SCC File No. 38459

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

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
(Appellants/Cross-Respondents)

-and-

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

RESPONDENTS
(Respondents/Cross-Appellants)

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, 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

REPLY FACTUM
(THE JUDGES OF THE PROVINCIAL COURT AND FAMILY COURT OF NOVA SCOTIA, AS REPRESENTED BY THE NOVA SCOTIA PROVINCIAL JUDGES' ASSOCIATION, RESPONDENTS)

(Pursuant to the Order of The Hon. Michael J. Moldaver, dated September 12, 2019)

MYERS LLP
Barristers and Solicitors
724 - 240 Graham Avenue
Winnipeg, MB R3C 0J7

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

SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, Ontario K2P 0R3

Marie-France Major
Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca
Agent for the Respondents

ATTORNEY GENERAL OF NOVA SCOTIA
Legal Services Division
1690 Hollis Street, 8th Floor
Halifax, NS B3J 2L6

Edward A. Gores, Q.C.
Tel: (902) 424-4024
Fax: (902) 424-1730
Email: edward.gores@novascotia.ca

Counsel for the Appellants

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600

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

Agent for the Appellants

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
E-mail: michael.morris@justice.gc.ca

Counsel for the Intervener, Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 0'Connor Street, Suite 500, Room 556
Ottawa, ON K2P 6L2

Christopher M. Rupar
Tel.: (613) 941-2351
Fax: (613) 954-1920
Email: Christopher.rupar@justice.gc.ca

Agent for Counsel for the Intervener, Attorney General of Canada

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
E-mail: sarah.kraicer@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

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

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

Agent for Counsel for the Intervener, Attorney General of Ontario

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
E-mail: stephane.rochette@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Quebec

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

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

csc@noelassocies.com **(for Service)**

Agent for Counsel for the Intervener, Attorney General of Quebec

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 for Saskatchewan

GOWLING WLG (CANADA) LLP
Barristers and Solicitors
160 Elgin Street, Suite 2600

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

Agent for Counsel for the Intervener, Attorney General for Saskatchewan

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
E-mail: doreen.mueller@gov.ab.ca

Counsel for the Intervener Attorney General of Alberta

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset St. W.
Ottawa, Ontario K2P 0R3

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

Agent for Counsel for the Intervener Attorney General of Alberta

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 Courts Judges Association

NORTON ROSE FULBRIGHT CANADA LLP
1500-45 O'Connor Street
Ottawa, ON K1P 1A4

Matthew J. Halpin
Tel: (613) 780-8654
Fax : (613) 230-5459
Email:
matthew.halpin@nortonrosefulbright.com

Agent for Counsel for the Canadian Superior Courts Judges Association

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
E-mail: gpratte@blgcanada.com

Counsel for the Intervener Canadian Bar Association

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

Karen Perron
Tel.: (613) 369-4795
Fax: (613) 230-8842
Email: kperron@blg.com

Agent for Counsel for the Intervener Canadian Bar Association

GOLDBLATT PARTNERS LLP
20 Dundas Street West
Suite 1039
Toronto, Ontario
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 for Provincial Court Judges

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

Agent for Counsel for the Intervener, Canadian Taxpayers Federation

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

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

Counsel for Canadian Civil Liberties Association

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

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

Agent for Counsel for Canadian Civil Liberties Association

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PART I – OVERVIEW

1. The Respondents address the following points arising from the ten intervener submissions:

a) deference owed to the executive/legislature given its control of public spending ought not to limit the record on judicial review and deprive the reviewing court of evidence relevant to its application of the *Bodner* test;

b) repeated reliance by some interveners on deliberative secrecy is misplaced given the un-appealed findings of the Courts below that the document sought does not contain Cabinet deliberations;

c) openness and transparency best protect the constitutional roles of the separate branches of government and public confidence in judicial independence;

d) no unique evidentiary burden should be placed on the party seeking disclosure of a Cabinet document in the circumstances at bar; and

e) none of the interveners provides a basis for revisiting *Carey* or interfering with the discretionary weighing of the *Carey* factors undertaken by the Courts below.

