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Citation Information
http://digitalcommons.osgoode.yorku.ca/sclr/vol34/iss1/4

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Judicial Independence Revisited

Lori Sterling and Sean Hanley

I. INTRODUCTION

On July 22, 2005, the Supreme Court of Canada rendered a unanimous decision in four consolidated appeals dealing with the appropriate process for setting judicial compensation. In so doing, it revised the minimum constitutional requirements of judicial financial security that had been previously addressed in its 1997 decision in the Provincial Judges Reference, and confirmed the need for curial deference to government decisions on judicial compensation.

Shortly after the 1997 decision, a number of judicial compensation commissions had recommended substantial salary increases. These increases were generally based on the increase in duties of provincial court judges, a desire to narrow the salary differential with federal superior court judges and growth in the economy. Governments did not...
typically accept all of the recommendations and the judicial associations sought judicial review.

In an unusually frank decision, the Supreme Court of Canada stated that it had hoped that the requirement of the commission process set out in 1997 in the Provincial Judges Reference would ensure the depoliticization of decisions respecting judicial compensation but that “instead of diminishing friction between judges and government, the result has been to exacerbate it”. The Court also stated that it intended in its decision to clarify the principles of the compensation commission process in order to avoid a continuation of these conflicts in the future.4

The Court confirmed that the compensation commission is essential to the determination of both provincial court judges’ and justices of the peace’s financial security. Nevertheless, the commission process is recommendatory and not binding on government. The government must seriously consider the recommendations but need not follow them.

The Court also dealt specifically with the standard of review for decisions on compensation, and set a very high threshold of deference to the government’s decision. In so doing, the Court signalled that it would not overturn government decisions except in rare circumstances.

In this paper, we examine whether the Court’s stated goal of limiting future litigation will be achieved. We conclude that indeed litigation respecting judicial compensation is likely to be curbed in the near future. Nevertheless the commission process will remain robust and there is even likely to be increased emphasis on the evidence and submissions presented by the parties to the commission.

The Supreme Court decision also leaves some important questions unanswered. In reaffirming the commission process as integral to the determination of judicial compensation, the decision provides little incentive for the development of any less adversarial relationship between government and the judiciary, comparable to that which arises in traditional labour relations. While some precedents for consensus building exist, the Supreme Court does not indicate in this decision how receptive it would be to a relationship developing between the judiciary and government that involves consultations and discussions concerning compensation.

judges and federal superior court judges argued for further salary increases following each increase for provincial judges, the two groups’ compensation continued to be “ratcheted” upward.

As well, the Court decision leaves open the question of how the judicial independence requirements will be applied to other decision-makers in the judicial system apart from provincial judges and justices of the peace. The decision does not address the application of the constitutional financial security principles to traffic commissioners, deputy judges, masters, or other decision-making bodies associated with the courts.

II. FRAMEWORK FOR JUDICIAL INDEPENDENCE PRINCIPLES

There are three core components of judicial independence: financial security, security of tenure and administrative independence. Each of these components consists of minimum guarantees that must be in place to ensure the independence of judges and courts.5

The basic minimum protections required to ensure judicial financial security, prior to the 1997 Provincial Judges Reference, were that (i) salaries be established by law; and (ii) that there be an absence of direct salary negotiations.6 Judicial independence could also be impaired if there were the appearance of salary manipulation motivated by an improper or colourable purpose, or discriminatory treatment of judges.7 The Provincial Judges Reference added the requirement that judicial salaries not be increased, decreased or frozen without an inquiry and non-binding recommendation by an independent, objective and effective compensation commission process.8

The basic requirement of security of tenure is that judges be appointed until an age of retirement, for a fixed term, or for a specific adjudicative task, and that their tenure be secure against arbitrary or discretionary interference by the Executive or other appointing authority.9 Courts have applied particular requirements flexibly to different types of decision makers.10 For instance, superior court judges’ appointments apply constitutionally until age 75 and they may only be

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6 Valente, id., at 704-706.
8 Provincial Judges Reference, supra, note 2, at para. 147.
9 Valente, supra, note 5, at 694-95 S.C.R.
removed from office on the joint address of Parliament and the Senate.\textsuperscript{11} The guarantee of security of tenure also requires that provincial court judges only be removed from office for cause related to capacity to perform judicial functions, and there be a judicial inquiry to establish that such cause exists, at which the judge must be given an opportunity to be heard.\textsuperscript{12}

The basic requirement of administrative independence is control by the courts “over the administrative decisions that bear directly and immediately on the exercise of the judicial function”. These were defined in what the Court has described as “narrow terms” consisting of the “assignment of judges, sittings of the court, and court lists — as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions...”\textsuperscript{13}

III. THE 1997 PROVINCIAL JUDGES REFERENCE

The 1997 Provincial Judges Reference was a landmark decision in two respects. First, the Court expressly recognized “unwritten constitutional principles” as a legitimate source for constitutional rules.\textsuperscript{14} In addition, it held that the Constitution commission process was necessary for inquiring into and making recommendations on the appropriate level of judicial compensation.\textsuperscript{15}

