SCC File No. 38459

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

BETWEEN:

THE ATTORNEY GENERAL OF NOVA SCOTIA representing HER MAJESTY THEY 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-

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(Pursuant to the Order of Moldaver J. revised September 12, 2019)

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A. Overview

1. It is axiomatic that pleadings in judicial review are critical to understanding what issues are relevant in a proceeding. The Interveners' failure to address the role of the pleadings in a review under *Bodner* results in the potential for unduly expanding the scope of what this Court intended in its guidance to lower courts as to the deference to be accorded to government in weighing political considerations and the standard of review to apply to its public reasons. That failure, coupled with not addressing the likely consequences of making production of Cabinet documents routine in constitutional litigation arising out of the separation of powers and protection of judicial independence, will erode the deferential standard of review and broaden that which comes under review.

2. The Interveners who support production of the Cabinet submission argue that *Bodner* itself mandates production of all material considered by Cabinet even though that is not what that decision requires. They describe Executive Council as an administrative decision-maker, though fail to address what that means in the context of the Executive's role and what this Court acknowledges as the basis for the high degree of deference to the government's spending considerations. The Interveners posit using the s. 1 *Charter* approach to document production in *Bodner* review, even though this Court rejected that approach.

3. The Interveners' argument that disclosure of the Cabinet submission will reveal the "real reasons", which they imply cannot be found in governments' public reasons, ignores the obligations and expectations placed on governments to provide reasons which are capable of judicial review. In the absence of a substantiated concern identified in a pleading that government has acted improperly, the search for such "real reasons" evinces a failure to accord respect and the presumption of good faith to Executive conduct, an approach that erodes this Court's attempt to de-politicize the judicial compensation process and which supports a growing cynicism surrounding the decision-making of our three branches of democracy.

B. Standard of Review and Scope of the Record

4. Although the Interveners acknowledge the deferential rationality standard and a court's limited role in reviewing a government's published reasons, they argue the record producible on judicial review must consist of "all relevant material that was before the government decision-maker", including submissions to Cabinet.[1] That administrative law concept of the 'record' does not, and should not, apply to Cabinet in the present context.

[1] Factum of the Canadian Civil Liberties Association ("CCLA") at paras. 8-9 and 13; Factum of the Canadian Association of Provincial Court Judges at paras. 17-22

5. The record on judicial review allows the court to determine whether a decision is reasonable or correct, depending on the applicable standard of review.[2] However, in judicial compensation cases, the Legislature's or Cabinet's underlying *decision* is not subject to review "as decisions about the allocation of public resources belong to legislatures and to the executive".[3] The court "is not asked to determine the adequacy of judicial remuneration" or to determine whether the government's remuneration decisions are *reasonable*.[4] Instead, the court undertakes a limited and deferential review of the sufficiency of the government's *reasons* which are made public with a focus on the government's justification, not the underlying spending decision.[5] The Cabinet process by which the reasons were formulated is not by default the subject of judicial review.

6. The traditional rule that the record includes all material before a decision-maker is geared towards tribunals that make adjudicative decisions at hearings, rather than legislative or policy-laden decisions at meetings, like Cabinet, where matters are debated, refined, and often contain political consideration. Executive Council operates in confidentiality precisely because of such a background. Here, there is no suggestion the Executive attempted to immunize the published OIC reasons from any scrutiny or that it acted in bad faith.

