CHAPTER 1

INTRODUCTION

1.1 The Commission

The Judicial Compensation and Benefits Commission (the "Commission") consists of three members: one nominated by federally-appointed judges (the "Judiciary") and another by the federal Minister of Justice, and a Chairperson chosen by the first two nominees. In September 1999, the Minister of Justice announced the appointments by the Governor in Council of Richard Drouin, O.C., Q.C., as Chair of the Commission, and Eleanore Cronk and Fred Gorbet as Commissioners, for terms ending on August 31, 2003. The next quadrennial inquiry will not commence until September 2003. Accordingly, the planning horizon of this report is four years, ending August 31, 2003. The process contemplates that the Commissioners, once appointed, will function independently of the parties that nominated them. We have conducted ourselves accordingly.

1.2 Background and Context

The legal authority of the Parliament of Canada to set the compensation of the Judiciary flows from Canada's Constitution. Section 100 of the *Constitution Act, 1867* specifically provides that the salaries, allowances and pensions of the judges "*of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the time being paid by Salary*", are to be fixed and provided by the Parliament of Canada. This section of the *Constitution Act, 1867* has remained unchanged through various phases of constitutional reform. The process to facilitate the fixing of such compensation is now provided for in the *Judges Act*, R.S. 1985, c. J-1, as amended, (the "*Judges Act*").

Before 1981, judges' salaries and benefits were reviewed by advisory committees, a process which was generally unsatisfactory to the Judiciary. Judges felt that the process merely amounted to petitioning the government to fulfill its constitutional obligations.

In 1982, section 26 was introduced to the *Judges Act*, establishing the "Triennial Commission". The intention was to create a body which would be independent of the Judiciary and Parliament, and which would present the Minister of Justice with objective and fair recommendations. The goal was to depoliticize the process, thus maintaining judicial independence.

There were five Triennial Commissions[1]. Despite extensive inquiries and research by each of them, many of their recommendations on judicial salaries and benefits, between 1987 and 1993, generally were unimplemented or ignored. The Government of Canada (the "Government") froze judges' salaries and suspended indexation in the mid-1990s. The last adjustment to judges' salaries was made in November 1998 pursuant to recommendations made by the Triennial Commission chaired by David Scott, Q.C. (the "Scott Commission")[2].

In its 1996 report, the Scott Commission described the problem with the triennial commission process by stating:

> *In spite of the thorough recommendation by successive Commissions, Parliament has failed, in a proactive sense, to fix judicial salaries and benefits for many years.*
>
> *Furthermore, successive reports have failed to generate any meaningful response from Government. The whole subject of judicial salaries and benefits has, in spite of best intentions, been politicized.*[3]

The Scott Commission's report and recommendations were tabled with the Minister of Justice in September 1996 and were then referred to the Standing Committee on Justice and Legal Affairs.

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[1] Lang (1983), Guthrie (1987), Courtois (1990), Crawford (1993) and Scott (1996). Dates refer to the year of the Report.
[2] In November 1998, the *Judges Act* was amended to increase judicial salaries by 4.1% effective April 1, 1997 and an additional 4.1% effective April 1, 1998.
[3] Scott (1996), at 8

While the Committee was considering that report, the Supreme Court of Canada ruled in *Reference Re Remuneration of Judges* (the "*PEI Reference Case")*.[4]

The PEI Reference Case

The *PEI Reference Case* involved litigation concerning judicial independence and the remuneration of provincial court judges in a series of cases in Prince Edward Island, Alberta and Manitoba. The common issue in these cases was the validity of provincial legislation purporting to reduce the compensation of provincial court judges as part of wider restraint measures involving a large number of other persons whose compensation was paid from public funds. Although the case arose in the context of provincial court judges, it is clear that the Court's statements pertain equally to federally-appointed judges and, hence, to the Judiciary whose compensation is the subject-matter of this report.

In its decision, the Supreme Court of Canada outlined a number of basic principles concerning the obligations of governments in establishing judicial compensation. Chief Justice Lamer concluded for the majority of the Court that provinces are under a fundamental constitutional obligation to establish judicial compensation commissions and, further, in the absence of prior recourse to such commissions, any change to or freeze in the remuneration of provincial court judges is unlawful.

