NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia,* 2018 NSCA 83

Date: 20181030
Docket: CA 475635
Registry: Halifax

Between:

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

Appellants (Cross-Respondents)

v.

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

Respondents (Cross-Appellants)

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: October 2, 2018, in Halifax, Nova Scotia

Subject: Contents of the record for judicial review of the Government's rejection of a recommendation by a judicial remuneration commission

Summary: An independent tribunal for the remuneration of Provincial and Family Court judges recommended a salary increase. The Government of Nova Scotia rejected the recommendation. The judges sought judicial review of the rejection. On a preliminary motion, the motions judge held that the record for judicial review should include the Report and Recommendation of the Attorney General to Cabinet, less the passages that contained legal advice, and a supplementary affidavit submitted by the Judges' Association, less certain passages that the motions judge considered to be irrelevant. The Attorney General appealed and submitted that the entire Report and Recommendation and Affidavit should be

excluded. The Association cross-appealed and submitted that the entire Report and Recommendation and certain additional passages of the Affidavit should be included.

Issues: What, if anything, from the Report and Recommendation and Affidavit should augment the record for judicial review?

Result: The Court of Appeal dismissed the Attorney General's appeal and partly allowed the Association's cross-appeal.

The Report and Recommendation was relevant and, subject to solicitor client privilege, should form part of the record for judicial review. The passages that contained legal advice were inadmissible as solicitor-client privileged.

The Affidavit in general was admissible. Paragraphs 17-20 were properly excluded by the motions judge. However, paragraph 22, excluded by the motions judge, was relevant and should be added to the record, and the Association should have the opportunity to refile the affidavit with a statement as to the basis for the affiant's information and belief.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 27 pages.

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Respondents (Cross-Appellants)

Judges: Fichaud, Oland and Beveridge, JJ.A.

Appeal Heard: October 2, 2018, in Halifax, Nova Scotia

Held: Appeal dismissed and cross-appeal allowed in part, with costs in the cause, per reasons for judgment of Fichaud, J.A., Oland and Beveridge, JJ.A. concurring

Counsel: Andrew Taillon for the appellants
Susan Dawes for the respondents

Reasons for judgment:

[1] Judicial independence is a constitutional principle that inheres in the separation of powers and rule of law.

[2] In 1997, the Supreme Court outlined how the determination of judicial remuneration should respect judicial independence. The Court said: (1) the process "demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse"; (2) that "imperative … requires that an independent body – a judicial compensation commission – be interposed between the judiciary and the other branches of government"; and (3) the commission should operate periodically, and be independent, objective and "effective". *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*PEI Reference*"), paras. 83, 107-9, 131, 133, 138, 147, 166, 169.

[3] This litigation concerns effectiveness. The Provincial Government rejected an independent compensation tribunal's recommendation for salaries of Provincial and Family Court judges. The judges sought judicial review of the Government's response. On this appeal of an interlocutory ruling, the question is – What should be in the judicial review record?

Background

[4] By S.N.S. 1998, c. 7, s. 1, the Legislature enacted the process contemplated by the *PEI Reference*. The *Provincial Court Act*, R.S.N.S. 1989, c. 238, was amended to add ss. 21A through 21N. By S.N.S. 2016, c. 2, ss. 8-14, the process was further amended. The provisions establish a tribunal that periodically studies and reports to the Province's Minister of Justice on the appropriate level of remuneration for judges of the Provincial and Family Courts. The tribunal has panelists appointed by the Minister of Justice, the Nova Scotia Provincial Judges' Association ("Association") and a third by the other two panelists. Before 2016, the tribunal's recommendations were binding. According to ss. 21J and 21K, added by the 2016 amendments, thereafter the Governor in Council may confirm, vary or reject the tribunal's recommendations and the Governor in Council is to provide reasons.

[5] The most recent tribunal was constituted in January 2016. Its members were Professor Bruce P. Archibald, Q.C. as Chair, Mr. Brian G. Johnston, Q.C. as appointee of the Minister of Justice and Mr. Ronald A. Pink, Q.C. as appointee of the Association ("Tribunal"). On November 18, 2016, the Tribunal completed its report on the remuneration of Provincial and Family Court judges for April 1, 2017 to March 31, 2020 ("Tribunal Report"). The recommendations were by consensus. The Tribunal Report recommended, among other things, that judges' salaries increase by about 9.5% spread over three years.

[6] On February 2, 2017, the Governor in Council ("Government") approved Order-in-Council 2017-24 ("OIC"). The OIC opened with:

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

[7] The OIC adopted four of the Tribunal's five propositions, but varied the salary recommendation. For the Tribunal's recommended increase of 9.5% over three years, the OIC substituted an increase of 1%, to take effect in 2019-2020. The OIC's eleven pages of reasons concluded with:

> For all of the foregoing reasons, including the Tribunal's failure to consider the comparative financial benefit of the retirement payment known as the Public Service Award in its salary analysis, the Governor in Council determines that the current salary level of Provincial Court Judges is sufficient in Nova Scotia to attract excellent candidates for appointment as judges and safeguard the independence of the Judiciary. In the circumstances, an appropriate increase is 1% for the 2019-20 fiscal year to approximate the salary adjustments already set for Crown Attorneys, the funding increase for physicians, and the proposed increases of other Nova Scotians receiving salaries out of public funds, including members of the Legislative Assembly, all of whom have had or will have a salary freeze for two years. The Governor in Council therefore varies recommendation 1 accordingly to provide for a 1% increase in salary level for the 2019-20 fiscal year and confirms recommendations 2 to 5 of the Report.

[8] On March 7, 2017, the judges of the Provincial and Family Courts filed a Notice for Judicial Review with the Supreme Court of Nova Scotia. The Notice named the Association as the judges' litigation representative, and the Attorney General and Governor in Council as respondents. The Notice pleaded that the Government's rejection of the Tribunal Report's salary recommendation infringed the principles of judicial independence.

[9] On March 15, 2017, the Governor in Council filed a Notice that, as the decision-making authority, it would not participate in the judicial review. On the same day, the Attorney General filed a Notice of Participation asserting that the reviewing court should uphold the OIC.

