

January 16, 2004

To: The Judicial Compensation and Benefits Commission

This letter is in response to the submission on behalf of many of the judges of the courts of appeal requesting a salary difference between the courts of appeal and the federally appointed trial courts. That submission is dated December 3, 2003. The co-ordinating judge is Mr. Justice Nuss of the Quebec Court of Appeal.

I respectfully disagree with the Nuss submission's request that there should be a salary differential between the two courts.

The equality of salaries between these two court levels has existed throughout Canadian history. It has worked well and there is no basis to suggest that it will not continue to do so. Put simply, there is no compelling reason why a change should be made.

The dominant reason offered for a change is that our court system is hierarchical. While this is correct, it by no means describes the total picture. A more accurate comparison of these courts is derived from examining the nature of their respective responsibilities.

The work in the trial courts involves both fact finding and the law. The judges hear the witnesses give their testimony, weigh their evidence carefully and, based on the evidence, make the findings of fact. The federally appointed trial courts handle all the jury trials – including murder trials - with all the attendant pressure of doing so. They are responsible for judicial review, the process by which the courts ensure that governments are bound by the rule of law. The brunt of responsibility for the vast majority of major cases in Canada is shouldered by the federally appointed trial judges. These include cases such as the biker trials in Quebec and the Air India trial in British Columbia.

This is not to say that the responsibilities undertaken by the other courts in Canada are not also onerous - they are.

I turn to the courts of appeal. Their main responsibility is as courts of error. If trial court judges err, courts of appeal may make whatever orders are necessary to rectify the errors. Courts of appeal also have a responsibility to interpret and develop the law. While this is also done in the trial courts, this is more central to the role of appellate courts. On occasion, appellate courts will review findings of fact made in the trial courts. However, this is a relatively rare occurrence because of the recognition that it is the trial court judges who have had the opportunity to hear the witnesses, weigh their evidence carefully and make the findings of fact accordingly.

What emerges from this comparison is that trial courts and courts of appeal have quite different types of work and responsibilities. It is not simply a matter of hierarchy. The differences are far more significant than that. I suggest, however, that the respective levels of work and responsibility are roughly equal.

The Nuss submission states that for all practical purposes the courts of appeal are effectively courts of last resort for approximately 98% of all cases in this country. With respect, I must disagree with the impression that this assertion creates. For most litigants the reality is that the trial courts are their courts of last resort. This is so because most trial court decisions end the matter in dispute and are never appealed.

The Nuss report suggests an important institutional purpose would be served by providing "additional incentive" to encourage trial court judges "to move up the judicial ladder". With respect, there is no evidence to indicate that. I suggest that a salary differential will not make any difference to the availability or quality of trial court judges prepared to accept appointments to courts of appeal.

The Nuss submission points to the salary differential enjoyed by the judges at the Supreme Court of Canada. I suggest that nothing significant can be drawn from this. It is well recognized that the job of a judge at the Supreme Court of Canada entails levels of workload and responsibility well beyond those ordinarily encountered in the trial courts and in the courts of appeal.

The Nuss submission points out that there are salary differentials between trial courts and courts of appeal in many other jurisdictions. The fact that we operate differently does not mean that our system is flawed.

This brings me back to my essential point. We have, in Canada, a system that has worked well throughout our history. There is no compelling evidence that it needs to be changed.

Respectfully submitted,

The Honourable Justice Duncan W. Shaw
Supreme Court of British Columbia