SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2018 NSSC 13

Date: 20180306
Docket: Hfx Nos. 461108; 463248
Registry: Halifax

Between:

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

Applicants

v.

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

Respondents

Judge: The Honourable Justice Ann E. Smith

Heard: September 20, 21, 2017, in Halifax, Nova Scotia

Counsel: Susan Dawes, for the Applicants
Andrew Taillon; Erin Cain, for the Respondents

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By the Court:

I Introduction

(a) The Judicial Review

[1] On March 7, 2017 the Judges of the Provincial Court and Family Court of Nova Scotia, as represented by the Nova Scotia Provincial Judges' Association, (the "Applicants") filed a Notice for Judicial Review, requesting judicial review of Order-in-Council 2017-24 (the "OIC") whereby the Nova Scotia Governor in Council rejected salary recommendations made by the Nova Scotia Provincial Judges' Salaries and Benefits Tribunal (the "Tribunal").

[2] The Tribunal is an independent tri-partite tribunal appointed every three years whose task is to recommend the salaries and benefits for Judges of the Provincial Court and Family Court, including the Chief Judge and Associate Chief Judge of each Court (the "Judges"), in accordance with the process described in the *Provincial Court Act*, RSNS 1989, c. 238, as amended, 2016, c.2, ss. 8-14.

[3] On November 18, 2016 the Tribunal completed its report (the "Tribunal Report") regarding salary and benefits for the Judges for the period April 1, 2017 to March 31, 2020.

[4] On February 2, 2017 the Governor in Council produced the OIC which confirmed four of the five recommendations of the Tribunal, but varied one recommendation.

[5] Specifically, the Governor in Council varied the Tribunal's recommendation that the Judges' salaries be increased by approximately 9.5% over three years, (including a 5.45% increase in the first year), to an increase of 1% for fiscal year 2019 to 2020. The OIC states, in part:

> 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.

[6] The Notice for Judicial Review sets out the following grounds for review:

1. The Respondents have violated the constitutional principles of judicial independence as articulated in the common law and entrenched in section 11(d) of the *Canadian Charter of Rights and Freedoms* and the preamble and sections 96, 100 and 129 of the *Constitution Act, 1867*, in that the Governor in Council has:

    (a) failed to articulate a legitimate reason for departing from the Tribunal's salary recommendations;

    (b) failed to rely upon a reasonable factual foundation in its reasons for rejection; and

    (c) viewed globally, failed to respect the Tribunal process and ensure that the purposes of the Tribunal – preserving judicial independence and depoliticizing the setting of judicial remuneration – have been achieved.

[7] In particular, the Applicants' plead that the Respondents have:

(a) failed to engage fully in the Tribunal process in a manner that ensures its effectiveness;

(b) failed to give constitutionally adequate and legitimate reasons for rejecting the salary recommendations of the Tribunal including, without limiting the generality of the foregoing:

    (i) failing to respond to specific reasons and articulations of the Tribunal and failing to deal with the Tribunal's reasoning and recommendations in a meaningful way;

    (ii) mischaracterizing the reasoning and/or intent of the Tribunal and its salary recommendations;

    (iii) basing its decision concerning the Tribunal's salary recommendations on erroneous or unsupported statements of fact;

    (iv) basing its decision concerning the Tribunal's recommendations on alleged facts, reasons or arguments not advanced before the

Tribunal that the Province had reasonable opportunity and a responsibility to raise at the hearings before the Tribunal;

(v) reiterating submissions made to and substantively addressed by the Tribunal;

(vi) making unjustified assumptions and/or assertions in its reasons;

(vii) re-weighing factors considered by the Tribunal without justifying the difference in weight;

(viii) mischaracterizing or misapprehending the jurisdiction or mandate of the Tribunal and the purpose of the Tribunal process;

(ix) advancing reasons that are not compatible with the common law and the Constitution in that they are inconsistent with the role and purpose of the Tribunal process and the role of the executive and/or legislative branches of Government in that process;

(x) offering reasons which treat judges as civil servants, contrary to relevant constitutional principles and/or which are designed to protect the position of the Government in its bargaining with civil servants rather than address the merits of the recommendations for judges;

(c) failed to respect the Tribunal process such that its purposes have not been achieved. Such errors by the Respondents include, but are not limited to:

(i) misconstruing the role, jurisdiction, and mandate of the Tribunal and failing to participate in the process with the requisite good faith and respect for the process;

(ii) rendering the process meaningless by its position that the Tribunal was effectively bound to adhere to the Government's fiscal plan;

(iii) acting on the basis of political considerations, in order to bolster the Government's position in ongoing public section bargaining; and

(iv) imposing a greater burden on the judiciary than on civil servants.

(b) The Constitutional Challenge

[8] In addition to seeking judicial review of the OIC, the Applicants also allege in a Notice of Application in Court filed on May 8, 2017, that certain sections of the *Financial Measures (2016) Act* and the affected amended sections of the *Provincial Court Act* are unconstitutional. The Applicants say that, as a result, the OIC is void *ab initio*.

[9] Prior to these legislative changes, the Tribunal's recommendations were binding on the Governor in Council. The changes to the legislation had the effect of removing the binding nature of the recommendations, allowing the Governor in Council to approve, vary or reject the Tribunal's recommendations.

II The Motions Before the Court

(a) The Content of the Record

(i) The Report and Recommendation

[10] The Applicants have brought three motions to the Court for determination.

[11] The first motion concerns the content of the Record on review. The Record as filed with the Court consists of two documents, the OIC and the Tribunal Report.

[12] The first sentence of the OIC refers to a "report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016." The Respondents have not included this "Report and Recommendation" as part of the Record.

[13] The Applicants seek a declaration, pursuant to *Civil Procedure Rule* 7.10(a), that the Report and Recommendation is part of the Record on judicial review.

[14] The Applicants also seek a declaration that the Respondents failed to comply with *Rule* 7.09 by not producing a complete copy of the Record by the date set for its production during a motion for date and directions before Wood J. of this court.

(ii) The Affidavit of the Honourable Judge James H. Burrill

[15] The Applicants also move for an order pursuant to *Rule* 7.10(g) and (h) that the Applicants be permitted to introduce evidence beyond the Record, specifically the Affidavit of the Honourable James H. Burrill, Judge of the Provincial Court, with exhibits (the "Burrill Affidavit"), sworn June 2, 2017.

(b) The Motion for Consolidation, or Hearing the Two Proceedings Together

[16] The Applicants also seek an order consolidating the judicial review with the Constitutional Challenge; or alternatively, an order that the proceedings be heard together, with the evidence admissible in the judicial review deemed admissible in the Constitutional Challenge and *vice versa*. In the further alternative, the Applicants seek an order that the proceedings be heard sequentially, with the judicial review heard first, followed immediately by the hearing of the Constitutional Challenge, and with any evidence admitted in the judicial review deemed admitted in the Constitutional Challenge.

III Background - "*PEI Reference*" and "*Bodner*"

(a) Introduction

[17] In order to put these motions in context, it is necessary to provide some background information and canvas the law with regard to the setting of Provincial Court Judges' remuneration.

[18] The starting point for guaranteeing the independence of the judiciary is found in the *Canadian Charter of Rights and Freedoms (Constitution Act*, 1982) (the "*Charter*"). Section 11(d) of the *Charter* guarantees the right to a fair hearing before an "independent and impartial tribunal."

[19] In *R. v. Valente*, [1985] 2 S.C.R. 673, the Supreme Court of Canada set out three essential conditions to achieving judicial independence: security of tenure, financial security and institutional independence.

[20] The Supreme Court of Canada has described disputes between the executive arm of government and the judiciary over the setting of remuneration for Provincial Court Judges as "very serious business." The business is serious because financial security is a component of judicial independence and judicial independence is a foundational underpinning of a constitutional democracy.

[21] Two decisions of the Supreme Court of Canada address how government decisions setting judicial compensation are to be judicially reviewed by superior courts.

(b) *PEI Reference*, 1997

[22] The first of these decisions is *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*PEI Reference*"). In that case, the Supreme Court of Canada heard three appeals concerning challenges to the impartiality and independence of provincial court judges in Alberta, Manitoba and Prince Edward Island. In hearing those appeals, the Court considered the financial security aspect of judicial independence.

[23] Lamer C.J., writing for the majority, refers to the "unprecedented situation which these appeals represent." He says that "the independence of provincial court judges is now a live issue in no fewer than four of the ten provinces in the federation." (paragraph 6)

[24] Lamer C.J. goes on to say that the three appeals had each arisen in different ways. In Alberta, accused persons had challenged the constitutionality of their trials before Provincial Court Judges. Two references had been brought by the PEI Cabinet. In Manitoba, the Judges' Association had brought a civil action which challenged the constitutionality of legislation which purported to roll back judicial salaries. (paragraphs 6 and 22)

[25] At paragraph 7, Lamer C.J. comments that litigation "between two primary organs of our constitutional system – the executive and the judiciary – is "very serious business."

[26] Lamer C.J. says at paragraph 8 that the task of the Supreme Court was to explain the proper constitutional relationship between provincial court judges and provincial executives and "thereby assist in removing the strain on this relationship."

[27] At paragraph 131, Lamer C.J. queries, "Given the importance of the institutional or collective dimension of judicial independence generally, what is the institutional or collective dimension of financial security?"

[28] Lamer C.J. answers this question by saying that financial security for the Courts as an institution has three components, "which all flow from the

constitutional imperative that, to the extent possible, the relationship between the judiciary and other branches of government be depoliticized." This imperative "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." (paragraph 131)

[29] Chief Justice Lamer says that the first component of institutional financial security is that, as a constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen. This can occur either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However,

> …any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective, and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. (para. 133)
>
> (emphasis added)

[30] The second component of institutional financial security outlined by Lamer C.J. is that:

> …under no circumstances is it permissible for the judiciary - not only collectively through representative organizations, but also as individuals - to engage in negotiations over remuneration with the executive or representatives of the legislature. (para. 134)

[31] Chief Justice Lamer outlines the third component by stating:

> …any reductions to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. (para. 135)

[32] Chief Justice Lamer emphasizes that the relationship between the legislature and executive on the one hand, and the judiciary on the other, should be "depoliticized." The Chief Justice sheds light on what it means to "de-politicize" the relationship, as follows:

> What I mean instead is the legislature and executive cannot, and cannot appear to, exert political pressure on the judiciary, and conversely, that members of the

> judiciary should exercise reserve in speaking out publicly on issues of general public policy that are or have the potential to come before the courts, that are the subject of political debate, and which do not relate to the proper administration of justice. (para. 140)

[33] The Chief Justice goes on to say that although provincial executives, or the legislature (depending on the Province), are constitutionally permitted to change or freeze judicial remunerations, "those decisions have the potential to jeopardize judicial independence." (paragraph 166).

[34] Lamer C.J. says that the imperative of protecting the courts from political interference through economic manipulation "is served by interposing an independent body – a judicial compensation commission – between the judiciary and the other branches of government." (paragraph 166)

[35] The Chief Justice goes on to say that the judicial compensation commissions charged with dealing with the issue of judicial remuneration must meet three general criteria. First, they must be independent. Secondly, they must be objective. Thirdly, they must be effective. (paragraph 169)

[36] Lamer C.J. says that "first and foremost" the commissions must be independent:

> The rationale for independence flows from the constitutional function performed by these commissions – they serve as an institutional sieve, to prevent the setting or freezing of judicial remuneration from being used as a means to exert political pressure through the economic manipulation of the judiciary. (paragraph 170)

[37] The compensation commissions must also be objective:

> They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. (paragraph 173)

[38] Chief Justice Lamer recommends that the enabling legislation or regulations establishing these independent compensation commissions include a list of relevant, non-exhaustive factors to guide the commissions. He notes as relevant factors, the cost of living, the need to ensure that judges' salaries remain adequate, and the need to attract excellent candidates to the judiciary. (paragraph 173)

[39] Lastly, Chief Justice Lamer says "and most importantly" the commissions must be effective.

[40] Chief Justice Lamer says that there are several requirements that must be met in order to guarantee the effectiveness of these commissions. First, government must not change judicial remuneration until it has received the report of the commission. Secondly, the commissions must convene regularly (he suggests every three to five years) in order to guard against a *de facto* decrease in judicial compensation because of inflation and cost of living. Thirdly, the reports of the commissions must have a meaningful effect on the determination of judicial salaries. (paragraphs 174 and 175)

[41] Importantly, Chief Justice Lamer says that s. 11(d) of the *Charter* does not require that the reports of the commission be binding, noting that at that time the legislatures of some provinces had adopted a binding procedure. (paragraph 176)

[42] However, if one or more of the recommendations in a commission's report (in a province without a binding procedure) is not accepted, the executive "must be prepared to justify this decision, if necessary in a court of law." (paragraph 180)

[43] Chief Justice Lamer goes on to discuss what that justification would look like. It is "one of simple rationality." 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. (para. 183)

[44] Chief Justice Lamer says that the standard of justification 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). (para. 183)
>
> (emphasis added)

[45] The two-stage analysis for determining the rationality of the government's response to vary or reject the recommendation(s) of a judicial compensation committee, established in *PEI Reference* is therefore as follows:

(1) Has the government articulated a legitimate reason for departing from the commission's recommendations? and

(2) Do the government's reasons rely upon a reasonable factual foundation?

[46] It is to be noted that prior to *PEI Reference*, salary review was between the provincial court judges, or their associations, and a Minister of the Provincial Crown.

(c) *Bodner*, 2005

[47] Eight years after *PEI Reference*, 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 Quebec v. Québec (Attorney General)*; *Minc v. Quebec (Attorney General)*, [2005] SCC 44 ("*Bodner*") the Supreme Court of Canada was again called upon to decide questions regarding judicial independence in the context of the setting of judicial remuneration.

[48] Provincial Court Judges in New Brunswick, Ontario and Quebec, Justices of the Peace in Alberta and Municipal Court Judges in Quebec sought judicial review of their provincial governments' decisions to reject compensation committee recommendations relating to their remuneration.