[10] On April 11, 2017, there was a motion for directions respecting the judicial review, followed on May 5, 2017 by the Attorney General's filing of the judicial review record. The record omitted the Report and Recommendation of the Attorney General and Minister of Justice dated December 19, 2016 ("R & R") that had been cited in the OIC's opening words.

[11] On June 5, 2017, the Association filed the Notice of Motion that led to the decision under appeal. The motion sought an order that the record for judicial review be supplemented to include both (1) the R & R and (2) an affidavit of the Honourable James Burrill, a judge of the Provincial Court, sworn June 2, 2017. Later I will discuss details of the R & R and the affidavit.

[12] On September 20 and 21, 2017, Justice Ann Smith of the Supreme Court of Nova Scotia heard the motion to supplement the record. She also heard another motion that is un-appealed. On March 6, 2018, she issued a decision (2018 NSSC 13), followed by an Order dated April 6, 2018. The motions judge determined that: (1) the R & R's passages with legal advice would be excluded from the judicial review record as solicitor-client privileged, (2) the rest of the R & R would augment the record, (3) some passages from Judge Burrill's affidavit would be excluded from the record as irrelevant, and (4) the rest of the affidavit would be added to the record.

[13] On April 23, 2018, the Attorney General filed a Notice of Application for Leave to Appeal and Notice of Appeal to this Court. The Notice pleads that the entire R & R and Burrill affidavit should be excluded from the record. On May 2, 2018, the Association filed a Notice of Application for leave to Cross-appeal and Notice of Cross-appeal, pleading that the excluded passages from the R & R and from the Burrill affidavit should be added to the record.

[14] On October 2, 2018, this Court heard submissions and reserved.

Issues

[15] I will reorder the grounds and address whether the motions judge committed an appealable error by:

1. not disallowing the entire R & R (Attorney General's appeal);
2. disallowing the passages of the R & R with legal advice (Association's cross-appeal);
3. not disallowing Judge Burrill's entire affidavit (Attorney General's appeal);
4. disallowing passages of the Burrill affidavit as irrelevant (Association's cross-appeal).

Leave to Appeal

[16] Leave to appeal is required for an appeal from an interlocutory order: *Civil Procedure Rules* 90.05(1)(c) and 90.09. Leave is granted to arguable issues: *Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5, paras. 18-37. An issue that could result in the appeal being allowed is arguable: *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, para. 18.

[17] The four issues on the appeal and cross-appeal are arguable, and I would grant leave.

Standard of Review

[18] This is an appeal from a judge, not an administrative tribunal. Accordingly:

- We assess pure or extractable issues of law for correctness.
- Issues of either fact or mixed fact and law with no extractable legal sub-issue are reviewed for palpable and overriding error. This means a clear error that affected the outcome.
- The exercise of statutory discretion is reviewed for error in legal principle or whether the ruling would cause a patent injustice. As it is presumed that a judge should not use a legal discretion to create an avoidable patent injustice, causing a "patent injustice" is an implied error of law.

Gwynne-Timothy v. McPhee, 2005 NSCA 80, paras. 31-33. *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2012 NSCA 33, paras. 59-60. *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras. 16-29. *Tapics v. Dalhousie University*, 2015 NSCA 72, para. 38.

The Principles from the PEI Reference and Bodner

[19] The judicial review of a government's rejection of a judicial compensation commission's recommendation is governed by principles. The record for that judicial review should serve the application of those principles. My analysis of the submissions on this appeal operates from that premise. I will start by summarizing the principles.

[20] In the *PEI Reference*, Lamer C.J.C. described the elements of an "effective" judicial compensation commission:

> 175 Third, the reports of the commission must have a meaningful effect on the determination of judicial salaries. Provinces which have created salary commissions have adopted three different ways of giving such effect to these reports. One is to make a report of the commission binding … . Another way of dealing with a report is the negative resolution procedure, whereby the report is laid before the legislature and its recommendations are implemented unless the legislature votes to reject or amend them. … The final way of giving effect to a report is the affirmative resolution procedure, whereby a report is laid before but need not be adopted by the legislature. …
>
> 176 The model mandated as a constitutional minimum by s. 11(d) is somewhat different from the ones I have just described. My starting point is that s. 11(d) does not require that the reports of the commission be binding, because decisions about the allocation of public resources are generally within the realm of the legislature, and through it, the executive. …
>
> 177 For the same reasons, s. 11(d) does not require a negative resolution procedure, although it does not preclude it. …
>
> 178 However, whereas the binding decision and negative resolution models exceed the standard set by s. 11(d), the positive resolution model on its own does not meet that standard, because it requires no response to the commission's report at all [Lamer C.J.C.'s underlining]. The fact that the report need not be binding does not mean that the executive and the legislature should be free to ignore it. On the contrary, for collective or institutional financial security to have any meaning at all, and to be taken seriously, the commission process must have a meaningful impact on the decision to set judges' salaries.
>
> 179 What judicial independence requires is that the executive or the legislature, whichever is vested with the authority to set judicial remuneration under provincial legislation, must formally respond to the contents of the commission's report within a specified amount of time. …

> 180 Furthermore, if after turning its mind to the report of the commission, the executive or the legislature, as applicable, chooses not to accept one or more of the recommendations in that report, it must be prepared to justify this decision, if necessary in a court of law. The reasons for this decision would be found either in the report of the executive responding to the contents of the commission's report, or in the recitals to the resolution of the legislature on the matter. An unjustified decision could potentially lead to a finding of unconstitutionality. …

[21] Lamer C.J.C. outlined a two-stage test: whether the government's response (1) discloses a legitimate reason, (2) that is supported by a reasonable factual foundation:

> 183 The standard of justification here, by contrast, is one of simple rationality [Lamer C.J.C.'s underlining]. It requires that the government articulate a legitimate reason for why it has chosen to depart from the recommendation of the commission, and if applicable, why it has chosen to treat judges differently from other persons paid from the public purse. A reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis. However, the absence of this analysis does not mean that the standard of justification is ineffectual. On the contrary, it has two aspects. First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (*Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373).
>
> 184 Although the test of justification – one of simple rationality – must be met by all measures which affect judicial remuneration and which depart from the recommendation of the salary commission, some will satisfy that test more easily than others, because they pose less of a danger of being used as a means of economic manipulation, and hence of political interference. Across-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational. …

[22] In *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Association v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v.*

Quebec (Attorney General); Minc v. Quebec (Attorney General), [2005] 2 S.C.R. 286 ("*Bodner*"), the Supreme Court refined the criteria.

