

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

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

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

This is the final submission by those judges of Courts of Appeal in Canada seeking a differential between the salaries paid to full-time (including supernumerary) judges of Courts of Appeal and salaries paid to federally appointed Trial Court judges (salary differential).

The mandate of the Judicial Compensation and Benefits Commission 2003 (Commission) is to inquire into the adequacy of judges' salaries and benefits taking into account enumerated statutory criteria.

In that regard s.26(1)(1.1) of the *Judges Act* provides:

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) In conducting its inquiry, the Commission shall consider

(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) the role of financial security of the judiciary in ensuring judicial independence;

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.

(1.1) La Commission fait son examen en tenant compte des facteurs suivants:

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;

b) le rôle de la sécurité financière des juges dans la préservation de l'indépendance judiciaire;

(c) the need to attract outstanding candidates to the judiciary; and

c) le besoin de recruter les meilleurs candidats pour la magistrature;

(d) any other objective criteria that the Commission considers relevant.

d) tout autre facteur objectif qu'elle considère pertinent.

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, s.26(1)(1.1)(d) specifically calls on the Commission to consider any other "objective criteria that the Commission considers relevant".

The rationale for a salary differential for judges on Courts of Appeal has been detailed in our original Submission and in the hearings before the Commission. The reasons identified in support of the requested salary differential fall squarely within the scope of the criteria the Commission is to consider in making its recommendations.

The scope and nature of the duties and responsibilities assigned to Courts of Appeal and accordingly the special role that the members of these Courts play in the judicial hierarchy in Canada constitute strong justifications for a salary differential.

It is an established fact that judicial hierarchy is an essential component of the appeal process in Canada. It is Parliament and the Legislatures that have chosen an hierarchical structure for Canada's judicial system. This structure recognizes and reflects the key differences in duties and responsibilities assigned to each Court level as cases move upwards through the appeal process. In other words, judicial hierarchy exists for a reason and constitutes a readily identifiable basis on which to distinguish amongst those various levels. Any suggestion that the Commission should ignore or gloss over the differences in the duties and the increase in responsibilities assigned to

each Court level as one moves up the judicial ladder, is an invitation to dismiss reality.

There can be no doubt that hierarchy is highly relevant to the salaries paid to judges at each Court level. The facts in this regard speak for themselves. Salary differentials are paid at every court level from Justices of the Peace to the Supreme Court of Canada except one - judges of Courts of Appeal. Why do salaries invariably increase as one moves up the judicial ladder? The reason is clear. The salaries paid reflect the comparative significance of the duties and responsibilities assumed by judges at each Court level. As explained in our original Submission, the failure to provide for a salary differential for judges of Courts of Appeal is an anomaly rooted in the history of the Courts in Canada. Today, with separate Courts of Appeal, there is no principled reason to deny a salary differential for judges on Courts of Appeal given the relative importance of the role played by those Courts in the Canadian judicial hierarchy and the consequential duties and responsibilities that accompany it.

In this regard, the government's own argument in support of a salary differential for the Supreme Court of Canada in fact justifies a salary differential for judges of Courts of Appeal. At the Commission hearings, government counsel acknowledged that the workload of judges is not measurable. He stated that the rationale for the salary differential for the Supreme Court was because of "the very particular importance ascribed to that Court within our society."¹

This rationale applies equally to Courts of Appeal. 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 Court². Their role and responsibilities have undergone a significant change in the last two decades. 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 responsibilities this imposes. They are called on to settle

¹ The transcript of hearing on February 4, 2004, p. 330.

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 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 this objective and relevant criterion should be given considerable weight in determining an appropriate salary differential.

In addition, the lack of a salary differential for judges of Courts of Appeal in Canada is at variance with almost all other jurisdictions whose systems can be examined for purposes of comparison. The existence of a salary differential between judges of Trial Courts, Appeal Courts, and Courts of final resort is the rule in England and Wales, Scotland and Northern Ireland, the Federal system in the United States and the system in all the 50 States, as well as in New Zealand. Again, the fact that other democratic countries have seen fit to adopt a salary differential for appellate Courts speaks directly to the relevance of judicial hierarchy in the setting of salaries for judges on Courts of Appeal. From this perspective, the present situation in Canada is an unjustified anomaly.

The lack of a salary differential for judges on Courts of Appeal also runs counter, not

² *Housen v. Nikolaisen*, [2002] S.C.R. 245 at pp. 247-248.

only to the prevailing rule with respect to other court levels in Canada, but also to the practice in other endeavors and spheres of professional activity, in both the public and private sectors. This too constitutes another objective and relevant criterion which the Commission should consider under s.26(1)(1.1)(d).

Another objective and relevant criteria which should be considered under s.26(1)(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 Commissioner's observed:

... I think the majority, the vast majority of the public, of the people of Canada, are absolutely convinced that there is a differential remuneration between Trial Court judges and Appellate Court judges.

