



**SUPREME COURT OF CANADA**

**CITATION:** Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia, 2020 SCC 21      **APPEAL HEARD:** December 9, 2019  
**JUDGMENT RENDERED:** July 31, 2020  
**DOCKET:** 38459

**BETWEEN:**

**Attorney General of Nova Scotia representing Her Majesty The Queen in Right of the Province of Nova Scotia and Governor in Council**  
Appellants

and

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

- 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

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

**REASONS FOR JUDGMENT:** Karakatsanis J. (Wagner C.J. and Abella, Moldaver, Côté, Brown, Rowe, Martin and Kasirer JJ. concurring)  
(paras. 1 to 73)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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N.S. (A.G.) v. JUDGES PROV. CT. AND FAM. CT.

**Attorney General of Nova Scotia representing Her Majesty The  
Queen in Right of the Province of Nova Scotia and  
Governor in Council**

*Appellants*

v.

**Judges of the Provincial Court and Family Court of Nova Scotia,  
as represented by the Nova Scotia Provincial Judges' Association**

*Respondents*

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*

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

**2020 SCC 21**

File No.: 38459.

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 NOVA SCOTIA

*Constitutional law — Judicial independence — Judicial remuneration — Judicial compensation commission making recommendations to provincial government concerning salaries, benefits and pensions of provincial judges — Attorney General providing report to Cabinet concerning commission's recommendations — Order in council varying commission's recommendation concerning judges' salaries — Judges applying for judicial review of order in council — Whether Attorney General's report should form part of record on judicial review — Whether production of report precluded on grounds of public interest immunity.*

In November 2016, the Nova Scotia judicial compensation commission recommended an approximately 5.5 percent increase in the salaries of provincial judges in 2017-18, a 1.2 percent increase in 2018-19 and a 2.2 percent increase in 2019-20. The provincial Attorney General provided a report to Cabinet concerning the commission's recommendations. The Lieutenant Governor in Council then made an order in council, based on the report and recommendation of the Attorney General, reducing the rate of salary increase to nil in 2017-18 and 2018-19 and to one percent in 2019-20. The Provincial Court Judges' Association applied for judicial review of

the order in council, and moved for a declaration that the Attorney General's report should be part of the record on judicial review. The motion judge granted the declaration in part, concluding that all but the portions of the report that were protected by solicitor-client privilege should form part of the record on judicial review. The Court of Appeal dismissed the Attorney General's appeal.

*Held:* The appeal should be allowed in part and the motion judge's declaration modified such that only the discussion of government-wide implications in the Attorney General's report and the communications plan should be included in the record.

The framework that governs whether confidential Cabinet documents can form part of the record on a review pursuant to *Bodner v. Alberta*, 2005 SCC 4, [2005] 2 S.C.R. 286, was developed in the companion appeal, *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20. Applying that framework in the present appeal, there is some basis to believe that certain components of the Attorney General's report — the discussion of government-wide implications and the communications plan — may contain evidence which tends to show that the government failed to meet a requirement of the *Bodner* test. Production of these components of the report is not precluded on grounds of public interest immunity, as the public interest in these parts remaining confidential is outweighed by the public interest in their being disclosed.

The party seeking to have a confidential Cabinet document produced 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 will the government be required to produce the document for judicial inspection.

In the present case, the government's reasons for varying the commission's salary increase recommendation may raise some concerns about whether the government failed to meaningfully engage with the commission's recommendations and about the government's respect for the commission process. Further, the government appears to have implemented precisely the increase it proposed in its submissions to the commission, again raising the issue of whether the government respected the commission process. Finally, there is also a reference to the Attorney General's report in the preamble to the order in council that provides the government's response, indicating that the Lieutenant Governor in Council may have relied on the report in formulating the response. In these circumstances, the Association meets the threshold for judicial inspection.

The next step in the analysis is to determine whether the Attorney General's report does in fact provide some evidence which tends to show that the government's response does not comply with the requirements set out in *Bodner*. The paragraph in the report that discusses government-wide implications and the communications plan appendix set out the bases on which the decision to accept or

vary the commission's recommendations could be criticized, as well as related political considerations, including the impacts of salary increases for judges on labour negotiations with public sector unions. The inclusion of these considerations provides some basis to support the contention that the government's response fell short of its constitutional requirements and could be of assistance to the Association in calling into question the respect the government has shown the commission process and the propriety of the government's motivation for rejecting the commission's recommendations. Thus, subject to public interest immunity, the discussion of government-wide implications in the Attorney General's report and the communications plan appendix should be included in the record.

Public interest immunity protects the confidentiality of Cabinet deliberations if the public interest in the document remaining confidential outweighs the public interest in its being disclosed. The companion appeal explains the main factors relevant to balancing these interests, and how they apply in the context of a *Bodner* review.

