

**SUBMISSION FOR A SALARY DIFFERENTIAL BETWEEN  
APPELLATE JUDGES AND TRIAL JUDGES**

**presented by**

**The appellate judges of six provinces (Alberta, Saskatchewan, Manitoba,  
Ontario, Quebec and New Brunswick)**

**to**

**The Judicial Compensation and Benefits Commission**

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BETWEEN APPEAL JUDGES AND TRIAL JUDGES**

The purpose of this Submission is to request that the Quadrennial Commission recommend a salary differential for appellate court judges.

A number of reasons exist in support of this salary differential including the nature of the work and degree of responsibility assumed at the appellate level and the recognition of the importance of hierarchy in the court system. The absence of a differential in Canada is an historical anachronism arising from an era in history predating the creation of separate courts of appeal.

Martin L. Friedland, in his report for the Canadian Judicial Council entitled "A Place Apart: Judicial Independence and Accountability in Canada", recognized that such a differential was justified and appropriate (at 54):

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.

It is time to acknowledge the reality of the current court structure in this country and bring Canada into line with other common law countries.

## IMPORTANCE OF HIERARCHY

The Canadian judicial system is organised in a hierarchy consisting of at least five levels of jurisdiction:

- (1) The Supreme Court of Canada;
- (2) The Appeal Court in each province and Territory and the appellate division of the Federal Court.
- (3) The Trial Courts in each province and the trial division of the Federal Court and the Tax Court.
- (4) Provincial Court judges and masters in each Province and Territory;
- (5) Justices of the peace and commissioners or their equivalents.

The remuneration paid to judges of the different levels of jurisdiction increases within the judicial hierarchy, with one notable exception. No increased salary is paid to judges in the second category, namely the appellate courts.

In addition, the Chief Justices and their Associates receive additional remuneration because of their added responsibilities. In short, but for the lack of an appellate court differential, the principle of a salary differential exists in Canada within the judicial system.

As noted earlier, the absence of a salary differential between appellate and trial court judges can be explained by the fact that the creation of separate courts of appeal has been a relatively recent occurrence in Canadian judicial history. Prior to this, appeals were heard by judges sitting on appeal as an appellate division of the trial court.

With one exception, that situation is now history. Distinct courts of appeal have now been set up in each Province and Territory. The one exception is the Federal Court and in this case, the government of Canada has recently proposed legislation to create a separate Federal Court of Appeal.

While trial judges may occasionally sit in appeal, the phenomena is exceptional, ad hoc and temporary. Compensation for a group – the appellate judges – should be based on what they do full time and not on what a limited number of trial judges in a limited number of provinces do for a limited period of time. In other words, there is no justification for a status quo based on an exception rather than the general rule, penalizing, as it would, appellate judges who sit only in appeal.

Nor should the need to maintain collegiality be used to justify the status quo. Collegiality is important amongst all court levels and subsists in spite of present salary differentials at other court levels. In any event, there will always

be a certain institutional distance between courts. In fact, this is required to preserve the independence and integrity of the appeal process.

## THE NATURE OF THE WORK

The importance of the trial judges and the inherent difficulty of their task are so universally acknowledged that a demonstration of these issues is not required. They are the ones who hear the evidence and make the findings of fact. They are also the first ones to be confronted with new and controversial questions of law. They work alone and not always in ideal conditions.

However, the responsibilities and obligations imposed on appellate courts in Canada are enormous. First, the role played by appellate courts in the evolution and interpretation of the law is a profound one. This is particularly challenging and demanding in the Charter era when questions about the legitimacy of the judicial function are frequently a topic of public debate. Second, provincial and territorial appellate courts are the courts of last resort for the overwhelming majority of cases. This reality is reflected in the fact that more than 98% of the cases in some provinces never reach the Supreme Court of Canada.

There is also another dimension to the work of judges on appellate court. Predictably and understandably, the cases dealt with are proportionately generally more complex since those that could have been settled or resolved at lower court levels have been before reaching the appellate level. Nor can one ignore the fact that provincial appellate courts are expected to deal with these complex caseloads with comparatively little support staff.

Appellate decision-making is comparable to decision-making at the Supreme Court of Canada level. In both instances, judges do not have the luxury of dealing with one case, deciding it and moving on. Instead, outstanding judgments are the rule and this is unavoidable at the appellate level given the pattern, complexity and flow of appellate caseloads.

Viewed from this perspective, a salary differential between appellate and trial courts is as justified as is the differential between appellate courts and the Supreme Court of Canada.

#### OTHER JURISDICTIONS

In virtually all common law countries, a salary differential exists between the appellate courts and the trial courts. This norm is of general application and is the rule in Great Britain, the U.S., Australia, New Zealand,

Scotland, Ireland and South Africa. In the U.S., this is the case not only at the Federal court level but also in all 50 state courts.

For example:

Great Britain (1997)	High Court Judges were paid	£ 112,011
	Lords of Appeal in Ordinary were paid	£ 131,034
U.S.A. (1999) Federal Judges	Court of Appeals (circuit)	\$150,000.00 U.S.
	Court of Districts	\$141,300.00 U.S.

**FINANCIAL IMPLICATIONS**

Since we recommend that appellate judges receive a salary equivalent to that which is ½ way between the salary of a Supreme Court puisne judge and the salary of a federally-appointed trial judge, the cost implications of implementing this recommendation would not be excessive given the relatively limited number of appellate judges.

**CONCLUSION**

For these reasons, we ask that the Quadrennial Commission make the following recommendation:

The salaries for federally-appointed appellate court judges shall be fixed at that amount which is the mid point between the salaries of puisne judges of the trial courts and the salaries of the puisne judges of the Supreme Court of Canada. The salaries of the chief justices of the appellate courts shall continue to be set at an amount which represents the same approximate percentage by which the salaries of those chief justices now exceed the judges of their courts, that is about 10%.