PART II – STATEMENT OF ARGUMENT

(a) Deference Ought Not Limit The Record On Judicial Review

2. The executive or legislature's control of public expenditures does not justify limiting the record on judicial review to what government chooses to include in its public justification.[1] The "inherently political" nature of decisions about public spending was the very reason to (a) interpose a judicial compensation commission ("JCC") in order protect the courts and depoliticize the setting of compensation; and (b) dictate "judicial oversight"[2] of government decisions on judicial compensation through the requirements of the *Bodner* test.[3]

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[1] Contrary to: Mémoire de l'intervenante Procureure Génerale du Québec ("**PGQ**"); para 16-23, Factum of Intervener Attorney General of Canada ("**AGC**"), paras 2 and 17; Factum of Intervener Attorney General of Saskatchewan ("**AGSK**"), para 8; Factum of Intervener Attorney General of Alberta ("**AGAB**"), para 6; Factum of Intervener Attorney General of Ontario ("**AGON**"), para 10

[2] See AGSK, paras 14-19

[3] *Reference re Remuneration of Judges of the Provincial Court (PEI),* [1997] 3 S.C.R. 3 ("***PEI Reference***"), paras 138-146, 166; *Provincial Court Judges' Assn of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Mgmt Board); Bodner v.*

3. The content of the record for the reviewing court is a separate question from the degree of deference that may be owed later in applying the *Bodner* test.[4] *Bodner* is clear that the task on review is not to examine government's response to the JCC simply "on its face"[5], but rather to apply the *Bodner* test to the government's reasons in light of the record, and any exceptional evidence admitted beyond the record.[6] The focus of review is the government's reasons; including in the record all documents before the decision-maker, does not alter that focus.[7]

4. Misconstrued by the AGC, the *TWN* case,[8] cites the same basic norms properly applied by the courts below: the record consists of all relevant documents that were before the decision-maker, subject to public interest immunity, deliberative secrecy or solicitor-client privilege. Other evidence is admissible beyond the record based on exceptions to the general rule.

5. The CTF's proposed approach glosses over the main point from *PEI Reference*: while applying an alleged across-the-board measure to judges is *prima facie* rational, government must first make that proposal to a JCC, which must assess it considering "objective criteria, not political expediencies".[9] Every government has a fiscal plan. To require only adherence therewith as a basis to reject the recommendations of a JCC, as CTF proposes, would obviate the need for the JCC process.[10] That approach was soundly rejected in *PEI Reference* and the subsequent jurisprudence.

(b) <u>The R&R Is Not a Record of Cabinet's Deliberations, Favouring Disclosure</u>

6. Some interveners ignore that the Cabinet document ordered produced by the Courts

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Alberta; Conférence des juges du Québec v. Quebec (AG); Minc v. Quebec (AG), 2005 SCC 44 ("***Bodner***"), paras 22-40

[4] See Respondent's Factum, para 7 and 48; Contrary to AGC, paras 3, 19, 25; AGSK, para 3 and 20; AGON, para 20-21; and AGAB, para 1, 13, 27, 30

[5] AGC, para 17

[6] Respondents' Factum, para 49

[7] Contrary to AGON, para 16-17

[8] *Tsleil-Waututh Nation v. Canada (Attorney General)* 2017 FCA 128 ("***TWN***") at para 68-80, 86, 97-100; Also see AGAB, paras 10-12

[9] Factum of Intervener Canadian Taxpayers Federation ("**CTF**"), paras 7, 10-19; *PEI Reference*, *supra* note 3, para 173; *R. Newfoundland Association of Provincial Court Judges*, 2000 NFCA 46, paras 188-191; *Judges of the Provincial Court of Manitoba et al. v. Her Majesty the Queen*, 2012 MBQB 79 (CanLII), pages 37-41; See also *Bodner, supra,* note 3, paras 22-40 and 89-101

