JUDICIAL INDEPENDENCE, JUDICIAL COMPENSATION AND RESPONSIBLE GOVERNMENT:
FINDING A MORE APPROPRIATE BALANCE

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The illustration on the cover was created by Judge Jean La Rue of the Cour du Québec in Saint-Jérôme. Judge La Rue is a noted artist whose works have been displayed in several Québec galleries.
I. Introduction-The Main Arguments

This purpose of this paper is to promote a dialogue on the contentious issue of who should decide what compensation is paid to judges and on what basis such decisions should be made. The focus is on the identification of constitutionally appropriate and balanced structures, procedures and criteria of decision-making, not on the substantive issue of what “good judges” are worth. The analysis is written from a political science rather than a strictly legal perspective. To better enable the reader to assess the analysis and evidence as it develops, the main arguments are outlined in this introduction.

The ongoing controversy and conflict over issues related to judicial compensation reflects the tensions between the constitutional principles of responsible government and democratic accountability and the equally important constitutional principles of judicial independence as an essential feature of a liberal democracy in which the rule of law prevails and there is public trust and confidence in courts and judges.

This paper argues that there are not insurmountable constitutional barriers to designing a compensation process that is consistent with the principles and practices of responsible government and respects in a practical way the right of judges to secure and appropriate compensation.

Over many decades, in response to changing conditions within society, in the political process, and in the role of the judiciary, there has been an evolution in our thinking and practices regarding both responsible government and judicial independence.

It is now time to refine our understanding further, and put in place new arrangements for determining judicial compensation that reflect and reinforce the principle of secure and appropriate remuneration for the judiciary that has been declared by the Supreme Court of Canada (henceforth simply Supreme Court) to be an essential component of the constitutional principle of judicial independence.

The next step in the evolutionary process would be the adoption of an independent commission process that leads to binding decisions. This would not be a radical step. For many years, a binding process existed in two Canadian jurisdictions and others

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1 The CAPJC paid for the study, provided advice on sources and reviewed a preliminary draft of the paper for factual errors.

The CAPCJ respected the independence of the author to offer his own perspective on the issues. The facts, interpretations and opinions contained in this paper are, therefore, completely the responsibility of the author.
have chosen to make the process either partially binding or binding in certain circumstances. When governments design the new structures and procedures, and when legislatures approve them, the principles of responsible government are being respected.

The real reasons why governments and/or legislatures insist on having the final word on judicial salaries are political, not constitutional or monetary. The amounts spent on judicial salaries are small compared to the total cost of government, and even more miniscule are the amounts involved with periodic adjustments to those salaries. It is the optics, not the objective facts that cause governments political problems in terms of their fear of a backlash from the public that is generally ill informed about the critical role of the judiciary and the need to protect its independence. Many politicians and members of the public do not understand and accept that the courts are a unique part of the political system that is entitled to important protections. The design of a new binding process should recognize this “political problem” and provide governments with an additional opportunity to publicize their concerns about increases in judicial compensation.

A popular response to the real and perceived tensions and conflicts over judicial compensation is to call for a balanced approach that recognizes and accommodates both sets of principles. However, simply agreeing on the need for balance does not move the conversation along very far in terms of resolving the tensions at the heart of the debate.

Balance is too vague a notion. It allows the institutions and actors involved with the judicial compensation debate to operate with their own, often implicit rather than explicit, normative assumptions of what is an appropriate balance between responsible government/democratic accountability versus judicial independence/appropriate judicial compensation.

Moreover in practice, as opposed to theory, the balance that takes place in a conflict situation tends to reflect the distribution of authority and the dynamics of power that exist between the contending parties. In the case of judicial compensation, governments have a preponderance of constitutional and legal authority, and a greater capacity to influence public opinion, than the judiciary.

Therefore to be practical and fair, any approach to balance on the compensation issue must involve some prescribed structures, procedures, criteria for decision-making, a reliance on evidence to support arguments, and a commitment on both sides to respect both the letter and the spirit of the dispute resolution provisions. In the case of disputes over judicial compensation, the absence of a clear and jointly accepted framework of principles, rules and criteria, governments and legislatures will be tempted to make decisions based on short term, opportunistic political calculations rather than on respect for judicial independence and the need to ensure a high quality judiciary.
The paper develops these arguments in the following order.

Section II provides an overview of the theory and practice of responsible government as it has evolved over time. Ministerial responsibility is the key component of responsible government. The gap between the traditional theory and contemporary practice with respect to ministerial responsibility is noted.

Section III provides a brief discussion of the meaning of accountability and multiple forms of accountability that exist within the political system, government and the judiciary. No longer are responsibility and accountability limited to matters directly and continuously under the control of ministers.

Section IV identifies the rise of what might be called a “New Integrity Branch of Government” in the form of the more numerous and influential agents of parliament (APs) created to supplement and complement the efforts of legislatures in holding the executive accountable. Where APs fit within the existing constitutional order is not entirely clear. They have some court like features, but are not exactly like courts. To protect their independence legislatures have established distinctive arrangements for financing their operations.

Section V describes how financial accountability in government is based on the principles that all spending must originate with the Crown (i.e. responsible ministers serving in cabinet) and all spending must be approved by the legislature. To take account of the diverse types of organizations that exist in the contemporary public sector, there are varying degrees of financial control and accountability based mainly on the sensitivity of the tasks of particular organizations and the desirability of distancing them from direct and continuous political involvement.

Section VI discusses the concept of judicial independence and its implications for the boundaries among the executive, legislative and judicial branches of government. The appointment/tenure of judges, the administration of the court system and judicial compensation have been identified as the three components of the crucial constitutional concept of judicial independence.

Section VII analyzes the advent, mandate and record of the judicial compensation commissions following a landmark constitutional ruling by the Supreme Court in The Reference Re Remuneration of Judges of the Provincial Court, 1997 (henceforth referred to simply as PEI Reference), followed by Bodner v. Alberta, 2005 (henceforth referred to simply as Bodner) that refined the earlier ruling.

Section VIII examines the limited number of published evaluations of the judicial compensation commission process that take a legal perspective on the issues. The section offers an alternative political science perspective on the process and proposes a refinement to the existing process.
II. Responsible Government

The British North America Act of 1867 (now known as the Constitution Act, 1867) that brought Canada into existence declared that the country would have a constitution similar in principle to that of the United Kingdom. This meant that Canada imported the principles and constitutional traditions of 19th century England.

It also meant that our constitution is a blend of law and politics. There are both formal, written constitutional and statutory provisions as well as informal, often unwritten conventions. Legal rules are binding on public officials whereas there is uncertainty and debate over the extent to which conventions are binding.

Many informed commentators have argued that a virtue of the original constitutional order was its generality and flexibility that allowed for evolution and adaptation in response to changing circumstances.

One of the key sets of constitutional principles imported from the UK was responsible government – the second, of course, was federalism. The same principles and practices of responsible government apply at both the national and the provincial level of government in Canada.

Canada is a constitutional monarchy in which the Governor General and the Lieutenant Governors in the provinces represent the Crown. In principle the Crown remains central to our constitutional order, but in practice it has become mainly a ceremonial and unifying feature of the political system.

The phrase “Crown in Parliament” refers to the fact that that the Parliament of Canada consists of the Governor General, the House of Commons and the Senate. At the provincial level where there are no upper houses, only the Lieutenant Governor and the Provincial Legislature are involved. The Queen in Her Courts is a distinct, separate part of the constitutional order.

In political and popular discourse, it is common to differentiate between the authority and power of the executive and the legislature, by using the phrase separation of powers. In the opinion of some constitutional scholars this is wrong because the two political parts of government are “fused” in such ways that talk of separation is

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inappropriate.\textsuperscript{5} Other informed commentators argue that the rise of disciplined parties in legislatures leading to the concentration of power in the office of the first minister and the cabinet has created a separation in practice. As discussed later in this paper, a realistic description of the executive-legislative relationship might be: the government proposes and Parliament disposes.

The debate over how best to describe the executive-legislative relationship is more than a constitutional quibble. It figures into the later discussion of what institutional arrangements and procedures for determining judicial compensation are appropriate under the constitution.

Responsible government is based on the principle that collectively and individually, ministers serve the Crown. This leads to a set of largely unwritten constitutional conventions on ministerial responsibility that exists in these two parts. The informal nature of these conventions means there is always room for controversy over the meaning and the significance of the various components of the doctrine of ministerial responsibility as it applies to particular situations.

Each part of the doctrine of ministerial responsibility has three components.\textsuperscript{6}

Collective ministerial responsibility requires that the prime minister and cabinet must at all times retain the confidence of a majority of the House of Commons. It requires that the proceedings of cabinet are confidential. And finally, it requires cabinet solidarity in terms of supporting and defending the policy positions taken by the government.

Individual ministerial responsibility has the following three components: the minister is legally in charge of the department; the minister is politically answerable before Parliament and beyond for all the official actions of his/her department and other entities in his/her portfolio and for their own personal conduct when performing public duties; and the minister is accountable to the prime minister/premier and to the cabinet for carrying out the decisions of the government.

Only the prime minister/premier can hire, fire and demote ministers. Contrary to the frequent comments in the media, the House of Commons cannot remove a minister through a vote of no confidence. And, in Canada ministers seldom resign because of policy blunders or mistakes in the administration of policies. The real sanction


involved with individual ministerial responsibility is a loss of reputation to the point where a minister becomes more of a liability than an asset and is removed or demoted in a cabinet shuffle.

Ministerial responsibility concentrates authority in the hands of the prime minister/ premier and cabinet that are serving the Crown. Most policy initiatives and all expenditures must originate with government. In theory governments answer to Parliament and can be voted out by a majority vote on a matter of confidence in the House of Commons. Money bills for the purpose of raising and spending public funds are generally regarded as confidence matters on which a government could potentially fall if such bills failed to pass in the legislature. Under conditions of majority government, however, the risk of defeat is minimal because of party loyalty, party discipline and the concentration of power in the office of the prime minister/ premier.

For two reasons during the 20th century there was growing dissatisfaction among parliamentarians, academics, media commentators and interested members of the public with ministerial responsibility operating as the main mechanism of accountability for both elected and appointed public officeholders.

