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 THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA AND THE GOVERNOR IN COUNCIL

APPLICANTS
(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)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL, (THE JUDGES OF THE PROVINCIAL COURT AND FAMILY COURT OF NOVA SCOTIA, AS REPRESENTED BY THE NOVA SCOTIA PROVINCIAL JUDGES' ASSOCIATION, RESPONDENTS)

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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

Susan Dawes
Kristen Worbanski
Telephone: (204) 926-1501
Facsimile: (204) 956-0625
Email: sdawes@myersfirm.com

Counsel for the Respondents, The Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges' Association

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

Marie-France Major
Telephone: (613) 695-8855
Facsimile: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Agent for the Respondents, The Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges' Association

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

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

Counsel for the Applicants

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

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

Agent for the Applicants

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Part I – Overview of Position and Statement of Facts

(a) Overview of Position

1. The Applicants seek leave to appeal an interlocutory decision on what constitutes the record on a judicial review ("JR") of a government's response to the recommendations of a judicial compensation commission ("JCC") and the application of the doctrine of public interest immunity ("PII") in that context. The issues raised were unanimously decided against the Applicants by both the Motion Judge and Nova Scotia Court of Appeal ("NSCA"), in well-reasoned decisions which apply established legal principles to particular facts. The proposed appeal raises no issue of public or national importance.

2. The unique form of JR applicable to government decisions setting judicial remuneration was established by this Honourable Court in *PEI Reference*[1] and *Bodner*[2], and has since been consistently applied by many Courts across Canada. The content of the record must serve the governing principles (i.e. "the *Bodner* test", discussed below), and those which define the record in JRs more generally.[3]

3. The Courts below held that, with the exception of certain sections protected by solicitor-client privilege, the Report and Recommendation of the Attorney General and Minister of Justice dated December 19, 2016 (the "R&R") was relevant and producible as forming part of the record on the JR. The R&R was before the Governor in Council and was expressly referred to in Order in Council 2017-24 (the "OIC"), whereby the Governor in Council, *inter alia*, rejected the salary recommendations set out in the Report of the Provincial Judges' Salaries and Benefits Tribunal dated November 18, 2016 (the "Tribunal Report").

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[1] *Reference re Remuneration of Judges of The Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of the Provincial Court of Prince Edward Island; R v Campbell; R v Ekmecic; R v Wickman; Manitoba Provincial Judges' Association v Manitoba (Minister of Justice)*, [1997] 3 SCR 3, ("*PEI Reference*")

[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); Minc v Quebec (Attorney General)*, 2005 SCC 44 ("*Bodner*")

[3] *Bodner*, *supra* note 2, paras. 31, 38

4. The Applicants' position that the record on JR is limited to the Tribunal Report and the Government's decision (i.e. the OIC), and thus excludes the R&R, relies upon an unduly narrow version of the *Bodner* test. If the Applicants' position were accepted, the reviewing Court would be prevented from performing its task. Additional evidence is required in order for the reviewing Court to examine the legitimacy of the government's reasons, the factual foundation underlying the government's decision, and government's participation in the whole of the process. The R&R is clearly relevant to this analysis.

5. With respect to PII, the Courts below applied the legal test set out in *Carey*[4] in ordering disclosure of the R&R. The Applicants raise the spectre of routine production of Cabinet documents as a ground for this Court to intervene in the discretionary weighing of the *Carey* factors by the Motion Judge. Whether a request for a document is novel or becomes routine, once it is determined to be relevant, the law of PII requires the Government to justify its non-disclosure based on the public interest. No guidance from this Honourable Court is required in relation to the well-settled principles governing PII. As such, there is no issue of national importance.

6. The unanimous result reached by the Courts below is critical to ensure that the complete record and all relevant evidence is before the Court on JR, to facilitate application of the *Bodner* test. The Applicants' effort to shield the R&R from disclosure is not a matter of pressing or national importance that would warrant this Honourable Court granting leave to appeal. The Respondents respectfully submit that leave to appeal ought to be denied.

(b) Statement of Facts

(i) The Underlying Litigation

7. The Nova Scotia Provincial Judges' Salaries and Benefits Tribunal (the "Tribunal") is an independent tri-partite, triennial, tribunal appointed in accordance with sections 21A – 21M of the *Provincial Court Act* (the "*Act*").[5] Prior to 2016, the Tribunal's recommendations were binding. Following 2016 amendments, the Governor in Council may confirm, vary or reject the

[4] *Carey v. Ontario*, [1986] 2 S.C.R. 637
[5] *Provincial Court Act*, RSNS 1989, c 238

Tribunal's recommendations, with reasons.[6]

8. The Tribunal Report, dated November 18, 2016, contains recommendations regarding judicial salaries and other benefits for the period April 1, 2017 to March 31, 2020.[7]

9. On February 2, 2017, the OIC was issued, whereby the Governor in Council, *inter alia*, rejected the salary recommendations set out in the Tribunal Report.[8] The OIC opened with the following statement:

> The Governor in Council on the report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016…hereby confirms recommendations 2 to 5 and varies recommendation 1 of the Nova Scotia Provincial Judges' Salaries and Benefits Tribunal… (emphasis added)[9]

10. On March 7, 2017, the Respondents filed a Notice for JR, requesting JR of the OIC on numerous grounds, including a failure to meet the three stages of the *Bodner* test, and seeking various orders and declarations.[10] In the Notice for JR, the Respondents described the record to be produced as including the R&R, which report is referred to in the first sentence of the OIC. The Respondents also stated their intention to rely upon the Affidavit of the Honourable James H. Burrill, Judge of the Provincial Court, dated June 2, 2017 (the "Burrill Affidavit").[11]

11. On May 5, 2017, the Applicants filed the record, which included only the OIC and the Tribunal Report.[12] The R&R was not included and was not referred to by the Applicants.