In the instant case, several factors weigh in favour of the government-wide implications and communications plan remaining confidential. These components of the Attorney General's report relate to a decision at the highest level of the executive. The government's response to the commission's recommendations involves important policy choices. In terms of the timing of disclosure, although the decision to vary the commission's recommended salary

increase has already been made and publicly announced, the details of the considerations before Cabinet have not yet been made public and can be expected to remain confidential. As well, the documents' contents may reveal matters that were discussed in Cabinet, and can be expected to remain confidential.

However, in terms of the interests of the administration of justice, this factor favours the disclosure of the government-wide implications in the Attorney General's report and the communications plan appendix. Some of the considerations mentioned in these components of the report were not rational or legitimate bases on which to vary or reject the commission's recommendations. Their inclusion in the record would help the reviewing court determine whether the government's response was grounded in an improper purpose and whether the commission process has been respected and its purposes have been achieved. By contrast, their exclusion would undermine the reviewing court's ability to deal with central issues on *Bodner* review. Thus, the public interest in disclosure outweighs the public interest in continued confidentiality.

### **Cases Cited**

By Karakatsanis J.

**Applied:** *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20; *Carey v. Ontario*, [1986] 2 S.C.R. 637; **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; **referred to:** *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3.

### **Statutes and Regulations Cited**

*Act to Amend Chapter 238 of the Revised Statutes, 1989, the Provincial Court Act*, S.N.S. 1998, c. 7, s. 1 [en. 1989, c. 238, ss. 21J, 21K].

*Financial Measures (2016) Act*, S.N.S. 2016, c. 2, s. 9 [rep. & sub. 1989, c. 238, ss. 21J, 21K].

*Interpretation Act*, R.S.N.S. 1989, c. 235, s. 7(1)(q) "Lieutenant Governor in Council".

*Nova Scotia Civil Procedure Rules*, r. 7.10(a).

O.C. 2017-24, preamble.

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

*Provincial Court Act*, R.S.N.S. 1989, c. 238, ss. 21E, 21H(2), 21J, 21K.

*Public Service Act*, R.S.N.S. 1989, c. 376, s. 29.

### **Authors Cited**

Nova Scotia Provincial Judges' Salaries and Benefits Tribunal (2017-2020). *Report and Recommendations for the Period April 1, 2017 to March 31, 2020*. Halifax, November 2016 (online: [https://novascotia.ca/just/Court\\_Services/\\_docs/Judges-Salaries-2017-2020.pdf](https://novascotia.ca/just/Court_Services/_docs/Judges-Salaries-2017-2020.pdf); archived version: [https://www.scc-csc.ca/cso-dce/2020SCC-CSC21\\_1\\_eng.pdf](https://www.scc-csc.ca/cso-dce/2020SCC-CSC21_1_eng.pdf)).

APPEAL from a judgment of the Nova Scotia Court of Appeal (Fichaud, Oland and Beveridge JJ.A.), 2018 NSCA 83, 429 D.L.R. (4th) 359, 30 C.P.C. (8th) 1, 48 Admin. L.R. (6th) 315, [2018] N.S.J. No. 448 (QL), 2018 CarswellNS 814 (WL Can.), affirming a decision of Smith J., 2018 NSSC 13, 409 C.R.R. (2d) 117, 20 C.P.C. (8th) 112, [2018] N.S.J. No. 76 (QL), 2018 CarswellNS 154 (WL Can.).  
Appeal allowed in part.

*Edward A. Gores, Q.C., and Andrew D. Taillon*, for the appellants.

*Susan Dawes and Kristen Worbanski*, for the respondents.

*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 Bussièrès 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, along with its companion appeal, *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20, requires that this Court balance several constitutional imperatives: 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 having the executive conduct its internal business in confidence.

[2] The appeals concern whether a confidential Cabinet document can form part of the record on judicial review of a government's response to a judicial compensation commission's recommendations. Further, they raise the issue of whether the production of such a Cabinet document is nevertheless precluded on grounds of public interest immunity.

[3] In this case, the Nova Scotia courts examined the report to Cabinet of the Attorney General of Nova Scotia, found that it was relevant and concluded that it was not protected by public interest immunity. The courts declared that the portions of the report not subject to solicitor-client privilege form part of the record on judicial review and must be produced by the Attorney General.

[4] This appeal falls to be resolved in accordance with the framework developed in the companion appeal. That framework governs whether confidential Cabinet documents can form part of the record on a review pursuant to *Bodner v.*

*Alberta*, 2005 SCC 44, [2005] 2 S.C.R. 286,<sup>1</sup> a limited form of judicial review of a government's response to a judicial compensation commission's recommendations.

[5] Applying that framework in this appeal, I conclude that there is some basis to believe that the Attorney General's report may contain evidence which tends to show that the government failed to meet a requirement of the *Bodner* test. The public reasons given for the government's decision to depart from the commission's recommended increase in judicial remuneration provide some basis to believe that the government may have relied on improper considerations and may not have respectfully engaged with the commission process.

