IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)*, 2022 NSSC 93

Date: 20220331
Docket: Hfx No. 461108
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

and

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:	June 23, 24, 2021, in Halifax, Nova Scotia
Final Written Submissions:	Applicants: October 12, 2021 Respondents: October 8, 2021
Counsel:	Susan Dawes and Kristen Worbanski, for the Applicants Jeffrey Waugh and Kevin Kindred, for the Respondents

By the Court:

Introduction

[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" or the "Judges' Association") 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:

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

Background Information

[8] Prior to 2016, recommendations made by a Nova Scotia salary and benefits tribunal concerning judicial compensation were binding upon Government. In September 2013 a Salary and Benefits Tribunal was established to make recommendations for the period April 1, 2014, to March 31, 2017 (the "2014 Tribunal"). On September 23, 2014, the 2014 Tribunal delivered its report and binding recommendations. The Tribunal recommended an annual salary of $231,500 effective April 1, 2014 (up from $222,993), followed by further salary increases in the years 2015-2016 and 2016 and 2017 based on the percentage increase, if any, in the Consumer Price Index for the previous calendar year. The recommendations of the 2014 Tribunal were implemented by the government by Order in Council signed on December 17, 2015.

[9] On December 14, 2015, three days before the 2014 Tribunal recommendations were implemented, the government introduced Bill 148, *The Public Services Sustainability (2015) Act* (the "*PSSA*") which imposed a set wage package for public sector employees of 0%, 0%, 1%, 1.5% and .5%. The Bill received Royal Assent on December 18, 2015, and was proclaimed on August 22, 2017.

[10] The evidence before the Court disclosed that on December 14, 2015, the then Premier of Nova Scotia, the Honourable Stephen McNeil, made statements in an interview aired on the CTV News Atlantic evening news broadcast to the effect that he had no choice but to implement the 2014 Tribunal recommendations, but that he would be considering changing the binding nature of the Tribunal process.

[11] In January 2016 the 2017 Tribunal was established. On May 3, 2016, the Finance Minister introduced Bill 174, *The Financial Measures (2016) Act* which had the effect of amending the *Provincial Court Act* to remove the binding nature of the Tribunal process.

[12] A copy of the speaking notes of the Honourable Randy Delorey, then Minister of Finance and Treasury Board when Bill 174 was tabled, were in evidence before this Court. The speaking notes record, in part:

> The Financial Measures (2016) Act includes amendments to the Provincial Court Act to ensure that the compensation for judges is affordable for Nova Scotians.
>
> Every jurisdiction in Canada has provisions to establish a tribunal to consider compensation for judges.
>
> Nova Scotia, however, is one of only two jurisdictions were recommendations for salary and benefits are fully binding on the government. This is not reasonable.
>
> Our judges do challenging and extraordinary work every day. Nova Scotians value their roles and their commitment; but it is equally important that government maintain control over public finances, especially in challenging economic times.

[13] Bill 174 was passed on May 20, 2016. As a result, the *Provincial Court Act* provided that the Governor in Council could vary or reject the Tribunal's recommendations.

[14] The Tribunal received extensive written submissions from the parties. The Tribunal held a hearing on July 28, 2016, where witnesses were called, including Mr. Ingram, the Director of Policy and Fiscal Planning for the Department of Finance and Treasury Board.

[15] The Tribunal's Report was issued on November 18, 2016.

[16] The Tribunal Report was considered by the Governor-in-Council in February of 2017. Approximately a month before that, the Attorney General provided a Report and Recommendation (the "R & R") to the Executive in Council concerning the Tribunal Report. The R & R was not included in the Record produced by the Government for this review. The Applicants brought a motion for its disclosure. Ultimately the Supreme Court of Canada ordered that two components of the R & R be included in the Record, a section entitled, "Government-wide implications" and a "Communications Plan".

[17] The OIC was produced by the Governor in Council on February 2, 2017. As noted above, the Governor in Council substantially varied the Tribunal's salary recommendation.

The Evidence before the Court

[18] The evidence before the Court consists of the Affidavit of the Honourable Judge Burrill sworn March 23, 2018 (the "Burrill Affidavit") and the Supplemental Affidavit of Judge Burrill sworn December 23, 2020 (the "Supplemental Burrill Affidavit)". Judge Burrill was not cross-examined on his Affidavits.

The Record and the Decision of the Supreme Court of Canada

[19] As noted above, the production of the R & R was the subject of a ruling by the Supreme Court of Canada in 2020. The initial Record filed by the Respondents consisted of the Tribunal Report and the OIC. The OIC referenced the R & R, but it was not included as part of the Record.

[20] In a decision reported at 2018 NSSC 13 (*Nova Scotia Provincial Judges' Association v. Nova Scotia (Attorney General)* this Court allowed, in part, a motion brought by the Judges' Association for disclosure of the R & R. The Judges' Association sought a declaration that the R & R be part of the record on judicial

review under *Civil Procedure Rule* 7.10(a). This Court found that portions of the R & R were protected from disclosure by solicitor-client privilege and that public interest immunity did not prevent disclosure of the rest of the R & R. In particular, this Court ruled that a "Communications Plan" which was an appendix to the R & R should be disclosed. That decision was appealed by the Respondents. The Court of Appeal upheld those portions of this Court's decision dealing with the inclusion of the R & R as part of the Record in a decision reported at 2018 NSCA 83 (*Nova Scotia (Attorney General) v. Judges of the Provincial Court and Family Court of Nova Scotia)*. The Court of Appeal's decision was appealed to the Supreme Court of Canada.

[21] The Supreme Court's decision in that appeal (*Nova Scotia (Attorney General) v. Judges of the Provincial and Family Court of Nova Scotia*, 2020 SCC 21 (*NSPCJA*) along with its decision in a companion appeal, *British Columbia (Attorney General) v. Provincial Court Judges' Association of British Columbia*, 2020 SCC 20 (*BCPCJA*) set out a framework for judicial inspection of a Cabinet document sought to be disclosed pursuant to *Bodner v. Alberta*, 2005 SCC 44 (SCC) ("*Bodner*"). As is discussed later in this decision, a *Bodner* review is a limited form of judicial review of a government's response to a judicial compensation commission's recommendation.

[22] In *BCPJA*, Karakatsanis J., writing for a unanimous Court stated:

> [5] In its judicial independence case law, this Court has consistently sought to strike a balance between several competing constitutional considerations by establishing a unique process for setting judicial remuneration, backed up by a focused, yet robust form of judicial review described in *Bodner* (cite omitted by this Court). In resolving this appeal, the rules of evidence and production must be applied in a manner that reflects the unique features of the limited review described in *Bodner*, and respects both judicial independence and the confidentiality of Cabinet decision making.
>
> [6] For the reasons that follow, where a party seeking *Bodner* review requests that the government produce a document relating to Cabinet deliberations, it must first establish that there is some basis to believe that the document may contain evidence which tends to show that the government failed to meet one of the requirements described in *Bodner*. Only then would the government be required to produce that document for judicial inspection. If the document does in fact provide some evidence which tends to show that the government's response does not comply with the constitutional requirements, the court can then determine whether its production is barred by public interest immunity or another rule of evidence invoked by the government.
>
> [7] Public interest immunity requires a careful balancing between the competing public interest in confidentiality and disclosure. Since there will be a strong public interest in keeping a document concerning Cabinet deliberations confidential, it must be outweighed by a still stronger public interest to warrant the document's disclosure. In the Bodner context, the strength of the public interest in disclosure will often be dependent on the importance of the document to determining the issues before the court in the Bodner review.

[23] In *BCPCJA*, the Supreme Court held that the Judges' Association did not meet the threshold necessary to compel production of a Cabinet document for judicial inspection. The Association did not provide any evidence or point to any circumstances that suggested that the Cabinet submission at issue indicated that the government did not meet the standard required by *Bodner*.

[24] However, in *NSPCJA*, the Supreme Court held that, after applying the *BCPCJA* framework, the Judge's Association had met the threshold to compel production of portions of the R & R.

[25] Writing for a unanimous Court, Karakatsanis J. stated:

> [5] Applying that framework in this appeal, I conclude that there is some basis to believe that the Attorney General's report may contain evidence which tends to show that the government failed to meet a requirement of the *Bodner* test. The public reasons given for the government's decision to depart from the commission's recommended increase in judicial remuneration provide some basis to believe that the government may have relied on improper considerations and may not have respectfully engaged with the commission process.
>
> [6] Having inspected the Attorney General's report, I find that only two components, the discussion of government-wide implications and the communications plan, provide some evidence that the government may have failed to meet the Bodner test. The rest of the report is either protected by solicitor-client privilege or provides not such evidence, and will not form part of the record.
>
> [7] Since the discussion of government-wide implications and the communications plan reflect matters that may have been considered by Cabinet, I turn finally to public interest immunity, and find that the public interest in these parts of the Attorney General's report remaining confidential is outweighed in favour of these parts' continued confidentiality, they are outweighed by their importance to the court's determination of the merits of the application for *Bodner* review.
>
> [8] As a result, only components of the Attorney General's report – the discussion of government-wide implications and the communications plan – should be produced as part of the evidence on Bodner review. That said, these excerpts are merely some evidence for the Supreme Court of Nova Scotia to consider in deciding the merits of the judicial review of the government's response.
>
> [Emphasis added]

[26] Karakatsanis J. noted (para. 36) that the Judges' Association in the within case plead that the government's reasons failed to explain the choice to depart significantly from the Tribunal's recommendation of an 8.9 percent increase in

judicial salary over three years, which aimed to bring judges' salaries more in line with salaries in other provinces and that the government's reasons do not justify its decision to limit the increase to one percent in the last year of the triennial cycle. Also noted by Karakatsanis J. (para. 37) was that the government's reasons:

> …repeatedly criticize the commission process and the recommendations in strong terms. The reasons contend that the commission proceeded in a "results-oriented and formulaic manner to achieve an outcome", adding that there was "no rational basis for its conclusion" (citation omitted). The reasons also criticize the commission's reliance on an "adversarial interest arbitration" model drawn based on collective bargaining, warning that, "as a consequence", "public confidence in the actual and apparent independence, objectivity and effectiveness [of the commission] could be called into question".

[27] After stating that the issue of whether the Government's reasons, in the broader context of this case, supplied some basis to believe that the R & R may contain evidence that tends to show that the Government failed to comply with one of its constitutional requirements in responding to the commission's recommendations, Karakatsanis J. stated (para 41):

> It is open to the respondents to rely on the government's reasons to argue that the government did not take sufficient account of the distinctive nature of judicial office in concluding that judicial salaries should increase only in line with the rest of the public sector. While across-the-board restraints on increases in salaries could be found to be rational, this Court has cautioned that "judicial independence can be threatened by measures which treat judges…identically to other persons paid from the public purse": *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at paras. 158 and 184. Similarly, although this Court accepted in *Bodner* that comparisons with the salaries of civil servants could be appropriate, this Court also warned that the government's response must *always* take into account the distinctive nature of judicial office: *Bodner*, at paras. 26, 75 and 123-26.
>
> [Emphasis that of Karakatsanis, J]

[28] In determining that the R & R does in fact provide some evidence which tends to show that the government's response does not comply with the requirements set out in *Bodner*, Karakatsanis J. referred to the "government-wide implications" section of the R & R where it is acknowledged that the Tribunal's role is unique owing to judicial independence but adds that "any salary increase provided to any group may have impacts on current labour negotiations for Government".

[29] Karakatsanis J also referred to the content of the Communications Plan:

> [51] ….The communications plan does not provide any advice or recommendations, but rather identifies the "communications challenges" that would result from accepting, rejecting or varying the commission's recommendations. It was put before Cabinet for its consideration in determining the government's response to the commission's recommendations. The communications plan sets out the bases on which the decision to accept or vary the commission's recommendations could be criticized, as well as related political considerations.
>
> [52] If the government were to accept the recommendations, the communications plan warns that the salary increase may not be acceptable to the public. The plan cautions that if the government accepts the recommendations, the public may question why the government amended the legislation to make the commission's recommendations non-binding, if the government is not prepared to depart from them. Finally, the plan suggests that public sector unions may use the salary increase to "bolster [their] case for higher wages" because the recommended increase is higher than that for public sector employees more generally.
>
> [53] The communications plan warns that if the government rejects or varies the recommendations, as it ultimately did, the Judges of the Provincial Court and Family Court will likely apply for judicial review. The plan explains that even so, the public will likely see the government as "firm and consistent on finances and wages for individuals supported by taxpayers" and that public sector unions will not be able to use the salary increase in support of their case for higher wages.

[30] Karakatsanis J further explained why she concluded that the communications plan and the "government-wide implications" section of the R & R provided some

basis to support the Judges' Association's contention that the government's response to the Tribunal's recommendations fell short of its constitutional requirements as follows:

> [54] …In particular, the suggestion that if the government accepts the commission's recommendations, it will be criticized for not availing itself of the option given to it by the Nova Scotia legislature to vary or reject the commission's recommendations, is hardly a rational basis for departing from those circumstances. It would undermine the legitimacy of the government's response if Cabinet relied on those considerations. Whether it did so will be a matter for the Supreme Court of Nova Scotia to decide on the merits.
>
> [Emphasis added]

[31] Karakatsanis J. cautioned that the government is owed due deference by a reviewing Court owing to its "unique position and accumulated expertise and its constitutional responsibility for management of the province's financial affairs", quoting from *Bodner* (para. 30). However, she added this *caveat*:

> [56] But it is far from clear that the government can depart from the commission's recommendations simply because it fears that accepting them would have a detrimental impact on public sector labour negotiations. In *Bodner*, at para. 160, this Court described the Quebec government's response to a similar commission's recommendations in these terms:
>
> > After the [commission] submitted its report, the [g]overnment's perspective and focus remained the same. Its position is tainted by a refusal to consider the issues relating to judicial compensation on their merits and a desire to keep them within the general parameters of its public sector labour relations policy. The [g]overnment did not seek to consider what should be the appropriate level of compensation for judges, as its primary concerns were to avoid raising expectations in other parts of the public sector and to safeguard the traditional structure of its pay scales.
>
> [Emphasis added]

[32] Karakatsanis J concluded that public interest immunity did not bar the production of the government-wide implications and communications plan as part of the Record. After stating that several of the factors identified in *Carey v. Ontario*, [1986] 2 S.C.R. 637 weighed in favour of those parts of remaining confidential, she concluded that "the exclusion of these components of the Attorney General's report from the record would impact the reviewing court's ability to determine the merits of the *Bodner* review". (para. 69).