12. On May 8, 2017, the Respondents filed a Notice of Application respecting a constitutional challenge to the 2016 amendments to the *Act* that removed the binding Tribunal process that had long existed in Nova Scotia.[13]

13. The Respondents brought two preliminary motions to the Motion Judge for

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[6] *Provincial Court Act*, ss. 21J and 21K
[7] Reasons for Judgment of the Supreme Court of Nova Scotia, dated March 6, 2018 ("NSSC Judgment"), para. 3 [Leave Application, Tab 2A, p. 11]
[8] NSSC Judgment, para. 4 [Leave Application, Tab 2A, p. 11]
[9] NSSC Judgment, para. 5 [Leave Application, Tab 2A, p. 11]
[10] NSSC Judgment, paras. 6-7 [Leave Application, Tab 2A, pp. 11-13]
[11] NSSC Judgment, para. 15 [Leave Application, Tab 2A, p. 15]
[12] NSSC Judgment, para. 11 [Leave Application, Tab 2A, p. 14]
[13] NSSC Judgment, paras. 8-9 [Leave Application, Tab 2A, pp. 13-14]

determination, only the first of which is the subject of the Leave Application.[14] By the first motion, the Respondents sought, *inter alia*, a declaration that the R&R is part of the record on JR and an order that the Applicants produce the R&R in its entirety.[15] The Applicants provided a sealed copy of the R&R to the Motion Judge. The Respondents also sought an order that they be permitted to introduce the Burrill Affidavit, as evidence beyond the record.[16]

(ii) <u>The Decision of the Motion Judge ("NSSC")</u>

14. On March 3, 2016, the Motion Judge issued a decision, followed by an Order dated April 6, 2018. She held that the record for JR should be supplemented to include: (1) the R&R, less certain passages that she determined were protected from disclosure by solicitor-client privilege; and (2) the Burrill Affidavit, with the exception of certain paragraphs (and related Exhibits) that she considered to be irrelevant.[17]

15. The Motion Judge accepted that the JR of a government decision regarding judicial compensation includes not only an assessment of the legitimacy of, and the reasonableness of the factual foundation for, the government's reasons, but also a *global review* of the whole of the tribunal process, which global review is "necessary in order…to determine whether the government's participation and response in the totality of the process demonstrates good faith and meaningful participation."[18] She declined to adopt the Applicants' unduly "limited" form of review.[19] The Motion Judge also applied the principle, well-settled in Nova Scotia jurisprudence,[20] that "any document that was before a decision-maker and relied on by it in reaching its decision, should form part of the record on judicial review"[21]. The R&R, referred to in the OIC and before the decision-maker, was relevant, formed part of the record and had to be produced.

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[14] The second motion sought consolidation, *inter alia*, of the two applications: NSSC Judgment, para. 16 [Leave Application, Tab 2A, pp. 15-16]

[15] NSSC Judgment, para. 13 [Leave Application, Tab 2A, p. 15]
[16] NSSC Judgment, para. 15 [Leave Application, Tab 2A, p. 15]
[17] NSSC Judgment, paras. 331-333 [Leave Application, Tab 2A, pp. 104-105]
[18] NSSC Judgment, para. 71 [Leave Application, Tab 2A, p. 30]; *Bodner, supra* note 2, paras. 31, 38
[19] NSSC Judgment, para. 72 [Leave Application, Tab 2A, p. 30-31]
[20] NSSC Judgment, paras. 80-108 [Leave Application, Tab 2A, pp. 34-41]
[21] NSSC Judgment, para. 108 [Leave Application, Tab 2A, p. 41]

16. The Motion Judge determined that the R&R was not protected from disclosure by operation of the doctrine of deliberative secrecy, as the Applicants argued, since it does not chronicle discussions of Cabinet members, but is rather a report from a senior solicitor to Cabinet.[22]

17. The Motion Judge thoroughly canvassed the undisputed leading cases regarding the doctrine of PII[23] and conducted a "meticulous"[24] analysis of the *Carey* factors. In her discretion, she determined that the balance of these factors favoured disclosure of the R&R, noting "[m]ost of the content of the document is background information."[25] She went on to find that certain sections of the R&R were protected from disclosure by solicitor-client privilege.[26]

18. The Motion Judge also determined that most of the Burrill Affidavit was admissible as relevant evidence on JR, based on established exceptions to the general rule that new evidence is usually not considered, applied in light of the *Bodner* test.[27]

(iii) <u>The Decision of the Court of Appeal</u>

19. The NSCA heard the Applicants' appeal and the Respondent's cross-appeal on October 2, 2018. In its October 30, 2018 decision, the NSCA unanimously upheld the findings of the Motion Judge that the R&R was relevant, not shielded from disclosure by either deliberative secrecy or PII, and therefore formed part of the record for JR, dismissing the Applicants' appeal on these points. The NSCA also dismissed the Applicants' appeal seeking to exclude the entirety of the Burrill Affidavit, instead admitting one further paragraph of the Affidavit on the Respondents' cross-appeal. The Respondents' cross-appeal relating to solicitor-client privilege was also dismissed.

