

GOVERNMENT'S SUBMISSION ON FUNDING
TO
THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION

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TABLE OF CONTENTS**Tab No.**

1. Submission
 - I. Issues
 - II. What is the Jurisdiction of the Commission?
 - III. Is There an Obligation to Fund Participation of the Judiciary?
 - IV. Conclusion

2. *Jones v. Royal Canadian Mounted Police Public Complaints Commission* (1998), 154 F.T.R. 184 (T.D.).

3. *National Energy Board Act (Can.), (Re)*, [1986] 3 F.C. 275 (C.A.).

4. *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 - excerpts.

5. *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 - excerpts.

6. *R. v. Campbell* (1998), 169 D.L.R. (4th) 231 (S.C.C.).

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I. ISSUES

1. In their reply submission the Canadian Judges Conference and the Canadian Judicial Council seek public funding of their participation before the Commission. They ask the Commission for "an appropriate decision as to costs."

2. The request by the Conference and Council raises two issues:

- (a) what is the jurisdiction of the Commission to entertain their request; and
- (b) is there any obligation upon the Government to fund their participation before the Commission?

II. WHAT IS THE JURISDICTION OF THE COMMISSION?

3. At the outset, it should be borne in mind that the Commission's mandate is advisory. Section 26 of the *Judges Act* confers responsibilities to inquire and report. The Commission is given no adjudicative functions. It is not intended that the Commission determine the legal obligations of the Government or the legal entitlements of the judiciary.

4. Given that mandate, it is not surprising that the *Judges Act* confers no express power on the Commission to make orders as to funding or to award costs.

5. An express provision would be expected where payment is to be made from public funds. Parliamentary authorization is required: see section 26 of the *Financial Administration Act*. In *Jones v. Royal Canadian Mounted Police Public Complaints Commission* (1998), 154 F.T.R. 184 (T.D.), Mme. Justice Reed observes, at para. 5:

... the authority to pay amounts from the public purse is not usually a power that exists unless expressly conferred.

6. A power to provide intervenor funding cannot be implied in the absence of "evidence of practical necessity for the exercise of the power ... to attain the objects expressly provided by Parliament": *National Energy Board Act (Can.), (Re)*, [1986] 3 F.C. 275, at 286 (C.A.). In the present case, not only is there no evidence of necessity, it appears that the predecessor triennial commissions were able to fulfil their mandates without funding the participation of members of the judiciary.

7. This is not a question as to the desirability of funding. It is a question as to the jurisdiction conferred by Parliament. In the *National Energy Board* case at 289-290, Mr. Justice Heald explains:

I am quite aware of the persuasive arguments in favour of intervenor funding. There is much to be said for the view that public interest intervenors and possibly others should be encouraged to participate in the proceedings before regulatory boards. One of the obvious benefits from such participation will be the assistance given to the tribunal as a result of the informed input from concerned, interested and informed groups and individuals. Another benefit may well be a resultant increase in public confidence in the regulatory process as conducted before the many boards and tribunals in existence.

However, on the basis of this statute, and in the absence of more specific enabling language, it is not for the Court to determine that the Board has the necessary jurisdiction, simply because it may feel that the Board should have such jurisdiction. This is a policy question to be decided by Parliament. As noted, *supra*, Parliament has conferred such specific jurisdiction in the case of some

regulatory boards. In others it has not chosen to do so. The National Energy Board falls into the latter category.

8. The Conference and Council may be inviting the Commission to find that the Government is under a constitutional obligation to provide funding. The Government submits that the Commission lacks the jurisdiction to make determinations of constitutional rights and obligations. It has no express power to determine questions of law. Neither can any such power be implied from the statutory scheme: the Commission's mandate is to inquire and report, not adjudicate; the Commission members need not possess legal expertise; no procedural protections are prescribed; no rules of evidence need apply; no appeal is available. Parliament has not intended that the Commission decide constitutional questions: consider *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at paras. 45-47, 52-58, 59-62.

9. For want of jurisdiction, the Commission should decline to find an obligation to provide funding or to order the Government to do so.

III. IS THERE AN OBLIGATION TO FUND PARTICIPATION OF THE JUDICIARY?

10. The Government submits that there is no obligation, constitutional or otherwise, to fund the participation of the Conference and Council before the Commission.