The "Government-Wide Implications" Section of the R & R

[33] The "Government-Wide Implications section of the R & R is brief. It reads as follows:

> The nature of the Tribunal's decision is unique because of the independence of the judiciary as (*sic*) separate branch of government. However, any salary increases provided to any group may have impacts on current labour negotiations for Government.
>
> [Emphasis added]

The "Communications Plan" Section of the R & R

[34] The "Communications Plan" is a three and one-half page document prepared by the Government's Communication Director. It is dated December 12, 2016. This Plan provides, in part, as follows:

> **Narrative**: Judges do challenging and important work every day. They get paid well to do a difficult job. The Supreme Court of Canada has been clear that judicial salaries are not to be tied to other public service salaries and Nova Scotia judges are among the lowest paid in the country. That's why the tribunal recommended a wage increase.
>
> **Background/Context**: Executive Council is being asked to either accept, vary or reject the recommendations of the Provincial Court Judges Salaries and Benefits Tribunal. It is an independent tribunal. The Tribunal recommends a salary increase of 5.5 percent in the first year, followed by increases in the second and third year tied to CPI. The raises, if accepted, would take effect on April 1, 2017 and run through to March 31, 2020.
>
> The Tribunal has set a provincial judge's 2017-18 base salary at $249,021. There are also improvements to pension and health benefits.
>
> The proposed raise recommended by the Tribunal exceeds the public-sector wage settlement plan. There will be a communications challenge if the Governor in Council accepts the recommendation because it exceeds the wage pattern for public sector employees set out by government.

[35] A section of the Communications Plan sets out "Stakeholder/Key Audience Analysis". The "public reaction" stakeholder analysis to accepting the Tribunal's salary recommendation is noted to be "neutral to positive". The following analysis is provided:

> An increase may meet with criticism. Raises will be seen as a large increase by many in the workforce who are not getting raises or do not have pensions.
>
> If government accepts the Tribunal's recommendations, members of the public may wonder why government enacted legislation to control salary increases for judges in the first place.
>
> The public will also question why judges would get a raise if government isn't prepared to negotiate higher salaries with teachers and civil servants.
>
> …
>
> Rejecting or varying the recommendation would be viewed as government being firm and consistent on finances and wages for individuals supported by taxpayers.

[36] The Communication Plans states that the reaction of court workers and other civil servants to the Tribunal Recommendations would be "negative, if Tribunal recommendations are accepted" and "positive, if government varies the recommendation to be in line with public sector wage pattern". The analysis in support of this stakeholder/key audience analysis is as follows:

> Although judges are distinct from other civil servants, their salaries are paid by the taxpayer. Other court workers, who work closely with judges, will not see a raise or a raise that is lower than the judiciary.
>
> The proposed raise for judges exceeds provincial wage settlements or public sector wage settlements.

[Emphasis added]

[37] The possible effect on public sector unions is noted in the Communications Plan to be positive, if the Tribunal recommendations are accepted, but negative or neutral if "government varies the recommendation to be in line with public sector wage pattern". The analysis provided reads as follows:

> Public sector unions are being asked to accept no increase for the first two years of a four year contract, followed by two years with minimal increase below the cost of living.
>
> Government is already involved in challenging labour negotiations with teachers and civil servants and has been clear that the pattern for wage settlements needs to change. The union may use this tribunal decision to bolster its case for higher wages.
>
> If government varies the recommendation to bring it in line with the public sector wage pattern, unions won't be able use it (*sic*) an argument for higher settlement.

[Emphasis added]

[38] Under the heading "Key Messages", the Communications reports sets out "key messages" if the Tribunal's recommendations are rejected, varied or accepted:

> **Key Messages:**
>
> *Recommendation rejected or varied:*
>
> - Judges deserve to be paid well, but the salary increases recommended by the tribunal are simply unaffordable.
> - We respect the independence of the judiciary, but every Nova Scotian receiving a salary paid from the public purse is being asked to accept less. We all have a part to play.
> - Judges do challenging and extraordinary work every day. And they are paid well. They themselves acknowledged to the Tribunal that they were among the 1 per cent of top salary earners in our province.
>
> *Recommendations Accepted:*
>
> - Judges do challenging and important work every day and they are well paid. The Supreme Court of Canada has set the bar high for judicial compensation. They've said judges' salaries can't be tied to other public sector salaries.
> - Government put a strong case forward to the tribunal about what it can afford; but at the end of the day salaries for Nova Scotia judges are still well below the national average. This is part of what the independent Tribunal considered when making its decision.
> - Ultimately, we'd like to set a salary that is affordable and in line with the rest of the public sector, but even with the legislation we put in place, not accepting the tribunal's recommendations will likely be challenged in court at a significant cost to taxpayers.

[39] Under the heading "Issues" "salary increase in a time of restraint", "ongoing labour negotiations" and "ignoring the government's own legislation" are addressed and the following stated:

> **Salary increase in a time of restraint**: In a time of restraint, many Nova Scotians will be critical of significant salary increases for judges. The raise to judges exceeds provincial wage settlement or public sector wage settlements. In the public

> hearing, the judiciary itself acknowledged their members were among the top one per cent of salary earners in the province.
>
> **Ongoing labour negotiations**: Eyes will be on this decision, given that the province is in the middle of labour negotiations with teachers and civil servants. Much of the focus is on government holding to its wage pattern.
>
> **Ignoring the government's own legislation**: This spring, the government passed legislation giving itself authority to accept, vary or reject the recommendations of the Tribunal. This was done because the Tribunal's recommendations were binding on government and the province felt it needed authority to manage finances in a time of restraint. There was also an issue of accountability. The last Tribunal recommended a 3.8 per cent raise, plus CPI for each of the next two years. The government will be open for criticism for enacting legislation to improve its accountability and then refusing to act on its new authority.

[40] The Communications Plan also contains a heading "Links to Government Priorities, Departments and/or Agencies". Under this heading, the following is stated:

> **Links to Government Priorities, Departments, and/or Agencies**: Government is very focused on fiscal responsibility and sustainability. A wage pattern that Nova Scotians can afford is a key part of this and government is in negotiations with teachers and civil servants. The Public Service Commission and negotiations with these groups will be impacted by this decision.

The Burrill Affidavit – Evidence Before the Court

[41] In his Affidavit, sworn March 23, 2018, the Honourable Judge James Burrill, a judge of the Provincial Court of Nova Scotia since his appointment in 2003, said as follows:

> On February 9, 2017, I listened to a radio broadcast on CBC Radio of a media scrum outside of Cabinet and heard the Premier state that the Tribunal's salary recommendation was rejected because the Tribunal had not looked at the totality of judges' compensation, but only at salary.

[42] Judge Burrill goes on to state in his Affidavit that he obtained a copy of an audio recording of the February 9, 2017, media scrum from the Court's Communications Director which was provided to her by a reporter with CBC Nova Scotia. Judge Burrill states that he reviewed a copy of a transcript of the media scrum in question and believes it to accurately reflect the recorded exchange and the statements of the Premier. Counsel for the Respondents did not dispute the accuracy of the transcript. The transcript includes the following exchanges between the Premier and reporters:

> **Jean Laroche (CBC)** – On the judges' pay, normally that's an independent process. But you've, I guess, trumped whatever they wanted. Why?
>
> **Premier** – They looked at one aspect of compensation with salaries. When you look at the entire compensation package for the Judiciary in our province, they are treated fairly. That compensation should reflect the province's ability to pay and it should be in line with every other Nova Scotian when it comes to what they can expect for increases.
>
> **Jean** – But our judges are among the lowest paid in the country?
>
> **Premier** – When you look at salary. But when you look at other compensation packages, that is not the case. You would also look at cost of living in other Canadian cities and it's not the same as it is there. So, if they want to go down, you know, when you look at it as totality of the compensation package, they're being treated fairly.
>
> **Brian Flinn (AIINS)** – Should judges lose their public service award?
>
> **Premier** – They're being treated fairly. As we go through this process, as you know, when we came in, it was all being done at arms-length from government, they weren't being compensated the same as every other jurisdiction. We're not looking at the totality of their investment, they strictly just looked at salary. I believe all of that should be part of that conversation, absolutely.

[43] The transcript also contains the following response of the Premier when asked about the Government's "labour file" and its use by justice department lawyers and possible advice from outside government:

> **Premier** - I've used, when I look at all of these files, it's not unique to any one particular file. When I look at the labour file, I don't look at one specifically, we've looked at the totality of the labour file. I haven't treated judges any differently than I've treated doctors, and I haven't treated doctors any differently than I'm treating teachers, and I haven't treated teachers any differently than I'm treating health-care workers.
>
> **Brian Flynn**- Right, but because there is a tribunal, you would have to look specifically how to proceed with dealing with the tribunal, I would guess? So specific advice on..
>
> **Premier** – The tribunal, we dealt with the tribunal issue, it was binding when we came into power. We made recommendations to say it was not binding and we've moved forward on our recommendation, on our decision.
>
> [Emphasis added]

Issues

[44] The Court identifies the issues for determination as follows:

1. What is the legal test to be applied in reviewing the Government's response to the recommendations of the Tribunal?
2. In applying the legal test:
   (a) Has the Government provided a constitutionally adequate and legitimate reason for varying the Tribunal's recommendations?
   (b) Do the Government's reasons rely on a reasonable factual foundation for varying the Tribunal's salary recommendation?
   (c) Viewed globally, has the Tribunal process been respected and have the purposes of the Tribunal – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?
3. In the event that this Court finds that any of the three issues above is answered in the negative, what remedy should the Court grant?

[45] Before discussing each issue, the Court will review the mandate of the Tribunal, including the statutory factors it must consider when making a recommendation for judicial compensation, the submissions it received from the parties, its report and the Government's reasons for rejecting the Tribunal's salary recommendation.

The Mandate of the Tribunal

[46] The relevant provisions of the *Provincial Court Act* which delineate the duties and mandate of the Tribunal as well as the factors the Tribunal must consider in making recommendations about judicial remuneration are as follows:

> **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.

[47] The *Act* requires that the Tribunal report be forwarded to the Governor in Council, and dealt with as follows:

Duties of Governor in Council

21K (1) Within forty-five days of receipt of the report prepared by a tribunal pursuant to subsection (1) of Section 21E, the Minister shall forward the report to the Governor in Council.

(2) The Governor in Council shall, without delay, confirm, vary or reject each of the recommendations contained in the report referred to in subsection (1).

(3) Upon varying or rejecting the tribunal's recommendations in accordance with subsection (2), the Governor in Council shall provide reasons for so doing to both the tribunal and the Association.

> (4) The Governor in Council shall, without delay, cause the confirmed and varied recommendations to be implemented, and the recommendations have the same force and effect as if enacted by the Legislature once implemented and are in substitution of any existing legislation relating to those matters. 2016, c. 2, s. 9.

The Submissions of the Judges' Association to the Tribunal

[48] The Judge's Association provided lengthy (65 page) submissions to the Tribunal. The Association provided the Tribunal with its analysis of the application of each Section 21E(3) factor. The Summary of its submission to the Tribunal reads as follows:

> Consistent with the Association's position before past tribunals, it is not advocating a specific salary amount. Instead, the Association has provided submissions with respect to each of the factors this Tribunal is required to consider pursuant to Section 21E(3) of the *PCA* (*Provincial Court Act*).
>
> It is the Association's position that a consideration of those factors lead to the inevitable conclusion that the judges of Nova Scotia's Provincial and Family Courts should receive an increase to their existing salaries.
>
> Without limiting the foregoing, important factors in favour of the Association's position are: (1) that Nova Scotia's provincial judges are constitutional (*sic*) barred from negotiating their salaries; (2) that Nova Scotia's provincial judges are statutorily barred from earning income from endeavours outside their office; (3) the need to attract excellent candidates when provincial judges make almost $80,000.00 less than federally appointed judges; and (4) that Nova Scotia's provincial judges are next to the lowest paid provincial judges in the country and their salary for 2015 – 2016 is $21,829 below the national average.
>
> Given the Province's current financial stability coupled with indicators of strong future economic performance, there are no compelling reasons that Nova Scotia's provincial judges should be amongst the lowest paid provincial judges in Canada.
>
> It is respectfully submitted that this Tribunal should set the provincial judges' salaries at a level that will meaningfully recognize the above-noted factors.

The Minister's Submissions to the Tribunal

[49] The Minister of Justice provided lengthy (34 page) submissions to the Tribunal on behalf of the Government, which included the Minister's review of each Section 21E(3) factor. The bottom line of the Minister's position with respect to judicial salaries was that a consideration of the Section 21E(3) factors supported an award consistent with the government's public service wage mandate.

[50] The Minister's conclusion to the government's submissions, state in part, as follows:

> The Minister specifically acknowledges that the Tribunal is not bound by the fiscal plan of the government. It is of course the case that the wage mandate of the government, and the zero percent increases to be levied on most of the public service, is not of particular concern to the Tribunal in and of itself. Neither the fiscal plan nor the wage mandate even carry the status of a relevant factor under the statute. The Minister appreciates that the constitutional obligations to maintain judicial independence remain at all times paramount for the Tribunal. Nonetheless, the Tribunal is to give full consideration to all of the relevant information and arrive at a principled determination of the salary appropriate to Provincial and Family Court Judges for 2017 – 2020. In so doing, the Tribunal cannot ignore the reality of the restraints placed on others in the community served by the Judges, as an indicator of the economic circumstances of the province, as the foundation to the relatively positive fiscal forecast, and as a reflection of the high pedestal upon which Judges presently sit.
>
> ….
>
> The consideration of the constitutional and legislative factors by this Tribunal ensures an independent process which provides crucial support for the independence of our judiciary. The executive cannot and will not summarily dismiss the recommendations made by this Tribunal.
>
> Those recommendations will not be taken lightly, rather the statements and considerations of this Tribunal will be given the serious consideration they are due, aware that this is necessary to support judicial independence. At the end of the day, it is the government who is responsible as stated under the *Finance Act* for prudent fiscal management taking into consideration the impact on Nova Scotia both now and in future years. The recent amendments to the *Provincial Court Act* reflect that

> it is the government who has the responsibility for all expenditures from the public purse, including the payment of judicial salaries. In accordance with the requirements of the *Finance Act*, the decision as to the salaries of the provincial and family court judges will be made transparently to the public, and the government is responsible for the decision.
>
> The Minister has reviewed the factors of Section 21E(3) and the information available to assess the judicial compensation package against the necessary financial security of the judges. It is the Minister's position that while the current salary and benefits arguably satisfy the requirements of judicial independence, an award consistent with the public service wage mandate would be appropriate in all of the circumstances.