1. New Constitutional Sources — Unwritten Constitutional Principles

Prior to the 1997 Provincial Judges Reference, the Canadian Constitution was considered to derive almost exclusively from the

\textsuperscript{13} Valente, supra, note 5, at 709, 712 S.C.R.; Provincial Judges Reference, supra, note 2, at para. 117.
\textsuperscript{14} Provincial Judges Reference, supra, note 2, at paras. 82-109. See also Chief Justice Beverley McLachlin, “Unwritten Constitutional Principles: What is Going On?”, Remarks given at the 2005 Lord Cooke Lecture, Wellington, New Zealand, at 19, 27.
\textsuperscript{15} Provincial Judges Reference, supra, note 2, at paras. 166-85.
Constitution’s text. Adopting a novel approach, Lamer C.J. held, for the majority, that the Canadian Constitution includes not only text but also unwritten principles, which derive from the Preamble to the Constitution Act, 1867. The requirement of judicial independence was described as “at root an unwritten constitutional principle” and “[t]he specific provisions of the Constitution Acts, 1867 to 1982, merely ‘elaborate that principle in the institutional apparatus which they create or contemplate’”. This reasoning extends judicial independence principles from their previously understood application to superior and provincial courts to apply to “all courts no matter what kind of cases they hear”.

The 1997 Provincial Judges Reference was decided under section 11(d) of the Charter and the majority’s comments on unwritten constitutional principles were obiter dicta. While these principles have been referred to in subsequent cases, their significance has been limited. More recently, it has been confirmed that they do not afford greater protection than that guaranteed by the Constitution’s text. The Supreme Court has also refrained from using unwritten principles to strike down legislation, and recently granted leave to appeal from a British Columbia Court of Appeal decision in which the majority declared legislation to be unconstitutional because it offended the “rule of law” principle. In the past, the Supreme Court of Canada has denied leave to appeal from decisions refusing to invalidate legislation on the

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16 A partial exception was the “implied bill of rights” theory, which according to some members of the Court, restricted the ability of the legislatures to limit individual expression. However, this approach to constitutional interpretation had not previously been expressly adopted by a majority of the Court (see Reference re Alberta Legislation, [1938] S.C.R. 100, at 133-34 (per Duff C.J.) and at 146 (per Cannon J.), affd [1938] 4 D.L.R. 433 (P.C.); Saumur v. Quebec (City), [1953] 2 S.C.R. 299, at 330-31 (per Rand J.) and at 354-56 (per Kellock J.); Switzman v. Ebling, [1957] S.C.R. 285, at 307 (per Rand J.) and at 328 (per Abbott J.); OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at 57 (per Beetz J.).
18 Id., at para. 107.
19 Re Therrien, supra, note 10, at para. 68.
basis of unwritten principles, and provincial courts of appeal have otherwise not gone further than to apply unwritten principles in reviewing discretionary decision-making. While not reversing itself, the Supreme Court has now signalled that the possibility of a new constitutional right emanating from the preamble, is much diminished.

2. The Commission Process

The Provincial Judges Reference also established for the first time the constitutional requirement of judicial compensation commissions with a mandate to review and make recommendations on provincial judges’ compensation every three to five years. The role of these commissions was to “depoliticize” the relationship between judges and governments to ensure that the setting of judicial compensation was based on objective considerations.

The Court emphasized that compensation commissions were to be “independent, objective and effective”. By “independent”, the Court meant that they should have members chosen by both the government and the judiciary. Members must also have security of tenure in that they serve for a fixed term.

By “objective” the Court meant that the commissions “must make recommendations on judges’ remuneration by reference to objective criteria, not political expediencies”. The Court stated that objectivity could be achieved by having the commission hear submissions from the provincial judges associations and the government, though this process was not constitutionally required. The Court also recommended, but did not require, that objectivity be promoted by including in the commission’s enabling legislation or regulation a list of relevant factors to guide the commission’s deliberations.


24 Provincial Judges Reference, supra, note 2, at para. 147.

25 Id., at paras. 171-72.

26 Id., at para. 173.
Finally, commissions must be “effective”. The Court emphasized that this did not mean that their recommendations were binding. The commission process must, however, “have a meaningful effect on the determination of judicial salaries”. This requires, as a minimum constitutional standard, that the government formally respond to the commission’s recommendations and provide reasons for any decision not to implement a particular recommendation.27

A government’s reasons for not accepting a commission recommendation are subject to judicial review on a standard of “simple rationality”. Chief Justice Lamer emphasized that “[a] reviewing court does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis”. Rather, the standard of simple rationality is described as follows:

First, it screens out decisions with respect to judicial remuneration which are based on purely political considerations, or which are enacted for discriminatory reasons. Changes to or freezes in remuneration can only be justified for reasons which relate to the public interest, broadly understood. Second, if judicial review is sought, a reviewing court must inquire into the reasonableness of the factual foundation of the claim made by the government, similar to the way that we have evaluated whether there was an economic emergency in Canada in our jurisprudence under the division of powers (Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373).28

3. Dissenting Opinion

The 1997 Court decision was not unanimous. In his dissenting reasons, La Forest J. criticized the majority’s decision to make novel pronouncements on the source of constitutional principles and the requirement of a judicial compensation commission, without the benefit of full argument. Justice La Forest also questioned the appropriateness of the Court making such far-reaching conclusions that were not necessary to determine the case before it on “an issue on which judges can hardly be seen to be indifferent, especially as it concerns their own remuneration”.29

27  Id., at paras. 174-80.
28  Id., at para. 183.
29  Id., at para. 302, La Forest J. (dissenting).
Justice La Forest disagreed with the majority’s view that unwritten constitutional principles provided limitations on the power of legislatures to interfere with judicial independence. In his opinion, judicial review of legislative actions derives its legitimacy from textual constitutional limits on legislative power and changes to these constitutionally entrenched principles should arise through constitutional amendment, not resort to underlying unwritten principles.

Justice La Forest also rejected the notion that changes to judicial compensation would necessarily interfere with judicial independence if they were not the product of a judicial compensation commission inquiry and recommendation. In particular, he was of the view that the decrease to judicial salaries before the Court in the Provincial Judges Reference, which were part of an overall economic measure affecting substantially all persons paid from public funds, would not cause a reasonable person to perceive that the independence or impartiality of judges had been compromised.

IV. THE 2005 PROVINCIAL JUDGES COMPENSATION APPEALS

1. Decisions of Appellate Courts

Since the 1997 Provincial Judges Reference, governments have frequently rejected judicial compensation commissions’ recommendations. Associations representing the judiciary have consistently challenged these decisions and courts, with few exceptions, have overturned the governments’ decisions on judicial review. In various provinces, superior and/or appellate courts that reviewed government reasons either applied the simple rationality standard with heightened rigour or departed from

30 Id., at para. 304, La Forest J. (dissenting).
31 Id., at para. 314, La Forest J. (dissenting).
32 Id., at para. 337, La Forest J. (dissenting).
the Provincial Judges Reference to create new, exacting standards for governments to meet.34

The majority of the Alberta Court of Appeal in Bodner v. Alberta is an example of courts imposing new standards. Justice Paperny, for the majority of the Alberta Court of Appeal, stated that a government must demonstrate “extraordinary circumstances” before departing from a commission recommendation and that on judicial review “a court must conduct a thorough and searching examination of the reasons proffered”.35

The Alberta Court of Appeal’s description of the standard of review stands in contrast to the majority approach in the Provincial Judges Reference. The majority of the Supreme Court of Canada had held that a reviewing court “does not engage in a searching analysis of the relationship between ends and means, which is the hallmark of a s. 1 analysis”.36 Further, the Alberta Court of Appeal’s requirement of “extraordinary circumstances” elevated the compensation commission’s role from that of a consultative body to a decision-making body whose recommendations could rarely be rejected.

The Quebec and New Brunswick Courts of Appeal are examples of Courts that purported to apply the simple rationality standard of review but did so with heightened rigour. Both appellate courts disagreed with the Alberta Court of Appeal’s description of the standard of review as “searching” and requiring extraordinary circumstances. Nevertheless, both of these courts in practice subjected the decisions of their respective provincial governments to exacting scrutiny.37

The Ontario courts, by contrast, adopted a deferential approach that was based on the Court’s articulation of the standard of review in the 1997 Provincial Judges Reference. Of the four provincial appellate courts whose decisions were appealed from, the Ontario Court of

35 Bodner, id., at para. 108.
37 Provincial Court Judges Assn. of New Brunswick v. New Brunswick, supra, note 33, at paras. 110, 123; Quebec (Attorney General) v. Conférence des juges du Québec, supra, note 33, at paras. 28, 47, 50-52.

In Ontario, the Judicial Remuneration Commission is statutorily empowered to issue binding recommendations on salary and most benefits. Recommendations on pensions, however, are not binding and are subject to the requirement that the government give rational reasons before departing from the recommendations. The Ontario government implemented the recommendations of the Judicial Remuneration Commission issued in 1999, which included a 28 per cent salary increase, but chose not to accept recommendations for reformulating the judges’ pension plan.