The first source of dissatisfaction with ministerial responsibility as an accountability mechanism was the growing dominance in legislatures by competing disciplined political parties. Party solidarity and party discipline contributed in turn to the rising power of first ministers within all Canadian political systems.

Parliamentary scrutiny of the executive was weakened because members of the governing party are not encouraged to probe and criticize, especially in public. Responsibility for challenging ministers, therefore, falls mainly to the opposition parties. However, there is little publicity and political gain to be had from mastering the complexity of public policy and government finances. Instead, revelations of mistakes and misdeeds are what gains media and public attention. Even in the face of such negative news ministers rarely resign.

The second source of dissatisfaction with ministerial responsibility was the increased scope and complexity of government that made it difficult, if not impossible, for ministers to be fully informed about actions for which they were theoretically responsible and accountable. Government was much simpler back in the 19th century when the doctrines of ministerial responsibility were imported from the UK. Until the second half of the 20th century the main unit of government was the vertically integrated department with a legally designated minister in charge who answered before the legislature, in the media and in other forums. As the activities of departments became more extensive and technical, questions were raised about the capacity of busy ministers to know and understand all that was being done in their names.
The problem of expecting ministers to answer for every official act of government became even more problematic when governments began to rely on non-departmental forms of organizations, such as crown corporations and regulatory agencies, to produce and deliver government programs. Because of the sensitive nature of the tasks such non-departmental entities perform, they are meant to be arms-length from government, to enjoy a measure of autonomy in their operations and budgeting, and not to be subject to continuous ministerial direction, oversight and involvement.

One distinguished public administration scholar described such arms-length bodies as “structural heretics” because they seemed to violate the constitutional principle that ministers were in charge of all organizations within their portfolio of responsibilities. Non-departmental bodies are not completely outside the scope of ministerial influence so the phrase “heretics” may be an exaggeration. In practice, the relationships among the cabinet, responsible ministers, crown corporations and statutory regulatory agencies are often closer than what official rhetoric implies. Anxious to avoid unwanted surprises, ministers and central agencies serving cabinets strive to ensure oversight of decision-making in arms-length bodies. This leads at times to confusion about who is responsible for particular decisions and this, in turn, leads to “discretionary accountability” in which ministers take credit for good news and shift the blame to corporate or regulatory officials for bad news.

Another development that strained conventional understanding of ministerial responsibility included the contracting out of the delivery of public services to for-profit or not-for-profit organizations in the private sector, sometimes without adequate mechanisms for accountability. A related development was the use of public/private partnerships to develop infrastructure and to provide services.

Finally, there was the use of private foundations to pursue public policy purposes. Writing back in 2003, Professor Peter Aucoin observed that governments were increasingly transferring significant amounts of money to private foundations with very limited oversight and accountability. In effect, public funds turned into private funds, and decisions in relation to the funds were largely beyond the reach of government and the legislature. Since Aucoin wrote, financial accountability for such foundations has been strengthened at the national level, mainly by allowing the Office of the Auditor General to follow the money in his/her scrutiny and reporting. But it remains the case that ministers and legislatures pay little attention to spending

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through organizations outside of government unless there are revelations of misspending.

In summary, as a result of changes in the contours of government and new methods of program delivery, the chain of accountability from the Crown through responsible ministers to Parliament and ultimately to the public, has been lengthened and there are a number of weak links in the chain.

In formal terms, ministers have some control over semi-independent non-departmental bodies like crown corporations and regulatory agencies, but the extent to which they are able and willing to answer is problematic. With private foundations there is even less meaningful ministerial oversight and control.

There has been a lively debate within the political science and public administration literature over whether changed circumstances mean the ministerial responsibility continues to offer a meaningful basis for accountability. To traditionalists like Nicholas D’Ombrain, the doctrine retains value because it focuses responsibility and accountability on an identifiable public officeholder who answers before Parliament and beyond for what happens or fails to happen in government. For critics, like Jeffery Roy, the diffusion of authority and control created by the new governance arrangements means ministerial responsibility has become little more than a constitutional fiction. This criticism goes too far because ministers remain answerable before legislatures and they can pay a price politically if mistakes or misdeeds are disclosed in the entities located at the periphery of their portfolios.

III. The Multiple Meanings of Accountability

Accountability has become a magic word, with almost infinitely elastic meaning. In almost all sectors of society there has been growing insistence on more forms and stricter enforcement of accountability. It would be helpful if we could use the term in a more precise and consistent manner, but this will not happen because the term has become an evocative symbol of declining public trust in institutions of all kinds. Politicians and governments have fallen most dramatically in the estimation of the public. Courts and judges have lost some, but far less ground in terms of public trust and confidence.

Elsewhere I have described accountability as a formal relationship based on five components:

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9 Nichols D’Ombrain, “Ministerial responsibility and the machinery of government.” Canadian Public Administration, 50,2 Summer 2007, 195-217

10 Jeffrey Roy, “Beyond Westminster governance: Bringing politics and public service into the networked era.” Canadian Public Administration. 51, 4 December 2008 541–568
• the delegation of responsibilities, ideally based upon agreed upon expectations and standards;
• the provision of authority, resources and a reasonably supportive environment to allow for the fulfillment of those responsibilities;
• the obligation of the accountable party to answer for performance based upon comprehensive, valid and balanced information;
• the obligation of the authorizing party to monitor performance and to take corrective action when needed; and
• the bestowal of rewards and sanctions based on performance.\(^{11}\)

The term “responsibility” in the above definition has two meanings.

First, we say that an institution or an individual is responsible when we put them in charge and give them the resources to complete a task.

Second, we say that someone is responsible when they act on the basis of an internalized subjective notion of what is right and perform their tasks with integrity.

The distinction between being in a position of responsibility and having professional sense of responsibility are significant for the role of the judiciary. There are formal structures, procedures and criteria for holding judges accountable. However, even more important than such external accountability mechanisms are the professional cultures of the courts, and the judicial qualities of individual judges, such as having an impartial mind and a capacity for independent, balanced judgment.

Accountability is related to but not the same as answerability, responsiveness, reporting and transparency. These devices are means to the achievement of accountability, but without the inclusion of consequences they do not constitute full accountability. The consequences of being accountable for performance can be material (loss of autonomy, money, position, etc.) and/or social/psychological (loss of reputation, credibility, legitimacy, etc.).

Over the past several decades governments and legislatures have supplemented ministerial responsibility with numerous other accountability mechanisms, both

internal and external to government. These developments are too numerous and not directly relevant to the themes of this paper.

With scandals and declining trust in public officials, the tendency has been to add new accountability requirements to existing mechanisms. The assumption seems to be that there never can be too much accountability, even if certain accountability rules and procedures compromise other important principles and values like independence and innovation. With multiple sources and types of accountability in the modern public sector there can be confusion and debate over which accountability requirements and devices should be most compelling for public officials of various kinds.

IV. A New Integrity Branch of Government?

A particularly noteworthy development in terms of the focus and themes of this paper is the creation over the past several decades of multiple officers or Agents of Parliament (APs) at both the national and the provincial level of government. The growing lineup of APs developed mainly in a reactive, ad hoc, improvised manner in response to events, often scandals. There was not deep thought given to where they fit in the usual threefold categorization of constitutional authorities consisting of Parliament, responsible ministers serving the Crown and the judiciary. All APs are investigative bodies and some perform the quasi-judicial function of adjudicating individual complaints, but they are not part of the court system and are less legalistic in their operations.

Agents of Parliament were created to supplement the capacity of Parliament to hold ministers and public servants accountable for the use of public authority and public money. The most recent addition to the roster of APs at the national level is the transformation of the Parliamentary Budget Office, previously located within the administrative framework of the Library of Parliament, into a stand-alone Agent of Parliament. This is an admission by Parliament that it needs help if it is to conduct its more historically important task of holding governments accountable for their spending.

Depending upon their individual mandates, APs are also involved with promoting and protecting the rights of Canadians to obtain government information, to participate in fair and free elections, to secure public services in both official languages, to protect

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personal privacy and to ensure that there is integrity and value-for-money spending in government.

In general APs must work within the framework of their enabling legislation and are primarily accountable to Parliament for their performance. However, with respect to their investigative and complaint resolution activities, APs are expected to act independently of both the executive and even Parliament.

APs are not subject to direction from the prime minister or cabinet. They report directly to Parliament, not through a cabinet minister in the way that regular departments do. On the other hand, the prime minister and cabinet supported by the central agencies that serve the political executive, initiate the appointment of the heads of APs, set budget and staffing levels and ensure that certain government-wide administrative policies are followed in the APs.

With multiple APs created over time and performing varied tasks, there is not a common governance framework. The general goal, however has been to create a balance between independence and accountability that is appropriate to the task of each agency. There are four main components to those governance frameworks: how the mandates of APs are set and revised; the procedures for the recruitment, selection, tenure and removal of the heads of the APs; how APs obtain their staffing and funding; and to whom they report on their performance with what potential consequences.

The financing arrangements for APs are of greatest concern here. There is a very mixed pattern at the provincial as compared to the federal level, and there can be significant differences among the various types of APs. At the provincial level the general tendency is to treat APs as just another part of government with budgets and staffing levels being set centrally by ministers on a central cabinet committee, usually called the Treasury Board or Management Committee of Cabinet.

At the national level, the House of Commons experimented for a period with an all-party panel chaired by the elected Speaker, that would review spending requests from APs and then recommend budgets to the Treasury Board committee of cabinet. If the Treasury Board revised the budgets, they were required to meet with the Speaker’s Panel to explain their decision. This arrangement was meant to ensure that governments did not limit the capacity and willingness of APs to provide critical scrutiny of their activities by withholding money. Established under a Liberal government in 2006 this pilot project did not survive the 2011 transition to a Conservative government.

Elections Canada and most provincial election agencies have greater financial autonomy than other APs. In the interest of ensuring independence in the conduct of free and fair elections, Parliament and many provincial legislatures have included in their election statutes a provision for what is called a “Statutory Draw.” Put simply,
this is ongoing open-ended authority to draw funds from the Consolidated Revenue Fund, without separate parliamentary approval. Adopted initially as a practical measure because of the difficulty of forecasting the costs of elections, the Statutory Draw has come to be seen as a means to avoid any real or perceived political interference in the election process and to strengthen the resolve of the chief electoral officer (CEO) to resist pressures from parties and candidates. 14

The same feature of an open-ended appropriation from Parliament exists for the ten provincial boundaries commissions appointed after every decennial census to redraw constituency boundaries for the 338 seats in the House of Commons. Again, the purpose of this financing arrangement is to avoid any hint of partisan involvement in the delicate task of ensuring reasonably equal value of the votes cast to elect a Member of Parliament while also protecting community of interest in drawing the boundary lines for constituencies. Similar boundary commissions operate in all provinces with similar protection against political interference.

