



**SUPREME COURT OF CANADA**

**CITATION:** British Columbia (Attorney General) v.  
Provincial Court Judges' Association of British  
Columbia, 2020 SCC 20

**APPEAL HEARD:** December 9, 2019  
**JUDGMENT RENDERED:** July 31, 2020  
**DOCKET:** 38381

**BETWEEN:**

**Attorney General of British Columbia**  
Appellant

and

**Provincial Court Judges' Association of British Columbia**  
Respondent

- 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

**CORAM:** Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,  
Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 121)

Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Côté,  
Brown, Rowe, Martin and Kasirer JJ. concurring)

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B.C. (A.G.) v. PROV. CT. JUDGES' ASSN.

**Attorney General of British Columbia**

*Appellant*

v.

**Provincial Court Judges' Association of British Columbia**

*Respondent*

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**

*Intervenors*

**Indexed as: British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia**

**2020 SCC 20**

File No.: 38381.

2019: December 9; 2020: July 31.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Constitutional law — Judicial independence — Judicial remuneration — Judicial compensation commission making recommendations to provincial Attorney General about remuneration, allowances and benefits of provincial judges — Attorney General making submission to Cabinet concerning commission's recommendations and government's response — Legislative Assembly passing resolution rejecting commission's recommended increase in salary — Judges petitioning for judicial review of Legislative Assembly's resolution — Whether Cabinet submission should form part of record on judicial review.*

In October 2016, the British Columbia judicial compensation commission recommended an 8.2 percent increase in the salary of provincial judges in 2017-18. The Attorney General made a submission to Cabinet concerning the commission's recommendations, and then tabled the government's proposed response to the commission's report and proposed a resolution rejecting the commission's recommended salary increase and adopting a 3.8 percent increase instead. The Legislative Assembly passed the resolution. The Provincial Court Judges' Association petitioned for judicial review of the resolution and sought an order to require the Attorney General to produce the Cabinet submission relied on in preparing the government's response. The master hearing the motion ordered the Attorney

General to produce the Cabinet submission. Appeals by the Attorney General from the master's decision to the Supreme Court of British Columbia and then to the Court of Appeal were dismissed.

*Held:* The appeal should be allowed and the master's order for production of the Cabinet submission quashed.

A government must give specific reasons justifying any departure from the recommendations of a judicial compensation commission. The government's response to the commission's recommendations is subject to a limited form of judicial review as described in *Bodner v. Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286. *Bodner* review is the mechanism for ensuring that the government respects the commission process and for safeguarding the public confidence in the administration of justice that process serves to protect. The standard of justification to uphold the government's response is that of rationality. *Bodner* sets out a three-part test for determining whether a government's decision to depart from a commission's recommendation meets this standard: (1) whether the government has articulated a legitimate reason for departing from the commission's recommendations; (2) whether the government's reasons rely upon a reasonable factual foundation; and (3) whether the commission process has been respected and its purposes — preserving judicial independence and depoliticizing the setting of judicial remuneration — have been achieved.

The limited nature of *Bodner* review, the role of the reviewing court and the purpose of the process have implications for the evidence considered by the reviewing court. The rules of evidence and production must be applied in a manner that reflects the unique features of *Bodner* review, and respects both judicial independence and the confidentiality of Cabinet decision making. The record on *Bodner* review necessarily includes any submissions made to the commission by the government, judges and others; the commission's report, including its recommendations; and the government's response to the recommendations. Certain forms of additional evidence are admissible if they are relevant to determining whether any part of the *Bodner* test has been met, including evidence aimed at calling into question the reasonableness of the factual foundation relied on by the government, the government's lack of meaningful engagement with or respect for the commission process or whether the government's response was grounded in an improper or colourable purpose. To those ends, the party seeking review can ask that the government produce evidence in its possession. Since a *Bodner* review often concerns decisions in which Cabinet plays a part, a party seeking review may request the production of a confidential Cabinet document.

Generally, what is in issue in a *Bodner* review is whether a government failed to meet its constitutional obligations flowing from the principle of judicial independence in its response to a commission's recommendations. The relevance of any proposed additional evidence must therefore be tested in relation to the issues that the court must determine on such a review. To be relevant, the proposed evidence

must contain something that tends to address a fact concerning one of the steps of the test established in *Bodner*.

However, something more than relevance is needed to strike the appropriate balance between respecting Cabinet confidentiality and maintaining the overall integrity of *Bodner* review. Although any inspection of a confidential Cabinet document undermines Cabinet confidentiality to some extent, judicial inspection of a document that concerns Cabinet deliberations about the judiciary would undermine it more significantly. Accordingly, special considerations arise when the party seeking *Bodner* review asks the government to produce a document related to Cabinet decision making. The party seeking review must point to something in the record, including otherwise admissible evidence, that supports its view that the document may tend to show that the government response failed to meet one or more parts of the *Bodner* test. It is not enough to simply say that the document was before the decision-maker or that it would provide additional background or context for the reviewing court.

If the party seeking review makes the requisite showing — that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner* — the government must produce it for the court's examination. The reviewing court must then examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet one of the parts of

the *Bodner* test. The document must be of assistance in challenging the legitimacy of the government's reasons, the reasonableness of the factual foundation it relied on, the respect it has shown the commission process or whether the objectives of the process have been achieved.

Even if the document meets this test, its production remains subject to any other rule of evidence that bars its disclosure, such as public interest immunity. This doctrine prevents the disclosure of a document where the court is satisfied that the public interest in keeping the document confidential outweighs the public interest in its disclosure. Public interest immunity requires a careful balancing of these competing public interests, which must be weighed with reference to a specific document in the context of a particular proceeding. The government has the burden of establishing that a document should not be disclosed because of public interest immunity. In the case of confidential Cabinet documents, since there will be a strong public interest in keeping a document concerning Cabinet deliberations confidential, it must be outweighed by a still stronger public interest to warrant disclosure. The main factors relevant to balancing the public interests in confidentiality and disclosure are identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637: the level of the decision-making process; the nature of the policy concerned; the contents of the documents; the timing of disclosure; the interests of the administration of justice; and whether the party seeking the production of the documents alleges unconscionable behaviour on the part of the government.

In the *Bodner* review context, various factors will often weigh in favour of keeping a document confidential. The Cabinet decision-making process is among the highest levels of decision making within the executive. Judicial remuneration is an important and sensitive area of public policy. The contents of a document concerning Cabinet deliberations may well reflect the views of individual ministers of the Crown and reveal disagreement among ministers; as a result, its contents will frequently be highly sensitive. Depending on the contents of the document, the timing may also weigh in favour of keeping the document confidential.

The interests of the administration of justice encompass a broad set of considerations, including the importance of the case and the need or desirability of producing the document. In the *Bodner* review context, these considerations cut both ways. Although such reviews are of great importance, the fact that a party seeks production of a relevant confidential Cabinet document in this context is not itself a general basis for disclosure. When considering the interests of the administration of justice, the focus must remain on the degree to which the document bears on what is at issue in the litigation. If the document tends to establish that the government set out to provide misleading public reasons for its response to the commission's recommendations, relied on a fundamentally flawed factual foundation, acted with an improper or colourable purpose, or was indifferent or disrespectful towards the commission process, this bears so directly — and so determinately — on the outcome of the *Bodner* review that to exclude the document would be contrary to the interests of the administration of justice. By contrast, if a Cabinet document's impact on the



*Bodner* review would be limited, and if its exclusion from the record could hardly keep the reviewing court from adjudicating the issues on their merits, the probative value of such evidence might not weigh heavily enough to warrant disclosure.

In the instant case, the Association did not meet the threshold necessary to compel production of the Cabinet document for judicial inspection. The Association failed to provide any evidence or point to any circumstances that suggest that the Cabinet submission may indicate that the government did not meet the standard required by *Bodner*. There is nothing on the face of the record that indicates the Cabinet submission may contain some evidence which tends to show that the government failed to meet a constitutional requirement. Furthermore, it is not sufficient to point to prior litigation in which the government relied on an inappropriate consideration — as revealed in a past Cabinet submission produced as part of the record — in order to make the Cabinet submission in the present case relevant. Something more would be required for there to be reason to believe that the submission may contain evidence that would tend to show that the government failed to meet a requirement described in *Bodner*.

Since the Association has failed to make the requisite threshold showing, the Attorney General need not produce the document for examination by the Court. It is unnecessary to determine whether any other rule of evidence, such as public interest immunity, would apply so as to permit the Attorney General to refuse to produce the Cabinet submission.