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 Commission is also required under s.26(1)(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 critical importance. Courts of Appeal are effectively courts of last resort for most cases in Canada. In addition, members of the Supreme Court are typically chosen from Courts of Appeal. Those who oppose a salary differential for Courts of Appeal ignore the fact that recruitment to Courts of Appeal from amongst trial judges is being hampered by the absence of a salary differential. This point was

made by the Chief Justice of Quebec in oral submissions. He is not the only Chief Justice to have faced this problem.

This is understandable. 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 almost a decade ago by the Friedland Report³ which recommended a salary differential for judges on Courts of Appeal in Canada. That is especially so with the increasing burdens being placed on Courts of Appeal. This reason further compellingly demonstrates the rationale for a salary differential for Courts of Appeal. That differential represents a tangible incentive for those willing to serve as judges of Courts of Appeal. It is also a signal of the recognition for the office and role played by appellate court judges.

Further, whatever may have been the situation in the distant past, the lack of a salary differential is not now, and has not been for a number of years, acceptable or satisfactory. A persuasive indication of the inadequacy of the status quo is the fact that 74 Appeal Court judges 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 significant and relevant that such a high 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.

We also wish to emphasize that simply because 59 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. Not only is the number of judges making this submission for a salary differential

³ Martin L. Friedland, A Place Apart: Judicial Independence and Accountability in Canada, May 1995,

substantial in its own right, that number constitutes a majority of judges of Courts of Appeal in Canada. That majority demonstrates considerable dissatisfaction with the status quo. And while numbers alone are not determinative, they certainly refute the claim of those who assert that the present situation is satisfactory and there is no need to deviate from it.

Nor is there any merit to the notion that a salary differential would be divisive. This allegation has no empirical basis. The majority of judges on Courts of Appeal have come forward publicly to support this submission. Moreover, 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. Indeed, of those trial judges who wrote, one strongly supported a salary differential for judges of Courts of Appeal.

It should be noted that the Government does not invoke this notion as a reason for opposing the submission for a salary differential. And rightly so. Unanimity in anything is not a reasonable expectation. It goes against the fabric of the decision-making process in Canada to suggest that a fair and justified salary differential should be denied just because some disagree and/or raise the spectre of an undefined divisiveness. Such a suggestion is tantamount to advocating that a wrong decision is warranted simply to avoid a so-called 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 commensurate with their duties and responsibilities resulting from their place in the hierarchy within the

judicial system.

There is another point which merits comment. In evaluating the adequacy of salaries for judges of Courts of Appeal, one cannot ignore the difficulties which existed in Canada prior to the implementation of the Quadrennial Commission process. The Scott Commission and other Triennial Commissions spoke eloquently of the need to depoliticize the process for setting judicial salaries and benefits. The reality is that without a Commission process, the ability to bring forward issues affecting a given group was extremely limited. In other words, the status quo exists, not because it was, or is, perceived as satisfactory vis-à-vis the salary differential issue, but because until recently, there was no effective way to change it. Hence, relying on the status quo as a measure of satisfaction would be unfounded for this reason too.

Finally, the fact that a state of affairs exists does not make that state of affairs fair or justified. If the status quo were equated with a satisfactory system, no one could ever seek a legitimate increase in salaries and benefits without facing the argument that everything has been working just fine (for whatever number of years) and there is no reason for a change. To accept this argument would unfairly prejudice those who had performed their duties without complaint.

In England, it was in 1971 that the Top Salary Review Body, after all the years that the High Court and Appeal Court judges had received the same salary, recommended that a differential be paid whereby the High Court judges would receive £21,000 and the Appeal Court judges £22,500 (7,14%). In 1985, they were paid £51,250 and £55,500 (8,29%) respectively ⁴. The lack of a salary differential for Appeal Court judges in Canada for a long period has no probative significance.

We submit that the foregoing reasons, coupled with our earlier submissions, both oral

⁴ The difference in salaries in 2003 is set out in our Submission of December 8, 2003 (pp. 8-9).

and written, establish a sound rationale for, and the appropriateness of, a salary differential for judges on Courts of Appeal. In addition to showing that a salary differential is warranted in order to attract the best of outstanding candidates to the Courts of Appeal, we submit that we have demonstrated with objective relevant criteria⁵, 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 necessary to achieve the legislative objective of an adequate salary for judges of Courts of Appeal.

Accordingly, we urge the Commission to recommend that the requested salary differential be paid to the full-time (including supernumerary) judges of Courts of Appeal in Canada.

Respectfully submitted

March 26, 2004

Co-ordinating judge for this final submission:
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⁵ which satisfies the norm set out in s. 26(1)(1.1)(d).