TO : THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2007

COMMENTS WITH RESPECT TO DOCUMENTS RECEIVED BY THE COMMISSION REGARDING THE SUBMISSION FOR A SALARY DIFFERENTIAL FOR JUDGES OF COURTS OF APPEAL

Submitted by 99 judges of
Courts of Appeal
January 28, 2008

À : LA COMMISSION D'EXAMEN DE LA RÉMUNÉRATION DES JUGES 2007

COMMENTAIRES SUR LA DOCUMENTATION TRANSMISE À LA COMMISSION CONCERNANT L'INSTAURATION D'UN ÉCART DE RÉMUNÉRATION POUR LES JUGES DES COURS D'APPEL

Soumis par 99 juges
des Cours d'appel
Le 28 janvier 2008

COMMENTS WITH RESPECT TO DOCUMENTS RECEIVED BY THE COMMISSION REGARDING THE SUBMISSION FOR A SALARY DIFFERENTIAL FOR JUDGES OF COURTS OF APPEAL

TO: THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2007

The following are the comments of the 99 judges of Courts of Appeal in Canada with respect to certain issues raised in documents sent to the Judicial Compensation and Benefits Commission (Commission)[1] regarding their submission for a salary differential dated December 10, 2007 (Submission).

Re: THE CONSTITUTION

It has been suggested that all Superior Court judges appointed by virtue of s. 96 of the *Constitution Act, 1867* have to be treated equally with respect to salaries and benefits.

There is absolutely no constitutional requirement that the salaries and benefits of all judges appointed pursuant to s. 96 of the *Constitution Act, 1867* must be equal.[2] Neither is there any constitutional impediment to granting a salary differential to Appeal Court judges and providing them with a higher salary than that paid to judges of the Trial Courts. There is nothing in the *Constitution Act, 1867* or in the *Judges Act* which prevents such a differential which was at times paid in the past.[3]

Section 100 of the *Constitution Act, 1867* confers on Parliament the general authority to set salaries for federally appointed judges. While this authority is

[1] As at January 23, 2008.
[2] See *Beauregard v. Canada*, [1986] 2 S.C.R. 56, 90.
[3] See *infra*, p. 9 and note 17.

subject to other constitutional limitations, in particular, the requirements of an independent judiciary, those limitations do not prevent salary differentials between judges of different Courts or indeed, between judges of the same Court. This latter point is illustrated by the fact that a salary differential exists between puisne judges, on the one hand, and Chief Justices and Associate Chief Justices, on the other, notwithstanding that they are all judges of Superior Courts.[4]

Furthermore, the *Judges Act*[5] provides different compensation for judges sitting on the same Court in the case of Supreme Court judges of Newfoundland and Labrador by granting judges resident in Labrador, as well as all judges in the Yukon, Northwest Territories and Nunavut a non accountable yearly allowance of $12,000 not provided to judges elsewhere in Canada.[6] Also s. 50 of the *Judges Act* provides different benefits to Superior Court judges depending on whether they were appointed before or after February 17, 1975.

It is noteworthy that the Government has never denied that Parliament has a right, constitutionally and legally, to pay a salary differential to Appeal Court judges. This view that Parliament has the authority to provide for a salary differential in favour of Court of Appeal judges is shared by of one of Canada's leading constitutional experts, Professor Martin Friedland. In his scholarly Report prepared for the Canadian Judicial Council,[7] he specifically recommends such a differential and explains his rationale for it. He states:

> Salaries for the Supreme Court of Canada should be – as they are – significantly higher than for other judges because in that Court one wants to ensure that the pool includes most of the *very* best…. Similarly, in my opinion, judges of courts of appeal should be paid somewhat more than judges in trial courts. [8]

[4] See *infra*, p. 9.
[5] R.S.C. (1985), c. J-1.
[6] *Ibid.*, s. 27(2).
[7] Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa, Canada Communication Group, 1995.
[8] *Ibid.*, p. 54.

Moreover, the *Judges Act* itself also envisions the possibility of a salary differential. In setting out the salaries payable to federally appointed judges, it groups Court of Appeal judges separately from Trial Court judges for every Province as well as the Federal Courts.[9] For example with respect to the salaries of Superior Court judges in New Brunswick s. 15 of the *Judges Act* provides:

> **15.** The yearly salaries of the judges of the Court of Appeal of New Brunswick and of the Court of Queen's Bench of New Brunswick are as follows:
>
> *(a)* the Chief Justice of New Brunswick, $254,600;
> *(b)* the five other judges of the Court of Appeal, $232,300 each;
> *(c)* the Chief Justice of the Court of Queen's Bench, $254,600; and
> *(d)* the 21 other judges of the Court of Queen's Bench,$232,300 each.

