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QUADRIENNIAL COMMISSION ON JUDICIAL COMPENSATION AND BENEFITS

Submission by Jacob S Ziegel

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1. I have read with much interest the submissions to the Commission by the Federal Government and the Joint Submissions by the Canadian Judicial Council and the Canadian Conference of Judges. As a taxpayer and retired law professor with a long standing interest in the judicial administration of justice, I have a keen interest in the current proceedings before the Commission and would like to offer some short comments of my own.
2. I strongly support the need for a strong and independent judiciary in Canada and one whose members are financially secure so as to attract very able judges. Nevertheless, my overall reaction to the Judges' Submission is the same as the Federal Government's -- that the Judges are asking for too much and that the country cannot afford a 24.6% increase in the judges' salary and commensurate increases in benefits. I also believe that to grant increases of anywhere near this magnitude would create serious inequities between the treatment of federally appointed judges and other senior persons employed in the public sector, and even greater inequities between the judges' salaries and benefits and the salaries and benefits paid to lower echelon public sector employees.

3. The alternative would be for the federal government to grant comparable across the board increases for public service employees. This solution is surely unrealistic. Even it were within the realm of practical politics, it would create a very dangerous precedent for the provincial and private sectors and trigger the very same inflation and deficit financing that caused so much damage to the Canadian economy in the 1980s. The Judges' submission draws attention to the buoyant state of the Canadian economy but ignores such facts as: a national debt of $550 billion, a generally acknowledged medicare crisis and a seriously underfunded medicare system, and the fact that all Canadian families have suffered a 20 per cent reduction in their standard of living as a result of the depreciation of the Canadian dollar against the US dollar from 87 cents to between 65-69 cents over the past decade. See Michael Porter and Roger Martin, *Canadian Competitiveness: Nine Years After the Crossroads*, paper presented at an Ottawa conference, January 22, 2000, and summarized in *The National Post*, January 22, p.17. I believe it incumbent therefore on the Commission to examine the Judges' proposals rigorously and to ensure that the Commission's recommendations to the Federal Government are well within the Federal Government's capacity to meet, will not trigger comparable demands from other public sectors officials and employees, and will not feed the fires of inflation.

4. What I should like to do in the remainder of this submission is to add some comments on the Federal Government's submission and to respond to some of the arguments made in the Judges' Submission in support of their salary proposals.[1]

[1] I do not address pension issues because of time constraints and because I have no expertise in the area. This is not meant to suggest that we should be complacent even about the current position. One of the

Impact of Proposals on Demands by Provincial Court Judges

5. So far as I am aware, none of the submissions made to the Commission have discussed the interface between any prospective increases in the salaries paid to federally appointed judges and the salary demands of Provincial Court judges from the Provinces. I believe this oversight needs to be corrected. For many years Provincial Court judges have felt aggrieved because their salaries and pensions were 50 per cent or more below the salaries and benefits received by their federal counterparts. This was true even though the provincial court judges are now responsible for most (95% or more) of the criminal cases coming before the courts and even they are now doing most of the criminal law work that used to be done by the higher courts.

6. The argument was accepted last year in the *Fourth Triennial Report of the Provincial Remuneration Commission of Ontario* in awarding the Provincial Court Judges a phased-in salary increase from $130,810 to $170,000 in the current year to bring their salaries much closer to the federal level.[2] The Commission also recommended[3] that the pension benefits of the provincial judges be raised to the federal level, and awarded the judges a major increase in the annual vacation period. The Saskatchewan

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features that troubles me about the existing 80 year rule is that it lends itself to "double dipping" and fails to take into consideration the fact that many appointees in the 45 age group and upwards will have accumulated substantial RRSP and/or group pension fund credits, thus putting them in the enviable position of collecting two pensions when they reach retirement age. I have even heard of cases where an appointee who has spent most of his/her career in the public sector will be entitled to *three* pensions on retirement.

[2] The Commission did not propose an automatic linkage between the provincial and federal salary and benefit levels. However, since the Report starts from the premise that the Provincial Court Judges are entitled to parity if the provincial economy can afford the additional cost, it will be very difficult for future Ontario Commissions to resist demands for absolute parity.

judges have since made the same demands in their recent submission to the Saskatchewan Judicial Compensation Commission. Parity considerations also appear to have weighed heavily in the major salary increases recommended in the 1998 report of the Alberta Judicial Compensation Commission. Those recommendations were subsequently upheld by the Alberta Court of Appeal in *Alberta Provincial Court Judges' Assoc. v. Alberta* (1999) 177 D.L.R. (4th) 418, and were held to be binding on the Alberta government even though the Alberta government had rejected them..

