TO:

THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION

SUBMISSION TO THE 2015 QUADRENNIAL COMMISSION

Submitted
March 11, 2016

[1] The appellate judges who have indicated their agreement with the request this submission contains, as well as those who will subsequently do so between now and the public hearings on April 5 and 6, 2016, request the present Quadrennial Commission to recommend a salary differential of 3% above the salary paid to trial judges in accordance with Recommendation 3 of the Quadrennial Commission Report filed on May 15, 2012 ("the Levitt Report").

[2] On Friday, February 26, 2016 the Canadian Superior Court Judges Association ("CSCJA") advised its members through a communication on the JAIN conference that it now believes it is most appropriate for it to maintain its traditional position of neutrality with respect to a salary differential for appellate judges. It further advised it would make no specific request to the Commission to consider an appellate differential, without however precluding any judge or group of judges from raising the issue before the Commission, as was done before previous Quadrennial Commissions. The CSCJA also indicated that should any submission be filed urging the Commission to recommend a salary differential, the CSCJA would remain neutral on the merits.

[3] Given the filing deadline of March 11, 2016, it has been impossible for those appellate judges who support a differential to prepare another substantive submission along the lines of the one that was prepared for the Block Commission in 2007.

[4] It is well accepted that the hierarchy of judicial authority is vital to the credibility and integrity of the rule of law. There are crucial differences in the role and responsibility

of judicial office holders at every level. These differences are not matters of appearance but are essential to the efficient administration of justice.

[5] Appeal courts exist at the head of the judicial hierarchy in each province and in the federal court system to ensure legality, fairness and consistency by all trial courts and tribunals, agencies or authorities that administer law within their respective jurisdictions. Accordingly, the supervisory power is broad and critical to ensuring respect for the administration of justice within each jurisdiction.

[6] A differential is not intended to be a measurement of whether individual judges work longer or harder than others. Rather, a ranking of stature of judicial offices is a ranking of the judicial officers themselves.

[7] We invite the Commission to consider the brief that was filed on behalf of 99 appellate judges on December 14, 2007 with the Quadrennial Commission chaired by Sheila Block ("the Block Report"). It is attached as Schedule A. Over eight years later, it remains a thorough explanation of the justification for a salary differential, not only as a matter of judicial hierarchy in the Canadian judicial system and related concerns, but also as a matter of comparison between Canada and other countries whose legal traditions and framework are similar to our own. In short, Canada stands out as the only such country without an appellate differential.

[8] The brief also addresses the supposed divisiveness that implementing a differential would create, and notes that such divisiveness is undefined. We well know that in each province the provincial judiciary (and the municipal judiciary in provinces

where they exist) is paid less than their federal counterparts, yet no one could seriously entertain the view that such divisiveness exists between judges of such different jurisdictions, nor can it be seriously entertained that the significant differentials between puisne judges and their chief justices (currently $29,800 or almost 10%) is divisive.

[9] Finally of note, the brief explains the different challenges that come with appellate work in comparison with those of trial judges based on an erroneous assumption that working in panels is somehow less demanding than sitting alone.

[10] We invite commissioners to read this brief, for it continues to represent an expression of the basis on which an appellate differential is warranted.

[11] After hearings at which counsel presented the foregoing brief and responded to questions, the Block Report was filed on May 30, 2008. It comprehensively addressed the issues raised in the foregoing submission as well as from others that took a contrary view. The relevant extract from the Block Report (pages 40-56) is attached as Schedule B.

[12] The analysis of the three commissioners led them to conclude that the structural and constitutional arguments against a differential were unfounded, and that the reasons they adopted in favour of a differential satisfied the criteria of s. 26 of the *Judges' Act* relating to adequacy of judicial compensation. Much of the focus was on the role of appellate judges in comparison to that of trial judges in terms of the impact of their work on the development of the law within their province or jurisdiction. More importantly, the commissioners considered but rejected the argument emanating from

some sources (including the government) that creating a differential for appellate judges would be a source of division.

[13] All of the recommendations of the Block Report were rejected by the government because of the financial crisis affecting the country at the time a decision had to be made.

[14] The 2011 Quadrennial Commission was chaired by Brian M. Levitt, and its report was filed on May 15, 2012. It is attached as Schedule C. At that time, the CSCJA urged the commissioners to adopt all of the recommendations of the Block Report, including that of an appellate differential, which obviated the need for appellate judges to make a separate submission.

[15] The Levitt Report again recommended the adoption of an appellate differential, which it fixed at 3% above the salary paid to trial judges.

[16] As we know, the government rejected the recommendation for an appellate differential, largely on the basis of arguments that it had made before the Commission but that both the Block Report and the Levitt Report rejected. The government also complained in its response that the claim for a differential was deficient since there had been no new information supplied in support of a differential.

[17] What new information did the government require? The judicial hierarchy in Canada had not changed, appellate jurisdiction had not changed, the structure of the judicial system had not changed, the constitutional landscape had not changed, nor had

any of the reasons that led to the conclusions in the Quadrennial Reports for a differential in 2008 and 2012 been seriously challenged.

[18] In any event, since the filing of the Block Report in May of 2008, the law-making and policy role of appellate courts has expanded. The quality and nature of the work has become increasingly more complex and more significant to the public as a whole.

[19] An appellate differential recognizes that appellate courts are effectively the court of last resort as to what the law is within their respective jurisdictions. The modest differential proposed most recently in the Levitt Report represents a symbolic ranking that is consistent with the acknowledged ranking in the judicial hierarchy of the courts on which appellate judges serve.

[20] Moreover, the government's conduct since the filing of the Block Report would suggest that it acts in a manner different from that which it argues before Quadrennial Commissions.

[21] Since that report in May of 2008, the government has made seven appointments to the Supreme Court of Canada. Six of them (Justices Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Brown) were named from a provincial court of appeal, while the seventh (Justice Côté) was named directly from private practice.

[22] Clearly the government itself recognizes the enhanced value of appellate work when considering appointment to the highest court in the country.

[23] Finally in this respect, in 2014 the government introduced legislation in an omnibus budget bill designating appellate judges (but not trial judges) and their families as "politically exposed persons", thus subjecting them to the invasive provisions of a federal statute governing money laundering and corruption. Although the CSCJA has requested the government to review the necessity and propriety of these provisions, their mere existence demonstrates that the government has no qualms with views about appellate judges being treated differently than trial judges in legislation when it chooses to do so.

[24] Both the Block Report in 2008 and the Levitt Report in 2012 left no doubt that an appellate differential was warranted and each of them made their recommendations accordingly. We invite the current commission to examine the prior reports and to renew the recommendation of the Levitt Report for a 3% differential. In examining the prior reports, we are confident that the Commission will reach the same conclusion as its predecessors as to the propriety of an appellate salary differential.

SCHEDULE A

SUBMISSION TO BLOCK COMMISSION

TO: THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2007

SUBMISSION FOR A SALARY DIFFERENTIAL FOR JUDGES OF COURTS OF APPEAL IN CANADA

Submitted
December 14, 2007

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

MÉMOIRE POUR UN ÉCART DE RÉMUNÉRATION EN FAVEUR DES JUGES DES COURS D'APPEL DU CANADA

Soumis
Le 14 décembre 2007

SUBMISSION FOR A SALARY DIFFERENTIAL FOR JUDGES OF COURTS OF APPEAL IN CANADA

TO: THE JUDICIAL COMPENSATION AND BENEFITS COMMISSION 2007

This submission, requesting a differential in salary between Appeal Court judges and Trial Court judges, is presented by 99 judges[1] of the Courts of Appeal in Canada.

JURISDICTION

A submission for a salary differential for Appeal Court judges was made in 2003 to the second Quadrennial Judicial Compensation and Benefits Commission (2003 Commission) by a majority of Appeal Court judges in Canada.

The 2003 Commission stated that the submission for a differential was "... a compelling submission ...". However, it concluded that it lacked jurisdiction to deal with the merits of the request and that it was a matter which the Government ought to consider. Its view was expressed, in part, in these terms:

> This Commission's jurisdiction, as noted earlier, is prospective in nature and the recommendations we make must be confined to the considerations identified in s. 26(1) of the *Judges Act*. We are not permitted nor authorized to re-design the court system in Canada. If we were, it is entirely probable we would design a system where appellate court members received higher compensation than trial court members. Ignoring the economic considerations mandated by the statute, we are obliged to consider what steps ought to be taken to ensure judicial independence including financial security and to promote a high quality of candidates for appointment to judicial office. There is no foundation for the thesis that altering the historical situation of the court of appeal judges, from a compensation perspective, would have any impact whatsoever on those considerations. Accordingly, we are obliged, in our view, to refuse to recommend the proposal

[1] As of December 1, 2007, there are 142 judges of Courts of Appeal in Canada (Judicom).

> made on behalf of the members of the court of appeal for differentiation in the compensation they currently receive from that of trial judges. We believe, however, that the government ought to give consideration as to whether or not a different level of compensation might be appropriate for puisne judges who sit on courts of appeal.
>
> [underlining added]

No party ever contended that the Commission lacked jurisdiction to make a recommendation on the merits of a request for a salary differential.

