).

B. Public Interest Immunity

1. The *Carey* Factors

14. The modern approach to litigation against the Crown recognizes that the government is not *per se* entitled to greater protection from document production than any other private litigant. However, in certain circumstances, the government may identify a public interest – quite apart from its particular litigation interest – which suggests that otherwise relevant government documents should not be disclosed.

15. In *Carey*, this Court held that a claim for public interest immunity will be made out where the public interest in maintaining confidentiality outweighs the public interest in the administration of justice. This Court identified the following relevant factors: (1) the nature of the policy concerned and the content of documents; (2) whether they involve policy formation or merely implementation; (3) the age of the documents, older being less sensitive; (4) the importance of the documents to the administration of justice; and (5) whether the party seeking production alleges misconduct.[8]

16. The *Carey* factors have been applied in constitutional litigation. Cabinet submissions (and the analyses they often contain) can be highly relevant in such cases, particularly where a justificatory test is involved. Where production has been ordered or agreed, cabinet documents have often provided important evidence to the court. For example, in at least two challenges to legislation and/or conduct which allegedly violated the freedom of association rights of teachers, the court reviewed and relied upon cabinet documents in assessing whether the Province had substantially interfered with collective bargaining.[9]

---

[8] *Carey v Ontario*, [1986] 2 SCR 637, 1986 CanLII 7 (SCC) ("Carey"), pp. 670-673.

[9] *OPSEU v Ontario*, 2016 ONSC 2197, paras. 16, 168; *British Columbia Teachers' Federation v British Columbia*, 2015 BCCA 184, paras. 205-210, reversed on appeal: [2016] 2 SCR 407, 2016 SCC 49.

17. Nevertheless, some of the *Carey* factors have required adaptation for constitutional litigation. For example, a challenge to a law will more likely involve policy formation than mere implementation, and many challenges are brought to recently-enacted legislation. Under *Carey*, these factors favour non-disclosure, but they have not precluded courts from ordering production. Further, only a minority of constitutional cases involve allegations of bad faith or individual misconduct. However, courts have concluded that there is at least as strong a public interest in ensuring that government decisions respect constitutional limits as there is in uncovering individual cases of misconduct.[10]

2. No Basis to Recalibrate *Carey* in Favour of the Crown in Constitutional Cases

18. The Appellants assert that cabinet documents have been too readily admitted under the *Carey* factors. They urge a recalibration of the test, with greater emphasis on the rationales behind cabinet confidentiality. The Appellants rely upon the work of Professor Campagnolo, who argues that production has been unwarranted in a number of post-*Carey* cases.[11] However, Prof. Campagnolo's arguments are not borne out by the jurisprudence on which he relies.

19. Despite acknowledging that the case for disclosure in public law cases is typically higher than in private claims against government,[12] Prof. Campagnolo does not distinguish between constitutional and non-constitutional cases. Of the 13 cases he cites to support his claim that

[10] See, for example, *Nova Scotia Teachers Union v Nova Scotia (Attorney General)*, 2019 NSSC 176 ("*Nova Scotia Teachers*"), paras. 46-47, where the court, under this factor, considered alleged improper conduct by the executive branch in passing legislation imposing a collective agreement.

[11] Campagnolo, Y., "A Rational Approach to Cabinet Immunity Under the Common Law", (2017) Alberta L. Rev. 55:1 ("Campagnolo"), p. 66. For further academic work by Prof. Campagnolo on this subject, see: Campagnolo, Y., "The History, Law and Practice of Cabinet Immunity in Canada", (2017) Revue générale de droit, 47, pp. 239–307; Campagnolo, Y., "The Political Legitimacy of Cabinet Secrecy", (2017) Revue juridique Thémis de l'Université de Montréal, 51:1, pp. 51-107.

[12] Campagnolo, p. 76.

production orders for cabinet documents have become "almost systematic", only five[13] are constitutional or true public law cases.