7. It is safe to assume that the pattern established in Ontario and Alberta, and now being proposed for Saskatchewan, will quickly be seized upon by the provincial judges in the other Provinces. Since there are as many provincial court judges as there are federally appointed judges (about a thousand in each case, including supernumerary judges at the federal level), the financial implications for the provinces of such major salary increases are profound. I appreciate that this Commission's terms of reference do not extend to a consideration of the emoluments paid to provincial judges. Nevertheless, in my respectful view, the Commission would ignore realities if it failed to consider the impact of its recommendations on future demands by provincially appointed judges. I would go further and invite the Commission to recommend to the Federal Government that it consult with the provinces on the feasibility of establishing common salary policies for federally and provincially appointed judges so as to reduce much of the friction and unhappiness generated by the current disparities between the federal and provincial salary levels and other emoluments.

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[3] Under the Ontario Framework Agreement, the Commission's findings are only binding on the Government with respect to changes in salary and related benefits.

Some Responses to Judges' Arguments in Favour Of a Major Salary Increase

8. (a) *Earnings of lawyers in private practice.* I am very sceptical about the reliability of the figures cited in the Judges' submission and, like the federal government, would like to see an up to date properly authenticated set of data covering lawyers across Canada and not restricted to the top one-third income earners in Ontario.[4] It would also be very helpful to have some figures on what judges were earning before their appointment to determine how many appointees actually suffer a loss in income by moving to the bench.[5]

9. I also agree with the Federal Government's submission that there is no necessary correlation between high earnings in private practice and suitability for judicial appointment. Senior downtown Toronto lawyers have told me that, in a large firm, a partner's income will turn more on the size of his/her billings than on the partner's legal abilities, although of course the two may coincide. In the same vein, high billings may tell us more about the clients' deep pockets than about the complexity of the work.

10. It is also relevant to note that a high percentage of judicial appointments made by the federal government are drawn from small, not large, firms where the incomes can be

[4] It is also important for such income figures to distinguish between lawyers' income from law practice and income from other sources since many lawyers who have been in practice for 20 years or more can be expected to have substantial outside income.

[5] Pre-appointment incomes of judges are cited in Judge Posner's well known book on the federal judiciary in the U.S.

expected to be much more modest. This was the finding by Prof. Russell and me in a study we published in 1991.[6] Our findings were as follows:

Size of private law firm of appointees

1 to 10	79	58.1%
11 to 25	22	16.2%
26 to 50	16	11.8%
51 to 100	15	11.0%
Over 100	4	2.9%
Total	136	100.0%

11. I also fully agree with the Federal Government's submission that successive administrations over the past 20 years have committed themselves to making the federal judiciary much more representative of the composition of the profession and diverse sources of employment for lawyers, and that this change is likely to grow in the future. Here again the Russell-Ziegel findings support the more recent statistics cited in the Federal Government's submission. We found[7] that out of 228 appointees made during the first Mulroney administration, only 59.6% (136) came directly from private practice, 28.9% (66) were promotions from lower courts, and 11.5% (26) were drawn from other sources – federal and provincial ministries of justice, other government departments, law schools, corporate counsel and elective officials.

12. (b) *Increased earnings of DM3s.* It seems to me very unfortunate that the federal government ever agreed to using the earnings of DM3s as a benchmark for

[6] Federal Judicial Appointments: An Appraisal of the First Mulroney's Gvernment's Appointments and the New Judicial Advisory Committees (1991) 41 Univ. Toronto L.J. 4.

determining judicial salaries. The roles and responsibilities of the two groups are totally different as are the terms of their appointment. What is more, we are told there are only 10 DM3s – a far cry from the approximately 900 active federally appointed judges. In using the DM3 benchmark, presumably the inference we are invited to draw is that all federally appointed judges have the equivalent endowments of DM3s. I find this hard to accept. A casual glance at any volume of law reports below the Supreme Court of Canada level will show that the quality of jdudgments varies greatly, from the excellent to the mediocre and a great deal in between.

13. (c) *The Need to Attract "Outstanding" Candidates.* The federal submission cites figures to show that there is no shortage of highly qualified candidates applying for judicial appointments at the current salary levels and approved by the provincial advisory committees established by the Minister of Justice. (In Ontario and now, I gather, in most of the other provinces there is equally no shortage of highly qualified candidates for appointment to the provincial courts.) I would add the following comments.

