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Dears Sirs and Mesdames:

I offer these brief comments in response to the joint submission of the Canadian Judicial Council and the Canadian Judges Conference.

From the perspective of a lawyer in a small Ontario city (Belleville), federally appointed judges are already overpaid, not underpaid. I know of at least 4 lawyers in my community who have made recent application for judicial appointments. Either I or other members of my firm have received calls from the committee who "vets" these applications, so this is not mere conjecture.

I know the kind of practices these lawyers have, and (roughly) the hours they put in. In one case, I have explicit knowledge of the candidate's income. It is significantly below what federally appointed judges currently earn. In my opinion, this person would make a very good judge—better than several who are currently on the circuit that services this community.

While I don't have explicit knowledge of the incomes of the other three candidates, I can speculate with a high degree of confidence that two of them are earning less than half of what a federal judge currently makes, while the third is probably earning somewhat less than a federal judge.

There may be other lawyers who have applied that I don't know about. However, I am fairly certain that there are very few lawyers in this community who are making anywhere near as much as a judge. Outside of the major cities, a lawyer's clientele consists of individuals and small businesses, not huge corporations. Our clients are spending their own money, and legal fees often aren't tax-deductible for them. Our ability to generate huge billings is rather limited.

In short, for most small-town lawyers, an appointment to the federal judiciary would be the equivalent of winning the cash-for-life lottery. To us, the idea of giving a raise to any judge who will sit in our bailiwick is ludicrous.

I now wish to address some of the specific points made in the CJC submission.

1. The judges seem offended that they haven't had a raise apart from indexing since 1988. But where is it written that all who toil deserve an automatic salary increase due to the mere passage of time? The expectation of increasing pay should logically arise only where the worker can point to increasing productivity. Are judges in 2000 producing more than they were in 1988? Are they deciding more cases? Are they getting their decisions out more quickly? Are their decisions wiser, or more just, than they were 12 years ago? Perhaps the answer to these questions is "yes", but surely it is incumbent upon the supplicants to produce some evidence of this before making their pitch. The increasing use of private mediation would tend to indicate that the consumers of adjudicative services are less than satisfied with the product they are getting from government-appointed judges. Besides, the judges knew when they took the job that the only raises guaranteed to them would be cost-of-living increases. Why do they expect something different now?
2. The judges argue that they don't get as many tax advantages as lawyers, including the right to make RRSP contributions. Gee, I wish I knew what these terrific tax advantages are. I must be overlooking something when I file my return. It's true, I suppose, that we lawyers get to write off the cost of our Errors and Omissions Insurance and other office expenses, but given the choice between not having to pay for these things at all, and having to pay but getting a tax deduction for it, surely the former is a more desirable state of affairs.
3. With regard to RRSP deductions, the submission was worded rather fuzzily on this point. The judges made it sound as though they had been singled out for punishment. However, I could find nothing in the law specifically denying RRSP deductions to judges. I can only conclude that they suffer from the same "disadvantage" as everyone else who belongs to a pension plan: namely, the combined pension contributions of the judges and their employer erodes their RRSP contribution room. Indeed, that was the conclusion reached by both the Tax Court of Canada and the Federal Court of Appeal in *Trussler v. The Queen* [1995] T.C.J. No. 864, affirmed at 99 DTC 5439. While there are indeed aspects of the judge's pension plan that seem bizarre and should be corrected, I believe that lawyers would be virtually unanimous in our willingness to give up our paltry \$13,500 RRSP deduction if we could get as desirable a pension as judges have. When we lawyers retire, we have to actually live off our savings. When judges retire, the money still keeps rolling in, and the judges get to keep all their savings. In any event, judges do get a tax deduction for the 7% of salary which they themselves contribute to their pension plans. At the current rate of pay, that's a deduction of \$12,647. Lawyers can deduct only \$1,033 more, which saves them about \$500 more than judges save. It's not exactly a big deal.
4. The judges argue that higher salaries are needed to attract the best possible candidates to the job. They contrast their incomes with those earned by top practitioners in the largest cities. This comparison has many problems. First of all, it is erroneous to assume that the top lawyers in private practice would necessarily make good judges. It's not the same job. Top-earning lawyers achieve their success by possessing various qualities or advantages that are not necessarily needed by or desirable in judges. Top litigators often have an outstanding sense of both showmanship and strategy, both of which are quite unnecessary in judges.

Sometimes top lawyers get to where they are because of political, social or familial connections—again, all factors that tend to make for worse, not better, judges. I believe that the qualities which would seem most desirable in judges would include a compendious knowledge of the law, and an analytical (as opposed to an adversarial) disposition. These qualities are probably more prevalent in academics than in practitioners. I contacted two law professors with whom I am acquainted, at different universities, to see what I could find out about lawyers' salaries in academia. Both confirmed that they are well below the level that federal judges are currently receiving.