[23] *Bodner*'s *per curiam* reasons reiterated and, in several respects, extended those of Lamer C.J.C. from the *PEI Reference*. Noteworthy to the submissions on this appeal are the Court's comments on the government's negative response to a recommendation of a judicial compensation tribunal, and the reviewing court's functions:

> (2) The Government's Response to the Recommendations
>
> 22 If the government departs from the commission's recommendations, the *Reference* requires that it respond to the recommendations. … Absent statutory provisions to the contrary, the power to determine judicial compensation belongs to governments. That power, however, is not absolute.
>
> 23 The commission's recommendations must be given weight. They have to be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.
>
> 24 The response must be tailored to the commission's recommendations and must be "legitimate" (*Reference*, at paras. 180-83), which is what the law, fair dealing and respect for the process require. The government must respond to the commission's recommendations and give legitimate reasons for departing from or varying them.
>
> 25 The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate. Instead, the reasons must show that the commission's recommendations have been taken into account and must be based on facts and sound reasoning. They must state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation. The reasons should reveal a consideration of the judicial office and an intention to deal with it appropriately. They must preclude any suggestion of attempting to manipulate the judiciary. The reasons must reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.
>
> 26 The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified.

> Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained. If a new fact or circumstance arises after the release of the commission's report, the government may rely on that fact or circumstance in its reasons for varying the commission's recommendations. It is also permissible for the government to analyse the impact of the recommendations and to verify the accuracy of information in the commission's report.
>
> 27 The government's reasons for departing from the commission's recommendations, and the factual foundations that underlie those reasons, must be clearly and fully stated in the government's response to the recommendations. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon, as will be explained below.
>
> (3) <u>The Scope and Nature of Judicial Review</u>
>
> …
>
> 29 … The government's decision to depart from the commission's recommendations must be justified according to a standard of rationality. The standard of judicial review is described in the *Reference* as one of "simple rationality" (paras. 183-184). The adjective "simple" merely confirms that the standard is rationality alone.
>
> 30 The reviewing court is not asked to determine the adequacy of judicial remuneration. Instead, it must focus on the government's response and on whether the purpose of the commission process has been achieved. This is a deferential review which acknowledges both the government's unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs.

[24] *Bodner* added a third stage to the two outlined by the Chief Justice in the *PEI Reference*. The Court in *Bodner* explained the addition by pointing out (para. 3) that "[t]he [*PEI*] *Reference* has not provided the anticipated solution, and more is needed", then saying:

> 12 Those were the hopes, but they remain unfulfilled. In some provinces and at the federal level, judicial commissions appear, so far, to be working satisfactorily. In other provinces, however, a pattern of routine dismissal of commission reports has resulted in litigation. Instead of diminishing friction between judges and governments, the result has been to exacerbate it. Direct negotiations no longer take place but have been replaced by litigation. These regrettable developments cast a dim light on all involved. In order to avoid future conflicts such as those at issue in the present case, the principles of the compensation commission process elaborated in the *Reference* must be clarified.

[25] Accordingly, *Bodner* reformulated the *PEI Reference*'s dual test into three questions:

> 31 In the *Reference*, at para. 183, a two-stage analysis for determining the rationality of the government's response is set out. We are now adding a third stage which requires the reviewing judge to view the matter globally and consider whether the overall purpose of the commission process has been met. The analysis should be as follows:
>
> (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?

[26] The Court then elaborated on the new third stage:

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

[27] With those principles in mind, I will turn to the grounds of appeal and cross-appeal.

Issue #1 – Admission of the R & R

[28] The Attorney General says that the R & R is irrelevant, as the judicial review focuses solely on the Tribunal Report and the Government's reply, not the views of the R & R's author. The Attorney General also submits the R & R is protected by deliberative secrecy, public interest immunity and solicitor-client privilege.

[29] The motions judge held that the passages with legal advice were protected by solicitor-client privilege. Under issue #2, I will discuss the Association's cross-appeal on that matter.

[30] The motions judge rejected the Attorney General's submissions on irrelevance, deliberative secrecy and public interest privilege. The Attorney General repeats those submissions in the Court of Appeal. I will discuss them in turn.

[31] The full R & R was provided to the Court of Appeal, as it was to Justice Smith, in a sealed envelope. The document was not disclosed to the Association or its counsel.

[32] **Relevance:** For two reasons, I disagree with the Attorney General that the R & R is irrelevant.

[33] First, the OIC says the Government's position is "on the report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016". The OIC recites, among other things, aspects of the factual foundation for the Cabinet's consideration of a response to the Tribunal Report. The second stage of the test from the *PEI Reference* and *Bodner* requires the reviewing court to assess whether the Government's response is based on a reasonable factual foundation. The R & R is relevant to the factual foundation.

[34] Second, *Bodner*'s third stage says the reviewing court "must weigh the whole of the process *and* the response" [emphasis added]. Clearly the whole process extends beyond just the response. The R & R is integral to that process.

[35] There is authority that the review record is not limited to the Government's response, and that material considered by Cabinet is admissible on the judicial review of a government's rejection or variation of a recommendation by a judicial compensation commission: *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244, paras. 4-11, 16, appeal dismissed 2012 BCCA 157; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022, paras. 52-54, 61-62, 68, 81-83; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2014 BCSC 336, paras. 31, 44-49, 63-67, 136-43, overturned on other grounds 2015 BCCA 136, lave to appeal refused [2015] 3 S.C.R. v (note); *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCSC 1193, paras. 18-28

(Master), appeal dismissed *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2018 BCSC 1390 (Sup. Ct.). at paras. 34 and 51, appeal dismissed 2018 BCCA 394, paras. 15-20; *Newfoundland and Labrador Association of Provincial Court Judges v. Newfoundland and Labrador*, 2018 NLSC 140, paras. 77, 101-10, 123-34.