V. Financial Accountability15

Section 53 of the Constitution Act, 1867 requires approval by the House of Commons of all expenditures of public money. The wording of Section 53 reflects the principle of parliamentary control over the spending of public money derived from the English Bill of Rights. It is clear from the wording that the House of Commons cannot “incidentally” delegate the spending power. All delegations of the authority to spend public money must be explicit.

In reviewing spending the House of Commons can reduce, but cannot increase the amounts being recommended by the Crown. 16

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14 It should be noted that the open-ended spending covers everything related to elections and referendums. There is a separate parliamentary appropriation for non-election activities of election agencies that is negotiated with government. This appropriation includes salaries for permanent staff of agencies. The salary of the CEO of Elections Canada is set by law as equal to that of a judge of the Federal Court, which is adjusted annually to account for inflation. Similar earmarking of CEO salaries to judicial positions occurs in several provinces. See Paul G. Thomas and Lorne Gibson, Comparative Assessment of Central Electoral Agencies. A Report Commissioned by Elections Canada, May 2014. Pp.27-33. Available at http://publications.gc.ca/collections/collection_2015/elections/SE7-2-2014-1-eng.pdf


The role of the Senate in the parliamentary expenditure process is somewhat unclear and controversial. It is clear that money bills cannot originate in the Senate, but there is less certainty over whether the appointed upper house is constitutionally allowed to defeat or amend such bills.

Since 1951, the Financial Administration Act (FAA) has been the primary statutory instrument by means of which the House of Commons endeavours to ensure that public money is only spent for purposes that have received its approval. As a legal instrument, the Act is the means whereby the House of Commons fulfills its constitutional obligation to hold the executive accountable for the spending of public money.

In the history of responsible government in the UK, it was the insistence by Parliament on control over spending by the Crown that provided the basis for the assertion of a wider role for the legislature to hold the executive accountable. Without going into a lengthy analysis, the consensus of most informed observers is that the process of reviewing and approving spending (known as the Supply Process) is the weakest part of the parliamentary process. Very little detailed examination of the forecasts (the Estimates) of government spending takes place in the full legislature or in the committees. Instead, most of the time is spent on the overall budgetary policy of government, and on embarrassing items of spending that the opposition parties claim represent waste, mismanagement or improprieties. Governments exert tight control over the supply process to avert such revelations. Reports and some reforms over the decades have not solved the basic problem that legislatures lack the capacity and commitment to master the complexities of budgeting in modern government. While the constitutional principle of parliamentary control of the purse may not be a complete myth, it serves mainly political rather than financial control purposes.

The FAA is not only an instrument for parliamentary surveillance of spending; it also provides the framework within which those in receipt of public money must account to Cabinet. As a committee of the Privy Council, the Treasury Board is a statutory body with responsibilities to Parliament that are assigned under the Act. In other words the FAA, not only established parliamentary authority over spending, it also served to centralize a great deal of the responsibility for conducting surveillance of the executive in the hands of the executive itself.

The Act applies to government departments, other government agencies, crown corporations, and to any parties engaged in financial transactions with such departments, agencies and corporations. Under the current, recently amended version, there are seven schedules appended to the statute that list the various government departments and agencies to which the Act applies. The arrangements for financial control, direction and accountability vary somewhat based on the type of organization involved, with agencies performing more sensitive tasks given somewhat greater financial autonomy.
There now exist multiple sources and types of accountability: constitutional, statutory, political, administrative, financial, contract-based, and performance based. The traditional, vertical, straight-line model of political accountability of ministerial responsibility was simple and straightforward. Over time, however, it ceased to match the new realities of politics and the new governance arrangements for developing and delivering policy, programs and spending. Recognition of the limits of the traditional doctrines and practices of ministerial responsibility led to calls for supplementary mechanisms of accountability. Ministers remain responsible and answerable, but there is no longer an assumption that they should control and be directly accountable for everything that happens in their broad fields of responsibility.

Today, different parts of government, and some organizations outside of government that use public money, operate along a continuum of ministerial direction, control and accountability and answerability before legislatures. The balance between independence and accountability depends on a number of considerations, but the nature of the task of a particular institution or set of institutions is a major factor behind various governance arrangements. Regular departments are subject to the most direct, immediate, strict and continuous ministerial supervision and parliamentary scrutiny. Other parts of today’s diverse public sector are subject to only indirect, remote, limited and occasional forms of political accountability. Based on the sensitive tasks performed by courts and judges, they definitely should operate at the autonomous end of the continuum.

Contemporary debates over the balance between independence versus accountability have to recognize that the roles and relationships of the Crown, responsible ministers and legislatures have changed drastically from what was implied by the traditional, “pure” notions of responsible government imported from the UK in the 19th century. The largely unwritten, often vague principles of our original constitution gave scope for governments and ministers to “play fast and loose” with the constitutional conventions when this was politically convenient. In recent decades there has been growing discussion of the desirability of codifying certain principles and precedents that might clarify the relationships among the legislature, the political executive and the courts in terms of the parameters and content of the decision-making of each branch of government.

VI. Judicial Independence

Judicial independence is widely accepted as a fundamental constitutional principle. The former Chief Justice of the Supreme Court, Brian Dickson, wrote that it is ‘the

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17 An excellent overview on this topic is the paper by Justice Ian Binnie, Judicial Independence in Canada, a paper submitted on behalf of the Supreme Court of Canada to the World Conference on Constitutional Justice. Venice, 2010. Available at www.venice.coe.int/WCCJ/Rio/Papers/CAN_Binnie_E.pdf
lifeblood of constitutionalism.” To uphold the principle that no one is above the law and to ensure impartiality in the adjudication of legal disputes, the judiciary as an institution and individual judges must be insulated against and independent from improper influence from external sources. This does not mean that courts and judges should be hermetically sealed in their own isolated world.

This is not the place to review the history of the concept of judicial independence in the Canadian context. Suffice to say that from the outset Canada’s approach to judicial independence mirrored that of the UK. The Preamble to the Act declaring that Canada had a constitution similar in principle to the UK, imported the history and traditions of judicial independence from “the mother” country. This meant there was significant, but limited formal written recognition of the principle of independence in Sections 96-101 of the Constitution Act, 1867.

The important point for this study is that for much of the history of the country judicial independence existed mainly as an unwritten constitutional principle. To this day there is still some lack of clarity and debate over the meaning of the concept and even more uncertainty and disagreement over how best to give practical expression to it in terms of prescribing the relationships between courts and legislatures and governments, including the bureaucracies that serve governments.

Over the decades the emergence of new levels of courts and a series of court rulings gave increasing operational meaning to the concept of judicial independence. With the adoption of the Charter of Rights and Freedoms in 1982 the Supreme Court was presented with an opportunity to “constitutionalize” judicial independence in the Valente case. Three components of the unanimous decision of the Court are relevant here.

First, the Supreme Court distinguished judicial independence at the individual and at the institutional level. Both types of independence were essential. Independence is needed to ensure that individual judges exhibit that impartial state of mind needed to deliver fair judgments. Institutional independence in terms of the administrative relationships of the courts to the executive and legislative parts of government, is necessary to ensure that the courts are not in reality, or in appearance, beholden to the legislature or the executive whose actions might come before the courts.

The distinction between individual and institutional independence becomes important to a later discussion because governments have frequently taken the position that judicial independence is limited to the adjudication function and does not extend to court administrative matters, including compensation issues.

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18 R v. Beauregard (1986), 2 SCR 56, para 24

19 Valente v. The Queen, [1985] 2 S.C.R. 673
Second the Supreme Court identified the following three “essential conditions” that lie “at the heart” of judicial independence: security of tenure, financial security and independence regarding matters directly related to adjudication. There is not a “one-size-fits-all” standard for ensuring independence, but there are minimal requirements for upholding the principle.

Third, the Supreme Court held that the guarantee of financial security is met when a right to a salary and benefits is established by law and is not subject to arbitrary decision-making. The Court did not insist that the final word on compensation must be moved from the executive to the legislative branch, just that the decisions not be motivated by short-term political calculations.

This component of the decision reflects the difficulty of gaining acceptance for any move away from the principle that all spending must originate from the Crown, meaning the cabinet, and must be approved by the legislature, which in a majority government situation is closely controlled by the prime minister, cabinet and the caucus of the governing party. In some jurisdictions the statute establishing the procedure for determining judicial compensation delegates the authority to the cabinet (Alberta and Saskatchewan) or to a minister of the Crown (as in New Brunswick). The tradition of control over spending by the political executive in the form of the premier and cabinet is a strong one that will not easily be changed.

The impression often created in political debate and in the media is that judges and the courts have become a power unto themselves and are insufficiently accountable for their performance. In fact, there are five broad, overlapping types of accountability for the judiciary. 20

First, there is political accountability because Governments appoint judges and ministers of justice and/or attorneys general answer to the legislature for many judicial activities. Governments face both prospective and retrospective scrutiny and accountability for the proper selection, promotion and discipline of judges.

Second, there is administrative and financial accountability involving the responsible and efficient use of financial and human resources. According to a 2005 report from the Canadian Judicial Council, courts operate under an “Executive” model of administration whose distinguishing feature is control by government and the bureaucracy. 21 Governments set budgets for courts and they decide on working conditions for judges.


Third, there is legal accountability that arises from the authority of the courts to review one another through procedures of appeal and review.

Fourth, professional accountability requires judges to exhibit and to transfer to others the professional norms and standards of behavior appropriate to the legal profession and the role of the judiciary. The Canadian Judicial Council deals with complaints of judicial misconduct involving federally appointed judges. There are similar judicial councils in each province that serve the same purpose. In addition, chief judges for the various levels of courts have taken on a role of promoting professional responsibility.

