

CHAPTER 6

FUNDING OF REPRESENTATIONAL COSTS OF JUDGES

In their initial submissions, the Conference and Council requested a decision by the Commission authorizing reimbursement by the Government of all costs incurred by the Conference and Council concerning their participation in the process of the Commission, payable in a manner analogous to a solicitor and client award of costs in a court proceeding. This scale of costs contemplates full reimbursement of all actual and proper expenditures, including fees and out-of-pocket disbursements for legal counsel and experts, inclusive of applicable taxes.

The Government argued that the Commission lacks jurisdiction both to order that the Government provide such funding to the Conference and Council and, further, to determine questions of law, including the question of whether the Government has any legal obligation to fund the participation of the Conference and Council before the Commission. It was argued, in any event, that the Government had no obligation to fund the participation of the Conference and Council, particularly where participation of the Judiciary, while desirable, was not required.

When the Commission met in public session on March 20, 2000 the respective positions of the involved parties on the funding issue were further clarified. It emerged that there was no dispute among the parties on the following:

- i) while the Commission does not have jurisdiction to direct or require that representational funding be provided by the Government to the Conference and Council, the Commission could make a recommendation to the Minister of Justice in that regard; and
- ii) the Government had contributed \$80,000 to the costs incurred by the Conference and Council in respect of their participation before the Commission. This payment was described by the Government as an “*ex gratia*” payment.

6.1 The Jurisdictional Question

As noted, all involved parties were agreed that there was no impediment to the Commission making a recommendation to the Minister of Justice on the matter of funding the representational costs of the Conference and Council, should the Commission conclude that such a recommendation was warranted. The making of such a recommendation, of course, is quite different from directing that reimbursement of representational costs be made by the Government. In either event, the Commission recognizes that consent of the parties cannot confer jurisdiction on the Commission if such jurisdiction does not otherwise legally exist.

The ability of an advisory tribunal to make a recommendation to government that reimbursement be made by the state of the representational costs of persons appearing before the tribunal, was clearly recognized in *Jones et al. v. RCMP Public Complaints Commission*.¹ In that case, the RCMP Public Complaints Commission declined to order the payment of funds to student complainants to allow them to be represented by counsel at an inquiry to be conducted by that tribunal. In addition, however, the tribunal concluded that it lacked jurisdiction to recommend to the federal government that such funding be provided and, accordingly, it declined to do so. On judicial review before the courts, the tribunal's decision was set aside and a declaration was granted that the tribunal had the authority to make the requested recommendation concerning funding, although there was no duty on it to do so. Rather, the decision whether to make such a recommendation was a matter within the complete discretion of the tribunal, as was the manner in which any such recommendation for funding might be made.

We are satisfied that similar reasoning applies to this Commission such that we are not precluded from making a funding recommendation if we determine that such a recommendation is advisable in the circumstances.

¹ (1998), 154 F.T.R. 184 (Federal Court of Canada, Trial Division).

6.2 Whether Provision of Funding is Obligatory

As noted, the Government asserted that there is no legal obligation, constitutional or otherwise, to fund the participation of the Conference and Council before the Commission. It also argued that the Commission lacks jurisdiction to determine whether an obligation to provide funding exists and, if so, on what basis, because such a determination involves a question of law and the determination of questions of law is beyond our legal authority.

In contrast, the Conference and Council argued that an obligation to provide representational funding to the Judiciary does exist and the entire issue of representational funding should be expressly recognized and dealt with by the Commission in its report.

We agree that it is important that we deal with the matter of representational funding in our report. For the reasons set out below, however, it is unnecessary for us to express a view on whether there is an affirmative legal obligation on the Government to provide representational funding to the Judiciary for the purposes of inquiries contemplated by section 26 of the *Judges Act* and further, on whether this Commission has the legal authority to determine such a question. We have concluded that some reimbursement of representational costs is both desirable and necessary to ensure the efficacy of the Commission's proceedings. Our recommendations in this regard are not dependent on any determination of whether an obligation to provide such funding exists in law.

