



Ontario Superior Court Judges' Association
L'Association des juges de la Cour Supérieure de l'Ontario

Office of the President
Le bureau du Président/de la Présidente

January 28, 2008

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

Dear Ms. Block:

The Ontario Superior Court Judges' Association ("OSCJA") represents approximately 300 Superior Court judges in the Province of Ontario. This group comprises about one third of all Superior Court trial judges in Canada. We, the President and Directors¹ of the OSCJA, are writing to express our opposition to the salary differential requested by certain appellate court judges.

At the outset, we wish to express our regret in having to write this letter. Nonetheless, in light of the position taken by some of our appellate colleagues and the response it has generated from our members, we feel obliged to file this response.

We also wish to stress that this letter is being written at a particularly critical time. The morale of our members has been in a state of deterioration due to an ever increasing workload, decreasing resources and dissatisfaction with the treatment given to the last Quadrennial Commission's recommendations.

We have reviewed the letters already forwarded to you in opposition to the salary differential by Chief Justices Donald I. Brenner of the British Columbia Supreme Court, Donald G.H. Bowman of the Tax Court of Canada, J. Derek Green of the Supreme Court of Newfoundland and Labrador, Francois Rolland of the Superior Court of Quebec, Joseph P. Kennedy of the Supreme Court of Nova Scotia, R.D.Laing of the Court of Queen's Bench for Saskatchewan, David D. Smith of the Court of Queen's Bench for New Brunswick, Justices Gordon Campbell and James K. Hugessen, and by Justice Duncan Shaw to the previous Quadrennial Commission. For the most part, we do not propose to repeat what others have already written.

We make the following additional submissions.

1. The central submission upon which certain of the appellate judges rely in seeking a salary differential is that it is justified on the basis of hierarchy. While in many organizations, hierarchy is a valid reason for paying higher incomes to those higher in the hierarchy, that is usually a function of the reality that those higher up bear more responsibility for the successful operation of the enterprise (with correspondingly greater stress and longer working hours). The same consideration does not apply to trial and appellate judges. While the roles of trial and appellate judges are different, it cannot be fairly said that overall, one role is more onerous or requiring of any more expertise than the other. Each role has its own onerous aspects, and we submit that equality of pay takes into consideration the reality that the two are "different but equal".

2. While the decisions of panels of appellate court judges are higher in the precedential hierarchy than the decisions of individual trial court judges, this does not in itself justify a differential in salary. Appellate decisions are accorded precedential value because they follow a review by three or more members rather than a decision of just one judge. Arguably a single judge sitting alone at trial who must decide disputed facts and law shoulders a greater individual responsibility than a single appellate judge sitting as part of a larger panel.

3. Our members believe that the role and work of each trial judge are at least as important, onerous and valuable as the role and work of each provincial appellate judge. To use Shaw J.'s words: "The brunt of responsibility for the vast majority of major cases in Canada is shouldered by federally appointed trial judges." Most decisions of trial judges are not appealed. We disagree that the courts of appeal are effectively the court of last resort. On sheer numbers, we are.

4. With the exception of the Divisional Court, our judges hear and decide each case alone. They have the benefit of significantly fewer resources (judicial and administrative) than have their appellate court colleagues. Appellate judges sit in panels of three or five. They benefit from discussion of the pertinent issues with two or four others also charged with the same review. The task of writing reasons is often borne primarily by only one of three or five members of the panel. Obviously trial judges write their reasons, jury charges and rulings alone. By the time of the appeal, the evidence has usually been distilled and organized, a task that at trial falls solely to the trial judge.

5. Appeals are usually civilized, sanitized affairs. Trials are often emotionally supercharged and involve daily personal contact with the aggrieved. Many litigants are angry or disaffected. Increasingly, many are unrepresented by counsel. These circumstances often give rise to security issues and cause stress to all participants including the trial judge.

6. In most regions of Ontario, our judges are required to circuit. They frequently live itinerant lifestyles, away from home and family for extended periods.

7. Both appellate and trial judges are appointed pursuant to section 96 of the Constitution Act, 1867. There is no distinction in the qualifications required for appointment to either court under section 96.

8. The patents and oaths of office of all Superior Court of Justice (Ontario) judges appointed pursuant to section 96 expressly recognize the judges as ex-officio members of the Court of Appeal for Ontario. Similarly, judges appointed to the Court of Appeal for Ontario are appointed as ex-officio judges of the Superior Court of Justice. The Oxford Dictionary defines ex-officio as "by virtue of one's office". In other words, the judicial patents issued to every Ontario judge appointed under section 96 of the Constitution Act, 1867 and the oath taken by each judge upon being sworn into office expressly recognize their dual status. Consequently, as ex-officio members of the Court of Appeal of Ontario, our patents would entitle us to any increase granted to judges of that court and vice versa.

9. In Ontario, appellate work is shared between the Superior Court trial judges and the judges of the Court of Appeal. Individual judges of the Superior Court hear appeals from summary conviction matters in criminal law and family law appeals from the Ontario Court of Justice.

The Divisional Court, an appeal division of the Ontario Superior Court, sits in all major centres of the Province of Ontario in panels of three and hears certain appeals from judges of its own court. It also hears appeals from administrative tribunals in Ontario. The Divisional Court distinguishes Ontario from all other provinces. The existence of the Court clearly demonstrates that the "hierarchy" argument advanced by some of the appellate judges lacks merit given that Ontario Superior Court judges do much of the work of judges of the Courts of Appeal in other provinces.

10. The submission of certain of the appellate court judges with respect to the conclusions of the 2003 Commission on salary differential is incomplete. It omitted the following portion of the Commission's report:

In short, there is no support for the proposition that the current method of compensating all puisne judges equally as they have been, has not been an entirely satisfactory arrangement to the functioning of the courts or the availability of suitable candidates to staff this country's courts of appeal. There is, on the other hand, some evidence that the creation of such a differential would be harmful.

11. The divisiveness that a salary differential would cause is evident from the number and breadth of submissions filed in opposition to the submissions of some of the appellate court judges.

12. Lastly, Canada is a mature country with mature institutions. We do not accept the submission of some of the appellate judges that the Commission should have regard to differentials existing in other jurisdictions. That submission ignores the existence of our unique Canadian constitutional framework.

We submit that any proposal for any salary differential should be rejected by this Commission.

Yours truly,



Sarah E. Pepall
President

SEP/cjn

¹ Justices John Brockenshire, R. J. Haines, Casey Hill, Joan Lax, Sidney Lederman, Robert MacKinnon, John McIsaac, Colin McKinnon, Ian McMillan, Ruth Mesbur, Nancy Mossip, T.P. O'Connor, Helen Pierce, Lynn Ralushny, Albert Roy, Mary Anne Sanderson, David Steinberg, David Stinson and Alan Whitten.