The Judges’ Associations’ application for judicial review of the decision to reject the pension enhancements was dismissed. On appeal, the Ontario Court of Appeal expressly disagreed with the Alberta Court of Appeal’s characterization of the standard of simple rationality in Bodner. The Ontario Court of Appeal explained that the simple rationality standard called only for “a cautious and modest review”:

It is not an exaggeration to say that the juxtaposition chosen by Lamer C.J.C. is one between the strictest (s. 1 of the Charter, especially as represented by its original formulation in R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200) and the most deferential (declaration of economic emergency in a distribution of powers context) standards of review in the history of Canadian constitutional law. The former is truly rigorous, as it should be given that the context is a government’s attempt to justify a continuation of its infringement of a constitutional right protected by the Charter. The latter is truly deferential, as it should be given that the context is a government’s attempt to deal with a matter concerning “social and economic policy and hence governmental and legislative judgment” (Reference re Anti-Inflation Act (Canada), [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, at pp. 422-424 S.C.R., pp. 495-96 D.L.R.).\footnote{Ontario Judges Assn., id., at para. 65.}
2. Elaboration of the Financial Security Requirements of the 2005 Provincial Judges Reference

(a) Commission Recommendations are Non-Binding

In its decision on the consolidated appeals from Ontario, Quebec, New Brunswick and Alberta, the Court strongly affirmed the remuneration or compensation commission process as a constitutional imperative. The purpose of the commission was to hear evidence and submissions and make recommendations to government. Unless the legislature provides that the report is binding, the government retains the power to depart from the commission’s recommendations, as long as it justifies its decision with rational reasons.40

(b) Reasons for Rejection to be Provided by Government

The Court also affirmed the necessity of a government response to the recommendations and elaborated on the nature of the reasons required of government. First, the government must act in good faith and its responses must be “legitimate”. The Court’s discussion of the requirements of legitimacy indicates that the reasons must:

• state in what respect and to what extent they depart from the recommendations, articulating the grounds for rejection or variation;
• deal with the commission’s recommendations in a meaningful way and show that the commission’s recommendations have been taken into account;
• be based on facts and sound reasoning;
• be compatible with the common law and the Constitution;
• include consideration of the judicial office and an intention to deal with it appropriately;
• preclude any suggestion of attempting to manipulate the judiciary; and

40 Provincial Judges Compensation Appeals, supra, note 4, at paras. 19-21.
• reflect the underlying public interest in having a commission process, being the depoliticization of the remuneration process and the need to preserve judicial independence.\(^{41}\)

The reasons must also be based on a “reasonable factual foundation”. That factual foundation ought to be explicit, and should not be based on facts that could have been put before the Commission but were not.\(^{42}\) Importantly, however, the response can properly include new facts or circumstances arising after the release of the recommendations. The reasons can also be based on facts relating to verification of the accuracy of the information in the commission report.\(^{43}\)

What is clear from the Court’s discussion about the reasons is that the Court is not interested in parsing every detail of the government’s response. Instead, the government response must simply be in good faith and based on a reasonable factual foundation.

(c) Judicial Review of Decisions on Judicial Compensation

(i) Evidence Admissible on Judicial Review

In both Ontario and New Brunswick, the Court admitted affidavit evidence filed by the provincial governments to support their reasons for rejecting the commission’s recommendation.\(^{44}\) In Ontario, the affidavit was provided by an actuary who was retained to analyze and calculate the costs of the Commission’s pension recommendations in light of the Commission’s binding salary increase. This evidence explained and expanded on the factual foundation supporting the government’s reasons.

In New Brunswick, the government filed actuarial evidence similar to that filed in Ontario. In addition, the government filed three affidavits from civil servants that set out internal estimations of the cost of the Commission’s recommendations, economic conditions in the province and salary increases within the civil service.\(^{45}\)

The Court held that all of the affidavits filed in the Ontario and New Brunswick proceedings were admissible. The Court confirmed that

\(^{41}\) Id., at paras. 22-27.

\(^{42}\) Id., at paras. 36, 62, 103.

\(^{43}\) Id., at paras. 26-27.

\(^{44}\) Id., at paras. 64, 103.

\(^{45}\) Id., at para. 60.
governments would not be permitted to adduce new facts that could have been advanced before the commission at the time of its inquiry, but were not. It is appropriate, however, for governments to provide added detail of the economic and actuarial information on which it relied in reaching the decision. In the Court’s view, the affidavits filed by both New Brunswick and Ontario did not advance new arguments, which ought to have been made before the Commission. They simply provided specifics of the factual foundation relied upon by the government and demonstrated the governments’ good faith in taking the recommendations seriously.46

(ii) Standard of Review

While much of the 2005 decision can be said to be merely a confirmation of the earlier approach, the articulation of the standard of judicial review does constitute a reformulation or, at the very least, a clarification. Specifically, the Court added a third component to the two-stage analysis required in the 1997 Provincial Judges Reference.47 Previously, the reviewing court had to ask whether the government: (i) articulated a legitimate reason for departing from the commission’s recommendations; and (ii) whether its decision relies on a reasonable factual foundation.48 Now, the reviewing court must also ask whether:

Viewed globally, has the commission process been respected and have the purposes of the commission — preserving judicial independence and depoliticizing the setting of judicial remuneration — been achieved?49

This new criterion appears to set a significantly higher threshold since it allows for the government to make some mistakes, provided it engages in the process in good faith.50 The reviewing court need only assess broadly whether the process, as a whole, suggests a failure to engage in an objective determination of the appropriate level of judicial compensation such that a reasonable person would perceive an interference with judicial independence. Minor errors or omissions would not be a basis for judicial review.