20. Just as in their Leave Application, [28] the Applicants argued again before the NSCA that

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[22] NSSC Judgment, para. 116 [Leave Application, Tab 2A, p. 43]
[23] NSSC Judgment, paras. 118-143 [Leave Application, Tab 2A, pp. 44-53]
[24] Reasons for Judgment of the Nova Scotia Court of Appeal, dated October 30, 2018 ("NSCA Judgment"), para. 46 [Leave Application, Tab 2B, p. 137]
[25] NSSC Judgment, para. 184 [Leave Application, Tab 2A, p. 63]
[26] NSSC Judgment, paras. 185-202 [Leave Application, Tab 2A, pp. 63-67]
[27] NSSC Judgment, paras. 212-315 [Leave Application, Tab 2A, pp. 70-102]
[28] NSCA Judgment, paras. 28-30 [Leave Application, Tab 2B, p. 132-133]

the R&R is irrelevant, as the record for JR is solely the Tribunal Report and the Government's response to the Tribunal Report (the "Response"). The NSCA rejected the Applicants' submission that the R&R is irrelevant for two reasons: (1) the R&R is relevant to the assessment of the reasonableness of the factual foundation relied upon by the Government pursuant to the second stage of the *Bodner* test; and (2) the third stage of *Bodner* states that the reviewing court "must weigh the whole of the process *and* the response", which necessarily implies that the whole process extends beyond just the Response.[29] Fichaud J.A., writing for the NSCA, held: "The R&R is integral to that process."[30]

21. The NSCA cited many authorities to support its conclusion that the JR record is not so limited, and that material considered by Cabinet is admissible on the JR of a government's Response.[31] The NSCA explained that the requirement that a government's reasons must be stated in its Response and that their legitimacy is the focus of the JR, did not translate, as the Applicants argued, to the conclusion that the only admissible items of evidence are the Tribunal's Report and the Response. The NSCA stated: "The application of *Bodner*'s tests – particularly the second and third stages – may involve the consideration of evidence outside the four corners of those two documents."[32]

22. The NSCA agreed with the Motion Judge's findings that the R&R is information to Cabinet, but is neither a minute or record of Cabinet deliberations, nor a draft of Cabinet's response to the Tribunal Report.[33] The NSCA accordingly rejected the Applicants' submission that the R&R is shielded by deliberative secrecy.

23. The Applicants did not suggest that the Motion Judge misstated the law with respect to PII, nor did they directly challenge her application of the *Carey* factors to the R&R. Rather, they argued that the Motion Judge erred by not properly considering the candour rationale for Cabinet confidentiality. The NSCA cited the cautionary note of this Court in *Carey*: "I am prepared to

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[29] NSCA Judgment, paras. 32-34 [Leave Application, Tab 2B, p. 133]
[30] NSCA Judgment, para. 34 [Leave Application, Tab 2B, p. 133]
[31] NSCA Judgment, para. 35 [Leave Application, Tab 2B, p. 133]
[32] NSCA Judgment, para. 36 [Leave Application, Tab 2B, p. 134]
[33] NSCA Judgment, para. 37 [Leave Application, Tab 2B, p. 134]

attach some weight to the candour argument but it is very easy to exaggerate its importance."[34] The Applicants repeat the same arguments again in this Leave Application.

24. The NSCA noted that the Government knew that its response would be subject to JR pursuant to the *Bodner* criteria and that this JR would focus on matters vital to the administration of justice: the proper functioning of the executive and the relationship between two branches of government.[35] The NSCA held that, to the extent the R&R speaks to those significant topics, its airing for the JR is, on balance, in the public interest and is well supported by this Honourable Court's decision in *Carey*.

25. The Applicants made the same argument to exclude the Burrill Affidavit that they did to oppose disclosure of the R&R: that under *Bodner*, the reviewing Court may only examine the Tribunal Report and the Response.[36] The NSCA rejected this submission, referring to numerous examples of similar JRs in which the reviewing Courts have considered evidence extrinsic to the Tribunal Report and Response.[37]

26. The Applicants do not seek leave to appeal the findings of the Courts below with respect to the admissibility of the Burrill Affidavit, creating an inconsistency in their position. They argue that the record on JR must be limited to the Tribunal Report and the Response but no longer contest the lower Courts' conclusions to the contrary on the Burrill Affidavit. The Leave Application is clearly an effort to shield the R&R, a plainly relevant document, from the Court's review. With respect, this is far from an issue of national importance.

