THE HONOURABLE RONALD L. BERGER
JUSTICE OF APPEAL

THE LAW COURTS
EDMONTON, ALBERTA
T5J 0R2

COURT OF APPEAL OF ALBERTA
COUR D'APPEL DE L'ALBERTA

January 24, 2008

Judicial Compensation and Benefits Commission
99 Metcalfe Street
8th Floor
OTTAWA
ON K1A 1E3.

Commissioners,

SALARY DIFFERENTIAL BETWEEN TRIAL AND APPELLATE COURTS

Your archives include my correspondence of December 16, 1999 (a copy of which I attach for ease of reference) on the subject of a salary differential.

The able and eloquent submissions of my appellate colleagues who favour such a differential do not persuade me. I remain opposed.

I have but one point to add.

Over the years that this issue has festered, successive governments of Canada, alive to the competing positions, have exercised their discretion to maintain the status quo. That policy choice should not be disturbed.

The persistent efforts of some appellate judges to benefit from a differential in salary should be firmly and finally rejected.

I wish you well in your deliberations.

Respectfully,

Ronald L. Berger

RLB/re
Attch.

Sent by fax - hard copy to follow

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Commissioners,

I am given to understand that the Quadrennial Commission may be invited to address the question of a salary differential between appellate and trial judges. I write to oppose any such proposal. I do so as a puisne judge of the Court of Appeal of Alberta. While others may share my views, I speak only for myself and not for any court, organization, or group of judges.

I was privileged to serve on the Court of Queen's Bench of Alberta from 1985 to 1996. Her Majesty's patent expressly names all Queen's Bench judges as *ex officio* members of the Court of Appeal. In this jurisdiction, members of the Court of Queen's Bench, to this day, continue to sit with the Court of Appeal on both regular and sentence appeal panels. This is in keeping with an established historical tradition in this Province. Prior to the creation of the Court of Queen's Bench in 1979 marking the amalgamation of the district courts with the trial division of the Supreme Court of Alberta, the latter was a single superior court with two divisions: trial and appellate. Apart from the issue of *stare decisis*, hierarchal distinctions were non-existent. Indeed, the Federal Order of Precedence among superior court judges in Alberta fixes precedence based on date of appointment rather than membership in one court or another.

This strongly entrenched tradition has served us well. It has strengthened collegiality and fostered mutual respect. Most importantly, the sound policy and operational reasons behind this traditional legal culture has promoted the kind of interaction that educates and enlightens members of both courts.

I have spoken with many trial judges in Alberta. It would not be unfair to say that the adoption of a salary differential runs the very real risk of destroying the goodwill, collegiality and interaction that we have worked so hard to achieve.

There are, in addition, practical reasons to reject the proposal. If trial judges, under the authority of their patents, are to continue to sit with courts of appeal, it is arguable that a pay differential among puisne judges performing the same judicial function would be constitutionally barred. It has been suggested that the solution would be to pay trial judges who sit with the Court of Appeal a per diem or "ad hoc bonus". Under such an arrangement, the spectre of some trial judges earning more money than others would loom large - a prospect, I respectfully suggest, which should be firmly rejected.

On the other hand, if the proponents of a salary differential contemplate that trial judges would no longer sit on an ad hoc basis with appellate judges, I wonder whether the consent of Provincial Governments would be required. By way of illustration, in Alberta, s. 9 of the ***Court of Appeal Act*** reads as follows:

> "A judge of the Court of Queen's Bench may sit or act
>
> (a) in place of a judge who is absent,
> (b) when an office of a judge is vacant, or
> (c) as an additional judge,
>
> on the request of a judge of the Court of Appeal."

There are, arguably, other constitutional issues that must be addressed. As set out above, all judges of the Court of Queen's Bench of Alberta are *ex officio* members of the Court of Appeal. They hold office during good behaviour. Is it suggested that their *ex officio* appointments be revoked? What constitutional mechanism would be employed to achieve that end? If no revocation is anticipated, is it intended that the *ex officio* appointments be rendered nugatory by other than constitutional means?

It has also been argued that the nature of the work of the final court of appeal within a province justifies a salary differential. I suggest that this is not sufficient reason to justify the proposal. Members of appellate courts sit as a group, diffusing the workload and responsibilities within the group. Trial judges sit alone, often away from home in less than ideal working conditions and must make complex and difficult decisions without the opportunity or comfort of consulting with their colleagues. Trial judges must bear the responsibilities of their decisions and accept the attendant publicity and criticism alone. The appellate court has a collective responsibility and as such individual judges are rarely subject to personal criticism.

In addition to the foregoing, I urge you to question the suggestion that the workload of an appellate court judge is more onerous than that of a trial judge. No one would contest the proposition that appeal court judges have far more reading and far more judgments to write. But it would be a mistake to compare the appellate apple with the trial orange. I well recall sitting at a rickety kitchen table in St. Paul, Alberta, at two o'clock in the morning, attempting to craft a jury charge to be delivered at 10.00 a.m that addressed, among other matters, self-defence, provocation, drunkenness, unsavoury witnesses and similar fact evidence. If I had put my mind to the subject at that time, I might well have argued for a salary differential **in favour** of trial judges.

I wish you well in your deliberations.

Yours truly,

Ronald L. Berger

RLB/re

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