Finally, there is societal accountability that arises from the scrutiny and criticism of judicial performance by ministers; legislators; the media; lawyers and interested members of the public.

Some of these forms of accountability are internal to the judiciary and others involve external oversight.

To conclude this section, it must be said that beyond constitutional and legal safeguards, probably the most important protection of judicial independence and improper influence are the norms of behavior entrenched in the legal and political cultures of the country.

In terms of the legal culture, no matter how many protective mechanisms are put in place, judicial independence in practice will depend heavily upon the professional discipline, impartiality and integrity of the leadership of the judiciary and the judges serving on the various levels of courts.

Money alone would drive few, if any, judges to warp their professional judgments. However, the appearance of judges going cap in hand to governments and legislatures asking for adjustments to their compensation, and/or engaging in court battles over such matters, does damage to the reputation and image of the judiciary and weakens public trust and confidence in the institution.

As for the political culture, ministers and legislators recognize that the public will not tolerate real or perceived political interference into the adjudicative function of the courts. On a number of occasions over the years, ministers have felt compelled to resign or have been removed from cabinet by the prime minister because of actions or statements that appeared to interfere with matters pending or already before the courts.

There is less understanding and acceptance by politicians of the need for judicial control over administrative matters.
When it comes to secure and adequate compensation for judges, there is often a gap between political rhetoric about respect for the judiciary and its independence and the political calculations that lead to denying, limiting or delaying adjustments to the compensation and benefits paid to judges.

Governments claim they have the constitutional right to make such decisions. When tough decisions have to be made about the allocation of scarce tax dollars, courts and judges cannot be singled out for special budgetary treatment compared to other parts of government and other needs within society. Governments recognize that opposition parties in legislatures will seldom jump to the defense of the judiciary.

All politicians, of whatever partisan background, recognize that judges are seen by a generally ill-informed public to be elites with security of tenure and hefty compensation packages compared to their situation. In the short-term, at least there is often political ground to be gained by attacking judges for making “exorbitant” compensation demands.

The relatively high prestige of the judiciary compared to other institutions within society is not necessarily inconsistent with political and popular indifference, or even hostility, to the financial claims of judges, especially in circumstances of scarcity when austerity is the order of day politically.

**VII. The Advent, Mandate and Record of Judicial Compensation Commissions (JCC)**

The idea of having an independent commission periodically make recommendations to governments and legislatures on judicial compensation was first adopted for federal courts and, as a result of a landmark ruling by the Supreme Court, became a constitutional requirement for all levels of federal and provincial courts. The origins and history of compensation commissions has been covered elsewhere so only some highlights will be presented here.

At the national level, every three years between 1981 and 1999, the Government of Canada appointed an advisory commission to recommend salaries and benefits for federal judges. The government was required to table the commission report in Parliament. However, it was not required to justify with arguments and evidence a decision to reject or modify recommendations from the commission. Successive governments largely ignored the extensive work of commissions.

Provincial courts are created by provincial statute and have no explicit, written constitutional status (they are not mentioned in Sections 96-101 of the Constitution Act, 1867). Responsibility for defining the contours of their independence, including financial security, had to come through court rulings. This places courts in an awkward situation. Courts have constitutional authority and expertise to rule on
judicial independence but they must exhibit similar deference and restraint that they expect governments and legislators to exhibit.

Some provinces began to use commissions during the 1980s, but governments tended to ignore their recommendations. As a result judges lost financial ground to inflation and to rising levels of compensation in the private bar.

Controversy, conflict and litigation over judicial compensation heated up during the 1990s when an economic downturn placed strain on provincial budgets and these financial circumstances caused a number of provinces to reduce or freeze the salaries of provincial court judges. One provincial judges’ association and some accused persons argued that such reductions violated the principle of financial security for judges. There were a series of cases across the country and eventually a number of them came together in an appeal to the Supreme Court.

The PEI Reference case was a blockbuster constitutional ruling by the Supreme Court that remains controversial. In a judgment written by Chief Justice Lamer and concurred in by all but one of the justices that heard the case, the Supreme Court went beyond all previous cases on judicial compensation and created a new institutional structure and a process to protect the financial security of judges at both the national and provincial level of courts.

There is a sizeable body of legal literature on the finer details of the ruling and the implications for the relationships among the governments, legislatures and the courts. The following discussion, written by a non-lawyer, highlights the implications of the decision for institutional independence of the judiciary. This discussion serves as background to an eventual proposal for putting the principle of financial security on a more solid footing in terms of both law and politics.

The PEI Reference case arose out of several cases, which originated in the provinces of Alberta, Manitoba and PEI, where provincially appointed judges were faced with salary reductions enacted by law. This led to mounting friction and conflict between judges and governments.

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The most dramatic clash was in Manitoba where the Minister of Justice made an offer of a small salary increase on the condition that the pending hearings of the compensation commission not proceed. When the Minister learned that the judges’ association intended to challenge the constitutionality of the legislation, the government abandoned a tentative agreement on an increase.

The Manitoba case was grouped by the Supreme Court with the others from PEI and Alberta because they all involved the central issue of the nature of the relationships among governments, legislatures and the judiciary. There were several key conclusions reached by the Court.

First, the Court had much to say on the fact that the explicit provisions relating to judicial independence in the Constitution Act, 1867 were simply illustrations of the fundamental principle of judicial independence that is implicitly enshrined in the Preamble of that Act that declares Canada to have a constitution similar in principle to the UK. Interpreting the Preamble broadly had the effect of extending constitutional protections in the remuneration process to those provincial judges not covered in previous court rulings.

Second, after describing the Manitoba events, Chief Justice Lamer wrote that the “pressure tactics” employed by the Manitoba Government created “an atmosphere of acrimony and discord.” He went on to declare that judicial independence “must include protection of judges’ ability to challenge legislation implicating their independence from the reasonable perception that the government might penalize them financially for doing so.”

Lamer recognized that decisions on the spending of public money were “inherently political.” But to ensure public confidence in the judicial system, those decisions must to the greatest extent possible be “depoliticized”. Governments or the legislature must not determine compensation of judges unilaterally. Nor can it be the subject of negotiations. Compensation must be determined on an objective basis of arguments and evidence. It must be free from the reality and any perception of politically expedient manipulation of the process. Likewise, judges must avoid becoming entangled in the politics of public spending.

A brief comment on this second finding by the Court is warranted for the purpose of this paper. Politicization and “depoliticization” are more terms of art in the field of public administration than in law. In the study and the practice of public administration the concern is to protect a neutral, merit-based, professional public service that is capable of offering independent policy advice to successive governments and of delivering programs to citizens in an impartial fair manner. Over time public administration scholars and professionals have recognized that several types and varying degrees of politicization can occur.

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23 PEI Reference at para 109
Historically the main concern was that the recruitment, selection, promotion and removal of public servants were based on political patronage without regard to the qualifications and performance of individual public servants. Independent public/civil service commissions were created to largely remove this source of politicization of a neutral, professional public service.

A related concern was how the classification and compensation were set for various jobs in the public service. Eventually compensation for public servants became subject to collective bargaining with public sector unions. Classification was removed from the political domain by a reliance on objective criteria administered by an independent body.

Most recently, the debate has centered on concerns that senior public servants, like deputy ministers and assistant deputy ministers, will become “promiscuous partisans”, a phrase that does not mean loyalty to a particular party but rather an unspoken motivation by at least some top administrators to please their elected political masters as a way to ensure career advancement.

In summary, the public administration literature on independence of the public service demonstrates the needs for a nuanced understanding of politicization and “depoliticization” that recognizes there are different sources and varying gradations of each. Transferring this thinking to the issues related to judicial independence, there is widespread acceptance of the need for a merit–based process for selecting and promoting judges. There is less understanding and acceptance of the need for an objective, evidence-based process for setting judicial compensation.

Third, the Court held that judges’ salaries may be increased, reduced or frozen but only after consideration of the arguments and evidence by a compensation commission that would be “independent, objective and effective.” Of these three attributes, ensuring the effectiveness of the commissions has proven to be the most difficult.

The Court offered some, mainly procedural, guidance as to what constituted an effective commission process. Governments and legislatures could not act on compensation matters before a periodic report from a commission was received. The recommendations of the commission need not necessarily be binding but they must be taken seriously, cannot be easily set aside and must have a meaningful impact on the determination of salaries. As discussed below, the Court also held that a government that rejected recommendations must be prepared to defend its decision in a court of law. In setting down these procedural criteria of effectiveness, the Court was trying to ensure that governments did not feel free to treat the commission as a nuisance and an empty ritual in which they could fulfill their constitutional obligations simply by going through the motions.
The Court was appropriately reticent to prescribe the types of factors that might justify a government rejection or variation of a commission recommendation. The standard of justification for rejection was “simple rationality”, a not particularly onerous requirement that rejection of commission recommendations must be related to a legitimate government interest. Government decisions on compensation cannot be based on “purely political considerations” or involve discrimination towards judges compared to other public officials.

The simple rationality test is sometimes described as a balanced compromise: governments retain the right to set salaries but they must explain and justify their reasons in a court of law. However, the test sets a low standard for governments to meet. The burden of proof on the government is limited to demonstrating a reasonable basis for its action, whereas the judges face the difficult challenge of demonstrating that the government action is arbitrary and unreasonable.

The Court took a predominantly procedural approach to describing an effective commission process. However, there are broader questions about the effectiveness of the process. Does the process protect judicial independence, inspire confidence among judges and help to attract and retain top quality judicial talent? Do governments and legislatures understand and accept the process as a legitimate constraint on their decision-making authority? Are governments and legislatures confident that commissions will take sufficient account of their broader decision-making roles and the politically difficult budgetary choices they face? Does the process “depoliticize” the compensation issue or does it heighten conflict between governments and judges in ways that bring the judiciary into disrepute? Does it inspire public trust and confidence in the judiciary? Is the commission process efficient and timely? Effectiveness, it seems, is a many splendored thing that is at least partly in the eye of the beholder.

Fourth, it is necessary to be clear about the mandate and the nature of the task of the commissions. Commissions are created to “present an objective and fair set of recommendations dictated by the public interest.” It must be acknowledged that there are complex matters of fact, interpretation and judgment involved with determining what salary adjustments are fair and serve that elusive phenomenon called the public interest.