(iv) The BCCA Consistently Applied The Same Established Legal Principles

27. The BC Court of Appeal ("BCCA") upheld a decision of the Chief Justice of the BC Supreme Court, which in turn upheld a decision of a Master, [38] that a submission to Cabinet by

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[34] NSCA Judgment, para. 44 [Leave Application, Tab 2B, p. 137]; *Carey*, *supra* note 4, para. 46, emphasis added
[35] NSCA Judgment, para. 45 [Leave Application, Tab 2B, p. 137]
[36] NSCA Judgment, para. 69 [Leave Application, Tab 2B, p. 142]
[37] NSCA Judgment, paras. 35, 71-72 [Leave Application, Tab 2B, pp. 133-134, 142-143]
[38] *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General)*, 2018 BCSC 1193 ("*BCSC 2018 – Master*"); *British Columbia (Attorney General) v Provincial Court Judges' Association of British Columbia*, 2018 BCSC 1390 ("*BCSC 2018*");

the Attorney General, which informed the BC Government's Response to the report of the JCC, was relevant to the JR and not protected from disclosure by PII. This decision is one of a line of cases in BC (the "BC Cases"), which have consistently held that the JR record is not limited solely to the Tribunal Report and the Response, and that material considered by Cabinet is relevant and admissible for the application of the *Bodner* test.[39]

28. The BC Cases provided instructive precedent for the instant case, but the Courts below reached their decisions with respect to the R&R based on the application of established precedent to the particular facts before them. The coincidental timing of the BCCA's consistent decision does not transform the issues raised by this Leave Application into ones of public and national importance. Indeed, the fact that the BCCA came to the same conclusion as the Courts below further undermines the Applicants' claim that guidance from this Court is needed.

Part II – Questions in Issue

29. The Respondents submit that the **first issue** identified by the Applicants is more accurately stated as: whether the R&R, a document the Applicants concede was before the Governor in Council when it made its decision and "provide[d] advice to Cabinet" regarding the Tribunal Report[40], is relevant and forms part of the record on JR of the Government's Response to the Tribunal Report. Given the well-established interpretation of the *Bodner* test and the general principles regarding what constitutes the record on JR, the R&R is properly included in the record for JR, subject to the doctrine of PII.

30. The Respondents restate the second issue as: is the R&R protected from disclosure by

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Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General), 2018 BCCA 394 ("*BCCA 2018*")

[39] *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244 ("*BCSC 2012*"), paras. 4-11, 16, upheld on appeal: *Provincial Court Judges' Assn. of British Columbia v. British Columbia (Attorney General)*, 2012 BCCA 157 ("*BCCA 2012*"); *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022 ("*BCSC 2012 – JR*"), paras. 52-54, 61-62, 68, 81-83; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336 ("*BCSC 2014*"), paras. 31, 44-49, 63-67, 136-43, overturned on other grounds: 2015 BCCA 136, leave to appeal refused: 2015 CanLII 69435 (SCC); *BCSC 2018 – Master*, *supra* note 38; *BCSC 2018*, *supra* note 38; *BCCA 2018*, *supra* note 38

[40] Leave Memorandum of Argument, paras. 11-12 [Leave Application, Tab 3, p. 155]

PII? The Applicants' **second issue** raises the spectre of "routine demands" for production of Cabinet documents and the impact of these on the application of *Carey* and *Babcock*[41]. Production decisions always turns on their facts, including whether the Government submits evidence of a specific public interest that requires non-disclosure (none was submitted in this case). The decisions below did not purport to apply the *Carey* factors to any case other than the present one, nor did they foreclose the discretionary weighing of those factors in future cases. The Applicants offer no compelling rationale for revisiting *Carey*, either in general or in the context of JR of judicial compensation determinations. The Applicants simply repeat their submission, rejected by the Courts below, that the candour argument should receive more weight, and propose an alternative approach to the PII analysis, which would not change the outcome in this case even if it was applied.

31. The only real issue on this Leave Application is whether the findings of the Courts below, that the R&R forms part of the record on the JR and is not protected by PII, are issues of public importance that ought to be heard by this Court. The Courts below applied established legal tests and there is no legal or policy reason to revisit them in the context of this interlocutory issue. Accordingly, there is no question of public importance or important issue of law to warrant the attention of this Honourable Court.

Part III - Argument

(a) It Is Well-Established That The *Bodner* Test Requires Evidence Beyond The Tribunal Report And The Government's Response

32. The Applicants argue that the Courts below misinterpreted *PEI Reference* and *Bodner*, but cite no authority for their restrictive interpretation. The Respondents submit that it is the Applicants who mischaracterize the *Bodner* test as being strictly limited to a review of the Tribunal Report and Response thereto, in an attempt to exclude the R&R from the record.

33. In *PEI Reference*, the majority of this Court held that independent, objective and effective JCCs are constitutionally required, to act as an "institutional sieve" to depoliticize the setting of compensation to the greatest extent possible.[42] The recommendations of the JCC with

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[41] *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3
[42] *PEI Reference*, *supra* note 1, paras. 133, 170-185

respect to judicial remuneration need not be binding on the executive or the legislature but should not be set aside lightly. If the executive or the legislature chooses to depart from them, it must provide reasons and justify its decision -- if need be, in a court of law.[43]

34. In *Bodner*, this Court found that its goal of reducing friction and depoliticizing the setting of judicial compensation had not been achieved by the test set out in *PEI Reference* and that "… more is needed".[44] The Court added a third stage to the earlier two-stage test, to define the following analysis ("the *Bodner* test"):

> (1) Has the government articulated a legitimate reason for departing from the commission's recommendations?
> (2) Do the government's reasons rely upon a reasonable factual foundation? and
> (3) Viewed globally, has the commission process been respected and have the purposes of the commission - preserving judicial independence and depoliticizing the setting of judicial remuneration - been achieved?[45]