The Appeal Court judges making the submission were, and are, of the view that the 2003 Commission erred in concluding that it did not have jurisdiction and that its failure to report on the merits of the request was an error in law. A number of them, through counsel, Mr. Roger Tassé Q.C., requested the Minister of Justice, in November 2004, to send the request back to the 2003 Commission pursuant to his powers under s. 26(4) of the *Judges Act*[2] and ask it for a recommendation on the merits. In a letter from the Deputy Minister of Justice, they were asked to wait until Parliament dealt with the then forthcoming Bill on judges' salaries before pursuing the issue of remitting the differential request to the 2003 Commission. It was not until December 14, 2006 that Parliament passed a Bill (C-17) with respect to the salaries of judges. The pending request for remitting the salary differential issue to the 2003 Commission under s. 26(4) of the *Judges Act* was then brought forward to the Minister of Justice. The request was still pending when the term of that Commission expired on August 31, 2007.

The ruling of the 2003 Commission on this issue is fundamentally incorrect on a question of law of a jurisdictional nature. The issue raised by the submission is one of remuneration and nothing more. A differential in compensation would not require a re-designing of the court system in Canada, but only a change in the remuneration of Appellate Court judges. The very purpose and mandate of a Commission is to inquire into the adequacy of the salaries of federally appointed judges. The question of a differential is clearly one that ought to be addressed on

[2] R.S.C. c. J-1.

its merits. It has been authoritatively settled by the Supreme Court of Canada (Supreme Court) that our Constitution mandates that all compensation issues relating to federally appointed judges be analyzed and processed by an independent body.[3] The Commission declined to do so on the ground of lack of jurisdiction. In our view, this is clearly an error which places the Appeal Court judges in an unjustifiably impossible position. On the one hand, the Commission states that it does not have the authority to address the question of a differential, and, on the other hand, Appellate Court judges cannot, in light of the judgments of the Supreme Court respecting the independence of the judiciary, raise and negotiate the issue with the Government.

It is precisely the task of the Commission, and not of the Government, to fully evaluate, on the merits, the submission for a salary differential.

Our position with respect to the jurisdiction of the Commission to deal with the merits of the request for a differential is supported by the Canadian Superior Courts Judges Association (Association) and the Canadian Judicial Council (C.J.C.). Furthermore, we are informed that the Government agrees with our contention regarding jurisdiction and will not contest our submission on that point.

THE MERITS OF THE REQUEST FOR A SALARY DIFFERENTIAL

The following is, in essence, what the 2003 Commission termed a "compelling submission", with certain refinements, additions and an updating of the statistical data, all of which, in our view, make this submission even more persuasive than the previous one. A very significant addition is our examination of the salary differential granted in the United Kingdom in 1974 to Appeal Court judges and thereafter continuously maintained.[4] We deal with it in detail further on.

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[3] In compliance with this requirement, Parliament established the Judicial and Benefits Commission (S.C. 1998 c. 30 s. 5). The legislative provision is now found in s. 26 of the *Judges Act*, R.S. c. J-1.

[4] A brief reference was made to the situation in the United Kingdom in the Appeal Court judges final submission of March 26, 2004 (at p. 8). Since then, we have been able to obtain documents which explain the change.

BACKGROUND

In a *Report on Judicial Independence and Accountability in Canada*[5], prepared for the Canadian Judicial Council, Professor Martin L. Friedland recommends that Appeal Court judges be paid a higher salary than Trial Court judges:

> Similarly, in my opinion, **judges of courts of appeal should be paid somewhat more than judges in trial courts. This is the pattern in England and the United States and it should be adopted here**. A differential would have been difficult in the past when there was no distinction in function in some provinces between court of appeal and trial judges. Moreover, the distinction between court of appeal and superior court trial division judges was not as pronounced in the past – at least in terms of numbers – before the merger of county and distinct courts with superior courts. County and district courts no longer exist in Canada. (emphasis added) (p. 54).

After the publication of the Friedland Report, a submission was made by judges of the Quebec Court of Appeal to the 1995 Commission on Judges' Salaries and Benefits (1995 Commission). That Commission declined to consider the issue on its merits because it was received too late in the process, stating: "The submission, while welcome, simply came too late to be given the attention that this subject deserves".[6]

A submission for a salary differential was made to the 1999 Quadrennial Judicial Compensation and Benefits Commission (1999 Commission) by Appellate judges of six Courts of Appeal.

The 1999 Commission noted that they "regarded many of these arguments [in favour of a salary differential] as compelling".[7] However, it deferred consideration of this matter pending receipt of further information. It undertook to consider the issue "in further detail should it be made the subject of a referral to us

[5] Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada, May 1995.

[6] 1995 Commission Report p. 30.
[7] 1999 Commission Report # 2.5 p. 51.

... within the term of our mandate".[8] The Government, the only party entitled by statute to refer issues to the Commission in between its regular four-year reviews, did not do so.

We, at the outset, referred to the 2003 Commission which concluded it did not have jurisdiction to deal with the merits of the submission for a differential presented to it.

Thus, in the result, the merits of previous requests for an appropriate salary differential have yet to be dealt with by a Commission.[9] We respectfully ask this Commission to recommend a salary differential for all full-time (including supernumerary) judges on Courts of Appeal in Canada in the amount equivalent to 6.7% of the salary paid to federally appointed Trial Court judges.

JUDICIAL HIERARCHY

A salary differential between Court of Appeal judges and Trial Court judges has been widely recognized in common law jurisdictions where a salary differential for appellate judges is typically the norm.

It is our submission that, in the end, there is one fundamental and compelling principle which, by itself, commands a salary differential. That principle is recognized in both the public and private sector in Canada and, indeed, the rest of the democratic world. It is one of the central organizing principles on which society remunerates individuals for the work they do.

With the notable exception of the remuneration paid to judges of Courts of Appeal, the principle of a salary differential exists for each court level in Canada. Supreme Court puisne judges are paid $47,800 (18.97%) more than other federally appointed puisne judges. Federally appointed Trial Court judges are paid more than provincially appointed judges. Provincially appointed judges are paid

[8] *Supra* p. 52.
[9] "Commission", when not otherwise defined, means a Commission on Judges' Salaries and Benefits.

more than justices of the peace. And Chief Justices and Associate Chief Justices of both Appellate and Trial Courts also receive increased remuneration in recognition of their additional and distinct responsibilities. However, judges on Courts of Appeal, are paid the same salary as federally appointed Trial Court judges.

It is noteworthy that when there were County Courts and District Courts, the judges were federally appointed and received a lesser salary than the other federally appointed Trial Court judges. In Ontario, for example, their salary was $6,500 less than that of the judges of the High Court.[10] Differentials have existed, and exist, throughout the federal system, except for the Appeal Court judges.

Judicial hierarchy recognizes the specific roles, duties and responsibilities assigned to each level of court. That judicial hierarchy is an essential element of the constitutional framework of our justice system.

The judicial structure in Canada consists of five levels with the proportion of cases of public importance increasing as one proceeds up the hierarchical ladder:

1. The Supreme Court of Canada.
2. The Appellate Courts in each Province and the Federal Court of Appeal.
3. The Federally appointed Trial Courts in each Province/Territory, the Federal Court and the Tax Court of Canada.
4. Provincial and Territorial Courts, and Masters.
5. Justices of Peace and Commissioners and their equivalents.

[10] In 1985, the judges of the County and District Courts in Ontario, Nova Scotia, British Columbia and Newfoundland received a salary of $82,600 while the judges of the High Court in Ontario and the equivalent level in the other aforementioned Provinces received a salary of $89,100, a differential of $6,500 (7.87%). The *Judges Act* 1985, R.S.C. ch. J-1, Sections 12, 14, 17, 21 and 23.

The real issue raised by this submission concerns the place occupied by judges of Courts of Appeal in the judicial hierarchy of this country and the attendant responsibilities imposed on them. Parliament and the Legislatures have established the various levels of courts and their relative rank in the judicial hierarchy. The higher the level of the court in the hierarchy of the Canadian judicial system, the greater the responsibility of the judges on that Court. This is illustrated in the binding or precedential impact of judgments rendered by Courts of Appeal on the lower Courts. There being a hierarchy of courts in the justice system the question is, what is the place of Courts of Appeal in that hierarchy? The answer is obvious. Courts of Appeal come immediately after the Supreme Court and occupy a rank between the highest Court in Canada and the Trial Courts.

The absence of a salary differential for Appeal judges is an historical anachronism arising from an era predating the creation of separate Courts of Appeal. In the past, only one superior Court was in existence with an appeal and a trial division and judges had a limited mobility between the two divisions of the same Court. Today, separate Courts of Appeal exist in every Province and Territory. However, exceptionally, in Prince Edward Island as well as in Newfoundland and Labrador, the Appeal Court is a division of the Supreme Court. In addition, Parliament, recognizing judicial hierarchy, has recently established the trial court called the Federal Court, and the Federal Court of Appeal. The decision by Parliament and the Legislatures to establish separate Courts of Appeal across Canada affirms the special place that these Courts now occupy in the judicial hierarchy.