The Submissions of the Judges' Association in Reply

[51] In its reply submissions to the Government's submissions, the Judges Association provided the following overview of its response:

> Overview
>
> The purpose of the JCC process, as observed by Chief Justice Lamer in *Bodner*, is to "depoliticize" the relationship between the government and the judiciary by changing the process for determining judicial remuneration.
>
> While the Province's Submission of June 30, 2016, to coin a term, is "talking the talk" by remarking on the Province's engagement and respect for the JCC process, by any substantive measure the Province is not "walking the walk".
>
> Considered at its core, the Province's position before this Tribunal is aimed at carrying out the Province's political agenda to limit public sector wage settlements. Repeatedly, the Province's submission emphasizes its responsibility for the expenditure of public funds and asserts that, in order to maintain the upward trend of the Nova Scotian economy, fiscal restraint of judicial salaries is necessary to ensure the continued improvement.
>
> The Province argues that Nova Scotia provincial judges already earn high incomes and that, in the interest of equity, the judges must be subjected to the same fiscal restraints in determining their financial compensation as it says it intends to apply to the entire public sector. The Government's mandate is framed as doing equity by treating all public sector "employees" in a like manner.
>
> In the Association's view, the Province's position is fundamentally flawed for three reasons which are as follows:

(a) The Province's approach fails to meaningfully examine whether the Nova Scotia provincial judges' salaries are fair and reasonable, as required by the PCA.

(b) The Province's approach attempts to insert a political mandate into what should be a non-political process and is not doing equity by treating all parties equally.

(c) The Province's Submissions does not give due consideration to the state of Nova Scotia's economy.

[52] The Minister also provided further Reply Submissions. In the conclusion to these reply submissions, the Minister states, in part:

> The Tribunal exists as a substitute for collective bargaining or other forms of bargaining but is not to become tantamount to interest arbitration. The intent is to depoliticize the process, not to create a new forum for adversarial wrangling. The process is not for the benefit of the judges nor does it guarantee high salaries or uniformity among judges. The process is not based on historical precedent nor further guestimates. Comparisons to other judicial salaries must take into account the basis for those salaries and the application of any differences. Equity among judges is not the purpose nor goal of the process. Judicial independence should be measured within the community served and comparisons to other jurisdictions do little to evaluate the public perception of the people actually served by the Provincial and Family Courts of Nova Scotia.
>
> Judges are not civil servants. However, within Nova Scotia, public servants represent a substantial proportion of the working public. Information on wage earners in the Province is relevant to the determination of the Tribunal, pertinent to the constitutional law, maintaining the independence of the judiciary, reflective of the unique nature of the position and as a measure of the economy. As employer of civil servants and pay master to public servants, the government will continue to provide relevant information without attempting to equate judges to non-judges.
>
> …
>
> Having considered the factors on their merits, the Minister is left with no discernible objective rationale, from a principled foundation, for a salary increase. Furthermore, as the Association notes at paragraph 15, there is no "magic number" to guarantee judicial independence. The reality is that a salary figure cannot be precisely determined from the myriad factors and the information pertinent to those factors. Accordingly, the Minister is attempting to find the fair and reasonable balance. The Minister does not agree with the Association submissions that fairness, or equity, is to be assessed solely in relation to other judges. In keeping with the wage mandate applicable to thousands of other Nova Scotia citizens, the

> proposed 1% increase, effective April 1, 2019, is put forward as an equitable outcome more in keeping with the constitutional law. This is not based on any concept of "comparators" as one would typically use the term in compensation determinations and negotiations. Rather, it remains an equitable standard applicable in the current circumstances given the population served. The Minister also strenuously reminds the Tribunal that reliance on bare salary figures from other jurisdictions and any kind of averaging approach does not respect the purpose of the process nor the statutory direction of the *Act*. The "magic number" will not appear based on a national average, a Maritime average, an Atlantic average, or any other approach which amounts to tossing numbers into the blender.

The Tribunal Report

[53] The Record before this Court includes the Tribunal's Report. The Report starts with an introduction as to the Tribunal's general mandate, a review of the written and oral submissions it received and the identification of the counsel who represented the Judges' Association and the Government. The Tribunal notes that although the Judges' Association and the Government were in general agreement with respect to the way pension and benefits should be addressed, they were "far apart on the salaries question". The Tribunal then turned to a review of its statutory mandate and the statutory factors it must review in coming to its recommendations on judicial remuneration, as set out in Section 21E(3).

[54] The Tribunal noted that the Section 21E(3) factors provided a "plethora of detail" in aiding it and the parties to focus on the relevant considerations. It noted, however, that factor 21(E)(3)(j) was clearly "very open-ended", i.e., "other such factors as the tribunal considers relevant", and that the factors are not weighted

which it said, "can pull on some issues in different, if not to say conflicting, directions".

[55] The Tribunal saw its task as "arriv[ing] at a sensible, rational balance among the Section 21E(3) factors in relation to every relevant issue – in this context, salaries".

[56] The Tribunal noted that it undertook its task with what it referred to as the following "stern admonitions" of the Supreme Court of Canada in *Bodner* at para. 17:

> "The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position."

[57] The Tribunal Report sets out at length its synopsis of the main submissions of the parties on each Section 21E(3) factor.

[58] The Tribunal's analysis with respect to the Section 21E(3)(a) factor, "the constitutional law of Canada" is as follows:

> The Government acts in relation to this factor within the framework of the division of powers among the branches of the state expanded upon in the immediately preceding paragraph. The Association highlighted judicial comments which incorporated the idea that "the judiciary has developed from a dispute resolution mechanism to a significant social institution with an important constitutional role…". The Tribunal believes that it is worthwhile to emphasize certain aspects of this latter point. Canadian courts, through the mechanisms of constitutional and

> administrative law, have the authority to ensure that legislatures and governments keep within the bounds of their respective spheres of authority. In some countries, this role or function is deemed of such importance that it cannot be entrusted to the ordinary courts of the land, but must be reserved to specialized constitutional courts. In Canada we trust our judges to do this work in the course of ordinary litigation, where an allegation arises that a legislature or a government authority has stepped outside the bounds of its authority. While this role is largely within the powers of superior courts which are clothed by judicature acts with inherent jurisdiction, even provincial courts exercise this rather awesome authority. Thus it is, that a judge in the Provincial Court in this Province is a "court of competent jurisdiction" for purposes of granting remedies under section 24 of the *Charter of Rights and Freedoms* when conducting a criminal trial. That judge, in those seemingly ordinary circumstances, can declare that a peace officer, a correctional officer or any other agent of the government has contravened the *Charter* and must be brought into line with the Constitution. Public servants and civil servants in this country can thus have their actions scrutinized in the ordinary courts to see that they pass constitutional muster. This is an important reason why Canadian judges, including Nova Scotia's Provincial Court judges, are not simply "civil servants", but rather have a special status under the Constitution in the matter of regulating the conduct of public servants, from the very highest to the lowest in the governmental hierarchy. Such considerations are not to be treated lightly as aspects of "the constitutional law of Canada" for purposes of section 21E(3)(a) of the *Provincial Court Act*.
>
> [Emphasis added]

[59] The Tribunal's analyzed the Section 21E(3)(b) factor, "the need to maintain the independence of the judiciary" as follows:

> As mentioned above…the Association rightly stressed the Supreme Court of Canada's observation that "…public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation…". The Government quite correctly did not derogate from this proposition, but perceptively noted that there are both individual and institutional aspects to protecting judicial independence. Both of the parties acknowledged that the current salary level for Nova Scotia Provincial Court judges is not so low as to constitute a real or perceived invitation to bribery or corruption, and the Tribunal is in accord. However, it is to be noted that some Nova Scotia Provincial Court judges have been lured to the Supreme Court of Nova Scotia over the years, and one cannot but be sensitive in this context to the federal provincial salary discrepancy, a topic which will be discussed below.

[60] The Tribunal's analysis with respect to the Section 21E(3)(c) factor, "the need to attract excellent candidates for appointment as judges" is as follows:

> The Association noted that the most recent appointments to the Provincial bench are "…excellent and supremely qualified appointments". The Government apparently agreed through its assertion that the recent provincial appointments "stack up very well" in comparison to newest federal appointees to the Supreme Court of Nova Scotia, and discounted any problem, perceived or real, in relation to the federal-provincial judicial salary gap. The Tribunal would observe in this context that the pool of candidates, as the Association states, is the same for both federal and provincial benches. This pool is well-educated, professionally trained and highly experienced group of legal practitioners. The Government asserted in this context that current Provincial Court judges' salaries put our judges in the top 1% of earners in the Province. But quite frankly, many members of the pool of qualified candidates find themselves in that elite company as well. By national standards, the threshold to enter the top 1% of income earners in Nova Scotia is shockingly low. Thus, the top 1% of income earners as a *negative* benchmark for not raising Provincial Court judges' salaries is not very helpful in relation to the question of whether current salaries will continue to be adequate to attract excellent candidates as one looks forward to the next three years, which are the scope of this Tribunal's mandate.

[61] The Tribunal then turned to the Section 21E(3)(d) factor, the "unique nature of the judges' role":

> In addition to the Tribunal's remarks above concerning the unique constitutional role played by judges as one of the three branches of the modern democratic state, the Tribunal believes it is critical under this rubric to consider what provincial courts actually do on a daily basis in this Province. This analysis, in some considerable measure, overlaps with factor 21E(3)(i), "the nature of the jurisdiction and responsibility of the court". While the Provincial Court has important jurisdiction over some family matters in some parts of the Province, the core of the Provincial Court's responsibilities rest within its role as the primary court for criminal matters throughout the Province. Virtually all criminal matters start in Provincial Court, and with the exception of serious indictable matters […..] most criminal matters are disposed of in Provincial Court. Many criminal matters are within the absolute jurisdiction of Provincial Court [……]. In other words, except in the rare instances of jury trials or an accused's election for a trial judge or a Supreme Court judge sitting alone, the Provincial Court judges are the predominant face of criminal justice for the people of Nova Scotia. It is well known that

> Provincial Court judges are the segment of the judiciary in this Province who are, for the most part, the true criminal law specialists, whose expertise and experience in the field can be relied upon. By comparison, other judges in the Province deal with criminal matters on a more occasional basis. Day in and day out, Provincial Court judges mete out criminal justice and struggle with the question of whether accused persons are guilty or not, and if guilty, what the sentence should be. The liberty and security of the person of significant members of Nova Scotia citizens is in the hands of the Provincial Court on a constant basis. This is unique, and stressful, work.

[62] The Tribunal analyzed the Section 21E(3)(e) factor, that it must consider "…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" as follows:

> […] As noted above, the Association stresses the widening gap between Nova Scotia's Provincial Court judges and federally appointed judges, now in the range of $80,000 – the highest it has ever been. It also notes that Nova Scotia's provincial judges' salaries are more than $26,000 less than the national average which is taken as the normal benchmark for PEI judicial compensation. Moreover, the Association believes that Nova Scotia judges should receive more than New Brunswick judges given the "differences" between the Provinces. The Government's analysis of the "differences" between the provinces under this heading was a considerable interest to the Tribunal, including its observation that "New Brunswick is…a neighbor and ordinarily a comparator for Nova Scotia". This latter proposition was reinforced in the Government's Reply Submissions where the Government took the Association to task for suggesting that the Tribunal should "discard" New Brunswick "purely because their judges are paid the lowest in the country except for Newfoundland [excluding Nova Scotia]. Moreover, the Government references its submissions to the 2014 – 2017 Tribunal where it asserted "…New Brunswick has always been one of the main comparators with Nova Scotia," and concluded after reviewed economic similarities, that "New Brunswick appears to be the only real comparator for Nova Scotia." The Tribunal thinks that there is some merit to these Government submissions in the current context of similarities and differences among comparator jurisdictions, and observes that the current New Brunswick salary is $246,880 (with recommendations for this year currently pending from its judicial salary commission) as compared to Nova Scotia's $236,151. Of course, the full range of

> comparative data for provincial judges across the country is found in Appendix B. The Tribunal's assessment of comparative economic indicators is that Nova Scotia's economy is as prosperous if not more prosperous than that of New Brunswick.

[63] The Tribunal then analyzed the Section 21E(3)(f) factor which requires the Tribunal to consider "…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". The Tribunal noted that this factor "has, somewhat surprisingly, become almost as contentious between the Government and the Association as the 'jurisdictional comparators' starting factor". It stated:

> […] It is interesting to note that starting from the same documents (the Government's Fiscal Brief, Budget projections, private sector analysis, and the like), the Government and the Association paint very different pictures of "prevailing economic conditions" and "the overall state of the economy" – the Association taking a rosier view than the Government, as described above. However, even the Government concludes that the data shows that "[t]he outlook in the short term for Nova Scotia is stable with modest growth". The Fiscal Brief suggests that real GDP growth for 2015 is 0.8% for Nova Scotia, which was the slowest for "non-energy producing" economies but that real GDP growth is forecast for 2016 at 0.9% and for 2017 at 0.8%, while the Province suggests that real GDP growth for 2018 may be 0.9%. Thus, while the prevailing economic conditions and overall state of the economy suggest somewhat sluggish growth, the Tribunal sees stable if modest improvement, which does not necessarily comport with the view that economic conditions must exclude fair and reasonable augmentation of judicial compensation for Nova Scotia's provincial judges, particularly in the light of the more optimistic private sector forecasts mentioned above.

[64] The Tribunal next provided its analysis with respect to the Section 21E(3)(g) factor, "the adequacies of judges' salaries having regard to the cost of living and the growth or decline of real *per capita* income in the Province":

> […] Data quoted from Statistics Canada sources varies slightly, but is in the same ball park. The Government's initial Brief indicates that the legislature's phrase "real *per capita* income" is an amalgam of measures of wealth such as real GDP, GDP *per capita* and average annual earnings. GDP for Nova Scotia was discussed above, but it may be important to point out real GDP in Nova Scotia has varied over the years from 2010 to 2014 (2010 – 2.8%; 2011 – 0.5%; 2012 – 0.9%; 2013 – 0.0%; and 2014 – 0.6%). By contrast, nominal GDP growth was consistently on the plus side (2010 – 5.5%; 2011 – 2.2%; 2012 – 0.5%; 2013 – 2.0%; and 2014 – 1.3%). In addition, real GDP *per capita* rose modestly each year from a start of $37,888 in 2010 to $37,944 in 2014. Finally, the average annual earnings in Nova Scotia in 2015 was $48,307 which is clearly below Provincial Court judges' salaries by a factor of almost 5. Moreover, as the Government pointed out, historically judges' salaries have risen at a rate higher than the rise in *per capita* income. The Tribunal thus accepts this factor alone would not warrant a rise in incomes for Provincial Court judges from current rates.

[65] The Tribunal then considered the Section 21E(3)(h) factor, "the relevant submissions made to the Tribunal". Its analysis of this factor is as follows:

> […] As stated above, the Tribunal has read the written submissions, heard the oral submissions and considered the voluminous accompanying documentation. We have tried to summarize these submissions for each of the "parties" under the relevant headings from section 21E(3) of the *Provincial Court Act*. It will have become apparent that the Government, when making submissions in relation to the relevant headings, made frequent reference to the Government's "wage mandate" of 9%, 0%, 1% and 1.5%/0.5% over four years in dealing with civil and public servants or those "being paid from the purse". It also made fairly frequent reference to the unproclaimed *Public Services Sustainability (2015) Act* which is intended to back up the Government's "wage mandate". The Tribunal makes two observations in relation to this approach adopted by the Government. Firstly, the Supreme Court of Canada and Courts of Appeal across this country have indicated that civil servant salaries, for the most part, are not appropriate comparators in the exercise of setting judicial salaries. The Government formally acknowledged this principle, but nonetheless made consistent reference to civil servant salaries to describe context, background and the like in relation to its wage mandate. This is problematic, because, secondly, the Tribunal is bound to make its recommendations on salaries (and the other issues within its mandate) by considering and balancing the factors found in section 21E(3) of the Provincial Court Act – duly enacted, and insofar as the sections relating to this Tribunal's activities are concerned, proclaimed in force, and therefore binding on the Tribunal. On the other hand, the unproclaimed *Public Services Sustainability (2015) Act*, and the Government's wage mandate, is not binding upon this Tribunal in any sense.