35. The **first stage** was described as a screening mechanism, which requires the government to provide a "legitimate" reason for any departure from the JCC's recommendations, which is "what the law, fair dealing and respect for the process require."[46] This Court's description of what constitutes a legitimate reason informs the evidence that must be before a reviewing court:

- the JCC's recommendations must be given weight;
- the Response "must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission";
- "[r]easons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality";
- the government must deal with the issues at stake in good faith;
- the government must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation.
- the reasons should "reveal a consideration of the judicial office and an intention to deal with it appropriately" and

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[43] *PEI Reference*, *supra* note 1, paras. 133, 180
[44] *Bodner*, *supra* note 2, para. 3
[45] *Bodner*, *supra* note 2, paras. 31
[46] *Bodner*, *supra* note 2, paras. 24, 32

- "[t]he reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence."[47]

36. This Court described the **second stage** of the review as an inquiry into the reasonableness and sufficiency of the factual foundation relied upon by the government in rejecting or varying the JCC's recommendations. Accordingly, evidence which supports or calls into question the factual foundation of the Response must be admissible on review.[48]

37. The **newly added third stage** requires evidence concerning the "totality of the process" and the government's participation therein. This Court outlined the task of a reviewing Court in assessing whether the JCC process was respected, as follows:

> 38 At the third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it may find fault with certain aspects of the process followed by the government or with some particular responses or lack of answer, the court must weigh and assess the government's participation in the process and its response in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues. The focus shifts to the totality of the process and of the response.

38. A non-exhaustive list of the evidence that is likely to be necessary in order for the *Bodner* test to be applied in any given case includes:

(i) evidence of the submissions made to the Tribunal in order that the Court can assess whether they were substantively addressed by the Tribunal itself and, in turn, whether the Government engaged with and responded to the Tribunal's reasoning;[49]

(ii) evidence which shows whether the Government's conduct throughout the process demonstrated the requisite good faith and respect for the process;[50]

(iii) evidence which demonstrates whether the Government's reasons are based on

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[47] *Bodner, supra* note 2, paras. 23-27
[48] *Bodner, supra* note 2, paras. 33-37
[49] *Bodner, supra* note 2, para. 23
[50] *Bodner, supra* note 2, paras. 24-25

facts and sound reasoning;[51]

(iv) evidence addressing the question of whether the Government has engaged in a meaningful way with the process of the Tribunal;[52] and

(v) evidence which describes the "totality of the process", thereby permitting the court to weigh "the whole of the process and the response."[53]

39. Given the allegations raised in the Respondents' Notice of JR and the reasons expressed in the OIC, the broad scope of evidence set out in the Burrill Affidavit was permitted to augment the record on JR in this particular case.[54] Other Court decisions which have applied the *Bodner* test are replete with references to similar types of evidence.[55] Contrary to the Applicants' assertion, the relevance of Cabinet submissions was not considered in *Bodner*.[56] However, the BC Cases which apply *Bodner*, support that material that was before Cabinet when it formulated the Response is admissible in such a JR.[57]

40. The Applicants argue that the lower Courts offered no explanation of what the reviewing

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[51] *Bodner*, *supra* note 2, para. 25
[52] *Bodner*, *supra* note 2, para. 38
[53] *Bodner*, *supra* note 2, para. 38
[54] NSSC Judgment, paras. 240-315 [Leave Application, Tab 2A, pp. 81-102]; NSCA Judgment, para. 67 [Leave Application, Tab 2B, pp. 141-142]
[55] E.g. *Newfoundland Association of Provincial Court Judges v. Newfoundland & Labrador*, 2003 NLSCTD 117, paras. 2, 3, 27, 28, 45, 81, 88 (which decision pre-dated *Bodner* and thus applies the test set out in *PEI Reference*); *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice)*, 2002 NBQB 156, pp. 25-28, 36-38, 40, 42-44 (which decision was appealed from and ultimately heard by as one of the four cases decided in *Bodner*); *Provincial Judges' Assn. v. The Province of New Brunswick*, 2009 NBCA 56, paras. 17-22, 34-37; *Manitoba Provincial Judges' Association v. Manitoba*, 2012 MBQB 79 ("*MBQB 2012*"), paras. 16, 20, 25, 68-73, 74, 98, 99, 111, upheld on appeal: *Judges of the Provincial Court (Man.) v. Manitoba et al*., 2013 MBCA 74 ("*MBCA 2013*"); *BCSC 2014*, *supra* note 39, paras. 32-34, 44-62; *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140 ("*NLSC 2018*"), paras. 6-37, 40, 77, 107-115, 118, 123-135, 150, 157
[56] Leave Memorandum of Argument, para. 45 [Leave Application, Tab 3, p. 164]
[57] The BC Cases, *supra* note 39

Court is to do with submissions to Cabinet or how the advice given to Cabinet is material to the "whole of the process" at the third stage of the *Bodner* test.[58] The Courts below explained that the R&R provides background information, provides specifics of the factual foundation relied upon by the Government, and contributes to showing Government's consideration of the Tribunal Report.[59] The Courts below did not "effectively add…an additional stage to the *Bodner* analysis"[60], as asserted by the Applicants. Rather, they ordered production of the R&R based on its relevance to the existing second and third stages of the *Bodner* test.