Our judicial system ascribes a critical importance to the role played by Courts of Appeal, as set out in the principles enunciated by the Supreme Court. [11] Their role and responsibilities have undergone a significant change in the last two and one half decades. Given the limited rights of appeal to the Supreme Court, Courts of Appeal have, for all practical purposes, become the Courts of final resort in approximately 98% of the cases before them, with all the attendant

[11] *Housen* v. *Nikolaisen*, [2002] S.C.R. 245 at pp. 247-248.

responsibilities this imposes. They are called on to settle the law for the Province and to assure the observance of the principle of universality, which requires that the same legal rules are applied in similar situations. They play a significant role in the evolution and interpretation of the law. They have a recognized law-making role, and their judgments are authoritative, not only in their Province, but in some instances throughout Canada. They are also an error-correcting court. With increasing frequency, Courts of Appeal are called upon by Provincial Governments to hear References on the constitutional validity of complex, and sometimes controversial legislation.

In short, Courts of Appeal perform appellate functions comparable to those performed by the Supreme Court, albeit at a level in the judicial hierarchy just below that of the Supreme Court. The Supreme Court judges merit and receive a salary differential. For the same reasons, judges of Courts of Appeal merit and should be paid a differential salary given the comparative importance of their duties, responsibilities and position in the judicial system. We submit that this objective and relevant criterion should be given considerable weight in determining an appropriate salary differential.

The source of appointments to the Supreme Court underscores the significance of judicial hierarchy and its importance in the Canadian justice system; they are almost always made from Courts of Appeal. Of the last 23 appointments to the Supreme Court (1979-2007), two were from private practice while all the other 21 were judges of Appeal Courts. There is no case in recent history of a judge of first instance being named directly to the Supreme Court. This exemplifies the place occupied by the Appeal Courts, and its judges, in the judicial hierarchy.

Judicial hierarchy serves the public interest. It permits an examination of the judgments of lower courts, thereby enhancing public confidence in the administration of justice. The Commission is required under s. 26(1.1)(c) to consider "the need to attract outstanding candidates to the judiciary". Attracting the best possible candidates to Courts of Appeal is of great importance given that

Courts of Appeal are effectively courts of last resort for most cases in Canada. A salary differential could also provide an incentive to move up the judicial ladder. We submit there is no legitimate reason not to provide judges aspiring to Courts of Appeal the additional motivational incentive found in a salary differential.

The reason that salaries and benefits must be sufficiently competitive to attract the very best candidates to the Supreme Court applies with equal force to Courts of Appeal. This was recognized more than a decade ago by the Friedland Report[12] which recommended a salary differential for judges on Courts of Appeal in Canada. That is especially so with increasing burdens being placed on Courts of Appeal. This reason further compellingly demonstrates the rationale for a salary differential for Courts of Appeal. It is also a signal of the recognition for the office and role played by Appellate Court judges.

Equally important, salary differentials in recognition of hierarchy and associated roles and responsibilities exist in the civil service and the private sector. The invariable rule is that the higher up the hierarchical ladder, the greater the overall responsibility and, in turn, the greater the remuneration. We generally speak of judges being "promoted" or "elevated" to Courts of Appeal and to the Supreme Court. This accurately reflects the reality of the position of Appeal Courts in Canada's judicial structure. It is only reasonable and fair that this different and higher position in the judicial hierarchy be accompanied, as in all other fields of human endeavour, by an increased salary after the promotion or elevation.

Amongst the objective and relevant criteria which should be considered under ss. 26(1) and (1.1)(d) is the public perspective. The public believes, and therefore accepts, that a salary differential is being paid in accordance with judicial hierarchy. As one of the Commissioners observed at the hearing of the 2003 Commission on February 4, 2004:

> ... I think the majority, the vast majority of the public, of the people of Canada, are absolutely convinced that there is a differential

[12] Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada, May 1995, p. 54.

> remuneration between Trial Court judges and Appellate Court judges.[13]

This public perception is not surprising. The Canadian public doubtless expects a salary differential as one moves up the judicial hierarchical ladder. This is entirely consistent with practice in both the private and public sectors where those with a higher position and concomitant responsibilities receive increased benefits. This disjuncture between public perception and expectation, on the one hand, and the current reality, on the other, constitutes a further reason in support of a salary differential for judges of Courts of Appeal.

THE SALARY DIFFERENTIAL IN OTHER JURISDICTIONS

The salary differential which we request would bring Canada into line with other democracies, whose legal traditions are similar to ours, where a salary differential between judges of Trial Courts and judges of Courts of Appeal is the norm.

The adoption of a differential for Lord Justices of the Court of Appeal in the United Kingdom, which we referred to earlier, is instructive.

Until 1974 there was no differential in salaries paid to High Court Judges and Lord Justices of Appeal in the United Kingdom (U.K.). In 1971, the U.K. Government created the Review Body on Top Salaries (Review Body) with the mandate to recommend salaries, *inter alia*, for the judiciary. A special Committee of its members, under the Chairmanship of Lord Beeching, was charged with the preparation of a recommendation with respect to the judiciary. In a very detailed Report, the Advisory Group examined the entire judiciary, established categories and applied differentials throughout the system. The Committee recommended that a differential in salary be granted to Lord Justices of Appeal in comparison to salaries of High Court judges in England and Wales. The recommendation reads:

[13] Transcript of hearing p. 234.

Lord Justices of Appeal

> 27. The High Court Judge and the Lord Justice of Appeal have always been paid at the same salary level. They do different types of work, but exceptional intellectual qualities are called for in a Lord Justice of Appeal, and appointment to the Court of Appeal from the High Court Bench is regarded as a promotion. On the other hand, the Lord Justice of Appeal does not undertake Circuit work, with the attendant inconvenience which we have taken into account in assessing the High Court Judge. On balance, we consider a differential justified, in recognition of the promotion. However, we do not consider that it should be large, because the need for it is substantially offset by the absence of the inconvenience factor inherent in Circuit work.[14]

The Review Body in accepting the recommendation of the Advisory Group stated in its Report:

The Advisory Group's Report

> 83. [...] In particular, it recommended that a differential should be established between the Lords Justices of Appeal and the High Court Judges, in recognition of the promotion which is involved in appointment to the Court of Appeal from the High Court Bench.[15]

Our views

> 93. [...] In other respects too, we endorse the views of the Advisory Group, including the desirability of grouping a number of existing appointments for salary purposes, and of according a differential to the Lords Justices of Appeal over the High Court Judges in England and Wales.[16]
>
> [underlining added]

In the result, the High Court judges that year received £21,000 annually and the Lord Justices in Appeal £22,500, representing a differential of 7.14%.

A few years later in 1978, the Review Body[17] adopted the recommendation of a differential for Appeal Court judges in Northern Ireland and Scotland submitted

[14] From the *Review Body on Top Salaries*, Report n° 6, December 1974, Cmmd. 5846, Appendix E, para. 27, at 93.
[15] *Supra* note 10, c. 4 at 31.
[16] *Supra* note 10, c. 4 at 35.
[17] Review Body on Top Salaries, Report n° 10, June 1978, Cmmd. 7253.

by a Sub-Committee under the Chairmanship of Sir George Coldstream and stated, in this regard, with respect to Northern Ireland:

> 66. [...] The Sub-Committee concluded, again on judicial grounds alone, that the Puisne Judge in Northern Ireland should be ranked with the High Court Judge in England and Wales, and that a differential should be created for the Lords Justices of Appeal in relation to the Puisne Judges, notwithstanding their interchangeability, in order to create a clear 'promotion' step from the High Court to the Court of Appeal. [...]
>
> [underlining added]

The Report of the Sub-Committee in proposing the differential emphasized that being named to the Court of Appeal was a promotion and even though there was some interchangeability, a differential was warranted. Its view was expressed in these terms:

> *Lords Justices of Appeal*
>
> 29. Because of the extent of the interchangeability between the Puisne Judge and the Lord Justice of Appeal in Northern Ireland, the Advisory Group in 1972 did not follow the pattern that it set in England and Wales in creating a differential between the High Court Judge and the Appeal Court Judge. We have examined this matter afresh, and we are convinced that, while interchangeability is still an important factor, and is necessary to the efficient functioning of a small higher judiciary, it should not be allowed to override the fact that the move to the Appeal Court is a promotion and that it is now established practice (so we have been told) to appoint to the Appeal Court exclusively from the High Court. We consider that a differential is appropriate and that it should be the same as we have indicated for England and Wales.[18]
>
> [underlining added]

The Review Body adopted the same reasoning with respect to the judges in Scotland.

The U.K. Government accepted the recommendation of the Review Body and since 1978, Justices of Appeal in England, Wales, Northern Ireland and Scotland receive the same salary and all of them receive the same differential with respect to the salary paid to High Court judges.