The suggestion that all judges of the Superior Courts should be paid exactly the same salary ignores the obvious. Trial Court judges and Court of Appeal judges sit on different Courts. Provincial governments have recognized the different functions performed by appellate judges and have seen fit to create separate Courts of Appeal with clearly defined statutory jurisdiction, duties and responsibilities. Each Court is constituted with a defined number of judges whose primary duties are to sit full time on that Court.

Furthermore, differentials in salaries between federally appointed judges, exist now and have always existed. The salary differentials established in the amendments to the *Judges Act* on December 14, 2006[10] are the following:

1) The Chief Justice of Canada receives 28.46% more than puisne Trial Court judges;
2) Puisne judges of the Supreme Court of Canada receive 18.98% more than puisne Trial Court judges;

[9] *Judges Act*, *supra*, note 5, ss. 10 to 20.
[10] S.C. 2006, c. 11.

3) Chief Justices of Appeal Courts, Chief Justices of Trial Courts, Associate Chief Justices and Senior Justices in the Northwestern Territories and Nanavut receive 9.59% more than puisne Trial Court judges;
4) Puisne judges of Appeal Courts – no differential;
5) Puisne judges of Trial Courts.

Re: NEWFOUNDLAND AND LABRADOR AND PRINCE EDWARD ISLAND

As stated in the Submission, in Newfoundland and Labrador, as well as in Prince Edward Island, the Appeal judges sit in separate Divisions of the Supreme Court. They are separate and distinct from the Trial Division. Indeed, the *Judges Act* recognizes this fact by specifically referring separately to the judges in the two Divisions when establishing their salaries (see s. 18 (a) (b) (c) and (d) and s. 21 (a) (b) (c) and (d)).

With respect to the situation in Newfoundland and Labrador, Chief Justice Wells of that Province advises:

> At the moment the *Judicature Act* provides for a Supreme Court of Newfoundland and Labrador with two divisions, the Trial Division and the Court of Appeal, created as such in 1975. Prior to 1975, when the District (County) Court was merged with the Supreme Court there were four judges on the Supreme Court and the three who had not sat at trial sat *in banc* to hear any appeal from a trial decision. Since the divisions were created in 1975 the court has, for all intents and purposes been two courts.
>
> During the past 12 months, legislation has been drafted to formally constitute the Trial Division and the Court of Appeal as separate courts instead of divisions of the same court. That legislation is presently under discussion with officials of the Department of Justice.
>
> In the past nine years that I have been on the Court, a judge from the Trial Division has sat on an appeal perhaps a total of a half dozen times, almost always to enable the Court of Appeal to cope with a potential conflict situation. In that time frame no judge from the Court of Appeal has been assigned to sit in the Trial Division. A judge of the Trial Division being "elevated" to the Court of Appeal has always finished matters underway in the Trial Division and on one occasion a judge being elevated started a new matter in the Trial Division because of a particularly difficult situation then existing.

Thus, the reality is that the functions, duties and responsibilities of the judges in the two Divisions are different, separate and distinct. The judges in the Appeal Court do not sit in the Trial Division and those in the Trial Division, except in rare and exceptional circumstances, do not sit in the Appeal Court.

With respect to the situation in Prince Edward Island former Chief Justice Mitchell of that Province advises:

> In Prince Edward Island legislation which would constitute the Appeal and the Trial Divisions of the Supreme Court as separate courts has been drafted and is expected to be introduced at the spring sitting of the legislature.
>
> The situation of the Prince Edward Island Appeal Division is unique among appellate courts in the country because it has three regular members and has not had a supernumerary for the past six years until my recent election that took effect on January 15, 2008. The Appeal Division has no other judges of its own to draw from when one of its members is ill, has a conflict, or there is a vacancy. As a result, the Appeal Division has sometimes needed judges of the Trial Division sit on appeals in order to constitute a panel. My survey of our judgements in the past five years indicates that in the years 2003 to 2006, a trial judge sat on an appeal panel a total of nine times but in 2007, that jumped to ten. The reasons for the jump in 2007, was because of an unusual member of conflicts and because a judge of the appeal division resigned due to illness in June and was not replaced until the end of November. When the court is at full complement and with myself as supernumerary I would expect it will seldom be necessary to call on trial judges to sit on appeals. Even without a supernumerary judge the Appeal Division only required a trial judge to sit on an appeal once in 2003, not at all in 2004, three times in 2005, and five times in 2006.