[49] The Court in *Bodner* confirms that the principles in *PEI Reference* remain valid. However, the Court notes that the independent commissions established in the wake of *PEI Reference* had not achieved the goal of depoliticizing the setting of judicial remuneration. "The *Reference* has not provided the anticipated solution, and more is needed." (paragraph 3)

[50] The Court comments on the "unfulfilled" hopes of the compensation committee process and states that the Court intends to clarify the principles from *PEI Reference* (paragraphs 11 and 12):

> Compensation commissions were expected to become the forum for discussion, review and recommendations on issues of judicial compensation. Although not

> binding, their recommendations, it was hoped, would lead to an effective resolution of salary and related issues. Courts would avoid setting the amount of judicial compensation, and provincial governments would avoid being accused of manipulating the courts for their own purposes.
>
> 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.
>
> (emphasis added)

[51] In each of the cases before the Court in *Bodner*, there was a dispute about whether the governments' reasons for not following the commissions' recommendations were rational.

[52] In the end, the Court clarified the test for determining the rationality of the government's response by adding a third part to the two-part test in *PEI Reference*.

[53] Before doing so, the Court reviewed the fundamental principles stated in *PEI Reference* and confirmed that the principles remain valid. Those three principles are: (1) the nature of compensation commissions and their recommendations; (2) the obligation of the government to respond; and (3) the scope of judicial review of the government's response and the related remedies. (paragraph 13)

[54] In terms of principle "2", "the government's response", the Court confirmed that the government must give weight to the commission's recommendations. 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 substantially addressed by the commission." (paragraph 23)

[55] I will return to the issue arising from a government response which simply reiterates previous submissions it made to a compensation commission when I deal with the motion to add the Burrill Affidavit to the Record.

[56] The government's response must also be tailored to the commission's recommendations and must be "legitimate", which is "what the law, fair dealing and respect for the process require." (paragraph 24)

[57] At paragraph 25, the Court goes on to discuss what constitutes legitimate reasons for rejecting or varying the commission's recommendations.

> Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality… The government must deal with the issues at stake in good faith.

[58] Also at paragraph 25, the Court states that 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.

[59] At paragraph 29, the Court refers to *PEI Reference* and says that the *Reference* "states that the government's response is subject to a limited form of judicial review by superior courts" and that the standard of review described in the *Reference* is one of "simple rationality."

[60] At paragraph 30, the Court notes that 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.

[61] The Court determined to add a third stage to the *PEI Reference* test. That stage requires the reviewing judge to review the matter globally and consider whether the purpose of the commission process was met. (paragraph 31)

[62] The *Bodner* test is as follows:

(1) Has the government articulated a legitimate reason for departing from the commission's recommendations? and

(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?
>
> (paragraph 31)

[63] In terms of the newly added third stage, the Court outlines the task of a reviewing court in assessing whether the commission process was respected:

> 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. (para. 38)
>
> (emphasis added)

[64] At paragraph 39, the Court notes that it is "impossible to draft a complete code for governments, and reliance has to be placed on their good faith." The Court says that the government's response can reweigh factors the commission has already considered as long as legitimate reasons are given for doing so.

> The focus is on whether the government has responded to the commission's recommendations with legitimate reasons that have a reasonable factual foundation.

[65] Before leaving the *Bodner* decision, I note that the Court addressed the question of whether affidavit evidence could be introduced on judicial review. I will return to this issue in more detail later when I deal with the admissibility of the Burrill Affidavit.

[66] At this point, however, I note that in the context of the Court's discussion about the admissibility of government affidavits showing its good faith response to a judicial commission report, the Court referred to the objective of the process being "open and transparent." (paragraph 63)

[67] The government's reasons must "provide a response to the commission's recommendations that is sufficient to inform the public, members of the legislature and the reviewing court of the facts on which the government's decision is based and to show them that the process has been taken seriously." (paragraph 63)

(d) The Parties' Interpretation of the *Bodner* Test

[68] The Respondents say that this Court's review of the OIC is a limited and deferential form of judicial review. They point to the Court's reference in *Bodner* to what it says *PEI Reference* established as the test on review.

[69] The Applicants focus on the newly added third stage of the test established by the Court in *Bodner*. They say that, rather than being a limited form of review, the review is a unique form of judicial review and one that must examine the Tribunal process globally.

[70] These two vastly different views of the role of this Court on review shape and inform the parties' positions on each of the motions and various issues this Court must decide.

(e) Conclusions on the Test in *PEI Reference* and *Bodner*

[71] Based upon the review I have undertaken of *PEI Reference* and *Bodner*, I conclude that my task as a reviewing Court in this matter will include a global review of the Tribunal process. That global review is necessary in order for this Court to determine whether the government's participation and response in the totality of the process demonstrates good faith and meaningful participation.

[72] That review is still deferential, but it is not as "limited," as the Respondents contend. By adding the third component to the analysis to be undertaken by a reviewing court, the Court in *Bodner* endorsed a much broader review than that which it established in *PEI Reference*. I interpret *Bodner* as expanding upon the "limited form of judicial review" which it described as being established in *PEI Reference*.

IV The Duties and Mandate of the Tribunal

[73] Before turning to the merits of the first motion, I set forth the relevant provisions of the *Provincial Court Act* which delineate the duties and mandate of the judicial compensation committee (the Tribunal) as well as the factors the

Tribunal must consider in making recommendations about judicial remuneration. These factors, it will be recalled, are the kind of considerations which had been suggested by Chief Justice Lamer in *PEI Reference*.

Duties of tribunal

21E (1) A tribunal shall inquire into and prepare a report containing recommendations with respect to

(a) the appropriate level of salaries to be paid to judges of the Provincial Court and the Family Court, including the chief judge and associate chief judge of each court;

(b) the appropriate level of *per diem* payments, or payments for part of a day, made to judges for presiding in the Provincial Court or the Family Court where those judges are not receiving salaries;

(c) the appropriate vacation and sick-leave benefits to be provided to judges of the Provincial Court and the Family Court;

(d) pension benefits and increases thereto in respect of increases in the cost of living, long-term disability benefits or salary continuation, life insurance and health and dental benefits for judges of the Provincial Court and the Family Court and the respective contributions of the Province and the judges for such benefits; and

(e) other non-discretionary benefits for judges of the Provincial Court and the Family Court.

(2) Where there is a dispute as to whether a benefit referred to in clause (e) of subsection (1) is a non-discretionary benefit, the Minister or the Association may, within thirty days of receipt of the report, appeal to the Nova Scotia Court of Appeal to have the question determined.

(3) When making recommendations pursuant to this Section, a tribunal shall take into consideration the following:

(a) the constitutional law of Canada;

(b) the need to maintain the independence of the judiciary;

(c) the need to attract excellent candidates for appointment as judges;

(d) the unique nature of the judges' role;

(e) the manner in which salaries and benefits paid to judges in the Province compares to judicial compensation packages

> in other jurisdictions in Canada, including the federal jurisdiction, having regard to the differences between those jurisdictions;
>
> (f) the provision of fair and reasonable compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy;
>
> (g) the adequacy of judges' salaries having regard to the cost of living and the growth or decline in real *per capita* income in the Province.
>
> (h) the relevant submissions made to the tribunal;
>
> (i) the nature of the jurisdiction and responsibility of the court; and
>
> (j) other such factors as the tribunal considers relevant to the matters in issue.

V First Motion – The Content of The Record

a. Should the Report and Recommendation Form Part of the Record?

[74] As noted above, the positions of the parties on this motion reflect their interpretations of the *Bodner* test.

[75] The Applicants say that *Bodner* promotes a unique form of judicial review which mandates a reviewing Court to weigh the whole of the process and the response of government in order to determine whether government has engaged in a meaningful way with the Tribunal process and has given a rational answer to its recommendations.

[76] The Respondents say that what is before this Court is a "limited form of judicial review." As noted above, that phrase, "limited form of judicial review" is used by the Supreme Court in *Bodner* when it describes what the Court in *PEI Reference* decided.

[77] I have previously indicated that I conclude that if a reviewing Court is to review the whole of the process and government's response to recommendations, it cannot carry out the kind of limited review proposed by the Respondents.

[78] However, it does not follow that every document reviewed by the government in responding to the recommendations must form part of the record before a reviewing court.

[79] I will now outline the position of the parties with respect to why, or why not, the Report and Recommendation should form part of the Record in this case.

(i) The Applicants' Position

[80] Firstly, the Applicants say that the Minister's Report and Recommendation is properly part of the Record because it is expressly referred to in the OIC. The OIC states at its outset:

> The Governor in Council on the report and recommendation of the Attorney General and Minister of Justice dated December 19, 2016, and pursuant to Section 21K of Chapter 238 of the Revised Statutes of Nova Scotia, 1989, the *Provincial Court Act* (the Act), hereby confirms recommendations 2 to 5 and varies recommendation 1 of the Nova Scotia Provincial Judges' Salary and Benefits Tribunal (the Tribunal) set out in the Tribunal's Report dated November 18, 2016, issued by Bruce P. Archibauld, Q.C., Brian G. Johnston, Q.C. and Ronald A. Pink, Q.C. (the Report) for the following reasons:...
>
> (emphasis added)

[81] The Applicants refer to *Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)* (1994), 129 N.S.R. (2d) 298 (N.S.C.A.). In that case, the Court of Appeal upheld a decision of Glube C.J. settling the record on an application for *certiorari*.

[82] At paragraph 51, Freeman J.A. refers to Chief Justice Glube's reference to comments of Sir William Wade (Administrative Law, Sixth Edition, Clarendon Press, Oxford, 1988 at p. 312) where the learned author states that "the record extends to include any document referred to in the primary documents."

[83] The Applicants also refer to the decisions of the British Columbia Supreme Court and Court of Appeal in *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 244 (the "*BCSC* Case") and 2012 BCCA 157 (the "*BCCA* Case").

[84] In British Columbia, at the time, the process for setting the remuneration for provincial court judges differed in certain ways from the process in place in this Province. As is the case in Nova Scotia, in British Columbia, a judges' compensation committee was formed every three years with a mandate to report and make recommendations to the Attorney General on matters relating to judicial remuneration and benefits. However, unlike in Nova Scotia, where the Governor in Council must determine whether to accept, vary or reject the recommendations

in the committee's report, in British Columbia, the Attorney General puts the report to the Legislative Assembly with a motion which is then subject to a vote.

[85] In the *BCSC* Case, the Attorney General's motion was to reject seven of the committee's recommendations. The motion passed unanimously in the legislature. The Judges' Association challenged the government's response to the judicial compensation committee's report by petition (judicial review) filed with the court. The Attorney General filed a response to the petition.

[86] As alluded to earlier in this decision, in *Bodner*, the Court found that the government may expand on the factual foundation contained in its response by providing details, in the form of affidavits, relating to economic and actuarial data and calculations. The Court in *Bodner* also said that government affidavits containing evidence of its good faith commitment to the process, such as information relating to the government's study of the impact of the commission's recommendations, might also be admissible. (paragraph 36)

[87] In the *BCSC* Case, the government chose to file affidavit evidence. It filed the affidavit of a Mr. Reimer, a senior policy and legislation analyst with the Ministry of the Attorney General. Mr. Reimer had managed the government's participation in the compensation committee process.

[88] Mr. Reimer deposed, in part, that he had

> drafted a detailed submission to Cabinet for the Attorney General's consideration and signature. The submission addressed all of the Commission's recommendations and provided options, with estimated costs, for each recommendation. (para. 9)

[89] The Judges' Association sought disclosure of the Reimer submission to Cabinet. The Attorney General refused, primarily on the basis of public interest immunity.

[90] Macaulay J., of the British Columbia Supreme Court, found that the Cabinet submission was relevant to the issues framed in the Judges' petition. The Court reasoned that because Mr. Reimer's affidavit implied that the Cabinet had available to it, and took into account, all necessary and material economic information, the content of Mr. Reimer's submission was necessary for an assessment of that position. In other words, because the government had specifically filed affidavit evidence in support of its process of review, it could not then refuse to disclose a document it had clearly relied on.

[91] On appeal, Finch C.J.B.C. upheld the lower court decision, noting that "there is now no doubt that the government may rely on affidavit evidence to support its opposition to this petition." (paragraph 13)

[92] The Chief Justice states as follows at paragraphs 14 and 15:

> The Judges' Association has not objected to the admissibility of the affidavits filed in support of the Attorney General's response to the petition. Rather, they seek to test the government's assertions of good faith and commitment to the review process by examining the factual foundations of the Attorney General's position, and ultimately the basis on which the legislature was asked to act.
>
> In my respectful opinion, the position of the Judges' Association is well-founded. This is not a case where the Association sought disclosure of unknown documentation. The Cabinet submission prepared by Mr. Reimer was put forward as a basis on which the government's response could be supported. It would be artificial to attempt to distinguish between the fact that Mr. Reimer prepared the document for Cabinet, and the content or substance of that document, given that the government appears to have relied on it in developing its response.
>
> (emphasis added)

[93] The Applicants contend that the Report and Recommendation was clearly considered by the Governor in Council and it should be produced just as was the Reimer report in the BC cases, as ordered by the Court.

(ii) The Respondents' Position

[94] The Respondents say that the Report and Recommendation is not relevant to the test laid out in *Bodner*. What matters, say the Respondents, is what is found in the government's reasons (the "OIC") in response to the Tribunal Report.

[95] In addition to this argument, the Respondents also advance three additional reasons why the Report and Recommendation should not be produced and form part of the Record.

[96] First, they rely on the doctrine of deliberative secrecy.

[97] Secondly, they say the document is protected from production by public interest immunity.

[98] Thirdly, the Respondents say that parts of the document are nonetheless protected from disclosure as a result of solicitor-client privilege.

[99] Before expanding on the Respondents' arguments as to why the Report and Recommendation should not be produced and form part of the Record, I will outline the Respondents' response to the arguments advanced by the Applicants as to why the document should be included in the Record.

[100] Counsel for the Respondents argue that the facts in the *BCSC* and *BCCA* cases are easily distinguishable from what is before this Court. They argue that in the *BCSC* Case, the government itself made the Reimer report to Cabinet relevant by choosing to file an affidavit to bolster its good faith position. In the circumstances, the Respondents say that it is not surprising that the Court then rejected the government's argument that it not be required to produce the report.