6.3 The Desirability of Participation: A Threshold Consideration

Much has been said in the submissions of the involved parties concerning the desirability of, or necessity for, participation by the Judiciary in the quadrennial review process. This issue goes to the heart of the Commission's process and its ability to discharge its obligations under the *Judges Act*. We agree with the following observation by Madam Justice Reed in *Jones et al. v. RCMP Public Complaints Commission*, made by her in the context of determining whether authority existed to make a recommendation that funding be provided:

The consideration that I would think would be crucial for the Commission is whether legal representation of the complainants would improve the quality of the proceedings before it. My observation is that when decision-makers have before them one party who is represented by conscientious, experienced and highly competent counsel, [as applied in that case], they prefer that the opposite party be on a similar footing. They prefer that one party not be unrepresented. An equality in representation usually makes for easier and better decision-making.²

In the *PEI Reference Case*, Chief Justice Lamer stressed that recommendations by independent compensation commissions on judges' remuneration must be made with reference to objective criteria, not political expediencies. For this reason, he indicated that, although not required as a matter of constitutional law, such a 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...*".³ There is no requirement under the *Judges Act*, as amended to date, that we receive and consider submissions from each of the Judiciary, the executive and the legislature. Nonetheless, there can be no doubt that the proceedings of this Commission have been materially improved by the fact of active participation by both the Conference and Council, and Government. The participation of members of the Judiciary and Government has directly contributed to our understanding of the issues and has improved the information base available to us for our deliberations. This is consistent with the spirit and direction of the Supreme Court of Canada's decision in the *PEI Reference Case*.

We also have had regard to the decision of Mr. Justice Roberts of the Newfoundland Supreme Court in *Newfoundland Association of Provincial Court Judges v. Newfoundland*.⁴ In that case, in ordering funding for the judges of the Provincial Court of Newfoundland before either a compensation tribunal or the courts should that become necessary, Mr. Justice Roberts stated:

Constitutionally, our political system is composed of three branches of government -- executive, legislative and judicial. The importance of the independence of the judicial branch from the other two branches has already been canvassed. Despite this independence, judges are paid from public funds controlled by the executive and/or the legislature.

² *Ibid.*, at 191, para. 25.

³ *Supra*, Chapter 1, fn. 4, at para. 173.

⁴ (1998) 160 D.L.R. (4th) 337 (Nfld. S.C.).

That is why, as Lamer, C.J.C. has stated, the process of determining compensation for judges must be depoliticized. The independent tribunal or commission envisaged by the Supreme Court of Canada in the Provincial Court Judges Case [the PEI Reference Case], a version of which has existed in Newfoundland since 1992, permits the necessary dialectic at one step removed from the judges themselves. That dialectic is critical to arriving at the synthesis which will be a fair and adequate remuneration, while at the same time preserving judicial independence, both in perception and substance. For this dialectic to function, the judges have to be represented before the independent commission and/or the courts, if necessary, in the same way as the executive and/or the legislature must be represented. Is it right and just, then, that the executive and/or legislative branches of government be represented by persons who services are paid for out of the public purse while those who represent the judicial branch are not? I think not. ...

...

For the system to work as envisaged, equity dictates that both parties to the process be funded, not just one.⁵

It seems clear to us that it is highly desirable that members of the Judiciary participate fully in the process of this Commission. For the purposes of this quadrennial review, they have done so chiefly through the involvement of the Conference and Council. Were the Judiciary not to be engaged in this Commission's process it could call into question both the efficacy of our proceedings and the objectivity of our recommendations. There is a strong argument to be made, therefore, that their participation is a necessary precondition if the process of this Commission is to be effective and objective, as required by the *PEI Reference Case*.

In any event, as a practical matter, without the participation of the Judiciary and the benefit of their submissions in addition to those of the Government and other interested persons, we are not confident that we would have gained sufficient understanding of the scope and potential impact of all of the issues raised before us.

That does not resolve the question, however, as to whether participation of the Judiciary must be funded participation. In our view, consideration of this aspect of the matter gives rise to at least the following issues:

⁵ *Ibid.*, at paras. 69 and 70.

- i) whether the decision-making process of the Commission would be improved by participation of the Judiciary and, if so, whether such participation could be assured in the absence of funding;
- ii) whether the participation of the Judiciary is connected to the Commission's ability to carry out an independent, effective and objective process for the determination of judicial remuneration;
- iii) whether, absent a recommendation from the Commission, public funding would otherwise be available to the Judiciary for participation in the Commission's process;
- iv) whether both the reality and appearance of fairness in relation to the Commission's process would be affected if public funding of the Judiciary's participation is not assured;
- v) whether the Government has elected to contribute to the representational costs of the Judiciary, by *ex gratia* payment or otherwise and, if so, whether the amount(s) of such contribution(s) is adequate in the circumstances;
- vi) in relation to disbursements incurred by the Judiciary for the cost of experts, whether the work performed by the experts was not otherwise available and whether, once undertaken, it was made available to all interested parties; and
- vii) whether the amount of representational costs was reasonable in the circumstances.