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[18] *Supra* note 14, appendix J.

This reasoning is all the more persuasive with respect to the situation in Canada, because, in fact, for all practical purposes, there is no interchangeability between the Appeal Courts and the Trial Courts.

An examination of the salaries paid in jurisdictions, outside of Canada, discloses the following salary differentials for Appeal Court judges.

ENGLAND & WALES, SCOTLAND AND NORTHERN IRELAND

The salaries of puisne judges in England & Wales, Scotland and Northern Ireland are the following as at November 1, 2007:

HIGH COURT	COURT OF APPEAL	HOUSE OF LORDS
£165,900	£188,900	£198,700

Appeal Court judges are paid £23,000 (13.86%) more than the High Court judges. The Law Lords of the House of Lords are paid £32,800 (19.77%) more than judges of the High Court.

UNITED STATES

In the United States, the differences in the salaries between the puisne judges of the Courts in the federal system are as follows since 2006:

DISTRICT COURT (First Instance)	CIRCUIT COURTS (Courts of Appeal)	SUPREME COURT
(U.S.) $165,200	(U.S.) $175,100	(U.S.) $203,000

Appeal Court judges are paid $9,900 (5.99%) more than the District Court judges. The judges of the Supreme Court are paid $37,800 (22.88%) more than those of the District Court.

In the State Courts there is, without exception, a differential in salary between Trial Court and Appeal Court judges in all the States, whether the Appeal Court be a Court of last resort or an intermediate Appellate Court.

NEW ZEALAND

The salaries of puisne judges in New Zealand as of October 1, 2006 are the following:

HIGH COURT	COURT OF APPEAL	SUPREME COURT
$315,000	$340,000	$363,000

Appeal Court judges are paid $23,000 (6.33%) more than judges of the High Court and judges of the Supreme Court are paid $48,000 (15.23%) more than High Court judges.

QUANTUM

We are requesting a salary differential in the amount equivalent to 6.7% of the salary paid to Trial Court judges. At present, the difference in salary between Supreme Court judges and Trial Court judges is $47,800[19] or 18.97%. In our view, approximately 35% of this spread would, at the present time, adequately reflect the place of the Appeal Courts in the judicial hierarchy, being between the judges of the Supreme Court and federally appointed judges of Trial Courts.[20]

Since we do not know what salaries will be recommended by this Commission for the puisne judges of the Supreme Court and the puisne judges of Trial Courts, we express our request for a salary differential in percentage terms by asking for (6.7%) more than the salary paid to Trial Court judges, or, alternatively, as 35% of the difference between the Supreme Court judges' salaries and the Trial Court judges' salaries.

OTHER MATTERS

It would be appropriate, at this point, before concluding our submission, to respond to certain questions raised in the past, which may still be extant. We will not be dealing with matters which were previously raised as possible obstacles,

[19] Supreme Court judges receive $299,800/yr and Trial Court judges $252,000/yr.
[20] Based on present salaries, the amount of the differential would be $16,884.

but which now appear to have been abandoned, such as a possible constitutional effect on the Provinces because of s. 92(14) of the *Constitution Act 1867*.[21]

The 2003 Commission referred to the notion of those who view the granting of a differential as being divisive. We submit that there is no merit to the notion that a salary differential would be divisive. It has no empirical basis. Salary differentials already exist at every court level but one. There is no reason to believe that a salary differential for Courts of Appeal judges would lead to any less goodwill, respect, collegiality and interaction between judges of those Courts and judges of Trial Courts than presently exist amongst all judges at all court levels in Canada. Indeed most sat in the Trial Court prior to being appointed to the Appeal Court. Judges understand the structure of the system within which they work. How judges treat each other is not contingent on what each court level is paid. Nor should it be. Moreover, a certain institutional separation already necessarily exists between the two court levels in order to preserve the independence, impartiality and integrity of the appeal process.

It should be noted that the Government did not raise this notion before the 2003 Commission as a reason for opposing the submission for a salary differential. And rightly so. It is unreasonable that a fair and justified salary differential should be denied just because some judges disagree on the basis of a claimed, but undefined, divisiveness. Such a suggestion is tantamount to advocating that a wrong decision is warranted simply to avoid an alleged divisiveness.

In any event, this notion lacks any principled foundation. No one has advanced any rational reason why paying one level of judges an increased salary would create divisiveness. Judges on Courts of Appeal are not suggesting that they be paid an increased salary at the expense of a fair salary for judges of other Courts. Judges on each Court level should receive fair and justified compensation

[21] It is dealt with at p. 5 of the Appeal Court judges submission to the 2003 Commission dated December 8, 2003.

commensurate with their duties and responsibilities resulting from their place in the hierarchy within the judicial system.

It has been mentioned that there is a lack of unanimity amongst the Appeal Court judges in Canada. This, in our view, is of no significance. Unanimity in anything is not a reasonable expectation. A clear and significant majority of judges on Courts of Appeal have come forward publicly to support this submission and most were previously judges on the Trial Court. We respectfully submit that the submission meets the requirements of the *Judges Act* and should be granted.

We also wish to emphasize that simply because some Appeal Court judges did not publicly express a view does not mean that they oppose the request or are satisfied with the status quo. A large number of them, although in agreement with the submission, may prefer, for personal or professional reasons, not to take a public stand. The number of judges making this submission for a salary differential is substantial in its own right; moreover that number constitutes more than two thirds of the Courts of Appeal judges in Canada.

A persuasive indication of the inadequacy of the status quo is the fact that more than two thirds of Appeal Court judges, constituting a clear and significant majority, have come forward publicly to express dissatisfaction and ask that this Commission recommend a salary differential. Having regard to the general sense of reserve of judges in Canada, it is particularly noteworthy that such a large number of Appellate Court judges have foregone the comfort and security of anonymity to publicly take a stand in an effort to correct what is now an unfair and unjustified situation.

It has been suggested (not by the Government) that because Appeal Court judges sit in panels of three and have the advantage of mutual assistance, they should not receive a salary differential. This argument assumes that sitting alone is more difficult than sitting in panels. However, Appeal Court judges do the majority of their work alone both in terms of preparing for appeals and writing judgments.

More important, working with others is often demanding and stressful in its own right. And yet Appeal Court judges face this challenge daily as they seek consensus to provide the certainty the law requires for the better administration of justice. This is not an easy task. That is especially true today where appellate judges with different perspectives strive to resolve contentious and complex issues of principle and law that affect Canadian society as a whole.

Accordingly, it cannot be seriously contended that the size of a panel on a Court of Appeal should render a salary differential inappropriate. Moreover, if sitting on panels of three meant that Appeal Court judges should be deprived of a salary differential, what are we to say of Supreme Court judges who sit on panels of five, seven or now, most often, of nine? Clearly, the size of a court panel must be irrelevant in assessing what is otherwise a just and reasonable salary for Court of Appeal judges.

The 1999 Commission mentioned that comparative data relating to current workloads of trial and appellate courts could be explored. We consider it inappropriate to engage in a debate that may be seen as diminishing the value of the work performed by judges at any other court level. The relative importance of the work done by all judges in Canada, from the justices of the peace to the judges of the Supreme Court, is universally recognized.

Just as it would be unnecessary, and even unseemly, to suggest that Supreme Court judges must justify their salary differential on the basis that they work harder or accomplish tasks of more value than judges on Courts of Appeal, or that Trial Court judges must do the same to justify their salary differential vis-à-vis Provincial Court judges and masters, it is equally improper to impose this obligation on Court of Appeal judges. No such justification has ever been required in support of existing salary differentials amongst court levels in Canada. Members of Courts of Appeal should not be treated any differently. At the hearing before the 2003 Commission in February 2004, counsel for the Government agreed that a workload comparison was not appropriate.

CONCLUSION

The mandate of the 2007 Commission is to inquire into the adequacy of judges' salaries and benefits taking into account enumerated statutory criteria.

In that regard ss. 26(1) and (1.1) of the *Judges Act* provide:

26. (1) Est établie la Commission d'examen de la rémunération des juges chargée d'examiner la question de savoir si les traitements et autres prestations prévues par la présente loi, ainsi que de façon générale, les avantages pécuniaires consentis aux juges sont satisfaisants.	**26.** (1) The Judicial Compensation and Benefits Commission is hereby established to inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judge's benefits generally.
(1.1) La Commission fait son examen en tenant compte des facteurs suivants:	(1.1) In conducting its inquiry, the Commission shall consider
a) l'état de l'économie au Canada, y compris le coût de la vie ainsi que la situation économique et financière globale du gouvernement;	*(a)* The prevailing economic conditions in Canada, including the cost of living, and the overall economic and current financial position of the federal government;
b) le rôle de la sécurité financière des juges dans la préservation de l'indépendance judiciaire;	*(b)* the role of financial security of the judiciary in ensuring judicial independence;
c) le besoin de recruter les meilleurs candidats pour la magistrature;	*(c)* the need to attract outstanding candidates to the judiciary; and
d) tout autre facteur objectif qu'elle considère pertinent.	*(d)* any other objective criteria that the Commission considers relevant.
[soulignements ajoutés]	[underlining added]

Given these statutory provisions, if a salary does not meet the test of being fair and justified, it is not an adequate salary. Thus, if it is fair and justified that judges on Courts of Appeal be paid a salary differential having regard to the enumerated criteria, then a recommendation for that purpose is required to meet the statutory objective of an adequate salary. In considering the adequacy of salaries for members of Courts of Appeal, ss. 26(1) and (1.1)(d) specifically call on the Commission to consider any other "objective criteria that the Commission considers relevant".