[36] The Government's reasons for rejection of the Tribunal's recommendation must be stated in its response, and their legitimacy is the focus of the judicial review (*Bodner*, paras. 23-27). But that does not mean the only admissible items of evidence are the Tribunal's Report and Government's written response. The application of *Bodner*'s tests – particularly the second and third stages – may involve the consideration of evidence outside the four corners of those two documents. This point arises also from the Attorney General's similar submissions on other grounds that I will discuss below (paras. 43-46, 71-78).

[37] **Deliberative secrecy:** The Attorney General next cites deliberative secrecy. Having read the R & R, I agree with the motions judge's finding (para. 116) that

> it does not chronicle discussions of Cabinet members. It is a report from a senior solicitor to Cabinet.

The R. & R. is information to Cabinet, but is neither a minute or record of Cabinet deliberations, nor a draft of Cabinet's response to the Tribunal Report. I reject the Attorney General's submission that the R & R is shielded by deliberative secrecy.

[38] **Public interest immunity:** Last is public interest immunity. The Attorney General submits that the motions judge paid insufficient heed to *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3.

[39] In *Babcock*, Chief Justice McLachlin summarized the antecedence of public interest immunity for Cabinet confidences:

> 19 At one time, the common law viewed Cabinet confidentiality as absolute. However, over time the common law has come to recognize that the public interest in Cabinet confidences must be balanced against the public interest in disclosure, to which it might sometimes be required to yield; see *Carey*, *supra* ([1986] 2 S.C.R. 637). Courts began to weigh the need to protect confidentiality in government against the public interest in disclosure, for example, preserving the integrity of the judicial system. It follows that there must be some way of determining that the information for which confidentiality is claimed truly relates to Cabinet deliberations and that it is properly withheld. At common law, the

> courts did this, applying a test that balanced the public interest in maintaining confidentiality against the public interest in disclosure: see *Carey*, *supra*.

[40] The Chief Justice then turned to s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, which enacted the mechanism to assess the Federal Government's assertion of Cabinet confidentiality in *Babcock*.

[41] Here there is no pertinent provision equivalent to s. 39 of the *Canada Evidence Act*. Rather we are considering the balancing test that McLachlin C.J.C.'s passage cited from *Carey v. The Queen in Right of Ontario*, [1986] 2 S.C.R. 637.

[42] In *Carey*, Justice La Forest for the Court set out the modern approach to public interest immunity:

> 38 The public interest in the non-disclosure of a document is not, as Thorson J.A. noted in the Court of Appeal, a Crown privilege. Rather it is more properly called a public interest immunity, one that, in the final analysis, is for the court to weigh. The court may itself raise the issue of its application, as indeed counsel may, but the most usual and appropriate way to raise it is by means of a certificate by the affidavit of a Minister or where, as in this case, a statute permits it or is otherwise appropriate, of a senior public servant. The opinion of the Minister (or official) must be given due consideration, but its weight will vary with the nature of the public interest sought to be protected. And it must be weighed against the need of producing it in the particular case.
>
> …
>
> 40 In making a claim of public interest immunity, the Minister (or official) should be as helpful as possible in identifying the interest sought to be protected. …
>
> Rationale for Non-disclosure of Cabinet Documents
>
> 43 Generally speaking, a claim that a document should not be disclosed on the ground that it belongs to a certain class has little chance of success. Claims to secrecy for some classes of documents have, however, traditionally been considered valid, notable among these being documents relating to national defence or security and those regarding diplomatic relations with other countries. …
>
> 44 The principal argument for withholding the documents described in the affidavit is that their disclosure would lead to a decrease in completeness, candour and in frankness of such documents if it were known that they could be produced in litigation and this in turn would detrimentally affect government policy and the public interest. …

46 I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance. Basically, we all know that some business is better conducted in private, but generally I doubt if the candidness of confidential communications would be measurably affected by the off-chance that some communication might be required to be produced for the purposes of litigation. Certainly the notion has received heavy battering in the courts.

…

79 The foregoing authorities, and particularly, the *Smallwood* case [*Smallwood v. Sparling*, [1982] 2 S.C.R. 686], are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved.

80 To these considerations, and they are not all, one must, of course, add the importance of producing the documents in the interests of the administration of justice. On the latter question, such issues as the importance of the case and the need or desirability of producing the documents; to ensure that it can be done adequately and fairly presented are factors to be placed in the balance. In doing this, it is well to remember that only the particular facts relating to the case are revealed. This is not a serious departure from the general regime of secrecy that surrounds high level government decisions.

…

84 There is a further matter that militates in favour of disclosure of the documents in the present case. The appellant here alleges unconscionable behaviour on the part of the government. As I see it, it is important that this question be aired not only in the interests of the administration of justice but also for the purpose for which it is sought to withhold the documents, namely, the proper functioning of the executive branch of government. For if there has been harsh or improper conduct in the dealings of the executive with the citizen, it ought to be revealed. The purpose of secrecy in government is to promote its proper functioning, not to facilitate improper conduct by the government. …

[43] The "*Carey* factors" have governed rulings on public interest immunity and disclosure of Crown documents: *e.g.*, *Leeds v. Alberta (Minister of the Environment)* (1990), 106 A.R. 105 (Q.B.). The Supreme Court of British Columbia, upheld by the Court of Appeal, has held that public interest immunity did not protect a report to Cabinet respecting the Government's response to the recommendations of a judicial compensation commission: *Provincial Court Judges' Association of British Columbia*, *supra*, (2012 BCSC 244), para. 24, per Macaulay J., appeal dismissed 2012 BCCA 157, per Finch C.J.B.C. for the Court.