46 Id., at paras. 60-64, 103.
49 Provincial Judges Compensation Appeals, supra, note 4, at para. 31.
50 Id., at para. 83.
(d) Application of Principles in the Four Appeals

The Court upheld the decisions of the Governments of Alberta, Ontario and New Brunswick not to accept the recommendations of the judicial remuneration commissions in those provinces. The decision of the Quebec government was rejected as failing to meet the standard of simple rationality.

The Court accepted a broad range of reasons for rejecting commission recommendations, provided they were responsive to the commission recommendations and related either to the appropriate level of judicial compensation, or to the appropriate factors to take into account in determining compensation levels. In the appeals, the Court accepted the following government considerations in rejecting commission recommendations:

• comparisons with public sector compensation, private lawyers, other provincial court judges and federal superior court judges;
• provincial economic conditions;
• past compensation increases; and
• factual errors in the commission’s report.51

The Court also confirmed that it was inappropriate for commissions to base their recommendations on any one aspect of compensation in isolation. For instance, the Court confirmed that it was inappropriate to simply set provincial judges’ salaries at a percentage (e.g., 85 per cent) of superior judges’ salaries without consideration of other relevant factors.52 The Court also confirmed the failure of the Ontario Commission to take into account the salary increase (on its own and its impact on pensions) when making recommendations to improve the pension plan.53

While the Court accepted most of the reasons advanced by the governments involved in the appeals, it did not accept all of them. It rejected as illegitimate the reason advanced by New Brunswick that the commission recommendations should only focus on the “minimum” salary required to guarantee judicial independence.54 The Court also

52 Id., at para. 72.
53 Id., at para. 96.
54 Id., at para. 67.
rejected the reason advanced by Quebec that the Commission could only make recommendations to adjust compensation from the Commission’s previous report. The Court also criticized Quebec for focusing on the impact that the Commission’s recommendations would have on the overall labour relations policy in Quebec’s public sector, without being responsive to the Commission’s reasons for recommending changes to judicial compensation.\(^{55}\)

With respect to the new and last part of the test, the Court held that the decisions of the Governments of Alberta, Ontario and New Brunswick, viewed globally and with deference, reflected respect for the commission process and the purposes of preserving judicial independence and depoliticizing the setting of judicial remuneration. While some of New Brunswick’s reasons were described as “unsatisfactory”, the Court found that on balance “the response shows that the Government took the process seriously”.\(^{56}\) By contrast, the Court concluded that the Quebec government failed “to consider what should be the appropriate level of compensation for judges, as its primary concerns were to avoid raising expectations in other parts of the public sector and to safeguard the traditional structure of its pay scales”.\(^{57}\)

V. Ramifications of Court’s Decision

1. Impact on Future Litigation

In this paper, we have suggested that the Court’s desire to reduce litigation over judicial compensation may well bear fruit. This is based on three aspects of the Court’s decision: the standard of review, the remedy available to the judiciary even if it is successful on judicial review and the potential for the losing party to pay for the costs of litigation.

\(^{55}\) Id., at paras. 158-65.

\(^{56}\) Id., at para. 83.

\(^{57}\) Id., at para. 160.
(a) A Deferential Standard of Review

In its decision, the Court rejected arguments by judicial associations that either commission recommendations should be binding or the standard of review should be far more onerous.

While these arguments may have led to reduced litigation, they did have drawbacks. First, making the commission’s recommendations binding would limit the provincial legislative power over provincial spending. The question of appropriate compensation for persons paid from the public purse depends on an assessment of complex social and economic facts. Courts have historically shown deference in reviewing public policy decisions that involve the weighing of competing social and economic evidence and legislative judgment.  

A more onerous standard of review such as correctness might also have drawn the reviewing courts into substantive arguments about the appropriate level of judicial compensation as they examined reasons for government decisions on compensation levels in detail. The commission process articulated in the Provincial Judges Reference requires that different levels of the judiciary play the role of applicant and decision-maker in proceedings respecting judicial compensation. The Supreme Court does not refer to this consideration overtly. The Ontario Court of Appeal, however, noted that while judges could be expected not to allow personal financial gain any bearing on their decision in a particular case, a heightened level of scrutiny in decisions respecting judicial compensation could well raise questions about the perception of a lack of impartiality.

Another factor that might have led the Court to reject a more onerous standard of review is the current level of compensation enjoyed by provincial court judges. Although governments in many provinces had rejected part or all of judicial compensation commission recommendations, the increases that were implemented were very substantial. Evidence filed in the four appeals before the Court showed


that salaries had nevertheless increased by approximately 36.6 per cent for Quebec judges, 50.9 per cent for New Brunswick judges, 57.7 per cent for Ontario judges and from 54.5 per cent to 134 per cent for Alberta justices of the peace. These facts countered any potential concern that governments’ rejection of various commission decisions had rendered the commission process ineffective.