41. As to the Applicants' reliance on deference, *Bodner* is clear that the level of deference to be accorded to Government is proportional to the degree to which it participated actively in the process, which has yet to be established.[61]

42. The decisions of the Courts below ensure that the complete record and all relevant evidence will be before the reviewing Court to facilitate the application of the *Bodner* test. Adopting the Applicants' interpretation of what is relevant to the *Bodner* analysis would require disregarding *Bodner* itself, as well as the body of jurisprudence that has followed and applied it.

(b) <u>The R&R Was Before The Decision-Maker, Referenced In The Decision, And Accordingly Properly Forms Part Of The Record On JR</u>

43. The Applicants fail to address the lower Courts' findings that the R&R is producible pursuant to generally accepted principles that the record on JR includes documents that were expressly referred to in the decision and/or were before the decision-maker. [62] The Applicants provide no contrary authorities on this point.

44. In the leading Nova Scotia cases on these principles, documents comparable to the R&R

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[58] Leave Memorandum of Argument, para. 53 [Leave Application, Tab 3, p. 167]
[59] NSSC Judgment, para. 184 [Leave Application, Tab 2A, p. 63]; NSCA Judgment, paras. 33-36 [Leave Application, Tab 2B, pp. 133-134]
[60] Leave Memorandum of Argument, para. 49 [Leave Application, Tab 3, pp. 165-166]
[61] *Bodner*, *supra* note 2, para. 83; *MBQB 2012*, *supra* note 555, para. 44*; MBCA 2013*, *supra* note 555, paras. 65-67
[62] *Village Commissioners of Waverley v. Nova Scotia (Minister of Municipal Affairs)*, 1994 CanLII 4136 (NSCA) ("Waverley"), p. 14; leave to appeal to SCC denied: [1994] S.C.C.A No. 411; *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 332 ("*IMP Group*"), paras. 21, 24

were produced without objection by the respondent government, including, *inter alia*, a report and recommendation to Cabinet and briefing material provided to the Minister.[63] Analogously, in *Anti-Inflation Reference*, which case is repeatedly referred to by the Applicants in their Leave Application, this Court considered the "White Paper" as material which Parliament had before it at the time when it enacted the legislation under review.

45. The principle that the record includes any documents referred to in the primary documents under review is consistent with the purpose of JR, which is not a re-hearing or fresh determination of the matters underlying the decision under review, but rather a review of the decision itself.[64] If a document was before the decision-maker and is referred to in the primary documents then it necessarily informed the decision and logically forms part of the record. The Applicants concede that the R&R "provide[d] advice to Cabinet,"[65]; it therefore clearly informed Cabinet's response. The R&R was properly ordered to be disclosed based on these uncontradicted legal principles.

46. Contrary to the Applicants' assertion, the NSCA did not find that "Cabinet cannot be analogized to an adjudicative tribunal."[66] In the context of determining the admissibility of the Burrill Affidavit as opposed to the R&R, the NSCA found that "the principles that govern admissibility in this case are <u>like</u> those that apply to a typical administrative JR and to an appeal, but they operate independently", due to the distinctions between the Government's consideration of the Tribunal Report as a political actor and a typical administrative tribunal.[67] Nevertheless, the NSCA held that "the appropriate scope of the material for this unique type of judicial review should reflect basic norms."

47. These "basic norms", and the general principles regarding the parameters of the record on JR applied by the Courts below, provide a complete answer to the Applicants' concern that the consideration of the "whole of the process" pursuant to the third stage of the *Bodner* test will

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[63] *Waverley*, *supra* note 62, p. 13; *IMP Group*, *supra* note 62, para. 13
[64] *IMP Group*, *supra* note 62, para. 21; quoting Sara Blake, *Administrative Law in Canada*, 5th ed. (LexisNexis, 2011)
[65] Leave Memorandum of Argument, para. 11 [Leave Application, Tab 3, p. 155]
[66] Leave Memorandum of Argument, para. 51 [Leave Application, Tab 3, p. 166]
[67] NSCA Judgment, para. 74, emphasis added [Leave Application, Tab 2B, p. 143]

lead to judicial overreach in the form of orders for disclosure of "deliberative documents"[68] and "policy and legal work on the submissions, debate, and response"[69]. The Courts below clearly found that the R&R was not a deliberative document, which determination the Applicants have not sought leave to appeal. The Courts below also applied solicitor-client privilege to exclude from disclosure sections of the R&R containing legal advice. This case presents no slippery slope, as the Applicants attempt to suggest.

(c) Evidence Of Bad Faith Is Not A Condition Precedent To Production Of The R&R; Government Should Not Be Permitted To Shield The Full Foundation Of Its Decision

48. The Applicants argue that the lower Courts ought to have required a specific allegation of bad faith or wrongdoing on the part of Cabinet as a prerequisite to finding that the R&R is relevant to the JR.[70] However, Lamer CJC was clear in *PEI Reference* that if the government chooses to reject or vary JCC recommendations, it must be prepared, if need be, to justify its decision.[71] Government's conduct and good faith throughout the Tribunal process, viewed globally, is necessarily under scrutiny according to the *Bodner* test.[72] Moreover, the Applicants' position ignores the reality that bad faith inherent in the Response may not become evident until documents like the R&R are disclosed and reviewed.[73]

