The Honourable
Justice Gordon L. Campbell

Supreme Court of
Prince Edward Island

Sir Louis Henry Davies Law Courts
42 Water Street
Charlottetown, PE C1A 1A4

March 22, 2016

Via Email: info@quadcom.gc.ca

Judicial Compensation and Benefits Commission
99 Metcalfe Street, 8th floor
Ottawa, Ontario K1A 1E3

Dear Commissioners:

Re: Proposal for Appellate Salary Differential

I make this respectful submission in order to record my opposition to the request by some appellate court judges for a salary differential to be established between Section 96 judges sitting at trial judges and Section 96 judges sitting as appellate judges.

I made a submission in opposition to a salary differential proposal presented in 2007 to the Block Commission. A copy of that submission is attached, and is available on the Judicial Compensation and Benefits Commission website. I wish to reiterate my earlier submission and invite the Commission to consider it both with regard to earlier submissions made in favor of a salary differential and with regard to the arguments raised in the current submission filed by the Hon. Allan R. Hilton. I will also address some of the comments in the latest submission in favor of a differential, and regarding events since my 2007 submission.

Firstly, to deny that the issue of a salary differential is divisive amongst the members of the judiciary, as the Hilton submission does, is to ignore all of the history on this issue to date. It is obvious from the various submissions, including for example, the submission of the Ontario Superior Court Judges' Association, that the idea is opposed by the majority of Section 96 judges. As divisive as the issue is now, it would become even more so if any such differential was implemented.

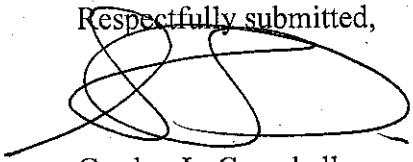
Secondly, the Levitt Commission followed the Block Commission and recommended a salary differential. The Government of Canada rejected that recommendation. It is important for the Commission to note that the Government of Canada responded in a substantive and rational fashion in considering that recommendation.

The government's response, with respect to that recommendation, met all of the requirements set out by the Supreme Court of Canada in the **P.E.I. Judges' Reference** (*Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R. 3) and in the **Bodner** case (*Provincial Court Judges' Assn. Of New Brunswick v. New Brunswick (Minister of Justice); Bodner v. Alberta*; 2005 SCC 44, et al). The government's response passed the test of "rationality", relied on legitimate reasons, did not reveal any improper motive, relied on a reasonable factual foundation, respected the commission process, demonstrated good faith, and gave serious consideration to the Commission's recommendations. The government's rejection of that recommendation cannot be summarily dismissed.

Thirdly, the Hilton submission states "that appellate courts are effectively the court of last resort" in their respective jurisdictions, and that "the quality and nature of the work [of appellate courts] has become increasingly more complex and more significant to the public as a whole." In fact, the trial courts across this country have always been, and are increasingly becoming, the courts of last resort for the majority of Canadians, due primarily to the increasing cost of litigation. Further, the quality and nature of work in the trial courts, as compared to the appellate courts, has become immeasurably more complex and more significant in the last decade with the ever increasing number of self represented litigants.

Finally, I would ask the Commission to give serious consideration to the 2008 submission of now-retired Justice James K. Hugessen, (available on the Commission website) in which he addresses the question from his own unique perspective. He also raises the question (in his point # 10) of whether the Commission has the statutory mandate to create a "new class of judges in Canada" as would be done by introducing such a differential. I urge this Commission to reject the request for a salary differential for Section 96 judges sitting on appeal courts versus those sitting on trial courts.

Respectfully submitted,



Gordon L. Campbell

Brief submitted by the Honourable Mr. Justice Gordon L. Campbell,
Supreme Court of Prince Edward Island, Trial Division, December 11, 2007.

December 11th, 2007

Ms. Sheila Block, Chairperson
Judicial Compensation and Benefits Commission
99 Metcalfe Street,
Ottawa, Ontario
K1A 1E3

Dear Ms. Block,

Re: Proposed Salary Differential Between Trial and Appellate Court Judges

I make this submission in opposition to what I anticipate will be a request for the Quadrennial Commission to recommend a salary differential between superior court judges depending upon whether they sit as members of a trial court or a court of appeal.