The Court described the commissions as an “institutional sieve”, a phrase that implies that the arguments and evidence presented by governments and judges’ associations will be filtered by a transparent process of written submissions, public hearings and responses by governments and/or legislatures to the recommendations made by the commissions. The process was meant to be flexible and consultative, with evidence and arguments presented through a series of stages. It was definitely not a process of bargaining or arbitration. The commissions are interposed and serve as a buffer between the government and the judges in order to avoid the reality or any appearance of direct bargaining between the two parties.
Fifth, the Court refrained from dictating the powers, structures and procedures of the commission. Rather than set down a commission model in “constitutional stone”, the Court declared that there could be diversity and flexibility in the design of the commission process in different jurisdictions and for different levels of courts, providing, of course, that the structure and process was independent, objective and effective.

Based on the PEI Reference ruling, all provinces had to establish commissions (some called them tribunals or committees) that conformed to the new constitutional requirements. Typically, commissions are formed on a three or four-year cycle. They are usually composed of three members – a nominee of the provincial judges’ association, a nominee of the government and a chairperson chosen by agreement of the two sides. In British Columbia the commission consists of five individuals, two appointed by the Attorney General, two by the Chief Judge of the Provincial Court. In both cases one of the individuals must be a non-lawyer. These four individuals choose a fifth person to chair the commission.

There is not a lot of evidence available on how commissioners understand and approach their role on compensation commissions. There is testimony before the Senate Standing Committee on National Finances by a representative for a commission on Superior Court judges that indicated federal commissioners took the independence principle seriously and did not act as a representative of the body that nominated them. This makes the commission process different from a labour arbitration process in which representatives of the two sides are expected to put forward the case for, and almost invariably vote for, the position of the side they are on. That method is not part of the operation of judicial compensation commissions which are independent bodies operating under the statutory provisions of the Provincial Court Acts in the various provinces, and applying the criteria in the relevant Act, including the requirement that the overall process serve the public interest.

The coverage of provincial commissions is broadly the same, consisting of salaries, pensions and other benefits. Their mandate is to inquire into these matters, not to engage even indirectly in negotiations. The inquiry process goes through a number of stages, often with statutory deadlines for the commencement and completion of those stages, including a date by which governments/legislatures must respond to the commissions’ reports.

With the exception of Newfoundland and Labrador, the provincial legislation creating commissions provides a listing of considerations that governments, judges and commissioners must pay heed to in their submissions and recommendations. These

considerations include economic conditions and what is affordable based on the state of government finances.

Significantly, the criteria for commission decision-making do not include the spending priorities of government. This is appropriate for two reasons – one constitutional and the other practical. First, if commissions were to consider and comment on spending priorities they would definitely become entangled in the political process. When governments make this argument, they seldom, if ever, offer explanations of how adjustments to the compensation paid to judges will prevent them from meeting other spending priorities on education, health, social services etc. Judges’ salaries and periodic adjustments are a tiny percentage of provincial spending.

Second, for political reasons governments tend not to declare their budgetary priorities explicitly and those priorities can shift in response to short-term events. This is a practical reason why commissions should avoid “the prediction game” of speculating on how spending on courts and judges fits with the future spending plans of governments.

The commissions are not meant to simply update the previous commission report. Instead, operating on a triennial or quadrennial cycle, commissions are required to produce new information and analysis to support their recommendations. To support this analytical role, commissions receive submissions, they hold public hearings, on a very occasional basis they hire experts to conduct research (for example on possible comparators for particular judicial positions and on the state of the economy) and they may request additional information from the two sides should circumstances change between the commencement and conclusion of their work.

Descriptions of how commissions reach their conclusions and recommendations are scarce. Typically it seems there are one or two deliberation meetings, following which the chairperson prepares a draft, and then a further meeting where the other members provide input on the draft before it is finalized. If an individual commissioner cannot agree with the majority opinion and recommendations, he or she can write a dissenting opinion. On occasion (in Manitoba for example) there have been “addendums” issued by one or more panel member where they agree with the recommendations, but not the reasons.

It is unclear whether government has ever relied on the lack of unanimity in and of itself as a reason for rejection, but there has been at least one occasion in New Brunswick when the Government has adopted the recommendations of the minority report (i.e. its own nominee) and the matter ended up in the Court of Appeal.

The time and effort involved with producing factual and valid analysis that supports sound recommendations should not be minimized. It must be frustrating and discouraging for commissioners when governments, often at the end of the process,
introduce new considerations as a basis for rejection or modification of commission recommendations. As discussed below, a pattern of governments simply dismissing commission reports, without adequate detailed reasons based on facts, will discourage lawyers and other professional individuals from accepting nominations on commissions. Cynicism about the commission process within the legal and the judicial communities is not desirable.

A number of provinces opted to retain or grant commissions binding authority over all or some compensation matters. Until legislative amendments passed in 2016 Nova Scotia kept its binding model, while the NWT also adopted a binding model. Ontario adopted and has retained a binding model, except for pensions. Manitoba opted for a binding model on salaries, provided that the salaries do not exceed the average of the salaries of judges in New Brunswick, Nova Scotia and Saskatchewan. The Yukon law provides for provisional binding recommendations, but only to the extent that that those recommendations do not exceed “the highest total value of judicial remuneration” provided to judges in Alberta, British Columbia, Northwest Territories and Saskatchewan. In Saskatchewan salaries must not be less than the national average salaries for the other provinces and territories.

In another “wrinkle”, in Manitoba a standing committee of the Legislature reviews recommendations and, if the full Legislature fails to vote on the committee’s report, the commission recommendations go into effect. This is how a 2005 report from the judicial compensation commission was implemented.

Another difference among the jurisdictions is whether the legislature, the cabinet or some combination of those two institutions are involved with approval of the recommendations from commissions. There are significant technical legal differences among the various jurisdictions that will not be fully described here. In New Brunswick recommendations from the commission are deemed accepted if the Minister responsible does not advise the commission and the Legislature that the recommendations have been rejected in whole or in part. The jurisdictions that use the legislature are British Columbia, Manitoba, Newfoundland and Labrador, Prince Edward Island and Quebec. Those provinces that use the cabinet are Ontario, Alberta and Saskatchewan, although in the latter jurisdiction if the minister rejects recommendations the decision must be brought before the legislature.

There are pros and cons on whether a vote in the legislature should be required to accept or vary commission recommendations. There is some value, both practical and symbolic, in having all of the elected representatives in a province vote on judicial salaries. Ideally, such action might remind public officials and interested members of the public about the importance of upholding the principles of judicial independence.

In majority government situations, however, approval of the government’s position by the full legislature is virtually a foregone conclusion. Governments control the timing and the nature of the review of commission recommendations that take place.
in legislative committees and/or the full legislature. Orchestration of the legislative process to confirm a cabinet decision may blur where responsibility and accountability for the final result resides, namely with the premier and the cabinet.

Placing recommendations before legislatures dominated by competitive political parties tends to increase the political nature of the approval process. This is the case, not because opposition parties rise to the defense of adequate remuneration for judges (they rarely do), but rather because there are political gains to be made from taking a hard line on increased judicial compensation. There was not one example discovered in the course of this research where a cabinet or a legislature approved a salary increase higher than what the compensation commission recommended; an option that is theoretically possible under the various laws.

The experience with the new commission process was disappointing from the outset. Based on a number of factors, such as the increased volume and complexity of cases coming before the courts, a desire to narrow the salary gaps between provincial and federal judges, and a recognition of the strength of the economy, a number of commissions across the country recommended substantial salary increases for provincial court judges. In most cases governments rejected these increases, leading to appeals of those decisions. Eventually five appeals from four provinces were combined in the Bodner v. Alberta case decided in 2005.  

The Bodner ruling upheld the right of governments and legislatures to reject or modify commission recommendations, but insisted on more solid grounds for doing so. The governments involved had not argued that exceptional economic or other circumstances justified their variation of commission recommendations. Instead they claimed their constitutional and political responsibility for managing the public purse gave them the right to weigh various factors differently than the commissions had. The Court rejected this argument. To allow governments to unilaterally assign different weight to the factors identified in the mandates of commissions would “eviscerate” the commission process and tilt the constitutional balance heavily in favour of the government.

Courts reviewing government decisions should ask three questions: 1) has the government articulated a legitimate reason for rejection or modification? 2) is there a reasonable factual foundation for the government’s reasons? 3) has the commission process respected the purpose of protecting judicial independence and depoliticizing the compensation process? On this last question, the court concluded that up to that point in time the use of commissions as intermediaries had not reduced friction between governments and judges, instead disagreements, court cases and sensational media coverage had made the issue of compensation highly political.

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25 Provincial Court Judges’ Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges’ Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General), 2005 SCC 44, (2005), 2 SCR 286
In addition to politicizing the issues, government rejections or variations to commission recommendations leading to litigation has produced in many, but not all, provinces a salary adjustment process that is prolonged, expensive and often highly publicized. In some provincial situations it has taken so long to resolve litigation over one commission report that the next commission process was already underway before there was a resolution of the issues from the previous commission.

Long delays mean uncertainty and loss of financial ground, sometimes only temporarily, for judges, especially when governments ultimately reject recommended salary and benefit adjustments. Lengthy, open disputes followed by unilateral government action erode the mutual understanding, respect and conditional trust required for appropriate constitutional relationships to exist among the judicial, executive and legislative branches of government.

Highly confrontational clashes between governments and judges lead to sensational and distorted media coverage. This in turn risks bringing the courts and judges into disrepute. Empirical studies from the election field indicate that the entanglement of independent election management bodies in political controversies produces declines in public trust and confidence in such bodies and in the free and fair quality of elections.26 Similar negative impacts on the reputation and image of the judiciary and on public confidence in the impartiality of judicial process are potential consequences of an excessively political process for determining salaries and benefits for judges.

A brief discussion of some recent illustrative cases in four provinces demonstrates that the problems of acrimony, conflict and delay are much worse in provinces with non-binding models compared to those where compensation commissions have the final word on compensation matters.