(b) Remedial Deference

The Court’s disposition of remedial questions also serves to dissuade litigation. The Court held that if a constitutional defect is found to lie with the government’s decision, then the matter should be returned to the government for reconsideration in light of the Court’s reasons, as was done in Quebec. Alternatively, if the defect lies in the commission process or recommendations, then it may be appropriate to direct the commission to reconsider the matter and provide a new recommendation to government. The Court emphasized that it is “not appropriate for this Court to dictate the approach that should be taken in order to rectify the situation. Since there is more than one way to do so, it is the government’s task to determine which approach it prefers.”

The effect of the decision on remedy is that judicial associations will generally not be able to use judicial review as a way to have a

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60 Conférence des juges du Québec v. Quebec (Attorney General), S.C.C. Court File No. 30477, Appellant’s Record, pp. 2543, 2656.
64 Provincial Judges Compensation Appeals, supra, note 4, at para. 171.
The more likely remedy would be reconsideration by government or a new, non-binding commission recommendation. In either event, the outcome would be unpredictable and may not result in a commission’s recommendations being implemented.

(c) Normal Costs Rules Apply

Finally, the Court’s decision on costs is also likely to reduce the frequency of litigation over government decisions on judicial compensation. The Court held that the Alberta Court of Appeal and Court of Queen’s Bench erred in awarding solicitor client costs against the province absent reprehensible, scandalous or outrageous conduct. The Court also confirmed its earlier pronouncement in Mackin⁶⁷ that while the protection of judicial independence is a noble objective, that on its own it is not sufficient to warrant an award of solicitor-client costs.⁶⁸ The Court awarded costs to Ontario and other provinces that were successful in the litigation.⁶⁹

The Court’s handling of costs makes clear that judicial associations will not receive preferable treatment in comparison with other litigants. This provides additional incentive for the judicial associations to exercise discipline in deciding whether to apply for judicial review of government decisions respecting commission reports.

⁶⁶ An exception is that courts may order recommendations implemented where legislation specifies that the recommendations are either binding or come into effect automatically unless rejected by the government. Where the recommendations come into effect automatically, a court order of implementation merely gives effect to that law (see Provincial Judges Reference, supra, note 2, at para. 294; Ontario Conference of Judges v. Ontario (Chair, Management Board), [2004] O.J. No. 2643, 71 O.R. (3d) 528 (Div. Ct.); Newfoundland Assn. of Provincial Court Judges, supra, note 33, at paras. 100-104; Alberta Provincial Judges’ Assn., supra, note 33, at para. 29; Courts of Justice Act, R.S.Q. c. T-16, s. 246.44, cited in the appendix to Conférence des Juges, supra, note 33, at 557; Provincial Court Judges Assn. of British Columbia, supra, note 33, at para. 1 (Provincial Court Act, R.S.B.C. 1996, c. 379, s. 14).

⁶⁷ Mackin, supra, note 65, at paras. 86-87.

⁶⁸ Provincial Judges Compensation Appeals, supra, note 4, at para. 132; see also the comments of the majority of the Newfoundland Court of Appeal in Newfoundland Assn. of Provincial Court Judges v. Newfoundland, supra, note 33, at paras. 282, 293, 299.

⁶⁹ Provincial Judges Compensation Appeals, supra, note 4, at paras. 85, 104, 133.
2. Other Impacts of Decision

Although litigation may be diminished as a result of this decision, the commission process is clearly entrenched. The Court never questioned the constitutional requirement or wisdom of the commission process, as had La Forest J., in dissent, in the 1997 decision. As well, none of the parties before the Court suggested that the commission process should be abolished for provincial court judges. Instead the parties focused exclusively on what is required to ensure that the commission process is effective.

The Court’s commitment to the commission process is not surprising in light of its decision in Mackin, supra. In that case, two supernumerary provincial court judges challenged the government’s decision to abolish the office of supernumerary judge, which permitted judges over age 65 to take on a reduced (40 per cent) workload for full compensation, and to replace it with per diem sittings. The Court held that there was no breach of security of tenure, but found that the elimination of supernumerary status amounted to a change in judicial compensation because it amounted to the withdrawal of a future benefit for all currently sitting judges. The change was unconstitutional because the proposal was not put to the commission for a recommendation.

Had the court wished to limit the commission’s function, it could have done so in Mackin by concluding that the commission process was required only for direct review of salary and benefits but not for indirect changes to compensation incidental to changes to bona fide court reforms. The Court clearly viewed the commission process as an important requirement of judicial independence. Similarly, the decision to limit the scope of judicial review of government decisions in the 2005 Provincial Judges Compensation Appeals does not reflect a reconsideration of the appropriateness of the commission requirement itself.