## Cases Cited

By Karakatsanis J.

**Explained:** *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. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Carey v. Ontario*, [1986] 2 S.C.R. 637; **referred to:** *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21; *Stonechild, Re*, 2007 SKCA 74, 304 Sask R. 1; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433; *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin L.R. (5th) 301; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, 80 B.C.L.R. (5th) 243; *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433; *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022; *Canada (Auditor General) v. Canada (Minister of*

*Energy, Mines and Resources*), [1989] 2 S.C.R. 49; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *MacKeigan v. Hickman*, [1989] 2 S.C.R. 796; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3; *Quebec (Commission des droits de la personne) v. Attorney General of Canada*, [1982] 1 S.C.R. 215; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110; *Smallwood v. Sparling*, [1982] 2 S.C.R. 686; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2003 BCCA 239, 14 B.C.L.R. (4th) 302; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368; *Somerville v. Scottish Ministers*, [2007] UKHL 44, [2007] 1 W.L.R. 2734; *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531; *Conway v. Rimmer*, [1968] A.C. 910; *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13, 409 C.R.R. (2d) 117; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova*

*Scotia*, 2018 NSCA 83, 429 D.L.R. (4th) 359; *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381; *Commonwealth v. Northern Land Council*, [1993] HCA 24, 176 C.L.R. 604; *Air Canada v. Secretary of State for Trade*, [1983] 2 A.C. 394.

### **Statutes and Regulations Cited**

*Attorney General Act*, R.S.B.C. 1996, c. 22, s. 2(j).

*Canada Evidence Act*, R.S.C. 1985, c. C-5, ss. 37 to 39.

*Canadian Charter of Rights and Freedoms*, s. 11(d).

*Code of Civil Procedure*, CQLR, c. C-25.01, art. 283.

*Constitution Act*, R.S.B.C. 1996, c. 66, s. 10(3).

*Constitution Act, 1867*, preamble, ss. 11, 18, 54, 90 to 92, 96 to 101, 100 to 102, 106, 126.

*Constitution Act, 1982*, s. 42(1)(d).

*Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 13(2).

*Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 9.

*Judicial Compensation Act*, S.B.C. 2003, c. 59, ss. 2, 5(1), (3), (5), (5.1), (5.2), 6(1), (2), (3), (4), 7.1, 8(1).

O.C. 213/2017.

*Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360, s. 11.

*Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22-1(4)(c).

### **Authors Cited**

d’Ombrain, Nicholas. “Cabinet secrecy” (2004), 47(3) *Canadian Public Administration* 332.

Forcese, Craig, and Aaron Freeman. *The Laws of Government: The Legal Foundations of Canadian Democracy*, 2nd ed. Toronto: Irwin Law, 2011.

Heard, Andrew. *Canadian Constitutional Conventions: The Marriage of Law & Politics*, 2nd ed. Oxford: Oxford University Press, 2014.

Royer, Jean-Claude, et Catherine Piché. *La preuve civile*, 5<sup>e</sup> éd. Montréal: Yvon Blais, 2016.

APPEAL from a judgment of the British Columbia Court of Appeal (Bauman C.J.B.C. and Harris and Dickson JJ.A.), 2018 BCCA 394, 19 B.C.L.R. (6th) 188, 430 D.L.R. (4th) 660, 48 Admin L.R. (6th) 279, [2018] B.C.J. No. 3445 (QL), 2018 CarswellBC 2776 (WL Can.), affirming a decision of Hinkson C.J.S.C., 2018 BCSC 1390, 19 B.C.L.R. (6th) 168, [2018] B.C.J. No. 2995 (QL), 2018 CarswellBC 2158 (WL Can.), affirming an order of Master Muir, 2018 BCSC 1193, [2018] B.C.J. No. 1410 (QL), 2018 CarswellBC 1891 (WL Can.). Appeal allowed.

*Stein K. Gudmundseth, Q.C., Andrew D. Gay, Q.C., and Clayton J. Gallant*, for the appellant.

*Joseph J. Arvay, Q.C., and Alison M. Latimer*, for the respondent.

*Michael H. Morris and Marilyn Venney*, for the intervener the Attorney General of Canada.

*Sarah Kraicer* and *Andrea Bolieiro*, for the intervener the Attorney General of Ontario.

*Brigitte Bussières* and *Robert Desroches*, for the intervener the Attorney General of Quebec.

*Thomson Irvine, Q.C.*, for the intervener the Attorney General of Saskatchewan.

*Doreen C. Mueller*, for the intervener the Attorney General of Alberta.

*Pierre Bienvenu*, *Azim Hussain* and *Jean-Simon Schoenholz*, for the intervener the Canadian Superior Courts Judges Association.

*Guy J. Pratte*, *Ewa Krajewska* and *Neil Abraham*, for the intervener the Canadian Bar Association.

*Steven M. Barrett* and *Colleen Bauman*, for the intervener the Canadian Association of Provincial Court Judges.

*Adam Goldenberg* and *Stephanie Willsey*, for the intervener the Canadian Taxpayers Federation.

*Andrew K. Lokan and Lauren Pearce*, for the intervener the Canadian Civil Liberties Association.

The judgment of the Court was delivered by

KARAKATSANIS J. —

[1] This appeal arises in litigation that implicates the relationship between two branches of the state. It requires this Court to balance several constitutional imperatives relating to the administration of justice and the separation of powers between the executive, legislative and judicial branches of the state: the financial dimension of judicial independence; the shared responsibility of the executive and legislature to make decisions about public money; and the public interest in ensuring the executive can conduct its internal business in confidence.

[2] This appeal, along with its companion appeal, *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2020 SCC 21, asks whether a Cabinet submission concerning a government's response to a judicial compensation commission's recommendations is properly part of the record on a judicial review of the government's response. If so, the further issue arises whether the Attorney General of British Columbia should nevertheless be permitted to refuse to produce the submission on grounds of public interest immunity.

[3] The British Columbia courts found that the confidential Cabinet document requested by the Provincial Court Judges' Association of British Columbia was relevant and not protected by public interest immunity, and ordered that the Attorney General produce it.

[4] In my view, they were wrong to do so.

[5] In its judicial independence case law, this Court has consistently sought to strike a balance between several competing constitutional considerations by establishing a unique process for setting judicial remuneration, backed up by a focused, yet robust form of judicial review described in *Bodner v. Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286.<sup>1</sup> In resolving this appeal, the rules of evidence and production must be applied in a manner that reflects the unique features of the limited review described in *Bodner*, and respects both judicial independence and the confidentiality of Cabinet decision making.

[6] For the reasons that follow, where a party seeking *Bodner* review requests that the government produce a document relating to Cabinet deliberations, it must first establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner*. Only then would the government be required to

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<sup>1</sup> *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. Québec (Attorney General)*; *Minc v. Québec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286 (*Bodner*).



produce the document for judicial inspection. If the document does in fact provide some evidence which tends to show that the government's response does not comply with the constitutional requirements, the court can then determine whether its production is barred by public interest immunity or another rule of evidence invoked by the government.

[7] Public interest immunity requires a careful balancing between the competing public interests in confidentiality and disclosure. Since there will be a strong public interest in keeping a document concerning Cabinet deliberations confidential, it must be outweighed by a still stronger public interest to warrant the document's disclosure. In the *Bodner* context, the strength of the public interest in disclosure will often depend on the importance of the document to determining the issues before the court in the *Bodner* review.

[8] Here, the Provincial Court Judges' Association did not meet the threshold necessary to compel production of a confidential Cabinet document for judicial inspection. While this is not a high bar, it is not met simply by showing that the government considered the Cabinet document before making its response. I would allow the appeal and quash the order for production of the Cabinet submission.

## I. Background

### A. *Judicial Compensation Act, S.B.C. 2003, c. 59*

[9] In the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*Provincial Judges Reference*), this Court set out the constitutional baseline for making changes to judicial remuneration. The *Judicial Compensation Act* implements that baseline in British Columbia.

[10] The *Judicial Compensation Act* provides for the appointment of a triennial judicial compensation commission to make recommendations about the remuneration, allowances and benefits of provincial judges and judicial justices: ss. 2 and 5(1). The commission must consider a prescribed set of factors and may consider other factors, provided it justifies their relevance: s. 5(5), (5.1) and (5.2). The commission communicates its recommendations in a final report to the Attorney General: s. 5(3).<sup>2</sup>

[11] Upon receipt of the commission's report, the Attorney General must then lay the report before the Legislative Assembly of British Columbia within a statutory timeline: s. 6(1). The Attorney General must also advise the Assembly that if it does not reject the commission's recommendations within a statutory timeline, the recommendations will go into effect: s. 6(1) and (3). The Assembly can then pass a resolution rejecting one or more recommendations and set judicial remuneration, allowances and benefits: s. 6(2). The resolution has binding legal effect: ss. 6(4) and 8(1).