As described above, the province of Manitoba has a qualified binding process on the salaries component of judicial compensation. Regardless of the party in power it also has one of the worst provincial records of resolving judicial compensation issues in a civilized, expeditious manner. In 2008 the Judicial Compensation Commission held hearings on salary adjustments for provincial court judges to cover the period from 2008 to 2010. Initially, the government advanced no salary adjustment figure, except to say that it should be minimal. In light of the economic difficulties that became evident after the hearings, the JCC subsequently asked for and received additional submissions from both sides. In June 2009 the JCC issued its recommendations with concurrence from the judges nominee and dissenting comments from the government nominee.

As per the procedure in Manitoba, the JCC report was presented to the Legislature’s Standing Committee on Legal and Legislative Affairs for review and a vote on a motion to place the report as approved or amended before the full Legislature. In a pre-planned and carefully orchestrated process the government used its majority on the committee and in the Legislature to reject the JCC recommendations. The Judges’ Association then appealed the government’s decision to the Manitoba Court of Queen’s Bench on the grounds that the government’s reasons were neither legitimate nor based on a reasonable factual foundation. In ordering that all recommendations of the JCC on salaries be implemented, Justice Oliphant wrote the following scathing description of the government’s tactics:

“... the government failed, in an abject manner, to respect the process for resolving issues pertaining to judicial salaries and benefits with the result that the neither of the purposes of the process was achieved. ....

In refusing to accept the recommendations of the JCC, for the reasons proffered, as part of a its strategy to enhance or maintain its bargaining position with others employed in the public sector, the government failed to recognize that judges are not civil servants. The government also acted in a manner that failed to achieve the established constitutional two-fold purpose of the established process, namely, the enhancing of judicial independence and the depoliticizing of the setting of judicial remuneration.”

The Government of Manitoba appealed Oliphant’s ruling but in 2013 the Court of Appeal rejected the government’s position and ordered the Legislature to implement the JCC recommendations.

In British Columbia, there has been an ongoing struggle over judicial compensation resulting in three Superior Court and two Court of Appeal decisions up to 2017. In the case of each triennial commission established between 2010 and 2016 the government rejected in whole the recommendations of the JCC. In tough economic times in 2010, being mindful what was affordable, the JCC recommended no increases for the first two years and an inflation level increase in the third year. Consistent with its budgetary mantra of “net-zero” the government rejected any increase over the entire three-year cycle. A judicial review of the government’s decision was sought and granted. The court ruled that the government’s reasons were not legitimate, writing as follows:

“In standing by its ‘net zero” mandate...the government diverted attention from the evidence and conclusions of the commission as they

27 Judges of the Provincial Court of Manitoba et al. v. Her Majesty The Queen, 2012 MBQB 79 para.155 at (CanLII), <http://canlii.ca/t/fqncq>
relate to the constitutional requirements applicable to setting the
salaries and benefits of judges. No party...disagreed 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 ... on other public sector bargaining units.”²⁸

The government revised its position and this led to another court review of
the government’s second response to the 2010 recommendations. That review did not
commence until after the 2013 Compensation Commission had delivered its
recommendations. To make this long, tangled, confusing and disturbing story short,
the next stages are simply summarized as follows. After the British Columbia Court
of Appeal ordered implementation of the 2010 JCC’s recommendations, the
government’s response to the 2013 JCC report was judicially reviewed, first by the BC
Supreme Court and then by the Court of Appeal, and the government’s response was
quashed. Meanwhile, in February 2017, the 2016 JCC recommendations for the years
2017 to 2019 were released. Government also rejected those and another judicial
review is now underway.

In the post-Bodner period (since 2005), judges in New Brunswick, Newfoundland and
Labrador, Nova Scotia, and Quebec have also felt compelled to take their respective
governments to court in order to gain acceptance of the recommendations of
compensation commissions. Mounting disappointment, frustration and anger within
the judicial community has led to a multiplicity of court challenges to both the process
and the substance of decisions on compensation made by either or both governments
and legislatures. This was not the desired and anticipated outcome arising from the
PEI Reference and Bodner cases.

In contrast to the turbulent histories elsewhere, Ontario seem like an oasis of calm
deliberation over judicial compensation. Prior to 1992 governments regularly
ignored recommendations from commissions. However, in that year, the government
agreed to a Framework Agreement, as a Schedule to the Judges Act. The single most
important feature of the framework is a binding provision for salaries. The binding
provision leaves little room for litigation and there have been only two occasions
when the judges and governments have taken disputes to court. The first dispute was
over pensions and it wound up being part of the Bodner case. The second time that
the judges took the Ontario Government to court was a change to pension made by
the government without referral of the matter to a judicial compensation commission.

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²⁸ Provincial Court Judges Association of British Columbia v British Columbia (Attorney General) 2012
BCCA 136  at para 73
Further evidence of eroding government respect for the commission model is seen in Nova Scotia where there had been a binding process for 30 years. During that period there had been no litigation with respect to salary matters. Previous governments had praised the binding model as a legitimate process that contributed to quality judges and justice within the province. Salaries for judges in Nova Scotia remained among the lowest in the country.

Despite what might be seen as a positive record, on May 3, 2016, the Finance Minister introduced Bill 174, The Financial Measures 2016 Act that would implement austerity measures in the public sector during an economic downturn.\textsuperscript{29} Included in this budget bill was an amendment to the Provincial Court Act that allowed the government to reject recommendations from the judicial compensation tribunal respecting both salaries and pensions. Speaking on the Bill in the House of Assembly the Minister described the change to a non-binding model as a “tweaking” of the compensation process. He argued that Nova Scotia was only one of two jurisdictions (the other being the NWT) where the binding model operated. The shift to a non-binding model, he argued, “would respect the responsibility of the government for public finances.” Allowing the cabinet to overrule tribunal recommendations, he concluded, would provide a “safeguard” in the compensation process.

There were a number of problems with the Minister’s justification for the adoption of a non-binding model.

First, granting cabinet the final word on judicial compensation was obviously more than just a “tweak” to the compensation process, especially considering the positive record under the binding model over a thirty-year period. The choice of language seemed to be a case of “political spin” meant to minimize the significance of the change. Burying the change in a budget bill and offering no extended defence of the change are other indications that the government hoped to avoid substantive debate on the issue.

Second, rather than just two jurisdictions that had a binding model as the Minister suggested, there were actually three because the Minister failed to include Ontario that has used a binding process (but for pensions) since 1992. In some other jurisdictions, commission recommendations are in principle binding on salaries if the adjustments fall within the range of other provinces. In other words, Nova Scotia was far less of an outlier than the Minister implied.

Third, in those jurisdictions where commissions had the final word on compensation matters, legislatures and governments must have accepted that those arrangements did not violate unduly the principles and practices of responsible government. Instead, a binding process was seen as an appropriate accommodation of the equally important, recognized constitutional principles of judicial independence, including

\textsuperscript{29} Nova Scotia House of Assembly, Debates, May 5, 2016. 8824-8827.
financial security for judges, based on a binding commission process that was effective because it was balanced and avoided excessive litigation.

Fourth, to argue, as the Minister did, that a “safeguard” was necessary, implied that the judicial compensation process was out of control. In fact, the compensation tribunal was required by law to consider the economic and financial circumstances of the province and the government when making its recommendations. As mentioned, judicial salaries in Nova Scotia were near the low end of the national scale suggesting that the tribunal in its findings and recommendations had always been mindful of the “affordability” factor. Before the Bill was passed, the tribunal had ordered salary increases for provincial judges of 3.8% for 2014-2015 and cost-of-living increases over the following two years. Such increases could hardly be described as excessive.

Likely the Nova Scotia government recognized that it would not pay a political price for unilaterally and drastically modifying the compensation process. None of the representatives of the opposition parties that rose in the Legislature to debate the Financial Measures Act 2016 criticized or even raised concerns about the abandonment of the binding model. In the hearings after second reading the only written submissions received were from the Nova Scotia Branch of the Canadian Bar Association, the provincial judges’ association and the Canadian Association of Provincial Court Judges calling for the government to withdraw the amendments to the Provincial Courts Act. As in other provincial situations, politicians and the media found it easy to portray such submissions as self-interested demands from well-paid judges.

Introduced on May 3, 2016, the Bill completed its speedy passage in the Nova Scotia House of Assembly on May 20, 2016. A constitutional challenge to the amendments to the Provincial Courts Act is currently underway.

Interestingly, it is the smallest jurisdictions of the NWT (binding model operates), the Yukon (the legislation mandates consensus building and mediation) and PEI that have been most successful in avoiding conflict, politicization and litigation.

The creation of the commission model in the PEI Reference case was an extraordinarily rare case of the Supreme Court engaging in institutional design in response to a mounting crisis of anger and hostility in relations among legislatures, executives and the courts. The crisis was creating threats to the preservation of the appropriate constitutional boundaries among the three branches of government. It was also damaging to the image and reputation of the courts and judges as independent and impartial in upholding the rule of law. The Bodner case reinforced the expectation that the commission model would depoliticize the setting of judicial remuneration. Unfortunately, the opposite has happened.

Conflict, controversy and politically motivated decision–making has become the pattern in many jurisdictions. The number of court cases filed against governments
for failing in their compensation decisions to comply with constitutional requirements has risen steeply over past decade.

It would be easy to criticize the Supreme Court for failing to anticipate these outcomes. However, institutional design is not a precise science; how a particular innovation will reverberate throughout an interdependent political system is difficult to predict in advance. There have been consequences of moving to a commission model that were not foreseen by the Supreme Court. Anticipating harsh criticism for assuming a policy role, the Court, in the person of Chief Justice Lamer, articulated some general principles that should guide the design of the commissions, but allowed flexibility for governments and legislatures to adapt the model to their own particular context. Had the Court been more prescriptive – for example requiring that all commissions have the authority to make binding rulings – the commission process might have been more harmonious and effective.

VIII. Summary Evaluation of the Commission Process and the Reforms Needed

Evaluation of the experience to date with judicial compensation commissions will evoke different judgments from different commentators. In part, these differences reflect different starting assumptions about the appropriate balance between responsible government and judicial independence. Such assumptions will shape, to some not easily determined degree, what sorts of structures and procedures are considered constitutionally appropriate for determining judicial salaries and benefits. It is to be expected that the stakeholders, involved with the compensation process, especially governments and judges, will often have different perspectives on the procedural and substantive issues involved.

