



## SUPREME COURT OF CANADA

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### Case in Brief: **British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia**

Judgment of July 31, 2020 | On appeal from the Court of Appeal for British Columbia  
Neutral citation: 2020 SCC 20

### **Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia**

Judgment of July 31, 2020 | On appeal from the Court of Appeal of Nova Scotia  
Neutral citation: 2020 SCC 21

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***A Cabinet document used to decide on judges' pay in British Columbia should stay confidential, the Supreme Court has unanimously ruled. But parts of one used in Nova Scotia should be disclosed.***

Under the Constitution, Canada has three branches of state. The executive branch (the Prime Minister or Premier and Cabinet) decides policy. The legislative branch (Parliament or legislatures) makes laws. The judiciary (the courts) interprets and applies laws. Each branch has a different role.

It is important for our democracy that each branch has some independence. For courts, "judicial independence" means they can do their work without interference from the other branches. For example, judges can only be removed from office for very good reasons. This is so judges aren't afraid to make the right decisions, even unpopular ones. Also, only judges can decide how to manage court processes. And judges must be paid properly, so financial pressure can't be used against them.

Judges can't negotiate their salaries with the government. Negotiations would make the issue political. This would upset the relationship between the branches. Instead, independent commissions make salary recommendations to governments. Governments have to formally respond and give reasons if they decide not to follow them.

Only the executive and the legislative branches can make decisions about judges' salaries. But courts can still review these decisions. This is to make sure governments are doing what they are supposed to under the Constitution. For judges' salaries, courts will look at whether there was a valid reason not to follow a recommendation. They will look at whether the decision was based on facts. And they will look at whether the government respected the commission's role and judicial independence.

Commissions in British Columbia and Nova Scotia made recommendations about salaries of judges appointed by those provinces. The governments decided not to follow all the recommendations. The associations representing the judges asked the courts to review the governments' decisions. As part of this, they asked the courts to order the governments to give them copies of the confidential Cabinet documents used to make the decisions.

The lower courts in both provinces said the governments had to disclose (share) the Cabinet documents.

All the judges at the Supreme Court of Canada said the British Columbia Cabinet document should stay confidential. But they said part of the Nova Scotia document should be disclosed (shared).

The Court said confidential Cabinet documents could only be shared under certain conditions. There had to be reason to believe the documents might help show that the government didn't follow its obligations. In such a case, a judge would look at the documents, without anyone else seeing them. If the judge decided the document would help show the government didn't follow its obligations, the judge could still decide not to release the documents. But only if there was a good reason not to.

For example, the document could be protected by solicitor-client privilege, if it dealt with legal advice to the government. The document could also be protected by "public interest immunity." This is when courts look at

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whether the public interest in keeping Cabinet documents confidential outweighs the public interest in knowing what was said.

It would depend on the situation. But it is important that ministers can have frank discussions with their colleagues. They have to defend government decisions publicly, even if they don't agree with them personally. It's part of their job. If Cabinet discussions weren't confidential, ministers could be criticized for holding different private views than those they defended in public. This could be a distraction and lower people's confidence in government.

In the British Columbia case, the Court said there was no reason to believe the document might help show the government didn't follow its obligations.

But, in the Nova Scotia case, the Court said there was reason to believe the document might help show the government didn't follow its obligations when it decided on judges' salaries. The Court looked at the Cabinet document. It confirmed parts of it would help show the government didn't follow some obligations. And the Court said public interest immunity didn't prevent those parts from being shared.

Courts have a special role in society because they hold up the rule of law. The rule of law is the principle that everyone should follow the same legal rules in society. Under the Constitution, courts can't be politicized. Otherwise, people could lose faith in our justice system. This is why judicial independence is important to all Canadians, not just judges.

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**Breakdown of the decision: *Unanimous*:** Justice Andromache [Karakatsanis](#) allowed the British Columbia appeal and allowed the Nova Scotia appeal in part (Chief Justice [Wagner](#) and Justices [Abella](#), [Moldaver](#), [Côté](#), [Brown](#), [Rowe](#), [Martin](#), and [Kasirer](#) agreed)

**More information (cases # 38381 & 38459):** Decisions: [British Columbia](#), [Nova Scotia](#) | Case information: [British Columbia](#), [Nova Scotia](#) | Webcast of hearing: [British Columbia](#), [Nova Scotia](#)

**Lower court rulings: 38381:** [motion for production of Cabinet document](#) (Supreme Court of British Columbia) | [appeal](#) (Supreme Court of British Columbia) | [appeal](#) (Court of Appeal for British Columbia) | **38549:** [motion for production of Cabinet document](#) (Supreme Court of Nova Scotia) | [appeal](#) (Court of Appeal of Nova Scotia)

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