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<sup>2</sup> The Attorney General is the minister responsible for the *Judicial Compensation Act* designated by O.C. 213/2017, Appendix B; see also *Attorney General Act*, R.S.B.C. 1996, c. 22, s. 2(j); *Constitution Act*, R.S.B.C. 1996, c. 66, s. 10(3).

B. *Judicial Compensation Commission's Recommendations and Government's Response*

[12] In October 2016, the Judicial Compensation Commission submitted its final report to the Attorney General and made recommendations for the 2017-20 period. The commission recommended an 8.2 percent increase in the salary of provincial judges in 2017-18 and a 1.5 percent increase in both 2018-19 and 2019-20.<sup>3</sup> The commission also recommended that the Provincial Court Judges' Association be reimbursed for the entirety of its costs of participating in the commission process.

[13] At some point after the commission submitted its report, the Attorney General made a submission to Cabinet concerning the commission's recommendations and the government's response. The Cabinet submission is not in the record before this Court and was not put before the courts below. Moreover, there is no evidence in the record about what the submission might contain.

[14] Having laid the commission's report before the Legislative Assembly in September 2017, the Attorney General tabled the government's proposed response to the commission's report in October 2017. The Attorney General did not table the Cabinet submission and there is no indication in the record that any member of the

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<sup>3</sup> The baseline salary used by the commission in making its recommendations was \$244,112 for the 2016-17 fiscal year, but the Legislative Assembly later retrospectively increased the salary for 2016-17 by 3.4 percent to \$252,290, thereby reducing the effect of the increase recommended by the commission for the 2017-20 period.

Legislative Assembly other than those serving in Cabinet was aware of the contents of the submission.

[15] The Attorney General moved to pass a resolution rejecting the commission's recommended increase in the salary of provincial judges and adopting a 3.8 percent increase in 2017-18 and a 1.5 percent increase in both 2018-19 and 2019-20.<sup>4</sup> The Attorney General also proposed reducing the recommended reimbursement for the Provincial Court Judges' Association's costs of participating in the commission process from approximately \$93,000 to about \$66,000 in accordance with the formula established by s. 7.1 of the *Judicial Compensation Act*. With the support of government and opposition members, the Legislative Assembly passed the resolution.

[16] The Provincial Court Judges' Association petitioned for judicial review of the Legislative Assembly's resolution. Among other things, the Provincial Court Judges' Association asked to have the resolution quashed and sought a declaration that the government's response and the resolution were inconsistent with the *Judicial Compensation Act* and with the constitutional principle of judicial independence.

[17] In anticipation of the hearing of their petition on the merits, the Provincial Court Judges' Association asked the Attorney General to produce the Cabinet submission relied on in preparing the government's response. The Attorney General

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<sup>4</sup> The retrospective salary increase for 2016-17 similarly reduces the effect of the increase adopted by the Legislative Assembly for the 2017-20 period.

refused, so the Association sought an order to require the Attorney General to produce the submission: see *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 22-1(4)(c).

## II. Procedural History

### A. *Supreme Court of British Columbia, 2018 BCSC 1193 (Master Muir)*

[18] The Provincial Court Judges' Association's motion was initially heard by a Supreme Court of British Columbia master. The master noted that the Attorney General did not contest that the government's response was informed by a detailed submission to Cabinet: para. 9 (CanLII).

[19] Turning to relevance, while acknowledging that the government had not referred to or relied on the submission to Cabinet in making its decision, the master concluded that the submission was relevant to the *Bodner* review and specifically to whether the government relied on a reasonable factual foundation in developing its response to the commission's recommendation, and whether its response demonstrates meaningful engagement with the commission process: paras. 9 and 18-21.

[20] Regarding public interest immunity, the master explained that the Attorney General did not provide any specific evidence of harm that would result from the production of the Cabinet submission: para. 23. The importance of review of

the government's response and the need for transparency outweighed the public interest in its remaining confidential: paras. 23 and 27. The master ordered the Attorney General to produce the Cabinet submission: para. 28.

B. *Supreme Court of British Columbia, 2018 BCSC 1390, 19 B.C.L.R. (6th) 168 (Hinkson C.J.S.C.)*

[21] The Supreme Court of British Columbia dismissed the appeal from the master's decision. Like the master, the court did not examine the Cabinet submission: para. 45.

[22] Hinkson C.J.S.C. found no error in the master's conclusion that the Cabinet submission was relevant, agreeing that the submission was relevant to the issue whether the government respected the commission process such that the overall objectives of the process were achieved: paras. 34-35.

[23] The court found no error in the master's conclusion that public interest immunity did not apply based on the factors identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637. The court emphasized that the submission related to the subject matter of the litigation and that the Attorney General did not offer in any evidence that any particular harm would flow from disclosure: para. 46.

C. *Court of Appeal for British Columbia, 2018 BCCA 394, 19 B.C.L.R. (6th) 188 (Bauman C.J.B.C., Harris and Dickson J.J.A.)*

[24] The Court of Appeal for British Columbia dismissed the Attorney General's further appeal from the Supreme Court's decision. Writing for the Court of Appeal, Bauman C.J.B.C. explained that although the Legislative Assembly is the decision-maker under the *Judicial Compensation Act*, the Attorney General prepares the government's draft response for approval by Cabinet before presenting it to the Legislative Assembly: para. 9. Cabinet is thus directly involved in the decision-making process.

[25] The Court of Appeal concluded that the Cabinet submission was necessarily relevant given that it informed the government's response to the commission's recommendations: paras. 9 and 16. Since Cabinet was "a primary actor in the impugned 'government response' . . . the Cabinet submission is clearly 'evidence which was before the administrative decision-maker'" and should be included in the record on judicial review: para. 19, quoting *Stonechild, Re*, 2007 SKCA 74, 304 Sask. R. 1, cited as *Hartwig v. Saskatchewan (Commission of Inquiry)*, at para. 33. The Court of Appeal also affirmed Hinkson C.J.S.C.'s analysis on public interest immunity: para. 22.

### III. Issues

[26] This appeal raises two issues: (a) whether the Cabinet submission in this case should form part of the record on *Bodner* review and (b) whether the Cabinet submission is protected by public interest immunity.

#### IV. Analysis

##### A. *Judicial Independence and the Nature of Bodner Review*

[27] This appeal arises in the context of review of a government's response to a judicial compensation commission's recommendations. Such review aims to safeguard judicial independence.

[28] The constitutional principle of judicial independence flows from the recital in the preamble to the *Constitution Act, 1867* that our country is to have a "Constitution similar in Principle to that of the United Kingdom", ss. 96 to 101 of the *Constitution Act, 1867*, s. 11(d) of the *Canadian Charter of Rights and Freedoms* and s. 42(1)(d) of the *Constitution Act, 1982*: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at pp. 72-73; *Provincial Judges Reference*, at paras. 84 and 105-9; *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433, at para. 94; *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 31.

[29] These provisions and the broader principle of judicial independence serve not only to protect the separation of powers between the branches of the state and thus, the integrity of our constitutional structure, but also to promote public confidence in the administration of justice: *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857, at paras. 21-23; *Conférence des juges de paix magistrats*, at para. 31. They are fundamental to the rule of law and to democracy in Canada.



[30] The overarching principle of judicial independence applies to all courts, whether of civil or criminal jurisdiction and whether their judges are appointed by federal, provincial or territorial authorities: *Provincial Judges Reference*, at para. 106; *Ell*, at paras. 21-24; *Conférence des juges de paix magistrats*, at para. 32.

[31] The three core characteristics of judicial independence are security of tenure, financial security and administrative independence: *Provincial Judges Reference*, at para. 118. The characteristic at issue in this appeal — financial security — in turn has three components, “which all flow from the constitutional imperative that . . . the relationship between the judiciary and the other branches of government be depoliticized”: para. 131 (emphasis in original). First, absent a “dire and exceptional financial emergency precipitated by unusual circumstances”, a government cannot change judicial remuneration parameters without first seeking the recommendations of an independent body, a “commission”: paras. 133 and 137. (Government can, depending on the context, mean the executive, legislature or legislative assembly.) Second, judges cannot engage in negotiations with the government over remuneration: para. 134. Finally, judicial remuneration cannot fall below the basic minimum level required for the office of a judge: para. 135.