49. The Applicants argue that Cabinet's conduct and the advice it receives should not be the subject of JR "unless the government puts that conduct and advice in issue"[74] and that, failing this, to admit such evidence would be to politicize the process. To accept this position would be to allow the Applicants to control the record on review and shield the full foundation of the Government's decision and the totality of the process from the reviewing Court. In decided cases, had the record on JR been confined to the Tribunal Report and Response, the

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[68] Leave Memorandum of Argument, para. 49 [Leave Application, Tab 3, pp. 165-166]
[69] Leave Memorandum of Argument, para. 53 [Leave Application, Tab 3, p. 167]
[70] Leave Memorandum of Argument, para. 46 [Leave Application, Tab 3, p. 165]
[71] *PEI Reference*, *supra* note 1, para. 180
[72] *Bodner*, *supra* note 2, paras. 23-40
[73] *BCSC 2012 – JR*, *supra* note 39
[74] Leave Memorandum of Argument, para. 49 [Leave Application, Tab 3, pp. 165-166]

governments' bad faith and/or politicization of the process would never have come to light.[75] That is clearly an unacceptable outcome, and a negative consequence of the Applicants' proposed approach.

50. The Applicants also assert the only other material the Government may put forward is more detailed information regarding the factual foundation of its reasons.[76] This Court did determine in *Bodner* that the Government may submit affidavit evidence on JR to show its good faith in the process,[77] however, it would create an absurdity if the Applicants could establish *good faith* by way of affidavit evidence, but the Respondents were unable to rely upon affidavits containing evidence of Government's *bad faith* and lack of commitment to the process to prove the converse. The Motion Judge observed that the Applicants did not provide her with any case law wherein a Court refused to allow applicants to put forward affidavit evidence of alleged bad faith on JR of a government Response.[78] None is submitted on this Leave Application either. Moreover, the Courts below admitted the Burrill Affidavit on this basis, which decision the Applicants have not sought leave to appeal. There is no principled distinction to support the Applicants' inconsistent position that the R&R is "irrelevant" whereas the Burrill Affidavit has been admitted. Both are squarely relevant to the application of the *Bodner* test, given the facts of the instant case.

(d) <u>The NSCA Decision Does Not Create Precedent For Routine Production; The Application Of PII Always Turns On The Facts</u>

51. The concern raised by the Applicants that the disclosure of the R&R will result in routine production of Cabinet documents is misplaced and based on a fundamental misstatement of the policy rationale underlying PII. Relevant Cabinet documents, like other evidence, must be disclosed, unless disclosure would be contrary to the <u>public interest</u> (not the government's

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[75] *MBQB 2012*, *supra* note 55, para. 114: affidavit evidence exposed the process of the government's response to be a "total sham" and "mere window dressing"; *NLSC 2018*, *supra* note 55, paras. 77, 101-10, 123-34; *BCSC 2012 – JR*, *supra* note 39

[76] Leave Memorandum of Argument, para. 42 [Leave Application, Tab 3, p. 163]

[77] NSSC Judgment, para. 224 [Leave Application, Tab 2A, p. 76]; *Bodner*, *supra* note 2, para. 36

[78] NSSC Judgment, para. 226 [Leave Application, Tab 2A, p. 77]

interests). There is nothing "unprecedented" about the producibility of a Cabinet document.[79] Once it is determined to be relevant, the confidentiality interests at stake must be balanced against the need for the document to be included in the JR record, pursuant to a balancing of the factors identified in *Carey*, which the Applicants acknowledge to be the leading case on PII. In other words, PII claims turn on their facts.

52. It is always open to the government to submit evidence identifying specific harm to the public interest that would result from the disclosure of a Cabinet document. The Applicants did not do so here, and nor did the BC Government in any of the BC Cases, where the absence of such evidence was specifically noted and relied upon.[80]

53. Even if disclosure were to become routine in this unique form of JR, that is not a reason to exclude the R&R from disclosure in this case. The Applicants argue that routine disclosure would create a future environment where advice and material crafted for the Executive branch would take into account that whatever is drafted will be scrutinized for use in litigation by the Respondents.[81] This "candour" concern, discussed below, is antithetical to the open and transparent process described in *Bodner*. The process ought not to allow for the government's real reasons or concerns to be shielded from scrutiny on JR.

(e) <u>The Applicants Mistakenly Assign Primacy To Candour Over Transparency</u>

54. The Applicants seek to elevate the so-called "candour argument" to an independent consideration above all other factors set out in *Carey*, including the importance of producing the documents to the administration of justice. The Courts below did not give "no weight" to the candour argument, as alleged, [82] rather they declined to give it the weight sought by the

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[79] Leave Memorandum of Argument, para. 54 [Leave Application, Tab 3, p. 167]

[80] *BCSC 2012*, *supra* note 39, para. 21, 16; *BCCA 2012*, *supra* note 39, para. 18; *BCSC 2014*, *supra* note 39, para. 29; *BCSC 2018 – Master*, *supra* note 38, para. 23; *BCSC 2018*, *supra* note 38, para. 43

[81] Leave Memorandum of Argument, para. 55 [Leave Application, Tab 3, p. 167]; this same argument was described as "troubling" in *BCSC 2018*, *supra* note 38, para. 50

[82] Leave Memorandum of Argument, para. 65 [Leave Application, Tab 3, p. 171]

Applicants.[83]