We have demonstrated with objective relevant criteria,[22] such as:

1) The present role and responsibilities of Courts of Appeal;
2) The rank of Courts of Appeal in the hierarchal structure of the judicial system;
3) The examination of judicial salaries in other comparable jurisdictions, and
4) The reference to prevailing conditions in other fields of endeavour in both the public and private sectors.

that the payment of a salary differential is required to achieve the legislative objective of an adequate salary for judges of Courts of Appeal.

Furthermore, a salary differential is warranted in order to attract the best of outstanding candidates to the Courts of Appeal.

May it please this Commission to recommend, in its Report to be submitted to the Minister of Justice, that the full-time (including supernumerary) judges of Courts of Appeal in Canada be paid a differential whereby their salary would be in an amount of 6.7% higher than the salary paid to federally appointed judges of Trial Courts or alternatively higher by 35% of the difference between salaries of the Supreme Court puisne judges and federally appointed puisne judges of Trial Courts. The present percentage difference in salaries between the Chief Justices and puisne judges of the Appeal Courts should be maintained.

Respectfully submitted
December 14, 2007

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[22] Which satisfies the norm set out in ss. 26(1) and (1.1)(*d*).

SCHEDULE B

BLOCK COMMISSION RECOMMANDATION CONCERNING AN APPELLATE SALARY DIFFERENTIAL

3) Salary Differential between Appellate and Trial Court Judges

125. We were presented with a request that judges appointed to courts of appeal receive a salary differential as compared to those appointed to trial courts. This is the fourth time that such a request has been made to a Triennial or Quadrennial Commission, but the question has yet to be considered on its merits.

Past Requests for a Differential

126. A request for a salary differential in favour of appellate judges was first advanced by the judges of the Quebec Court of Appeal in a submission to the Scott Commission. The submission was received as the Scott Commission's report was in the final stages of preparation and was therefore received too late to be given serious consideration.[119] The Scott Commission did however underline that the question was one which would require "very careful assessment":

> While some interesting points, in substance, in favour of the concept are advanced, a very persuasive case would have to be made to depart from the present regime which assumes that the burden of judicial office, while different in nature as between the trial and appellate court levels of our courts, nonetheless requires an equivalent discipline and dedication on the part of the judges at both court levels. The cultural impact on the system in the event of such differentiation would have to be very carefully weighed.[120]

127. Before the Drouin Commission, the appellate judges of six courts of appeal (Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick) supported the request for a differential. The Commission also received a submission from a *puisne* judge of a court of appeal opposing the request. The Government also opposed the request. The Association and Council remained neutral on the question.

128. The Drouin Commission concluded that it did not have before it sufficient information to be able to properly consider the question. It suggested that additional information in the following areas would be helpful:

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[119] Scott Report, *supra* note 36 at 30.
[120] *Ibid.*

- Data concerning the current workloads and responsibilities of trial and appellate courts across the country;
- The history of salary differentials in other comparable jurisdictions; and
- Consideration of potential constitutional issues raised by the parties.

The Commission concluded by indicating that it would be willing to consider the matter in further detail if it were made the subject of a referral to it pursuant to the *Judges Act* before the expiry of its term, but no such referral was made.[121]

129. Four years later, the McLennan Commission received a submission made on behalf of 74 of the 142 federally-appointed appellate judges. The request had what the Commission characterized as "an irregular constituency": it received the support of approximately 50 % of appellate judges, but did not include support from two of the country's provincial courts of appeal (one of which expressly opposed the request). The Government once again opposed the proposal. The Association and Council maintained its neutral position.[122]

130. Notwithstanding the fact that it described the submission as "compelling", the McLennan Commission concluded that there was no evidence before it that the implementation of a differential would impact either the financial security of the judiciary (and therefore its independence) or the ability to attract outstanding candidates to the country's courts of appeal. The Commission also appeared to conclude that the implementation of a differential would be tantamount to "re-design[ing] the court system in Canada", most likely a reference to concerns raised before it that the implementation of a differential would risk infringing provincial authority over the structure of the courts under section 92 (14) of the Constitution. Accordingly, in the absence of any ability to tie the request to the factors listed in section 26 of the *Judges Act*, the McLennan Commission considered that it was obliged to refuse to recommend that a differential in favour of appellate judges be implemented.[123]

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[121] Drouin Report, *supra* note 17 at 51-52.
[122] McLennan Report, *supra* note 22 at 53-54.
[123] *Ibid.* at 54-55.

Submissions Received

131. The request for a differential in favour of appellate judges presented to this Commission was coordinated by the Honourable Joseph R. Nuss of the Quebec Court of Appeal and was submitted on behalf of 99 of the then 141 judges of Canadian courts of appeal (approximately 70 % of appellate judges).[124]

132. We also received 18 submissions opposing the request. Some were made on behalf of particular courts and others were made on an individual basis. The Honourable James K. Hugessen of the Federal Court of Canada and the Honourable Gordon L. Campbell of the Supreme Court of Prince Edward Island each made oral submissions at the public hearing.

Positions of the Parties

133. There was consensus among the parties that the Commission had the jurisdiction to consider the request. The question of a differential was acknowledged as being one related to judicial compensation, and therefore within the mandate of the Commission (at least on a *prima facie* basis). For the judges opposed to the request, including Justices Campbell and Hugessen, it was submitted that such a recommendation would exceed the jurisdiction and mandate of the Commission for several reasons, most importantly however because it would involve a restructuring of the court system and therefore fall within provincial authority over court structure under section 92(14) of the *Constitution Act, 1867*. In a similar vein, it was suggested that the recommendation would have the effect of creating two classes of superior court judges where at present only one exists.[125]

134. The Government indicated that the Commission would have the jurisdiction to make such a recommendation, as long as it was able to support the recommendation with reference to the section 26 criteria. In such a scenario, the Government raised a number of

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[124] At the time the submission was made, there were 141 federally-appointed appeal judges in Canada, with three vacancies, all at the Federal Court of Appeal. An additional appointment was made to that court in February 2008. Online: < http://www.justice.gc.ca/eng/index.html>.

[125] Submission of Justice James K. Hugessen, January 9, 2008 at para. 10.

issues it termed "Practical Difficulties" and indicated that implementation of a differential would not be possible without the federal government first engaging in consultation with the provinces.

135. On the merits, although we address many of the specific arguments raised in the course of our analysis below, the general positions for and against the granting of a differential can be summarized as follows. According to those judges who favour the implementation of a differential, a differential is warranted in order to recognize the unique role and responsibilities of judges of provincial courts of appeal, in much the same way as the unique role of the Supreme Court of Canada is recognized by means of a differential. A differential is required in order to ensure the adequacy of the remuneration of appellate judges under section 26 of the *Judges Act* and is justified with reference to the objective criterion of the role and responsibilities of judges appointed to courts of appeal.

136. While much opposition to the awarding of a differential focuses on the jurisdictional and Constitutional obstacles identified above, it was also suggested that the proposal cannot be linked to any of the criteria under section 26, including to any relevant objective criterion under paragraph (d). Furthermore, any attempt to distinguish trial courts and courts of appeal relates to differences between the institutions and not the judges appointed to them. Perhaps most importantly, it is submitted that the implementation of a salary differential would have a strongly divisive effect among members of the judiciary and would threaten the collegiality which has historically been the hallmark of the relationship between trial and appellate courts across the country.

Analysis

137. We have reached the conclusion that the granting of a differential in favour of appellate judges would not involve a restructuring of the court system and would not infringe upon provincial authority under section 92 (14) of the Constitution. We have reached this conclusion based on the way in which superior courts have evolved over time and on the basis of the scope of the federal powers relating to appointment and to

remuneration of superior court judges under sections 96 and 100 of the Constitution. As we outline below, we have also concluded that a differential is justified and indeed warranted under section 26 of the *Judges Act* in order to ensure that judges of courts of appeal are adequately compensated within the meaning of that section.

Evolution of the Structure of Superior Courts

138. The structure of the provincial superior courts has evolved considerably over the last hundred years. At the beginning of the twentieth century, most Canadian jurisdictions did not have separate courts of appeal. The appellate function was only beginning to evolve and the practice in many jurisdictions was for several *puisne* judges of the superior court to sit *en banc* for the purpose of hearing appeals. While this generally involved avoiding having a judge sit on appeal of his own decision, this was by no means a universal prohibition.