[101] The Respondents emphasize that the Attorney General in this case has not filed any affidavit(s) to demonstrate good faith on its part, or for any other reason.

[102] The Respondents also say that the Report and Recommendation was advice to the Governor in Council, not evidence before a decision-maker.

[103] In that regard, the Respondents refer to the decision of this Court in *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 332. In that case, IMP brought a motion to order disclosure of documents in the context of an appeal of a ministerial order under the *Environment Act*. IMP suggested that there were documents in the department's possession which were before the Minister and which should form part of the record on review.

[104] The Attorney General opposed the motion on the grounds that IMP had not made out an evidentiary basis for disclosure, and on the secondary ground of Crown immunity.

[105] At the outset of the Court's analysis, Stewart J. reviews the basic principles respecting the record on judicial review and statutory appeal. Referring to Sara Blake, in Administrative Law in Canada, 5th ed. (LexisNexis, 2011) at 202-203 Her Ladyship quotes, "The record that was before the tribunal is the evidence on which a court bases its review of the tribunal's action or decision," and,

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the court is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. (Blake, at 204-206) (paragraph 21)

(emphasis added)

[106] The Respondents argue that the emphasis is on the "evidence" that was before the decision-maker as being the foundation for the record on review.

[107] In this case, the Respondents say that there was no evidence before Cabinet. Rather, the Cabinet had the Tribunal Report and the Report and Recommendation. The Report and Recommendation, say the Respondents, is not evidence but advice to Cabinet which it may accept or ignore and relates entirely to the internal deliberations of a decision-maker.

[108] Based on the case law reviewed, I accept, as a general principle, that any document that was before a decision-maker and relied on by it in reaching its decision, should form part of the record on judicial review. I do not accept the distinction, advanced by the Respondents, that the Report and Recommendation was not evidence before Cabinet, and on that basis alone, should not be ordered to be produced.

[109] I now turn to a review of the other bases on which the Respondents say the Report and Recommendation should not form part of the Record.

1. Deliberative Secrecy

[110] As noted above, the Respondents say that the Report and Recommendation is protected from disclosure, whether it is characterized as deliberative secrecy or as advice to Cabinet.

[111] Sara Blake in Administrative Law in Canada (5th ed. Lexis Nexis 2011) states that the case law establishes that the record on judicial review does not include (p. 202):

> The record does not include...documents protected by deliberative secrecy or privilege such as drafts of the tribunal decision, notes made by members of the tribunal, legal opinions given to the tribunal by counsel or other analyses done by tribunal staff to assist the tribunal in its deliberations.
>
> (emphasis added)

[112] The Respondents say that the Applicants had no right to see the Report and Recommendations at the time it was before Cabinet, and should not be so entitled now.

[113] In response, the Applicants say that deliberative secrecy applies to the deliberations of Cabinet – to what is said around the Cabinet table – and that the Report and Recommendation is not a document which chronicles the deliberations of Cabinet members.

[114] The Applicants refer again to the decision of Macaulay J., the *BCSC* Case, where Mr. Reimer's report to Cabinet was admitted into evidence on judicial review. It is noted, however, that Macaulay J.'s analysis in that case primarily is in the context of claimed public interest immunity, which he found did not apply to the document.

[115] I have carefully reviewed the Report and Recommendation which was attached to the Affidavit of Jeannine Lagasse, Secretary to the Executive Council, which was provided to me in a sealed envelope.

[116] Based on my review of the Report and Recommendation, I conclude that it does not chronicle discussions of Cabinet members. It is a report from a senior solicitor to Cabinet. While, as will be reviewed below, I have determined that portions of it constitute legal advice, I find that none of the document is protected from disclosure by operation of the doctrine of deliberative secrecy.

2. Public Interest Immunity

[117] As noted above, the Respondents submit that the Report and Recommendation in its entirety attracts public interest immunity, and that portions of it also attract solicitor-client privilege.

[118] Public interest immunity is a rule of evidence, previously known as Crown privilege. It arises when evidence that is relevant is not admitted into evidence because that would be contrary to the broader public interest.

[119] Hobb, Monahan and Wright in Liability of the Crown, 4th 3d. (Toronto: Thomson Reuters Canada Limited, 2011) explain public interest immunity as follows (p. 114):

> ...[E]vidence that is relevant and otherwise admissible must be excluded if its admission would be injurious to the public interest...[T]here is no hard-and-fact rule as to the kind of injury to the public interest that will support a claim of Crown privilege. It is for the court to which the claim is made to assess the gravity of the risk to the public interest that would be caused by disclosure, and to balance that risk against the risk to the administration of justice that would be

> caused by denial of the evidence to the litigants. Such a balancing process is inherently discretionary.
>
> (emphasis added)

[120] A leading case in Canada on public interest immunity is the decision of the Supreme Court of Canada in *Carey v. The Queen in Right of Ontario*, [1986] 2 S.C.R. 637 (S.C.C.).

[121] The opening paragraphs of the judgment of the Court delivered by LaForest J. neatly summarize the issues before the Court:

> This case involves a conflict between the public interest that a person who asserts a legal claim be afforded access to all information relevant to prove that claim, and the public interest against disclosure of confidential communications of the executive branch of government.
>
> The immediate issue is whether the appellant Carey is entitled to compel production in an action against the Crown in right of Ontario and the other respondents of Cabinet documents in the possession of the executive government of the province which, he contends, would support his claim. In Ontario the issue falls to be decided under common law. (paragraphs 1 and 2)

[122] In *Carey*, a litigant sought to subpoena Cabinet documents as part of a civil action involving the government's investment in a tourist lodge. The Province submitted that disclosure would breach Cabinet confidentiality and thereby inhibit frank discussions of policy during Cabinet meetings.

[123] The particular documents sought to be disclosed were documents that were forwarded to Cabinet and various related committees, or were sent as a result of Cabinet discussions to those committees. The privilege claim was not based on the content of the documents, but on the class of documents to which the Crown argued they belonged.

[124] In his decision, LaForest J. explains the two competing and shifting interests that must be addressed: access to all relevant information for the "fair disposition of the issues", and the need that "certain information regarding governmental activities should not be disclosed in the public interest." (paragraph 22) He stated:

> ...There is...an obvious difference between information relating to national defence and information relating to a purely commercial transaction. On the other side of the equation, the need for disclosure may be more or less compelling having regard to the nature of the litigation (e.g. between a criminal and civil

> proceeding) and the extent to which facts may be proved without resort to information sought to be protected from disclosure. (paragraph 23)

[125] LaForest J. confirms that the level of the decision-making authority is a consideration, but he also finds that the nature of the policy and the contents of the documents to be "even more important." He states at paragraphs 78 and 79:

> The foregoing authorities, and particularly, the *Smallwood* case [*Smallwood v. Sparling*, [1982] 2 S.C.R. 686 (S.C.C.)], 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.
>
> 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 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.
>
> (emphasis added)

[126] On the facts in *Carey*, the claim that the documents sought were protected from disclosure on the basis of public interest immunity was not made out.

[127] The Respondents' counsel distinguishes the facts in *Carey*, which he said arose from "politicians getting involved in a real estate deal" from the facts before the Court in the within case which he says involves a Cabinet document, the Report and Recommendation, which he says is specifically advisory between the Attorney General and her colleagues. The document, he contends, consists of advice from one member of the Governor in Council to the other members to use

in their deliberations on a decision they were statutorily required to make and which also fit within the larger discussion of the Province's fiscal position.

[128] The Applicants respond by saying that the Respondents have not identified, by affidavit evidence, the public interest sought to be protected. They refer to *Carey*, where LaForest J. stated:

> 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. (paragraph 40)

[129] In *Carey* LaForest J. referred to the Federal Court of Appeal's decision in *Goguen v. Gibson*, [1983] 2 F.C. 463 (Fed. C.A.) and noted that

> …the Minister described with as much detail as the nature of the subject matter would allow the precise policy matters sought to be protected from disclosure. (paragraph 40)

[130] The Affidavit submitted by the Respondents, sworn by the Secretary to the Executive Council, Ms. Jeannine Lagasse, refers to public interest immunity in

paragraph 5 as follows:

> 4. I am informed by Andrew Taillon, counsel for the Respondents, and do verily believe, that the Respondents claim public interest privilege over the entire Report and Recommendation and solicitor-client privilege over portions of the Report and Recommendation.

[131] Counsel for the Respondents says that the harm sought to be protected is implicit – to allow the process to be politicized – which is what he says would happen if the Applicants were allowed to "look into the minds of Cabinet members." He says that what matters is not what was said around the Cabinet table, but what is contained in the government's reasons.

[132] Another leading case in Canada on public interest immunity is *Leeds v. Alberta* (1990), 106 A.R. 105 (Q.B.). Both parties referred to this decision which summarizes the factors relevant to the public interest immunity balancing exercise as established in *Carey*. Prior to setting forth those factors from *Carey*, the Court in *Leeds* made the following comments about the then state of public interest immunity jurisprudence:

> …the clear trend in Canada is towards the concept of extensive disclosure of Crown documents to assist in the fair administration of justice as opposed to any blanket concept of non-disclosure under the rubric of a public interest immunity concept. Since *Smallwood*, our Supreme Court has taken the position "...that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest." This statement by Mr. Justice La Forest at p. 186 of *Carey* clearly rejected the virtual automatic immunity granted such documents under earlier British decisions.
>
> This general trend towards full disclosure has been even more evident in Canadian court decisions when the Crown is a party to the litigation and has a direct interest in seeking immunity to perhaps bolster its position in the litigation. The reasoning behind this trend was given by Lord Edmund Davies in the English decision of *Burmah Oil Co. Ltd. v. Bank of England,* [1979] 3 All E.R. 700 (H.L.) when he stated at 720:
>
> > Accordingly, since not only justice itself but the appearance of justice is of considerable importance, the balancing exercise is bound to be affected to some degree where the party objecting to discovery is not a wholly detached observer of events in which it was in no way involved.
>
> …In my opinion, the rationale given by Lord Edmund Davies applies even more forcefully whenever the Crown is an original party to the action. As a defendant in the case at Bar, the Crown's interest in the outcome of litigation is both obvious and undeniable. Any claim by the Crown that it should not be subject to full discovery by the opposing party must therefore be carefully scrutinized. As a party, the Crown is subject to "...the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions" unless an overriding public interest is established: Rand, J. at page 482 of *R. v. Snider, supra*. (paras. 23-24)
>
> (emphasis added)

[133] At paragraph 25 in *Leeds*, Miller A.C.J.Q.B. sets out the relevant factors that must be examined by a court in determining whether government has put forth a proper claim for public interest immunity. These criteria are as follows:

(1) The nature of the policy concerned;

(2) The particular contents of the documents;

(3) The level of the decision making process;

(4) The time when a document or information is to be revealed;

(5) The importance of producing the documents in the administration of justice, with particular consideration to:

a. The importance of the case,

b. The need or desirability of producing the documents to ensure that it can be adequately and fairly represented,

c. The ability to ensure that only the particular facts relating to the case are revealed;

(6) Any allegation of improper conduct by the executive branch towards a citizen.

[134] As noted above, in the *BCSC* Case (paragraph 21) Macaulay J. dealt with the government's argument that the Reimer report, prepared for Cabinet in responding to the tribunal's recommendations, and taken to Cabinet by the Attorney General, was protected from production by operation of public interest immunity.

[135] In determining that public interest immunity did not apply, Macaulay J. (paragraph 21) referred to the decision of the Supreme Court of Canada in *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at paragraph 19 where the Court describes the doctrine:

> 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*. 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*.

[136] After noting that he had applied the *Carey* factors (as summarized in *Leeds*) in determining whether the Reimer report should be disclosed, and noting that he took into account that the Attorney General had not filed an affidavit suggesting that any harm would flow from ordering production of the report, Macaulay J. states:

> [22] For the reasons set out above, I consider the content of the Cabinet submission relevant, although I take into account that it is background information for consideration by the Cabinet in formulating the Response and, ultimately, the resolution that the Attorney General placed before the Legislative Assembly for a vote.
>
> [23] Most important, in my view, in the administration of justice, is the need to produce the document, having regard to the high level of importance to be accorded to the case; the need to ensure, as much as possible, transparency in the process for determining judicial remuneration; and finally, to ensure that all relevant material is available for the purpose of judicial review.
>
> [24] I take into account the ever present need to reinforce public confidence in the independence of the judiciary as a means of safeguarding the respective constitutional positions of the three branches of government and to maintain confidence in the administration of justice. Given the inherently political decisions that are a necessary part of the process of setting judges' remuneration and related matters, confidence requires as much transparency as possible. In *Bodner*, the Supreme Court emphasized the important objective of "an open and transparent process" for determining judicial remuneration and related matters (para. 63). The *PEI Reference* recognized that the executive, or the legislature, as applicable, must be prepared to justify a decision not to accept any recommendation in court if necessary (para. 180). Accordingly, the need for transparency extends here, subject to necessary restraint, to the judicial review process as well. Directing the release of the Cabinet submission assists in achieving that goal.
>
> (emphasis added)

[137] Macaulay J. ordered the Attorney General to produce a copy of the Cabinet submission referred to by Mr. Reimer in his Affidavit.

[138] On appeal to the British Columbia Court of Appeal, Finch C.J.B.C. dealt with the Attorney General's argument, that in addressing the merits of the judicial review, the Court is limited to the government's Response, which is the statement upon which the Legislative Assembly moved to reject some of the commission's recommendations. The Attorney General argued that the government's response conformed to the three-part test set out in *Bodner*.

[139] This is the same argument advanced by the Respondents in the case before this Court, i.e., that the only relevant documents on the judicial review of the OIC are the Tribunal reasons and the OIC.

[140] Finch C.J.B.C. rejected that argument saying that:

> [12] In my view, it is not entirely correct to say, as the Attorney General does, that relevance in this context is to be defined by the statutory scheme. Although the statutory scheme sets the general framework, relevance for the purposes of this judicial review is to be determined by the issues that arise from the petition, and from the Attorney General's response to the petition. The Attorney General supports its response, in part, by the evidence contained in Mr. Reimer's affidavit.