[32] More specifically, this appeal concerns the first component of financial security: the convening of a judicial compensation commission to make recommendations concerning judicial remuneration. The commission charged with

making such recommendations must be independent, effective and objective: *Provincial Judges Reference*, at para. 133.

[33] The effectiveness requirement means that the commission must be regularly convened, that no changes can be made to remuneration until the commission submits its report and that “the reports of the commission must have a meaningful effect on the determination of judicial salaries”: *Provincial Judges Reference*, at paras. 174-75 and 179; see also *Bodner*, at para. 29.

[34] To ensure that the commission’s recommendations have a meaningful effect, the government must formally respond to the commission’s report: *Provincial Judges Reference*, at para. 179; *Bodner*, at para. 22. Because of the executive and legislature’s shared constitutional responsibility to make decisions about the expenditure of public money,<sup>5</sup> the commission’s recommendations are not binding (unless the legislature so provides). The government must, however, give specific reasons justifying any departure from the recommendations: *Provincial Judges Reference*, at para. 180; *Bodner*, at paras. 18 and 20-21; *Conférence des juges de paix magistrats*, at para. 35.

[35] To hold a government to its constitutional obligations in jurisdictions where a commission’s recommendations are not binding, the government’s response to the commission’s recommendations is subject to what this Court described in *Bodner* as a “limited form of judicial review”: paras. 29 and 42. The standard of

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<sup>5</sup> See *Constitution Act, 1867*, ss. 54, 90 to 92, 100 to 102, 106 and 126.

justification to uphold the government's response is that of "rationality": *Provincial Judges Reference*, at paras. 183-84; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 57; *Bodner*, at para. 29. Both the standard of justification and the test used to measure the government's response against that standard are "deferential": *Bodner*, at paras. 30, 40 and 43. Both the fact that the government remains ultimately responsible for setting judicial compensation and the fact that the nature of a *Bodner* review is limited serve to balance the constitutional interests at stake.

[36] Building on the approach established by the *Provincial Judges Reference*, in *Bodner*, at para. 31, this Court set out a three-part test for determining whether a government's decision to depart from a commission's recommendation meets the rationality standard:

- (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?

[37] Under the first two parts of the test, the focus is on the reasons given by government for departing from the commission's recommendations: *Bodner*, at paras. 32-33 and 36. The government "must respond to the [commission's] recommendations" by "giv[ing] legitimate reasons for departing from or varying them": paras. 23 and 24. The reasons must "show that the commission's recommendations have been taken into account and must be based on [a reasonable factual foundation] and sound reasoning": paras. 25 and 26. The reasons must also "articulat[e] the grounds for rejection or variation", "reveal a consideration of the judicial office and an intention to deal with it appropriately", "preclude any suggestion of attempting to manipulate the judiciary" and "reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence": para. 25.

[38] The third part of the *Bodner* test looks to whether the government has respected the commission process and, more broadly, whether the purposes of that process have been achieved: paras. 30-31, 38 and 43. This new part of the test was added by this Court in an effort to achieve the "unfulfilled" hopes this Court had in the *Provincial Judges Reference* of depoliticizing the process of setting judicial remuneration and thereby preserving judicial independence: paras. 10-12 and 31. The third step in the *Bodner* test requires the court to take a global perspective and ask whether the government demonstrated respect for the judicial office by engaging meaningfully with the commission process: see paras. 25, 31 and 38.

[39] However, this addition in *Bodner* was not intended to transform the analysis into a probing review of the process through which the government developed its response, whether it took place within the executive, the legislature or both. As a result, I cannot agree with the Provincial Court Judges' Association that references to the "totality" or "whole of the process" in *Bodner*, at para. 38, were meant to expand the scope of review such that the Cabinet decision-making process must necessarily be scrutinized in every case.

[40] There is no doubt that the *Provincial Judges Reference* and *Bodner* require that the reviewing court focus on the government's response. In *Bodner* itself, this Court looked at the Alberta, New Brunswick and Ontario governments' responses to commission recommendations to determine whether the third part of the *Bodner* test had been met: paras. 83, 100 and 130-31. That said, the third part of the *Bodner* test is not necessarily limited to consideration of the government's public reasons.

[41] Moreover, this does not mean that the government can hide behind reasons that conceal an improper or colourable purpose. The *Provincial Judges Reference* and *Bodner* cannot be interpreted to mean that as long as the government's public reasons are facially legitimate and appear grounded in a reasonable factual foundation, the government could provide reasons that were not given in good faith. Indeed, it is implicit in the third part of the *Bodner* test itself that, presented with evidence that the government's response is rooted in an improper or colourable purpose and has accordingly fallen short of the constitutional benchmark set in this

Court's jurisprudence, the reviewing court cannot simply accept the government's formal response without further inquiry.

[42] This is nothing new. In *Beauregard*, at p. 77, this Court made clear that “[i]f there were any hint that a federal law dealing with [the fixing of salaries and pensions of superior court judges] . . . was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-à-vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held *ultra vires* s. 100 of the *Constitution Act, 1867*” (emphasis added). This is true of all judges to whom the constitutional principle of judicial independence applies: see *Provincial Judges Reference*, at paras. 145 and 165.

[43] Considerations of legitimacy and respect for the process — and conversely, considerations of impropriety or colourability — permeate the entire *Bodner* analysis. Indeed, in *Bodner*, which concerned the remuneration of provincially-appointed judges, this Court considered whether the reasons given by the Alberta, New Brunswick, Ontario and Quebec governments were “based on purely political considerations”, “reveal political or discriminatory motivations” or “evidence any improper purpose or intent to manipulate or influence the judiciary”: paras. 66, 96 and 159; see also paras. 68 and 123.

[44] Reasons that reveal an improper or colourable purpose would fail the first step of the *Bodner* test which requires that a government articulate a legitimate reason for departing from a commission's recommendations. Similarly, in reviewing whether

a government had relied on a reasonable factual foundation, this Court acknowledged the possibility that the government might also rely on “affidavits containing evidence of good faith and commitment to the process, such as information relating to the government’s study of the commission’s recommendations”: *Bodner*, at para. 36. Finally, a government’s conduct and the adequacy of its response are also directly engaged in the third part of the *Bodner* test, which looks to whether the government has respected the commission process and, more broadly, whether the purposes of that process have been achieved.

[45] Thus, even if a government’s public reasons appear to satisfy the requirements of *Bodner*, the government’s response remains subject to challenge on the basis that it is grounded in an improper or colourable purpose.

[46] In *Bodner*, this Court underscored that “[t]he limited nature of judicial review [of the government’s response] dictates the choice of remedies. The remedies must be consistent with the role of the reviewing court and the purpose of the commission process”: para. 42. In my view, the limited nature of *Bodner* review, the role of the reviewing court and the purpose of the process also have implications for the evidence considered by the reviewing court.

#### B. *Evidence on Bodner Review*

[47] The limited nature of *Bodner* review implies that the record for this type of review is narrower than it would be on ordinary judicial review. It also means that

relevance must be assessed in relation to the specific issues that are the focus of the court's inquiry on *Bodner* review: the legitimacy of the reasons given by government, the reasonableness of the factual foundation relied on by government, and the respect for the commission process by government such that the objectives of the process have been achieved. Further, since *Bodner* review tends to oppose two branches of the state, special considerations arise where the party seeking *Bodner* review requests the production of a confidential Cabinet document. As I detail below, those considerations require that the party seeking production establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet a requirement described in this Court's jurisprudence, including *Bodner*. Only then will the reviewing court examine the document to determine whether it should be produced.

(1) Scope of the Record on *Bodner* Review

[48] Like the Court of Appeal, the Provincial Court Judges' Association invokes the rule that the record on judicial review generally includes any evidence that was before the decision-maker, subject to limited exceptions that either add to or subtract from the record. According to the Provincial Court Judges' Association, since the submission was put before Cabinet and since Cabinet approved the resolution introduced by the Attorney General and ultimately passed by the Legislative Assembly, the Cabinet submission was part of the evidence before the decision-maker and is thus relevant to the judicial review. The Provincial Court



Judges' Association argues that the submission must therefore be included in the record on judicial review.

[49] The Attorney General argues that the decision-maker was the Legislative Assembly, not Cabinet, so the Cabinet submission was not before the decision-maker and therefore should not be included in the record. More fundamentally, the Attorney General rejects the suggestion that the administrative law notion of the record on judicial review applies in this context.