Thus the situation in Prince Edward Island is a truly isolated one, it is particularly exceptional and of limited scope. It can hardly serve as an example of what prevails in the rest of Canada.

Re: *Ex-Officio* designation of Trial Court judges and sitting *ad hoc* in appeal

It has also been mentioned, as an obstacle to granting a salary differential, that in some Provinces judges appointed to the Trial Court are also *ex-officio* judges of the Appeal Court, where they may be called upon to sit on an *ad hoc* basis.

Ad hoc means for a limited time or for a specific purpose.[11]

The Trial judge asked to sit *ad hoc* on the Appeal Court does not become a member of that Court anymore than an Appeal Court judge asked to sit *ad hoc* on the Supreme Court of Canada, by virtue of s. 30 of the *Supreme Court Act*,[12] would become a judge of the Supreme Court.

In all Provinces the Appeal Court is composed of the Chief Justice, and a designated number of judges and supernumerary judges. Appointments are not made by the Governor General encompassing all the Superior Courts in the Province. They are made to either the Court of Appeal or the Trial Court (depending on the Province, called the Superior Court, Supreme Court or Court of Queen's Bench). While in some Provinces judges of one or both Courts may, by virtue of their office, be *ex-officio* members of the other Court,[13] they are, and remain, full time judges only of their own Court. The *ex-officio* status, where it exists, does not change the substance of the judge's functions, general duties, or responsibilities.

One cannot lose sight of the rationale for these provisions. They provide flexibility. They allow a trial judge who is elevated to a Court of Appeal to complete outstanding judgments. The fact that provincial legislation may provide this flexibility does not change the fact that a judge is only a full time member of one Court.

---

[11] See Albert Mayrand, « *Dictionnaire des maximes et locutions latines utilisés en droit* », 4e éd., Éditions Yvon Blais, 2007, p. 20; we find the following description of *ad hoc*:

> [Unofficial Translation] One calls a judge *ad hoc* when he or she is called upon to sit during a certain time or to hear a specific matter in a Court other than the one to which he or she has been appointed (*Code of Civil Procedure* art. 514).

[12] R.S.C. (1985), c. S-26.

[13] The situation varies in the different Provinces. For example, in New Brunswick the Trial Court judge is *ex-officio* judge of the Court of Appeal and not vice versa. In Saskatchewan, the Appeal Court judge is *ex-officio* judge of the Trial Court and not vice versa. In Quebec, the judges of the neither Court are *ex-officio* judges of the other Court. In Ontario, the judges of both Courts are *ex-officio* judges of the other Court.

Government communications regarding the appointment of a judge do not mention the *ex-officio* status. Indeed, when a Trial Court judge is elevated to the Court of Appeal an Order in Council is required appointing him or her to that Court and the *ex-officio* designation is of no assistance or relevance in that regard because the Trial judge is a member only of the Trial Court.

Re: WORKLOAD

There is no useful purpose in comparing workloads. It is not contended that Appeal court judges should get a salary differential because of a heavier workload. It has always been acknowledged that Trial Court judges, like Appeal Court judges, work diligently and conscientiously. One cannot, and should not, read into a salary differential, or the request for it, deprecation of, or lack of respect for, the functions of Trial Court judges. Just as one should not believe that the differential paid to Supreme Court judges shows a diminished regard for the functions of Appeal Court judges. Furthermore, there is no known measurement for determining a meaningful workload and it is inappropriate to embark on the attempt. The Government acknowledged this in its oral submission by counsel presented to the 2003 Commission:

> […] In my submission, that inquiry is, if not impossible, a very, very difficult inquiry and one of perhaps questionable value at the end of the day.[14]

Re: THE HISTORICAL VIEW

Even if there has been a certain course of action over a large number of years during which Appeal Court judges and Trial Court judges have been paid the same salary, that situation and the call for inertia should not prevail. The change which would provide a salary differential should be made because it is justified. Even within the judicial system, where precedent is an important consideration, changing conditions result in changes in the interpretation or application of the law. The changing role of the Appeal Courts in Canada over the past number of years has been fully described in our Submission of December 10, 2007.[15] It is well to keep in mind that the United Kingdom in 1974 granted a differential after more than one

[14] Transcript of hearing February 4, 2004, p. 330.
[15] See in particular p. 8-11.

hundred years when none existed. That differential has since been consistently maintained.