[141] Finch C.J.B.C. notes that the Judges' Association did not object to the admissibility of the affidavits filed in support of the Attorney General's response to the petition. Rather, they sought to test the government's assertions of good faith and commitment to the review process by examining the factual foundations of the Attorney General's position, and ultimately the basis on which the legislature was asked to act. (paragraph 14)

[142] Finch C.J.B.C. concluded that the chambers judge did not err in holding the Cabinet submission to be relevant to the judicial review process stating:

> [15] In my respectful opinion, the position of the Judges' Association is well-founded. This it not a case where the Association has sought disclosure of unknown documentation. The Cabinet submission prepared by Mr. Reimer was put forward as a basis on which the government's response could be supported. It would be artificial to attempt to distinguish between the fact that Mr. Reimer prepared the document for Cabinet, and the content or substance of that document, given that the government appears to have relied on it in developing its response.

[143] With that review of the doctrine of public interest immunity, I conclude that a determination as to whether the Respondents' claim of public interest immunity is made out, requires this Court to consider the factors identified in *Carey*, and summarized in *Leeds*. I will refer to these as the "*Carey* factors."

[144] The first *Carey* factor is "the nature of the policy concerned." The "serious business" referred to by C.J. Lamer in *PEI Reference*, that is, the protection of judicial independence in the context of government's decision to vary the salary recommendation made by the Tribunal, is of the utmost importance. However, nothing in the Report and Recommendation is the kind of sensitive material concerning national security, national defence or diplomatic negotiations referenced by the Court in *Carey*. This criteria favours disclosure.

[145] The second *Carey* factor is the particular contents of the document.

[146] The Report and Recommendation is 13 pages long, with attached Schedules "A to F." It contains the following headings and sub-headings:

[147] The Schedules are as follows:

"A" Tribunal Report
"B" Judicial Salaries Across Canada (chart)
"C" Overview of Legislation – Remuneration Tribunals/Commissions (chart)
"D" Overview of Most Recent Judicial Review Compensation Commission Reports and Government Responses (chart)

"E" Overview of Government Reasons for Rejecting Recommendations and Judicial Review Decisions (chart)

"F" Factors to be considered by Nova Scotia Provincial Judges' Salaries and Benefits Tribunal Section 21E(3), *Provincial Court Act (excerpt from legislation*) with attached "Communications Plan"

[148] The document begins with the following information:

"Title:	Recommendations of Judges' Salaries and Benefits Tribunal (2017 – 2020)
Submitted by:	Honourable Diana Whalen, Minister of Justice and Attorney General
Prepared by:	Tina M. Hall, Team Lead & Senior Solicitor, Department of Justice
Reviewed by:	Greg Penny, Executive Director, Finance and Administration
	Valerie Pottie Bunge, Executive Director, Policy and Information Management
	Michelle Higgins, Executive Director, Court Services
Deputy Minister:	Karen Hudson, Q.C."

[149] The signature of Tina M. Hall appears under the subheading, "Attorney General", beneath the general heading, "Approvals."

[150] It will be evident from my description of the contents of the Report and Recommendation thus far, that I have concluded that large portions of the document attract neither public interest immunity, solicitor-client privilege or amount to Cabinet discussions protected from disclosure by the doctrine of deliberative secrecy.

[151] I will, however, return to the application of the remaining *Carey* factors, after outlining the contents of the Report and Recommendation.

[152] There is a "Summary" at the outset of the document which sets forth the fact that Cabinet is requested to make an Order which accepts, varies or rejects the Tribunal's recommendations. There is a statement that the Cabinet must provide

reasons if it decides to vary or reject any of the Tribunal's recommendations in accordance with the requirements of the *Provincial Court Act*.

[153] The next section, titled, "Legal Authority" sets out the text of sections 21A(1), 21(H(2), 21K(1)-(4) of the *Provincial Court Act*.

[154] The third section of the document is entitled "Current Situation and Purpose for This Request." This section contains two paragraphs. The first states that the Tribunal released its non-binding recommendations in its report dated November 18, 2016, and was received by the Minister on November 25, 2016, with the Report attached as Schedule "A." The second paragraph states that the purpose of the request is to request the Governor in Council to make an Order accepting, varying, or rejecting the Tribunal's recommendations in accordance with the *Provincial Court Act*.

[155] The fourth section of the Report and Recommendation is entitled "Background." The first heading under this section is "The Law" which recites that Section 21A of the *Provincial Court Act* establishes an independent tribunal to recommend the remunerations of Provincial and Family Court Judges and that prior to 2016 the Tribunal's recommendations were binding on Cabinet.

[156] The next paragraph under "The Law" outlines the amendments to the *Provincial Court Act* passed by the Nova Scotia Legislature in the Spring of 2016, including the fact that section 21K of the *Act* authorizes Governor in Council to exercise its discretion to confirm, vary, or reject the Tribunal's recommendations, and that such decision is required to be made "without delay."

[157] The next sub-heading under "Background" is "Governing Principles." Eight, bullet-point principles are set forth which are noted to be "established by the Supreme Court of Canada."

[158] The following sub-heading under "Background" is "Key Arguments Before the Tribunal."

[159] The arguments of the Attorney General and the Judges' Association are summarized.

[160] The next heading under "Background" is "The Tribunal's Recommendations." What follows is a brief description of each Recommendation with reference to Schedule "A", the Tribunal's Report.

[161] The next heading under "Background" is the "Tribunal's Reasons." Each of the five Recommendations made by the Tribunal is expanded upon as are the Tribunal's reasons.

[162] The next main heading is "Key Issue." This section contains a reiteration of the earlier statements that Governor in Council must make an Order accepting, varying or rejecting the Tribunal's recommendations and states that if Governor in Council decides to vary or reject any of the recommendations, it must provide reasons as per the *Provincial Court Act*.

[163] "Jurisdictional Review" is the next main heading. Reference is made to Schedule "B", "Judicial Salaries Across Canada", and to Schedule "C", "Overview of Legislation – Remunerations Tribunals/Commissions."

[164] Reference is made to the current salaries for Provincial Judges in Nova Scotia, Newfoundland and Labrador, Prince Edward Island, New Brunswick and federally-appointed judges.

[165] The next main heading in the document is "Assessment of Alternatives/Risk Assessment/Mitigation."

[166] The content of the Report and Recommendation under the heading "Proposed Action and Timing" refers to the requirement, set out in Subsection 21J(1) of the *Provincial Court Act*, that recommendations made by a Tribunal must take effect on the first day of April immediately following the year in which the Tribunal is appointed, or such later date as recommended by the Tribunal and confirmed or varied by the Governor in Council.

[167] The content beneath the next heading, "Financial Impact", references two sections of the *Finance Act* (Sections 77 and 78), which require certain approvals. There is also reference to whether the funding request is "In-year", i.e. a current year impact which cannot be absorbed in an existing appropriation.

[168] There is a calculation of the financial impact of the Tribunal salary increase and the total new funding required.

[169] There are a number of questions with "yes" and "no" responses relating to possible third party funding, possible impact on a "Revenue Stream" of the Province and whether additional "FTES" are required. A final question under the

heading "Financial Impact" asks for any further comments on the financial impact of the request not covered above. No further comments are provided.

[170] The next heading is "Information Technology." A question is posed as to whether there is a technology component to the request. A "yes" or "no" response is requested.

[171] The next heading is "Government – Wide Implications." There are two sentences under this heading.

[172] The next two sections of the Report and Recommendation, "Consultation" and "Efficiency/Productivity", ask whether Aboriginal consultation is required. The notation "N/A" is written under "Efficiency/Productivity."

[173] The next section of the Report and Recommendation is titled "Legal Implications." I will return to the content under this section after addressing the content under the remaining headings of the document.

[174] Under the heading "Policy Lens" reference is made to the fact that the process whereby the Tribunal makes recommendations is to ensure that the three aspects of constitutionally required judicial independence are maintained.

[175] Under the next heading "Recommendation" there is a statement that an Order acknowledging receipt of the Tribunal Report be made and that Governor in Council may accept, vary or reject the Tribunal's recommendations.

[176] The final section of the Report and Recommendation is titled "Form of Order", and is a formal recitation of the Governor in Council's acknowledgement of receipt of the Tribunal's Report and its Order to accept, vary or reject those recommendations, effective on the date of the Order.

[177] With that general review of the contents of the Report and Recommendation, I turn to the third *Carey* factor, "the level of the decision making process." Clearly, the decision is at a very high level, being a decision of Cabinet. This factor favours non-disclosure.

[178] The fourth *Carey* factor is the timing of the disclosure. This factor favours disclosure. The government has made its decision. This is not a situation where there is a decision pending.

[179] The fifth *Carey* factor is

> the importance of producing the documents in the administration of justice, with particular consideration to the importance of the case, the need or desirability of producing the documents to ensure that it can be adequately and fairly represented and the ability to ensure that only the particular facts relating to the case are revealed.
>
> (emphasis added)

[180] In the *BCSC* Case, Macaulay J stressed the need for disclosure of the Reimer report in terms of the importance of the administration of justice. In *Leeds* (paragraph 32) the Court stated that disclosure may be necessary for a fair determination of the issues and that *Carey* established that a litigant is not required to prove that the documents are of direct assistance to its case, or damaging to the opposing party's case.

[181] This factor favours disclosure. The judicial review of the OIC is highly important and it is imperative that this Court has all relevant material available to it when conducting the judicial review. In the words of Macaulay J., the "need to ensure, as much as possible, transparency in the process for determining judicial remuneration" points to disclosure.

[182] The sixth, and final *Carey* factor is "any allegation of improper conduct by the executive branch towards a citizen." The Court in *Leeds* said the plaintiff's allegations of tortious misconduct on the part of the Crown in that case was sufficient to fall within the factor of improper conduct on government's part.

[183] This factor favours disclosure. If the executive branch of government in this case has engaged in behaviour that is improper, that must be fully canvassed as part of the *Bodner* test.

[184] I conclude, balancing all of the *Carey* factors, that the Report and Recommendation must be produced. Most of the content of the document is background information, much of which is (indirectly) already in the possession of the Applicants. However, there are two important provisos to my decision that the Report and Recommendation must be produced.

3. Solicitor-Client Privilege

[185] The Respondents say that that portion of the Report and Recommendation under the heading, "Legal Implications" is protected from disclosure by operation of solicitor-client privilege. I agree, for reasons which follow.

[186] I also conclude that the content of the document under the heading "Assessment of Alternatives/Risk Assessment/Mitigation" is covered by solicitor-client privilege.

[187] I have carefully reviewed the contents of the "Assessment of Alternatives/Risk Assessment/Mitigation" section of the document. I find that this section of the document contains legal advice from the Attorney General to her colleagues. It is clearly advice to Cabinet, given by a solicitor, setting forth "alternatives", assessing "risk" and addressing "mitigation."

[188] Unlike the Reimer report before Macaulay J. in the *BCSC* Case, which was prepared by a government policy analyst, the Report and Recommendation before this Court was prepared by a solicitor, Tina M. Hall, a senior solicitor with the Department of Justice.

[189] I conclude that all of the information under the heading, "Assessment of Alternatives/Risk Assessment/Mitigation" is protected from disclosure.

[190] As noted previously in this decision, the second section of the Report and Recommendation which I will not order disclosed is the content of the document under the heading "Legal Implications."

[191] The Applicants, of course, do not know what is set forth under this heading. However, they correctly note that not all communications between lawyers and their clients are protected from disclosure by solicitor-client privilege. For example, lawyers may provide strategic and policy advice to clients on matters outside the scope of their legal duties.

[192] The Applicants rely upon *R. v. Campbell*, [1999] 1 S.C.R. 565 (S.C.C.) for the proposition that when government lawyers give policy advice outside the scope of their legal responsibilities, that advice is not protected by privilege.

[193] In *Campbell*, the Court stated at paragraph 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.
>
> (emphasis added)

[194] Relying on *Campbell*, the Applicants also argue that, to the extent the Report and Recommendation contains legal advice, it is open for this Court to find that the Respondents have waived solicitor-client privilege over the document.

[195] In *Campbell*, the legal advice was advice given by the Department of Justice to police concerning the legality of a "reverse-sting" operation involving the police selling hashish to the accused. The police carried out the operation on the basis that it was legal, and the accused was charged with conspiracy to traffic in hashish and possession for the purpose of trafficking.

[196] The investigating RCMP officer testified that he relied on the legal advice in order to make out the argument that the police acted in good faith because they acted on legal advice.

[197] The Supreme Court found that the RCMP waived solicitor-client privilege by placing the investigating officer's good faith in issue, which it said directly called into question the content of the impugned legal advice. In order to analyze the officer's good faith, and that of the RCMP (the client), the advice given had to be considered. The moral content of the officer's illegal act (trafficking in hashish) could not be judged without access to the content of the advice given.

[198] The Applicants say that, similarly, it is necessary to know the legal advice set forth in the Report and Recommendation in order to test the government's position that it acted in good faith in varying the Tribunal's recommendations.

[199] I have considered this argument and have carefully reviewed the content of the document under the heading, "Legal Implications." I am convinced that the content under this heading is protected from disclosure by solicitor-client privilege.

[200] The content under this heading is not the kind of policy advice that government in-house lawyers may provide outside the scope of their legal responsibilities and which may well not attract solicitor-client privilege.

[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*. While their good faith in the totality of the process will come under review by this Court when the merits of the judicial review are heard, I do not conclude that that fact alone, means that legal advice they received must be disclosed.

[202] I conclude that the communications set out under this heading were made in the context of a solicitor-client relationship in the course of providing legal advice and were intended to remain confidential as per the test outlined by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821 (S.C.C.).

b. Summary of Conclusions on Report and Recommendation

[203] I conclude that the Report and Recommendation must be produced by the Respondents and form part of the Record on review, with the exception of the content under the headings "Assessment of Alternatives/Risk Assessment/Mitigation" and "Legal Implications."

[204] Each of the Schedules to the Report and Recommendation, with the exception of Schedule "D", must be disclosed to the Applicants. Although both Schedules "C" and "D" are referred to in the "Legal Implications" section of the document, reference is also made to Schedule "C" under the heading "Jurisdictional Review", a section of the document which I have determined is not protected from disclosure. Accordingly, only Schedule "D" is protected from disclosure. I note that there is no reference to any Schedule in the "Assessment of Alternatives/Risk Assessment/Mitigation" section of the Report and Recommendation.

