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Provincial Court Judges' Professional Allowances and Judicial Independence

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Cases Considered:

Reilly v The Chief Judge of the Provincial Court of Alberta, 2008 ABCA 72,

Provincial Court Judge John Reilly requested the approval of the Chief Judge of the Provincial Court of Alberta to use his professional allowance to attend a conference in Caux, Switzerland. The Caux conference's focus was "Peace - Building Initiatives" and would also be attended by an Elder and three Chiefs of the Stoney Reserve. Judge Reilly's jurisdiction includes the Stoney Reserve and he has long been interested in the administration of justice to Aboriginal peoples and the Stoney Nation in particular. All of this he set out in his request to the Chief Judge, relying upon the professional allowance established through the *Provincial Court Judges and Masters in Chambers Compensation Regulation*, A.R. 176/98 ("*Compensation Regulation*"), which reads:

> 4.1 (1) On and after April 1, 2000, a judge other than a supernumerary judge is entitled to a professional allowance of $2500 per year to be used for the following purposes as authorized by the Chief Judge:
>
> (a) the attendance at relevant conferences and seminars that are related to the carrying out of the duties and functions of a Provincial Court Judge;…

The Chief Judge denied the request, stating that even if he "stretched the boundaries for educational conferences and the guidelines the Association has established ….. the request was outside the bounds." In further reasons, the Chief Judge said that, "none of the Caux conference series was focused on law or the administration of justice", and that the specific Peace - Building Initiatives session was "a political philosophy seminar aimed at dealing with areas of armed conflict around the world …"Judge Reilly applied for judicial review of the Chief Judge's decision, arguing that the denial of the requested use of the allowance was outside the Chief Judge's authority, and that the decision infringed upon his judicial independence. The Chambers Judge, Justice B.L. Rawlins of the Alberta Court of Queen's Bench, dismissed the application. She held that the Chief Judge had the authority to make an objective assessment for the use of professional allowances and that there was no interference with judicial independence. In her view, a professional allowance does not confer a financial benefit and this is not a matter going to financial security, matters which do relate to judicial independence.

On appeal, the Court of Appeal (per Justice Marina Paperny, with Justices Constance Hunt and Ellen Picard concurring) first identified the appropriate standard of review. Because the issue was one of statutory interpretation (does the Chief Judge have the legal authority to set use by judges of professional allowances?) and because the argument was that if the Chief Judge did have this authority, this would offend the principle of judicial independence, the standard of review was found to be correctness. Thus the Court gave little deference on these issues. The Court pointed out that had the substance of the Chief Judge's decision been attacked, the standard specified in s. 9.1 (7) of the *Provincial Court Act*, R.S.A. 2000, c. P-31 – "patently unreasonable" - would have applied. This provision appears to have become an interesting anachronism in view of the Supreme Court of Canada's March 7, 2008 decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, in which the Supreme Court consolidated the common law reasonableness *simpliciter* and patent unreasonableness standards into a single standard of reasonableness.

The Court of Appeal first addressed interpretive arguments, and held that because professional allowances were not mentioned, they were outside the Chief Judge's general supervision powers under s. 9.1(5) of the *Provincial Court Act*. Further, the words "as authorized by the Chief Judge" in the Compensation Regulations were found to be concerned with scheduling only and did not apply to the listed purposes of professional allowances, including attendance at relevant conferences. There are also Guidelines developed by the Chief Judge, in consultation with the Assistant Chief Judges and the Alberta Provincial Judges' Association, for the authorization of non - pre-approved conference expenditures that requires submission in writing, with an explanation, with the decision to be made "solely" by the Chief Judge "entirely on the basis of the written request". Justice Paperny for the Court of Appeal had little difficulty concluding that the Chief Judge did have the power to approve a judge's proposed use of professional allowance.

As to the issue of judicial independence, the Court's analysis is more complete. The constitutional principle of judicial independence requires that judges in their adjudicative role be completely independent of influence in those judicial functions. This includes financial security, security of tenure and administrative independence. There must be freedom of influence by the state, that is, the executive branches of government, and by other judges, as the Supreme Court of Canada noted in *R v. Lippe* [1991] 2 S.C.R. 114 (at para. 45). Assessment of judicial independence involves an objective test: would a reasonable person fully apprised of the circumstances consider that a court or judge could carry out its functions free from influence by government or other judges?

The key to the Court of Appeals' decision is an analogy. In the *Provincial Court Judges Reference*, [1997] 3 S.C.R. 3, the types of decisions in issue as potentially subject to influence included discretionary benefits such as sabbatical leaves. There the Supreme Court concluded that decisions concerning discretionary benefits did not implicate judicial independence. The reason given was that these are not 'essential conditions' of judicial independence. The hypothetical 'reasonable person' would not consider that a provincial court judge's independence would be influenced by desire for these benefits.

The analogy arises from the fact that in the *Provincial Court Judges Reference*, the decision maker concerning discretionary benefits was the Lieutenant Governor in Council – i.e. the Provincial Cabinet. Here, said the Court of Appeal, the same reasoning applies and is supported by the decision power being in the hands of the judiciary rather than the executive. This, as Justice Paperny noted, 'was considered preferable' in *Valente v. The Queen*, [1985] 2 S.C.R. 673.

But the Court of Appeal recognized that merely bringing this decision making power into the judiciary is not necessarily a complete answer to the judicial independence issue. It noted the concern, expressed by commentators, that the approval power may be used as 'an administrative sanction or reward'. This points to the idea that institutional politics can be complex and difficult. Nevertheless, said the Court, the Chief Judge's discretion regarding the professional allowance is structured by the Guidelines that were developed in consultation with the Provincial Judges' Association. In this context, a decision to deny approval for a particular use of the professional allowance would not be seen by a reasonable person to be an 'affront' to judicial independence.

At the core of this case are fundamentally different ideas and values concerning appropriate professional development and education subjects for provincial court judges, and perhaps ultimately concerning the adjudicative and administrative roles of provincial court judges. Judge Reilly's approach is theoretical and value driven, reflecting concern about law and dispute settlement in society and particularly in Aboriginal society. The Chief Judge's reasons suggest a concept of judicial education and training that is functional, bounded by the traditional conceptual legal, procedural and judicial administrative territory of the court. What is clear is that the Court of Appeal was having none of the dispute at this level. It raised, but put aside, the history of litigation and conflict between the parties over independence issues (see for example *Reilly v. Wachowich*, 1999 ABQB 309; *Reilly v. Wachowich*, 2000 ABCA 241). It also reiterated that the merits of the Chief Judge's decision were not an issue on the appeal. That left doctrinal judicial independence analysis, and this is the essence and the value of the Court's decision.