[10] Factum of Intervener Canadian Association of Provincial Court Judges ("**CAPCJ**"), para 23

below did not record Cabinet deliberations.[11] This finding was not appealed.[12] Courts have consistently distinguished between documents that inform Cabinet's decision-making and documents that record actual Cabinet table discussions: the former are more readily disclosable than the latter.[13]

(c) Safeguarding Branches of Government Requires Openness and Transparency

7. The inherently political decisions that set judicial compensation, and the reality that this unique form of judicial review involves different branches of government, justify as much openness and transparency as possible – not elevated deference to government secrecy.[14]

8. Where the Crown submits evidence of a specific public interest requiring non-disclosure, deference is owed to objections by the Crown to production of particular documents based on their contents. However, a class-based claim made on generic rationales like candour is a different matter.[15] This Court expressly addressed the separation of powers in *Carey*: it is for the courts, not the Crown, to determine the issue.[16] In the PII context, deference is a conclusion, not an analysis. The courts must weigh pertinent factors, in their discretion, to determine the proper balance between the public interests in the administration of justice and withholding certain evidence.[17] Where the Crown is a party, any claim for less than full disclosure must be carefully scrutinized.[18]

9. A troubling argument is made that the public interest in the depoliticization of the JCC process is best served by withholding Cabinet documents that could attract political criticism.[19]

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[11] AGC, paras 9-10, 11; AGSK, paras 8, 19, 21-24; AGON, paras 5, 19; AGAB; paras 22-24; PGQ, paras 5, 27-28
[12] Respondents' Factum, paras 20, 26
[13] See Respondents' Factum, paras 85-86; Factum of Intervener Canadian Civil Liberties Association ("**CCLA**"), para 22
[14] *Bodner*, *supra* note 3, para 63; *Provincial Court Judges of BC v. BC (Attorney General)*, 2012 BCSC 244, paras 23-24; *Provincial Court Judges of BC v. BC (Attorney General),* 2014 BCSC 336, paras 28-30; Contrary to AGSK, paras 2, 3, 13, 19, 20, 25, 31; AGAB, paras 26, 27, 30
[15] *Carey v. Ontario,* [1986] 2 SCR 637, 1986 CanLII 7 ("***Carey***"), paras 36, 40
[16] See *Carey*, *supra* note 15, para 39; Contrary to AGSK, para 12
[17] *Carey*, *supra* note 15, para 36, 39, 79-80; *Government Liability Law and Practice* (Canada Law Book, 2017) at p. 12-35 (Book of Authorities of the AGAB)
[18] *Leeds v. Alberta (Min. of the Environment)*, 1990 CanLII 5933 (ABQB) ("***Leeds***"), para 24
[19] AGSK, paras 22-24; AGON, para 6; AGC, para 7

This is anathema to the objective of an open and transparent process articulated by this Court.[20] As "secrecy breeds distrust and…information breeds confidence"[21], disclosure of relevant information will reinforce public confidence in judicial independence.[22] *Carey* is clear that "[t]he purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government".[23] Non-disclosure to serve the political fortunes of the government of the day does not serve the public interest.

(d) No Unique Evidentiary Burden Should be Placed On Party Seeking Disclosure

10. Parties seeking disclosure of Cabinet documents in the judicial compensation JR context should not be subject to a unique evidentiary burden.[24] *Carey* directs that it is the Crown that must establish that the public interest would be prejudiced by any particular disclosure sought.[25] A burden as proposed by the interveners[26] is unsupported by *Bodner*[27] and is wholly impracticable.[28]

(e) The Courts Below Meticulously Weighed the *Carey* Factors and Held the Appellants Failed to Establish PII

11. No intervener argues that a relevant Cabinet document may never be disclosed under the *Carey* analysis; some argue for "considerable deference" by courts, which should be "particularly cautious", and require disclosure only in "exceptional circumstances."[29] No such circumstances are defined; instead, these interveners impugn the discretionary weighing of the Courts below.