One final potential effect of this decision is that judicial associations and governments are likely to focus more on the evidence adduced before the commission. The Court held that government decisions must

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70 Provincial Judges Reference, supra, note 2, at paras. 302-304, 337, La Forest J. (dissenting).
71 Alberta and some government interveners argued unsuccessfully in the appeal in Bodner, supra, note 34, that a commission process was not constitutionally required for justices of the peace.
72 Mackin, supra, note 65, at para. 69.
be responsive to the commission recommendations and, absent new facts or circumstances, cannot be based on facts or reasons that could have been put before the commission but were not.73 This means that the evidence and submissions before the commission will dictate any leeway that the government will have in responding to the recommendations. Although the experience across the country has been that commission processes were never taken lightly by either side, this new decision provides further incentive for ensuring that arguments and facts are fully canvassed.

3. Unresolved Issues

(a) Developing an Ongoing Relationship

The 1997 Provincial Judges Reference and 2005 Provincial Judges Compensation Appeals leave open the extent to which governments and the judiciary (or their representative associations) may communicate about judicial compensation, outside the commission inquiry process. In the 1997 Provincial Judges Reference, the Court was intent on avoiding negotiations over judicial compensation and, in particular, the potential apprehension of undue influence that might arise as a result of “horse-trading” that typically forms part of collective bargaining.74 To do this, the Court decided to interpose the commission process between the judiciary and the government as an “institutional sieve” to provide a forum for the objective consideration of the appropriate level of judicial compensation without direct negotiations between the parties.75

The resulting litigation over rejected compensation commission recommendations, however, presented a new problem. As the Court observed in its decision in the Provincial Judges Compensation Appeals, negotiation had been replaced by litigation and the objective of depoliticizing judicial/government relations was not achieved.76 The Court responded by making clear that this recourse will not result in government decisions being overturned, save in limited circumstances.

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73 Provincial Judges Compensation Appeals, supra, note 4, at paras. 36, 62, 103.
74 Provincial Judges Reference, supra, note 2, at para. 188.
75 Id., at para. 189.
76 Provincial Judges Compensation Appeals, supra, note 4, at paras. 12, 43.
Another possible avenue to diminish the need for litigation would be to revisit the strict limits placed on negotiations in the 1997 Provincial Judges Reference. The ability to discuss issues respecting compensation informally might assist in depoliticizing relations. Most other compensation decisions involving payments from the public purse involve lengthy negotiations, mediations and ongoing consultations. The resulting agreement receives approval from both politicians and union or association members. The parties learn to work together, not just when bargaining a new collective agreement, but also during the life of the agreement.

By contrast, the commission process for resolving judicial compensation disputes is typically formal, sporadic and confrontational. Lawyers typically represent both sides. The process resembles the adversarial nature of a trial or arbitration process, which is normally a course of last resort used only when negotiation and consensus building have failed. If the two sides were able to communicate each other’s concerns in a less formal and adversarial setting, focus on interest-based discussions and engage a mediator to help resolve issues, they may be able to narrow issues in dispute.

The majority reasons in the 1997 Provincial Judges Reference appear, however, to create a disincentive for governments and the judiciary to seek agreement outside the adversarial commission process. The Court’s clearly stated concern that negotiation may give rise to a reasonable apprehension that judges’ interests in matters at stake in negotiations may compromise their impartiality would set a very low threshold if applied strictly. As La Forest J. observed in dissent, however, one would expect that “a reasonable person … would believe judges are made of sturdier stuff than this”.

On the other hand, some comments in the majority’s reasons in the Provincial Judges Reference suggest that consultation and discussion between government and judiciary may be permissible, provided both sides avoid hard-bargaining tactics that could cause a perception that the courts may be subject to undue influence in their decision-making. For instance, the majority appears to contemplate some degree of direct discussions in stating that the prohibition on negotiations “does not preclude expressions of concern or representations by chief justices and

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77 Provincial Judges Reference, supra, note 2, at paras. 134, 186-87.
78 Id., at para. 337.
chief judges, and organizations that represent judges, to governments regarding the adequacy of judicial remuneration”. The Court also expressly recommended consultation with the judiciary in designing commission processes.

In addition, in Ontario, the 1992 Commission Report was based in part on a joint review of the provincial judges’ pension plan. One of Ontario’s reasons for rejecting the Commission’s pension recommendations in its subsequent 1999 report was that no demographic changes had taken place since the joint recommendation was made and accepted. The Court accepted this reason as legitimate without making any negative comment on the collaborative process involving the joint submission.

The Alberta government and Alberta Provincial Judges Association also made a joint submission to the Alberta Judicial Compensation Commission during its 2000 inquiry. The parties made clear that the joint submission was provided “simply to assist the 2000 Commission in its work, and in full recognition and acknowledgement that, as required by Canadian constitutional law, the 2000 Commission must be an objective, independent, and effective body which has the power to make a recommendation at variance with a joint submission”.

