The Honourable
Justice Gordon L. Campbell

Supreme Court of
Prince Edward Island

Sir Louis Henry Davies Law Courts
42 Water Street
Charlottetown, PE C1A 1A4

April 29, 2021

By email

Ms. Martine Turcotte, Chair
Ms. Margaret Bloodworth, Commissioner
Mr. Peter Griffin, Commissioner

Re: 2020 Judicial Compensation and Benefits Commission
Request for Salary Differential Between Trial and Appellate Court Judges

Dear Madam Chair:
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Dear Mr. Commissioner:

I make this submission in opposition to the request submitted by the Honourable Jacques Chamberland, J.A., of the Québec Court of Appeal, for the Quadrennial Commission to recommend a salary differential between superior court judges depending upon whether they sit as members of a trial court or a court of appeal.

Justice Chamberland, for whom I have great respect, reviewed the treatment of the issue by past commissions, starting with the 2003 Commission and continuing through to the last Commission report in 2016. He implicitly relies on prior submissions, including the submission coordinated by the Honourable Joseph R. Nuss, J.A., then of the Québec Court of Appeal (the "Nuss" submission), to the 2007 Commission. In 2007, I submitted correspondence in opposition to the arguments presented in the Nuss submission. I am now submitting an updated version of my previous correspondence. The issue at hand has not changed in any fundamental way.

I am a puisne judge of the Supreme Court of Prince Edward Island. I am making this submission on my own behalf and not as a representative of this court or of any organization or group of judges to which I belong. Many of my colleagues across Canada tell me they strongly oppose any such salary differential, but, knowing the request is being opposed, feel it is not necessary to enter the fray simply to repeat the same arguments.

General Arguments

The main argument previously presented in favour of a salary differential is simply that the appellate courts are above the trial courts in the court hierarchy. The Nuss submission claimed

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the principle of hierarchy is one upon which society remunerates individuals "for the work they do". However, the Nuss submission then specifically declares that it would be improper to compare the work that is done in the two levels of court. How then can one know "the work they do"? It is my submission that it is fallacious to attempt to use the hierarchy of the courts to justify salary differentials for individual judges working within those courts.

It is not the work of any **individual judge** on a court of appeal that denotes that courts place within the hierarchy of courts. It is as a result of those judges forming panels of three or more judges that decisions of appeal courts rank above decisions of trial courts. Court of appeal judges are not paid collectively for their work. They are paid as three individual judges. Despite the fact their decisions are combined to dispose of a matter, **each individual judge** is charged with the responsibility, as is a lone trial judge, to hear a matter and make their own determination of the result.

Comparisons to Other Court Levels

Prior submissions point to the salary levels for Supreme Court of Canada judges and for judges of Canada's provincial courts as evidence of a judicial hierarchy, and, for that reason, suggest appeal court judges should receive a higher salary than judges of trial courts. What the submission fails to recognize is that there are significant constitutional, jurisdictional, and historical differences between superior court judges appointed pursuant to section 96 of the Canadian Constitution, and judges either of the Supreme Court of Canada or of provincial courts.

a) Supreme Court of Canada

The Supreme Court of Canada was created pursuant to section 101 of the Canadian Constitution and is unique within the country. That court was set apart from other "superior" courts from the time this country was born. That court exercises full and final jurisdiction on all matters, on all types of laws, in all provinces and territories in the country. No other court serves that role.

Some other courts, such as the Federal Court, Federal Court of Appeal, and Tax Court, have Canada-wide jurisdiction. However, they are statutory courts, and their jurisdiction is narrow and relates only to certain specific areas of law. Still other courts, i.e., courts of appeal and trial courts, both being "Section 96" courts, have broad jurisdiction, but that jurisdiction is limited to only one province, (subject to exceptions for those courts which also serve as the court of appeal for a territory). Historically, the creation, structure, and jurisdiction of the Supreme Court of Canada have been different than that of the provincial superior courts. Historically, and logically, the remuneration paid to judges of the Supreme Court of Canada has been different as well.