The Foundational Principle of Judicial Independence

The analysis of Chief Justice Lamer began with an extensive discussion of the basis for judicial independence. He concluded that judicial independence, at root, is an unwritten constitutional principle, which traces its origins to the *Act of Settlement of 1701*. It is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. Thus, the express provisions of the *Constitution Act, 1867* are not an exhaustive code for the protection of judicial independence in Canada. Rather, the specific provisions of the *Constitution Acts*, 1867 to 1982,

[4] *Reference Re Remuneration of Judges* (1997), 150 D.L.R. (4th) 577 and [1998] 1 S.C.R. 3.

merely "*elaborate that principle in the institutional apparatus which they create or contemplate*" (at 617, para. 83).

The *PEI Reference Case* confirms that there are three core characteristics of judicial independence: security of tenure, financial security and administrative independence. "Financial security" has both an individual and an institutional or collective dimension (at 631-633, paras. 115 to 122). Collective or institutional financial security has three components, all of which flow from the requirement that, to the extent possible, the relationship between judges and the executive branch of government be depoliticized (at 637, para. 131).

The necessity to depoliticize the relationship between judges and the executive branch of government requires, at least, that:

i) no changes to or freezes in judicial remuneration be effected without prior recourse to an independent, effective and objective process for determining judicial remuneration. Thus, *"what judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration"* (at 637, para. 133);

ii) under no circumstances should the judiciary, either collectively through representative organizations or individually, engage in negotiations concerning remuneration with the executive or representatives of the legislature. To do so would be to act fundamentally at odds with judicial independence (at 638, para. 134); and

iii) judicial salaries cannot be reduced, in any circumstances, below a minimum level. According to the Court, *"…any reduction to judicial remuneration, including de facto reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge"* (at 638, para. 135).

Only in extraordinary and dire circumstances may governments avoid the requirement of prior recourse to a compensation commission before changing or freezing judges' remuneration. But for these rare and exceptional circumstances, as a matter of law, governments must adhere to the three components of the collective or institutional dimension of financial security identified above. Financial security, in turn, constitutes one of the three basic elements of judicial independence.

The Requirement for a Special Process

The *PEI Reference Case* did not dictate the exact shape and powers of the independent review body mandated by the Court's judgment. It did establish, however, certain of the required content of the norms of "independence, effectiveness and objectivity". Generally, such content includes at least the following:

i) members of compensation commissions must have some kind of security of tenure, which may vary in length;

ii) the appointments to compensation commissions must not be entirely controlled by any one branch of government;

iii) a commission's recommendations concerning judges' compensation must be made "*by reference to objective criteria, not political expediencies*";

iv) it is preferable that the enabling legislation or regulations creating compensation commissions stipulate a non-exhaustive list of relevant factors to guide the commission's deliberations;

v) the process of compensation commissions must be employed before implementation of any changes or freezes to judicial compensation;

vi) to guard against the possibilities that government inaction might lead to a reduction in judges' real salaries because of inflation, compensation commissions must convene at least every three to five years to ensure the adequacy of judges' salaries and benefits over time;

vii) the reports of compensation commissions must have a "*meaningful effect on the determination of judicial salaries*". Thus, while the report of a compensation commission need not be binding, at a minimum the responsible legislative or executive authority must formally respond to the report within a specified time; and

viii) finally, the executive or the legislature, as applicable, must be prepared to justify any decision rejecting one or more of the recommendations in a compensation commission's report, if necessary, in a court of law.

As envisaged by the *PEI Reference Case*, all provinces, as well as Yukon Territory, have established commissions to conduct reviews of the compensation and benefits of provincial and territorial court judges.

In 1998, Parliament enacted extensive amendments to the *Judges Act*. Certain of these amendments were intended specifically to respond to the requirement to assure an "independent, effective and objective" process for the determination of judicial compensation. The mandate of this Commission flows from the new process for review of judges' compensation established by the *Judges Act*, as amended.