[66] The Tribunal also made specific reference to a written submission filed by a single member of the public, which is discussed further in this decision.

[67] The Tribunal then made its salary recommendation, as summarized above. In doing so, the Tribunal provided this further comment:

> Some comments on the above is necessary. The base rate in the first year has been arrived at by taking the current New Brunswick judges' salary rate (our best comparator jurisdiction given the various similarities and differences among those across the country) and adding an amount equal to 0.9% which is the real GDP growth forecast for Nova Scotia for 2016. The Tribunal sees this latter figure as a proxy for the likely growth in the Province's fiscal capacity for the year and a partial reflection of the rise in the cost of living for the year. This exercise is necessary since the current New Brunswick salary level is subject to assessment by their next compensation commission, which appears to be a year out of synchronization with our Nova Scotia effort. The Tribunal is convinced that this relatively straight-forward approach nonetheless achieves an appropriate balance among all the facts which we must consider under section 21E(3) of the *Provincial Court Act* in light of the submissions we have received. The use of the Consumer Price Index of the previous calendar year to adjust salaries in the two subsequent years, reflects the experience which the current members of the Tribunal have had as members of previous incarnations of the Tribunal. We have experimented in the past with Industrial Aggregate Index (IAI) and with the Consumer Price Index (CPI) for the previous *fiscal* year. Both of these approaches revealed themselves to be problematic for different technical reasons which need not be elaborated upon here. Suffice to say that the CPI for the previous *calendar* year has proved itself a practical and workable means to resolve the question of adjusting judges' salaries because of rises in the cost of living.

The Government's Reasons – the OIC

[68] The Government's reasons (the "Reasons") for departing from the Tribunal's recommendation that Judges' salaries be increased by approximately 9.5% over three years (including a 5.45% increase in the first year) are set out in the OIC.

[69] Reason 1 is as follows:

> 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% increases 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, nor does the Report appropriately reflect the submission from a member of the public received by the Tribunal who expressly stated, "When very large increases in salaries and benefits are given to the upper echelon of society the general public feels helpless…"
>
> [Emphasis added]

[70] Reason 2 provides:

> 2. The Tribunal made a demonstrable error in not considering the entire compensation package of Provincial Court Judges in Nova Scotia, including the value of the retirement bonus known as the Public Service Award. By regulation enacted in 1986, a Public Service Award must be granted to Provincial Court Judges in Nova Scotia upon retirement or earlier in certain circumstances: see *Public Service Award Regulations*, N.S. Reg. 282/86, passed pursuant to the *Act*. The Public Service Award for a judge who has served 26 years currently exceeds $118,000. The payment is to be made on retirement although judges may request a tax-free advance payment after 15 years of service. The Tribunal's omission to consider this retirement payment leads to inconsistency when making comparisons between jurisdictions that pay no such retirement bonus; for example, New Brunswick Provincial Court Judges appointed after April 15, 1970, do not receive a comparable payment or bonus, yet the Tribunal established a recommended salary for 2017 specifically using base salaries of Provincial Court Judges in New Brunswick as the comparator salary;

[71] Reason 3 provides:

3. The Tribunal did not properly apply clause 21E(3)(e) and (f) of the *Act*, and did not adequately consider the *differences between jurisdictions* as required by the *Act*. The Tribunal arrived at its decision in a results-oriented and formulaic manner to achieve an outcome which simply used New Brunswick as the only comparator jurisdiction, which was a significant departure from the same Tribunal's reasoning in their 2014-2017 Report. For the 2014-17 period, New Brunswick was rejected as a comparator jurisdiction. At that time, New Brunswick salary levels were materially lower than Nova Scotia. Specifically, in their report of September 23, 2014, when the New Brunswick salary level for Provincial Court Judges was $204,700, the Tribunal (made up of the same members) ordered a 3.8% increase for Nova Scotia Provincial Court Judges to $231,500 for 2014-15 followed by Consumer Price Index increases for each following year. This put Provincial Court Judges in Nova Scotia $26,800 per year higher than the jurisdiction the Tribunal now finds is the only true comparator for Nova Scotia. The effect and the apparent intent of the Tribunal in the current Report was to accept the submission of the Judges' Association that achieving proximity to the national average salary level is the single most important factor, despite the many other differences between jurisdictions, including total compensation, housing costs, cost of living, pre-appointment income levels and workload. To illustrate the Tribunal's formulaic approach, adopted to move "in proximity to" the perceived national average salary, it is noted the Tribunal has on this occasion selected New Brunswick as the only appropriate comparator (despite the difference in total compensation noted in paragraph 2, above, and that New Brunswick was rejected as a comparator for 2014-17) and then decided to recommend a further increase in the salary level above the New Brunswick level by an additional 0.9% which they said, "…*is the real GDP growth forecast for Nova Scotia for 2016. The Tribunal sees this latter figure as a proxy for the likely growth in the Province's fiscal capacity for the year…*" (p. 42). There is no rational basis for this conclusion; there are many circumstances where a government's fiscal capacity can decline despite real GDP growth, for example where GDP growth is driven by increased government spending or where government has a material prior year adjustment. Hoped-for GDP growth is not a valid proxy for government fiscal capacity nor is it relevant to the analysis called for by clauses 21E(3)(e) and (f) of the *Act*. In fact, GDP growth should have very little relevance to the Tribunal's work, particularly when the Tribunal overlooks in its analysis that GDP per capita in Nova Scotia is approximately $15,000 less than the national average GDP per capita;

[72] Reason 4 provides:

4. In considering if the current salary is sufficient to support recruitment of qualified members of the Nova Scotia Bar as Provincial Court Judges in Nova Scotia, the Tribunal did not identify and consider in the Report any evidence of the current actual income levels of the pool of candidates eligible for appointment as Provincial Court Judges in Nova Scotia. The Tribunal simply concluded, without

evidence of actual income levels whether specific or aggregated, that many were in "*elite company*" (p.35) as part of the top 1% earners in Nova Scotia (p. 35). Actual information about pre-appointment income levels and comparison to the current salary level for provincial court judges is a practical necessity when assessing whether the salary level of provincial court judges in Nova Scotia is sufficient "*to attract excellent candidates for appointment as judges*" as required by clause 21E(3)(c) of the *Act*. The Tribunal did not consider this factor. The Tribunal separately observed that both "parties" agreed that excellent and supremely qualified candidates are currently being attracted to the court (p. 34).

The Tribunal made a further analytical error by concluding: "*But quite frankly, many members of the pool of qualified candidates find themselves in that elite company as well. By national standards, the threshold to enter the top 1% of income earners in Nova Scotia is shockingly low. Thus, the top 1% of income earners as a negative benchmark for not raising Provincial Court judges salaries is not very helpful in relation to the question of whether current salaries will continue to attract excellent candidates as one looks forward to the next three years, which are the scope of this tribunal's mandate"* (p. 35). Concluding the threshold to enter the top 1% of income earners in Nova Scotia is "shockingly low" and then disregarding it as a factor in their assessment is an analytical error. In fact, this supports the view that Provincial Court Judges should not be insulated from the economic realities faced by other Nova Scotians. The Supreme Court of Canada has noted that judicial independence exists "for the benefit of the judged, not the judges". (see para. 4 in *Provincial Court Judges Association v. New Brunswick Minister of Justice et al*, 2005 SCC 44);

[73] Reason 5 is as follows:

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 Act 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.
>
> The Tribunal has erred and/or exceeded its statutory mandate in recommending salary levels increases over the next three years which will exceed amounts available in the fiscal plan as set by the executive and legislative branches of Government pursuant to Sections 5, 11 and 56 of the *Finance Act*. The proposed salary increase set out in Recommendation 1 is excessive in the current circumstances having regard to the prevailing economic conditions of the Province of Nova Scotia and the Tribunal did not give sufficient weight to nor properly analyze and consider the fiscal capacity of the Province.

[74] Reason 6 and other Reasons:

> 6. In carrying out its mandate the Tribunal has made procedural errors (further reasons set out below) which resulted in the Tribunal too closely adopting the procedures of adversarial interest arbitration arising in collective bargaining processes under labour law. The Tribunal should approach their task using the procedures of an independent commission (see for example Section 45A of the *House of Assembly Act*, Chapter 1 of the Acts of 1992). While the Tribunal mentioned the "*primacy of the public interest and the inappropriateness of conceiving of the exercise as private litigation or mere interest arbitration*" (p. 3), objectively assessed it is difficult to distinguish the process used by the Tribunal from "mere interest arbitration". In the specific facts and circumstances of this Tribunal, public confidence in the actual and apparent independence, objectivity and effectiveness of the Tribunal could be called into question by reasonable members of the public as a consequence. Procedural errors may have contributed to the Tribunal's apparent substantive errors set out in paragraphs 1 to 5 above.

[75] With that review of the Tribunal's statutory mandate, a synopsis of the submissions it received, its recommendations to Government and the Government's reasons, the Court turns to the issues for determination.

Issue 1: What is the legal test to be applied in reviewing the Government's response to the recommendations of the Tribunal?

[76] In *NSPCJA,* the Supreme Court of Canada noted that it had set out the constitutional baseline for making changes to judicial compensation in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island,* [1997] 3 S.C.R. 3 ("*PEI Reference*") and that the Nova Scotia *Provincial Court Act* implements that baseline in Nova Scotia. (p. 10).

[77] A review of a government's response to a judicial compensation tribunal's recommendations has the aim of safeguarding judicial independence (*BCPCJA* at para. 27).

[78] In *BCPCJA* the Court referred to *PEI Reference* in confirming that the three core characteristics of judicial independence are security of tenure, financial security and administrative independence. Karakatsanis J explained, with reference to *PEI Reference,* that financial security in turn has three components:

> [31] […] The characteristic at issue in this appeal – financial security – in turn has three components, "which all flow from the constitutional imperative that…the relationship between the judiciary and the other branches of government be depoliticized": para. 131 (emphasis in original).

[79] Again, with reference to *PEI Reference,* Karatkatsanis J. explained in *BCPCJA* that the first component of financial security is the convening of a judicial compensation committee to make recommendations concerning judicial remuneration. The commission charged with making such recommendations must

be independent, effective and objective. (para. 32, referring to *PEI Reference* at para. 133).

[80] The effectiveness requirement means that the commission must be regularly convened, that no changes can be made to remuneration until the commission submits its report and that "the reports of the commission must have a meaningful effect on the determination of judicial salaries" (para. 33, with reference to *PEI Reference* at paras. 174-75 and *Bodner* at para. 29).

[81] To ensure that the commission's recommendations have a meaningful effect, the government must formally respond to the commission's report (*PEI Reference* at 179 and *Bodner* at para. 22).

[82] As explained by Karakatsanis J. in *BCPCJA*, the standard of justification to uphold the government's response is that of "rationality" and the test used to measure the government's response against the standard is deferential:

> [35] To hold a government to its constitutional obligations in jurisdictions where a commission's recommendations are not binding, the government's response to the commission's recommendations is subject to what this Court described in *Bodner* as a "limited form of judicial review": paras. 29 and 42. The standard of justification to uphold the government's response is that of "rationality": *Provincial Judges Reference*, at paras. 183-84; *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 57; *Bodner*, at para. 29. Both the standard of justification and the test used to measure the government's response against the standard are "deferential": *Bodner*, at paras. 30, 40 and 43. Both the fact that the government remains ultimately responsible for setting judicial compensation and the fact that the nature of a *Bodner* review is limited serve to balance the constitutional interests at stake.

[83] In *Bodner*, the Supreme Court of Canada set out a three-part test for determining whether a government's decision to depart from a commission's recommendation meets the rationality standard:

1. Has the government articulated a legitimate reason for departing from the commission's recommendations?
2. Do the government's reasons rely upon a reasonable factual foundation? and
3. Viewed globally, has the commission process been respected and have the purposes of the commission – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

[84] In *Bodner*, the Supreme Court of Canada stated that a commission's recommendations must be given weight. The Court explained what constitutes a "legitimate reason" for departing from a commission's recommendations (paras. 23-24):

> The commission's recommendations must be given weight. They have to be considered by the judiciary and the government. The government's response must be complete, must respond to the recommendations themselves and must not simply reiterate earlier submissions that were made to and substantively addressed by the commission. The emphasis at this stage is on what the commission has recommended.
>
> The response must be tailored to the commission's recommendations and must be "legitimate"…which is what the law, fair dealing and respect for the process require. The government must respond to the commission's recommendations and give legitimate reasons for departing from or varying them.

[85] In terms of whether the government's reasons rely upon a reasonable factual foundation, the Court in *Bodner* said that if a government places different weights on different relevant factors, that difference must be justified, and using public

servants or the private sector as comparators (which may be legitimate) must be explained (para. 26):

> The reasons must also rely upon a reasonable factual foundation. If different weights are given to relevant factors, this difference must be justified. Comparisons with public servants or with the private sector may be legitimate, but the use of a particular comparator must be explained.

[86] In terms of the third step in the *Bodner* review, the Supreme Court in *Bodner* outlined the task of a reviewing court in assessing whether the commission process was respected (para. 38):

> At the third stage, the court must consider the response from a global perspective. Beyond the specific issues, it must weigh the whole of the process and the response in order to determine whether they demonstrate that the government has engaged in a meaningful way with the process of the commission and has given a rational answer to its recommendations. Although it may find fault with certain aspects of the process followed by 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.

[87] *BCPCJA* Karakatsanis, J. confirmed the three-part test in *Bodner* as the appropriate test for a court to apply on judicial review and referred to the Court's description in *Bodner* of the judicial review of a government's response to a commissions' recommendations as being a "limited form of judicial review" (*Bodner*, at paras. 29 and 42). However, Justice Karakatsanis also described that the limited review to be both "focused" and "robust" (para. 5).