[44] In this case, the motions judge canvassed the *Carey* factors and determined that the balance favoured disclosure (paras. 143-184). On the appeal, the Attorney General neither challenges the applicability of the *Carey* factors nor identifies an error in the judge's analysis of a particular factor. Essentially, the Attorney General cites the "candour argument" to recalibrate the scale, then submits that the balancing should have a different outcome. In *Carey*, Justice La Forest said (para. 46) "I am prepared to attach some weight to the candour argument but it is very easy to exaggerate its importance", a characterization that, in my respectful view, the Attorney General's submission shares.

[45] The Government knew that its variation or rejection of the Tribunal's recommendation would be subject to judicial review for legitimacy, reasonable factual foundation and respect for the purpose of the process, according to *Bodner*'s criteria. The judicial review would focus on matters vital to the administration of justice, the proper functioning of the executive and the relationship between two branches of government. To the extent the R & R speaks to those significant topics, its airing for the judicial review is, on balance, in the public interest and is well supported by La Forest J.'s comments in *Carey*.

[46] The motions judge's analysis is meticulous, has no error in principle and causes no patent injustice. Subject to the issue of solicitor-client privilege, that I will come to next, the R & R should be included in the record for the judicial review.

[47] **Summary:** I would dismiss this ground of the Attorney General's appeal.

Issue #2 – Disallowance for Solicitor-Client Privilege

[48] The R & R contains legal advice from a senior solicitor with the Department of Justice. These passages discuss the legal implications and litigation risks

associated with alternative courses. The motions judge held that these passages were shielded by solicitor-client privilege.

[49] On the cross-appeal, the Association submits that (1) solicitor-client privilege does not extend to non-legal, "policy" advice that happens to be given by a solicitor, (2) the OIC's reference to the R & R waived any privilege, and (3) the motions judge wrongly attributed privilege to a passage of the R & R for which the Government did not assert privilege. I will address these points in turn.

[50] **Policy advice:** Not every item of advice from a lawyer is protected by solicitor-client privilege. In *R. v. Campbell*, [1999] 1 S.C.R. 565, Justice Binnie for the Court said:

> 50 It is, of course, not everything done by a government (or other) lawyer that attracts solicitor-client privilege. While some of what government lawyers do is indistinguishable from the work of private practitioners, they may and frequently do have multiple responsibilities including, for example, participation in various operating committees of their respective departments. Government lawyers who have spent years with a particular client department may be called upon to offer policy advice that has nothing to do with their legal training or expertise, but draws on departmental know-how. Advice given by lawyers on matters outside the solicitor-client relationship is not protected. … As Lord Hanworth, M.R., stated in *Minter v. Priest*, [1929] 1 K.B. 655 (C.A.), at pp. 668-69:
>
> > [I]t is not sufficient for the witness to say, "I went to a solicitor's office." … Questions are admissible to reveal and determine for what purpose and under what circumstances the intending client went to the office.
>
> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. ...

[51] In this case, the motions judge addressed the distinction and Justice Binnie's comment from *Campbell*, then determined that the R & R's passages were legal, not policy advice (paras. 192-200).

[52] Having read the R & R, I share the motions judge's conclusion. A more detailed explanation would disclose the privileged content.

[53] **Waiver:** The Association says the OIC impliedly waived solicitor-client privilege. It cites *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, (1983), 45 B.C.L.R. 218 (S.C.), per McLachlin J., as she then was, and *Nova Scotia (Transportation and Infrastructure Renewal) v. Peach*, 2011 NSCA 27,

paras. 10-11, 16, 18, 33, which adopted the test in *S. & K. Processors*. In *S. & K. Processors*, McLachlin J. said:

> 6 … where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost ….
>
> …
>
> 10 … In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived. …

[54] The Association's factum says implied waiver is tested objectively, and (para. 80) "[t]his objective assessment is illustrated by this Honourable Court's decision in *Peach*". The Association also cites *R. v. Campbell*.

[55] The waiver would stem entirely from the OIC's opening words: "on the report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016" (above, para. 6).

[56] The motions judge disagreed that privilege was waived. Her decision said:

> [201] Further, I cannot conclude that the Respondents waived solicitor-client privilege merely by stating, "on the report and recommendation of the Attorney General" in the OIC. The Respondents have not placed their conduct directly in issue as did the RCMP in *Campbell*. …

[57] In my view, her conclusion is correct.

[58] In *Peach*, Ms. Peach asked her municipal representative whether a road was public or private and, if public, who had the responsibility to maintain it. The area manager of the Department of Transportation sent the municipal representative an email saying that the Department had "sent all documented information to Department of Justice for a Legal Review and ruling" and "it was Justice's opinion that …". The issue was whether Ms. Peach could obtain a copy of the Department of Justice's legal opinion under freedom of information legislation. This Court upheld the chambers judge's ruling that solicitor-client privilege was waived. Justice Oland for the Court said:

> [37] … the Chambers judge who had examined that opinion letter described [the Department's area manager] … as "communicating the solicitor's opinion and reasons" and as "disclosing the heart of the opinion." The references to "reasons"

> and "the heart of the opinion" distinguishes this situation from those described in the case law cited by the appellant. …
>
> [38] I would add that the facts show that [the Department's area manager] intended to disclose. This was not a situation involving any element of inadvertence. **He intended to reveal the existence of a legal opinion, "the heart" of that opinion, and his reliance upon it.** [emphasis added]

[59] In *R. v. Campbell*, the issue was whether the RCMP's reverse sting operation was done in good faith. The officer testified that he relied on legal advice. The Crown cited that reliance as evidence of good faith. Binnie J.'s decision said:

> 46 … Most importantly for present purposes is the fact that **the Crown emphasized the good faith reliance of the police on legal advice**. … The RCMP's reliance on legal advice was thus invoked as part of its "good faith" argument. … The credibility of a highly experienced departmental lawyer was invoked to assist the RCMP position in the abuse of process proceedings. [emphasis added]

[60] In this case, nothing resembles the bases for waiver cited by the courts in *Peach* and *Campbell*. The words "on the report and recommendation of …" are a standard prefix to Orders-in-Council. The named individual is the initiating Minister. Here that happens to be the Attorney General. There is no statement that OIC adopted the Departmental solicitor's legal advice contained in the R & R. The OIC's prefix is narrative. It is not the Government's public assertion of reliance that would waive solicitor-client privilege.