[50] With respect to the identification of the formal decision-maker, neither the *Provincial Judges Reference* nor *Bodner* prescribes that a particular institution must make the decision to respond to a commission's recommendations. In some cases, it may be clear that only a single institution is involved, but in a jurisdiction like British Columbia where both the executive and Legislative Assembly play a substantive role, it would be artificial to focus solely on the Legislative Assembly's part and ignore the executive's involvement. Indeed, in this case the executive's proposed reasons for departing from the commission's recommendations were incorporated by reference into the resolution passed by the Legislative Assembly.

[51] More importantly, in my view, the *Provincial Judges Reference* and *Bodner* describe a unique form of review distinct from judicial review in the ordinary administrative law sense. In contrast to judicial review, *Bodner* review is available even when the decision-maker is the legislature (or any part of the legislature): see *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 558; *Wells v.*

*Newfoundland*, [1999] 3 S.C.R. 199, at para. 59. Further, the grounds for a *Bodner* review are narrower than those for a usual judicial review. The *Bodner* grounds centre on the legitimacy and sufficiency of a government's reasons for departing from a commission's recommendations, whether the government has respected the commission process more generally and whether the objectives of the process have been achieved.

[52] In the usual context of judicial review, the record generally consists of the evidence that was before the decision-maker: see *Delios v. Canada (Attorney General)*, 2015 FCA 117, 100 Admin L.R. (5th) 301, at para. 42; *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41, 80 B.C.L.R. (5th) 243, at para. 52. However, the rule that the record generally consists of the evidence that was before the decision-maker cannot be automatically transposed into the limited context of *Bodner* review.

[53] The record on *Bodner* review necessarily includes any submissions made to the commission by the government, judges and others; the commission's report, including its recommendations; and the government's response to the recommendations, which, as the *Provincial Judges Reference* recognized, at para. 180, may take different forms depending on which institution is charged with responding.

[54] As *Bodner* itself acknowledged, the record may also include certain forms of additional evidence put in by the government: paras. 27 and 36. The

government may be permitted to “provide details [concerning the factual foundation of its response], in the form of affidavits, relating to economic and actuarial data and calculations” and “affidavits containing evidence of good faith and commitment to the process, such as information relating to the government’s study of the impact of the commission’s recommendations”: para. 36; see also paras. 63-64 and 103. But the government cannot use the additional evidence to “advance reasons other than those mentioned in its response” or to cure defects in the factual foundation it relied on in its response: paras. 27 and 36.

[55] Although the point was not made explicitly in *Bodner*, the party seeking *Bodner* review, which will usually be the judges whose remuneration is at stake, can also put in certain forms of additional evidence relevant to the issues the reviewing court must decide. The party seeking review can, for example, seek to introduce evidence to counter relevant evidence put in by a government. It may put in evidence aimed at calling into question the reasonableness of the factual foundation relied on by the government, the government’s lack of meaningful engagement with or respect for the commission process or whether the government’s response was grounded in an improper or colourable purpose. To those ends, the party seeking review can ask that the government produce evidence in its possession. For the government’s part, provided it respects the rule against supplementing its reasons and bolstering their factual foundation, it can respond with additional evidence of its own to refute the allegations made by the party seeking review.

(2) Relevance of Evidence to a *Bodner* Review

[56] The Attorney General contends that the British Columbia courts were wrong to conclude that the Cabinet submission is relevant to the *Bodner* review sought by the Provincial Court Judges' Association. The attorneys general of Canada and of several provinces intervened to make similar submissions.

[57] Evidence is relevant when it has “some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence”: *R. v. White*, 2011 SCC 13, [2011] 1 S.C.R. 433, at para. 36, quoting D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at p. 31. Put another way, [TRANSLATION] “a fact is relevant, in particular, if it is a fact in issue, if it contributes to rationally proving a fact in issue or if its purpose is to help the court assess the probative value of testimony”: J.C. Royer and C. Piché, *La preuve civile* (5th ed. 2016), at para. 215.

[58] Evidence is thus relevant to a proceeding when it relates to a fact that is in issue in the proceeding. The pleadings, which must be read generously and in light of the governing law, define what is in issue: see *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 41.

[59] Generally, what is in issue in a *Bodner* review is whether a government failed to meet its constitutional obligations flowing from the principle of judicial independence in its response to a commission's recommendations. The relevance of

any proposed additional evidence must therefore be tested in relation to the issues that the court must determine on *Bodner* review.

[60] To be relevant, the proposed evidence must contain something that tends to establish a fact concerning one of the steps of the test established in *Bodner*. For instance, if the party seeking *Bodner* review contests the reasonableness of the factual foundation relied on by a government, the proposed evidence must either tend to support or undermine the reasonableness of that foundation. Likewise, if the party seeking *Bodner* review alleges disrespect for the commission process or that the government's response is grounded in an improper or colourable purpose, the proposed evidence must either tend to establish the legitimacy of the government's response or its illegitimacy. Finally, if the government introduces evidence of its good faith and commitment to the process, the applicant's proposed evidence may be tendered to undermine that evidence: see, e.g., *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022.

[61] However, as I will explain, the requirement of relevance alone — even as it pertains to the limited set of issues properly considered on a *Bodner* review — fails to adequately protect the competing constitutional imperatives that arise when a party seeking *Bodner* review requests production of a confidential Cabinet document.

### (3) Confidential Cabinet Documents in the *Bodner* Context

[62] Since a *Bodner* review often concerns decisions in which Cabinet plays a part, a party seeking review may request the production of a confidential Cabinet document as additional evidence to show that the government's response does not meet the applicable constitutional requirements. Although the normal course would be for the judge to consider a description of the proposed evidence or examine it to determine whether it is relevant to the *Bodner* review, special considerations arise when the party seeking *Bodner* review asks the government to produce a document related to Cabinet deliberation and decision making.

[63] Unlike an action or an application for judicial review brought against the government by a private party, a *Bodner* review usually opposes two different branches of the state — the judiciary and the executive — as parties in the application. In the *Provincial Judges Reference*, at para. 7, Lamer C.J. underscored that while litigation is always “a very serious business”, “it is even more serious where it ensue[s] between two primary organs of our constitutional system — the executive and the judiciary — which both serve important and interdependent roles in the administration of justice”. Such litigation may prove necessary to hold the government to its constitutional obligations in jurisdictions where the commission's recommendations have not been made binding. *Bodner* review is the mechanism for ensuring that the government respects the commission process and for safeguarding the public confidence in the administration of justice that process serves to protect.

[64] But as this Court warned in *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49, at pp. 89, 97-98, 103 and 109, the outcome of an action brought by one branch of the state against another can effectively alter the separation of powers. Such proceedings call for special prudence to keep courts from overstepping the bounds of the judicial role.

[65] Canadian constitutional law has long recognized that sovereign power in this country is divided not only between Parliament and the provincial legislatures, but also among the executive, legislative and judicial branches of the state: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 33. Although there are limited areas of overlap, the branches play fundamentally distinct roles and have accordingly developed different core competencies: *Provincial Judges Reference*, at para. 139; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 29.

[66] As this Court underscored in *Criminal Lawyers' Association*, at para. 29, “each branch will be unable to fulfill its role if it is unduly interfered with by the others”. Several doctrines work to prevent undue interference, including the secrecy afforded judicial deliberations (*MacKeigan v. Hickman*, [1989] 2 S.C.R. 796), and the recognition of the privileges, powers and immunities enjoyed by the Senate, the

House of Commons and the legislative assemblies: *Constitution Act, 1867*, preamble and s. 18; *New Brunswick Broadcasting Co.*; *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687. These doctrines are a corollary to the separation of powers because they help to protect each branch's ability to perform its constitutionally-assigned functions.

[67] The executive, too, benefits from a degree of protection against undue interference. Deliberations among ministers of the Crown are protected by the constitutional convention of Cabinet confidentiality. Constitutional conventions do not have direct legal effect: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 880-83; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 98. However, as I will explain in greater detail, the common law respects the confidentiality convention and affords the executive public interest immunity over deliberations among ministers of the Crown: see *Carey; Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at paras. 18-19 and 60.

[68] Where the executive plays a role in formulating a government's response to a judicial compensation commission's recommendations, Cabinet will generally determine the position taken by the executive. Ministers' deliberations concerning their appreciation of the recommendations and how the government should respond will usually be protected by Cabinet confidentiality.



