Beyond Salary Commissions for Provincial Courts

Unlike in many other countries, the lower trial courts in Canada have jurisdiction to hear almost every serious criminal case short of murder. Anything that affects the status of provincial courts as "inferior" courts affects the repute of the administration of criminal justice. Given that the clientele of criminal courts — accused, complainants, witnesses — frequently come from the most disadvantaged sections of society while the clientele of the superior courts are frequently corporations and the more advantaged, care must be taken to avoid any hint of second class justice.

In the last 30 years, provincial courts have thankfully become more thoroughly judicialized. They are no longer magistrates' courts housed with the police in public safety buildings. The appointment process has been improved. In those jurisdictions that use public advertisements and a nominating committee, it is more transparent than that used for superior court judges. Nevertheless, some problems have persisted. Proposals made by the Law Reform Commission and others concerning unification have unfortunately stalled except in the new territory of Nunavut.

The focus of concerns in the 1990s was salaries, which even in the most generous of jurisdictions lag well behind those of superior courts (Ontario is now closing the gap). In almost every jurisdiction, judges or accused challenged salary levels and reductions. Frequent protests that the litigation was not really about money fell, at times, on deaf ears. The idea of a minimum judicial salary guaranteed by the constitution is a somewhat awkward device to protect provincial courts. Nevertheless, in the real world, salary differentials cannot be ignored. The fact that provincial court judges continue to receive substantially lower salaries than their fellow trial judges is a sign of second class justice. The ultimate issue is the status, not the salaries, of provincial court judges.

In the Provincial Court Judges Reference, [1997] 3 S.C.R. 3, the Supreme Court constitutionalized a new framework for resolving salary disputes. The court deduced from the principle of judicial independence an
obligation to have independent, objective and effective commissions which hear evidence and make recommendations concerning compensation. The government need not accept these recommendations, but it has an obligation to respond and give rational reasons for any departures.

Many, including Justice La Forest in a trenchant dissent, criticized the court for mandating the commission process out of thin air. Like many other criticisms of the court for judicial activism, these are not compelling. In Charter cases, courts often go beyond the words of the text. Recourse to preambles is legitimate and in this case was a necessity if the court was to interpret the constitution in light of modern realities and not entrench the second class status of provincial courts.

The court was careful not to impose any substantive result, but rather to structure a process for determining these matters. Perhaps because legislatures in the past had frequently rejected commission recommendations, Justice La Forest argued that the commission process was a triumph of form over substance. Nevertheless, structuring fair procedures remains at the core of the judiciary’s domain and betrays charges that the court engaged in judicial activism. The commission process mirrors the continuing dialogue between independent bodies and legislatures, which runs throughout the fabric of the Charter.

The court was careful not to render judges immune from fiscal restraint, but only to require that the legislature provide rational reasons for departing from the commission’s recommendations. Although rationality is a less stringent standard than s. 1 review, so far it has not been toothless. The Supreme Court indicated that there must not be discrimination against judges or unreasonable factual assumptions. Legislatures cannot simply reject the commission’s recommendations as unreasonable and excessive: British Columbia Legislative Assembly Resolution on Judicial Compensation (Re) (1998) 160 D.L.R. (4th) 477 (B.C.A.). Another decision suggests that even the need to share the burdens of fiscal restraint may not be sufficient: Alberta Provincial Judges Assn. (1999), 177 D.L.R. (4th) 418 (Alta. C.A.).

It will take some time for the newly constitutionalized commission process to shake out. Courts should not substitute their views for those of the legislature, but they also should not be shy about requiring the legislature to respond to the reasons given by a commission. The ultimate goal, however, should be the promotion of a respectful dialogue between governments and judges as mediated by the commission. This dialogue should not be limited to salary and pension issues.

The Supreme Court’s concern about protecting judges from direct bargains with the government holds equally true for other aspects of the administration of justice. Provincial court judges on the front line are in an excellent position to provide feedback to provincial Attorneys General about the effects of charging policies, community corrections, prison overcrowding and legal aid. Given the provincial government’s intense policy and fiscal interest in all these matters and the need to maintain judicial independence and impartiality, it is best that controversies arising from these matters be mediated by the independent commission. The commissions probably cannot replace day-to-day management structures, but they should be able to deal with the most controversial and intractable conflicts between judges and governments. At the very least, governments have an obligation to provide reasoned and prompt replies to the concerns of provincial court judges whenever they are endorsed by an independent commission.

Salaries will continue to be an issue, but the commission process should evolve into a new mechanism for conducting the often delicate and tricky debate between courts and governments about the administration of justice. Such a comprehensive commission process would outshine the federal triennial commission process, which focuses on salaries. If provincial courts have more transparent and comprehensive appointment and commission processes than the superior courts, this can only assist the ultimate goal of unification of all trial courts. Only then will every person coming before a trial court be completely assured the same standard of justice.

K.R.