[61] **Non-assertion of privilege:** Before the motions judge, the Attorney General's brief specifically claimed solicitor-client privilege over the "Legal Implications" section of the R & R. That section referred to Schedule D, titled "Overview of Most Recent Judicial Review Compensation Commission Reports and Government Responses (chart)". The R & R contained another section titled "Assessment of Alternatives/Risk Assessment/Mitigation".

[62] After examining the R & R, the motions judge held that solicitor-client privilege attached to the "Legal Implications" section, to Schedule D and to the "Assessment of Alternatives/Risk Assessment/Mitigation" section.

[63] On the appeal, the Association submits that privilege must be asserted, nothing was asserted for the "Assessment of Alternatives/Risk Assessment/Mitigation" section, and the motions judge erred by attributing privilege over that section. The Attorney General replies that, the "Assessment of

Alternatives/Risk Assessment/Mitigation" section contains solicitor-client advice, that topic was raised generally, and if the Attorney General neglected to specifically identify it to the motions judge, then the Attorney General asserts privilege in the Court of Appeal.

[64] Having read the "Assessment of Alternatives/Risk Assessment/Mitigation" section, I agree with the motions judge that it contains legal advice that normally would attract privilege.

[65] Perhaps the Attorney General's counsel neglected explicitly to identify that section to the motions judge. In my view, the outcome should not turn on an oversight. The Attorney General's brief to the motions judge, in its "Conclusion", claimed that the entire R & R be kept confidential "as it attracts either public interest immunity or solicitor-client privilege". That suffices to allow the motions judge's appraisal of the "Assessment of Alternatives/Risk Assessment/Mitigation" section for solicitor-client privilege. Further, in the circumstances, I accept the Attorney General's assertion of privilege over that section at the hearing in the Court of Appeal.

[66] **Summary:** I would dismiss this ground of the Association's cross-appeal.

Issue #3 – Admission of Judge Burrill's Affidavit

[67] Judge Burrill's affidavit is 12 pages, with 49 paragraphs and 34 exhibits. In summary, the affidavit:

- sets out historical background to the process of judicial compensation tribunals in Nova Scotia, and the triannual reports from 1999 through 2014;
- gives some detail of the 2014 Tribunal process, including attributions of governmental delay;
- recites evidence of the Government's dealings with public sector unions;
- attaches a news article from December 2015 that quotes the Premier's statement respecting the Government's anticipated approach to the process of the next compensation tribunal;
- sets out background to S.N.S. 2016, c. 2, that amended the *Provincial Court Act* by making the tribunal process non-binding;

- describes the 2017 Tribunal process and attaches submissions to the Tribunal and documents from the Tribunal;
- attaches extracts of news interviews of the Premier, respecting the Government's reasons for varying the Tribunal's salary recommendation.

[68] The motions judge disallowed some passages as irrelevant, but held the remainder was admissible, either as helpful background or as bearing on the key issues.

[69] On the appeal, the Attorney General urges that the entire affidavit should be disallowed. The Attorney General repeats its submission that, under *Bodner*, the reviewing court may examine the Tribunal Report, including any appendices, and the Government's written reply, but nothing else.

[70] Under Issue #4, I will comment on the passages from Judge Burrill's affidavit that the motions judge disallowed. My views on issue #3 relate to the judge's ruling that the rest of the affidavit is admissible.

[71] In *Judges of the Provincial Court Association of Manitoba v. Manitoba*, 2012 MBQB 79, appeal dismissed 2013 MBCA 74, the motions court considered affidavit evidence to support its ruling that the Government of Manitoba's conduct offended the *Bodner* test. Oliphant J.'s pragmatic approach was that actions, supported by evidence, speak louder than words. Oliphant J. said:

> 116 No platitudinous statement in the world made by the government as to its commitment to the process can pass muster in the face of its conduct. …

The Manitoba Court of Appeal dismissed the appeal. Steel J.A. for the Court said:

> [67] I see no error here. The application judge is reflecting the fact that the court is analyzing the process as a whole and trying to determine whether the Government participated wholeheartedly and effectively in the process or whether its actions simply showed it "was going through the motions." …

[72] British Columbia and Newfoundland also have seen judicial reviews of governmental rejections of recommendations by judicial compensation commissions. Those reviewing courts have received evidence, extrinsic to the commission report and government reply, that pertains to the *Bodner* tests: see authorities cited above, para. 35.

[73] On the judicial review from a decision of an administrative tribunal, the reviewing court may receive fresh evidence to assess the exercise of procedural fairness at the tribunal: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, para. 20(b), per Stratas J.A; *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (C.A.), leave to appeal refused [1980] 2 S.C.R. viii (note). Similarly, an appeal court may receive fresh evidence respecting the regularity of the trial court's process: *R. v. Wolkins*, 2005 NSCA 2, paras. 58 and 61, per Cromwell J.A. for the Court; *R. v. Assoun*, 2006 NSCA 47, paras. 297 and 316, and authorities there cited, leave to appeal refused [2006] 2 S.C.R. iv (note).

[74] The principles that govern admissibility in this case are like those that apply to a typical administrative judicial review and to an appeal, but they operate independently. The Government, when considering its reply to the Tribunal Report, was a political actor constrained by constitutional responsibilities. It functioned as neither a typical administrative tribunal nor a lower court. The Government neither received "evidence", nor conducted a "hearing", nor were its sources confined to a particular "record". Consequently, the appropriate scope of the material for this unique type of judicial review should reflect basic norms: the reviewing court may receive evidence that is relevant to an arguable submission of either party.

[75] It is useful to summarize what appear to be key – though not necessarily the only – aspects of the parties' theories on the merits.