I am a puisne judge of the Supreme Court of Prince Edward Island, Trial Division. I am making this submission on my own behalf and not as a representative of this court or of any organization or group of judges to which I belong. Many of my colleagues across Canada tell me they strongly oppose any such salary differential, but for reasons I will touch upon later, they are reluctant to publicly declare their opposition.

Because I am not privy to the details of the anticipated submission to this Commission by some appellate court judges, I have structured my submission in response to the arguments presented to the 2003 Quadrennial Commission.

General Arguments

The main argument previously presented in favor of a salary differential is simply that the appellate courts are above the trial courts in the court hierarchy. Those submissions, coordinated by the Honorable Joseph R. Nuss, J.A., of the Québec Court of Appeal, claimed the principle of hierarchy is one upon "which society remunerates individuals for the work they do." It is my submission that it is fallacious to attempt to use the hierarchy of the courts to justify salary differentials for individual judges working within those courts. Furthermore, the submission specifically declares that it would be improper to compare the work that is done in the two levels of court. How then can one know "the work they do"?

It is not the work of any individual judge on a court of appeal that denotes that court's place within the hierarchy of courts. It is a result of their being a panel of three or more judges that decisions of a court of appeal rank above those of a decision of a trial court. It is a fundamental principle of our judicial system that **each individual** judge is an independent and impartial decision-maker and that no judge, whether on a trial court or on a court of appeal, can properly fetter their discretion or otherwise give over their decision-making authority to another or to a group or panel of judges. **Each individual** judge on a court of appeal is required to work independently and to come to their own decision. They may be persuaded by the opinion of a fellow judge to concur, but they must **each independently** exercise their own judgment in assessing the law and the principles applicable to any appeal before them in making their decision.

Court of appeal judges are not paid collectively for their work. Notwithstanding that their decisions are combined to dispose of a matter, either with or without a dissent, they are **each** charged with the responsibility, as is a lone trial judge, to hear a matter and make their own individual determination of the result.

Comparisons to Other Court Levels

The 2003 submission points to the salary levels for Canada's provincial court judges and for the Supreme Court of Canada as evidence of a judicial hierarchy and, for that reason, appeal court judges should receive a higher salary than judges of trial courts. What the submission fails to recognize is that there are significant constitutional, jurisdictional and historical differences between superior court judges appointed pursuant to section 96 of the Canadian Constitution and judges either of provincial courts or the Supreme Court of Canada.

a) Supreme Court of Canada

The Supreme Court of Canada was created pursuant to section 101 of the Canadian Constitution. That court was set apart from other "superior" courts from the time this country was born. That court exercises full and final jurisdiction on all matters, on all types of laws, in all provinces and territories in the country. No other court serves that role. While the Federal Court and Tax Court each have Canada-wide jurisdiction, they too are trial courts and their jurisdiction relates only to certain specific areas of law. Courts of appeal and trial courts, both being "Section 96" courts, have jurisdiction only in one province, (subject to exceptions for those courts who also serve as the court of appeal for a territory) and the jurisdiction of such superior court (Section 96) judges does not include numerous matters that are within the exclusive jurisdiction of the Federal Court or Tax Court. Historically, the creation, structure and jurisdiction of the Supreme Court of Canada has been different than that of the provincial superior courts. Historically, the remuneration paid to judges of the Supreme Court of Canada has been different as well.

b) Provincial Courts

Provincial and territorial courts are created pursuant to specific legislation in each province or

territory. Their jurisdiction varies greatly across the country, ranging from those which are

strictly criminal courts addressing most (but not all) criminal issues to those covering criminal and family jurisdiction, and others covering criminal, family and some limited civil jurisdiction. To qualify to become a provincial court judge you must have been a member of the bar in your province for a minimum of five years. To qualify to become a superior court judge in a province you must have been a member of the bar for a minimum of 10 years. The creation and jurisdiction of, and the minimum qualifications for appointment to, provincial courts has always been significantly different than that for superior courts. Salaries, which are determined separately by each province and which are paid by each province, vary widely across the country as well.

The 2003 submission fails to recognize that all Section 96 judges are appointed pursuant to the same constitutional provision and that we share, and always have shared, the same jurisdiction and the same obligation to render decisions independently. It is no accident that all judges of all provincial superior courts (whether trial or appeal) have always received the same remuneration. Additional sums paid to Chief Justices relate to administrative duties and are not relevant to the issue at hand.