(a) In a previous judicial compensation case, *Provincial Court Judges' Association of British Columbia v British Columbia (AG)*, the court admitted cabinet documents under the *Carey* factors, and specifically relied upon those materials in concluding that the government exhibited a lack of a good faith commitment to the constitutional process under the *Bodner* test.[14]

(b) Prof. Campagnolo cites three *Charter* cases. In all three (*Health Services and Support-Facilities Subsector Bargaining Association v British Columbia*,[15] *BCTF v British Columbia*,[16] and *British Columbia Teachers' Federation v British Columbia*[17]), the claimants successfully obtained production of cabinet documents and ultimately succeeded on the merits.[18]

(c) In *Nova Scotia (AG) v Nova Scotia (Royal Commission Into Marshall Prosecution)*,[19] the Commission of Inquiry held that it would permit questioning on "the general nature of Cabinet discussions on the Marshall case", but not the views of individual ministers. This decision was upheld on appeal to this Court. Presumably this evidence was helpful to the Commission in making its wide-ranging recommendations.[20]

---

[13] Prof. Campagnolo also cites *Johnston v Prince Edward Island* (1988), 73 Nfld & PEIR 228 (SC (TD)) ("*Johnston*"), reversed on other grounds: (1989), 73 Nfld & PEIR 222 (CA), a case in which significant land owners challenged the government's conduct and other government acts in connection with the passing of legislation which would limit the development of their land. The plaintiffs argued that the impugned legislation was *ultra vires* and also raised various administrative law arguments and common law torts. The claim was dismissed in full. See *Johnston v Prince Edward Island* (1995), 1995 CanLII 10509, 128 Nfld & PEIR 1 (SC (TD)).

[14] *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2012 BCSC 1022, paras. 54-62, 81.

[15] 2002 BCSC 1509 ("*Health Services*").

[16] 2010 BCSC 961.

[17] 2013 BCSC 1216 ("*BCTF*").

[18] *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391, 2007 SCC 27; *British Columbia Teachers' Federation v British Columbia*, [2016] 2 SCR 407, 2016 SCC 49.

[19] [1989] 2 SCR 788, 1989 CanLII 39 ("*Marshall*").

[20] Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations (1989).

20. In his analysis, Prof. Campagnolo treats success on the merits as the main indicator of whether the cabinet documents were relevant or were produced unnecessarily.[21] However, whether or not the documents in question assist the plaintiffs in the prosecution of their case is not the criterion upon which disclosure is to be determined.[22] There are countless reasons why a claim may or may not be ultimately unsuccessful. In any event, as set out above, in constitutional cases production of cabinet documents has often coincided with success by the claimants.

21. More importantly, production may be crucial for a fair determination of the case, may narrow or eliminate the issues in dispute, and may otherwise lead to cost-savings for both the litigants and the court.[23] Prof. Campagnolo's emphasis on success on the merits undervalues the vital administration of justice interests which are served by production. It disregards the venerable principle that even where claimants ultimately fall short on the merits, "justice must not only be done, but must be seen to be done".

22. Finally, Prof. Campagnolo argues that encouraging candour around the cabinet table should be afforded greater weight as a reason not to order disclosure. However, in constitutional and public law cases, the courts regularly distinguish between the information that was before cabinet and the actual deliberations of cabinet ministers.[24] Ordering production of the former may meet the goals of fairness and comprehensiveness of the record where appropriate in constitutional and public law cases, while preserving the ability of cabinet ministers to bring

[21] Campagnolo, p. 67.

[22] *Johnston*, para. 27.

[23] See *Carey*, p. 680, where the Court recognized that disclosure was not limited to circumstances in which the plaintiff had established that the documents would directly assist his or her case on the merits: "[d]isclosure may ... be necessary for a fair determination of the issues and for saving costs".

[24] See e.g. *Marshall*, pp. 790, 792-793; *Health Services*, para. 39; *BCTF*, paras. 73-75; *Nova Scotia Teachers*, para. 39.

candour to their private debates. This and other forms of tailored orders may provide the courts with options to balance countervailing interests where public interest immunity is claimed.[25]

23. In *Carey*, this Court made it abundantly clear that any claim for immunity must be determined on the basis of the specific public interest concerns raised by the specific document at issue. By over-emphasizing the candour rationale, the Appellants risk returning to a time where cabinet documents as a class were entitled to blanket immunity. Although maintaining cabinet confidentiality may be an important interest, it cannot be made to override, as a matter of course, the strong public interests in transparency and in ensuring that constitutional cases are decided on a proper record.

