

**TO: THE JUDICIAL COMPENSATION AND BENEFITS
COMMISSION 2003**

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

**Submitted
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INTRODUCTION

This submission for a salary differential between the salary paid to Appeal Court and Trial Court judges is presented by 74¹ judges of the Courts of Appeal in Canada.

In a *Report on Judicial Independence and Accountability in Canada*² 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).

A submission by Appellate judges of six Courts of Appeal was made to the 1999 Quadrennial Judicial Compensation and Benefits Commission requesting a

¹ As of December 1, 2003 there are 142 judges of Courts of Appeal in Canada (Judicom).

² Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, May 1995.

differential in salary for judges of the Courts of Appeal compared to salaries for judges of the Trial Courts.

The 1999 Commission noted that they “regarded many of these arguments [in favour of a salary differential] as compelling”³. 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 ... within the term of our mandate”⁴. 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. Thus, this issue remains unaddressed.

It should be noted that a similar submission was made by judges of the Quebec Court of Appeal to the 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.”⁵

Accordingly, the merits of previous requests for an appropriate salary differential have yet to be dealt with by a Commission. We ask this Commission to recommend a salary differential for all full-time (including supernumerary) judges on Courts of Appeal in Canada.

BACKGROUND INFORMATION

There are many reasons justifying a salary differential between Court of Appeal judges and Trial Court judges. These have been widely recognized in common law jurisdictions where a salary differential for appellate judges is typically the norm.

We do not propose to review each reason in detail since it is our submission that, in the end, there is one fundamental and compelling principle by

³ 1999 Commission Report # 2.5 p. 51.

⁴ Supra p. 52.

⁵ 1995 Commission Report p. 30.

itself warranting 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. That principle is hierarchy.

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 of Canada puisne judges are paid \$41,200 (19.02%) more than other federally appointed puisne judges. Judges on Courts of Appeal are paid the same as federally appointed Trial judges. Federally appointed Trial Court judges are paid more than provincially appointed judges. Provincially appointed judges are paid more than justices of the peace. And Chief Justices and Associate Chief Justices also receive increased remuneration in recognition of their additional and distinct responsibilities.

It would be useful to respond to certain questions raised regarding this issue. The 1999 Quadrennial 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 of Canada, 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.

It has been suggested that because Appeal Court judges sit in panels of three and have the advantage of mutual assistance, they should not receive a pay 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 of Canada judges who typically sit on panels of five, seven or 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.

As for the suggestion that were a salary differential adopted, the collegiality between judges on the Court of Appeal and Trial Court judges might be affected, we respectfully disagree. Salary differentials exist already at every court level but one. There is no reason to believe that a salary differential for Courts of Appeal 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 many of us 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, no day-to-day operational collegiality is required between Trial judges and Court of Appeal judges. On the contrary, a certain institutional separation is necessary between the two court levels in order to preserve the independence, impartiality and integrity of the appeal process.

We also submit that there is no merit in the argument that there is perhaps a constitutional impediment to granting Court of Appeal judges a salary differential. The suggestion that the occasional use by some courts of *ad hoc* trial judges on appeal might be a constitutional bar to a salary differential is, in our view, without foundation. One need merely look to the *Supreme Court Act*⁶ itself to dispel this assertion. Section 30 of that statute provides for the appointment of *ad hoc* judges from Courts of Appeal or even superior Trial Courts to the Supreme Court. Parliament has acknowledged that there is no obstacle to *ad hoc* appointments stemming from the salary differential in remuneration of Supreme Court of Canada judges as compared to other federally appointed judges. Thus, there is, on this basis, no constitutional impediment which would deny Courts of Appeal judges an appropriate salary differential.

If on occasion a Trial Court judge may be called upon to sit on appeal, the phenomenon is limited, *ad hoc* and temporary. Thus, there is no reasonable justification for refusing a salary differential to judges on Courts of Appeal based on a limited exception.. The inequity inherent in using a limited exception to determine a substantive issue of principle and fairness to all judges is self-evident.