[69] A document reflecting on Cabinet deliberations concerning a government's response may well be relevant, even if only to negate the claim that the government failed to meet its constitutional obligations. If the government sought to have the document admitted in support of an affidavit speaking to its good faith and its commitment to the process of the sort described in *Bodner*, at para. 36, the document would undoubtedly be considered relevant. It is difficult, then, to see why the same should not also be true where the party seeking *Bodner* review looks to have the document admitted to challenge the government's claims of good faith and commitment to the process or to raise the question whether the government acted for legitimate reasons or with an improper or colourable purpose.

[70] Thus, if relevance were the sole consideration, confidential Cabinet documents would routinely be part of the record in every *Bodner* review. For example, the Cabinet document would either tend to lend credence to the contention that a government's response failed to meet its constitutional requirements — or tend to refute that contention. In my view, something more than relevance is needed to strike the appropriate balance between respecting Cabinet confidentiality and maintaining the overall integrity of *Bodner* review.

[71] As I have said, *Bodner* review generally opposes two branches of the state: the members of the judiciary challenging the government's response and the attorney general defending it. Where the response is the product of the legislature or a collaboration between the executive and legislature, the interests of the three branches

may, whether directly or indirectly, be at stake. Yet, given our constitutional structure, a member of the judiciary will also necessarily be charged with hearing and determining the application for *Bodner* review: see *Provincial Judges Reference*, at para. 180; *Bodner*, at para. 29. Owing to the doctrine of necessity, this is so even if the judge charged with hearing the application is directly affected by the commission's recommendations and the government's response: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3, at para. 5.

[72] Routine judicial inspection of a confidential Cabinet document would reveal to a member of the judiciary the content of Cabinet deliberations. Although any inspection of a confidential Cabinet document undermines Cabinet confidentiality to some extent, judicial inspection of a document that concerns Cabinet deliberations about the judiciary would undermine it more significantly. That is especially so where the judge is directly affected by the response resulting from those deliberations. As with adjudication of the *Bodner* review itself, judicial inspection is appropriate in this context only where it is strictly necessary.

[73] In my view, these special considerations should be accommodated at two distinct stages.

[74] First, a threshold showing is required.

[75] Before the reviewing court can examine the document, the party seeking *Bodner* review must first establish that there is some basis to believe that the Cabinet document in question may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*.

[76] This threshold is met if the party seeking review can show that there is reason to believe that the Cabinet document may contain something that would undermine the validity of the government response. This requires the party seeking review to point to something in the record, including otherwise admissible evidence, that supports its view that the document may tend to show that the government response failed to meet one or more parts of the test established in *Bodner*.

[77] Meeting this threshold does not require the party to have knowledge or information about the content of the Cabinet submission. Nor does it require that the party point to something in the record that explicitly refers to the Cabinet submission or its contents. It would be unfair to require the party to establish the contents of a confidential document: see, in the public interest immunity context, *Carey*, at p. 678.

[78] The party can, however, rely on additional evidence and the rest of the record, including submissions to the commission, to support its contention that the threshold is met. For instance, the party might point to statements made by ministers or others that suggest that the government's response may have been grounded in reasons other than those formally expressed, that the government may have relied on a flawed or incomplete factual foundation or that the government may have shown

disrespect for the commission process. The party may also be able to rely on additional evidence introduced by the government that suggests that a document concerning Cabinet deliberations may disclose reliance on improper purpose. But it is not enough to simply say that the document was before the executive in its capacity as decision-maker or that it would provide additional background or context for the reviewing court.

[79] If the party seeking review makes the requisite showing — that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner* — the government must produce it for the court's examination.

[80] Second, the reviewing court must then examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet one of the parts of the test mandated in *Bodner*. In other words, the document must, taken with the record as a whole and in light of the applicant's theory of the case, be of assistance in challenging the legitimacy of the government's reasons, the reasonableness of the factual foundation it relied on, the respect the government has shown the commission process or whether the objectives of the process have been achieved. It may suggest that the government response was based upon an improper or colourable purpose. To be clear, the cogency of the evidence need not be considered at this stage of the analysis.

[81] Even if the document meets this test, production of the document remains subject to any other rule of evidence that bars its disclosure, such as solicitor-client privilege (which was raised in the courts below in the companion appeal) or public interest immunity (which was raised in this Court in both appeals).

[82] The Provincial Court Judges' Association submits that *Bodner* review is meaningless without the production of confidential Cabinet documents to illuminate the true reasons for the government's response, which may differ from its publicly-articulated reasons. The Provincial Court Judges' Association says that without an understanding of the actual basis on which the decision rests, the reviewing court will be unable to determine whether the government's response satisfies constitutional requirements.

[83] I do not agree that *Bodner* review is ineffective without any relevant Cabinet submission being included in the record. Though necessarily limited in scope, *Bodner* review is a robust form of review. The test requires that the government justify a *departure* from the commission's recommendations. The government must give legitimate and rational reasons for doing so and sound reasoning must be supported by a reasonable factual foundation. The government's response must demonstrate respect for the judicial office, for judicial independence, and for the commission process; as well, the broader objectives of the process must be achieved.

[84] Thus, the party seeking *Bodner* review may well be able to make a strong case for overturning a government's response based on the public reasons given by the government. The party seeking *Bodner* review may also rely on additional admissible evidence to make their case, such as statements made by ministers or others, including more general statements made outside the commission process, about judges or their remuneration, and historical patterns, including the government's responses to past commission recommendations. Those forms of evidence might well support the contention that the government relied on an illegitimate reason for departing from the commission's recommendations or that its response does not "reveal a consideration of the judicial office and an intention to deal with it appropriately": *Bodner*, at para. 25. They might also support the contention that the government did not show appropriate respect for the underlying public interest in judicial independence and in having an effective commission process.

[85] I underscore that it is never enough for the government to simply repeat the submissions it made to the commission: *Bodner*, at para. 23. That does not justify a departure from the commission's recommendations. Similarly, a government that consistently rejects a commission's recommendations will put in question whether it is respecting the commission process and, as a result, whether the process is achieving its objectives. Although across-the-board salary increases or reductions that affect judges have been found to meet the rationality standard, a government that does not take into account the distinctive nature of judicial office and treats judges simply

as a class of civil servant will fail to engage with the principle of judicial independence: *Provincial Judges Reference*, at paras. 143, 157 and 184; *Bodner*, at para. 25. More rarely, the level of remuneration itself may call the government's response into question: see *Provincial Judges Reference*, at para. 135.

[86] A government response that does not *meaningfully* engage with the commission process and its recommendations risks failing the *Bodner* test. As *Bodner*, at para. 31, makes clear, the reviewing court must ultimately be satisfied that the objectives of the commission process — namely, depoliticizing decisions about judicial remuneration and preserving judicial independence — have been met.

[87] To summarize, the object of *Bodner* review is the government's response to the commission's recommendations, which will generally consist of the government's decision to depart from the commission's recommendations and the reasons given for that decision. The submissions to the commission, the commission's recommendations, and the government's response accordingly form the core of the record on *Bodner* review. Certain forms of additional evidence are admissible if they are relevant to determining whether any part of the *Bodner* test has been met, including whether the government's response is grounded in an improper or colourable purpose. However, where a party seeking *Bodner* review requests the production of a confidential Cabinet document, the party must first establish there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*. Only then will

the reviewing court examine the document in private to determine whether it, in fact, provides some evidence which tends to show that the government failed to meet its constitutional obligations. If the document does provide such evidence, the court must then determine whether any other rule of evidence, such as public interest immunity, bars its production.

(4) Application

[88] Since the Provincial Court Judges' Association seeks production of a confidential Cabinet submission, the first issue is whether it has made the requisite threshold showing.

[89] The Provincial Court Judges' Association points to prior litigation involving judicial remuneration in which the Attorney General produced a Cabinet submission concerning the government's response to a commission's recommendations: see *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022. The Supreme Court of British Columbia in that case found that the submission revealed an "inappropriate emphasis" on the need to maintain a link between judicial salaries and public sector salaries: para. 81. The Provincial Court Judges' Association argues that this history makes the Cabinet submission in the present case relevant to resolve the issue of whether the government engaged with and showed respect for the commission process.



[90] I am not persuaded. The case relied on by the Provincial Court Judges' Association was decided nearly a decade ago. It does not follow that because a Cabinet submission revealed that the government relied on an inappropriate consideration 10 years ago, it may have relied on a like consideration in the present case. Indeed, the government would be expected to learn from its past mistakes. Something more would be required for there to be reason to believe that the submission may contain evidence that would tend to show that the government failed to meet a requirement described in *Bodner*.