Even independent scholars can have differences of opinion on the compensation topic based on the focus and methods of their research. Unfortunately, there is limited academic literature on judicial remuneration. Nearly all of the available literature is written from a legal perspective.

An example of such literature is the article by Sterling and Hanley that argues there was a design flaw in the commission model that came out of the PEI Reference. In order to avoid any real or perceived erosion of judicial independence, the Supreme Court insisted there could be no hint of negotiations. Judges and courts could not be seen relaxing their scrutiny of the legality of government action in return for an extra percentage increase in salary. This prohibition on any form of bargaining led, in the view of the authors, to an excessively formal, legalistic and adversarial process in which both sides feel compelled to be represented by counsel and the proceedings resemble a trial. More progress, less conflict and less litigation would occur, they argue, if the process relied in the initial stage of the commission process on informal communication and discussion, assisted by a mediator. The process would become adversarial and legalistic only when there was a clear impasse.
This diagnosis is probably correct, but only partly. It is true that the more consensus-based approach based on mediation that operates under law in the Yukon seems to regularly produce results acceptable to both sides with far less rancour. But that is a small jurisdiction and the relationships between government and court officials are more face-to-face and personal than in larger jurisdictions. Also, there is still the Court prohibition on bargaining that a more collaborative model would have recognized.

A second legal assessment of the commission process is contained in the LLM thesis completed by Graeme Bowbrick at the University of British Columbia in 2013. The thesis examined the experience with judicial compensation in five provinces (Alberta, British Columbia, Nova Scotia, Ontario and Quebec) and the federal jurisdiction, with particular attention to three historical periods (prior to PEI Reference case of 1997; the period between that decision and the Bodner decision in 2005; and the period following Bodner up to 2010). The analysis focuses on the rate of adoption of commission recommendations, the salary adjustments and the conflict levels between governments and judges. Bowbrick concludes that the PEI Reference case was a positive change because it forced governments to modify their unilateral decision-making of the past that had been a source of strain on the relationships with the judiciary.

He points out that economic context is a major factor in exacerbating the inevitable tensions among judges, governments and legislatures. In terms of outcomes he claims his data demonstrate a balanced process in which governments and judges achieved comparable success in achieving their respective initial positions on compensation. Based on this overall positive assessment, Bowbrick feels no need to reform the commission process; it is sufficient simply for the two sides to recognize the legitimacy of each other’s roles and to change their attitudes towards the process.

It should be noted that Graeme Bowbrick served as the New Democratic Party representative for New Westminster in the British Columbia Legislature from 1996 to 2001 and served as Attorney General in the NDP government from 2000 to 2001. As Attorney General he was required to make a recommendation to Cabinet on a report from a judicial compensation commission. Initially he favoured deference to the commission, and was troubled by the argument that “If only we were accountable, then surely the spending decisions should be ours alone” (emphasis added). He goes on to argue that the Supreme Court ruling in the PEI Reference case “favoured

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30 Graeme Bowbrick JUDICIAL COMPENSATION IN CANADA: AN EXAMINATION OF THE JUDICIAL COMPENSATION EXPERIENCE IN SELECTED CANADIAN JURISDICTIONS 1990-2010. March 2013. Available at https://open.library.ubc.ca/media/download/pdf/24/1.0071914/2

31 Ibid. p3
judicial independence at the expense of democratic principles governing the accountability of governments for their financial decisions.”

Reflecting his position as a practicing politician, Bowbrick insisted in 2013 that ultimately responsible government must trump judicial independence. Unfortunately the dissertation does not analyze at any length the principles of responsible government, especially as those principles and practices have evolved over time. The bibliography for the dissertation contains no sources that contain an extended discussion of responsible government under contemporary political and governing conditions.

As for his claim the PEI Reference case created a constitutional imbalance favouring judges, recent evidence suggests his selection of cases led him to an overly positive conclusion that the commission process was operating in an appropriate, balanced and fair manner. Browbrick's analysis stops in 2010 and since then there has been an increased pace and intensity of conflict and litigation in at least six provinces. Two of his five provincial cases - Nova Scotia and Ontario - had full or partial binding processes so that probably contributed to his more harmonious picture of the commission process. As mentioned above, Nova Scotia dropped the binding model in 2016. His conclusion that the commission process produced balanced outcomes can also be questioned. Extending his analysis beyond the 2010 stop date might very well reveal remuneration outcomes that were less balanced because of more frequent rejection of commission recommendations by governments and legislatures.

The Bowbrick thesis is too optimistic because simply calling for a change in attitudes is unlikely to have the desired impact. Politicians need to change their understanding and attitudes towards the process more than the judges. And as discussed below, bringing about the necessary change in the attitudes of governments and legislatures will be difficult because of the incentives within the political process that encourage politicians to take a hard line on judicial remuneration. Moreover, in the overlapping and intersecting worlds of governments and courts there has developed recently in many jurisdictions a negative, suspicious and combative culture. As we know, changing cultures is a slow and uncertain process. Developing mutual understanding and bonds of trust will take time and a record of positive interactions.

Writing from the perspective of a political scientist who studies power – who gets what, when, how and why – I find that the Sterling and Hanley perspective ignores or underestimates the importance of the “politics of judicial compensation”.

To understand the recent experience with judicial compensation commissions we need to understand that politics is a distinctive type of human activity with its own character, goals, definitions of success and its own form of rationality that matches means to ends. Over the course of human history there have been countless different

32 Ibid. p3
understandings of political activity, different approaches to the study of the activity and different estimations of its worth to society.

For the purpose of this discussion I have chosen to draw upon the perspective of the British political theorist and journalist Bernard Crick whose small, somewhat polemical book “In Defence of Politics” (1962) proved to be both popular and influential. Crick defended politics as an essential activity in which conflicts of interest are adjudicated by discussion, persuasion and deliberation, not by force, fraud or ideology. While praising politics against its enemies, Crick also recognized the need for limits on the activity. “The attempt to politicize everything,” he wrote, “is the destruction of politics. When everything is seen as relevant to politics, then politics has in fact become totalitarian.” By totalitarian, he meant that politics could dominate all other aspects of society. He insisted that there are domains of activity where reliance upon political thinking and short-term political tactics was misguided and harmful.

In contemporary society there is an historically high level of public suspicion, even cynicism, about politics and politicians. Politicians are seen by many to be only interested in power, in gaining election then gaining re-election. This leads them to behave in a self-interested, opportunistic and dishonest manner. Lack of public trust and confidence in politicians and the political process has led the public to insist on more rules to prevent or restrain certain kinds of political behaviour. There is a strong public insistence on greater transparency, greater reliance on evidence as a basis for government decision-making and perennial calls for new and stricter forms of accountability.

Recognizing the low esteem in which their occupation is held, politicians have agreed to regulations on their behaviour, but sometimes these constraints are more symbolic than real. Much of the unique character of political activity arises from the publicity that surrounds it. This is especially true in the era of what has been called the “permanent election campaign”. Governing becomes barely indistinguishable from campaigning.

“Political management” has become an identifiable activity and specialized occupation within government, mainly conducted by political staff serving ministers. It involves the use of sophisticated communications strategies based on polling, focus groups, data gathering on audiences of various kinds, “spin”, targeted messaging, control over information, and attempts at news management, all intended to create positive headlines and to avoid negative news.

How does this discussion of the contemporary nature of political activity relate to debates over judicial remuneration? In the PEI Reference case the Supreme Court


34 Ibid. p.151
argued that judicial remuneration decisions should not be based on “political expediencies.” In the Bodner case the Court argued that government decisions on compensation must meet the test of “simple rationality” by which it meant logical arguments supported by objective facts. Both Court rulings called for the “depoliticization” of the compensation process.

Defenders of the traditional understanding of responsible government would argue that the Supreme Court and other courts have adopted a highly negative view of politics that misunderstands its essential purpose of identifying, representing and accommodating in its decision-making the broad range of diverse, often contending values and interests within society. Decisions on the use of scarce resources is the most striking concrete example of the need to set priorities through tough budgetary choices. The matrix of decision-making for public budgeting involves multiple considerations beyond the need to respect and uphold principles of judicial independence and adequate remuneration. Responsible and accountable ministers of the Crown, it is argued, are in the best position to make such sensitive judgments.

In my opinion, would be reformers who want to depoliticize compensation issues do themselves no favour by starting out with explicit or implicit statements denigrating politics. Also, unless they are into rejection, reformers should not ignore the political acceptability and feasibility of their proposed reforms.

Use of the term “depoliticization” without any clarification implies that salary determination can be taken completely out of the domain of politics, which is unrealistic. There will always be some type and degree of politics involved with salary setting. The goal should be to minimize the opportunities for governments and legislatures to engage in narrow, opportunistic, short-term political decision-making and distorted, inflammatory political rhetoric about judicial compensation.

Recognizing that governments and legislatures play a legitimate role in compensation matters, we need to design a reformed process that recognizes and respects appropriate constitutional relationships among the branches of government, that is fairer to the judicial community and relies more fully on sound evidence and reasoned arguments.

The current compensation model represents an improvement over the unilateral and arbitrary decision-making by governments that existed prior to the PEI Reference of 1997. That approach failed to uphold important constitutional relationships among the branches of government, failed to protect the financial security of judges against politically opportunistic decision-making and did not provide a fair and balanced approach to salary determination. Lessons have been learned since compensation commissions became a statutory requirement and it is now time to further refine our thinking and procedures for balancing responsible government and judicial independence.
Viewed from a political perspective, the constitutional principles, statutory provisions, structural arrangements and procedures, and the rules of decision-making that shape the process for determining judicial compensation are not neutral instruments. They create a framework of opportunities and constraints that determines the relative authority and power of the government/legislatures and the judges. Based on the traditional understanding of the principles and practices of responsible government, the current process for settling judicial compensation is unbalanced in favour of governments/legislatures.

It must be acknowledged that there are broad, mainly procedural constraints on governments laid down in the major constitutional cases. Commissions must be appointed at regular intervals. Governments cannot set remuneration until a commission has met and reported. Governments are obliged to respond formally to the recommendations of commissions and to give reasons and evidence for their decisions. Governments would argue that, regardless of the constitutional niceties, they will be held politically accountable for the outcomes arising from the judicial compensation process.