14. (i) The reference to "outstanding" candidates in s.26 of the Judges Act is misleading. To be sure, at the Supreme Court of Canada level, we should aim for candidates of the very highest quality. At the lower court levels, however, particularly at the trial level, a different range of qualities are desirable and "very good" candidates will also serve Canada's needs very adequately.

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[7] Ibid., Table 6.

15. (ii) In any event, the federal government does not practice what the statute preaches. In the Russell-Ziegel study, our respondents assessed the legal reputations of the Mulroney appointees as follows:[8]

Outstanding	25.5%	} 43.4%[9]
Outstanding/good	17.9%	
Good	42.9%	
Fair	5.2%	
Weak	0.9%	

16. There is no reason to believe that the range of qualities among appointees has changed. In making their assessment of applicants for appointment, the provincial advisory committees to the federal Minister of Justice are permitted, but apparently not required, to indicate whether or not a candidate is "highly recommended". Even then the federal government is not obliged to restrict its appointments to candidates who are highly recommended by the committees. Although urged to do so on many occasions, successive federal governments have refused to allow the advisory committees to submit a short list of the best qualified candidates for appointment – in short, to convert the advisory bodies from screening committees to merit selection committees.

17. *Salaries of Judges in Other Countries.* Here too I find myself in agreement with the federal submission. It is unhelpful to compare Canadian judicial salaries with the salaries of judges in other common law jurisdictions without examining the total

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[8] Ibid., Table 14.

[9] Wherever possible, we tried to secure two independent assessment for each appointee. We found that practitioner respondent tended to be consistently more generous in their assessments of the quality of an appointee than a University based legal academic.

contexts -- social, economic and professional – in which the foreign judges operate. Apart from this consideration, the Judges' submission, in my view, makes misleading comparisons so far as salaries in England and the US are concerned.

18. As of December 1, 1998, there were only 125 High Court judges and their equivalents in Scotland and Northern Ireland in the whole of the United Kingdom[10]. Ontario alone, with a sixth of the population of the United Kingdom, has about twice as many superior court judges as there are High Court judges in the United Kingdom. In my opinion, a more accurate English counterpart to Canadian superior court trial judges would be the Circuit judges, whose salaries as of 1 April 1999 ranged from €100,209 to €92,810, and not the much higher salary for High Court judges cited in the Judges' submission. Coming as I do from England, I can also attest to the fact that the cost of living in the south of England is generally much higher than the Canadian cost of living.

19. So far as comparisons with the US position is concerned, the comparison, I believe, should be with US state court judges and not with US federal court judges. This is because US federal court judges are predominantly concerned with US federal law and diversity suits whereas most of the federally appointed judges in Canada sit in provincially established courts and, except in the criminal area, apply provincial law f much of their time. The difference matters because American state court judges generally receive a substantially lower salary than US federal court judges. In 1999, the salary for state trial court judges ranged from US $77, 340 to $136,700 with a median salary of $99,998; that for appellate court judges (i.e., judges below the state

[10] Lord Chancellor Dept.'s Website, Judicial Salaries 1999-2000, p.3.

Supreme Court level) ranged from US $83, 384 to $144,000 and the median figure was $106,797.[11]

Some Other Comparisons

20. If comparison are to be made, I think it would also be helpful to look at the salary of law professors at Canadian law schools, an important source of judicial candidates. (Three out of nine of the current members of the Supreme Court of Canada are former law professors; there were also three during Chief Justice Lamer's tenure of office). However, the salaries of even senior law professors do not begin to match the salaries of federally appointed judges.[12] In 1998, only 14 out of a faculty of about 40 at the University of Toronto law school (generally regarded as Canada's most senior law school) made over $100,000; the average, not the median, salary of the 14 was $126,346 or just over twothirds of the salary of a federally appointed judge. I have been reliably informed that the salary of senior law professors at other Canadian law schools was at least 20 per cent less.[13]Given the disparity in salaries, pension benefits and other emoluments, it is not surprising that many legal academics are attracted to a judicial career.

Conclusion

21. Though all the factors referred to above are relevant in determining what increases in the judges' salaries and other emoluments would be fair and reasonable, I believe the

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[11] National Center for State Courts, *Survey for Judicial Salaries*, Fall 1999.

[12] Nor of course do they enjoy anything like the same generous pension provisions.

[13] Official figures are not available or at least were not available to me.

two most important factors remain the capacity of the federal government to meet the federal judges' requests and the impact of doing

22. so on the salary demands of other public sector employees and, not least, on the demands of Provincial Court judges for parity of treatment with their federal counterparts.

RESPECTFULLY SUBMITTED

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