[6] Having inspected the Attorney General's report, I find that only two components, the discussion of government-wide implications and the communications plan, provide some evidence that the government may have failed to meet the *Bodner* test. The rest of the report is either protected by solicitor-client privilege or provides no such evidence, and will not form part of the record.

[7] Since the discussion of government-wide implications and the communications plan reflect matters that may have been considered by Cabinet, I turn finally to public interest immunity, and find that the public interest in these parts of the Attorney General's report remaining confidential is outweighed by the public

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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.

interest in their being disclosed. Although there are several factors weighing in favour of these parts' continued confidentiality, they are outweighed by their importance to the court's determination of the merits of the application for *Bodner* review.

[8] As a result, only components of the Attorney General's report — the discussion of government-wide implications and the communications plan — should be produced as part of the evidence on *Bodner* review. That said, these excerpts are merely some evidence for the Supreme Court of Nova Scotia to consider in deciding the merits of the judicial review of the government's response.

[9] For the following reasons, I would allow the appeal in part.

## I. Background

### A. *Provincial Court Act, R.S.N.S. 1989, c. 238*

[10] 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 *Provincial Court Act* implements that baseline in Nova Scotia.

[11] In Nova Scotia, the triennial Provincial Judges' Salaries and Benefits Tribunal (the commission) is charged with making recommendations concerning the salaries, benefits and pensions of judges of the Provincial Court and Family Court based on prescribed factors and other factors the commission considers relevant:

*Provincial Court Act*, s. 21E. The commission makes its recommendations in a report to the Minister of Justice who forwards the report to the Lieutenant Governor in Council: ss. 21H(2) and 21K(1).<sup>2</sup>

[12] Before 2016, the commission’s recommendations were binding. The recommendations were automatically implemented, unless they required legislative changes. If so, the Minister of Justice was to introduce the necessary legislation in the House of Assembly: see *An Act to Amend Chapter 238 of the Revised Statutes, 1989, the Provincial Court Act*, S.N.S. 1998, c. 7, s. 1, enacting *Provincial Court Act*, ss. 21J and 21K.

[13] In 2016, the Nova Scotia legislature amended the *Provincial Court Act* to give the Lieutenant Governor in Council the power to vary or reject the commission’s recommendations: see *Financial Measures (2016) Act*, S.N.S. 2016, c. 2, s. 9, repealing and replacing *Provincial Court Act*, ss. 21J and 21K.

[14] Once it receives the commission’s report, the Lieutenant Governor in Council “shall, without delay, confirm, vary or reject each of the recommendations” made by the commission: *Provincial Court Act*, s. 21K(2). If a recommendation is varied or rejected, reasons for so doing must be provided: s. 21K(3). The Lieutenant

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<sup>2</sup> In Nova Scotia, the offices of Attorney General and Minister of Justice are held by the same person: *Public Service Act*, R.S.N.S. 1989, c. 376, s. 29. The *Provincial Court Act* employs the term “Governor in Council”, which the *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 7(1)(q) defines as interchangeable with the term “Lieutenant Governor in Council”. To avoid confusion with the Governor General in Council, usually referred to in federal law as “Governor in Council”, and to ensure these reasons can more easily be understood by readers in other provinces, I will refer to Nova Scotia’s Lieutenant Governor in Council.

Governor in Council “shall, without delay, cause the confirmed and varied recommendations to be implemented”: s. 21K(4).

B. *Government’s Response*

[15] In its submissions to the commission, the Nova Scotia government took the position that a salary increase “consistent with the public service wage mandate” of no increase in the first two years and a one percent rise in the final year “would be appropriate in all of the circumstances”: Nova Scotia Provincial Judges’ Salaries and Benefits Tribunal (2017-2020), *Report and Recommendations for the Period April 1, 2017 to March 31, 2020* (November 2016) (online), at para. 39.

[16] In its November 2016 report, the commission noted that the salary of Provincial Court judges was lower than that of judges in every other province and territory, save Newfoundland and Labrador. The commission recommended an approximately 5.5 percent increase in the salaries of Provincial Court judges in the 2017-18 fiscal year and an increase in line with Statistics Canada’s Consumer Price Index for Nova Scotia in 2018-19 and 2019-20. Based on the methodology prescribed by the commission, this recommendation would have resulted in a 1.2 percent increase in 2018-19 and a 2.2 percent increase in 2019-20, for a total increase of approximately 8.9 percent over three years.<sup>3</sup>

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<sup>3</sup> The government’s response, which was prepared a few months after the commission’s report, estimates that the commission’s recommendation would result in an approximately 9.5 percent



[17] In December 2016, the Attorney General provided a report to Cabinet concerning the commission's recommendations. The report was filed under seal in this Court, as it had been in the courts below. The Supreme Court of Nova Scotia included a detailed summary of the report in its reasons: 2018 NSSC 13, 409 C.R.R. (2d) 117, at paras. 146-76.