[88] Justice Karakatsanis explained the focus of each part of the *Bodner* test, including the "new" third step added after *PEI Reference*:

> [37] Under the first two parts of the test, the focus is on the reasons given by the government for departing from the commission's recommendations: *Bodner*, at paras. 32-33 and 36. The government "must respond to the [commission's] recommendations" by "giv[ing] legitimate reasons for departing from or varying them": paras. 23 and 24. The reasons must "show that the commission's recommendations have been taken into account and must be based on [a reasonable factual foundation] and sound reasoning": paras. 25 and 26. The reasons must also "articulat[e] the grounds for rejection or variation", "reveal a consideration of the judicial office and an intention to deal with it appropriately", "preclude any suggestion of attempting to manipulate the judiciary" and "reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence": para. 25.
>
> [38] The third part of the *Bodner* test looks to whether the government has respected the commission process and, more broadly, whether purposes of that process have been achieved: paras. 30-31, 38 and 43. This new part of the test was added by this Court in an effort to achieve the "unfulfilled" hopes this Court had in the *Provincial Judges Reference* of depoliticizing the process of setting judicial remuneration and thereby preserving judicial independence: paras. 10-12 and 31. The third step in the *Bodner* test requires the court to take a global perspective and ask whether the government demonstrated respect for the judicial office by engaging meaningfully with the commission process: see paras. 25, 31 and 38.

[89] However, Karakatsanis J. stated that the third step in *Bodner* was "not intended to transform the analysis into a probing review of the process through which the government developed its response. The references to "totality" or "whole of the process" in *Bodner* (para. 38) were not "meant to expand the scope of review such that the Cabinet decision-making process must necessarily be scrutinized in every case. (para. 39).

[90] Nor is the third part of the *Bodner* test necessarily limited to consideration of the government's public reasons (*BCPCJA*, at para. 40).

[91] The government cannot "hide behind reasons that conceal an improper or colourable purpose":

> [41] ….The *Provincial Judges Reference* and *Bodner* cannot be interpreted to mean that as long as the government's reasons are facially legitimate and appear grounded in a reasonable factual foundation, the government could provide reasons that were not given in good faith. Indeed, it is implicit in the third part of the *Bodner* test itself, that, presented with evidence that the government's response is rooted in an improper or colourable purpose and has accordingly fallen short of the constitutional benchmark set in this Court's jurisdiction, the reviewing court cannot simply accept the government's formal response without further inquiry.
>
> [Emphasis added]

[92] Indeed, this Court notes that in *Bodner*, the Supreme Court linked the amount of deference owed by a reviewing court to the government's reasons for departing from a commission's recommendations to the government's active participation in the process as a whole:

> At the third stage of the rationality analysis, the government's reasons must be examined globally in order to determine whether the purposes of the commission process have been achieved. The Government's justification for its departure from the Commission's recommendations is unsatisfactory in several respects. However, at this stage, the response must be viewed globally and with deference. From this perspective, the response shows that the Government took the process seriously. In some respects, it had to rely on the representations it had made to the Commission. Thus, the Government has participated actively in the process and it should be shown greater deference than if it had ignored the process.
>
> [Emphasis added]

[93] In *NSPCJA*, Karakatsanis J also had specific comments directed to this Court as the motions Judge conducting the *Bodner* review in light of the content of the "government-wide implications" and the "communications plan" sections of the R & R:

> [70] Some of the considerations mentioned in the discussion of government-wide implications and in the communications plan were not rational or legitimate bases on which to vary or reject the commission's recommendations. If the Supreme Court of Nova Scotia concluded that Cabinet relied on these considerations in reaching its decision, then these documents would tend to show that one or more of the requirements from *Bodner* was not met. The fact that the legislature gave the Lieutenant Governor in Council the power to vary or reject the commission's recommendations is not itself a reason to vary recommendations. Likewise, the impact of accepting a recommendation on labour negotiations is generally not a legitimate basis for varying a recommendation made by a commission: see *Bodner*, at para. 160. The communications plan indicates that the government may have been concerned about the risk of an uninformed public reaction.
>
> [71] Thus, the inclusion of these components of the Attorney General's report in the record would help the reviewing court determine whether the government's response was grounded in an improper purpose and whether the third part of the *Bodner* test, which considers whether commission process has been respected such that the purposes of that process have been achieved, has been met. The exclusion of these parts of the report from the record may leave the reviewing court with an incorrect understanding of the considerations that may have informed the government's response. It may also raise the question of whether the government provided legitimate reasons for departing from the commission's recommendations. I am accordingly of the view that the interests of the administration of justice favour the disclosure the government-wide implications in the Attorney General's report and the communications plan appendix.
>
> [Emphasis added]

Issue 2(a): In applying the legal test, has the Government provided a constitutionally adequate and legitimate reason for varying the Tribunal's recommendations?

Issue 2(b): Do the Government's reasons rely on a reasonable factual foundation for varying the Tribunal's salary recommendation?

Issue 2(c): Viewed globally has the Tribunal process been respected and have the purposes of the Tribunal – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?

[94] I intend to address issues 2(a), 2(b) and 2(c) in the Court's review of the Government reasons.

Reason 1 "The Tribunal did not adequately consider the public interest and the submission from the public and reflect such interest and views in the Report in addressing Recommendation 1 – Salaries"

[95] The Judges' Association argues that Reason 1 is not rational or legitimate. It states that the Government misstated the task of the Tribunal in this reason and failed to meaningfully engage with the Tribunal's reasoning.

[96] The Judges' Association submits that the task of the Tribunal was to recommend appropriate compensation for the Judges considering the objective factors. The Tribunal concluded that an approximate 9.5% increase in the salary for Judges over the next three years would be seen as a "fair and reasonable conclusion" from the perspective of ordinary Nova Scotians.

[97] Reason 1 also states that, "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."

[98] The Judges' Association says that this portion of Reason 1 is simply a bald reiteration of the Government's position before the Tribunal and that comparing judges' remuneration to these other groups is improper.

[99] The reference in Reason 1 to a submission from a member of the public is to a letter the Tribunal received from a single member of the public, Frank Dunham, which is appended to the Tribunal's report as an Appendix.

[100] In its Report, the Tribunal responded directly and substantially to the contents of this letter:

> The Tribunal wishes also to comment on the Submission received from Mr. Frank Dunham, as mentioned above (see Appendix D). The Tribunal is grateful to Mr. Dunham for his willingness to make a thoughtful contribution to the Tribunal's deliberations. Mr. Dunham is, no doubt, the kind of reasonable Nova Scotian "upon whom the Government wishes the Tribunal to rely in making our judgments about what is "fair and reasonable" with respect to recommendations for the setting of judicial salaries. We note that Mr. Dunham states that unless there are additional qualifications required for judges, "…there is no justification for an increase in salaries and benefits beyond the cost of living increase", which of course, is relevant to one of the ten criteria which this Tribunal must consider (section 21E(3)(g) of the *Act*). Mr. Dunham also asserts that "[w]hen very large increases in salaries and benefits are given to the upper echelon of society, the general public feels helpless…and…the wedge between the haves and the have-nots is driven a little deeper". This sentiment, of course, can be seen as relevant to the Supreme Court of Canada's concerns, as expressed in the *PEI Reference*, *supra,* at para. 135, and is a salutary reminder to the Tribunal that perceptions and realities of social and

> economic inequality, should be kept in mind as basic notions in a democracy. We trust that Mr. Dunham may ultimately conclude that the Tribunal's balancing of all the concerns we must take into account, including those he mentions, is reflective of an overall "fair and reasonable conclusion" from the perspective of ordinary Nova Scotians.

[101] The Respondents argue that Reason 1 is not saying that the Tribunal did not consider Mr. Dunham's letter, but rather that the recommendations do not reflect the concerns expressed in the letter. It seems clear to this Court that the Respondents' position is that only way that the Tribunal could have appropriately reflected Mr. Dunham's submission, was to adopt it. However, the *Bodner* test is clear that it is not legitimate for a party to reiterate submissions made to the Tribunal in so far as they were substantially addressed by the Tribunal.

[102] This Court finds that Reason 1 simply reiterates the Government's position before the Tribunal. It is a "bald expression of disagreement" which the Supreme Court of Canada has held is insufficient and therefore not legitimate. (*Bodner,* paras. 25 and 39). Further, it is not rational or legitimate to suggest that the opinion of a single member of the public should override the Tribunal's very careful assessment of each of the objective statutory factors.

Reason 2: ***"The Tribunal made a demonstrable error in not considering the entire compensation package of Provincial Court Judges in Nova Scotia, including the value of the retirement bonus known as the Public Service Award".***

[103] In its Report the Tribunal noted that the Government, in its written submissions, had referred to the proposition from *Bodner* at para. 15 that "the reports of previous commissions and their outcomes form part of the background and context that a new compensation commission should consider". The Tribunal stated:

> 26. […] The Government rightly suggested that as a "jumping off place" for this Tribunal's deliberations …[i]t is important to have as complete a picture as possible regarding the present circumstances of the compensation elements." Government therefore provided a helpful summary of the salary and benefits elements which Nova Scotia Provincial Court Judges currently enjoy.
>
> [Emphasis added]

[104] This "helpful summary" of the elements of the Judges' current compensation, included the Public Service Award.

[105] As is disclosed in the Affidavit of Judge Burrill, on February 2, 2017, counsel for the Minister of Justice wrote to the Tribunal, enclosing a copy of the OIC and requesting that the Tribunal review proposed legislation which would have the effect of ceasing accrual of the Public Service Award for judges. Written submissions were filed with the Tribunal on February 21, 2017, on behalf of each of the Judges' Association and the Minister of Justice with respect to the proposed amendment.

[106] On March 6, 2017, the Tribunal issued its "Review and Commentary on a Draft Proposed Amendment to the Public Service Award Regulation Affecting Provincial Judges".

[107] It is clear from its reasons in this "Review" that the Tribunal was both aware of and considered the Public Service Award as an element of its recommendation for provincial court judges' remuneration. The "Review" states:

> As the Association points out, the existence of the Public Service Award was raised by the Government at four different junctures in its briefs to the Tribunal prior to the oral hearings on July 28, 2016 (at which time counsel for the Minister also raised the Public Service Award in final argument). These, of course were the hearings which resulted in our Report of November 18, 2016. However, in those pre-report arguments, the existence of the Public Service Award was presented by the Government as a reason for *not* increasing the provincial judges' salaries. The Government made *no* argument that the Public Service Awards should be abolished or phased out. (para. 6).
>
> [Emphasis of Tribunal]

[108] The Tribunal's Review concluded that it simply was not in a position to offer precise commentary on whether the Governor in Council should adopt the proposed amendment to the Public Service Award Regulations under the *Provincial Court Act*. It stated:

> It may be that with adequate information and argument, the Tribunal could make a recommendation that the Government do so. However, we are not presently in such a situation. Were we to do so, it would have to be in the context of a full consideration of where the Nova Scotia provincial judges' Public Service Awards sit in the full context of their compensation package, and in the light of the section 21E(3) factors. We are bereft of the factual information required to make such a judgment. While the Government's fiscal plan is a relevant matter to consider under subsections (f), (g), (h) and (j) of section 21E(3) of the Act, it certainly does not trump the other factors in that section. In that regard, it may be appropriate to point out that, contrary to the perception which may have emerged in some quarters, the Tribunal in making its five recommendations in the Report of November 18, 2013 (sic) was very much conscious of the existence of the Public Service Award as an aspect of the overall compensation package for Nova Scotia's provincial judges, and Recommendation 5 on "continuity" was made with that in mind.

[Emphasis of Tribunal]

[109] This Court finds that Reason 2 is not legitimate. The Tribunal clearly considered the Public Service Award in the context of the Judges' overall remuneration. The fact that the Government did not lead evidence before the Tribunal as to jurisdictions which do not pay such a "retirement bonus" cannot be raised now as a reason the Government gives for finding fault with the Tribunal's recommendations.

[110] Another point needs to be made about Reason 2. This relates to the statement that, "[T]he Public Service Award for a judge who has served 26 years currently exceeds $118,000." The Judges' Association submits, and this Court agrees, that this statement is misleading. The figure of $118,000 is the maximum amount that could be accrued, but the evidence before the Tribunal did not show that any judge had actually accrued that amount. The Government's submissions to the Tribunal referred to aggregates of amounts that had been paid out to judges as severance and the range of payment that had been made. It was also acknowledged by the Government before the Tribunal that a portion of the payouts to judges had accrued when the judges were employed with the Government prior to their appointment to the bench.

Reason 3: ***"The Tribunal did not properly apply clause 21(E)3(e) and (f) of the Act, and did not adequately consider the differences between jurisdictions are required by the Act."***

[111] This reason begins by stating that the Tribunal "arrived at its decision in a results-oriented and formulaic manner to achieve an outcome which simply used New Brunswick as the only comparator jurisdiction".

[112] This Court finds that this section of Reason 3 ignores the Tribunal's careful assessment of each statutory factor. Reading the Report as a whole, it is abundantly clear that the Tribunal did not arrive at its decision in either a "results-oriented" or "formulaic manner". Rather, the Tribunal conducted a careful assessment of each statutory factor.

[113] Reason 3 also attacks the Tribunal for using New Brunswick as a comparator when the same panel members had rejected New Brunswick as a comparator in 2014. However, the Government itself argued before the Tribunal for New Brunswick to be a comparator. The Tribunal explicitly addressed why it found that New Brunswick was the best comparator in "the current context":

> Moreover, the Government referenced its submissions to the 2014-2017 Tribunal where at p. 20 it asserted "…New Brunswick has always been one of the main comparators with Nova Scotia, "and concluded after reviewed economic similarities, that "New Brunswick appears to be the only real comparator for Nova Scotia." The Tribunal thinks that there is some merit to these Government submissions in the current context of similarities and differences among comparator jurisdictions, and observes that the current New Brunswick salary is $246,880 (with

> recommendations for this year currently pending from its judicial salary commission) as compared to Nova Scotia's $236,151. Of course, the full range of comparative data for provincial judges across the country is found in Appendix B. The Tribunal's assessment of comparative economic indicators is that Nova Scotia's economy is as prosperous if not more prosperous than that of New Brunswick.

[114] This Court finds that the fact that the 2014 Tribunal rejected New Brunswick as a comparator is not a rational or legitimate reason for the Government to argue in Reason 3 that the 2017 Tribunal erred in identifying New Brunswick as an appropriate comparator in the circumstances before it. Reason 3 goes on to state that "[t]he effect and the apparent intent of the Tribunal in the current Report was to accept the submission of the Judges' Association that achieving proximity to the national average salary level is the single most important factor".

[115] The Judges' Association points out, correctly, that it did not make that submission to the Tribunal. Rather, it submitted that the disparity between Nova Scotia Provincial judges' salary and the national average was an important factor, not the only factor by any means, that it advanced. The Tribunal clearly considered all factors and noted that no one factor was determinative. Nor did the Tribunal state that achieving proximity to the national average as an overriding factor in its Report. This part of Reason 3 does not engage with the Tribunal's Report and respond to its salary recommendation.

[116] Further, as the Judges' Association points out, the salary recommended by the Tribunal cannot be said to achieve proximity with the national average salary. The salary recommended by the Tribunal for 2017/2018 is $11,627 below the national average salary for 2015/2016.