b) Provincial Courts

Provincial and territorial courts are created pursuant to specific legislation in each province or territory. Their jurisdiction varies greatly across the country, ranging from those which are strictly criminal courts addressing most (but not all) criminal issues to those covering criminal

and family jurisdiction, and others covering criminal, family, and some limited civil jurisdiction. The qualifications to become a provincial court judge differ by province and are different than those required to become a superior court judge in a province. The creation and jurisdiction of provincial courts has always been significantly different than that of superior courts. Salaries, which are determined separately by each province and which are paid by each province, vary across the country as well. While there is a logical basis for the difference in salaries between superior courts and provincial courts in each province, I do note that provincial court judges' salaries have generally grown at a much faster rate over the past two decades than those of federally paid superior court judges. That may be one of the factors affecting the superior courts' ability to attract top candidates in certain areas.

The Nuss submission fails to recognize that all Section 96 judges share the common fact they are appointed pursuant to the same constitutional provision and that we share, and always have shared, the same jurisdiction, each limited to one province, and the same obligation to render decisions independently. It is no accident that all judges of all provincial superior courts (whether trial or appeal) receive the same remuneration. There is a logical basis for that. Additional sums paid to Chief Justices relate to administrative duties and are not relevant to the issue at hand.

Workload Differential

As mentioned, the Nuss submission in support of a salary differential took pains to express that there ought not to be any comparison of work done by different court levels when considering the issue of salary differential. It stated it would be "unseemly" to do so. The submission expressed that "no such justification has ever been required in support of existing salary differentials amongst court levels in Canada," and the authors insist that "members of the courts of appeal should not be treated any differently". Ironically, the rest of their submission expressly seeks different treatment for superior court judges sitting on appeal than for superior courts sitting at trial.

As expressed above, there is a foundational difference between the establishment of the Supreme Court of Canada and the provincial courts in each province which explains and justifies the compensation difference for those courts. There is no such foundational difference between superior court judges sitting at trial verses at appeal.

After declaring there should be no comparison of workplace demands, they proceed to provide only comparisons they believe may reflect favourably upon them. They make a comparison of the relative difficulty of sitting in panels of three, with mutual assistance, as opposed to sitting alone. They submit that, like trial judges, most of their work is done in preparing for and writing judgments and they have the additional "often demanding and stressful" factor of working with others in considering different perspectives as they attempt to resolve contentious or complex issues. Frankly, most people would consider it to be a benefit that you can work closely with a colleague. A balanced comparison would have reflected the fact, for example, that in most cases, only one member of a three-member panel actually writes the decision. In a minority of

cases another judge may also write either a dissenting or concurring decision. On an extremely rare occasion, all three judges on the panel may write their own decisions. One of the benefits of having additional panel members with whom to consult and converse is that when consensus is reached, two of the panel members are relieved of the principal responsibility of writing a decision. A trial judge has no such luxury.

Their comparison also refers only to preparation before a hearing and writing a decision after hearing. They fail to refer to any comparison of workplace demands that occur while judges are actually hearing cases. Trial judges are constantly called upon to make significant in-trial decisions with very limited time available for research and reflection. They must be alert to situations that arise in the presentation of evidence and have full and sole responsibility for ensuring a fair trial. Further, they always preside over their own court, very often in the face of one or more self-represented parties on complex legal matters. Jury trials can be particularly demanding. Undoubtedly, from time to time, appeal court judges face demands not normally presented to trial court judges, but I would submit the demands on appeal court judges do not exceed those placed on trial court judges.

Trial judges handle many lengthy, complex, sometimes horrific trials which may be incredibly stressful. By the time such a matter reaches the appeal court it will have been distilled, sanitized, carefully categorized, packaged, and scheduled to fit into a "civilized" work week before a panel of three judges, only one of whom will generally write a decision. I am not making a proposal that appeal court judges receive only one-third of the remuneration of a trial judge, but in my respectful opinion, there is more of a logical basis for such a proposal than there is for any proposed differential in favour of judges of appeal courts.