5. In comparing their salaries to top lawyers, the judges have manipulated the statistics to their advantage. First, they assumed that any lawyer earning less than \$50,000 must be working part-time and should be eliminated from the sample. I'm sorry to report that this is inaccurate. I know for a fact (because I was consulted by one such lawyer who required legal advice) that there is the occasional full-time practitioner who makes under \$50,000 a year. I'm sure the individual who was my client is not the only one. I agree that the number is probably very small, and that such lawyers are probably not concentrated in the big cities, but nevertheless, when the judges compare themselves to the top one-third of lawyers, they are already using a skewed sample.
6. The statistics are misleading for other reasons, too. Lawyers in private practice do not earn the same amount every year. Some years are much better than others if the lawyer completes a major trial or deal during that year. A lawyer who is in the top third of all earners one year may be in the middle third the next. By selecting the top one-third of all lawyers' incomes in any single year, the judges are comparing themselves only to the best year of certain lawyers' careers. For a truly valid comparison against private practitioners, a different methodology would have to be used. One would have to track the earnings of all lawyers, including peaks and valleys, for a period of perhaps 5 years, calculate the average annual earnings of each lawyer, and then look at the top third. This would undoubtedly give a much lower result than merely creaming off the top third for a single year.
7. The judges also failed to consider that the incomes of partners in law firms are not entirely attributable to their own "work product". Partners have capital invested in their firms—\$150,000 would not be unusual for a large big-city firm, I'm told. Therefore, some of what a lawyer earns is actually a return on his or her invested capital. Judges can take their capital and put it in the stock market, where its returns will not be considered judicial salary and will therefore skew the comparison.
8. The judges chose to compare themselves to lawyers aged between 40 and 50, giving as their reason the fact that these are the years when a lawyer is most likely to be appointed to the bench. However, these are also likely to be the peak earning years in most lawyers' careers. Lawyers in their late 50s, 60s and 70s, having sent their children through university and paid off their mortgages, are far more likely to ease off and earn less. Declining energy levels or ill health may make it impossible for them to maintain their previous incomes. In fact, many lawyers look upon a judicial appointment as a pleasant, relatively stress-free way to wind down a legal career. If we increase judicial salaries to compete with the earnings of 40-to-50-year-olds, the effect is to "lock in" the income that a lawyer might earn in his or her peak years, and guarantee that peak level of income for the rest of the judge's

career—indeed, perhaps for the rest of his or her life. That’s a pretty nice deal, if you ask me.

9. In comparing judges’ incomes to lawyers’ incomes, the judges failed to take into account any of the non-monetary disadvantages of being a lawyer. Although I was unable to find any statistics on the subject, my perception is that lawyers who earn more than judges (and many who earn less than judges) probably put in far more hours at work. They don’t get any paid vacation time. If they take a month’s holiday, it affects their income for the year. They have to worry about collecting accounts receivable from clients who can’t always pay. They have to worry about professional negligence claims being made against them. Judges suffer no financial consequences at all if they goof up. Their decisions get appealed, and the litigants, not the judges, pay for their mistakes.
10. The judges’ reasoning has yet another flaw. If a raise is really necessary to attract the best candidates, then what does that imply about the individuals who have been appointed to the bench over the past few years? By the judges’ own reasoning, these people must be less than the best. So why should they also benefit from the raise that’s designed to attract the best? Perhaps their salaries should be left intact. If they wish to get a raise, they should have to resign and compete against the new crop of “better” candidates for a position.
11. The judges also compared their salaries to those of Deputy Ministers in the civil service. This is like comparing unicorns to sasquatches. Neither of them have any connection whatsoever to the real world. There is no objective basis by which to evaluate what a civil servant should be paid. There are no market signals. Taxpayers are compelled to “purchase” their services and pay their salaries whether their existence is helpful or harmful to the country. Are they doing a good job or a bad job? Who can tell? Their salary levels are entirely arbitrary, and any comparison to them is meaningless.
12. The judges also compared their salaries to those of judges in other countries. They claimed that comparable judges in the U.K. make £123,787, which they translated at an exchange rate of 2.50 to obtain C\$309,500. However, the exchange rate, as everyone knows, fluctuates. Would judges expect their salaries to be adjusted downwards if the rate falls? Currently, it is 2.37. This means the comparable figure in Canadian dollars should be \$293,375. However, cost of living considerations must also be taken into account. The International Salary Calculator at <http://www.homefair.com/homefair/cmr/salcalc.html> says that if you are earning \$100,000 living in Toronto, you’ll need \$151,071 to have a comparable standard of living in London, England. If this is correct, then the amount needed by a Canadian judge to give a comparable lifestyle to a judge in the U.K. is only \$194,197. This is not much more than the \$178,100 they are currently getting, and considerably less than the \$225,000 they are asking for. According to the same web site, judges in Halifax are already earning about \$20,000 more than they would need to have the same standard of living as judges in London.
13. The judges’ submission fails to address any considerations of judicial quality. There are many good judges on the bench, but there are also some who are less than satisfactory. To deny this is to claim perfection not only for the judges, but also for the persons who select and appoint them. Why should all judges, good and bad, be paid the same salary? It is fairly common for lawyers to agree to adjourn a motion

on a day when one of the less satisfactory judges is sitting. Has anyone ever thought of looking to see how many motions, or pre-trials, or trials each judge actually handles and paying them accordingly? I've written on this subject of judicial quality several times and I enclose copies of the following articles from *Canadian Lawyer* magazine:

- Rent-a-Judge: Maybe They'd Try Harder
- A Modest Proposal for Judicial Independence
- How About Real Diversity at the Supreme Court, and
- Who Will Judge the Judges?

These articles can also be found on my web site at <http://www.nextcity.com/go/KarenSelick>.

I hope these comments will be useful to the commission in its deliberations.

Yours truly,

Karen Selick

(electronic copy unsigned)