12. The Motions Judge conducted a meticulous analysis of the *Carey* factors in light of the facts, including a detailed inspection of the cabinet document, and concluded that disclosure of

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[20] *Bodner*, *supra* note 3, para 63
[21] *Health Services and Support-Facilities Subsector Bargaining Assn v. British Columbia*, 2002 BCSC 1509, para 38
[22] Also see Factum of Intervener Canadian Bar Association, paras 17-19
[23] *Carey*, *supra* note 15, para 84
[24] Contrary to AGSK, paras 27-28; PGQ, para 34. See also: CTF paras 29-30
[25] *Carey*, *supra* note 15, para 78
[26] Contrary to AGSK, paras 27-28; PGQ, para 34. See also: CTF paras 29-30
[27] A government must be prepared to justify its decision not to accept JCC recommendations in a court of law: *Bodner*, *supra*, note 3, para 18; *PEI Reference*, *supra* note 3, para 180
[28] *Carey*, *supra* note 15, para 99; and see: CAPCJ, para 21; Respondents' Factum, para 70
[29] AGSK, para 19, 20; AGAB, para 27; PGQ, para 28, 36

the document was, on balance, in the public interest.[30] It cannot be credibly suggested that the Courts below required only a demonstration of simple relevance before ordering disclosure.[31]

13. Arguments that the Courts below misconstrued the *Carey* factors are also ill-conceived. AGAB argues that judicial compensation decisions are similar in nature to those involving national security or diplomatic relations, ignoring the Motions Judge's finding that nothing in the R&R is akin to the type of sensitive material referenced by the Court in *Carey*.[32] *Carey* is clear that the document at issue need not be of historic interest in order to qualify for disclosure.[33] Arguing that these proceedings are civil not criminal, and do not allege improper conduct by the executive towards a citizen,[34] ignores their constitutional dimension and resultant high level of importance.[35]

14. Several interveners focus on the fact that the review engages the relationship between branches of government and/or concerns the expenditure of public funds.[36] The nature of the policy at issue is only <u>one factor</u> among others under the *Carey* test, and was duly considered by the Courts below.[37] Moreover, the Appellants knew that they would need to justify their decision on judicial review, yet failed to submit evidence of any specific public harm that militated against disclosure. This failure is elided by these interveners.

15. Like the Appellants, some interveners seek to elevate considerations of Cabinet solidarity and candour above all *Carey* factors, including the importance of production in the administration of justice.[38] This approach is contrary to *Carey* and subsequent PII jurisprudence.[39] Some interveners critique a general trend towards disclosure of Cabinet

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[30] NSSC Judgement, AR, Vol. I, Tab A, p 48-58 paras 143-184; NSCA Judgement, AR, Vol. I, Tab C, p 134, para 46
[31] Contrary to AGAB, para 29
[32] NSSC Judgement, AR, Vol. I, Tab A, p. 48 para 144; Contrary to AGAB, para 26
[33] *Carey*, *supra* note 15, para 83; also see: CCLA, para 17; Contrary to AGSK, para 30; AGAB, para 30; PGQ, para 38
[34] AGAB, para 30
[35] See Respondents' Factum, para 97; CCLA, paras 17, 23
[36] AGSK, para 31; AGAB, paras 26, 27, 29, 30
[37] *Carey, supra* note 15, para 79; NSSC Judgement, AR, Vol. I, Tab A, pp 48-56 paras 144-176; NSCA Judgement, AR, Vol. I, Tab C, pp. 131-134, paras 38-46
[38] PGQ, paras 31-33, 36; AGSK, paras 3, 32; AGAB, paras 23, 25, 27, 29, 31
[39] See Respondents' Factum, paras 80-92

documents.[40] The Respondents respectfully submit that the trend towards fulsome disclosure to assist in the fair administration of justice[41] should be affirmed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Winnipeg, in the Province of Manitoba, this 6th day of November, 2019.

Susan Dawes   Kristen Worbanski

Counsel for the Respondents The Nova Scotia Provincial Judges' Association

[40] AGAB, para 29

[41] *Leeds*, *supra* note 18, paras 23-24; *Carey, supra* note 15, para 85

PART VII – TABLE OF AUTHORITIES

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