7. The argument that Cabinet material is relevant under *Bodner* because it might show politicization of the process ignores that Cabinet is making political decisions concerning government spending, which are not the subject of *Bodner* review. The law already provides a meaningful method for reviewing improper governmental conduct – where evidence exists for such improper conduct judges' associations in their pleadings allege such conduct and introduce to the record as extrinsic evidence that which supports their allegations. [6]

8. As noted by the CCLA, other justificatory tests exist in constitutional litigation under s. 1 of the *Charter*.[7] However, s.1 of the *Charter* imposes a "very rigorous standard of justification" that requires the court to evaluate the proportionality of the means the government has chosen to meet an important objective, including whether the means minimally impair the right or freedom in question.[8] This is necessarily different from the *Bodner* context. There is no equivalent context in judicial compensation cases. The court does not engage in a "searching

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[2] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, 2011 SCC 62 at para. 15; *Delios v. Canada (Attorney General)*, 2015 FCA 117 at para. 26; *Bernard v. Canada (Attorney General)*, 2015 FCA 263, at paras 17-18.
[3] *Bodner* at para. 20
[4] *Bodner* at para. 30
[5] *Bodner* at para. 27; *PEI Reference* at paras. 182-184
[6] *Bernard*, paras 18-28 ; *Newfoundland and Labrador Judges*, *infra*, para. 66
[7] CCLA Factum, para 8
[8] *PEI Reference* at para. 182

analysis of the relationship between ends and means".[9] A s. 1 analysis proceeds only after a court finds a *Charter* rights violation. In the judicial remuneration context, that a government varies or does not follow a commission's recommendation does not necessarily result in a *Charter* violation or infringement on judicial independence. The spending decision has been recognized by this Court as a political matter.[10]

C. Extrinsic Evidence

9. Government may choose to provide additional evidence to explain or support the factual foundation contained in its public response. The Intervenors argue access to such choice should result in a compelled production of the Cabinet submission.[11] They point to other forms of extrinsic evidence which has been used in judicial compensation cases, such as legislative debates, to argue that the judicial review cannot be confined to the "four corners" of the public response.[12]

10. In certain circumstances, a reviewing court is permitted to consider information outside the government's public response. The relevance of extrinsic evidence on a judicial review, in the judicial compensation context is determined by the limited nature of judicial review as set out in *Bodner* and by the allegations contained in the pleadings. Cases cited by the Interveners in which extrinsic evidence was produced and relied upon are consistent with this approach.

11. For example, government affidavits about its financial situation were accepted by the Court in *Newfoundland and Labrador Judges*,[13] as they did not "add to the reasons given in the Government's response" and, instead, supported the "factual foundation relied upon by the Government".[14] Too, legislative debates concerning a history of judicial compensation delays and politicization of the process were accepted.[15] However, these documents formed part of the public process within which the response was evaluated under *Bodner* and were relevant to the grounds of review as pleaded.[16] The circumstances in our proceeding are unlike those in *Newfoundland and Labrador Judges.*

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[9] *Bodner* at paras. 31-38; *PEI Reference* at para. 182
[10] *PEI Reference* at para. 142 and 176
[11] Factum of the Canadian Superior Court Judges Association at paras. 19-21
[12] Factum of the Canadian Superior Court Judges Association at paras. 15-17
[13] *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140 ("***Newfoundland and Labrador Judges***")
[14] *Newfoundland and Labrador Judges* at para. 88
[15] *Newfoundland and Labrador Judges* at paras. 154-171
[16] *Newfoundland and Labrador Judges* at para. 66

12. In *Cameron*[17], the issue was whether the Yukon Government was obligated to disclose documents that the government used in formulating its submissions to the JCC, and documents that showed communications between the government and the Territorial Court Judges. The Court noted that "[r]elevancy should still be determined by reference to the grounds for judicial review set out in the application".[18] There, the pleadings alleged that impermissible negotiations took place between the government and the Territorial Court, and there was support for this allegation in the joint submission that the parties made to the JCC.[19] On this basis, the Court ordered disclosure of the communications relevant to this aspect of the pleadings.

13. However, the Court declined to order production of the documents used in preparing its JCC submissions on the grounds that "the Petitioner has not established how going behind the submissions to the material used to formulate them would assist the reviewing Court on the issues raised in the Petition."[20] The Court rejected the argument that the rules concerning document discovery should be "broadly interpreted" because judicial compensation cases are constitutional in nature. The Court held that the rules should not be interpreted as providing a right to discovery of all documents in the possession of the decision-maker, "only documents relevant to the grounds for judicial review are producible".[21] These principles apply in this case.