139. Although some jurisdictions, such as Nova Scotia, retained the *en banc* system for many decades, the beginning of the last century saw a trend towards the formalizing of the appellate function in superior courts and the creation of a separate appeal division, as occurred for example in Alberta in 1921.

140. An overlapping development was the creation in some jurisdictions of a separate court of appeal, to which s.96 judges would be specifically appointed. This trend slowly played out over the course of the last century to the point where only two jurisdictions in Canada still retain appeal divisions instead of separate courts. In each of those jurisdictions, Newfoundland & Labrador and Prince Edward Island, we have been informed that legislation has been drafted which would create a separate court of appeal.[126] Within the next few years therefore, the already strong trend may become a uniform state of affairs across the country. This structural evolution has had a corresponding impact on the function and level of responsibility assumed by courts of

[126] 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 at 5-6 [Pro-Differential Judges Reply Submission].

appeal across the country and by the judges appointed to those courts. We will discuss this impact in our analysis of the factors under section 26 of the *Judges Act.*

141. Although the aforementioned trend was generally acknowledged, it was suggested to us by one of the intervenors that it was nevertheless inappropriate to rely on this trend because the power over the structure of superior courts is a matter of provincial jurisdiction and the provinces could therefore decide to revert to the *en banc* system if they wished, thereby eliminating the structural basis for any differentiation between trial and appellate judges.[127]

142. While we agree that it would be within provincial authority to contemplate and effect such a reorganization, we see no sign that any jurisdiction is planning to do this. As noted above, any signs of change continue to point towards increased separation between the trial and appellate functions. Furthermore, were the trend to move in the other direction in the future, such a change could be addressed by a future Quadrennial Commission. We note in passing that similar arguments would have applied to the implementation of a differential in favour of Chief Justices, since their roles and responsibilities are determined by virtue of provincial authority. This potential for provincial legislative action was not seen as a sufficient obstacle to prevent the implementation of a differential in their favour.

Ex officio Membership and the Nature of Judicial Appointments

143. In several Canadian jurisdictions, a judge of the superior trial court is *ex officio* a member of the court of appeal.[128] In some jurisdictions, judges of the court of appeal are also *ex officio* members of the trial court.[129] It was submitted before us that these provincial decisions regarding *ex officio* status might act as a bar to the implementation of a salary differential. Under this argument, the *ex officio* status provisions would prevent any kind of distinction between trial and appellate judges, whose Orders in Council

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[127] Presentation of Justice Campbell, Transcript of the March 13, 2008 Quadrennial Commission Public Hearing at 316.
[128] See *e.g.*, Alberta's *Court of Appeal Act*, R.S.A. 2000, c.C-30, ss.3(3).
[129] See *e.g.*, Saskatchewan's *Court of Appeal Act*, S.S. 2000, Chapter C-42.1, ss. 5(1).

confirming appointment even include reference to the *ex officio* membership where applicable.

144. We are not persuaded that such a bar exists. While the *ex officio* status of judges in several jurisdictions does have practical implications which we will address below, we do not consider that it prevents the federal government from differentiating between the remuneration paid to trial judges and those on courts of appeal. The process of appointment, while it acknowledges *ex officio* status where it exists, is nevertheless a process of appointment to a particular court. When a judge is elevated from a trial court to a court of appeal, the *ex officio* confirmation on his or her original Order in Council does not suffice to make the new appointment a reality. A second Order in Council is required in order to effect the elevation, even where the individual concerned is already an *ex officio* member of the appellate court. Just as the federal appointment process clearly differentiates between appointment to a trial court and to a court of appeal, so too can the federal process for setting judicial remuneration. In fact, where such differences exist and have been brought to our attention, our mandate suggests that we are required to give them due consideration.

145. It was also brought to our attention that salary differentials have previously existed in several provinces between trial and appellate judges. In 1920, the *Judges Act* provided that superior court judges across Canada should be paid the same salary, regardless of whether they were appointed to the trial court or court of appeal. This amendment removed differentials between trial and appeal judges in Manitoba, British Columbia and Saskatchewan.[130] The fact that such differentials previously existed suggests that the federal Government is competent in principle to legislate in this area.

Evaluating the Request under Section 26

146. Our evaluation of the request for a differential must take place in accordance with section 26 of the *Judges Act.* First, the question must be one tied to the adequacy of judicial compensation or benefits. In this case, do we consider that appellate judges are

[130] Pro-Differential Judges Reply Submission, *supra* note 127 at 9.

adequately compensated if they receive the same level of remuneration as trial judges? In order to answer this question, we turn to the factors listed in section 26 (1.1).

147. The McLennan Commission concluded that there was "no evidence" before it which linked the request for a differential to either the financial security of the judiciary or to the ability to attract outstanding candidates. Before us, neither of these criteria was the subject of significant emphasis. The analysis therefore turns on the identification of an objective criterion under paragraph (d) "any other objective criterion that the Commission considers relevant".

148. As noted earlier, the Drouin Commission had suggested that information regarding the workload of trial and appellate judges would help a future Commission undertake its analysis of the request. We agree with those judges who support a differential that such a comparison would be of limited utility and value and do not feel that it is necessary in order to properly deal with the request. Furthermore, we recognize the onerous work demands placed on all judges, whether appointed to trial courts or to courts of appeal. [131]

149. As discussed below, we do however believe that there is a substantive difference in the role and responsibilities of the judges who are appointed to appellate courts and that this difference constitutes a relevant objective criterion within the meaning of paragraph (d) of section 26 (1.1).

150. With the evolution in court structure described above came an evolution in the role and responsibilities of an appellate court and of the judges appointed to it. We can now identify two essential functions of a court of appeal:

1) Correcting injustices or errors made at first instance; and
2) Stating the law.

151. A court of appeal's primary function is the correction of injustices or errors made at first instance. The focus of this role is on the correction of errors of law. The standard of

[131] *Ibid.* at 8.

review on a question of law is that of correctness, with the consequence that, on a question of law, an appellate court is free to replace the opinion of the trial judge with its own.[132] Appellate courts rarely interfere with findings of fact and there are constraints on their power to do so.

152. This error-correcting role discharges the court's obligations with regard to the first of its client groups, the litigants before it. It also discharges part of the court's obligations towards a second client group, the general public, by upholding the principle of universality, which "requires appellate courts to ensure that the same legal rules are applied in similar situations":[133]

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined.[134]

Courts of appeal are therefore not only burdened with correcting injustices that relate to a particular case, but of correcting errors that arise from the incorrect application of the law by a court of first instance. Courts of appeal not only create the decisions which are binding on trial courts; they ensure that those decisions are consistently and correctly applied by the lower courts.

153. A second, intimately related function of a court of appeal is to state the law. As with the upholding of the principle of universality, this function requires the court to address its decisions beyond the particular litigants before it, to a broader audience that includes all potential future litigants as well as all courts which will be bound by the resulting decision. This responsibility imposes particular burdens on the reviewing court:

> The call for universality, and the law-setting role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases, as well as for the case under review.[135]

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[132] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at para. 8.
[133] *Ibid.* at para. 9.
[134] *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504 at 515, cited in *Housen v. Nikolaison, supra* note 132 at para. 9.
[135] *Woods Manufacturing Co. v. The King, ibid.* at 5, cited in *Housen v. Nikolaisen, ibid.* at para. 9.

In *Housen v. Nikolaisen*, having just cited the above passage with approval, the Supreme Court summarized the difference in functions in the following manner:

> Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. [136]

154. The impact of appellate work therefore extends far beyond the individual litigants in a particular case. Appeal decisions are binding not only on the parties, but on all future cases, unless the appeal decision is overturned at the Supreme Court. Appeal reasons must therefore be drafted in the awareness that they are unlikely to benefit from further review for error.

155. In addition to being binding law within the province, the decisions of provincial and territorial courts of appeal have considerable persuasive value in other Canadian jurisdictions. This expands the likely audience for decisions of courts of appeal and illustrates the breadth of impact of such decisions.

156. The advent of the Charter has affected the role of courts at all levels, but has imposed on appeal courts in particular an expanded role in the interpretation and development of the law. When one combines this function with the fact that very few decisions of provincial courts of appeal are appealed to the Supreme Court, it becomes clear that provincial courts of appeal play a central role in the settlement and development of the law.[137] This includes the role appellate courts play in hearing references on constitutional questions — questions which may be particularly complex and controversial. In fact, courts of appeal have been responsible for settling the law nation-wide in several key areas in the past two decades, including on the question of same-sex marriage and on language rights.

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[136] *Housen v. Nikolaisen, ibid.*

[137] For example, in Ontario, fewer than 3% of decisions are appealed to the Supreme Court of Canada; in Quebec, the number is as low as 1%. Online: <http://www.ontariocourts.on.ca/coa/en/> and <http://www.tribunaux.qc.ca/mjq_en/c-appel/index-ca.html>.