[117] When the Tribunal's reasons are read as a whole, it is clear that the additional 0.9% it recommended above the current New Brunswick judges' salary, factored in both likely growth in fiscal capacity and the rise in the cost of living. The New Brunswick Tribunal process was a year behind that of Nova Scotia. Further, 0.9% was less than the rise in the Consumer Price Index forecast in the Government's Fiscal Brief and by Statistics Canada. Reason 3 concludes with the statement that "GDP growth should have very little relevance to the Tribunal's work, particularly when the Tribunal overlooks in its analysis that GDP per capita in Nova Scotia is approximately $15,000 less than the national average GDP per capita." However, the Tribunal used New Brunswick as a comparator, not the national average.

[118] This Court finds that the Government did not engage in a meaningful way with the Tribunal's reasoning process. Reason 3 is not legitimate and not supported by a reasonable factual foundation.

Reason 4: ***"In considering if the current salary is sufficient to support recruitment of qualified members of the Nova Scotia Bar as***

> ***Provincial Court Judges in Nova Scotia, the Tribunal did not identify and consider in the Report any evidence of the current actual income levels of the pool of candidates eligible for appointment"***

[119] This Reason relates to the attraction and retention factor. In essence, the OIC criticizes the Tribunal for not considering evidence that was not submitted to it. This was the evidence of the actual income levels for the pool of candidates for appointment to the Provincial Bench. Reason 4 states, in part, "This actual information is a practical necessity in order to be able to consider this factor". However, the Government itself did not put that information before the Tribunal. If it was a "practical necessity", it was incumbent that the Government put that information before the Tribunal. Failure to do so, undermines the effectiveness of the Tribunal, and blindsides it, after the fact. That is not consistent with *Bodner* principles and leads to an ineffective process.

[120] The evidence before the Tribunal led it to conclude that the pool of candidates eligible for appointment as Provincial Court judges in Nova Scotia were "a well-educated, professionally trained and highly experienced group of legal practitioners". In response to the Government's argument before the Tribunal that current Provincial Court judges' salaries put judges in the top 1% earners in the Province, the Tribunal said that utilizing the top 1% of income earners as a:

> "…*negative* benchmark…for not raising Provincial judges' salaries is not very helpful in relation to the question of whether current salaries will continue to be adequate to attract excellent candidates as one looks forward to the next three years, which are the scope of this Tribunal's mandate." (para. 44)

[121] The Government now argues that the Tribunal made an analytical error by "so easily dismiss[ing]" the fact that judicial salaries place judges within the top 1% of the Province's income earners. In its submissions to this Court counsel for the Government stated, "[I]t is noted that Judges are paid very well in relation to ordinary Nova Scotians".

[122] This Court finds that the Tribunal's conclusion concerning the "1% argument" was based on the statutory factors. It clearly concluded that it did not follow that Provincial Court judges should not get a salary increase because they were in the top 1% of income earners. I find no analytical errors in the Tribunal's reasoning on this point. Accordingly, Reason 4 is not supported by a reasonable factual foundation.

Reason 5: ***"The Tribunal did not properly apply clause 21E of the Act which requires consideration of the prevailing economic conditions which includes the current state of public finances in Nova Scotia"***

[123] In this reason, which is set out in full earlier in this decision, the Government asserts that "[t]he 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 increases that do not exceed the growth capacity in the fiscal plan".

[124] However, as noted by the Judges' Association in its submissions to this Court, the Government provided no evidence to establish that its forecast surplus would be undermined if the Tribunal's salary recommendations were implemented. In fact, and to the contrary, the opinion of Mr. Ingram, the Government's Director of Policy and Fiscal Planning with the Nova Scotia Department of Finance and Treasury Board, who gave evidence before the Tribunal, was that a raise in judicial salaries would not have a significant impact on overall Government spending. Although the Respondent now argues that had Mr. Ingram known that the Tribunal would recommend salary increases in the "magnitude" it did, Mr. Ingram's evidence may have been different, that is pure speculation.

[125] Reason 5 also states that the Government's fiscal plan does not contemplate making a special exception for the wages of Provincial Court Judges and the Tribunal's recommendation "that an exception be made for Provincial Court Judges". Reason 5 goes on to say that in deciding that the public sector wage mandate reflected in the fiscal plan created under the *Finance Act* and the legislation supporting the fiscal plan (including the then unproclaimed *PSSA*) was "not binding

on the Tribunal in any sense", the Tribunal gave no or inadequate consideration to the fiscal needs of Nova Scotians as set out in the fiscal plan.

[126] The Government made repeated references to its wage mandate in its submissions to the Tribunal. The Tribunal was well aware of the Government's position. The Respondent acknowledges in its submissions to this Court that the Tribunal was not bound to adhere to the Government's fiscal plan. It argues, however, that where measures are part of an across-the-board policy of fiscal restraint, they are *prima facie* rational.

[127] Certainly, Justice Lamer in *PEI Reference* makes it clear that "across-the-board" measures which affect substantially every person who is paid from the public purse….are *prima facie* rational" (para. 184).

[128] It is worth pointing out that in *PEI Reference*, the Supreme Court considered four appeals together with the same central issue of whether the guarantee of judicial independence in s. 11(d) of the *Charter* restricted the ability of governments to reduce the salaries of provincial judges.

[129] In the case on appeal from PEI, the PEI Government had enacted the *Public Sector Pay Reduction Act* which reduced the salaries of provincial court judges and

others paid from the public purse. The Respondents refer to the following passage from *PEI Reference* where Chief Justice Lamer J. stated:

> [196] Finally, I want to emphasize that the guarantee of a minimal level of judicial remuneration is not a device to shield the courts from the effects of deficit reduction. Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times. Rather, as I said above, financial security is one of the means whereby the independence of an organ of the Constitution is ensure. Judges are officers of the Constitution, and hence their remuneration must have some constitutional status.

[130] Justice Lamer held that if PEI established a judicial compensation committee in future that made recommendations that the legislature declined to follow as "part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds," such a response would be *prima facie* rational (para. 201). In that regard, he stated:

> [147] As a general principle, s. 11(d) allows that the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class.

[131] The PEI legislation was *prima facie* rational. However, the reduction in the judicial salaries was unconstitutional due to the lack of recourse to "an independent, objective, and effective process for determining judicial remuneration" (para. 200).

[132] Of course, unlike the facts before the Court in *PEI Reference,* and the facts before this Court, the *PSSA* was not proclaimed at the relevant time, and specifically excluded provincial court judges from its application.

[133] In the Manitoba appeal in *PEI Reference,* a judicial compensation committee was in place. Bill 22 imposed a salary reduction on judges of the provincial court in Manitoba which had the effect of removing an increase that had earlier been recommended by a judicial compensation committee and accepted by the Manitoba Government and also precluded consideration of the subsequent year by the next judicial compensation committee. The Manitoba legislation was in force and applied to judges whereas the *PSSA* was not in force and did not apply to judges.

[134] *Bodner* makes it clear that government must meet the *Bodner* test if it departs from a tribunal's recommendations. As noted by Macaulay J. in *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2012 BCSC 1022:

> [73] In standing by its "net-zero" mandate argued before the JCC and reiterating it as the principal basis for concluding that the recommended increase was unreasonable, the government diverted its attention from the evidence and conclusions of the commission as they relate to the constitutional requirements applicable to setting the salaries and benefits of judges. No party, including the PCJA, disagree that judges must share the burden of economic downturns but that does not entitle government to avoid real involvement in the constitutional process for determining the salaries and benefits of judges. Instead, the primary concern of

> government throughout appears to have been to avoid the potential impact of accepting recommendations on other public sector bargaining units.
>
> [174] In the result, the continuing invocation and repetition by government at all stages of the process primarily consisting of the "net-zero" mantra is neither legitimate nor rational under *Bodner*.
>
> …
>
> [176] Prince Edward Island had, in fact, passed legislation that imposed an across-the-board cut that reduced the salaries of "substantially every person remunerated from public funds, including members of the P.E.I. Provincial Court." That legislation was *prima facie* rational (para. 203). Nonetheless, the reduction in the judicial salaries was unconstitutional due to the lack of recourse to "an independent, objective, and effective process for determining judicial remuneration" (para. 200).
>
> [77] In my view, the passage from *PEI Reference*, considered in context, is illustrative but strengthens the requirement that government commit itself to the process. The factual matrix in the present case differs significantly from the scenario outlined above.
>
> [78] *PEI Reference* does not grant government a pass on its constitutional obligation, even in difficult economic times. The government reliance on the net-zero mandate cannot be permitted to trump the constitutional obligations applicable to setting judicial remuneration. The mandate is only a negotiating position for bargaining with public sector unions. Judges are not constitutionally permitted to participate in collective bargaining with government. The JCC understood that it was not bound by the net-zero mandate of government.
>
> [79] It is unfortunate that government chose not to participate meaningfully in the constitutional process. I agree with the PCJA that the approach taken by government rendered the process largely pointless.
>
> [Emphasis added]

[135] It is clear from its Report, that the Tribunal paid very careful attention to the Government's submissions concerning its fiscal plan and the *PPSA*. For example, the Tribunal quotes from the Government's written submissions:

> [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".
>
> As noted above, the Government's "envelope" determined for wage increases is a pattern of 0% in year one, 0% in year two, 1% in year three, and 1.5% and a subsequent 0.5% in year four. The Government thus "…urges the Tribunal to consider the equity involved if the restrictions placed on 75,000 individuals is ignored". The Government argues that this approach is consistent with observations from the Supreme Court of Canada in paragraphs 158 and 159 of the *PEI Reference Case*, *supra*.

[136] The Tribunal, however, after considering all the relevant statutory factors, rejected the Government's arguments:

> […] As stated above, the Tribunal has read the written submissions, heard the oral submissions and considered the voluminous accompanying documentation. We have tried to summarize these submission for each of the "parties" under the relevant headings from section 21E(3) of the *Provincial Court Act*. It will have become apparent that the Government, when making submissions in relation to the relevant headings, made frequent reference to the Government's "wage mandate" of 9%, 0%, 1% and 1.5%/0.5% over four years in dealing with civil and public servants or those "being paid from the purse". It also made fairly frequent reference to the unproclaimed *Public Services Sustainability (2015) Act* which is intended to back up the Government's "wage mandate". <u>The Tribunal makes two observations in relation to this approach adopted by the Government. Firstly, the Supreme Court of Canada and Courts of Appeal across this country have indicated that civil servant salaries, for the most part, are not appropriate comparators in the exercise of setting judicial salaries. The Government formally acknowledged this principle, but nonetheless made consistent reference to civil servant salaries to describe context, background and the like in relation to its wage mandate. This is problematic, because, secondly, the Tribunal is bound to make its recommendations on salaries (and the other issues within its mandate) by considering and balancing the factors found in section 21E(3) of the *Provincial Court Ac*t – duly enacted, and insofar as the sections relating to this Tribunal's activities are concerned, proclaimed in force, and therefore binding on the Tribunal. On the other hand, the unproclaimed *Public Services Sustainability (2015) Act*, and the Government's wage mandate, is not binding upon this Tribunal in any sense.</u>

[Emphasis added]

[137] This Court finds that Reason 5 is not a rational or legitimate response to the Tribunal's recommendations. The Tribunal reached its recommendations with respect to judicial salary after fully engaging with the Government's proposal concerning its wage mandate, the unproclaimed *PSSA* and its statutory obligations.

Reason 6 and the Additional Reasons

Reason 6: ***"In carrying out its mandate the Tribunal has made procedural errors…which resulted in the Tribunal too closely adopting the procedures of adversarial interest arbitration arising in collective bargaining processes under labour law"***

[138] The Government does not identify what "procedural errors" the Tribunal made either in the OIC, before the Tribunal or in argument before this Court apart from stating that "[P]rocedural errors may have contributed to the Tribunal's apparent substantive errors set out in paragraphs 1 to 5 above".

[139] Reason 6 does not state what aspects of "adversarial interest arbitration" that the Tribunal allegedly adopted. This is a conclusory point made without any detail about the Tribunal's processes.

[140] Reason 6 states that "[I]n the specific facts and circumstances of this Tribunal, public confidence in the actual and apparent independence, objectivity and

effectiveness of the Tribunal could be called into question by reasonable members of the public as a consequence."

[141] Before this Court counsel for the Government further argued that the Tribunal misconstrued its role by failing to recognize the constitutional authority of the legislature. That argument brings the focus back to the Tribunal's alleged failure to adhere to the Government's fiscal plan. In its brief, the Government stated:

> Reason 6 and the additional reasons are connected to the overarching theme of the variance in the OIC: the Tribunal's complete reluctance to adhere to a fiscal plan that was established through legislation and that ultimately became binding on others paid from the public purse.
>
> [Emphasis added]

[142] This argument flies in the face of *Bodner*. Simply because the Tribunal's recommendations are no longer binding on Government, that does not mean that the Governor in Council can side-step its obligation to carry out its duties consistent with its constitutional obligation to meet the *Bodner* test if it wants to depart from the Tribunal recommendations.

[143] The Additional Reasons provide that the Tribunal did not properly recognize or acknowledge the separate constitutional authority of the legislature and executive. However, as set out earlier in the decision, the Tribunal clearly engaged with the Government's submission on this point. It correctly identified its constitutional mandate: i.e., to recommend appropriate compensation by carefully considering and

weighing all of the statutory factors. The Tribunal understood that it was not bound to the Government fiscal plan.

[144] Counsel for the Association also argued before this Court that the Government was fixated with its fiscal plan and public sector wage mandate. That, it is said, led to the OIC's failure to engage in any meaningful way with the Tribunal's analysis with respect to the "unique nature of the judges' role", referred to in section 21E(3)(d) of the *Act*.

[145] In *NSPCJA* the Supreme Court of Canada identified this concern:

> [41] It is open to the [Association] to rely on the government's reasons to argue that the government did not take sufficient account of the distinctive nature of judicial office in concluding that judicial salaries should increase only in line with the rest of the public sector. While across-the board restraints on increases in salaries could be found to be rational, this Court has cautioned that "judicial independence can be threatened by measures which treat judges…identically to other persons paid from the public purse": *Provincial Judges' Reference*, at paras. 158 and 184. Similarly, although this Court accepted in Bodner that comparisons with the salaries of civil servants could be appropriate, this Court also warned that the government's response must always take into account the distinctive nature of judicial office: *Bodner*, at paras. 26, 75 and 123-26.

[146] This Court finds that the OIC did not engage in any meaningful way with the unique nature of judicial office. Its focus on its fiscal plan and its public sector wage mandate seems to have blinded it to its constitutional responsibility to do so.

[147] The Additional Reasons go on to provide that the Tribunal chose to "usurp the statutory authority of the Minister of Finance and Treasury Board, the Minister's

civil service staff and the legislature which approved the fiscal plan and reach its own view on economic conditions and its likely effect on Government finances based on an expressed preference for the forecasts of private sector economists".