6.4 Analysis of Relevant Factors

As determined by the *PEI Reference Case*, the existence of this Commission and the special process envisaged by the *Judges Act* for its inquiries, are constitutionally mandated. The process of the Commission is specifically designed to establish an independent, effective and objective means for the determination of judicial remuneration in consequence of the constitutional prohibition precluding judges from negotiating their remuneration directly with representatives of the executive or the legislature.

Under this construct, while neither the Government nor the Judiciary is expressly deemed by statute to be a party to the Commission's proceedings, in practical terms they are the two principal actors before the Commission. In addition, although the *Judges Act* does not specifically require the participation of the Judiciary in the proceedings of the Commission, the

Act does expressly contemplate the involvement of the Judiciary at key stages of the process. Thus, for example, the involvement of the Judiciary is necessary under subsection 26.1(1) of the *Judges Act* in the nomination process which serves as the means by which the Commission is constituted. Similarly, under subsection 26(3) of the *Judges Act*, the Judiciary must be involved if the Commission seeks to postpone the date of commencement of its inquiry under subsection 26(1). These two features of the *Act* provide evidence of a legislative intention that the Judiciary be engaged in the special process required by the *PEI Reference Case* for the determination of judicial remuneration.

In *R. v. Campbell et al.*⁶ the Supreme Court of Canada was asked to provide directions on whether the Province of Alberta was required to pay the reasonable expenses of the Alberta judiciary incurred in participating in Alberta's provincial remuneration commission process, or litigation relating thereto. In a unanimous decision, the Court held:

*The composition and the procedure established for hearings before the independent, effective and objective commissions may vary widely. So will the approach to the payment of the representational costs of the judges. In some instances the resolution of the payment of representational costs will be achieved by agreement. Often the commission will have to determine the issue subject to an appeal to the court. In those circumstances the position adopted in the reasons of Roberts J. in Newfoundland Assn. of Provincial Court Judges, supra, may be appropriate, a matter upon which we need not comment in this motion. Suffice it to say, whatever may be the approach to the payment of costs it should be fair, equitable and reasonable.*⁷

As appears from this passage, the Supreme Court of Canada specifically had regard in *R. v. Campbell et al.* to the earlier decision of Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland*. In the latter case, as earlier noted, Mr. Justice Roberts concluded that judges have to be represented before independent compensation commissions if the depoliticized process intended for such commissions is to function properly. In consequence, he held on equitable principles that both parties to the process must be funded. The Supreme Court of Canada, in *R. v. Campbell et al.*, expressly refrained from commenting on

⁶ (1998), 169 D.L.R. (4th) 231.

⁷ *Ibid.*, at 233, para. 5.

the notion that funding was obligatory. The Court did not hold, although it left open the future possibility of holding, that the payment by government of the representational costs of judges in respect of participation before remuneration commissions is required at law, either in consequence of constitutional principles or in the interests of equity and fairness. What the Court did establish, however, is that the approach to the payment of representational costs of judges must be fair, equitable and reasonable.

In this case, both the Government and the Judiciary were represented throughout the Commission's process by able and experienced counsel. In the case of the Government, all of its representational costs were paid from public funds. In addition, the Government had available to it, also at public expense, the services of a variety of government experts, as required or thought desirable by the Government. In contrast, the Commission has been informed that the representational costs of the Judiciary have been paid for in equal shares to date by the Council and Conference, save as offset by the \$80,000 *ex gratia* payment made by the Government.

The Council is a statutory body under the *Judges Act* and is generally funded by Parliament through the Commissioner for Federal Judicial Affairs based on Parliamentary appropriations. The Commission is not aware of whether the budget of the Council was increased specifically to compensate the Council for its anticipated expenditures in relation to this Commission's inquiry.