1.3 Mandate

Section 26 of the *Judges Act* establishes the Commission. The Commission is permanent, with established offices and an independent structure. Its mandate is clearly set out in subsections 26(1) and (2) of the *Judges Act*:

> *26(1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judges' benefits generally.*
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> *Factors to be considered*
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> *(1.1) In conducting its inquiry, the Commission shall consider*
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> *(a) the prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;*
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> *(b) the role of financial security of the judiciary in ensuring judicial independence;*
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> *(c) the need to attract outstanding candidates to the judiciary; and*
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> *(d) any other objective criteria that the Commission considers relevant.*
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> *26(2) The Commission shall commence an inquiry on September 1, 1999 and on September 1 of every fourth year after 1999, and shall submit a report containing its recommendations to the Minister of Justice of Canada within nine months after the date of commencement.*

Also included in the Commission's mandate under the *Act* is a new referral clause whereby the Minister of Justice can request other reports from the Commission:

> *26(4) In addition to its quadrennial inquiry, the Minister of Justice may at any time refer to the Commission for its inquiry a matter mentioned in subsection (1). The Commission shall submit to that Minister a report containing its recommendations within a period fixed by the Minister after consultation with the Commission.*

Subsections 26(6) and 26(7) of the *Act* outline the responsibilities of the Minister of Justice upon receiving a report from the Commission:

> *26(6) The Minister of Justice shall table a copy of the report in each House of Parliament on any of the first ten days on which that House is sitting after the Minister receives the report.*
>
> *26(7) The Minister of Justice shall respond to a report of the Commission within six months after receiving it.*

1.4 Operating Principles

In our deliberations, we were guided by our mandate as set out in section 26 of the *Judges Act*, described above. In particular, the *Act* requires that we determine whether judicial salaries and benefits are adequate and that we must consider, in arriving at this determination, the four factors set out in subsection 26(1.1).

In conducting our inquiry, we addressed each of these factors in a number of ways. We considered information presented to us in submissions from interested parties and in responses by those parties to our questions of clarification. Our staff undertook research on our behalf. We sought and received expert advice on some important issues. We also spent considerable time discussing among ourselves the issues, the evidence, how it could be interpreted, and our conclusions and recommendations.

It is important in the public interest and for the benefit of all interested persons, including the Judiciary and Government, that our report clearly outline the basis and rationale for our recommendations. For this reason, the specific context for our individual recommendations is discussed in more detail in subsequent chapters of this report. We believe it will also help the reader understand our overall report if we set out some of our basic conclusions and operating

principles to provide insight into how we approached the various issues we were asked to consider, in light of the statutory factors.

Our work was shaped and guided by the Supreme Court of Canada's articulation, in the *PEI Reference Case,* of the constitutional importance of the concept of judicial independence. From the outset we attempted to be alert and responsive to the requirements outlined by the Court for an "independent, effective and objective" special process for determining judicial compensation.

We strongly affirm the importance of an independent judiciary, and we recognize the role that financial security plays as a fundamental component of independence as set out in the second enumerated factor under subsection 26(1.1). We note, in this regard, that the *PEI Reference Case* does not provide explicit guidance as to the appropriate level of remuneration necessary to ensure judicial independence, other than to indicate that:

i) the basic minimum must be at a level that will not lead to perceptions that judges are susceptible to political pressure through economic manipulation (at 658, para. 193); and

ii) the salary level *"shall be adequate, commensurate with the status, dignity and responsibility of their office"* (at 659, para. 194).

We cite these references to illustrate an important point. There is, in our view, no single, objectively demonstrable answer to the question of what is adequate compensation for the Judiciary in light of the factors enumerated in subsection 26(1.1). This is not to say that the issues cannot be approached with objectivity. We believe that they can and we believe that we have done so. But, at the end of the day, judgments are required that necessitate compromise among sometimes competing objectives or interests.

For example, we were required explicitly by the first factor set out in subsection 26(1.1) to consider the economic situation and the financial position of the Government. We received material from the Government indicating that the economy is robust and the financial position is healthy. We concluded from this that there is no fiscal constraint that should impact on the ability of Parliament to ensure that judicial compensation is adequate. But the lack of fiscal constraint, while important and welcome, should not be viewed as an invitation to be profligate

with taxpayers' money. It is a condition that allowed us to recommend without constraint what we felt to be appropriate, but it did not help us determine what that recommendation should be.