[18] In February 2017, the Lieutenant Governor in Council made an order varying the commission's recommendation concerning the salaries of provincial judges: O.C. 2017-24. The order in council reduces the rate of salary increase to nil in the 2017-18 and 2018-19 fiscal years and to one percent in the 2019-20 fiscal year. The preamble to the order states that the order is made by the Lieutenant Governor in Council "on the report and recommendation of the Attorney General and Minister of Justice".

[19] The respondents, the Judges of the Provincial Court and Family Court, represented by the Nova Scotia Provincial Court Judges' Association, applied for judicial review of the order in council, seeking an order quashing the order in council, an order confirming the commission's recommendations and declarations that the government has interfered with judicial independence. In their application, the judges requested production of the Attorney General's report referred to in the order in council.

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increase: A.R., vol. 2, Tab 2A, at p. 7. Had it gone into effect, the actual increase would have been 0.6 percent less because inflation was slightly lower than the 2.0 percent per year the government estimated: see the methodology described by the commission in the *Report and Recommendations for the Period April 1, 2017 to March 31, 2020*, at para. 53.

[20] The Attorney General filed a record in the Supreme Court of Nova Scotia that did not include the report. The Provincial Court Judges' Association moved for a declaration that the report is part of the record on judicial review under the *Civil Procedure Rules*, r. 7.10(a).

## II. Procedural History

### A. *Supreme Court of Nova Scotia, 2018 NSSC 13, 409 C.R.R. (2d) 117 (Smith J.)*

[21] The Supreme Court of Nova Scotia granted in part the declaration sought by the Provincial Court Judges' Association. Justice Smith explained that the review contemplated by *Bodner* requires that the reviewing court determine whether the government's participation and response in the totality of the process demonstrates good faith and meaningful participation. The court referred to the general rule that the record on judicial review includes every document that was before a decision-maker and relied on by it in reaching its decision, subject to exceptions that subtract from the record, such as deliberative secrecy, which did not apply here.

[22] Turning to public interest immunity, Smith J. found that, while the decision making process took place at a very high level, the balance of the factors identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637, favoured disclosure. The court concluded that portions of the report contain legal advice from the Attorney General and are protected by solicitor-client privilege. The court declared that all but these

portions of the report should form part of the record on judicial review and directed the Attorney General to produce the non-privileged portions of the report.

B. *Nova Scotia Court of Appeal, 2018 NSCA 83, 429 D.L.R. (4th) 359 (Fichaud, Oland and Beveridge J.J.A.)*

[23] The Nova Scotia Court of Appeal found no error in the reviewing court's conclusion that the report was relevant or in its analysis of public interest immunity. The Court of Appeal added that disclosure of the report was in the public interest because the government knew its response to the commission's recommendations would be subject to judicial review and because the review would focus on matters vital to the administration of justice and to the relationship between two branches of government. Justice Fichaud, writing for the Court of Appeal, affirmed the conclusion that portions of the report are protected by solicitor-client privilege.

### III. Issues

[24] This appeal raises two issues: (a) whether the Attorney General's report should form part of the record on *Bodner* review and (b) whether the report is nevertheless protected by public interest immunity such that it should not be produced.

[25] The Provincial Court Judges' Association did not cross-appeal the Court of Appeal's holding that portions of the report are subject to solicitor-client privilege,

that there was no waiver of such privilege and that those portions would therefore not form part of the record on *Bodner* review. Accordingly, the Court of Appeal's conclusions on these points are not on appeal before this Court. They are final.

#### IV. Analysis

[26] I begin with a preliminary point. Although the government's response takes the form of an order made by the Lieutenant Governor in Council under the *Provincial Court Act*, that order is based on advice given by Cabinet. Since its advice is nearly always binding, Cabinet effectively determines what decision will be made by the Lieutenant Governor in Council: see *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at pp. 546-47. The document at issue in this appeal concerns the process Cabinet followed to settle on its advice.

[27] This appeal falls to be decided in accordance with the framework governing the production of confidential Cabinet documents on *Bodner* review established in the companion appeal, *B.C. Provincial Court Judges*. Although the parties to this appeal framed the debate as being concerned with relevance, as I explained in *B.C. Provincial Court Judges*, relevance alone is not sufficient to balance the competing constitutional interests at stake when a party seeking *Bodner* review requests the production of a confidential Cabinet document.

[28] Thus, the party seeking to have the confidential Cabinet document produced 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*, understood, as they must be, as building on *Beauregard v. Canada*, [1986] 2 S.C.R. 56, and the *Provincial Judges Reference*. Only then will the government be required to produce the document for judicial inspection. Having inspected the document, the reviewing court determines whether the document in fact provides some evidence which tends to show that the government failed to comply with a requirement described in *Bodner*. If the document provides such evidence, the court can order production as part of the record, subject to public interest immunity or any other applicable rule of evidence invoked by the government.