- The Attorney General would cite Lamer C.J.C.'s acknowledgements that: (1) a "non-binding" commission recommendation is a permissible model, (2) "[t]he standard of justification … is one of simple rationality", and (3) "[a]cross-the-board measures which affect substantially every person who is paid from the public purse, in my opinion, are *prima facie* rational" (*PEI Reference*, paras. 175-78, 183-84).

  The Attorney General would contend: (1) the 2016 amendment to the *Provincial Court Act* merely enacted the permissible model, (2) nothing suggests any pressure exerted toward, or manipulation of the judiciary, (3) the OIC represents the Government's *bona fide* view on judicial remuneration, and (4) that the Government may have held this view since 2015 does not make it unconstitutional.

- The Association would cite *Bodner*'s directions that the reviewing court: (1) must analyze whether "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?", and (2) "must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission". (*Bodner*, paras. 31, 38)

  The Association would allege that the Government had decided by 2015, before the 2017-20 Tribunal convened, that any 2017-20 adjustment to the compensation of Provincial and Family Court Judges would never exceed the adjustment given to other provincial civil servants. Thereafter, according to the Association, the Government just bided its time through the 2017-20 process, "going through the motions" without the required meaningful engagement, until it could implement its pre-ordained determination.

[76] My reasons should not be taken as preferring one or the other theory, or as commenting on the cogency of any evidence. Those matters are for the review. Here the issue is – May the parties include in the review record the material that will allow each to present its theory most effectively at the merits hearing?

[77] Clearly, the answer is – Yes. Subject to exclusionary rules like privilege, evidence is admissible to allow either party to put its best foot forward. That is what "relevance" means. In *R. v. White*, [2011] 1 S.C.R. 433, Justice Rothstein phrased it more scrupulously:

> (a) Relevance
>
> 36. … In order for evidence to satisfy the standard of relevance, it must have "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" … . [citations omitted]

[78] The theories of both the Attorney General and the Association are arguable under the principles from the *PEI Reference* and *Bodner*. The Association may offer the evidence that promotes its theory. I endorse the following comments from the motions judge's decision:

> [223] … Cabinet is required, per *Bodner*, in such circumstances to engage meaningfully with the Tribunal's reasoning, and not merely reiterate in its decision the outcome it wanted all along.
>
> …
>
> [226] Counsel for the Respondents did not provide me with any case law where a Canadian Court refused to allow Applicants to put forth affidavit evidence of alleged bad faith on judicial review of a government decision following a Tribunal process. Nor did the Supreme Court of Canada in *Bodner* so say. The Court was silent on the point.
>
> [227] The case law provided to me by the Applicants, considered within the backdrop of the *Bodner* test, convinces me that such affidavit evidence is relevant and admissible on judicial review by this Court, in the circumstances before me.
>
> [228] To not allow this evidence to augment the Record on judicial review, would be to allow government to shield itself from the kind of allegations of bad faith which the Applicants wish to advance on review. …
>
> …
>
> [230] If the Respondents' argument is correct, *i.e.*, that only the OIC and the Tribunal Report are properly before the Court on review, the situation which was before Oliphant J. in *Judges of the Provincial Court of Manitoba, et al. v. Her Majesty the Queen*, 2012 MBQB 79 would never have come to light.
>
> …
>
> [237] In the view of this Court it makes no sense to say evidence about bad faith conduct is not admissible because government has chosen, perhaps strategically, to not allege through evidence, that it acted in good faith. Such an approach would never have brought to light the "total sham" described by Oliphant J.

[79] Except for the passages disallowed by the motions judge, to be discussed under Issue #4, Judge Burrill's affidavit is admissible either as helpful narrative or to promote the Association's theory. I would dismiss this ground of the Attorney General's appeal.

Issue #4 – Disallowed Passages of Judge Burrill's Affidavit

[80] The motions judge disallowed several paragraphs from Judge Burrill's affidavit. The Association's cross-appeal is confined to paras. 17-20 and 22 and Exhibit "F". Those passages discuss the Government's implementation of the recommendations by the preceding judicial compensation tribunal for the term of April 1, 2014 to March 31, 2017. For that 2014-17 term, the *Provincial Court Act* said the recommendations of the Tribunal were binding (above, para. 4).

[81] The cross-appealed paragraphs from Judge Burrill's affidavit say:

> 17. Notwithstanding the clarification provided by the Tribunal, the Government took no immediate steps to implement the recommendations. On or about October 6, 2015, on my own behalf, as Chair of the Association's Compensation Committee, and on behalf of the President of the Association, the Chief Judge requested a meeting with the Minister of Justice. By letter dated October 23, 2015, the Minister of Justice declined to meet. A copy of that letter is Exhibit "F" to this Affidavit.
>
> 18. I instructed the Association's legal counsel, Bruce Outhouse, Q.C., to make inquiries of the Acting Deputy Minister of Justice regarding when the binding recommendations of the Tribunal would be implemented. I am informed by Mr. Outhouse and do verily believe that he spoke with the Acting Deputy Minister, Thilairani Pillay, Q.C., on or about November 17, 2015, and was assured that the Order in Council would be signed prior to Christmas.
>
> 19. During the fall of 2015, the province was engaged in collective bargaining with a number of public sector unions, including those representing teachers and government employees. In mid-November, 2015, tentative agreements were reached with the Nova Scotia Teachers' Union ("NSTU") and the Nova Scotia General Employees' Union ("NSGEU"). A copy of two CBC News Nova Scotia articles referring to these tentative agreements are attached as Exhibit "G" to this Affidavit.
>
> 20. A ratification vote was held by the NSTU in early December, 2015 and the membership rejected the tentative agreement. A copy of an article from the NSTU's December 2015 newsletter forms Exhibit "H" to this Affidavit. Following the teachers' rejection, the NSGEU delayed its ratification vote and reversed its recommendation that the tentative agreement be accepted. Its members ultimately voted to reject the tentative agreement as well. A copy of a Global News article regarding the rejection of the tentative contract is attached as Exhibit "I" to this Affidavit.
>
> …
>
> 22. On December 17, 2015, Order in Council 2015-373 was signed. On the same day, the Premier gave an interview explaining that he had no choice but to implement the 2014 Tribunal's recommendations, but that he would be considering changing the binding nature of the Tribunal process. A copy of the CTV News Atlantic article, which quotes the Premier, is attached as Exhibit "J" to this Affidavit.