Even acknowledging these constitutionally prescribed constraints, governments still have a clear advantage over judges in terms of both legal authority and strategic opportunities to control the procedures and outcomes of the judicial compensation process. Governments and legislatures write the rules and criteria that guide the compensation process. Governments have more freedom and opportunity than judges to explain, defend, publicize and gain public support for their positions. And most importantly, in most jurisdictions they have the final word on what adjustments to judicial remuneration will take place.

Compared to “hard power” of governments/legislatures, courts and judges are limited to “soft power” of seeking to influence the commission process by invoking a set of constitutional principles, making arguments about the operational requirements for upholding those principles, and offering arguments and evidence about how remuneration needs to be modified in light of changing circumstances. The main forum for making the judges’ case is before the commissions by means of submissions and public hearings. Judges are not entitled to lobby governments or to bargain through the media.

Governments regularly insist that the principles and practices of responsible government based on the conventions of ministerial responsibility require that they have the upper hand and the final word in the compensation process. They take the position that only elected and politically accountable public officials in cabinet and/or the legislature can decide what type of spending serves the best interests of a particular province.

This position ignores or minimizes the evolution in our understandings of the vague conventions of ministerial responsibility in response to the changing contours of the
public sector that place significant amounts of public spending at some distance from direct and continuous ministerial and parliamentary control. In the modern public sector a wide variety of organizations exist along a continuum of control versus independence. New mechanisms of accountability have been developed to fit with the particular tasks and unique characteristics of so-called “arms-length” non-departmental bodies like crown corporations and statutory regulatory agencies that constrain the behaviour of private and public organizations and adjudicate disputes.

A related development has been the emergence of a strong executive power in the office of the prime minister supported by loyal and disciplined members of the governing party. In theory parliaments are meant to control the executive, but realistically the opposite is the case, at least when majority governments exists. Parliamentary control is weakest when it comes to understanding and reviewing public spending.

Recognizing the limits of ministerial responsibility as a basis for meaningful accountability, and in response to the misuse of authority and public money, governments and legislatures have adopted other types of accountability mechanisms, such as the growing and influential roster of APs intended to protect and promote various cherished values, like access to information, fair elections, honest budgeting and protection of personal privacy. APs are also meant to supplement the efforts by parliaments to hold executives accountable. With this new “integrity branch” of government, there have been innovative attempts to find the right balance between independence and accountability, attempts that include different financing arrangements from those that exist for regular departments.

Governments insist that the constitution demands that they set budgets, seek parliamentary approval and ultimately answer to the public for their choices. However, placing control over public spending in the hands of bodies outside of government already occurs. In fact, until recently two Canadian jurisdictions (as of 2016 just one) relied on a binding process for setting judicial compensation and other provinces have chosen to make the process partially binding or binding in certain circumstances. No constitutional upheaval or irresponsible demands on the public purse arose under the binding model.

Courts are not just another part of government; they are a recognized, separate part of the constitutional architecture and they are constitutionally entitled to protection of their independence, including secure financial remuneration for judges. When governments introduce statutes establishing commissions and granting them authority to set salaries, the constitutional requirement for executive initiative and parliamentary approval of spending is fulfilled. Two examples of this practice were cited earlier. In support of free elections provision has been made in statutes for open-ended budgets for election management costs incurred by election agencies. Similarly, in support of fair representation in legislatures independent boundary commissions have similar protection of their independence.
Governments often argue that in fairness to other parts of the public sector and to public employees in other fields they cannot offer courts special status that exempts them from budgetary restraint when it is necessary. As already indicated, courts are not just another part of government and judges are not regular public employees. Also, in most jurisdictions the factors to be considered by commissions when making salary recommendations include economic conditions and the financial circumstances of governments in a particular jurisdiction.

Another concern expressed by governments is that “rich” settlements with judges will become a reference point for public sector unions in their collective bargaining negotiations with governments. The leverage gained by unions could “ignite a firestorm” of wage and benefit inflation in the public sector.

There are two problems with this argument.

First, the process for determining judicial remuneration is not meant by the constitutional rules to be part of the overall government strategy of collective bargaining with the public sector unions. There is a constitutional dimension to the setting of judges’ compensation that does not operate in other public sector employment situations.

Second, governments have never produced convincing evidence that a “conflagration” of wage demands by unions has been produced when governments grant salary and benefit adjustments to judges that reflect cost of living increases, a changed work product by the court, represent a “catch up” for lost financial ground, better align judicial compensation to that in the private bar, and so on.

The real issue for governments in settling judicial remuneration is not the dollar amounts involved. As a percentage of total provincial spending the costs of the courts represent a small percentage. Judicial salaries are an even smaller amount and the periodic adjustments to salaries and benefits are tiny items in the overall spending by governments. This is not an argument for irresponsible spending on judges, but a reminder that salary adjustments need to be kept in perspective relative to other spending by governments.

The real political problem for governments is not the actual amounts spent on maintaining and improving judges’ salaries and benefits, but the “optics” of doing so. In politics appearances can be reality. In the perception of some politicians and many citizens, judges are already richly rewarded for what they do. Judicial salaries in the two to three hundred thousand dollar ranges seem like a fortune for average citizens who earn far less than that. Among political leaders, and even more so among regular citizens, there is not deep knowledge about what is at stake in terms of constitutional principles and the need to attract top quality legal talent to the bench when compensation for that talent is generally much higher in the private sector.
Governments like to argue that provided compensation is adequate and reasonably stable, there will never be a shortage of applicants to join the judiciary. Also, as professionals, judges will not allow their changing financial fortunes arising from government decisions to affect their independence and judgments.

This is only partly true and is therefore misleading. It is true that money is not the sole, or even the main motivator that inclines legal professionals to apply for judicial positions and to remain on the bench. There is a significant component of public service motivation involved with pursuing a judicial career. However, the goal presumably is not just to attract a pool of qualified candidates but also to recruit some of the individuals with best legal minds and the appropriate judicial temperaments. Arbitrary government decisions that ignore salary recommendations from commissions will lead to disappointment, frustration, poor morale and even cynicism about and/or among judges. However, such outcomes are unlikely to affect the work habits and decision making of judges.

Apart from the failure to comply fully with the letter and the spirit of the constitutional rulings on judicial compensation, the real negative impacts of the current process are on the image and reputation of the institution of the judiciary and on the judges who serve in it. The commission process tends to attract media attention only when there is disagreement and deadlock between governments and judges. The ensuing coverage tends to be simplified, shallow, distorted and sensational, with lots of inflammatory rhetoric about “whiny” judges, “outrageous demands” on the public purse and negative comments about what judges are paid compared to provincial premiers.

Judges cannot expect to “win” public understanding and support for their position within the “court of public opinion” when compensation issues are “politicized” and debated in the media. Keeping the issues relatively submerged and low key during the most sensitive stages of the compensation process, with explanation and defence of the outcomes coming later, might limit the opportunities for “political grandstanding” and ill-informed media commentaries.

Durable readers who have persisted to this point are entitled to a reward in the form of a concrete proposal for how to improve a compensation process that is not working as intended by the Supreme Court when it brought down its landmark rulings in the PEI Reference and the Bodner cases.

The Court may have been naïve in thinking that compensation issues could be largely removed from the political domain and could be settled in an objective, evidence-based type of inquiry. Someone once quipped that politics is like darkness, it is part of every 24-hour time period. Any proposed reform to the compensation process must take into account the conditions and incentives that drive political activity.
My recommendation would be the adoption of a binding commission model with an additional stage added to the compensation setting process. As under the current process, commissions would operate on triennial or quadrennial cycles. No compensation could be set until after a commission met and reported. The commission would invite public submissions and hold public hearings. After internal deliberations the commission would issue to the two sides an interim report of its findings and recommendations. Ideally the report would be unanimous but there would be the opportunity for dissenting opinions. There would be a timetabled period for review and responses to the interim report from both governments and judges. After receiving and considering the final responses from the two sides, the commission would issue its final binding report that governments and legislatures would be required to implement.

This use of a two-step finalization stage is based on the procedures required of federal boundaries commissions appointed in each of the provinces after the decennial census. The task of the commissions is to draw the geographical boundaries of the 338 constituencies in the House in Commons so as to ensure equal value of the vote while giving adequate recognition to the need for effective representation based on recognition of communities of interest. The commissions receive submissions, hold public hearings, issue an interim boundaries map for the province and then there is a time period when MPs and interested citizens can file concerns with the commission. The boundaries commission process is meant to avoid any real or perceived political “gerrymandering” of constituency boundaries to favour a particular party.

Secure and fair remuneration for judges is at least as important a constitutional principle as equal value of the vote and fair representation in the legislature. Governments gave up their previously assumed right to draw constituency boundaries to improve their prospects for re-election. The point is that arrangements once seen to be constitutionally acceptable can at a later point in time no longer be seen as appropriate and fair.

Adding another stage to the compensation process will provide governments with another opportunity to publicize their concerns about the impacts on the public purse of the province. A binding ruling by a compensation commission would offer some “political cover” for governments that do not want to be seen “overpaying” judges, especially when employees in other parts of the public sector are being forced to accept salary reductions or freezes.

Adoption of a binding model will also change the incentives and dynamics of the commission process. Governments and judges will be encouraged to put forward “reasonable” positions at the outset. Knowing the commission has the final word will encourage commissioners to conduct serious analysis in support of sound, detailed recommendations. An additional stage will allow for the recognition of late breaking developments. In all probability there will be far less litigation over commission rulings and government responses. This will avoid damage to the image of the
judiciary and a weakening of public confidence that result from highly publicized clashes between the two sides.

Upholding judicial independence and protecting responsible government requires a balanced approach. The proposed adoption of compensation commissions with binding authority does not violate written or unwritten constitutional norms. It is more an evolutionary than a radical step. The additional proposed stage in the compensation process would allow both sides to develop greater understanding and respect for each other by encouraging greater dialogue over arguments and evidence as filtered by the commissions. A binding process would remove the regular rejections or variations of commission recommendations by governments and legislatures that have become a source of tension in the relationships between the three branches of government. Less litigation would de-escalate the tensions between the two sides and build greater conditional trust into the process.

It will take time and a record of positive outcomes to establish more respectful and constructive relationships. Adoption of a binding process, with an additional stage for both governments and judges to make their case, is both constitutionally appropriate and politically feasible.