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Institutions versus Individuals

157. It was submitted to us that, even if we were to recognize a distinct role for courts of appeal, that institutional role would not imply any distinction between the judges appointed to trial courts and appeal courts. The differences being underlined by those in favour of a differential all relate to the institution and should not impact questions of remuneration which must be evaluated on an individual basis. We are not persuaded that judges of courts of appeal can be so separated from the role they are expected to play and the various responsibilities they take on when they accept appellate appointment. While the roles and responsibilities are those associated with the institution, they must be carried out by the individual judges who accept appointment to it. We would underline that a similar argument could be raised regarding the Supreme Court of Canada, where the unique nature of the role of that institution has been asserted as a justification for the implementation of special retirement provisions for its individual judges.

158. In evaluating to what extent the role of the institution 'rubs off' on the individual judges appointed to it, it is also interesting to consider recent trends for appointment to the Supreme Court of Canada. The vast majority of judges appointed to the Supreme Court have come from courts of appeal across the country. In the case of the few judges who were not elevated from courts of appeal, the appointments came from private practice or from the public sector. At a minimum, this suggests that there is something in the work of appellate courts which prepares judges for the unique nature of service at the Supreme Court of Canada.

The Exercise of Appellate Functions by Trial Courts and Judges

159. Arguments were made before us relating to the fact that trial judges are from time to time called upon to exercise what can best be classified as appellate functions. For example, in some jurisdictions, trial judges sit on sentencing appeals. In Ontario, all Superior Court judges are also judges of the Ontario Divisional Court, which is an appellate court and is a branch of the Superior Court of Justice. The Divisional Court is the main forum for judicial review of government action in Ontario. It also hears

statutory appeals from administrative tribunals and civil appeals for claims not exceeding $50,000 as provided for under the *Courts of Justice Act*.[138]

160. We would however distinguish these examples of the exercise of appellate functions in several ways. The scope of the exercise of the appellate function, even in the case of the Divisional Court, is limited. The ceiling imposed on which civil appeals can be heard by the Divisional Court is reflective of the intention that larger cases will make their way directly to the Court of Appeal. Furthermore, the decisions of trial courts exercising appellate functions, and of the Divisional Court in Ontario, remain subject to appeal to the relevant court of appeal. These decisions are less likely to represent the 'final word' on important questions of general application.

161. It is the combination of the functions exercised and the relative importance of the cases in which those functions are exercised which justifies a differential. We would not for example equate the appellate work of provincial courts of appeal with that of the Supreme Court of Canada, even though partial functional analogies may be drawn. Similarly, while we recognize that trial judges do exercise appellate functions in certain circumstances, we do not consider that these appellate functions can be equated with those assumed on a regular basis by judges of provincial courts of appeal.

Practical Considerations

162. A number of what can be termed practical concerns were raised before us. While none in our estimation constitutes an obstacle to the implementation of a differential, all merit consideration and some may need to be addressed as part of the implementation process.

Ad hoc participation by trial judges on courts of appeal

163. Provincial legislation governing court structure in most Canadian jurisdictions provides Chief Justices of courts of appeal (and in some cases of trial courts) with

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[138] *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, s.19. See also online: <http://www.ontariocourts.on.ca/scj/en/divct/index.htm>.

considerable flexibility with regard to staffing arrangements, within the limits permitted by the federal power of appointment. The fact that in several jurisdictions, judges of the trial court are *ex officio* judges of the court of appeal is a key aspect of this flexibility. Chief Justices of courts of appeal frequently have the ability to ask the Chief Justice of the trial court that a judge be provided to the court of appeal for the purpose of sitting on a particular panel.[139] This kind of *ad hoc* participation by trial judges provides flexibility in cases of illness, conflict or delayed appointment.[140] While this flexibility is required in order to ensure the smooth functioning of courts of appeal, its use in most jurisdictions is infrequent. In several jurisdictions, the creation of supernumerary positions has also provided courts of appeal with an alternate means of dealing with situations of conflict or illness and has accordingly reduced the reliance on the *ad hoc* participation of trial court judges in appeal hearings.

164. The Government suggested that, if we recognized that a differential was required in order to provide adequate remuneration, then our only option would be to recommend the abolition of the *ad hoc* arrangements, something which is clearly within provincial jurisdiction as a matter pertaining to the structure of the courts. If we concluded that a differential is required in principle, then the Government submitted that it would not be acceptable to have a trial judge sit on appeal without receiving the appellate differential during the corresponding period, even if the time spent sitting on appeal were very brief. It was also submitted that the enactment of a threshold for triggering a form of 'acting pay' for trial judges sitting on appeals would be problematic, because Chief Justices considering which judge to nominate for an appeal would then logically consider not only which judge was most suitable for the task at hand, but would also attempt to avoid suggesting judges who had already sat enough days on appeals to quality for the salary differential.

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[139] See *e.g.*, Ontario's *Courts of Justice Act*, R.S.O. 1990, Chapter C.43, ss.4(1).

[140] Pursuant to Quebec's *Courts of Justice Act,* the Chief Justice of the Court of Appeal can certify to the Governor General his opinion that the administration of justice would be promoted by the appointment to the Court of Appeal of an assistant judge from among the judges of the Superior Court during the absence of a judge of a court of appeal, where it appears probable that such absence will continue for a term or more. Note how this more formal, longer-term arrangement requires contact with the Governor General. *Courts of Justice Act*, R.S.Q. c. T-16, s.12.

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165. We do not agree that the options are limited in these ways. This is not the first time that the Government has had to contemplate the practical implications of the implementation of a differential. The differential in favour of Chief Justices poses similar challenges. Most provincial legislation governing court structure includes provision for the temporary replacement of the Chief Justice if she or he is unable to act for reason of illness, etc. The question of whether and when to award the corresponding differential to the individual who replaces a Chief Justice provides a useful analogy. The *Judges Act* does not provide for any adjustment of salary for an acting Chief Justice but does provide that the individual will receive the representational allowance assigned to the Chief Justice. The salary of an acting Chief Justice remains that of a *puisne* judge, despite the temporary assumption of the role and responsibilities of the head of a court. In keeping with this legislative decision, we are of the view that the concept of 'acting pay' should also be rejected for those trial judges who serve as *ad hoc* judges of the court of appeal.

Courts of mixed composition

166. Our attention was drawn to the composition of certain Canadian courts, in particular the courts of appeal of the territories and the Court Martial Appeal Court. In the case of the territorial courts, although these courts are permanent courts of appeal and perform functions analogous to the provincial courts of appeal, the unique confluence of remote locations and the much smaller populations that these courts serve has necessitated more flexibility of composition. Appointments to the territorial courts of appeal are made from among the judges of the supreme courts of the territories and from the judges of the courts of appeal of various provinces. The Court Martial Appeal Court presents a similar challenge: its membership is made up of "designated judges" from among the judges of the Federal Court of Appeal, Federal Court and from superior courts of criminal jurisdiction. An appeal could therefore be heard by a judge of the Federal Court of Appeal alongside a judge of the Federal Court and a judge of the Quebec Superior Court. It could be said of these courts that *ad hoc* sittings by trial judges on appeals are a permanent feature of the way they function. We would however distinguish between appointment to a court of appeal on what is effectively a part-time basis, as

occurs in the above examples, and full-time appointment to a provincial court of appeal. In both of the above examples, the salaries of the judges sitting on territorial appeal courts and on the Court Martial Appeal Court (including that of its Chief Justice) are determined with reference to their primary appointments; this should continue to be the case following the implementation of a differential in favour of full-time appellate judges. Should the nature of appointments to any of these courts change in the future, so that appointment to either a territorial court of appeal or to the Court Martial Appeal Court could be said to be a judge's primary appointment, it would be necessary for the scope of application of the salary differential in favour of appellate judges to be adjusted accordingly.

The Cultural Impact of a Salary Differential

167. A large number of trial judges have expressed the concern that the implementation of a salary differential between trial judges and appellate judges would be divisive. Even before a differential was seriously considered, the Scott Commission had warned that "the cultural impact on the system" of the introduction of a differential would have to be very carefully weighed.[141] We are alive to this concern and wish to underline that in recommending the adoption of a differential we do not in any way wish to undermine or diminish the value of the important work undertaken by trial judges across the country. We agree with the analogy offered with the awarding of a differential to judges of the Supreme Court of Canada: just as that differential should not be taken to diminish the value of the work done by judges on courts of appeal, this differential must not be taken to diminish the contribution of the judges of our trial courts.

168. Although we gave careful consideration to the objections raised by judges of trial courts across the country, we have concluded that the implementation of a differential is required in order to ensure adequate remuneration for judges of both levels of court, according to their respective roles and responsibilities, as they have evolved over time.

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[141] Scott Report, *supra* note 36 at 30.

169. The strong trend towards the separation of trial courts and courts of appeal has had the impact we have described above on the related functions assigned to judges of each level of court. In some jurisdictions, this is reflected in the express distinction made between trial judges and appeal judges in terms of rank and precedence, further confirmation of the effect the growing institutional and functional separation has had on the individual judges appointed to each court.[142]

170. While judges at all levels may have differing views about the merits of a system that promotes distinctions between trial and appellate courts and judges, we felt obliged, according to the terms of our mandate, to recognize that such distinctions now firmly exist and that they warrant recognition within the context of judicial remuneration.