[91] Although it is not determinative, I note that neither the executive nor the Legislative Assembly put the Cabinet submission in issue. Neither the government's response nor the Legislative Assembly's resolution refers to the Cabinet submission. Nor, in contrast with the affidavit filed in a past round of litigation opposing the Attorney General and Provincial Court Judges' Association, is there any reference to the Cabinet submission in the affidavit filed in support of the Attorney General's response to the petition for review. Nor is there anything on the face of the record that indicates the Cabinet submission may contain some evidence which tends to show that the government failed to meet a constitutional requirement.

[92] In my view, the Provincial Court Judges' Association has failed to make the requisite showing. It has not provided any evidence or pointed to any circumstances that suggest that the Cabinet submission may indicate that the government did not meet the standard required by *Bodner*. It was therefore not

necessary for the Attorney General to produce the document for examination by this Court.

[93] This would effectively dispose of this appeal.

[94] It is therefore unnecessary in this case to determine whether public interest immunity would otherwise apply so as to permit the Attorney General to refuse to produce the Cabinet submission. However, since the parties and interveners in both appeals have made extensive submissions about the law of public interest immunity, I will examine how public interest immunity applies to confidential Cabinet documents sought in a *Bodner* review and why, in my view, it is not necessary to revisit this Court's public interest immunity doctrine as it applies in this context.

### C. *Public Interest Immunity*

[95] There is a strong public interest in maintaining the confidentiality of deliberations among ministers of the Crown: *Carey*, at pp. 647 and 656-59; *Babcock*, at paras. 18-19. As a matter of constitutional convention, Cabinet deliberations are confidential: N. d'Ombrain, "Cabinet secrecy" (2004), 47(3) *Canadian Public Administration* 332, at pp. 334-35. Federal ministers swear an oath as Privy Counsellors to "honestly and truly declare [their] mind and [their] opinion" and to "keep secret all matters . . . secretly treated of" in Cabinet: see C. Forcese and A. Freeman, *The Laws of Government: The Legal Foundations of Canadian*

*Democracy* (2nd ed. 2011), at p. 352. Provincial and territorial ministers swear a similar oath as executive counsellors.

[96] Ministers enjoy freedom to express their views in Cabinet deliberations, but are expected to publicly defend Cabinet's decision, even where it differs from their views: see A. Heard, *Canadian Constitutional Conventions: The Marriage of Law & Politics* (2nd ed. 2014), at pp. 106-7; d'Ombrain, at p. 335. The confidentiality of Cabinet deliberations helps ensure that they are candid and frank and that what are often difficult decisions and hard-won compromises can be reached without undue external interference: see Forcese and Freeman, at p. 352; d'Ombrain, at p. 335. If Cabinet deliberations were made public, ministers could be criticized for publicly defending a policy inconsistent with their private views, which would risk distracting ministers and undermining public confidence in government.

[97] Grounded in constitutional convention as much as in practical considerations, this confidentiality applies whether those deliberations take place in formal meetings of the Queen's Privy Council for Canada,<sup>6</sup> or a province or territory's Executive Council, or in meetings of Cabinet or of committees composed of ministers, such as Treasury Board. The confidentiality extends not only to records of Cabinet deliberations, but also to documents that reflect on the content of those deliberations: *Babcock*, at para. 18.

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<sup>6</sup> Although the Queen's Privy Council for Canada established by s. 11 of the *Constitution Act, 1867*, includes members who are not ministers of the Crown, confidentiality also extends to its proceedings.

[98] The common law protects the confidentiality of Cabinet deliberations through the doctrine of public interest immunity: *Babcock*, at para. 60. Public interest immunity forms part of federal common law and the common law of each province and territory: see *Babcock*, at paras. 19, 23 and 26. As with any common law rule, Parliament or a legislature may limit or do away with public interest immunity, provided it clearly expresses its intention to do so: *Quebec (Commission des droits de la personne) v. Attorney General of Canada*, [1982] 1 S.C.R. 215, at p. 228; *Babcock*, at para. 20; see, more generally, *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 21.<sup>7</sup>

[99] In *Smallwood v. Sparling*, [1982] 2 S.C.R. 686, and in *Carey*, this Court rejected absolute Crown privilege and instead recognized a qualified public interest immunity. Public interest immunity prevents the disclosure of a document where the court is satisfied that the public interest in keeping the document confidential outweighs the public interest in its disclosure: see *Carey*, at pp. 653-54 and 670; *Babcock*, at para. 19; see also *Bisailon v. Keable*, [1983] 2 S.C.R. 60, at p. 97.<sup>8</sup>

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<sup>7</sup> Provincial legislatures have generally preserved public interest immunity: see, e.g., *Code of Civil Procedure*, CQLR, c. C-25.01, art. 283; *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sch. 17, s. 13(2); *Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 9; *Proceedings against the Crown Act*, R.S.N.S. 1989, c. 360, s. 11. By contrast, Parliament has partially displaced public interest immunity in ss. 37 to 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5: see *Babcock*, at paras. 21 et seq.; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110.

<sup>8</sup> The same considerations generally apply to testimony. However, ministers and former ministers serving as members of the Senate, House of Commons or a legislative assembly benefit from a limited form of testimonial immunity as a matter of parliamentary privilege: see *Vaid* at para. 29; *Ainsworth Lumber Co. v. Canada (Attorney General)*, 2003 BCCA 239, 14 B.C.L.R. (4th) 302; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (C.A.).

[100] Although this Court rejected claims of absolute Crown privilege in *Smallwood* and *Carey*, it did not “accord the individual an automatic right to discovery of sensitive and confidential documents held by the state”: *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3, at para. 54. *Smallwood* and *Carey* thus require a careful balancing of the competing public interests in confidentiality and disclosure: see *Babcock*, at para. 19; *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368, at para. 35. These competing public interests must be weighed with reference to a specific document in the context of a particular proceeding.

[101] In *Carey*, at pp. 670-73, this Court described the main factors relevant to balancing the public interests in confidentiality and disclosure of documents concerning public decision making, including at the Cabinet level:

- (1) the level of the “decision-making process”;
- (2) the “nature of the policy concerned”;
- (3) the “particular contents of the documents”;
- (4) the timing of disclosure;
- (5) the “importance of producing the documents in the interests of the administration of justice”; and

(6) whether the party seeking the production of the documents “alleges unconscionable behaviour on the part of the government”.

[102] Although public interest immunity may be raised by any party or by the reviewing court itself, the government has the burden of establishing that a document should not be disclosed because of public interest immunity: *Carey*, at pp. 653 and 678. The government should put in a detailed affidavit to support its claim of public interest immunity: pp. 653-54.

[103] As a general rule, when it is clear to the reviewing court, based on a government’s submissions, that public interest immunity applies to a document, it need not inspect the document: *Carey*, at pp. 671 and 681. If, however, the court has doubts about whether public interest immunity applies, the court should inspect the document in private to resolve its doubts: pp. 674 and 681; see also *Somerville v. Scottish Ministers*, [2007] UKHL 44, [2007] 1 W.L.R. 2734, at paras. 156 and 204; *Al Rawi v. Security Service*, [2011] UKSC 34, [2012] 1 A.C. 531, at para. 145. Indeed, even if the court is persuaded that public interest immunity does not apply, the court should nevertheless inspect the document in private to ensure that it does not inadvertently order the disclosure of a document which should in fact remain confidential: see *Conway v. Rimmer*, [1968] A.C. 910 (H.L.), at p. 971. If, having inspected the document, the court concludes that the contents, or any part of the contents, are not protected by public interest immunity, the court can order production accordingly.

(1) Public Interest Immunity in the Context of *Bodner* Review

[104] As noted in *Carey*, the determination of public interest immunity often requires the reviewing court to examine the document in question. Since in the *Bodner* context the court will generally have examined the document to determine whether it should otherwise be part of the record, the document will usually already be before the court.

[105] Accordingly, the court must, looking to the factors identified in *Carey* and any other pertinent factors, determine whether the public interest in the Cabinet document's disclosure outweighs the public interest in its remaining confidential. In such a context, at least three *Carey* factors — the level of decision-making process to which the document relates, the nature of the policy on which the document bears and the contents of the document — will often weigh in favour of keeping the document confidential.

[106] Aside from decisions made by the Queen or her representatives, the Cabinet decision-making process is the highest level of decision making within the executive: see *Carey*, at p. 670; *Reference re Canada Assistance Plan (B.C.)*, at pp. 546-47.