In contrast, the Conference receives no public funding and is financed solely by its members. The Commission has been informed that there are 950 members of the Conference, at present, which represents approximately 94% of the Judiciary. Membership statistics vary from year to year and, in the past, have been as low as 850. The current annual membership fee is \$300, increased in 1999 from the previous amount of \$150 to take into account the costs of establishment of a permanent office for the Conference and the engagement of staff for that office, and in contemplation of this quadrennial review process. The Conference's objects extend beyond representation of its members before this or similar commissions. The Conference was founded before the establishment of the triennial review process. Its activities include, where appropriate, involvement in the process of compensation commissions relating to the Judiciary, as well as the determination of policy for the continuing education of judges,

among other matters. From time to time the Conference engages the services of outside counsel and other professionals to advise on issues unrelated to the quadrennial review process.⁸

The Commission was informed that the \$80,000 *ex gratia* payment received from the Government was made on account of the representational costs of both the Conference and Council and, upon receipt, was applied in full against outstanding invoices rendered by legal counsel for the Conference and Council.⁹

The Judiciary has not always been represented by legal counsel before past remuneration commissions. In our view, the participation of the Judiciary in the process of this Commission is as important and as beneficial as is the participation of the Government. As noted above, the quality of the Commission's decision-making and the efficacy of its process have been enhanced by the participation of both the Judiciary and Government. We are concerned, therefore, to ensure that no avoidable financial barriers to the future participation of the Judiciary before this inquiry, however constituted, are created. We also wish to ensure that public funds are expended only as necessary to defray the representational costs of the Judiciary.

We are generally of the view that the burden of paying the representational costs of the Judiciary attributable to participation in this quadrennial review process, should not be borne by individual judges. However, one of the stated reasons for recently increasing the annual membership fee for members of the Conference was associated with the costs to be incurred by the Conference through participation in the process of this inquiry. Accordingly, those members of the Conference who paid the increased annual membership fee presumably did so on the express understanding that a portion of that fee would be utilized to pay costs associated with participation in the quadrennial review. This factor must be taken into account.

Finally, we do not believe that the participation of the Judiciary should be dependent on the goodwill of the government of the day in authorizing *ex gratia* payments. If this were the case, the independence of the Judiciary from government would be undermined and the participation of the Judiciary in commission proceedings would be rendered uncertain.

⁸ Letter from Ogilvy Renault to the Commission, dated April 14, 2000, at 4.

⁹ *Ibid.*, at 3.

6.5 Conclusions and Recommendations

The Conference and Council provided us with a full breakdown of their representational costs as of the end of April, 2000, inclusive of legal fees and disbursements, and costs associated with experts. These costs were approximately \$270,000.00. We reviewed that breakdown and all related particulars in detail and concluded, for the purposes of our inquiry, that the costs incurred were reasonable.

We recognized that the costs of participating in the process of this inquiry were considerable. They included costs related to participation in the public hearings, the preparation of various written submissions and responding to inquiries by the Commission for additional information. The question is not whether such costs can be paid by the judges who belong to the Conference and Council but, rather, what proportion of these costs fairly and equitably should be borne by the Conference and Council or their members. We agree with the proposition recognized by Mr. Justice Roberts in *Newfoundland Association of Provincial Court Judges v. Newfoundland*, previously referenced, that it is neither right nor just that the executive and/or legislative branches of government be represented before a compensation commission by persons and experts whose services are paid for out of the public purse, while those who represent the judicial branch are not. On the other hand, we also believe that some contribution should be made by the Judiciary to their overall representational costs, through application of a portion of their membership fees in the Conference. Finally, we were conscious that any recommendation by us concerning payment of representational costs will apply only to this quadrennial review, and that future commissioners will be free to determine the issue as they think fit, having regard to the facts and circumstances applicable to their inquiries.

On the basis of all of the information available to us, the factors outlined above, and the circumstances which applied to the conduct of this quadrennial review, we concluded that the Government should be responsible for payment of 80% of the total representational costs incurred by the Conference and Council in respect of their participation in the process of this inquiry, as detailed for our consideration.

Recommendation 22

The Commission recommends that the Government pay 80% of the total representational costs of the Conference and Council incurred in connection with their participation in the process of this inquiry as of May 31, 2000, such payment by the Government not to exceed the aggregate amount of \$230,000, inclusive of the amount of \$80,000 already contributed by the Government as of the date of this report and any extraordinary and explicitly identifiable increase to the budget of the Council in order to fund the participation of the Judiciary in the work of this Commission, and that the remainder of such costs be paid by the Conference and Council in such proportion as they deem appropriate.