Workload Differential

The 2003 submission in support of a salary differential took pains to express that there ought not to be any comparison of workloads between court levels when considering the issue of salary differential. It stated it would be "unseemly" to do so. The submission expressed that "no such justification has ever been required in support of existing salary differentials amongst court levels in Canada" and the authors insist that "members of the courts of appeal should not be treated any differently." Ironically, the rest of their submission expressly seeks different treatment for members of the court of appeal.

After declaring there should be no comparison of workplace demands, they proceed to provide only comparisons that may reflect favorably upon them. They make a comparison of the relative difficulty of sitting in panels of three with mutual assistance as opposed to sitting alone. They submit that, like trial judges, most of their work is done in preparing for and writing judgments and they have the additional "often demanding and stressful" factor of working with others in considering different perspectives as they attempt to resolve contentious or complex issues. Frankly, most people would consider it to be a benefit that you can work closely with a colleague. A balanced comparison would have reflected the fact, for example, that in most cases, only one member of a three-member panel actually writes a decision. In a minority of cases another judge may also write either a dissenting or concurring decision. On an extremely rare occasion, all three judges on the panel may write their own decisions. One of the benefits of having additional panel members with whom to consult and converse is that when consensus is

reached, two of the panel members are relieved of the principal responsibility of writing a decision. A trial judge has no such luxury.

Their comparison also refers only to preparation before a hearing and writing a decision after hearing. They fail to refer to any comparison of workplace demands that occur while judges are actually hearing cases. Trial judges are constantly called upon to make significant in-trial decisions with very limited time available for research and reflection. They must be alert to situations that arise in the presentation of evidence and have full and sole responsibility for ensuring a fair trial. Further, they always preside over their own court, and very frequently in the face of one or more self-represented parties on complex legal matters. Jury trials can be particularly demanding. Appeal court judges rarely, if ever, experience equivalent demands. It is quite understandable that appellate judges would like to avoid consideration of workload differentials.

Trial judges handle many lengthy, complex, sometimes horrific trials which may be incredibly stressful. By the time such a matter reaches the appeal court it will have been distilled, sanitized, carefully categorized, packaged, and schedule to fit into a "civilized" work week before a panel of three judges, only one of whom will generally write a decision. I am not making a proposal that appeal court judges receive only one-third of the remuneration of a trial judge, but in my respectful opinion, there is more of a logical basis for such a proposal than there is for any proposed differential in favor of judges of appeal courts.

Constitutional impediments

The 2003 appellate judges submission addresses the issue of all trial judges being ex officio members of their respective appeal courts and the fact that trial judges occasionally sit as members of appeal court panels. They insist this fact should not be used as a constitutional basis for declining to create a differential. Unfortunately, they do not address this matter in a principled fashion. They fail to acknowledge that **upon appointment** all trial judges are ex officio members of the court of appeal and, in most provinces, vice versa. Their submission refers to Section 30 of the ***Supreme Court Act*** where legislative authority is given for the Supreme Court of Canada, on an ad hoc basis, to use the services of a member of any provincial superior court, whether trial or appeal level. That legislative provision relates to very specific and limited circumstances. Unlike the ex officio status of superior court judges in each province, a superior court judge so engaged does not become a permanent member, or a permanent ex officio member, of the Supreme Court of Canada. It is truly ad hoc, as opposed to being inherent in the status of the provincial superior court judge.

Hierarchy

The submission describes the hierarchy of courts as the key principle upon which the appellate judges rely for a salary differential. It is readily acknowledged that, in Canada and elsewhere, there is a hierarchy of courts issuing decisions with respectively greater precedential value. This

is a fundamental fact. However, it is not a fundamental or self-evident fact that there is (as was claimed in the 2003 submission) greater responsibility imposed on the **individual** judge of a court of appeal as a result of the precedential value given to the decision of a **panel** of judges presiding over the very same jurisdictional issues. The Supreme Court of Canada and each provincial court are distinguished by virtue of their significant jurisdictional differences. That decisions of appeal courts are binding on trial courts is not disputed. It is acknowledged within the court system and by the general public. However, if the precedential value of decisions is truly tied to the worth (salary) of an individual judge, then what is to become of one who dissents on an appeal? The decision by that judge has not become part of the "binding precedent" affecting trial court judges. Has that dissenting judge failed to exercise his or her "additional responsibility"?