[107] As the British Columbia courts acknowledged in the present case, judicial remuneration is an important and sensitive area of public policy, implicating not only the use of public money, but also the administration of justice and ultimately, judicial

independence. The British Columbia courts did not find this to be a factor weighing in favour of continued confidentiality: BCSC Reasons, at para. 42; C.A. Reasons, at para. 22; for similar statements by the Nova Scotia courts in the proceedings that gave rise to the companion appeal, see also *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13, 409 C.R.R. (2d) 117, at para. 144; *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia*, 2018 NSCA 83, 429 D.L.R. (4th) 359, at paras. 44-46. I cannot agree with such an approach. As this Court explained in *Carey*, at pp. 671-72, the nature of the policy on which the document bears may weigh in favour of continued confidentiality to varying degrees depending on its sensitivity and significance. A government's decision about how to respond to a judicial compensation commission's recommendations concerns not merely a matter of implementation, but involves the "formulation of policy on a broad basis": see *Carey*, at p. 672; see also *Newfoundland (Treasury Board) v. N.A.P.E.*, 2004 SCC 66, [2004] 3 S.C.R. 381, at para. 58. That said, as I explain below, when the policy concerns a constitutional requirement relating to the justice system, and, thus, the administration of justice, as is the case in the *Bodner* context, this may *also* weigh in favour of disclosure.

[108] The contents of a document concerning Cabinet deliberations may well reflect the views of individual ministers of the Crown and reveal disagreement among ministers. Cabinet documents may also reveal considerations that were put before Cabinet. As a result, their contents will frequently be highly sensitive: see *Babcock*, at para. 18.



[109] Depending on the contents of the document, the timing may also weigh in favour of keeping the document confidential. A document that simply reveals that Cabinet made a decision to reject a recommendation made by a judicial compensation commission will bear little confidentiality once that decision is publicly announced. By contrast, ministers can rightly expect that a document that weighs several different possible responses to the commission's recommendations and proposes a particular response will remain confidential for some prolonged time even after the decision is publicly announced.

[110] In this case, the British Columbia courts appear to have treated the government's failure to assert a specific harm that would result from the Cabinet submission's disclosure as being conclusive of the need for disclosure: see Master Reasons, at para. 23; BCSC Reasons, at para. 46; C.A. Reasons, at para. 22.

[111] Because of the strong public interest in Cabinet confidentiality, the disclosure of a Cabinet document undermines that confidentiality and is, at least to some degree, harmful. As *Carey* recognized, certain Cabinet documents may, owing to their contents, raise additional concerns, as might be the case where they relate to defence or national security or refer to specific points of disagreement among ministers. It will often be helpful to the court for the government to be as specific as possible in raising the potential for such harm: pp. 653-54 and 671. But the government's failure to identify some specific harm resulting from a confidential Cabinet document's disclosure does not *automatically* mean the document must be

disclosed. The focus must remain on whether the public interest in the document's disclosure outweighs the public interest in its remaining confidential.

[112] Given the strong public interest in keeping documents concerning Cabinet deliberations confidential, a strong countervailing public interest will usually be necessary to justify their disclosure. The strength of the public interest in disclosure will often turn on the interests of the administration of justice, a factor identified in *Carey*.

[113] The notion of the "interests of the administration of justice" undoubtedly encompasses a broad set of considerations: see *Carey*, at pp. 647-48 and 671. Two stand out in the *Bodner* context: "the importance of the case and the need or desirability of producing the documents to ensure that [the case] . . . can be adequately and fairly presented": *Carey*, at p. 671.

[114] In the companion case, the Nova Scotia Court of Appeal concluded that disclosure of the report is in the public interest because the government knew its response to the commission's recommendations would be subject to review and because the review would focus on matters vital to the administration of justice and to the relationship between two branches of government: paras. 44-46.

[115] These considerations cut both ways. Although there is no doubt that *Bodner* reviews are of great importance, the fact that a party seeks production of a relevant confidential Cabinet document in the context of a *Bodner* review is not itself

a general basis for disclosure. Such an approach would effectively trump the public interest in the confidentiality of Cabinet deliberations in every *Bodner* review. It would also conflate the importance of the *issues* canvassed on such a review with the importance of the *evidence* provided by the Cabinet document to the disposition of those issues.

[116] In the *Bodner* context, the reviewing court's analysis of the factors bearing on the public interest in disclosure must necessarily be informed by its conclusion on the nature and probative value of the evidence. A document may provide some evidence that the government failed to meet one of the parts of the *Bodner* test, but the importance of the evidence may vary widely. When considering the interests of the administration of justice, the focus must therefore remain on the degree to which the document bears on what is at issue in the litigation.

[117] A document may contain information not otherwise available such that its exclusion from evidence would undermine the court's ability to adjudicate the issues on their merits: see *Carey*, at pp. 654 and 673; *Commonwealth v. Northern Land Council*, [1993] HCA 24, 176 C.L.R. 604, at p. 619. A document that tends to establish that the government set out to provide misleading public reasons for its response to the commission's recommendations; that the government relied on a fundamentally flawed factual foundation; that the government acted with an improper or colourable purpose; or that the government was indifferent or disrespectful towards the commission process will be highly probative. Such a document bears so directly

— and so determinately — on the issues that the reviewing court needs to resolve on *Bodner* review that to exclude the document would be contrary to the interests of the administration of justice: see *Air Canada v. Secretary of State for Trade*, [1983] 2 A.C. 394 (H.L.), at p. 435. Given the important constitutional interests at stake, the public interest in disclosure would almost certainly outweigh the public interest in the document’s remaining confidential. Excluding such a document from evidence would keep the court from fulfilling its judicial role, jeopardize public confidence in the administration of justice, and ultimately threaten the rule of law. In such cases, where the probative value of the document is high, the public interest immunity analysis will lead to the same result as the production analysis set out above.

[118] By contrast, the public interest immunity analysis may lead to a different result for a Cabinet document that supports the contention that the government failed to meet one of its constitutional requirements, but whose impact on the *Bodner* review would be limited. The probative value of such evidence might not weigh heavily enough to warrant disclosure, especially if there were strong public interest in its remaining confidential. But such a document’s exclusion from the record could hardly keep the reviewing court from adjudicating the issues on their merits. The public interest in disclosure of such a Cabinet document would thus not outweigh the public interest in its remaining confidential.

[119] As a general matter, the notion of “unconscionable behaviour” referred to in *Carey*, at p. 673, will only be pertinent in a limited set of cases. This factor is

superadded to more general considerations involving the administration of justice. The conduct in question must be “harsh” or “improper”; though it need not be criminal, it must nevertheless be of a similar degree of seriousness: p. 673. In the *Bodner* context, this factor does little work independent from the factor relating to the interests of the administration of justice. The harshness or impropriety of the government’s conduct would be canvassed in assessing whether the government acted with an improper or colourable purpose. A document that demonstrates unconscionable behaviour on the government’s part would tend to establish its failure to meet its constitutional requirements in a highly probative manner and, for that reason, the public interest in its disclosure would almost certainly outweigh the public interest in its remaining confidential.

[120] Accordingly, I disagree with the suggestion of the Attorney General of British Columbia and other attorneys general that this Court’s public interest immunity case law results in routine, almost inevitable, disclosure of confidential Cabinet documents, and should thus be revisited. Properly applied in the *Bodner* context, public interest immunity requires a careful balancing of the public interests in confidentiality and disclosure. Since the public interest in the confidentiality of documents concerning Cabinet deliberations is often particularly strong, the public interest in their disclosure will usually need to be stronger still to warrant their disclosure.

#### V. Disposition

[121] I would allow the appeal without costs and quash the master's order for production of the Cabinet submission. The Provincial Court Judges' Association's petition can now be adjudicated on its merits without consideration of the Cabinet submission.

*Appeal allowed without costs.*

*Solicitors for the appellant: Gudmundseth Mickelson, Vancouver.*

*Solicitors for the respondent: Arvay Finlay, Vancouver.*

*Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Toronto.*

*Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.*

*Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.*

*Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.*

*Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.*

*Solicitors for the intervener the Canadian Superior Courts Judges Association: Norton Rose Fulbright Canada, Montréal.*

*Solicitors for the intervener the Canadian Bar Association: Borden Ladner Gervais, Toronto.*

*Solicitors for the intervener the Canadian Association of Provincial Court Judges: Goldblatt Partners, Toronto.*

*Solicitors for the intervener the Canadian Taxpayers Federation: McCarthy Tétrault, Toronto.*

*Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.*