[205] I also note that included as the second, third, fourth and fifth pages of Schedule "F" is a document entitled "Communications Plan", "advice to Executive Council" dated December 12, 2016, prepared by Peter McLaughlin, Communications Director. Although Schedule "F" is referred to in the Report and Recommendation in paragraphs under the headings, "Key Arguments Before the Tribunal" and "Tribunal's Response", the references are clearly to only the first page of Schedule "F", which sets out sections of the *Provincial Court Act*, and not to the Communications Plan.

[206] I could not find reference elsewhere in the Report and Recommendation to the Communication Plan, and am left to wonder whether it was intended to be a separate schedule to the Report and Recommendation.

[207] Schedule "F" ("Communication Plan") clearly does not constitute legal advice. Nor is it protected from disclosure by the doctrine of public interest immunity. I order that Schedule "F" must be disclosed to the Applicants and shall form part of the Record on review.

VI The Burrill Affidavit

(a) Introduction

[208] The Applicants move for an order that they be permitted to augment the Record on review with the Affidavit of the Honourable Judge James H. Burrill, sworn June 2, 2017. This Affidavit contains 49 paragraphs and attaches 34 exhibits. The Respondents oppose the motion.

[209] The Applicants say that the new evidence in the Burrill Affidavit is general background information relating to the history of the Tribunal process in Nova Scotia and the government's decision to amend the governing legislation shortly after the appointment of the 2017 Tribunal. The new evidence, say the Applicants, also details the hearing process conducted by the 2017 Tribunal including the submissions received by the Tribunal before it issued its Report. Finally, the Applicants say that the new evidence supports their allegation that the government has failed to respect the Tribunal process resulting in the politicization of the setting of judicial remuneration.

[210] The Respondents oppose the motion on the basis that new evidence is not permitted to expand the Record on review, in circumstances where the Respondents have not filed Affidavit evidence. The Applicants say that, in any event, the new evidence is irrelevant to this Court's application of the *Bodner* test. They say that adding the Burrill Affidavit to the Record would augment the *Bodner* test in an impermissible manner. The Respondents ask that the Burrill Affidavit be struck in its entirety pursuant to *Rule* 39.04(1).

[211] The parties' respective positions will be outlined in detail below.

(b) The Law with Respect to the Record on Judicial Review

[212] To state the obvious, a judicial review is not a trial. In general terms, it is not an opportunity to present new evidence that was not before the decision-maker below. However, while Courts once took a fairly strict approach to prohibit the introduction of new affidavit evidence on judicial review, in more recent years

Courts have recognized a number of exceptions to the general rule that new evidence cannot be put before the reviewing Court.

[213] Stratas J.A. of the Federal Court of Appeal in *Association of Universities and Colleges of Canada and The University of Manitoba and The Canadian Copyright Licensing Agency*, 2012 FCA 22 outlines the categories or types of additional evidence that can be permitted on judicial review and states that the list of exceptions is not closed:

> There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:
>
> > (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in determining the issues relevant to the judicial review: (cites omitted). Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider...
> >
> > (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural fairness: e.g. *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 1980 CanLII 1877 (OCA), 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
> >
> > (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, *supra.* (paragraph 20)

[214] Decisions of the Nova Scotia Supreme Court have permitted evidence on judicial review beyond what was before the decision-maker in order to allow an applicant to make out, broadly speaking, an argument of lack of fairness.

[215] Stewart J. in *IMP Group International Inc. v. Nova Scotia (Attorney General)*, 2013 NSSC 332 referred to the general rule that new evidence is usually not considered on judicial review. Her Ladyship also referred to exceptions to the general rule, quoting from Blake in Administrative Law in Canada, 5th 3d., (LexisNexis, 2011) at paragraph 21 of the Court's decision:

> Only material that was considered by the tribunal in coming to its decision is relevant on judicial review because it is not the role of the court to decide the matter anew. The court simply conducts a review of the tribunal decision. For this reason, the only evidence that is admissible before the courts is the record that was before the tribunal. Evidence that was not before the tribunal is not admissible without leave of the court. If the issue to be decided on the application involves a question of law, or concerns the tribunal's statutory authority, the court will refuse leave to file additional evidence. Evidence challenging the wisdom of the decision is not admissible…If the applicant alleges bias, use of statutory power for an improper purpose, fraud on the tribunal, absence of evidence to support a material finding of fact or failure to follow fair procedure, the court may grant leave to file evidence proving these allegations...
>
> (emphasis added)

[216] Stewart J. also reviewed secondary authorities addressing the introduction of new evidence on judicial review at paragraph 22 of the Court's decision:

> [22] In an article on "The Record on Judicial Review" Freya Kristjanson writes that alleged failures of procedural fairness or natural justice, she notes, "may properly be the subject of affidavit evidence where the failure is not visible on the face of the record", and evidence demonstrating such errors "will generally be permitted to form part of the record on judicial review. Key areas of concern are bias and use of statutory powers for an improper purpose". Freya Kristjanson, "The Record on Judicial Review", Adv Q 41:4 (September 2013) 387 at 397.
>
> (emphasis added)
>
> [23] In their text *Judicial Review of Administrative Action in Canada*, (Canvasback: loose-leaf) at s. 6:5300, Brown and Evans comment that "affidavit evidence will only be permitted to supplement the administrative record in limited circumstances, "adding that:
>
> > where the basis for judicial review involves bias or fraud, it will almost always be necessary to have evidence which is not part of the administrative record…On the other hand, where the alleged error is not jurisdictional, nor one of adjudicative or procedural fairness,
> >
> > the applicant will…usually be confined to the record of the tribunal's proceedings, without augmentation.

(emphasis added)

[217] Counsel for the Applicants referred this Court to the decision of Arnold J. in *Sipekne'katik v. Nova Scotia (Minister of Environment)*, 2016 NSSC 260. In that case Arnold J. allowed new evidence on a statutory appeal, which he noted, in the circumstances before him, was "very similar to a judicial review." At paragraph 13 he stated:

> [13] In *Scotian Materials Ltd. v. Nova Scotia (Environment)*, 2016 NSSC 62, Murray J. dealt with an application for fresh evidence on a s. 138 appeal:
>
> > 14 The jurisprudence is clear that where a breach of natural justice is alleged in the grounds, fresh evidence can be admissible to demonstrate a denial of natural justice. Such evidence must be relevant and is admissible for the limited purpose of showing for example a lack of jurisdiction or a denial of natural justice.
> >
> > …
> >
> > 37 In *IMP* at paragraph 46 the court in referring to the case of *Brar v. College of Veterinarians of British Columbia*, 2011 BCSC 215, cited its own decision in *Nechako Environmental Coalition v. British Columbia (Minister of Environment, Lands and Parks)*, [1997] BCJ No. 1790 (SC), stating at para. 46:
> >
> > > [w]here the existence of relevant documents is known, the Court will not deprive itself of access thereto if there is no other bar to their production.
> >
> > (emphasis added)

[218] Arnold J. also referred at paragraph 14 to the decision of the New Brunswick Court of Appeal in *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, quoting from that Court's decision at paragraph 64:

> In my view, affidavit evidence in a case of this nature may be allowed to the extent that it is relevant with respect to an alleged nominate defect causing a loss of jurisdiction such as an allegation that a discretionary decision was made for an improper purpose. No one can seriously suggest that if evidence existed that the discretionary decisions of the Minister in this case were only motivated by partisan politics, rather than by the objects of the legislation, that affidavit evidence to prove it could not be brought before the reviewing judge.
>
> (emphasis added)

[219] The affidavits sought to be admitted in *Sipekne'katik* were relevant to the question of whether the Crown had met its duty to consult with Aboriginal people.

Arnold J. addressed this at paragraphs 28 and 29 of his decision:

> 28 When the honour of the Crown is raised as an issue, the reviewing court requires relevant information in order to determine whether the Minister's decision should be interfered with because the Crown failed to meet its constitutional obligations.
>
> 29 Merely because the honour of the Crown is raised as an issue does not mean that any and all affidavit evidence will be admissible. To be admitted under this exception, the evidence must be relevant to determining whether the honour of the Crown is a real issue, the scope and content of the duty to consult and whether such a duty has been fulfilled. Such evidence is only admissible to assist in determining whether procedural fairness was denied.
>
> (emphasis added)

[220] Based upon this review of the case law, I conclude that, for the purpose of the within judicial review, new affidavit evidence may be permitted to augment the Record if it falls under the general background exception, or what I will call the "fairness exception."

[221] I now turn to the application of the legal principles outlined above to the facts at hand.

(c) Do any of the Exceptions to the general rule apply so as to permit new evidence (Burrill Affidavit) to be included as part of the Record

[222] The issues raised in the Notice of Judicial Review question the government's good faith participation in the Tribunal process of setting judicial compensation. This Court will be called upon to determine whether, as per the *Bodner* test, the process as a whole served the purpose of depoliticizing the setting of judicial remuneration. If there is evidence of politicization, such evidence should and must be admissible.

[223] The within judicial review is not a garden variety review of a decision-maker such as an administrative tribunal. Rather, it is a unique review in the sense that the Court is required to review a Cabinet decision as contained in the OIC. OICs are not routinely subject to judicial review. This judicial review is also unique in that the Cabinet decision, as contained in the OIC, occurred after the

government argued its position before the Tribunal, and that position was rejected by the Tribunal. 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.

[224] The Applicants say that evidence which calls into question the government's commitment to the process, is relevant and admissible. They say that the government cannot exclude evidence of bad faith, by strategically determining not to put forward evidence of good faith. As noted earlier in this decision, the Supreme Court of Canada in *Bodner*, specifically said that the government may submit affidavit evidence on judicial review to show good faith on its part in the Tribunal process.

[225] As noted previously in this decision, the Respondents argue that they did not put forth affidavit evidence on the government's good faith participation in the process, as permitted by *Bodner*. They say that accordingly, the Applicants have no right to put forward affidavit evidence of supposed bad faith.

[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. I find that the Respondents' argument that only evidence of good faith on the part of government can be put forward to supplement the Record on judicial review to be a technical argument, and one without merit based upon the decision in *Bodner*.

[229] I agree with counsel for the Applicants that, to the extent there is evidence that goes to whether the process of setting judicial remuneration has been politicized, it is essential that that evidence be before a reviewing Court. How else can the Court conduct a meaningful review of government's participation in the

"totality of the process" and thereby reach a conclusion as to whether the Tribunal process has been politicized or not?

[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.

[231] In that case, the Court permitted affidavit evidence on judicial review of the government's decision to reject the recommendations of a judicial compensation committee. The process in Manitoba at the time was that the compensation committee issued its report with recommendations on judicial compensation which was then tabled in the Legislature. The Legislature referred the compensation committee's report to a standing committee on legal and legislative affairs. That standing committee considered the report. The practice at the time was that the standing committee would adopt a motion, with reasons, for rejecting or accepting the report. That motion would then be sent back to the Legislature and the Legislature would accept or reject the motion of the standing committee.

[232] As part of the standing committee process, counsel for the Judges' Association was given the opportunity to present. Counsel did so and offered new facts about some key considerations, i.e., the salaries of judges in Nova Scotia, New Brunswick and Saskatchewan, relevant considerations under the *Manitoba Provincial Court Act.* The salaries of the judges in those provinces had been increased after the hearing before the Manitoba compensation committee.

[233] The evidence which Oliphant J. permitted on judicial review of the government's decision (which comprised the standing committee for the purpose of the motion) was set forth in the Affidavit of the Honourable Chief Judge Ken Champagne. That evidence established that the standing committee totally ignored the evidence made available to it by counsel for the Judges' Association. Instead, the standing committee adopted a motion put forth by the Minister of Finance, who sat on the standing committee, rejecting the recommendations of the Tribunal. In fact, Oliphant J. notes that the motion had evidently been prepared in writing before the hearing of the standing committee even occurred.

[234] The "total sham", referred to by Oliphant J., would never have seen the light of day, but for the submission of that new affidavit evidence. Oliphant J. referred to the government's response to the committee report in that case not only as a "total sham", but also "mere window dressing." (paragraph 114)

[235] While the facts known to this Court at this stage are different than those before Oliphant J., the Manitoba case nonetheless illustrates why the kind of evidence the Applicants say should augment the Record, should not be precluded. Whether the evidence in the Burrill Affidavit is persuasive and the weight to be given to it, or parts of it, are matters yet to be decided. However, it would be premature, and would entail a narrow reading of *Bodner*, for this Court to preclude the Applicants from having this evidence before the Court on review.

[236] This Court on review cannot be constrained by simply looking at the government's reasons in the OIC and the Tribunal Report as suggested by the Respondents. Oliphant, J. referred to the government's reasons, on the basis of the evidence before him, as "platitudinous." (paragraph 116) How can a Court know if the government's reasons contain platitudes unless the Applicants are permitted to lead evidence of government conduct? Did the government simply "go through the motions" in rejecting the Tribunal's recommendations? If there is Affidavit evidence that it did, then that should be before a reviewing Court.

[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.

[238] Accordingly, I find that, in principle, new Affidavit evidence may augment the Record on review if it falls within the background or fairness exception.

[239] I now will review the contents of the Burrill Affidavit on a paragraph-by-paragraph basis and determine whether the statements made and the exhibits attached fall within a recognized exception to the introduction of new evidence and are otherwise admissible.

(d) Review of the Contents of Burrill Affidavit

[240] Paragraphs 1 – 3: The Affiant identifies himself, his background as a Provincial Court Judge of Nova Scotia since 2003, his membership in the Nova Scotia Provincial Court Judges' Association and his membership on the compensation committee of the Canadian Association of Provincial Court Judges. The Affiant refers to the purpose of the Association, and says that it is a voluntary association which represents all but one of the judges of the Provincial and Family Court of Nova Scotia.

[241] Paragraphs 1 – 3 constitute background information and are admissible as the "background" exception to new evidence on review.

[242] Paragraphs 4 – 8 of the Affidavit fall beneath the heading "Salary and Benefits Tribunal Process."