The fallacy in the argument of the appellate judges is that it is the court's level and function and not that of the individual judge that constitutes a hierarchical structure and can be differentiated. Each individual judge of each court of appeal is under the very same obligation and responsibility to fairly, impartially and independently decide each case as is each judge of each superior trial court exercising the very same jurisdiction. It is contrary to the historical, constitutional, and jurisdictional place of trial court judges within Canada's justice system to suggest that, individually, they (not their courts) ought to be ranked or rated as somehow inferior to their brethern superior court judges who happen to sit on the appeal court, notwithstanding that trial court judges are appointed pursuant to the same authority as appeal court judges, have the same qualifications, exercise the same jurisdiction, and arguably, have significantly greater workloads and a greater impact on the lives of those involved in the justice system than appeal court judges.

Reference was made to the limited number of cases that go beyond the court of appeal level to the Supreme Court of Canada, thereby imposing even greater responsibility on the court of appeal as they are "in practical terms" the courts of last resort for litigants. In practical terms, the vast majority of cases that proceed through the trial process never proceed through the appeal process. Therefore, in practical terms, the trial courts are the court of last resort for most litigants.

As well, their submission is out of touch with the modern reality that trial courts expend tremendous effort at the pretrial stage on legal motions, dispute resolution efforts, and oral decisions that effectively dispose with finality of most civil proceedings. Only a very limited number of these matters surface in courts of appeal.

Historical anachronism

Their submission includes information with respect to court structures and salary differentials that have always been in place in many other common law or democratic jurisdictions around the world. They conclude that this demonstrates that Canada's system is an anomaly as if it was somehow created by accident or oversight. To refer to the lack of a salary differential as a

historical anachronism is to ignore more than 140 years of history and tradition in Canada.

There are many areas of constitutional structure, governance and of individual laws in which Canada developed its own unique system or processes rather than mimicking the United States, the United Kingdom, or other jurisdictions. The Canadian structure is reasoned, based upon sound principles, and has survived the test of time.

Numbers in Support

I anticipate that any 2007 submission in favor of a salary differential for appellate judges will have the support of a substantial number of appellate court judges across the country. This should come as no surprise. Those promoting the salary differential have very actively pursued the support of their fellow appeal court judges since the time of the report of the last Quadrennial Commission. It is hard to imagine that you would find any group of people who would not be in favor of a salary increase for themselves, especially after a concerted effort to obtain their support for the suggestion. Surely the number of potential beneficiaries expressing support for a salary differential cannot seriously be considered as a weighty matter. It is a thinly veiled attempt to obtain a salary increase.

The final submission on behalf of appellate judges (March 2004) states that "it is noteworthy that the Canadian Superior Courts Judges Association has taken a position of neutrality and federally appointed trial court judges, except for two or three of approximately 900, have expressed no views." They use that statement in an effort to demonstrate that a salary differential would not be divisive. Let me state firstly that I believe the proposal for a salary differential is divisive and, if implemented, would create a schism. However, to attempt to use the non-interventionist position of the Canadian Superior Courts Judges Association (CSCJA) or of trial judges to demonstrate the acceptance or lack of opposition to the proposed differential is disingenuous. The CSCJA represents the vast majority of both appeal court and trial court judges in Canada. It is an indication of the degree of divisiveness of the issue that the CSCJA has decided to take "no position" before this Quadrennial Commission. For the Association to vote against the salary differential would be to cause disaffection amongst the many appellate court members who support the differential, and thereby risk losing the membership of those judges. I have no hesitation in saying that from my personal interaction with trial court judges across this country, the vast majority of them are opposed to any such salary differential. It is worth noting that it is a significantly different matter for one to publicly state their opposition to a request by a group of "colleagues" for an additional benefit than it is for a potential recipient to state their support for that benefit.

I urge this Commission to reject any notion of a salary differential amongst provincial superior court judges. Constitutional and jurisdictional principles governed the establishment and

structure of our court system in Canada. History has proven its worth. There are no sound principles upon which the proposed change can be based.

Yours truly,

Gordon L. Campbell