Constitutional impediments

The Nuss submission addresses the issue of all trial judges being *ex officio* members of their respective appeal courts and the fact that trial judges occasionally sit as members of appeal court panels. They insist this fact should not be used as a constitutional basis for declining to create a differential. Unfortunately, they do not address this matter in a principled fashion. They fail to acknowledge that **upon appointment** all trial judges are *ex officio* members of the court of appeal and, in most provinces, vice versa. Their submission refers to Section 30 of the ***Supreme Court Act*** where legislative authority is given for the Supreme Court of Canada, on an *ad hoc* basis, to use the services of a member of any provincial superior court, whether trial or appeal level. That statutory provision relates to very specific and limited circumstances. Unlike the *ex officio* status of superior court judges in each province, a superior court judge so engaged does not become a permanent member, or a permanent *ex officio* member, of the Supreme Court of Canada. It is truly *ad hoc*, as opposed to being inherent in the status of the provincial superior court judge.

Commission's jurisdiction

The Nuss submission maintains the Quadrennial Commission has the jurisdiction to institute a differential in salaries between those superior court judges sitting on appeal courts and those

sitting on trial courts. I contend the Commission has no such jurisdiction, and it cannot be granted jurisdiction on the say-so of any number of individuals, or of any group or Association, save and except through Parliament.

The Commission in 2003 addressed the issue and concluded, properly so in my view, that it does not have the jurisdiction to "redesign the court system in Canada" which they would be doing by establishing an appellate differential.

The Nuss submission disagreed. Yet at page 13 of their submission, you will see they largely take their support from a quote from a 1978 report of a Review Body of the United Kingdom adopting the recommendation for a salary differential for appeal court judges in Northern Ireland and Scotland. The very reason the Review Body adopted a differential was "in order to **create** a clear 'promotion' step from the High Court to the Court of Appeal".

The 2003 Commission found any such "redesign" would raise constitutional issues regarding the administration of justice and would require broad consultation. That Commission recognized such a decision would be for the affected governments to make. Such activities are not the function of a Quadrennial Commission.

Since the 2003 Commission report, the Block Commission recommended a salary differential, as did the Levitt Commission. However, in 2016, the Rémillard Commission concluded appellate judges were not entitled to any such salary differential. Nothing has changed in the mandate given to this Commission. The Commission should view the request by some appellate judges as an unwelcome diversion from the serious task it has been requested to perform.

In the event this Commission finds that it does have jurisdiction to address the question of a salary differential, then I urge the Commission to refrain from recommending such a differential in recognition of the fact there is no logical or historical basis in Canada for treating individual superior court judges differently from each other. Further, I submit that through the Quadrennial Commission process, Parliament is well aware of the request presented by judges sitting on appeal courts, and Parliament is the more appropriate body to determine whether a new distinction should be made amongst superior court judges.

Hierarchy

The submission describes the hierarchy of courts as the key principle upon which the appellate judges rely for a salary differential. It is readily acknowledged that, in Canada and elsewhere, there is a hierarchy of courts issuing decisions with respectively greater precedential value. This is a fundamental fact. However, it is not a fundamental or self-evident fact that there is (as was claimed in the 2003 submission) greater responsibility imposed on the **individual** judge of a court of appeal as a result of the precedential value given to the decision of a **panel** of judges presiding over the very same jurisdictional issues. The Supreme Court of Canada and each provincial court are distinguished by virtue of their significant jurisdictional differences. That decisions of appeal courts are binding on trial courts is not disputed. It is acknowledged within

the court system and by the general public. However, if the precedential value of decisions is truly tied to the worth (salary) of an individual judge, then what is to become of one who dissents on an appeal? The decision by that judge has not become part of the binding precedent affecting trial court judges. Has that dissenting judge failed to exercise his or her additional responsibility? Or, in other circumstances, would there be a need for special compensation for trial court judges who sit on appeal from time to time?