In other words, if it is right and just to grant a differential now to meet the test of an adequate salary required by s. 26 of the *Judges Act* and the criteria there set out, it would be wrong to refuse it on the ground that none has existed for a long period of time.

An examination of the salaries paid to federally appointed judges to Appeal Courts and Trial Courts since Confederation reveals that there were differences in salaries paid to them for approximately 50 years. In 1920, the *Judges Act*[16] provided for the first time that Superior Court judges across Canada whether in the Appeal Court or the Trial Court would be paid the same salary. Until then, in some Provinces, Appeal Court judges received a higher salary than Trial Court judges.[17] At times, judges at the same level received different salaries depending on the Province where they exercised their functions.[18] Even judges on the same Court, in the case of Quebec, received different salaries.[19]

Re: THE QUANTUM

The Government has never objected to the differential on the ground of the quantum requested. The amount requested in the Submission follows the recommendation in the Friedland Report that "… judges of Courts of Appeal

[16] S.C. 1920 (10-11 Geo. V), c. 56.
[17] In Manitoba (S.C. 1912, (2 Geo. V) c. 29, s. 4.), British Columbia (S.C. 1913 (3-4 Geo. V) c. 28, s. 3) and Saskatchewan (S.C. 1916 (6-7 Geo. V), c. 25, s. 1), puisne judges of the Appeal Court were paid $7,000 annually while puisne judges of the Trial Court were paid $6,000 annually a differential of 16.66%. The Chief Justices of the Appeal Courts in those Provinces received $8,000 annually while the Chief Justices of Trial Courts received $7,000 annually.
[18] In 1886, puisne judges in British Columbia, Manitoba, New Brunswick and Nova Scotia and some in Quebec were paid $4,000 annually while those in Ontario and some parts of Quebec were paid $5,000 annually while those in Prince Edward Island were paid $3,200 annually (R.S.C. 1886, c. 138). In 1906, puisne judges in British Columbia, Alberta, Saskatchewan, New Brunswick, Nova Scotia and puisne judges of the Trial Court in Manitoba received $6,000 annually while those in Ontario and Quebec (residing in Montreal and Quebec City) received $7,000 annually. Judges in Prince Edward Island received $5,200 annually (R.S.C. 1906, c. 138).
[19] In 1914, 26 puisne judges of the Superior Court residing in Montreal and Quebec City received $7,000 annually while 15 others residing elsewhere received $5,000 annually (S.C. 1914 (4-5 Geo. V), c. 38, s. 1).

should be paid somewhat more than judges in Trial Courts. That is the path in England and the United States and it should be adopted here ".

[underlining added]

The criterion of "somewhat more", when the Report was submitted in 1995, refers to 10.38% in England and 6.07% in the United States Federal system.

Thus, the request for a differential of 6.7% is a very modest one.[20] It follows the guidelines and recommendations in the Friedland Report and is similar to the situation today in the United States Federal system (5.99%) and New Zealand (6.33%) but lower than the United Kingdom (13.86%).

CONCLUSION

It is respectfully submitted that none of the views opposed to the granting of the requested salary differential detract from or counter the validity of the reasons set out in the Submission which demonstrate that a salary differential for Appeal Court judges is necessary to provide an adequate salary within the terms of s. 26 of the *Judges Act*.

May it please the Commission to recommend the salary differential requested in the Submission.

Respectfully submitted
January 28, 2008

Co-ordinating judge for these comments
The Honourable Joseph R. Nuss, J.A.
Quebec Court of Appeal
Édifice Ernest-Cormier
100, Notre-Dame Street East, Rm. 2.48
Montreal, Quebec H2Y 4B6
(514) 393-2012 (514) 864-3130 (Fax)
jrnuss@judex.qc.ca

[20] Contrary to the suggestion that it is for "… a substantially higher remuneration than other judges of Superior Courts" (Submission of Hugessen J., first paragraph).