[82] The motions judge's comments on paras. 17-20 and 22 include:

> [257] I do not view paragraphs 17-18 as general background information. Rather, the gist of these paragraphs is to attribute delay on the part of the government in implementing the 2014 Tribunal recommendations.
>
> …
>
> [262] The content of paragraph 20 suffers from similar difficulties as does the content of paragraph 19 in that no source for the information set out is provided.
>
> …
>
> [264] In general terms, the reason advanced by the Applicants for the relevance of paragraphs 17-20, is that they relate to a supposed delay on the part of government in implementing the recommendations of the 2014 Tribunal, allegedly because the government was engaged in public sector collective bargaining with two unions. In oral submissions, the Appellants' counsel also explained the alleged relevance of these paragraphs by asking the question, "Has the process been tainted by concern about its impact on public sector bargaining?"
>
> [265] There will be many difficult issues before this Court on judicial review. I find it unnecessary to complicate the evidentiary base before the Court by augmenting it with evidence about what the government did or did not do in response to the 2014 Tribunal Recommendations.
>
> [266] I find that paragraphs 17 through 20 (and Exhibits "F", "G", "H" and "I") do not contain relevant information and are therefore inadmissible.
>
> …
>
> [268] Paragraph 22 refers to the date that the Order in Council resulting from the 2014 Tribunal report was signed. I accept that that is general background information, falls within that exception, and is admissible.
>
> [269] However, the rest of paragraph 22 is problematic. There is reference to an interview the Premier allegedly gave (without the source of that knowledge), attributes [*sic*] comments to the Premier concerning the 2014 Tribunal's recommendations and attaches [*sic*] another news article (Exhibit "J"). With respect the comments allegedly made by the Premier, counsel for the Applicants says that the evidence is not submitted for the truth of its contents, but rather for the fact that the comments were made.
>
> [270] I find that only the first sentence of paragraph 22 contains information relevant to the judicial review. The remaining sentences as well as Exhibit "J" contain inadmissible hearsay and are, in any event not relevant to this Court's review of the 2017 Tribunal process.

[83] The Association submits that the reviewing judge misapprehended the relevance of the disputed passages. The Association's appeal factum says:

> 121. The evidence in the Disputed Paragraphs is relevant to the 2017 Tribunal process under review in the present proceeding because it is revealing of the Appellants' intent going into the process and, in particular, that there was a lack of good faith intent to participate in the process from its outset.

[84] I do not see an appealable error in the motions judge's disallowance of paras. 17-20. Paragraphs 17-20 were offered, not as background narrative, but to show the Government's bad faith in the 2017-20 process. Those paragraphs relate to a delay in the enactment of the 2014 Tribunal's recommendations for 2014-17. The level of compensation in the 2014 Tribunal recommendations for judges was binding, by legislation, whatever happened in collective bargaining with the NSTU or NSGEU. So the events recited in paragraphs 17-20 speak to timing, not to the level of judges' remuneration. I agree with the motions judge that the timing of the 2014-17 adjustment has no probative spillover to the 2017-20 remunerative level featured in this litigation.

[85] With respect, I have a different view of the motions judge's treatment of Judge Burrill's para. 22. The Premier's alleged statement relates to the level of compensation arising from the 2017-20 process. The statement, if it is admitted, would pertain to the Government's intent for the next round. The Association's theory is that, before the 2017-20 process began, the Government had decided that an adjustment to the Judges' 2017-20 level of compensation would not exceed the adjustment awarded to other public sector employees, and the Government just "went through the motions" of the 2017-20 tribunal process without meaningful engagement. Paragraph 22 may have some probative impact on that matter. As I mentioned earlier, the weight is for the merits hearing, not this interlocutory appeal. In my view, the motions judge erred in law by ruling that para. 22 was irrelevant.

[86] The motions judge (para. 270) said paragraph 22 contained hearsay, though her later summary (para. 321) cited only irrelevance as the basis for exclusion. In practice, the admission of an opposing party's statement at the eventual merits hearing rarely should turn on an anticipatory hearsay ruling at an interlocutory motion. This is so, whether the statement comes from the Premier or anyone else. The tendering party may stipulate that the statement is offered, not for the truth of its contents, but to show that the statement was made. The motions judge (para. 269) said that the Association made such a stipulation; so the evidence was not offered as hearsay. There may be an applicable exception to the hearsay rule, such as a statement against interest by the opposing party; the motions judge did not discuss that matter. Further, the *Civil Procedure Rules* have mechanisms, such as

an interrogatory or a request for an admission, to identify and admit the opposing party's statement; the tendering party should have the opportunity to engage these mechanisms.

[87] The motions judge also said that para. 22 did not recite Judge Burrill's source of information and belief for the information in para. 22. That can be easily remedied. I would permit the Association to refile an affidavit that includes the source for para. 22. The motions judge (para. 303) made a similar allowance for Judge Burrill's paras. 40-42, that also omitted to state a clear source.

[88] I would allow the cross-appeal in part to admit paragraph 22, subject to the caveats in the preceding two paragraphs on hearsay and source of knowledge.

Conclusion

[89] I would dismiss the appeal.

[90] I would partly allow the cross-appeal to rule that the contents of para. 22 of Judge Burrill's affidavit are relevant, and to permit the Association to re-introduce those allegations in a revised affidavit that states the basis of Judge Burrill's information and belief. The Association may address the hearsay issue as discussed in para. 86, though the manner will not be prescribed in this Court's Order.

[91] Otherwise, I would dismiss the cross-appeal.

[92] Costs of the appeal and cross-appeal, quantified at $5,000 all inclusive, should be in the cause.

Fichaud, J.A.

Concurred: Oland, J.A.

Beveridge, J.A.