The fallacy in the argument of the appellate judges is that it is the court's level and function and not that of the individual judge that constitutes a hierarchical structure and can be differentiated. Each individual judge of each court of appeal is under the very same obligation and responsibility to fairly, impartially and independently decide each case as is each judge of each superior trial court exercising the very same jurisdiction. It is contrary to the historical, constitutional, and jurisdictional place of trial court judges within Canada's justice system to suggest that, individually, they (not their courts) ought to be ranked or rated as somehow inferior to their colleagues of the superior court who happen to sit on the appeal court. Trial court judges are appointed pursuant to the same authority as appeal court judges, have the same qualifications, exercise the same jurisdiction, have workloads that are at least equal to appellate court workloads, and have a very significant impact on the lives of those involved in the justice system.

Those seeking augmented salaries speak of the limited number of cases that go beyond the court of appeal level to the Supreme Court of Canada, thereby imposing even greater responsibility on the courts of appeal as they are, in their words, in practical terms, the courts of last resort for litigants. However, in practical terms, the vast majority of cases that proceed through the trial process never proceed through the appeal process. Trial courts are the first to interpret and apply legislation. Even when matters do get appealed, a majority of such cases are upheld by the appeal court. It is not appropriate to discount the substantial law-making role trial courts have in this country and the impact their decisions have on its citizens. In fact, the trial courts are the court of last resort for most litigants.

As well, their submission is out of touch with the modern reality that trial courts expend tremendous effort at the pretrial stage on legal motions, dispute resolution efforts, and oral decisions that effectively dispose with finality of most civil proceedings. Only a very limited number of these matters surface in courts of appeal.

Historical anachronism

Submissions seeking a differential have included information with respect to court structures and salary differentials that are in place in selected other common law or democratic jurisdictions. They conclude that this demonstrates that Canada's system is an anomaly, as if it was somehow created by accident or oversight.

The modern-day United Kingdom traces its roots directly back to the year 1066, to the time of William the Conqueror. There was no "historical" salary differential in the U.K. It was only

introduced in 1974. Surely our appreciation of history does not start in 1974. They also rely on the fact the United States, another democracy, has a salary differential for appellate versus trial judges. Should we also appoint judges to the Supreme Court of Canada for life, or elect our trial judges? To refer to the lack of a salary differential in Canada as an historical anachronism, or to conclude Canada is out-of-step with other democracies, is to ignore Canada's long history and tradition of setting its own course rather than following in lockstep with either the U.S. or the U.K. The fact others do something is no justification for us to follow suit.

There are many areas of constitutional structure, governance, and of individual laws in which Canada developed its own unique systems or processes rather than mimicking the United States, the United Kingdom, or other jurisdictions. The Canadian structure is reasoned, based upon sound principles, and has survived the test of time. There is nothing "compelling" in the copycat argument put forth in favour of a salary differential.

Numbers in Support

The submission for a differential naturally has the support of a substantial number of appellate court judges across the country. This should come as no surprise. Those promoting the salary differential have very actively pursued the support of their fellow appeal court judges since the issue was first raised with a prior Commission. It is hard to imagine that you would find any group of people who would not be in favor of a salary increase for themselves, especially after a concerted campaign to obtain their support for the suggestion. Surely the number of potential beneficiaries expressing support for a salary differential cannot seriously be considered as a weighty matter.

As has always been the case, the Canadian Superior Courts Judges Association (CSCJA) has taken "no position" with respect to this issue. The CSCJA represents the vast majority of both appeal court and trial court judges in Canada. I can say without hesitation, based on my personal interaction with trial court judges across this country, the vast majority of them are opposed to any such salary differential. It is an indication of the degree of divisiveness of the issue that the CSCJA has maintained its neutral stance.

I urge this Commission to reject any notion of a salary differential amongst provincial superior court judges. Constitutional and jurisdictional principles governed the establishment and structure of our court system in Canada. History has proven its worth. There are no sound principles upon which the proposed change can be based.

Yours truly,

Gordon L. Campbell, J.