Similarly, in interpreting the third factor identified in subsection 26(1.1), relating to recruitment of outstanding candidates to the Judiciary, it is important to note that there is no objective definition of "outstanding". An example of the need to compromise can be illustrated by considering this factor against the background of regional differences across Canada. Generally, all members of the Judiciary are paid the same salary, regardless of where they live and work. But it is a reality that attracting outstanding candidates in major metropolitan areas will require higher compensation than attracting outstanding candidates in rural areas of Canada. The Commission, therefore, considered whether judges should be differentially compensated, on a provincial or regional basis, as had been considered by various Triennial Commissions[5]. For reasons later outlined in this report, we concluded that we should not recommend regional variations in salaries. Nonetheless, we recognized that unless the Government compensates judges in all regions of the country according to the "highest paying" or most lucrative legal services market, which we do not believe to be realistic or responsible, uniform salaries will have a differential impact, in different regions of the country, on the ability to attract outstanding candidates to the Judiciary. After weighing what evidence was available and taking these realities into account, we had to make compromises that, in our view, best serve the broad public interest.

We sought, in accordance with the fourth factor enumerated in subsection 26(1.1), to inform ourselves with regard to a number of objective criteria that we believed relevant to our deliberations. These included, with regard to salaries, comparators that we considered in coming to conclusions about adequacy, particularly in light of the second and third enumerated factors. While we considered a number of comparators, we believe that the unique position of the Judiciary in Canada strongly militates against a formulaic approach to the determination of an

[5] The Lang Commission (1983) considered recommending regional variations in judicial salaries and rejected the concept, "*so as to avoid the creation of different classes within the judiciary*" (at 7). The Lang Commission, however, did recommend that "*the next triennial commission address the issue of regional and cost of living variations for judicial salaries and allowances*" (at 15). The successor Commission, Guthrie (1987), concluded that "*Having considered the matter, we are not disposed to recommend any changes*" (at 10).

adequate salary. With regard to annuities and other benefits, we also sought the advice of experts on practices that are generally followed within the private and public sectors. Once again, we stress that while such information was helpful and informative, it was not determinative.

Finally, we conclude this section by noting that not only are the role and responsibilities of the Judiciary unique in our society, they constantly evolve according to the dynamics and needs of Canadian society. In response to the *Charter of Rights and Freedoms* (the "*Charter*"), and the growing complexity of our social and economic relationships, the Judiciary is playing an increasingly public role in key decisions that affect us all. Moreover, the characteristics of the Judiciary have changed and continue to shift: judges are being appointed at a younger age, and more females are being appointed to the Bench. The caseload of judges has grown, as more cases move to the higher courts for determination. Many of these cases are high profile and controversial. They capture the public interest and become the focus of media attention. Judicial decisions often generate considerable political debate. The reality of these trends must be recognized when considering the salary and benefits that are adequate to secure judicial independence and attract outstanding candidates to the Bench.

1.5 Operating Process

The Commission sought to establish an open and accessible process for all those interested in participating in our inquiry, or in keeping abreast of the Commission's proceedings. A web site was created and any documents that were accessible electronically were posted on the site (see http://www.quadcom.gc.ca). Links were made to other relevant sites and documents. An e-mail address was incorporated to allow for communication directly with the Commission and with the Commission's Executive Director in our Ottawa office.

In November 1999, a notice announcing the Commission's inquiry and process was published in major newspapers across the country. This notice invited anyone who was interested to make written submissions to the Commission and indicated that an oral hearing would be held. A copy of the notice is attached at Appendix 1. In addition, the Chair wrote letters to provincial and

territorial Ministers of Justice and Attorneys General and to law societies informing them of the Commission's inquiry and inviting submissions or comments on issues covered by our mandate.

The Commission received submissions from 20 parties. Submissions from the Canadian Judges Conference and the Canadian Judicial Council (the "Conference and Council"), representing the Judiciary, and from the Government covered a broad range of compensation and benefits matters. Submissions from other parties addressed a more limited range of specific issues. A list of those persons who provided written submissions is set out at Appendix 2.

The Commission held a public hearing on February 14, 2000 in the Government of Canada Conference Centre on Rideau Street in Ottawa. The hearing was continued on March 20, 2000 in the same location. A copy of the notices of hearing and a list of participants can be found at Appendix 3. Copies of the transcripts of these hearings are available for perusal at the Office of the Commission. Access can be arranged through the Executive Director.