[243] Paragraph 4 refers to the Tribunal process as described in subsections 21A through 21M of the *Provincial Court Act*.

[244] Paragraph 5 sets out a limited history of the Tribunal process in Nova Scotia. The Affiant states that the process was established in this Province in 1988, that at that time Tribunals made binding recommendations on only judicial salaries and that Tribunals were conducted and reports were issued in each of 1988, 1990, 1991, 1994, and 1998.

[245] Paragraph 6 refers to *PEI Reference* and the fact that following that decision, the *Provincial Court Act* was amended to allow the Tribunal to make binding recommendations on salary and other benefits (Section 21E of the *Act*).

[246] Paragraph 7 refers to Tribunal reports and binding recommendations under this legislation (until its recent amendment) in each of 1999, 2002, 2005, 2008, 2011, and 2014.

[247] Paragraph 8 provides that prior to 2014, Tribunal recommendations were implemented within about eight (8) to ten (10) weeks of the Tribunal's Report being issued.

[248] I find that paragraphs 4 – 8 constitute evidence which falls within the general background exception and that this evidence is admissible on review.

[249] Paragraphs 9 – 22 fall under the heading "2014 Tribunal."

[250] Paragraphs 9 and 10 describe the establishment of the Tribunal in September 2013, names its members and the experience of each member on one or more previous Tribunals.

[251] Paragraphs 11 and 12 provide that the 2014 Tribunal received written submissions from a number of interested parties and delivered its Report and binding recommendations on September 23, 2014. A copy of the 2014 Tribunal Report is attached as Exhibit "A."

[252] Paragraphs 13 – 15 refer to letters exchanged by the Association's counsel and counsel for the government requesting clarification of recommendations and with respect to possible cost of living increases to the salary increases the Tribunal had recommended. This correspondence is attached as Exhibits "B", "C", and "D."

[253] Paragraph 16 states that the Chair of the 2014 Tribunal wrote to the Attorney General of Nova Scotia on April 8, 2015, in response to the requests for clarification and a Tribunal recommendation relating to pension. The letter from the Chair is attached as Exhibit "E."

[254] At this point, I note that the Applicants' counsel referred this Court to the decision of Savage J. in *Provincial Court Judges' Association of British Columbia (Attorney General v. British Columbia)* 2014 BCSC 336. In that case, Savage J. admitted affidavit evidence on review concerning a prior judicial review process in that case, reasoning that the past process might be relevant in looking at the recent process.

[255] In my view, the contents of paragraphs 9 – 16 are properly characterized as setting forth general background information, possibly relevant in setting the current Tribunal process in context and are admissible on that basis.

[256] Paragraphs 17 and 18 deal with a supposed delay on the part of the government in implementing the recommendations. Attached as Exhibit "F" is correspondence from the Minister of Justice dated October 23, 2015, declining to meet with Judge Burrill, as Chair of the Association's Compensation Committee, with respect to the government's supposed delay in implementing the Tribunal's recommendations.

[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.

[258] Counsel for the Applicants said in closing submissions that these paragraphs were background information, but also go to "government's respect for the process."

[259] The Applicants' position in that regard is made clear in paragraph 19 where there are statements about the Province's engagement in public sector collective bargaining in the fall of 2015, with supposed tentative agreements reached with the

Nova Scotia Teachers Union ("NSTU") and the Nova Scotia General Employees Union ("NSGEU") in mid-November 2015. A copy of two CBC News Nova Scotia articles referring to these tentative agreements are attached as Exhibit "G."

[260] Counsel for the Applicants says that the purpose of including the newspaper articles referred to in paragraph 19 was merely to establish the timing of the public sector bargaining. I note that the content of paragraph 19 suffers from the lack of a source for the information contained therein.

[261] Paragraph 20 refers to a ratification vote held by the NSTU in early December, 2015, with the membership rejecting the tentative agreement. Reference is made to an article from a Nova Scotia Teachers' Union newsletter dated December 2015, which is attached as Exhibit "H." There is also reference to NSGEU delaying its ratification vote and reversing its recommendation that a tentative agreement be accepted, with its members ultimately voting to reject the tentative agreement. A copy of a news article regarding the rejection of the tentative contract is attached as Exhibit "I."

[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.

[263] With respect to the newspaper article and the NSTU newsletter referred to in paragraph 20, counsel for the Applicants submitted that these were being submitted only to fix the timing of public sector bargaining in the context of the implementation of the 2014 Tribunal recommendations.

[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 Applicants' 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.

[267] Paragraph 21 provides information about the government's introduction of the *Public Services Sustainability (2015) Act*. The 2017 Tribunal report references this Bill. This constitutes general background information and is admissible.

[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 comments to the Premier concerning the 2014 Tribunal's recommendations and attaches another news article (Exhibit "J"). With respect to the comments allegedly made by the Premier, counsel for the Applicants says that this 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.

[271] Paragraphs 23 to 49 fall under the heading, "2017 Tribunal."

[272] Paragraph 23 sets forth the date the 2017 Tribunal was established, its members and its mandate. This is background information and is admissible.

[273] Paragraph 24 states that the Finance Minister introduced Bill 174, the *Financial Measurer (2016) Act* on May 3, 2016, which had the effect of removing the binding nature of the Tribunal process. A copy of the Minister's speaking notes are attached as Exhibit "K." This material constitutes background information and is admissible.

[274] Paragraph 25 states that the Association was not consulted with respect to the amendments to the *Provincial Court Act*. This statement is likely of marginal relevance, but I will allow it under the background exception.

[275] Paragraph 26 outlines that the Vice-President of the Canadian Bar Association Nova Scotia Branch, the President of the Canadian Association of

Provincial Court Judges, and counsel for the Association made submissions in opposition to the proposed amendments. Copies of the submissions are attached as Exhibits "L", "M" and "N."

[276] I find that the content of paragraph 26, and each of the attached exhibits, are not relevant evidence on this judicial review. As is stated in paragraph 27 (which is admissible as background information), Bill 174 passed without amendment and received royal assent. The Tribunal rendered its Report under the new regime created by the legislative amendments. It is that process, which this Court must review, and only that process. Whether the kind of information set out in paragraph 26 is relevant and admissible in the Constitutional Challenge is not before this Court at this time.

[277] Paragraph 28 contains admissible background information with respect to public notices of the Tribunal proceedings and the receipt of one submission from a member of the public.

[278] Paragraphs 29, 30 and 31 refer to, and attach as exhibits ("O", "P", "Q", "R", "S" and "T"), submissions and documents provided by the Association and the Minister of Justice and Attorney General to the Tribunal.

[279] Paragraph 32 refers to a Joint Book of documents, in five volumes, provided to the Tribunal. Paragraph 33 attaches as an exhibit ("U") the indices for the first four volumes. Paragraph 34 attaches as an exhibit ("V") the index and selected documents from the fifth volume of the Joint Books.

[280] Earlier in this decision, when I was reviewing *Bodner*, I said that I would return to the issue of submissions provided by government to a judicial compensation tribunal. The Supreme Court said in *Bodner* that the government must engage meaningfully with a tribunal's recommendations on judicial compensation and cannot, in its decision to reject or vary those recommendations, simply reiterate arguments it made before the tribunal, especially when the tribunal clearly considered those arguments and rejected them.

[281] The Respondents suggested that by proposing to admit the submissions made before the Tribunal, that the Applicants are seeking to attack the Tribunal Report and "leap frog back to the Tribunal."

[282] I do not interpret the Applicants' arguments about the submissions being introduced as part of the Record on review, to be a collateral attack on the

Tribunal's reasons. Rather, I accept the Applicants' argument that the submissions are relevant because they relate to the government's participation in the totality of the process. One of the Applicants' grounds for judicial review is that the government's OIC reiterates submissions made to, and substantively addressed by the Tribunal.

[283] I conclude that the submissions (and documentation) provided to the Tribunal should form part of the Record on review. How is this Court to know whether the government has met its duty to engage meaningfully with the Tribunal's reasons, without knowing what arguments were advanced before the Tribunal by the government? Did the government simply reiterate the same submissions it made to the Tribunal in the OIC without taking into account the Tribunal's response to those arguments? In my view, a reviewing Court must have the parties' submissions before it, especially those of the government, in the context of meeting the *Bodner* test.

[284] My decision in this regard is consistent with decisions of other Courts in the context of review of government decisions following a tribunal process to set judicial compensation.

[285] I refer to the trial decision of the New Brunswick Court of Queen's Bench, in *Provincial Court Judges' Association of New Brunswick v. New Brunswick (Minister of Justice)*, 2002 NBBR 156.

[286] Throughout this decision, Boisvert J. refers to the Affidavit of the Honourable Judge Patricia L. Cumming of the New Brunswick Provincial Court which appears to have referred to, and attached as exhibits, the submissions of the government and the Judges' Association (paragraphs 35, 40 – 44, 68 – 69, 71, 78, 87 and 92-9).

[287] In *Manitoba Provincial Judges' Association v. Manitoba*, 2012 MBQB 79 (upheld in 2013 *MBCA* 74) Oliphant J. refers to the Affidavit of The Honourable Chief Judge Ken Champagne of the Provincial Court of Manitoba. The Affidavit attaches the report of the compensation committee (paragraph 16), copies of a motion to members of a Standing Committee and a transcript of the proceedings of the Standing Committee (paragraph 20), evidence in the Affidavit that no government in Canada had ever varied or rejected a recommendation made by a tribunal in order to implement something more generous than what was recommended (paragraph 25) and the government's submissions to the tribunal (paragraphs 98 and 99).

[288] While counsel for the Respondents argues that it appears that the introduction of the evidence described in these cases may not have been contested, I do not base my decision to allow the Affidavit evidence of Judge Burrill to be included in the Record solely on the basis that it has been allowed before other Courts on these kinds of judicial reviews. Rather, the basis for my decision is that this kind of evidence is necessary in order for this Court to conduct the kind of review stipulated by the Supreme Court of Canada in *Bodner*; that is, the Court must look at the government's participation in the totality of the process and at its response to the Tribunal in order to determine whether the process for setting judicial remuneration has been depoliticized.

[289] Accordingly, I find that the information and Exhibits ("O"-"V") found in paragraphs 29, 30, 31, 32, 33 and 34 of the Burrill Affidavit contain relevant and admissible evidence under either the general background exception or the fairness exception.

[290] Paragraph 35 states that the Tribunal conducted an oral hearing on July 28, 2016, that no transcript of the hearing exists and that it was recorded. This evidence is general background information which is relevant and admissible.

[291] Paragraph 36 refers to Exhibit ("V") which is a fiscal brief filed on behalf of the Minister of Justice and prepared in part by the Director of Policy and Fiscal Planning with the Nova Scotia Department of Finance and Treasury Board. Another author of this report is identified. The paragraph goes on to say that prior to the Tribunal hearing, Association counsel submitted questions for the authors to the Minister's counsel and that these questions were answered in writing. The questions and answers are attached as Exhibit "W" and Judge Burrill states that these were also an exhibit before the Tribunal.

[292] For the reasons outlined above, the material in paragraph 36, including Exhibits "V" and "W" is relevant on judicial review because it demonstrates the positions government took before the Tribunal. It is either background information or falls within the fairness exception.

[293] Paragraph 37 states that the Minister made one of the authors of the fiscal report available at the Tribunal hearing for further cross-examination, following which both the Association and the Minister made oral submissions. This evidence is likely of marginal relevance, but I will allow it as it may help inform this reviewing Court on the content of the government's submissions. Accordingly, it falls with the general background exception or the fairness exception.

[294] Paragraphs 38 and 39 set out the fact that the Tribunal Report was issued on November 18, 2016 and that on February 2, 2017 the Governor in Council passed the OIC. All of this is relevant and admissible evidence, although I note that both these documents form part of the Record produced by the Respondents.

[295] Paragraph 40 states that following the issuance of the OIC, the Premier made a number of public statements regarding the change to the non-binding Tribunal process and the Government's decision to reject the recommendations.

[296] Paragraph 41 refers to an interview the Affiant says that the Premier gave to a news outlet on February 14, 2017. The Affiant attributes statements to the Premier concerning why binding arbitration was not being used for judges and concerning the then contract dispute between the government and teachers. The Affiant says that he has reviewed a transcript of the relevant excerpts of the interview, which is attached as Exhibit "X" to his affidavit, and he confirms its accuracy.

[297] Paragraph 42 refers to a media scrum outside of Cabinet on February 9, 2017, with the Affiant saying that the Premier gave reasons for rejecting the Tribunal's salary recommendation. A transcript of the media scrum is attached as an Exhibit "Y" with a statement by the Affiant confirming its accuracy.

[298] With respect to paragraphs 41 and 42, the Applicants' counsel says that despite the Respondents' objections to the content of these paragraphs, they have not identified inaccuracies in the transcripts attached as exhibits. The Applicants say that the statements made by the Premier are not being submitted for the truth of their content, but rather for the fact that they were made. The Respondents' counsel argues that such statements should not be before this Court.

[299] The Respondents argue that by bringing into evidence the government's dealings with broader public sector bargaining, the Applicants are trying to insert themselves into the debate and are thereby themselves politicizing the process.