A. *Should the Attorney General's Report Be Part of the Record on Bodner Review?*

[29] As I recounted in the companion appeal, *B.C. Provincial Court Judges*, the constitutional principle of judicial independence includes financial security as one of its core characteristics: *Provincial Judges Reference*, at para. 118. One component of financial security is that, absent a “dire and exceptional financial emergency precipitated by unusual circumstances”, a government cannot change judicial remuneration parameters without first seeking the recommendations of a judicial compensation commission: *Provincial Judges Reference*, at paras. 133 and 137; *B.C. Provincial Court Judges*, at para. 31. For the commission to be effective, its recommendations must “have a meaningful effect on the determination of judicial

salaries”: *Provincial Judges Reference*, at para. 175; see also *Bodner*, at para. 29, and *B.C. Provincial Court Judges*, at para. 33.

[30] The government must formally respond to the commission’s report and give specific reasons justifying any departure from the commission’s recommendations: *Provincial Judges Reference*, at paras. 179 and 180; *Bodner*, at paras. 18-22; *Conférence des juges de paix magistrats du Québec v. Québec (Attorney General)*, 2016 SCC 39, [2016] 2 S.C.R. 116, at para. 35; *B.C. Provincial Court Judges*, at para. 34. The government’s response is subject to “a limited form of judicial review” on a standard of “rationality”: *Provincial Judges Reference*, at paras. 183-184; *Bodner*, at paras. 29 and 42; *B.C. Provincial Court Judges*, at para. 35.

[31] The test for determining whether the government’s response meets the rationality standard is threefold:

- (1) Has the government articulated a legitimate reason for departing from the commission’s recommendations?
- (2) Do the government’s reasons rely on 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?

(*Bodner*, at para. 31; *B.C. Provincial Court Judges*, at para. 36)

[32] As I explained in the companion appeal, although the *Bodner* test focuses on the government's response, this does not mean that the reviewing court can ignore the broader context and the court is not necessarily limited to consideration of the government's response: see *B.C. Provincial Court Judges*, at paras. 40-45. The third part of the *Bodner* test examines whether the government has respected the commission process such that its purposes have been achieved. And, importantly, the government's response cannot stand if it shown to have been grounded in an improper or colourable purpose, which reflects a concern that is deeply rooted in this Court's judicial independence case law and permeates the whole of the *Bodner* test. In *Bodner* itself, 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 political purpose or intent to manipulate or influence the judiciary": *Bodner*, at paras. 66, 96 and 159; see also paras. 68 and 123.

[33] Although the record on *Bodner* review consists primarily of submissions made to the commission, the commission's report and the government's response, the record can also include additional evidence relevant to the issues on *Bodner* review: *B.C. Provincial Court Judges*, at paras. 53-55.

[34] *Bodner* review generally opposes two branches of the state as parties to the litigation: the executive and the judiciary challenging the government's response. Determining the relevance of additional evidence where it is disputed may, in the normal course, require inspection of the proposed evidence by a member of the judiciary. Any inspection of a confidential Cabinet document has the potential to undermine Cabinet confidentiality. However, because the judiciary is directly interested in the litigation, the inspection of a confidential Cabinet document relating to the government's response to a judicial compensation commission's recommendations has the potential to significantly undermine Cabinet confidentiality: *B.C. Provincial Court Judges*, at paras. 70-72. As a result of these considerations, the companion appeal establishes a special set of rules that govern when a party applying for *Bodner* review seeks the production of a confidential Cabinet document.

[35] Before the reviewing court inspects the document, the party seeking a *Bodner* review must first point to some circumstance or evidence that supports its view that the document may tend to show that the government's response failed to meet one of the parts of the *Bodner* test: *B.C. Provincial Court Judges*, at para. 75. This does not require the party to have knowledge or information about the content of a confidential Cabinet document. As I explained in *B.C. Provincial Court Judges*, at para. 78, the party can rely on evidence of statements made by ministers or others and broader circumstances, including historical patterns in government responses to commission recommendations. The court may look to the entire record, including the submissions the government made to the commission, in determining whether the



circumstances meet the threshold for judicial inspection. The government's response itself may supply some basis to believe that the confidential Cabinet document may contain evidence which tends to show that the government failed to meet a requirement described in *Bodner*.

[36] In its notice of application, the Provincial Judges' Association pleads that the government's reasons fail to explain the choice to *depart* significantly from the commission's recommendation of an 8.9 percent increase in judicial salaries over three years, which aimed to bring them more in line with salaries in other provinces. In the respondents' view, the reasons do not justify the government's decision to limit the increase to one percent in the last year of a triennial cycle.

[37] For their part, the government's reasons repeatedly criticize the commission process and the recommendations in strong terms. The reasons contend that the commission proceeded in a "results-oriented and formulaic manner to achieve an outcome", adding that there was "no rational basis for its conclusion": A.R., vol. 2, at pp. 8-10. The reasons also criticize the commission's reliance on an "adversarial interest arbitration" model drawn based on collective bargaining, warning that, "as a consequence", "public confidence in the actual and apparent independence, objectivity and effectiveness [of the commission] could be called into question": A.R. vol. 2, at pp. 12-13.