24. *Carey* has not led to "routine" production of cabinet documents, as argued by the Appellants and some interveners. In constitutional cases, it has led to appropriate orders that have assisted the courts. The *Carey* test does not require recalibration in favour of the Crown.

PART IV. COSTS

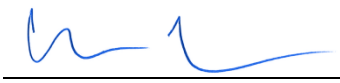
25. The CCLA does not seek costs, and asks that no costs be awarded against it.

PART V. ORDER REQUESTED

26. The CCLA requests that the Court consider its submissions in deciding this appeal, but takes no position in respect of its disposition.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 22, 2019



Andrew Lokan / Lauren Pearce
Paliare Roland Rosenberg Rothstein LLP
Counsel for the Intervener, CCLA

[25] It is common for the court to impose terms on the production of cabinet documents in an effort to limit any injury to the public interest resulting from disclosure. Such terms have included the filing of documents in a separate court file, the return of documents to the government at the conclusion of the litigation, the taking of any related *viva voce* evidence in camera, and an undertaking from counsel with respect to the making, storage, and destruction of any copies. See, for example, *Can Am*, para. 55.

PART VI. TABLE OF AUTHORITIES

Jurisprudence

Authority	Paragraph Reference
BCTF v British Columbia, 2010 BCSC 961	19
British Columbia Teachers' Federation v British Columbia, 2013 BCSC 1216	22
British Columbia Teachers' Federation v British Columbia, 2015 BCCA 184, reversed on appeal: [2016] 2 SCR 407, 2016 SCC 49	16, 19
Can Am Simulation Ltd v Newfoundland, 1994 CanLII 10473, 118 Nfld & PEIR 35 (SC (TD))	11, 22
Carey v Ontario, [1986] 2 SCR 637, 1986 CanLII 7 (SCC)	3, 6, 15, 16, 17, 18, 19, 21, 23, 24
Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia, [2007] 2 SCR 391, 2007 SCC 27	19
Health Services and Support - Facilities Subsector Bargaining Association v British Columbia, 2002 BCSC 1509	19, 22
Johnston v Prince Edward Island (1988), 73 Nfld & PEIR 228 (SC (TD)), reversed on other grounds: (1989), 73 Nfld & PEIR 222 (CA)	19, 20
Johnston v Prince Edward Island (1995), 1995 CanLII 10509, 128 Nfld & PEIR 1 (SC (TD))	19
Nova Scotia (Attorney General) v Nova Scotia (Royal Commission into Marshall Prosecution), [1989] 2 SCR 788, 1989 CanLII 39	19, 22
Nova Scotia Teachers Union v Nova Scotia (Attorney General), 2019 NSSC 176	17, 22
Ontario Public Service Employees Union v Ontario (Management Board of Cabinet), 1998 CanLII 18408 (ON LRB)	11
OPSEU v Ontario, 2016 ONSC 2197	16
PEI Reference, [1997] 3 SCR 3, 1997 CanLII 317 (SCC)	7

Authority	Paragraph Reference
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), [2005] 2 SCR 286, 2005 SCC 44	2, 7, 8, 9, 12, 19
Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General), 2012 BCSC 1022	9, 19
Re Anti-Inflation Act, [1976] 2 SCR 373, 1976 CanLII 16 (SCC)	13

Secondary Material

Authority	Paragraph Reference
Campagnolo, Y., "A Rational Approach to Cabinet Immunity Under the Common Law", (2017) Alberta L. Rev. 55:1	18, 19, 20, 21, 22
Campagnolo, Y., "The History, Law and Practice of Cabinet Immunity in Canada", (2017) Revue générale de droit, 47	18
Campagnolo, Y., "The Political Legitimacy of Cabinet Secrecy", (2017) Revue juridique Thémis de l'Université de Montréal, 51:1	18
Royal Commission on the Donald Marshall Jr. Prosecution, Digest of Findings and Recommendations (1989)	19