Governments and judicial associations seeking to take a more collaborative approach to the determination of judicial compensation should nevertheless exercise caution. The majority in the Provincial Judges Reference was critical of the Manitoba government and, to some extent, the judicial association in that province, over the fact that they agreed to put a joint submission to the Commission. The Court’s concern, however, seems directed more to the apparent expectation, expressed in correspondence between the parties, that the commission would “rubber-stamp” the proposal without conducting a hearing, than to the fact that a joint proposal to the commission was considered at all.

79 Id., at para. 134.
80 Id., at para. 167.
81 Provincial Judges Compensation Appeals, supra, note 4, at paras. 95-96, 98.
83 Provincial Judges Reference, supra, note 2, at paras. 238-46.
(b) Spectrum of Judicial Independence Requirements

Another issue not fully resolved in the Provincial Judges Compensation Appeals is the way in which the established principle that the essential requirements of judicial independence should be construed flexibly with respect to various courts and tribunals applies in practice. The Court applied the same standard to all the cases before it, even though one case dealt with justices of the peace.

In the case of Bodner, one of the consolidated appeals, Alberta and some government interveners argued unsuccessfully that the principle of judicial independence did not require an independent, objective commission process for determining justices of the peace’s compensation. The Court rejected this argument and concluded that a commission was both legislatively and constitutionally required for Alberta’s justices of the peace. 84

In other recent cases, however, the Court has affirmed the flexible application of judicial independence requirements. In Re Therrien, the Court confirmed that constitutional judicial independence principles applied flexibly in concluding that removal of a provincial court judge from office did not require a legislative address similar to the address of Parliament and the Senate required for removal of superior court judges:

These essential conditions should instead respect that diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected… 85

In Ell v. Alberta, the Court also referred to the principle that the mechanisms required to achieve minimum constitutional judicial independence requirements will vary. 86 In that case, justices of the peace were effectively removed from office by the imposition of new minimum qualifications without any grandparenting provision for justices of the peace currently holding office. The Court confirmed that

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84 Provincial Judges Compensation Appeals, supra, note 4, at para. 121; the Ontario Divisional Court also reached a similar conclusion in requiring a judicial compensation commission for Ontario Justices of the Peace (Ontario Federation of Justices of the Peace Assns., supra, note 65, at 562-63 O.R.).

85 Supra, note 10, at paras. 65-67.

86 Ell v. Alberta, supra, note 10, at para. 31; see also: R. v. Lippé, supra, note 10, at 142 S.C.R.
requirements of judicial independence apply flexibly among various decision-makers in concluding that judicial independence had not been compromised:

The level of security of tenure that is constitutionally required will depend upon the specific context of the court or tribunal. Superior court judges are removable only by a joint address of the House of Commons and the Senate, as stipulated by s. 99 of the Constitution Act, 1867. This level of tenure reflects the historical and modern position of superior courts as the core of Canada’s judicial structure and as the central guardians of the rule of law. Less rigorous conditions apply in the context of provincial courts, which are creatures of statute, but which nonetheless perform significant constitutional tasks.87

The Court in Ell concluded that the requirement that judicial officers only be removed for cause cannot be applied as rigidly where removal occurs by legislative means.88 The Court found that the legislation in issue was part of a legislative measure that was “reasonably intended to further the interests that underlie the principle of judicial independence”, in particular public confidence in the administration of justice and the maintenance of a strong and independent judiciary.89 As a result, a reasonable and informed person would perceive the reforms to the office to strengthen, rather than diminish, the independence and qualifications of Alberta’s justices of the peace.90

VI. CONCLUSION

The Court’s decision in the 2005 Provincial Judges Compensation Appeals is likely to curb litigation respecting judicial compensation in the near future. It makes clear that decisions respecting judicial compensation affect the allocation of public funds, a matter properly within the purview of the provinces. The role of the commission is

87 Ell, id., at para. 31.
88 Id., at para. 36.
89 Id., at para. 33.
confirmed, not as a body charged with determining the appropriate level of judicial compensation, but as a consultation and recommendation process designed to ensure that governments have independent and objective advice and give genuine consideration to the commission’s recommendations.

The level of deference afforded governments is very high. Only where a government’s conduct or reasons reflect a failure to give consideration or be responsive to a commission’s recommendations will the Court set aside a recommendation. The fact that the remedy will likely be limited to returning the decision for reconsideration by government, and that judges may end up paying for both sides’ costs of litigation, will likely encourage associations representing the judiciary to exercise discipline in deciding whether to challenge decisions respecting their compensation in the courts.

The effect of the decision is not limited to reducing litigation over judicial compensation. As well, the Court has signalled that the commission process, although only recommendatory, must nevertheless remain robust. Because the government’s response must deal with facts and arguments before the commission, the parties will have to ensure that all relevant facts and submissions are on the record.

Finally, the decision does not address other related issues that may arise in the future. Specifically, it leaves open questions about the extent to which governments and the judiciary may engage in ongoing consultations in order to resolve compensation-related issues apart from the commission process. It also remains to be seen which elements of judicial independence apply to other decision makers that operate within the court system.