[38] Although the government acknowledges that the commission could have provided constitutionally valid reasons for not staying within the scope of the

province's fiscal plan, the government concludes that the commission erred or exceeded its jurisdiction in failing to stay within the fiscal plan and "chose to, in effect, usurp the statutory authority of the Minister of Finance": A.R., vol. 2, at p. 15 (emphasis added).

[39] As a result, the government varied the commission's recommendation substantially, freezing judicial salaries for 2017-18 and 2018-19 and adopting a one percent increase for 2019-20 "to approximate the salary already set for Crown Attorneys, the funding increase for physicians, and the proposed increase of other Nova Scotians receiving salaries out of public funds, including members of the Legislative Assembly": A.R., vol. 2, at pp. 18-19.

[40] The issue is whether these reasons, in the broader context of this case, supply some basis to believe that the Attorney General's report may contain evidence that tends to show that the government failed to comply with one of its constitutional requirements in responding to the commission's recommendations.

[41] It is open to the respondents to rely on the government's reasons to argue that the government did not take sufficient account of the distinctive nature of judicial office in concluding that judicial salaries should increase only in line with the rest of the public sector. While across-the-board restraints on increases in salaries could be found to be rational, this Court has cautioned that "judicial independence can be threatened by measures which treat judges . . . identically to other persons paid from the public purse": *Provincial Judges Reference*, at paras. 158 and 184. Similarly,

although this Court accepted in *Bodner* that comparisons with the salaries of civil servants could be appropriate, this Court also warned that the government's response must *always* take into account the distinctive nature of judicial office: *Bodner*, at paras. 26, 75 and 123-26.

[42] As this Court made clear in *Bodner*, at paras. 23, 25 and 38, the government must respond to the commission's recommendations, taking those recommendations into account and dealing with the issues at stake in a meaningful way. In *Bodner* itself, the Quebec government's failure to address certain key justifications for the commission's recommendations proved fatal to the rationality of its response: para. 159. Here, the government's reasons identify a number of possible errors in the commission's comparison with judicial salaries in New Brunswick. The government's study of the factual foundations relied on by the commission is appropriate and expressly contemplated by *Bodner*, at paras. 26 and 36. But it is also arguable that the government may not have engaged in a meaningful way with the commission's analysis of the increase in the cost of living in Nova Scotia or its broader comparison of judicial salaries in Nova Scotia with those across the country, which formed the central justification for its recommendation. The legitimacy of the Nova Scotia government's reasons may also be assessed in light of the extent of the departure from the commission's recommendation.

[43] The government may of course disagree with the commission's recommendations and its reasoning. However, the government is also expected to

show respect for the commission process such that the objectives of that process — depoliticization and judicial independence — can be achieved: *Bodner*, at paras. 25-26 and 30-31. Here, the government’s reasons themselves may raise some concerns about whether the government failed to meaningfully engage with the commission’s recommendations and about the government’s respect for the commission process.

[44] Further, the government in this case appears to have implemented precisely the increase it proposed in its submissions to the commission, again raising the issue of whether the government respected the commission process: see *Bodner*, at para. 23; *B.C. Provincial Court Judges*, at para. 85. In doing so, like the Quebec government in *Bodner* itself, the Nova Scotia government “appears to have been content to restate its original position without answering certain key justifications for the [commission’s] recommendations”: para. 159. This is an important factor to consider in determining whether the threshold is met.

[45] Finally, I note that there is also a reference to the Attorney General’s report in the preamble to the order in council that forms the government’s response. While such a reference indicates that the Lieutenant Governor in Council may have relied on the Attorney General’s report in formulating its response, this alone would not likely have been sufficient to meet the threshold. It remains simply a factor to be considered.

[46] In my view, in these circumstances, the Association meets the threshold for judicial inspection of the document in question. There is some basis to believe that

the Attorney General's report may contain evidence which tends to show that the government in fact fell short of its constitutional obligations as required under this Court's jurisprudence on judicial independence.

[47] The next step in the analysis is therefore to determine whether the Attorney General's report does in fact provide some evidence which tends to show that the government's response does not comply with the requirements set out in *Bodner: B.C. Provincial Court Judges*, at para. 80.

[48] The report, which was filed under seal, is available for examination by this Court. We are in a position to inspect the document and decide whether it should be produced, thus providing further guidance on the application of this framework. Like the Nova Scotia courts, I do not comment on the portions of the report protected by solicitor-client privilege and focus solely on the non-privileged portions.

[49] As the Supreme Court of Nova Scotia's summary of the report makes clear, most of the non-privileged portions of the report supply background information intended to provide context to the Lieutenant Governor in Council about the decision it had to make under the *Provincial Court Act*. Apart from the discussion of government-wide implications and the communications plan, the balance of the non-privileged portions of the report provides no evidence that the government's response fails to comply with the requirements described in *Bodner*. Those portions contain nothing bearing on the legitimacy of the public reasons given by the government for departing from the commission's recommendation. They shed no

light on the reasonableness of the factual foundation relied upon by government. They do not evince disrespect for the commission process. Nor do they suggest improper motivation. Those non-privileged portions of the report need not be produced.