D. Transparency and Routine Production of Cabinet Submissions

14. Courts have successfully applied the *Bodner* test without requiring production of confidential submissions that informed Cabinet's deliberations.[22] Interveners' arguments that a Cabinet submission must be produced in order to further the objective of "transparency" are not warranted under *Bodner*.[23]

15. The suggestion that production is required so that the judges will know the "real reasons" for government's rejection of a JCC recommendation[24] is speculation only and not supported by the pleadings. There is nothing to suggest the reasons given by government are a sham or produced in bad faith, and it increases the potential to further politicize the process while making the compensation process more adversarial to treat judicial review as the search for reasons other than as that which is published and relied on by government. The argument that government routinely hide its reasons or that Cabinet might act with ulterior purpose in the absence of pleading

[17] *Cameron v. Yukon*, 2010 YKSC 58 ("***Cameron***")
[18] *Cameron* at para. 12
[19] *Cameron* at paras. 2, 5 and 19
[20] *Cameron* at para. 20
[21] *Cameron* at para. 20
[22] See, by way of example, the cases cited in the Factum of the Attorney General of Ontario at paras. 22-33
[23] Factum of the Canadian Superior Court Judges Association ("CSCJA") at paras. 10-14; Factum of the Canadian Bar Association at paras. 7-19
[24] Factum of the Canadian Association of Provincial Court Judges at para. 21; Factum of the Canadian Bar Association at paras. 13 and 17

and support undermines the democratic process and the mutual respect and good faith that ought to be the basis on which the dialogue between the branches of government occurs in judicial compensation processes.[25]

16. Where appropriate, the law already allows judges' associations to make and substantiate allegations of improper politicization. We see this in *Newfoundland and Labrador Judges*, where it was alleged that the debates in the Legislative Assembly had impermissibly politicized the process, and in *Manitoba Judges*[26], where the judges' association was able to demonstrate government's disregard for the process because of how the hearing was conducted before the Standing Committee responsible for responding to the commission's recommendations.[27] Thus, where allegations of improper government conduct have a factual basis, there exists the power in judicial review to respond appropriately.

17. Routine production of Cabinet submissions will not lead to useful "transparency" in *Bodner* reviews. In *Bodner* this Court found that by not producing certain documents government met the objectives of an open and transparent public process, which objectives "would not be furthered if governments were required to answer commission recommendations by, for example, producing volumes of economic and actuarial data".[28] Routine production of Cabinet submissions shifts the focus away from the public process without fostering increased transparency. A Cabinet submission does not express a subsequent decision nor does it describe Cabinet's collective understanding; these matters would require further evidence beyond that currently contemplated under a *Bodner* approach.

18. Routine production could result in a change to how Cabinet documents are drafted. As recognized in *Babcock*, the "advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship".[29] Routine production would not likely foster increased transparency.

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[25] See generally Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, *Respecting Democratic Roles* (2004), https://www.scc-csc.ca/judges-juges/spe-dis/bm-2004-11-22-eng.aspx (last visited 2019-11-05)

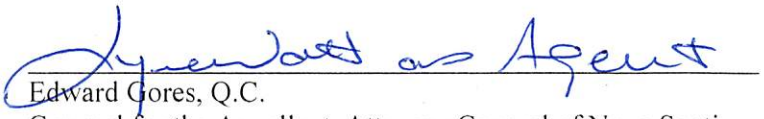
[26] *Judges of the Provincial Court (Man.) v. Manitoba et al.*, 2013 MBCA 74 (**"*Manitoba Judges*"**)

[27] *Manitoba Judges* at para. 69

[28] *Bodner* at para. 63

[29] *Babcock* at para. 18; *John Doe* at para. 45

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of November, 2019



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