Recommendation Concerning Salary Differential in Favour of Appellate Judges

171. As discussed above, those judges who support a salary differential propose a differential equal to 6.7% of the salary paid to trial court judges. This amount was proposed on the basis that it constitutes roughly one third of the difference between the current salary of a *puisne* judge and that of the judges of the Supreme Court of Canada. The Government opposes the payment of any salary differential, and the Association and Council maintain a position of neutrality on the matter. Because the submissions of the Government and of the Association and Council did not include a detailed discussion of the question of quantum, we invited the parties to provide additional comments on this issue, particularly in relation to the proposal of a 6.7 % differential. The Government's response to this request focussed on the impact that such a differential would have on existing differentials (a question we deal with separately below) but did not provide assistance in terms of how an adequate differential might be calculated. In the absence of a full discussion by the parties regarding the appropriate differential to ensure an adequate salary for judges appointed to courts of appeal, we have attempted to strike an appropriate balance by recognizing the role and responsibility of judges appointed to

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[142] See *e.g.*, Nova Scotia's *Judicature Act*, R.S.N.S. 1989,c. 240, s.22; see also British Columbia's *Court of Appeal Act*, R.S.B.C. 1996, c.77, ss.4(3), which provides that "the justices of the Court of Appeal have rank and precedence, after the Chief Justice of the British Columbia, the Chief Justice of the Supreme Court and the Associate Chief Justice of the Supreme Court, over all other judges of the courts of British Columbia and have rank and precedence among themselves according to the seniority of their appointment."

courts of appeal without diminishing the value and importance of work of judges appointed to trial courts. We therefore recommend that the differential for *puisne* judges appointed to courts of appeal should be an amount equal to 3 % of the salary paid to *puisne* judges of trial courts, an amount which we believe will ensure the adequacy of the remuneration of judges serving on both courts.

Recommendation 3

The Commission recommends that:

> **A salary differential should be paid to *puisne* judges appointed to provincial courts of appeal and to the Federal Court of Appeal, and that the salary of *puisne* judges appointed to these courts should be set at $272,200 effective April 1, 2008, inclusive of statutory indexing effective that date.**

4) Salary Levels of Other Judges

172. The Association and Council propose that "the salary differentials between *puisne* judges, chief justices and associate chief justices, justices of the Supreme Court of Canada, and the Chief Justice of Canada be maintained in the same proportion as currently exists".[143]

173. The Government does not take issue with this proposal.

174. For many years a relatively constant differential has been maintained between the salaries of *puisne* judges and chief justices, associate chief justices and justices of the Supreme Court of Canada. We agree that there should be a differential. It is our view that the additional responsibilities of these judges, which in the case of associate chief justices and chief justices include administrative responsibilities, are objective criteria that are relevant to our inquiry into the adequacy of judicial salaries, in accordance with

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[143] A&C Submission, *supra* note 47 at para. 148.

SCHEDULE C

LEVITT COMMITTEE RECOMMANDATION CONCERNING AN APPELLATE SALARY DIFFERENTIAL

Salary Differentials between Trial and Appellate Judges

62. Submissions have been made to all Quadrennial Commissions regarding the institution of a salary differential between the *puisne* judges of the trial and appellate courts.

63. Both the Drouin and McLennan Commissions commented favourably on submissions in favour of such a salary differential. The Drouin Commission declined to act on the basis that the matter required further review and evaluation, which it offered to undertake.[71] While the McLennan Commission declined to act on the submissions because it considered that such a recommendation was beyond its jurisdiction, it went on to state that, if the Commission had determined that it was empowered to do so, it would be "entirely probable" that it would favour such a differential.[72] The Block Commission recommended that such a differential be instituted based on a detailed history of the evolution of the court system in Canada which focussed on the evolution of the appellate courts and their distinct function.[73]

64. Appellate judges must not only state the law, they must also correct legal errors made in courts of first instance. Moreover, appellate decisions have a greater sense of finality than those of trial decisions. These decisions can be overturned only by the Supreme Court of Canada, a court which in recent years has heard fewer than 100 cases annually.[74] Furthermore, appellate court decisions are consistently applied by lower courts and are considered to be more persuasive jurisprudence than trial court judgments.

65. The Commission has concluded that the time has come to deal with the question of salary differentials for appellate court judges. Accordingly, the Commission determined to recommend a 3% salary differential for *puisne*

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[71] Drouin Report, *supra* note 5 at 52.
[72] McLennan Report, *supra* note 28 at 55.
[73] Block Report, *supra* note 20 at paras 138-145.
[74] Supreme Court of Canada, summary of statistics 2001 to 2011, Online: http:scc-csc.gc.ca/stat/pdf/doc-eng.pdf. It should be noted that for that period, an average of 15 of the cases the Supreme Court of Canada heard were "as of right", meaning that the total number of cases the Court chooses to hear is, effectively, even smaller than indicated.

judges of the appellate courts (and the maintenance of the differential between those judges and the Chief and Associate Chief Justices of those courts) in light of:[75]

a) the fact that no recommendation is being made for a salary increase for the judiciary as a whole notwithstanding the fact that, while roughly equivalent, the total compensation of *puisne* judges is below that of the selected public sector comparator group;

b) the importance which a majority of Provincial appellate court judges have attached to this issue and the consistent, neutral position of the Association and Council in this regard throughout the Quadrennial processes;

c) the relatively small amount of money involved, based on figures supplied by the Government;[76] and

d) the Government's admission that, while economic uncertainty remains, the outlook has improved significantly from the situation which the Government faced at the time of its response to the Block Report.[77]

66. The Block Commission recommended that the salary differential between the judges of the Supreme Court of Canada and the balance of the federal judiciary be preserved by maintaining the differential then in place and fixing the salaries of the Supreme Court of Canada judges by reference to the newly increased salaries of the *puisne* judges of the other appellate courts. The Commission has not made such a recommendation because it could not see in the proceedings of the Block Commission or the submissions made to this Commission a record on the basis of which it could do so. The Commission would be pleased to

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[75] Block Report, *supra* note 20 at paras 146–171.
[76] A salary differential of 3% for the current number of appellate judges as applied to the 2010-2011 salaries of trial court judges would have an aggregate cost of $1.2 million as compared to a total cost of judicial compensation and benefits for the same period of $452 million.
[77] Reply of the Government of Canada, January 30, 2012 at para 16 ("Government Reply").

further consider this matter if a reference is made by the Government pursuant to the *Judges Act* during our mandate.

67. The Commission considered, but did not agree with, the reservations as to jurisdiction which troubled the McLennan Commission. In the Commission's view, the differential recommended goes to the question of the adequacy of judicial remuneration because the recommended differential reflects a judgement made by the Commission as to a difference in the impact on the administration of justice of the work of the appellate court judges as compared to that of the work of judges of the trial courts. The Commission noted that neither the Drouin nor the Block Commissions were concerned about jurisdiction in regard to this issue.

68. Concerning the Commission's use of the Block Report with respect to salary differentials, the Government stated that "[t]his Commission must make its recommendations on an objective basis. The mere fact that a prior commission recommended a salary differential is insufficient."[78] The Commission has carefully considered all submissions made before it and reviewed a summary of the Block Commission transcript. In oral argument, counsel for the Government agreed that such a review would satisfy the Government's procedural concern.

Recommendation 2

The Commission recommends that:

> ***Puisne* judges sitting on provincial and federal appellate courts should be given a salary differential of 3% above *puisne* judges sitting on provincial and federal trial courts.**
>
> **Effective April 1, 2012, their salaries should be set, inclusive of statutory indexation, at $296,700.**

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[78] *Ibid* at para 48.

Recommendation 3

The Commission recommends that:

Salary differentials should continue to be paid to the Chief Justice of Canada, the Justices of the Supreme Court of Canada and the chief justices and associate chief justices of the trial and appellate courts;

The salary differential for the chief justices and associate chief justices of the trial courts should be established in relation to the salary of the *puisne* judges appointed to the trial courts;

The salary differential for the chief justices and associate chief justices of the appellate courts should be established in relation to the salary of the *puisne* judges appointed to the appellate courts;

The salary differentials of the Chief Justice of Canada and the Justices of the Supreme Court of Canada should be established in relation to the salaries of *puisne* judges appointed to trial courts; and

Effective April 1, 2012, the salaries should be set, inclusive of statutory indexation, at the following levels:

<u>Supreme Court of Canada</u>

Chief Justice of Canada $370,300
Justices $342,800

<u>Federal Court of Appeal and Provincial Courts of Appeal</u>

Chief Justices $325,300
Associate Chief Justices $325,300

<u>Federal Court, Tax Court and Trial Courts</u>

Chief Justices $315,900
Associate Chief Justices $315,900