[300] I do not accept that argument. The government itself made arguments before the Tribunal to the effect that the Tribunal should adhere to what it called the "wage envelope" that it said was permitted by the government's fiscal plan. I refer to the Tribunal Report at paragraph 27:

> ….However, it is important to note that as a general proposition, under the heading "The Constitution of Canada" the Government took the view that the

> Tribunal's approach to the factors should be conducted in the light of the *Public Services Sustainability (2015) Act* (unproclaimed), as that Act has been relevant to agreements with Crown Attorneys, Medical Residents, and Doctors Nova Scotia, and will likely have an impact on teachers and civil servants in bargaining units as well as non-unionized government personnel. The Government's initial Submissions at p. 10 make the following statement:
>
> > Given the critical nature of the wage mandate and the principles supporting it, the Minister will not and cannot advocate for increases to judicial salaries in excess of the fiscal plan, unless one or more of the statutory criteria of Section 21E(3) demands such a position.
> >
> > (emphasis added)

[301] Further, the government's reasons in rejecting the Tribunal's recommendations, as set forth in the OIC, also refer to collective bargaining in the public and private sectors:

> 1 – The Tribunal did not adequately consider the public interest and the submission from the public and reflect such interests and views in the Report addressing "Recommendation 1 – Salaries". The Tribunal found that an approximately 9.5% increase in the salary for Provincial Court Judges over the next three years would be seen as a "*fair and reasonable conclusion*" from the perspective of ordinary Nova Scotians (as concluded at pp. 41 and 42). This conclusion would not accurately reflect the views of reasonable people undertaking a comparison of the increase proposed by the Tribunal to the lower salary and funding increases to be received by other Nova Scotians receiving remuneration out of public funds including, for example, physicians, Crown Attorneys and public sector workers, among others, and compared to trends in private sector wage growth in Nova Scotia…
>
> …
>
> 5.The Tribunal did not properly apply clause 21E(3)(f) of the Act which requires consideration of prevailing economic conditions which includes the current state of public finances in Nova Scotia. The modest surplus currently forecast in the Government's statutorily mandated fiscal plan is dependent on all persons receiving remuneration out of public funds (whether executive, legislative or judicial) receiving salary increases that do not exceed the growth capacity in the fiscal plan. The fiscal plan does not contemplate making a special exception for the wages of Provincial Court Judges. In recommending to the Governor in Council that an exception be made for Provincial Court Judges and deciding the public sector wage mandate reflected in the fiscal plan created under the *Finance Act*, Chapter 2 of the Acts of 2010 (the Finance Act) and the legislation supporting the fiscal plan (including the yet to be proclaimed *Public Services Sustainability Act*, Chapter 34 of the Acts of 2015) is "*not binding on the Tribunal*

> *in any sense*" (p. 41, *emphasis added*) the Tribunal gave no or inadequate consideration to the fiscal needs of Nova Scotians as set out in the fiscal plan. The independent constitutional roles of the legislature and executive with regard to budgeting, raising revenue through taxation and expenditure of public money compels the Governor in Council to vary the salary recommendation of the Tribunal.
>
> (emphasis [underlining only] added)

[302] The content of paragraphs 40, 41 and 42 of the Affidavit is relevant to the Applicants' grounds for judicial review, i.e., that the government in essence treated them like civil servants and determined their remuneration by wrongly acting on the basis of political considerations to sure up its position in ongoing public sector bargaining. As such, generally the content of these paragraphs falls within the fairness exception and is admissible. The statements attributed to the Premier are admitted, not for the truth of their contents, but for the fact that they were said.

[303] However, paragraphs 40, 41 and 42 fail to set forth the basis for the Affiant's statements. Counsel for the Applicants requested that the Affiant be permitted to amend his Affidavit to set forth the basis of his knowledge and belief. I will allow the Affiant to do so. The amended paragraphs should clearly show the basis of Judge Burrill's knowledge and belief. It is not at all clear from the wording of these three paragraphs the basis for the statements made. For example, was Judge Burrill present and heard these statements, or did someone else (and who) so advise him (and if so, when)? If those amendments are made and are satisfactory, I will find that the contents of paragraphs 40, 41 and 42, with attached Exhibits "X" and "Y", to be admissible as falling within the fairness exception.

[304] I make the decision to allow the (if revised) contents of paragraphs 40, 41 and 42 because I accept counsel for the Applicants' argument that such information is critical for this Court's eventual understanding of whether the Tribunal process was politicized. If a reviewing Court in these circumstances can only look at government's reasons to reject or vary a tribunal recommendation and if a Premier then made public statements which distanced the government from those reasons, it would be impossible for the Court to ferret out what was really going on in terms of the government's need to fully and meaningfully engage in the process. Accordingly, with the proviso that the Applicants are free to revise these paragraphs, and if they do so in a matter acceptable to this Court, I consider the paragraphs admissible under the fairness exception to the introduction of new evidence.

[305] Paragraph 43 refers to a letter which the Minister of Justice wrote to the Tribunal on February 2, 2017, enclosing a copy of the OIC and requesting, pursuant to section 21K of the *Provincial Court Act*, that the Tribunal review proposed legislation which would have the effect of ceasing accrual of the public service award for judges. The letter is attached as an Exhibit "Z."

[306] Paragraph 44 refers to the Affiant being advised by counsel to the Association that written submissions were filed with the Tribunal on February 21, 2017 on behalf of each of the Association and the Minister of Justice with respect to the proposed amendment to the legislation (with respect to public service awards for judges), with those submissions attached as Exhibits "AA" and "BB" to the Affidavit.

[307] Paragraph 45 refers to counsel for the Association advising the Affiant that reply submissions were submitted by the Association and the Minister of Justice on the "public service award" issue on February 27, 2017, with copies attached as Exhibits "CC" and "DD."

[308] Paragraph 46 refers to a document issued by the Tribunal titled, "Review and Commentary On A Draft Proposed Amendment to the Public Service Award Regulation Affecting Provincial Judges", a copy of which is attached as Exhibit "EE" to the Affidavit.

[309] Paragraph 47 refers to counsel for the Association advising the Affiant that the Deputy Minister wrote to the Tribunal on March 14, 2017, with a copy of that correspondence attached as Exhibit "FF."

[310] Paragraph 48 refers to a further submission filed by the Association on March 24, 2017, a copy being attached as an Exhibit "GG." The Affiant states that counsel for the Minister of Justice wrote on March 20, 2017 to advise that the Minister did not intend to provide anything further.

[311] Finally, paragraph 49 states that on March 30, 2017 the Tribunal wrote to counsel for the Minister of Justice and the Association, with a copy of that correspondence attached as Exhibit "HH." In this letter, the Tribunal states, in part:

> The Tribunal has concluded that were the Public Service Award Regulation intended to end accrual of Public Service Awards for Provincial Judges to be enacted April 1, 2017 under current circumstances, there would indeed be an adverse impact on the principle of the independence of Provincial Judges which

> would be to the detriment of the public interest. Our reasoning in reaching this conclusion is briefly summarized in the following paragraphs, given the tight timelines under which we are operating.

[312] Counsel for the Applicants says that the significance of the content of paragraphs 43 through 49 lies in the fact that the Tribunal Report, in her submission, accepted the status quo, i.e., that anything that had not been dealt with by the Tribunal would remain, and that included the public service award. In fact, counsel argues that one of the reasons that the government varied the Tribunal's salary recommendation was that it did not take into account the value of the public service award. In those circumstances, she argues, the Minister wrote to the Tribunal, enclosing a copy of the OIC, and asking that the Tribunal look at the proposed legislation, comment on the amendments, and whether the effective date in the proposed regulation (April 1, 2017) could be changed to April 1, 2015. The latter date was the date the government ended (by regulation) accrual for all exempt and non-union employees. Reference is made to public sector employers then being in negotiations to end future accrual of similar awards in cases where they are provided for in collective agreements.

[313] Counsel for the Applicants says that this evidence provides context to its argument that the government did not engage meaningfully and in the manner stipulated by *Bodner* in the Tribunal process. It goes, it is contended, to "respect for the process.

[314] The Respondents argue that the content of paragraphs 43 through 49 is irrelevant to the *Bodner* test and the judicial review this Court must undertake.

[315] I find that the evidence set forth in paragraphs 43 through 49 and Exhibits "Z", "AA", "BB", "CC", "DD", "EE", "FF", "GG" and "HH" are relevant to the Applicants' arguments and is the kind of evidence which may help this Court in determining whether the government's participation in the entirety of the process reflected the kind of good faith and meaningful participation that is the hallmark of the *Bodner* test on review. I allow its admission under the fairness exception to the introduction of new evidence on review.

(e) Summary of Conclusions on Admissibility of Burrill Affidavit

[316] Paragraphs 1 – 3 – relevant and admissible as background information.

[317] Paragraphs 4 – 8 – relevant and admissible as background information.

[318] Paragraphs 9 – 16 and Exhibits “A”, “B”, “C”, “D” and “E” – relevant and admissible as background information.

[319] Paragraphs 17 – 20 and Exhibits “F”, “G”, “H” and “I” – irrelevant and not admissible.

[320] Paragraph 21 – relevant and admissible as background information.

[321] Paragraph 22 – first sentence relevant and admissible as background information. Remainder of paragraph 22 as well as Exhibit “J” contain irrelevant evidence which is not admissible.

[322] Paragraphs 23 – 25 and Exhibit “K” – relevant and admissible as background information.

[323] Paragraph 26 and Exhibits “L”, “M” and “N” – irrelevant and not admissible.

[324] Paragraphs 27 and 28 – relevant and admissible as background information.

[325] Paragraphs 29 – 34 and Exhibits “O”, “P”, “Q”, “R”, “S”, “T”, “U” and “V”– relevant and admissible evidence under either the background exception or the fairness exception.

[326] Paragraph 35 – relevant and admissible under the background exception.

[327] Paragraphs 36 and 37 and Exhibits “V” and “W” – relevant and admissible under either the background exception or the fairness exception.

[328] Paragraphs 38 and 39 – relevant and admissible.

[329] Paragraphs 40, 41 and 42 and Exhibits “X” and “Y”– relevant and admissible (if properly revised) and used for the limited purpose (statements made, not for the truth of their content) under the fairness exception.

[330] Paragraphs 43 through 49 and Exhibits “Z”, “AA”, “BB”, “CC”, “DD”, “EE”, “FF”, “GG” and “HH” – relevant and admissible under the fairness exception.

Conclusions on First Motion

[331] I direct that the Report and Recommendation be produced to the Applicants, with redactions for the entirety of the two sections: (1) "Assessment of Alternatives/Risk Assessment/Mitigation and (2) "Legal Implications." Schedule "D" is also to be redacted. With those redactions, the Report and Recommendation shall be produced to the Applicants and shall form part of the Record on review.

[332] I note that the Applicants sought a declaration that the Respondents failed to comply with *Civil Procedure Rule* 7.09 by not producing a complete copy of the Record. The Respondents' counsel very ably argued serious issues as to what should form the Record in this complex case. I accepted certain of those arguments. It is not appropriate to declare that the Respondents failed to produce the Record in these circumstances, and I decline to do so.

[333] The Applicants are permitted to introduce the Burrill Affidavit, with exhibits, on judicial review, with the exceptions of the paragraphs (and related Exhibits) which I have found to contain irrelevant evidence or inadmissible hearsay. The Applicants may submit a revised Affidavit of Judge Burrill to address the Court's concerns with the content of paragraphs 40, 41 and 42. This revised Affidavit should be filed with the Court and provided to counsel for the Respondents within 30 calendar days of the date of this decision.

VII <u>Second Motion</u> – Should the Judicial Review Motion and the Constitutional Challenge Application be Consolidated or, Alternatively, Heard Together

(a) Introduction

[334] As referred to at the outset of this decision, in addition to seeking judicial review of the OIC, the Applicants also allege in a Notice of Application in Court filed on May 8, 2017 that sections 8-14 of the *Financial Measures Act (2016)* and the affected amended sections of the *Provincial Court Act* are unconstitutional. The Applicants say that, as a result, the OIC is void *ab initio*.

[335] The Applicants filed a motion seeking consolidation of the two proceedings. The Applicants have alternate positions to full consolidation. They seek, alternatively, that the two matters be heard together with the evidence admissible in the judicial review deemed admissible in the Constitutional Challenge (and *vice*

versa). Although not set out in their Notice of Motion, the Applicants requested, before this Court, that in the further alternative, the judicial review be heard first, followed immediately by the Constitutional Challenge with the Record and any evidence admitted on the judicial review deemed admitted in the Constitutional Challenge. The Applicants also request that the two matters be case managed together.

(b) Issues

[336] The Issues are:

1. Should the judicial review be consolidated with the Constitutional Challenge?

2. Alternatively, should the two proceedings be heard:

    a. together with the evidence admissible in the judicial review deemed admissible in the Constitutional Challenge (and *vice versa*);

    or, in the further alternative,

    b. sequentially with the Constitutional Challenge heard immediately after the judicial review and with the Record and any evidence admitted in the judicial review also deemed admitted in the Constitutional Challenge.

(c) The Position of the Parties

[337] The Applicants say that the two proceedings should be consolidated because they arise out of the same facts, the legal arguments are interrelated and a consolidation would be the most just, efficient and cost effective process for the parties and the Court. The Applicants say that the judicial review is a particular and unique form of judicial review which lends itself to be consolidated with the Constitutional Challenge, which is an Application in Court.

[338] The Respondents' primary position in opposing consolidation is that the *Civil Procedures Rules* do not allow for a consolidation of a judicial review with an application in court. In particular, relying upon *Rule* 37.02, the Respondents say that a consolidation may only be ordered by a judge "if the proceedings to be

consolidated are of the same kind." The Respondents say that the two proceedings should not be heard together because they are completely different matters.

[339] The Respondents also say that logically the Constitutional Challenge should be heard first since a successful result for the Applicants would render the judicial review moot because it is the impugned changes to the legislation which allowed the Governor in Council to make the decision which led to the judicial review.

[340] Nor, say the Respondents, should the proceedings be heard sequentially. They say that the Court should render its decision in the Constitutional Challenge before the judicial review is heard so as to maintain the potential for maximum efficiency.

Issue 1: Should the judicial review be consolidated with the Constitutional Challenge?

[341] Before turning to the relevant *Civil Procedure Rules*, it is useful to describe in more detail what the two proceedings are all about.

The Judicial Review

[342] Earlier in this decision, this Court set out the Applicants' grounds for review. These grounds will not be repeated here, although it is useful to review the relief sought.

[343] In the order proposed, the Applicants seek, *inter alia*, a declaration that the Respondents acted contrary to the *Constitution* of Canada and the *Provincial Court Act* and have interfered with the judicial independence of the Applicants. Other relief sought includes an order in the nature of *certiorari* quashing the OIC as it relates to the salary recommendations. The Applicants also seek a declaration that the Report of the Tribunal, including its recommendations with respect to salary "is in full force and effect as of February 2, 2017" and that the Respondents are required to implement the Tribunal's recommendations, including by an order in the nature of *mandamus*.