11. The decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("the *PEI Judges case*"), is silent on the issue of funding.

12. Judicial compensation commissions must be independent, objective, and effective. That said, the design of the commission is left to the executive and legislature. In the *PEI Judges case*, at para. 167, Chief Justice Lamer explains:

I do not wish to dictate the exact shape and powers of the independent commission here. These questions of detailed institutional design are better left to the executive and the legislature, although it would be helpful if they consulted the provincial judiciary prior to creating these bodies. Moreover, different provinces should be free to choose procedures and arrangements which are suitable to their needs and particular circumstances. ...

13. Participation of the judiciary before judicial benefits commissions is desirable, but not essential:

In addition to being independent, the salary commissions must be objective. They must make recommendations on judges' remuneration by reference to objective criteria, not political expediencies. The goal is to present "an objective and fair set of recommendations dictated by the public interest" (Canada, Department of Justice, *Report and Recommendations of the 1995 Commission on Judges' Salaries and Benefits* (1996), at p. 7). Although s. 11(d) does not require it, the commission's objectivity can be promoted by ensuring that it is fully informed before deliberating and making its recommendations. This can be best achieved by requiring that the commission receive and consider submissions from the judiciary, the executive, and the legislature. ...

(*PEI Judges case*, at para. 173, per Chief Justice Lamer).

The absence of a constitutional requirement of judicial participation was reiterated in *R. v. Campbell* (1998), 169 D.L.R. (4th) 231 (S.C.C.).

14. If judicial independence does not require that judges participate before judicial compensation commissions, can it be said that judges are constitutionally entitled to funding where they chose to do so? In answering this question, it is instructive to return to the imperative articulated by Chief Justice Lamer in the *PEI Judges case*, at para. 131:

... To my mind, financial security for the courts as an institution has three components, which all flow from the constitutional imperative that, to the extent possible, the relationship between the

judiciary and the other branches of government be depoliticized. As I explain below, in the context of institutional or collective financial security, this imperative demands that the courts both be free and appear to be free from political interference through economic manipulation by the other branches of government, and that they not become entangled in the politics of remuneration from the public purse.

15. The Government submits that there is no basis upon which to suggest that public funding is necessary to avoid a perception of economic manipulation of the judiciary. That perception is avoided by the very existence of a judicial benefits commission interposed between the judiciary and the executive, and by judicial salaries and benefits far beyond the minimum level.

16. In the present case, there is no basis upon which to suggest that the cost of participating before the Commission would either impair judicial salaries to any substantive degree or prevent active participation by judges in the Commission's inquiry. Indeed, it would appear that the cost borne by individual judges would be modest given:

- (a) there are over 1000 judges who may contribute;
- (b) those judges are among the top two percent of earners in Canada;
- (c) the judges are legally-trained professional, experienced in dealing with sophisticated issues;
- (d) the proceedings before the Commission are informal and non-adversarial;
- (e) the Commission has the financial and other means to carry out its own investigation;
- (f) the Government has contributed \$80,000 by way of an *ex gratia* payment to the Conference and Council;
- (g) in addition, the Government paid for the pension study prepared for the Conference and Council; and
- (h) the Government, and in particular the office of the Commissioner of Federal Judicial Affairs, have freely responded to requests for information from the Conference and Council.

17. The Government submits that there is no imbalance of the sort confronted in *Newfoundland Association of Provincial Court Judges v. Newfoundland* (1998), 160 D.L.R. (4th) 338 (Nfld. 5.c.). To the extent that that decision suggests a constitutional obligation based upon some general notion of equity, the Government submits that it is wrongly decided. Any constitutional obligation can only derive from the constitutional imperative of judicial independence.

18. In any event, the approach to funding adopted by the Government in the present case is fair and equitable. The Commission has the means to conduct its inquiry and the judges have the means to make representations.

IV. CONCLUSION

19. The Government submits that the Commission should decline to make the decision as to costs requested by the Conference and Council. The Commission lacks the jurisdiction to do so. Furthermore, it has not been shown that the Government's approach to funding in any way impairs public confidence in an independent judiciary.