55. Since the R&R does not contain the Government's deliberations, the candour argument is especially weak. In *Health Services and Support-Facilities Subsector Bargaining Association*, Burnyeat J. considered the application of PII to a host of documents, including submissions to Cabinet, in the context of constitutional litigation.[84] One of the factors favouring disclosure was that the documents were related to what was before Cabinet when decisions were made, and did not chronicle Cabinet discussions. As such, disclosure would not impede Cabinet debate.[85]

56. The Applicants reiterate their reliance on *Babcock*, however, that case dealt with statutory confidentiality under the *Canada Evidence Act*, whereas PII in the present case must be determined pursuant to the common law balancing test from *Carey*.[86]

57. Finally, the "candour argument" is the rationale often expressed to support a "class claim" for PII, as opposed to a "contents claim".[87] It is clear that the Applicants are advancing a class claim in relation to the R&R, since they have submitted no evidence of specific harm to the public interest that would result from its disclosure. In *Carey*, this Court stated: "Generally speaking, a claim that a document should not be disclosed on the ground that it belongs to a certain class has little chance of success".[88] Further, the authorities recognize that the self-interest of members of government in asserting a class claim is evident and warrants close scrutiny.[89]

58. Courts applying PII in JRs of government decisions respecting judicial remuneration have consistently determined that the key principle and overriding factor at stake is the importance of producing the documents at issue to the administration of justice. There is an ever-present need to reinforce public confidence in the independence of the judiciary as a means of

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[83] *Carey, supra*, note 4, paras. 46, 48
[84] *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509, ["*Health Services*"], para. 1
[85] *Health Services, supra* note 84, para. 39
[86] *Babcock, supra* note 41; NSCA Judgment, paras. 38-41 [Leave Application, Tab 2B, p. 134-135]
[87] E.g. *Carey, supra* note 4, paras. 12-13, 44
[88] *Carey, supra* note 4, para. 43
[89] *Carey, supra* note 4, paras. 65-66; *BCSC 2018, supra* note 38, para. 46

safeguarding the respective constitutional positions of the three branches of government and to maintain confidence in the administration of justice. In *Bodner*, this Court emphasized the important objective of "an open and transparent public process" for determining judicial compensation.[90] Primacy must therefore be placed on the need to ensure, as much as possible, transparency in the process for determining judicial remuneration and to ensure that all relevant material is available for the purpose of JR.[91] Production of the R&R accordingly serves, rather than injures, the public interest.[92]

59. The legislative and judicial trend is that litigants should have full access to all relevant information in order to ensure fair proceedings.[93] Given the principles at stake, it is all the more important not to depart from this trend in this case.

60. While a Court must be cautious before ordering relevant documents from the highest level of government to be produced, in the absence of harm to the public interest, such documents must be disclosed.[94] The Applicants' emphasis on candour and the possibility of "ill-informed" criticism of Government above all other considerations,[95] is anachronistic and inconsistent with the guiding principles established by this Court.[96]

61. The Law Review article[97] referred to by the Applicants has received no previous judicial consideration, and its proposed approach would not alter the result in this case. On Campagnolo's analysis, the R&R would be a "non-core" rather than a "core" secret, and it is acknowledged that the candour rationale does not support an absolute immunity.[98] Disclosure

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[90] *Bodner*, supra note 2, para. 63
[91] *BCSC 2012*, *supra* note 39, paras. 23-24; *BCSC 2014*, *supra* note 39, paras. 29-31; *BCSC 2018 – Master*, *supra* note 38, paras. 23-28; *BCSC 2018*, *supra* note 38, paras. 43, 48-52; *BCCA 2018*, supra note 38, para. 20
[92] NSSC Judgment, paras. 179-181, 184 [Leave Application, Tab 2A, pp. 62-63]; NSCA Judgment, para. 45 [Leave Application, Tab 2B, p. 137]; *supra* note 91
[93] *Carey, supra*, note 4, para. 85
[94] *Carey, supra* note 4
[95] Leave Memorandum of Argument, paras. 65-66 [Leave Application, Tab 3, p. 171]
[96] *Bodner*, *supra* note 2; *Carey*, *supra* note 4
[97] Yan Campagnolo, "A Rational Approach to Cabinet Immunity under the Common law" (2017) 55:1 Alta. L. Rev. 43 ("*Campagnolo*"); Leave Memorandum of Argument, p. 22 [Leave Application, Tab 3, p. 174]
[98] *Campagnolo*, *supra* note 97, p. 65

would depend on the gravity of government misconduct. As preserving judicial independence and depoliticizing the setting of judicial compensation is of profound gravity, disclosure is favoured. Moreover, the Applicants failed to adduce evidence of harm to meet the proposed "executive onus of justification", which requires the government to explain why *prima facie* relevant Cabinet documents should be withheld.[99]

62. The Courts below considered the same issues posed by the Applicants in their Leave Application. Their decisions were sound, well-reasoned, and entirely consistent with the guiding principles set out in decisions of this Court and the body of jurisprudence in which they have been applied. No issues of public and national importance are identified.

Part IV and V –COSTS SUBMISSION AND NATURE OF ORDER SOUGHT

63. The Respondents request that the Application for Leave to Appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Winnipeg, in the Province of Manitoba, this 28th day of January, 2019.

Susan Dawes
Counsel for the Respondents The Nova Scotia Provincial Judges' Association

[99] *Campagnolo, supra* note 97, p. 73

PART VI: TABLE OF AUTHORITIES

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