The Constitutional Challenge – Application in Court

[344] The Application is brought against the Honourable Minister of Justice and Attorney General of Nova Scotia and the Honourable Minister of Finance and Treasury. The Applicants seek a declaration that Sections 8-14 of the *Financial*

Measures (2016) Act (and the affected amended sections of the *Provincial Court Act*, R.S., c. 238, s.1; 1992, c. 16, s.18) violate "the unwritten principles of judicial independence that are contained in the *Constitution Act, 1867*, preamble, and Sections 96 to 100, and sections 2(d) and 11(d) of the *Canadian Charter of Rights and Freedoms*, and are not saved by section 1." They also seek a determination and an order that Sections 8-14 of the *Financial Measures (2016) Act* (and the consequent amendments to the *Provincial Court Act*) are of no force and effect. A further declaration sought is that the OIC is void *ab initio* and that the recommendations set out in the Report of the Tribunal are binding on the Province.

[345] They seek damages pursuant to section 24(1) of the *Charter*.

[346] The grounds for the orders sought are as follows:

1. The applicants, the Judges of the Provincial Court and Family Court of Nova Scotia, all reside in Nova Scotia;

2. The respondents….are obliged, as a matter of constitutional principle, to ensure that any changes to judicial compensation are determined only after recourse to an independent, objective and effective process which achieves the goals of depoliticizing the setting of judicial compensation and protecting judicial independence;

3. Until the 2016 amendments, the *Provincial Court Act* had long provided an effective process for setting judicial compensation. This included that a Provincial Judges' Salary and Benefits Tribunal (the "Tribunal"), appointed every three years, made binding determinations of all aspects of judicial compensation.

4. On May 20, 2016, the *Financial Measures (2016) Act* was passed and received royal assent. It had the effect, in part, of amending various sections of the *Provincial Court Act* to provide that the Tribunal's determinations are no longer binding and permit the Governor in Council to confirm, vary or reject the Tribunal's recommendations.

5. After receiving written and oral submissions from interested parties, the Provincial Judges' Salary and Benefits Tribunal issued its Report on November 18, 2016, setting out its recommendations for judicial compensation for the period April 1, 2017 to March 31, 2020. On

February 2, 2017, the Governor in Council issued Order in Council 2017-24, whereby it confirmed four of the recommendations in the Report but rejected the recommendations for salary increases.

6. The applicants state that, by removing the binding nature of the Tribunal process, the Province no longer provides an effective process for the determination of judicial compensation and has politicized, and/or failed to depoliticize, the setting of judicial compensation.

[347] In their Notice, the Applicants state that they expect to file affidavits from The Honourable Judge John Maher, on the subject of "A history and description of the judicial compensation processes in each of the other jurisdictions across Canada" and from The Honourable Judge James H. Burrill on the subject of "the history of judicial compensation tribunals in Nova Scotia, and the governing legislation."

[348] In its Notice of Contest, the Respondents state that the amendments to the *Provincial Court Act* provide an effective process for the determination of judicial compensation and contest that the changes have politicized and/or failed to depoliticize the setting of judicial compensation. The Respondents also state that "it is lawful and constitutionally permissible for the Governor in Council to confirm, vary, or reject the recommendations of the Provincial Judges Salary and Benefits Tribunal."

Relevant Civil Procedure *Rules* and Law

[349] Civil Procedure *Rule* 37.02 reads as follows:

> **Consolidation of proceedings**
>
> 37.02 A judge may order consolidation of proceedings if the proceedings to be consolidated are of the same kind, that is to say, actions, applications for judicial review, or appeals, and one of the following conditions is met:
>
> (a) a common question of law or fact arises in the proceedings;
>
> (b) a same ground of judicial review or appeal is advanced in the applications for judicial review or appeals and the ground involves the same or similar decision-makers;
>
> (c) claims, grounds, or defences in the actions or applications involve the same transaction, occurrence, or series of transactions or occurrences;

> (d) consolidation is otherwise, in the interests of the parties.
>
> (emphasis added)

[350] The Respondents say that a judicial review proceeding is not "of the same kind" as an application in court. Counsel for the Respondents notes that there is no reported case in Nova Scotia where two different types of proceedings have been consolidated under *Rule* 37.02.

[351] Referring to the decision of Bourgeois J. (as she then was) in *King v. RBC Dominion Securities Inc*., 2012 NSSC 225, the Respondents say that it appears to be taken matter of factly that the matters must be of the same type to be consolidated. In that case Bourgeois J. noted at paragraph 29:

> Turning now to Rule 37.02, given that these matters are all actions, I can proceed to the other considerations as outlined.
>
> (emphasis added)

[352] The Applicants say that the reference in *Rule* 37.02 to proceedings of the "same kind" does not limit the Court's discretion in this case. They say that the *Rule* should be interpreted broadly given the object and purpose of the *Rules* which is for the "just, speedy, and inexpensive determination of every proceeding." (*Rule* 1.01) The Applicants emphasize what they call the "particular and unique circumstances" of the judicial review as determined by the Supreme Court in *Bodner*.

[353] The Applicants point to the decision of Rosinski, J in *Jeffrie v. Hendriksen*, 2011 NSSC 351, as particularizing the factors that should be considered in an application for consolidation. However, this Court notes in that case, the matters sought to be consolidated were two applications, obviously proceedings of the same type within the wording of *Rule* 37.02.

[354] While I agree with the Applicants' submission that multiplicity of proceedings should be avoided, with that principle being set forth in section 41 of the *Judicature Act*, in my view, proceedings should not be consolidated unless the prerequisite of *Rule* 37.02 – that the proceedings "are of the same kind" – is met.

Conclusion on Issue 1

[355] The judicial review and the Constitutional Challenge are proceedings of two different kinds. They cannot be consolidated pursuant to *Civil Procedure*

Rule 37.02. Even though I accept that the judicial review in this case has unique features which are not present in "regular" judicial reviews, the proceeding nonetheless remains a judicial review, governed by the *Rules* and law relating to judicial reviews. It is not an application in court, which is a proceeding governed by different *Rules* and law.

[356] The motion to consolidate the judicial review and the Constitutional Challenge is dismissed.

Issue 2: Should the two proceedings be heard together, or, alternatively, the Judicial Review heard first, followed immediately by the Constitutional Challenge?

[357] The Applicants say that the judicial review should be heard first, immediately followed by the Constitutional Challenge, with the Record and any evidence admitted on the judicial review, deemed admitted in the Constitutional Challenge.

[358] *Civil Procedure Rule* 37.03 is relevant and provides as follows:

> **Proceedings to be tried or heard together**
>
> 37.03 A judge may order that proceedings be tried or heard together, or in sequence.

[359] The Respondents provided this Court with two decisions of the Court which deal with the application of *Rule* 37.03: *Comeau v. Bellam Insurance Services Limited*, 2010 NSSC 404 ("*Bellam*") and *C. (R.) v. Nova Scotia (Attorney General)*, 2016 NSSC 299.

[360] In *Bellam*, the plaintiffs sought what Hood J. called "partial consolidation" of the damages portion of two actions. Because at the time there were no decided cases under the "new" *Civil Procedure Rules* 37.03 and 37.04, Justice Hood considered the law with respect to consolidation under the *1972 Civil Procedure Rules*.

[361] Hood J. referred, in particular, to the decision of Saunders J. (as he then was) in *Stone v. Raniere* (1992), 117 N.S.R. (2d) 194 (T.D.). In that case, Saunders J. set forth factors relevant to a determination of whether consolidation is just and appropriate. Saunders J. referred to the factors set out in the decision of the Prince

Edward Island Supreme Court in *Hillcrest Housing Ltd., Re* (1985), 56 Nfld. & P.E.I.R. 237 (P.E.I.S.C.) which considered a *Rule* identical to Nova Scotia's previous *Rule*. At paragraph 10 of his decision, Saunders J. summarizes the factors from *Hillcrest Housing:*

> (1) the general convenience and expense;
>
> (2) whether a jury notice is involved;
>
> (3) how far the actions have progressed;
>
> (4) whether the plaintiffs have separate solicitors;
>
> (5) actions should not be consolidated where matters relevant in one action have risen subsequent to the commencement of the other, and the actions have proceeded to a considerable extent;
>
> (6) where consolidation is otherwise proper, the fact that on discovery questions would be unobjectionable in one action which might be privileged in the other action is not a sufficient reason for refusing an order consolidating the actions.

[362] Saunders J. also notes that the Court in *Hillcrest* recognized the principle "formulated in a number of cases, being that in order for consolidation to be ordered a decision in one case would dispose of the essential cause of action in the other case." (paragraph 11)

[363] In *C.(R.) v. Nova Scotia (Attorney General)* the plaintiff sought an order directing that two actions in which he was the plaintiff be tried together. Hunt J. referred to the *Hillcrest* factors from *Stone v. Raniere*. He also referred to *Jeffrie v. Hendriksen* where Rosinski J. noted that the risk of inconsistent findings or outcomes is an additional factor demonstrating that matters are intertwined.

[364] Hunt J. also referred to the decision of the Nova Scotia Court of Appeal in *Healy v. Halifax (Regional Municipality)*, 2016 NSCA 47 (N.S.C.A.).

[365] In *Healy*, the Court of Appeal considered *Rule* 37.04 for the first time. Bourgeois J.A. notes that an order issued under *Rule* 37.04 is fundamentally like a

consolidation, albeit a partial one, and that it was accordingly appropriate to consider principles governing the remedy of consolidation. Her Ladyship states at paragraph 35:

> …Although many cases have articulated a series of factors for consideration in a consolidation motion, the overarching consideration has been, and continues to be, what is "just" between the parties. See for example *Stone v. Raniere* (1992), 117 N.S.R. (2d) 194, and the many cases in which it has been followed. Determining what is "just" may be aided by the court considering certain factors, but should not be dictated by a rigid set of criteria. Perhaps what may not be "just" for a total consolidation, may be "just" for the extraction of a common issue.
>
> (emphasis added)

[366] For the reasons which follow, I do not consider it just between the parties to hear the judicial review and the Constitutional Challenge together.

[367] It is true, as the Applicants submit, that some of the evidentiary bases for the proceedings may well be the same. This is particularly the case with respect to certain of the content of the Burrill Affidavit. However, as noted above, the Applicants have indicated an intention to file an additional affidavit as part of the Constitutional Challenge. The content of that affidavit is not before the Court.

[368] To order the two proceedings be heard together would likely result in a motion as to whether, and if so, to what extent, that additional affidavit should be part of the judicial review.

[369] However, the latter point is a small factor in my overall assessment of what is just between the parties.

[370] It makes no logical sense to this Court that the two proceedings should be heard together or consolidated when the hearing of the Application could completely dispose of the judicial review if the Applicants are successful.

[371] Further, the Constitutional Challenge to the legislation, in my view, is a very different procedure and will almost certainly involve a very different evidentiary base, than will be the case on the judicial review, even with the Record on review augmented in the manner I have allowed. The Applicants have not provided the Court with any authority where a court ordered a *Charter* challenge to legislation to be consolidated or heard together with a judicial review.

[372] Turning to the specific *Hillside* factors as adopted by this Court in S*tone v. Raniere:*

General Convenience and Expense

[373] In my view it would be more inconvenient and potentially cause more expense to the parties to intertwine these two proceedings. There are different evidentiary standards in each proceeding. Although I have allowed the Burrill Affidavit to be included in the Record (with redactions and revisions), the fact remains that the Record on judicial review will be substantially more restricted than the likely affidavit evidence before the Court on the Constitutional Challenge. As noted above, an additional affidavit is proposed by the Applicants.

How Far the Actions and Applications Have Progressed To Date

[374] Both matters are in their early stages. This factor is neutral.

Whether the Plaintiffs in Each Case Have Different Solicitors

[375] The Applicants have the same counsel in each proceeding. This factor is also neutral.

A Decision in one Proceeding will Dispose of the Other

[376] A result in one proceeding does not necessarily dispose of the other. If the Applicants are unsuccessful on the Constitutional Challenge, that does not necessarily dispose of the matters they have raised on judicial review. Success on the Constitutional Challenge would, though, completely dispose of the judicial review motion. It would become moot.

[377] Considering all of these factors, I conclude that it is not just and convenient to the parties, nor is it an efficient use of Court and administrative resources to hear the two proceedings together.

[378] The Applicants also argue, in the alternative, that the two proceedings should be heard sequentially, with the judicial review being heard first, and the Constitutional Challenge heard immediately thereafter, with the Record and any evidence in the judicial review deemed admissible on the Constitutional Challenge.

[379] For the reasons already articulated, it makes no logical sense to this Court in terms of convenience and the costs to the parties, not to mention the impact on court resources, for the judicial review to be heard first.

[380] In terms of sequential hearing, it makes sense for the judicial review to be heard after the hearing of the Constitutional Challenge.

Conclusions on Motion to Consolidate or Have the Proceedings Heard Together

[381] The Applicants' motion to consolidate, or alternatively, to have the judicial review and the Constitutional Challenge heard together is dismissed.

[382] I order that the Constitutional Challenge shall be heard and a decision rendered in that matter, prior to the hearing of the judicial review. I decline to order, as argued by the Respondents, that the judicial review should not go ahead until after the expiry of any appeal(s) or appeal periods of the decision in the Constitutional Challenge. That could have the effect, depending on whether there is an appeal to the Nova Scotia Court of Appeal, and possibly a further appeal to the Supreme Court of Canada, of indefinitely staying the motion for judicial review. There was no such motion before this Court.

[383] Despite there being no stay motion before this Court, the practical reality of the effect of this decision, is that this Court will schedule the Constitutional Challenge to be heard first and will render a decision in that proceeding prior to hearing the judicial review motion.

[384] The Applicants also submitted that the two proceedings be case managed together and asked this Court to so order. I decline to make such an Order, but obviously this Court will be available to the parties in terms of addressing any issues arising from the implementation of this decision, the scheduling of the proceedings and such other matters as they may wish to bring to me for resolution.

Costs

[385] Success on both the motions before the Court has been somewhat divided. I will hear the parties on costs if they cannot agree re same within 30 calendar days of this decision.

[386] Finally, I ask Ms. Dawes to prepare a draft form of Order, for Mr. Taillon's review and consent as to form, in light of my decisions on the Motions.