[148] However, a review of the Tribunal's reasons shows that it reached its own view, based on the evidence before it, of appropriate compensation for judges in light of prevailing economic conditions in the Province and the overall state of the Provincial economy.

[149] The Government acknowledged before the Tribunal that it was not bound by the Government's fiscal plan. The Government now criticizes the Tribunal for departing from its fiscal plan, calling this a usurpation of the authority of the Minister of Finance and the Legislature.

[150] This Court finds that the Tribunal reached its own conclusions on the prevailing economic conditions in the Province. It was part of its job to do so. It reviewed the Government's Fiscal Brief, budget projections and private sector analysis. It noted that the Association took a rosier view than the Government. It stated that "even the Government concludes that the data shows that "[t]he outlook in the short term for Nova Scotia is stable with modest growth".

[151] The Tribunal, after considering all of this information concluded:

> "Thus, while the prevailing economic conditions and overall state of the economy suggest somewhat sluggish growth, the Tribunal sees stable if modest improvement, which does not necessary comport with the view that economic conditions must exclude fair and reasonable augmentation of judicial compensation for Nova Scotia's provincial judges, particularly in the light of the more optimistic private sector forecasts mentioned above."

[152] It is clear that the Tribunal carefully considered all of the evidence before it in reaching its conclusion. The Government argues that the Tribunal gave no reasons as to why its fiscal plan should not be followed. However, a review of the Tribunal's Report as a whole shows that it carefully considered and weighed all of the statutory factors, and having done so, made its recommendations for an augmentation in the salaries for Provincial Court judges.

[153] In its Additional Reasons the OIC essentially suggests that the *Finance Act* has primacy over the Constitution. The OIC states:

> It is not consistent with the constitutional principle of independence of the judiciary to require the Tribunal to stay within the scope of the Finance Act, an Act of the Legislature which expressly prevails in the event of a conflict with any other Act of the Legislature (see Section 5 of the Finance Act) or to give constitutionally valid reasons why it does not intend to stay within the scope of the Finance Act and the fiscal plan in making recommendations.

[154] This argument can be quickly disposed of. While the *Finance Act* prevails in the event of a conflict with other legislation, it does not prevail over the Constitution. The *Act* essentially embodies the constitutionally mandated process which attempts to ensure that judicial independence is protected as established in *PEI Reference* and *Bodner*.

[155] In *Bodner,* the Supreme Court of Canada found that the Quebec government's response to the recommendations of a compensation committee were tainted by a refusal to consider the appropriate level of compensation for judges:

> Its position is tainted by a refusal to consider the issues relating to judicial compensation on their merits and a desire to keep them within the general parameters of its public sector labour relations policy. The Government did not seek to consider what should be the appropriate level of compensation for judges, as its primary concerns were to avoid raising expectations in other parts of the public sector and to safeguard the traditional structure of its pay scales. (para. 160).
>
> [Emphasis added]

[156] It is to be recalled that in the Communications Plan forming part of the R&R, the possible effect on public sector unions is noted to be positive if the Tribunal recommendations are accepted, but negative or neutral if "government varies the recommendation to be in line with public sector wage pattern". The analysis provided reads as follows:

> Public sector unions are being asked to accept no increase for the first two years of a four year contract, followed by two years with minimal increase below the cost of living.
>
> Government is already involved in challenging labour negotiations with teachers and civil servants and has been clear that the pattern for wage settlements needs to change. The union may use this tribunal decision to bolster its case for higher wages.
>
> If government varies the recommendation to bring it in line with the public sector wage pattern, unions won't be able use it (*sic*) an argument for higher settlement.

[157] It is true that the Communications Plan does not provide any advice or recommendations and was an appendix to the Attorney General's report. However,

the concerns it refers to are completely in line with the Government's publicly stated positions in the case of the Premier, and in its submissions before the Tribunal. This Court finds that the Government's repeated argument throughout this process that judicial compensation must be in line with its fiscal plan is neither legitimate nor rational pursuant to *Bodner* principles.

[158] The Additional Reasons in the OIC go on to state that the Tribunal should only operate as a "shield from executive or legislative intrusion and improper influence which could threaten independence of the judiciary, not a sword which could have the appearance of giving judges "special status".

[159] However, judges do have special status under the *Constitution* and judicial independence is a key concept under it. The Tribunal correctly, in this Court's view, stated in that regard:

> […]Thus it is, that a judge in the Provincial Court in this Province is a "court of competent jurisdiction" for purposes of granting remedies under section 24 of the *Charter of Rights and Freedoms* when conducting a criminal trial. That judge, in those seemingly ordinary circumstances, can declare that a peace officer, a correctional officer or any other agent of the government has contravene the *Charter* and must be brought into line with the Constitution. Public servants and civil servants in this country can thus have their actions scrutinized in the ordinary courts to see that they pass constitutional muster. This is an important reason why Canadian judges, including Nova Scotia's Provincial Court judges, are not simply "civil servants", but rather have a special status under the constitution in the matter of regulating the conduct of public servants, from the very highest to the lowest in the governmental hierarchy. Such considerations are not to be treated lightly as aspects of "the constitutional law of Canada" for purposes of section 21E(3)(a) of the *Provincial Court Act*.

[Emphasis added]

[160] This Court notes that at the conclusion of the OIC, it states:

> …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.

[161] In the end, the Government implemented the exact same salary adjustment that it had argued before the Tribunal. This was noted by the Supreme Court of Canada in *NSPCJA* to be an "important factor to consider" in determining whether *Bodner* principles had been followed:

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

[162] This Court finds that the Government was tied to its own fiscal position throughout this process to such an extent that it blinded itself to its constitutional obligations under *Bodner*.

[163] The Government's reasons for departing from the Tribunal's recommendations are in large measure based on the same arguments it made before

the Tribunal, and which the Tribunal rejected. In this Court's opinion, the Government appears to have been content to simply restate its original position made to the Tribunal. In Reason 6 and Additional Reasons it did not justify its departure from the Tribunal's salary recommendations.

Issue 2(c): ***Viewed globally, has the Tribunal process been respected and have the purposes of the Tribunal – preserving judicial independence and depoliticizing the setting of judicial remuneration – been achieved?***

[164] The constitutional work of a judicial compensation committee is to ensure that the setting of judicial compensation is depoliticized. Chief Justice Lamer explained that purpose in *PEI Reference*, as follows (para. 166):

> The constitutional function of this body is to depoliticize the process of determining changes or freezes to judicial compensation. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature, responding to the particular proposals made by the government to increase, reduce, or freeze judges' salaries.

[165] The question before the Court is whether the Government politicized the process of setting the judges' remuneration. There is plenty of evidence before the Court that it did.

[166] Firstly, the Government seems to have entered the process with a closed mind. It implicitly made it publicly clear that that was why it was amending the *Judges' Act* to make the Tribunal's recommendations non-binding. It wanted to control the

outcome in the event that the Tribunal's recommendations did not align with its fiscal plan. Fiscal plans are inherently political.

[167] The then Premier made public statements just prior to the adoption of the 2014 Tribunal's report about the need for authority to reject the recommendations. He expressed concern about three people on a panel deciding what Nova Scotia taxpayers could afford.

[168] The Communications Plan in the R & R stated that ignoring the government's own legislation was an issue and that the Government could be criticized for not acting on this new authority. That is a political concern. This aspect was singled out by the Supreme Court of Canada in *NSPCJA*:

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

[169] The reasons provided by the Government do not refer to the concern about public criticism, but this Court notes that public statements made by the then Premier

in the aftermath of the Government rejecting the Tribunal's salary recommendations are telling.

[170] On February 9, 2017, in a media scrum outside of Cabinet, the then Premier was asked about whether the Government had sought specific advice regarding how to deal with the Tribunal, the Premier stated:

> The Tribunal, we dealt with the Tribunal issue, it was binding when we came into power. We made recommendations to say it was not binding and we've moved forward on our recommendation, on our decision.

[171] On February 14, 2017, during a televised interview where questions were asked of the then Premier about the Government's contract dispute with teachers, the Premier was asked by the interviewer why binding arbitration was not being used. The Premier responded:

> Steve: What about binding arbitration? I've had a lot of email, a lot of tweets. People want to know why not allow a neutral third party to come in and settle this?
>
> Premier: Steve, I've been very clear about the fact that we've, uh, binding arbitration has impacted the Province of Nova Scotia in a way, I just rejected it from Judges. A binding arbitration, or an arbitrator said I should provide Judges a nine per cent pay raise. That's just simply, can't afford to do that.

[Emphasis added]

[172] This process was ineffective before it even began. The Government was determined that any salary increases judges would receive would mirror the Government's fiscal plan. The parties need not have bothered making their submissions on judges' remuneration to the Tribunal, because the Government was

determined to treat judges the same as teachers, doctors and crown attorneys, among others. This focus on the part of the Government to adherence to its fiscal plan, rather than to assessing appropriate compensation for judges in light of the legislative factors, undermined the entire process.

[173] The Respondents before this Court argued that this Court should only look at the Government's reasons in determining whether its decision met the *Bodner* test. That thinking was rejected by the Supreme Court of Canada. At the third stage of the *Bodner* analysis, the Court is to look carefully at the entire context. As noted earlier in this decision, the Government relied, in part, on the existence of the public service award to reject the Tribunal's salary recommendation, and then in the aftermath of receiving the Tribunal's Report indicated that it wished to remove that benefit. Conduct of that nature demonstrates disrespect for the process.

[174] Government reasons may look legitimate on their face. However, facially legitimate reasons may be a ruse to hide improper reasons. This was clearly stated by the Supreme Court of Canada in *BCPCJA*:

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

> purpose and has accordingly fallen short of the constitutional benchmark set in this Court's jurisprudence, the reviewing court cannot simply accept the government's formal response without further inquiry.
>
> [42] This is nothing new. In Beauregard, at p. 77, this Court made clear that "[i]f there were any hint that a federal law dealing with [the fixing of salaries and pensions of superior court judges]…was enacted for an improper or colourable purpose, or if there was discriminatory treatment of judges *vis-a vis* other citizens, then serious issues relating to judicial independence would arise and the law might well be held *ultra vires* s. 100 of the *Constitution Act,* 1867" (emphasis added). This is true of all judges to whom the constitutional principle of judicial independence applies: see *Provincial Judges Reference,* at paras. 145 and 165.
>
> [43] Considerations of legitimacy and respect for the process – and conversely, considerations of impropriety or colourability – permeate the entire *Bodner* analysis. Indeed in *Bodner,* which concerned the remuneration of provincially-appointed judges, this Court considered whether the reasons given by the Alberta, New Brunswick, Ontario and Quebec governments were "based on purely political considerations", "reveal political or discriminatory motivations" or "evidence any improper purpose or intent to manipulate or influence the judiciary": paras. 66, 96 and 159; see also paras. 68 and 123.

[175] This Court also has to look at the outcome, as part of the third step in the *Bodner* review. This was a point noted by the Supreme Court of Canada in *NSPCJA* (para. 42):

> The legitimacy of the Nova Scotia government's reasons may also be assessed in light of the extent of the departure from the commissions' recommendations.

[176] The Tribunal's recommendation of an 8.9% increase over three years, was varied by the Government to a 1% increase only in the third year. In the view this Court, this signals that the Tribunal process did not have a meaningful effect on the setting of judicial remuneration.

[177] I find that when the process as a whole is examined, it is clear that it did not achieve the purpose of depoliticizing the setting of judicial compensation.

[178] After the hearing of this matter, the parties referred this Court to the decision of the British Columbia Court of Appeal in Provincial Court *Judges' Association of British Columbia v. British Columbia (Attorney General), 2021 BCCA 295* (the "BCCA Decision"). This Court invited written submissions of the parties on the import of this decision on the matters before this Court. The Court received same from both parties.

[179] While a decision of a Court of Appeal in another jurisdiction requires this Court to pay careful attention to its import, it is not binding on this Court. However, on March 7, 2022, counsel advised this Court that the Supreme Court of Canada had not granted the Judges' Association leave to appeal the BCCA decision [2021] S.C.A. No. 330 (S.C.C. File No. 39843). This Court invited counsel, if they wished, to provide the Court with submissions on the impact of the leave dismissal on the within proceeding. They declined to do so.

[180] The Respondents rely upon the finding by the BCCA that the government was entitled to place more weight on the statutory factor of changes in the compensation paid by others from the public purse than the tribunal had done in reaching its recommendations. Of course, that is not a statutory factor that the Tribunal, in this case, must consider in assessing appropriate judicial compensation. This Court also notes that the salaries substituted by the BC government in response to the tribunal

report were “significantly higher” than the ones it had initially proposed to the tribunal. Clearly, the recommendations had an impact on the salaries finally adopted. In this case, however, the Government imposed the same salary increase that it had proposed to the Tribunal, which was in accordance with its public sector wage mandate and fiscal plan. That was a point specifically referred to by the Supreme Court of Canada as “an important factor to consider” in determining whether *Bodner* principles had been met in *NSPCJA* at para. 150.

[181] For these reasons, I believe that the findings of the BCCA in this decision are distinguishable from the facts before the Court in this matter.

Conclusions on Issue 2(a), (b) and (c)

[182] Despite the deference owed by this Court to the Government based on the case law cited above, in the circumstances, this Court finds that the OIC, for the reasons set out above, cannot stand. The Government did not, in its Reasons, provide a constitutionally adequate and legitimate reason for varying the Tribunal’s recommendations. Viewed globally, the Government did not respect the *Bodner* process. That process was politicized by the Government.

Issue 3: In the event that this Court finds that any of the three issues above is answered in the negative, what remedy should the Court grant?

[183] In light of this Court's conclusions on issues 1 and 2, it is necessary to consider the third issue, i.e., that of remedy.

[184] The Applicants ask the court to declare that the recommendations contained in the Tribunal Report are in full force and effect as of April 1, 2017. The Applicants concede that the typical remedy on an application of this nature is to remit the matter to the government for reconsideration as established in *Bodner*. However, the Applicants argue that since *Bodner*, several courts have held that the implementation of a tribunal's recommendations is an appropriate remedy.

[185] The Applicants argue that an implementation order is appropriate in this case on the following bases: (i) implementation is the only effective remedy given the government's conduct; (ii) delay in the implementation of the Tribunal process favour implementation; and (iii) if improper considerations are removed, there is no basis for rejecting the Tribunal's recommendations.

[186] The Respondents argue that the Applicants' request for an exceptional remedy is not appropriate on judicial review. They submit that the remedies available on judicial review are of a limited nature, as established in *Bodner*. The Respondents concede that there are narrow exceptions to the general rule but suggest that the circumstances before the Court do not fit within those narrow exceptions.

[187] In particular, the Respondents argue that the Government did not act in bad faith, nor did it lack good faith in responding to the Tribunal Report. Further, the Respondents say that there is no evidence of a systemic delay in the Tribunal process. The Respondents say that in the event the Application for judicial review is allowed, the Tribunal Report should be remitted to the Governor in Counsel for reconsideration in light of the reasons of this Court.