[50] The paragraph under the heading “government-wide implications” in the Attorney General’s report acknowledges that the commission’s role is “unique” owing to judicial independence, but adds that “any salary increases provided to any group may have impacts on current labour negotiations for Government”.

[51] As for the communications plan, it is an appendix to the Attorney General’s report, which was prepared by the Department of Justice’s Communications Director and approved by the Deputy Attorney General and the Attorney General. The communications plan does not provide any advice or recommendations, but rather identifies the “communications challenges” that would result from accepting, rejecting or varying the commission’s recommendations. It was put before Cabinet for its consideration in determining the government’s response to the commission’s recommendations. The communications plan sets out the bases on which the decision to accept or vary the commission’s recommendations could be criticized, as well as related political considerations.

[52] If the government were to accept the recommendations, the communications plan warns that the salary increase may not be acceptable to the public. The plan cautions that if the government accepts the recommendations, the

public may question why the government amended the legislation to make the commission's recommendations non-binding, if the government is not prepared to depart from them. Finally, the plan suggests that public sector unions may use the salary increase to "bolster [their] case for higher wages" because the recommended increase is higher than that for public sector employees more generally.

[53] The communications plan warns that if the government rejects or varies the recommendations, as it ultimately did, the Judges of the Provincial Court and Family Court will likely apply for judicial review. The plan explains that even so, the public will likely see the government as "firm and consistent on finances and wages for individuals supported by taxpayers" and that public sector unions will not be able to use the salary increase in support of their case for higher wages.

[54] In my view, the inclusion of these considerations in the discussion of government-wide implications and in the communications plan provides some basis to support the contention that government's response to the commission's recommendations fell short of its constitutional requirements. In particular, the suggestion that if the government accepts the commission's recommendations, it will be criticized for not availing itself of the option given to it by the Nova Scotia legislature to vary or reject the commission's recommendations, is hardly a rational basis for departing from those recommendations. It would undermine the legitimacy of the government's response if Cabinet relied on these considerations. Whether it did so will be a matter for the Supreme Court of Nova Scotia to decide on the merits.

[55] Of course, the government can undoubtedly take into account broader considerations of public policy in formulating its response to the commission's recommendations. Indeed, the government is due deference by the reviewing court, owing to its "unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs": *Bodner*, at para. 30.

[56] But it is far from clear that the government can depart from the commission's recommendations simply because it fears that accepting them would have a detrimental impact on public sector labour negotiations. In *Bodner*, at para. 160, this Court described the Quebec government's response to a similar commission's recommendations in these terms:

After the [commission] submitted its report, the [g]overnment's perspective and focus remained the same. Its position is tainted by a refusal to consider the issues relating to judicial compensation on their merits and a desire to keep them within the general parameters of its public sector labour relations policy. The [g]overnment did not seek to consider what should be the appropriate level of compensation for judges, as its primary concerns were to avoid raising expectations in other parts of the public sector and to safeguard the traditional structure of its pay scales.

[57] Thus, in this case, the considerations highlighted in the discussion of government-wide implications and in the communications plan could be of assistance to the Association in calling into question the respect the government has shown the commission process and the propriety of the government's motivation for rejecting the commission's recommendations. These components of the Attorney General's



report provide sufficient context to enable the reviewing court to understand and assess this evidence.

[58] In the end, the Supreme Court of Nova Scotia will make the determination on the merits. It will reach a conclusion, based on the entire record, about whether and how these considerations informed the government's response.

[59] But, in my view, the discussion of government-wide implications and the communications plan provide some evidence that tends to show that the government failed to meet its constitutional requirements described in *Bodner*. Thus, subject to public interest immunity, these parts of the Attorney General's report should be included in the record.

#### B. *Public Interest Immunity*

[60] The government claims public interest immunity over the Attorney General's report as a document prepared for Cabinet discussion. Accordingly, the final issue is whether public interest immunity bars the production of the discussion of government-wide implications and the communications plan as part of the record.

[61] Public interest immunity protects the confidentiality of Cabinet deliberations: *Carey*, at pp. 655-59 and 670-71; *B.C. Provincial Court Judges*, at paras. 67 and 98. The Nova Scotia legislature has not displaced the common law doctrine of public interest immunity and, indeed, in the context of proceedings against

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

[62] The common law test is whether the public interest in the document remaining confidential outweighs the public interest in its being disclosed: *Carey*, at pp. 653-54 and 670; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, at para. 19; *B.C. Provincial Court Judges*, at para. 99. The main factors relevant to balancing the competing public interests in confidentiality and disclosure of documents concerning Cabinet decision making were described in *Carey*, at pp. 670-73:

- (1) the level of the “decision-making process”;
- (2) the “nature of the policy concerned”;
- (3) the “particular contents of the document”;
- (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”.

