January 25, 2008

Ms. Sheila Block, Chairperson
Judicial Compensation and Benefits Commission
99 Metcalfe Street,
Ottawa, Ontario
K1A 1E3

Dear Ms. Block,

Re: Proposed Salary Differential Between Trial and Appellate Court Judges

I have had the opportunity to review the December 10, 2007 submission of some appellate court judges seeking a salary differential. While I find the submission is essentially the same as the previous one of December 8, 2003, upon which I have commented extensively in my own submission of December 11, 2007, there are a few additional points I would like to address.

The submission coordinated by the Honourable Joseph R. Nuss, J.A. maintains that 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. Any such "redesign" would raise constitutional issues regarding the administration of justice and would require broad consultation. The past Commission recognized such a decision would be for the affected governments to make. Nothing has changed in the mandate given to this Commission, and it should view the request by some appellate judges as an unwelcome diversion from the serious task it has been requested to perform.

I refer the Commission to the 2004 Reply Submission of the Government of Canada, paragraphs 56 to 64, a copy of which is attached for easy reference. (At the time of writing this, I have not had the benefit of reading the 2008 Reply Submission of the Government of Canada.) I agree generally with the comments of the Government on this point, and in particular with the

submission of the Government, at paragraph 56, that "Such a differential is neither necessary nor justified in light of the criteria prescribed by section 26(1.1) of the Judges Act. There are no objective indicators to suggest that such a differential is necessary either to secure the independence of an appellate judge or to attract outstanding candidates for appointments to courts of appeal."

At paragraph 64, they make the significant point that "In terms of federally appointed judges, there are at present only two salary differentials sanctioned by the legislation – between puisne judges and chief justices, and between justices of the Supreme Court of Canada and justices of other superior courts."

The Nuss submission, in effect, argues that the Commission would not be creating a distinction and there would be no "redesigning of the court system in Canada" by instituting a salary differential. Yet if you look to 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" **[Emphasis added]**. Such activities are not the function of this Commission.

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 instituting such a differential in recognition of the fact that, if such an action was to be taken, there is a more appropriate forum, namely Parliament, that is better positioned to consider any such change that affects the structure and organization of the court system in Canada.

The appeal judges who support the Nuss submission claim that the failure to have a salary differential is "an historical anacroynism". Yet again, quoting from page 11 of their own submission, they state, "**Until 1974** there was no differential in the salaries paid to High Court Judges and Lord Justices of Appeal in the United Kingdom (U.K.)." **[Emphasis Added]** The modern-day United Kingdom traces its roots directly back to the year 1066 to the time of William the Conqueror. Surely our appreciation of history does not start at 1974. Obviously, the structure and development of the United Kingdom's courts changed over time, as has ours, but there was never any such differential in place in 1867 when Canada became an independent nation, or in 1931 at the time of the Statute of Westminster, or in 1949 when the Privy Council ceased to have jurisdiction in Canada in favor of the Supreme Court of Canada. As I expressed in my earlier submission, Canada has freely and independently developed many principles, practices and policies that differ from those of our American, British, or other Commonwealth cousins. Contrary to the Nuss submission, there is nothing "compelling" in the "me too, me too" argument put forth in favor of a salary differential.

Finally, I wish to make it clear that I fully support the submission of the Canadian Superior Court Judges Association whereby it seeks a salary increase on behalf of **all** superior court judges in Canada.

Yours truly,

Gordon L. Campbell

Reply Submission of the Government of Canada
to
The Judicial Compensation and Benefits Commission 2004

V. APPELLATE JUDGES' SUBMISSION - SALARY DIFFERENTIAL FOR APPELLATE JUDGES

56. Those appellate judges who support the submission, i.e., 74 out of 142 appellate judges, have proposed that court of appeal judges receive a higher salary than trial judges. The position of the Government with respect to the proposal for establishment of a separate higher level of pay for appellate judges remains as stated before the Drouin Commission. Such a differential is neither necessary nor justified in light of the criteria prescribed by section 26(1.1) of the *Judges Act*. There are no objective indicators to suggest that such a differential is necessary either to secure the independence of an appellate judge or to attract outstanding candidates for appointments to courts of appeal.

57. The judges' arguments themselves demonstrate the change that such a differential might engender in the judicial culture and context. It is by no means generally accepted that the work of appellate judges is either more significant or more demanding than that of their colleagues on the trial benches. It is well understood that the skills and strengths of a good trial judge may very well differ from those of an appellate judge. Some judges are better suited to the important functions of fact-finding and assessing credibility of witnesses than to the more academic and collegial functions of an appeal court judge. This does not, however, mean that one function is more or less important than the other. In fact, many of the most important judicial skills must be exercised by both types of judges. It is worth noting that in some jurisdictions, trial judges are regularly called upon to perform appellate functions, either as *ex officio* members of their Court of Appeal, as in Alberta, or as members of an intermediate appeal body, such as the Divisional Court in Ontario.

58. Nor can it be said that the exigencies and stresses of individual decision-making at the trial level, based on complex and difficult fact situations, are less taxing than the demands faced by appellate judges. Although trial and appellate judges may differ in responsibilities in a number of ways, they perform functions of equal value and which are equally onerous.

59. The appellate judges' proposal is premised on the assumption that hierarchy alone is sufficient reason to establish the differential. The argument relies on the importance of the appeal process to public confidence and to the principles of *stare decisis* as justification for additional remuneration. It also suggests that such additional remuneration would motivate trial judges to seek elevation to higher office.

60. The Commission should not recommend a salary differential in the absence of objective evidence that appellate judicial salaries are inadequate. At a minimum, there should be some clear indicators to suggest that the work of appellate judges is more onerous or of greater value than that of a trial judge, based on a careful assessment of the responsibilities of both appellate and trial judges.

61. The appellate judges' submission relies primarily on an argument that hierarchy should determine compensation. In support, it refers to hierarchy as being a common justification for salary differentials in the public and private sectors. However, public and private sector workplaces - and the processes to establish remuneration in these workplaces - are fundamentally different from the judicial context.

62. Differential salaries within an organization are typically driven by market forces, such as the demand for labour in particular job classifications and the supply of labour available to meet this demand. As a result, it is not always the case that salaries rise as one ascends the hierarchy in an organization. However, to the extent that this does happen, it happens because higher salaries are required to recruit and retain employees with the required qualifications for higher-level positions.

63. The appellate judges' submission also relies on salary differences between provincial/territorial court judges and federally appointed judges, and between justices of the peace and provincial/territorial court judges. It would be inappropriate, however, to base a recommendation upon the existence of these differentials, as the salaries for these judges and judicial officers are neither established nor paid for by the federal government and cannot be seen as a part of an accepted hierarchy of federally appointed judges.

64. In terms of federally appointed judges, there are at present only two salary differentials sanctioned by the legislation - between *puisne* judges and chief justices, and between justices of the Supreme Court of Canada and justices of other superior courts. The salary differential is established for Chief Justices in recognition of the judicial management and representative functions they carry out in respect of their courts, in addition to their judging duties. Justices of the Supreme Court of Canada are paid a higher salary in recognition of the particular exigencies of judicial service on that Court, including workload.