[188] In *Bodner*, the Supreme Court stated:

> 44 In light of these principles, if the commission process has not been effective, and the setting of judicial remuneration has not been "depoliticized", then the appropriate remedy will generally be to return the matter to the government for reconsideration. If problems can be traced to the commission, the matter can be referred back to it. Should the commission no longer be active, the government would be obliged to appoint a new one to resolve the problems. Courts should avoid issuing specific orders to make the recommendations binding unless the governing statutory scheme gives them that option. This reflects the conclusion in *Mackin v. New Brunswick (Minister of Justice)*, [2002] 1 S.C.R. 405, 2002 SCC 13 (S.C.C.), that it is "not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government's task to determine which approach it prefers" (para. 77).
>
> (Emphasis added)

[189] Notwithstanding the Court's direction in *Bodner* that the proper remedy where the process has not been depoliticized is to remit the matter back to the government for redetermination, courts post-*Bodner* have frequently ordered that recommendations be binding, rather than remitting the matter.

[190] One of the appeals considered by the Supreme Court of Canada in *Bodner* came from the Conférence des juges du Québec. The court upheld the Quebec Court of Appeal's ruling that the government's rejection of the salary commission recommendations was unconstitutional and remitted the matter back to the government for reconsideration. While the matter was before the Supreme Court, a new judicial salary commission was created in Quebec, which made new recommendations. The government rejected the recommendations again. On judicial review, the Quebec Superior Court ordered the implementation of the recommendations. On appeal, in *Conférence des juges du Québec c. Québec (Procureur général)*, 2007 QCCA 1250, the Quebec Court of Appeal considered this second rejection made by the Quebec government. The Court of Appeal cited *Bodner* for the principle that courts should refrain from ordering the mandatory implementation of the committee's recommendations; however, the Court went on to find that *Bodner* does not provide that the appropriate remedy could *never* be such an order. The proper remedy flowing from the principles governing judicial independence, the court wrote, is "heavily dependent on the circumstances of the case" (para 87).

[191] In its second rejection, the Quebec government had rejected the salary increase proposed by the commission and proposed, instead, a lower salary increase.

The Court found that the government improperly treated the commission's recommendations as a mere negotiation process:

> 74 The government, whose responsibility it is to refer to the National Assembly a solution in keeping with the constitution, appears to have treated the reports of the O'Donnell and Cimon committees not as the product of an independent, objective and effective process, but rather as a final offer in a collective negotiation process that merely calls for a final counter-offer, which may even be identical to the one made before the committee. It also appears to be treating the judges as persons remunerated from the public purse who, conveniently, do not have the right to strike.
>
> 75 This state of affairs is regrettable, involving as it does repeated legal confrontations between the government and the judiciary. By maintaining their salary and benefits in a perpetual state of uncertainty, the situation causes concrete and unjustifiable prejudice to the members of the judiciary (not everything can be resolved through retroactive payments or reimbursements). In addition, there is a significant risk that it will create a dispiriting and unhealthy environment for judges and for the administration of justice. When such a risk becomes reality, the result benefits no one. Indeed, it is the citizens who are the first to suffer, as illustrated by the facts which gave rise to the judgment in *Mackin v. New Brunswick (Minister of Finance)*.

[192] Further, the Court focused on the delay caused by the government and stated that such delays are antithetical to the objective of the commissions:

> 77 One factor is first apparent from the foregoing passages: legal disputes, conflicts and delays in the determination of the salary of judges are antithetical to the objective pursued through the establishment of the independent commissions or committees on judicial remuneration.
>
> …
>
> 83 First, the prejudice that attracts the remedy in the present proceeding is of entirely the same order as that remedied in the 2005 Judgment: undue delay in determining judicial remuneration…

[193] In *New Brunswick v. New Brunswick (Minister of Justice)*, 2009 NBCA 56, the Court held that the New Brunswick government's response to the judicial

compensation commission's recommendations was unconstitutional and "remit[ted] the matter to the Government with the direction to implement with due diligence the base salary recommendations contained in the Majority Report" (para 4).

[194] The parties agreed that the base salary target, namely, to place the judges' salary as the seventh highest out of the ten provinces, was rational. The government opted to accept the dissenting Minority Report, rather than the commission's Majority Report, to achieve this target. However, the data in the Minority Report was inaccurate, and would in fact place the judges in ninth place for three years and in tenth place for five years (para 24).

[195] The court held that the government's rejection of the salary recommendations included in the Majority Report failed to meet the required standard of rationality. As to remedy, the court referenced *Bodner* and noted that the usual remedy is to remit the matter to the government for reconsideration. However, the exceptional circumstances led to only one solution: to order the government to implement the recommendations of the Majority Report. Drapeau CJNB wrote, for the court:

> 45 In the case at hand, the commission process has not been effective because of the irrationality of the Government's choice of its dissenting nominee's recommendations as the means of achieving its objective of a 7th place ranking. Simply put, the reason for choosing those recommendations over the ones formulated in the Majority Report does not "rely upon a reasonable factual foundation" (see *Bodner*, para. 31). The generally appropriate remedy is to return

> the matter to the Government for reconsideration. However, the present case is truly exceptional.
>
> 46 The pertinent period (2004-2008) is expired. All interested parties know the recommendations in the Minority Report placed the Judges in last place on the national comparison scale for the four years of the 2004 JRC's mandate and that the recommendations in the Majority Report situate the Judges precisely where the Government intended they be. A new JRC is set to begin its work for the post-2008 period. As these reasons take form, the term of that JRC's mandate is slowly wasting away. Just as significantly, and as might be expected, the Government approached the formulation of its Response as a choice between two options: the base salary recommendations in the Majority Report or those in the Minority Report. Sending the matter back for reconsideration makes sense where there is more than one way to rectify the situation. But here, there is only one possible solution if one wishes, as deference obligates, to achieve the Response's objective of placing the Judges in 7 place nationally: it is to implement with due diligence the recommendations in the Majority Report.
>
> [Emphasis added]

[196] In *Provincial Judges' Assn of Manitoba v Manitoba*, 2013 MBCA 74, the Court found that the government's reasons for rejecting the recommendations of the judicial compensation committee did not pass the test of rationality established in *Bodner*. The court went on to summarize the principles established in *Bodner* as follows:

> 150 The Supreme Court in *New Brunswick (Minister of Justice)* made clear that, where a reviewing court finds that the government's reasons for rejecting the recommendations of a judicial compensation committee were flawed, the typical remedy would be to refer the matter back to the Legislature. The court should not encroach upon the provincial legislature's jurisdiction to allocate funds from the public purse and set judicial salaries.
>
> …
>
> 152 In exceptional circumstances, however, the typical remedy may not be appropriate. Lack of good faith may be one situation where an exceptional remedy is required….
>
> …

> 155 However, I believe that, even if there is no finding of bad faith on the part of the Government, there are other exceptional circumstances which lead to the conclusion that referral back to the Legislature would not be an effective remedy.

[197] The Court held that a referral back to the legislature would not be an effective remedy, and that the existence of exceptional circumstances warranted a departure from the typical remedy. The court ordered the implementation of the commission's recommendations.

[198] Similarly, in *Provincial Court Judges' Assn of British Columbia v British Columbia (Attorney General)*, 2015 BCCA 136, the majority recognized the *Bodner* principle that Courts should be reluctant to order mandatory implementation of a judicial compensation commission's recommendation, but went on to order a mandatory implementation in the circumstances of the case. Chaisson JA, for the majority, began the majority's discussion on remedy by stating:

> 77 A court must be very reluctant to instruct a Legislature how to proceed (*Bodner* at para. 44), but in the context of establishing judges' compensation there is precedent for doing so.

[199] The Court then referenced *Conférence des juges du Québec c. Québec (Procureur général)*, 2007 QCCS 2672, New Brunswick (2009), and *Manitoba* (2013), and noted that in each of these cases, Courts recognized the caution expressed in *Bodner* but went on to give implementation directions to the

government on the basis of exceptional circumstances. The majority followed the pattern in the case law since *Bodner*, writing:

> 81 In the circumstances of this case, it is my view that it is not appropriate again to refer the 2010 JCC report to the Legislature for reconsideration. I reach this conclusion for two main reasons.
>
> 82 If consideration of economic circumstances other that those extant in 2011 is eliminated, there would appear to be no basis for rejecting the JCC recommendations that was not found to be unacceptable by Macaulay J.
>
> 83 Continuation of uncertainty is not in the best interest of either party and is not consistent with the scheme of the process mandated by the *Judicial Compensation Act*. PCJs still do not know what remuneration they are to receive for the period 2011 - 2014. The 2013 JCC report that was rejected in part by the Legislature used the Legislature's 2013 response to the 2010 JCC report as a starting point. Directing a further reconsideration of the 2010 JCC report re-opens that response with further uncertainty. It is difficult to see how the judicial review of the Legislature's response to the 2013 report could proceed while the 2010 JCC process remains incomplete. Subject to the Legislature's further response to the 2010 JCC report, there may be yet another judicial review concerning that report. In my view, it is necessary for the 2010 JCC process to end.
>
> …
>
> 85 In my view, the Legislature was neither entitled to reconsider its response to the 2010 JCC report on the basis of 2013 financial data, nor to advance new substantive reasons for rejecting the report. On that basis, I would allow this appeal.

[200] By contrast, in *Provincial Court Judges' Assn of British Columbia v British Columbia (Attorney General)*, 2017 BCCA 63, the Court remitted the matter to the government for reconsideration. The facts of the case were unusual. A new commission was established in 2013 to provide new salary recommendations in accordance with the legislation. The 2013 commission process concluded before the 2010 commission recommendations, which were on appeal to the British Columbia

Court of Appeal in *Provincial Court Judges' Assn of British Columbia v British Columbia (Attorney General),* 2015 BCCA 136 (above). After the 2013 commission process concluded, the British Columbia Court of Appeal issued their decision in British Columbia (2015), ordering implementation of the 2010 commission recommendations. The 2010 recommendations on salary increases altered the "starting place" for the salary changes proposed by the 2013 commission, which were unknown to the 2013 commission at the time of their recommendation. The court decided that the 2013 recommendations should be remitted back to the government for reconsideration:

> 20 These circumstances are unprecedented, and call for a practical, and respectful, approach. Certainly the Act does not contemplate such events as have occurred here. Doing the best I can with this out of the ordinary situation, and striving for resolution that addresses reality, I would quash the resolution of the Legislative Assembly and remit the 2013 Commission's recommendations to it, considering [*Provincial Court Judges' Assn of British Columbia v British Columbia (Attorney General),* 2015 BCCA 136] and the order entered in that appeal.
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> …
>
> 24 In conclusion, I agree the resolution should be quashed. I would allow the appeal only to the extent of deleting the second paragraph of the order and substituting therefore an order that the Final Report of the 2013 Judges Compensation Commission be remitted to the Legislative Assembly for reconsideration. I would dismiss the cross appeal, and I would dismiss the application to adduce fresh evidence.

[201] In *Newfoundland and Labrador Association of Provincial Court Judges v Newfoundland and Labrador*, 2018 NLSC 140, the judges' association sought orders of *certiorari* quashing the government's resolution respecting the judicial

compensation commission's report, and *mandamus* requiring the implementation of the commission's recommendations. Applying the test from *Bodner,* the Court found that the government failed to present a reasonable factual foundation to justify rejecting the commission's recommendations. The Court further found that the government showed a lack of respect for the commission process and, in that way, its response fell short of meeting its constitutional obligations. Further, the government failed to ensure depoliticization of the process.

[202] In its discussion of the appropriate remedy, the Court held that because the government failed to achieve depoliticization of the process, it would therefore be inappropriate to remit the recommendation back to the government for consideration. The Court also noted that the government failed to recognize its constitutional obligations, and suggested that this was one basis on which to find against the government with respect to remedy:

> 179 The Government acknowledges that bad faith may be a reason to direct implementation of the recommendations but says the evidence does not support such a conclusion. In the Manitoba decision, Justice Oliphant found bad faith and hence implementation was ordered. In this case, I am not prepared to find bad faith. The evidence does not support it, even though I have found serious flaws in both the effectiveness and the respect for the process. Bad faith, in law, requires evidence of an animus, a state of mind that convinces the court that the perpetrator intended to cause harm. That may be the case here, and the conduct over many years might suggest it, but I am not convinced. However, the evidence does suggest that at minimum, the Government has taken a zealous approach to its fiscal problems without any recognition of its constitutional obligations. Whether that lack of recognition arises through ignorance or willful blindness I am unable to say. However, I am satisfied that even in the absence of a finding of bad faith, the

> conduct of the Government on this, and previous, tribunals warrants a finding adverse to it.
>
> …
>
> 183 As a consequence, in my view it is inappropriate to remit the recommendations to the Government for reconsideration. In addition to the attendant delay, there is nothing in the past behaviour of the Government over many years (regardless of political stripe) to provide any level of confidence that suddenly, the process would be respected in a way that conforms to the constitutional obligations of the executive and legislative branches.
>
> [Emphasis added]

[203] The court thus ordered implementation of the tribunal recommendations.

[204] In the circumstances before this Court, I find that this matter should be remitted back to the Government for review and decision in light of this Court's decision.

[205] I certainly take into account the issue of delay. The Tribunal dealt with compensation for the 2017-2020 time period. That has now expired, and another Tribunal has made recommendations for the 2021 – 2024 time period. Much of that delay, however, can be attributed to the appeal to the Supreme Court of Canada from the Nova Scotia Court of Appeal's decision with respect to the content of the record.

[206] I also take into account that the Government which dealt with this matter failed to live up to its constitutional obligations under *Bodner*. It failed to depoliticize the setting of judicial compensation. It did not act in good faith. However, that Government was defeated in a Provincial election and a new

Progressive Conservative Government led by the Honourable Tim Houston has been in power in this Province since August 31, 2021. This Court has no reason to believe that the Houston Government will fail to live up to its obligations under *Bodner*.

Conclusions – A Return to the Grounds for Judicial Review

[207] With due respect to the deference owed to the Government, I find that the Respondents have failed to articulate rational and legitimate reasons for departing from the Tribunals' salary recommendations.

[208] The Respondents have failed to rely on a reasonable factual foundation in its reasons for rejection.

[209] Viewed globally, the Respondents have failed to respect the Tribunal process and ensure that the purposes of the Tribunal – preserving judicial independence and depoliticizing the setting of judicial renumeration – have been achieved.

[210] An Order in the nature of certiorari quashing OIC 2017-24, as it relates to salary recommendations is granted.

[211] The matter is remitted back to the Respondents for reconsideration in light of the reasons in this decision.

[212] The Applicants are entitled to costs. Failing agreement between the parties, the Court will receive written submissions within one month of the date of this decision.

Smith, J.