In the companion appeal, I explained how these factors apply in the context of a *Bodner* review: see *B.C. Provincial Court Judges*, at paras. 106-19.

[63] The burden is on the government to establish that a document should not be disclosed because of public interest immunity: *Carey*, at pp. 653 and 678; *B.C. Provincial Court Judges*, at para. 102. The government should put in a detailed affidavit to support its claim of public interest immunity and it will often be helpful for the government to be as specific as possible in identifying harm that would result from disclosure: *Carey*, at pp. 653-54 and 671; *B.C. Provincial Court Judges*, at para. 102.

[64] Here, the Secretary of the Executive Council's affidavit simply confirms the communication of the Attorney General's report to Cabinet and confirms that the Nova Scotia government was asserting public interest immunity over the entire report and solicitor-client privilege over parts of it. While it provides evidence that the Attorney General's report was provided to Cabinet, such an affidavit provides scant assistance in assessing a claim of public interest immunity.

[65] Nonetheless, several of the factors identified in *Carey* weigh in favour of the government-wide implications and communications plan remaining confidential. These components relate to a decision at the highest level of the executive made by the Lieutenant Governor by and with the advice of the Executive Council. The government's response to a judicial compensation commission's recommendations involves important policy choices.

[66] Although the decision to vary the commission's recommended increase in judicial remuneration has been made and publicly announced, the details of the considerations that were before Cabinet, including those in the communications plan, have not been made public. Ministers are entitled to expect that those considerations will remain confidential for decades.

[67] The discussion of government-wide implications in the Attorney General's report must be taken to reflect her views. While the communications plan does not speak to the differing views of individual ministers, it is not simply factual background. Its contents may reveal matters that were discussed and considered in Cabinet. Such contents, too, can be expected to remain confidential. Thus, this factor also weighs in favour of preserving the confidentiality of these components of the report.

[68] Turning to the interests of the administration of justice, the most important consideration is the degree to which the document bears on what is at issue in the litigation and the extent to which its exclusion from the record would undermine the court's ability to adjudicate the issues on their merits.

[69] I am satisfied that the exclusion of these components of the Attorney General's report from the record would impact the reviewing court's ability to determine the merits of the *Bodner* review.

[70] Some of the considerations mentioned in the discussion of government-wide implications and in the communications plan were not rational or legitimate bases on which to vary or reject the commission's recommendations. If the Supreme Court of Nova Scotia concludes that Cabinet relied on these considerations in reaching its decision, then these documents would tend to show that one or more of the requirements from *Bodner* was not met. The fact that the legislature gave the Lieutenant Governor in Council the power to vary or reject the commission's recommendations is not itself a reason to vary recommendations. Likewise, the impact of accepting a recommendation on labour negotiations is generally not a legitimate basis for varying a recommendation made by a commission: see *Bodner*, at para. 160. The communications plan indicates that the government may have been concerned about the risk of an uninformed public reaction.

[71] Thus, the inclusion of these components of the Attorney General's report in the record would help the reviewing court determine whether the government's response was grounded in an improper purpose and whether the third part of the *Bodner* test, which considers whether the commission process has been respected such that the purposes of that process have been achieved, has been met. The exclusion of these parts of the report from the record may leave the reviewing court with an incorrect understanding of the considerations that may have informed the government's response. It may also raise the question of whether the government provided legitimate reasons for departing from the commission's recommendations. I am accordingly of the view that the interests of the administration of justice favour

the disclosure of the government-wide implications in the Attorney General's report and the communications plan appendix.

[72] The level of decision making, the nature of the policy concerned, the contents of the discussion of government-wide implications and of the communications plan and the timing of the disclosure all weigh in favour of these components of the Attorney General's report remaining confidential. Because the policy concerns a constitutional requirement relating to the justice system, and, thus, the administration of justice, it also weighs in favour of disclosure. The exclusion of this evidence from the record would undermine the reviewing court's ability to deal with central issues on *Bodner* review: whether the government articulated legitimate reasons for departing from the commission's recommendations; whether the government's response was grounded in improper considerations and whether the government respected the commission process. The interests of the administration of justice thus strongly favour the disclosure of these parts of the Attorney General's report. I conclude that the public interest in their disclosure outweighs the public interest in their remaining confidential.

#### V. Disposition

[73] I would allow the appeal in part, but only to modify the Supreme Court of Nova Scotia's declaration, such that only two components of the Attorney General's report — i.e. the components titled “government-wide implications” and “communications plan” — should be included in the record. I would award the

Provincial Judges' Association its costs in this Court. Within 10 days of this judgment, the Attorney General shall file in this Court a new redacted version of volume 3 of the appellants' record, amended in accordance with these reasons. The Association's application for review of the government's response can now be determined on the merits in light of the amended record.

*Appeal allowed in part with costs to the respondents.*

*Solicitor for the appellants: Attorney General of Nova Scotia, Halifax.*

*Solicitors for the respondents: Myers, Winnipeg.*

*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.*

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