It has also been argued that a salary differential might somehow affect the provinces constitutionally because of s. 92(14) of the *Constitution Act 1867*. This view assumes that because legislative responsibility for court structure rests with the provinces, a salary differential could have implications for the provinces. However, the issue is not one of court structure. A request for a salary differential for Courts of Appeal affects only the federal government since it is Parliament alone under the *Constitution Act 1867*, ss. 100 and 101 which bears the

⁶ R.S.C. 1985, c. S-26.

constitutional obligation to provide for salaries and benefits to federally-appointed judges. A salary differential for judges on Courts of Appeal is in no different position constitutionally than a salary differential for Supreme Court of Canada Justices and Chief Justices, both of which have been in existence for years.

In any event, this contention ignores the obvious. A hierarchical court structure already exists throughout Canada. A salary differential would in no way alter that court structure.

JUDICIAL HIERARCHY

We now turn to the key principle we mentioned earlier - judicial hierarchy. The Canadian judiciary is organized in a carefully designed hierarchy. 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 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 the Peace and Commissioners or their equivalents.

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 of Canada and occupy a rank between the highest Court in Canada and the Trial Courts. Courts of Appeal play a significant role in the evolution and interpretation of the law. Indeed, given the limited rights of appeal to the Supreme Court, Courts of Appeal are, for all practical purposes, effectively the courts of last resort for approximately 98% of all cases in this country.

The absence of a salary differential for Courts of Appeal 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 enjoyed a limited mobility between the two divisions of the same Court. Today, separate Courts of Appeal exist in every Province and Territory with the exception of Prince Edward Island and Newfoundland. In addition, Parliament has recently established a Federal Trial Court and a Federal Court of Appeal which recognize judicial hierarchy. 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.

Appointments to the Supreme Court of Canada underscore the significance of judicial hierarchy and its importance in the Canadian justice system. Those appointments are almost always made from provincial Courts of Appeal. Of the last 20 appointments to the Supreme Court (1979-2003), 2 were from private practice while all the other 18 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. Judicial hierarchy should also satisfy the very important institutional purpose of encouraging Trial Court judges, by providing an additional 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.

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 of Canada. 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.

This would also 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. Examples include England, Wales, Scotland, Northern Ireland, the United States and New Zealand.

ENGLAND & WALES, SCOTLAND AND NORTHERN IRELAND

The salaries of puisne judges are the following as at April 1, 2003:

HIGH COURT	COURT OF APPEAL	HOUSE OF LORDS
147,198 £	166,394 £	175,055 £

Appeal Court judges are paid 19,394 £ (13.04%) more than the High Court judges. The Law Lords of the House of Lords are paid 27,857 £ (18.92%) 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 in 2003:

DISTRICT COURT (First Instance)	CIRCUIT COURTS (Courts of Appeal)	SUPREME COURT
(U.S.) \$ 154,700	(U.S.) \$ 164,000	(U.S.) \$ 190,100

Appeal Court judges are paid \$9,300 (6.01%) more than the District Court judges. The judges of the Supreme Court are paid \$35,400 (22.88%) more than those of the District Court.

In the State Courts there is 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 2003

HIGH COURT	COURT OF APPEAL
\$ 264,100	\$ 283,500

Appeal Court judges are paid \$19,400 (7.34 per cent) more than judges of the High Court. The Court of last resort has been the Privy Council but Parliament is now in the process of creating a Supreme Court of New Zealand.

CONCLUSION

We request that this Commission 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 6.7% higher than the salary paid to federally appointed 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 8, 2003

Co-ordinating judge for this submission: Honourable Joseph R. Nuss, J.A. Québec Court of Appeal Court House 1, Notre-Dame Street East, Room 17.33 Montreal, (Quebec) H2Y 1B6
