Appendix 9

Letters from Individuals Who Replied to the Submission on a Salary Differential for Puisne Judges in the Appeal Courts of Canada

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THE HONOURABLE
CONSTANCE R. GLUBE

CHIEF JUSTICE OF NOVA SCOTIA

THE LAW COURTS
P.O. BOX 2314 HALIFAX,
NOVA SCOTIA
B3J 3C8

January 6, 2004

Fax 613-947-4442

Mr. Roderick A. McLennan, Chairperson
Judicial Compensation and Benefits Commission
99 Metcalfe St.
Ottawa, Ont. K1A 1E3

Dear Commissioners:

Recent press reports may have left the impression that all Canadian appellate judges or Courts of Appeal are in favour of a salary differential between federally appointed trial judges and appellate judges. Such a view would be erroneous.

I am writing on behalf of all the members of the Nova Scotia Court of Appeal. We are unanimous in our opposition to a differential in salary between judges of superior trial courts and courts of appeal. We believe that a differential would be divisive and is unwarranted.

Yours very truly

Constance R. Glube

TELEPHONE: (902) 424-4900 FAX: (902) 424-0646

THE HONOURABLE
CONSTANCE R. GLUBE

CHIEF JUSTICE OF NOVA SCOTIA

THE LAW COURTS
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January 22, 2004

Fax 613-947-4442

Mr. Roderick A. McLennan, Chairperson
Judicial Compensation and Benefits Commission
99 Metcalfe St.
Ottawa, Ont. K1A 1E3

Dear Mr. McLennan:

Further to your letter of January 13, 2004, I confirm that all but one of the members of the Nova Scotia Court of Appeal (8 + 2 supernumerary judges) wish to put on record that they are opposed to the requests made in Mr. Justice Nuss' brief.

Yours very truly

Constance R. Glube

The Honorable Madam Justice
Bonnie L. Rawlins

COURT OF QUEEN'S BENCH OF ALBERTA

The Court House
811 4th Street S. W.
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January 22, 2004

Judicial Compensation and Benefits Commission
9th Floor
99 Metcalfe Street
OTTAWA, Ontario
K!A 1E3 (Via email:jruest@quadcom.gc.ca)

Dear Commission:

I am a member of the Alberta Court of Queen's Bench. I would ordinarily not file a separate submission with the Quadrennial Commission; however, given the import of certain submissions you have received on judicial benefits, the salary differential sought by members of Courts of Appeal across Canada, and the recent Provincial Court Judges Commission in Alberta, I feel compelled to do so. My position can be summed up quite simply: hierarchy counts for all court levels and it should be reflected in the salary paid to judges at each court level.

The judicial system is based on hierarchy, as is every corporation, government and organization. Hierarchy exists for a reason; it is a direct reflection of the fact that the duties and responsibilities imposed on members of a court change as a case proceeds up the hierarchical ladder. So too do the consequences of the decision made by each Court. Traditionally, and properly, with the anomaly of Courts of Appeal, a corresponding pay differential has always existed amongst various court levels. It is beyond dispute that such a differential is justified by the nature of the duties and responsibilities assumed at each level by those appointed to those positions. No one would seriously suggest, for example, that a Traffic Commissioner does the same job as a justice of the Supreme Court of Canada, or should receive the same salary.

Without in any way diminishing the importance and the value of the work done by intake courts in Canada, the reality is that a day in docket court is not the same as a day presiding over a multi-party criminal jury trail or a complex oil and gas dispute with hundreds of documents, both of which trials can last for months. The issue is not about the training or intelligence of individual judges of any Court. It is about the nature of the work undertaken at the various court levels. This hold true with respect to each step up the judicial ladder from justice of the peace, to traffic commissioner, Provincial Court, Superior Trial Court, Court of Appeal, and finally, Supreme Court of Canada. A justice of the peace may be as intelligent as a judge of the highest court, but the duties and responsibilities imposed on each differ significantly as do the consequences of the decisions made.

Consequently, s.96 trial judges, to whom Parliament and Legislatures have assigned duties which may be fairly characterized as more complex than those assigned to provincial courts, and who are constituted as appellate courts for most of the decisions of those provincial courts, should receive a salary commensurate with those responsibilities and that appellate jurisdiction. Historically, that differential has been recognized as being at least 20% more than the salary paid to judges of Provincial Courts and in any event, an amount equal to the mid point of the highest level of federal Deputy Ministers. There is no valid reason to resile from these parameters. For Alberta, it is my understanding that the recent Provincial Court Judges Commission has recommended the retention of a differential between the salary of the Provincial Court and s. 96 Courts. The salary recommended for Provincial Court Judges is $210,000 as of April 1, 2004 and $220,000 as of April 1, 2005. I am assuming that you have already been provided with the information on the current salary and benefits package received by the majority of federal Deputy Ministers.

For the same reasons, I fully support the submission that judges of Courts of Appeal should receive an increased salary to reflect the appellate duties assigned to them. These duties closely approximate in nature and substance the type of work undertaken by the Supreme Court of Canada. Indeed, for more than 95% of cases heard and decided in each Province in Canada, Courts of Appeal are effectively the courts of last resort. I am sure that there are many who would be surprised to learn that judges on Courts of Appeal do not presently receive an increased salary. I urge this Commission to rectify this inequity. As you may be aware, in Alberta, trial judges occasionally sit ad hoc on the Court of Appeal from time to time, but this is not a reason to deny the principle of a salary differential.

Recognizing judicial hierarchy and compensating those holding positions in accordance with their place in that hierarchy will not negatively affect collegiality amongst judges at any court levels. Surely, fair-minded judges at all court levels would acknowledge that the nature of the work done by those in judicial positions who can overrule their decisions warrants an appropriate salary differential. Such a differential would encourage all judges to strive for, and consider, appointment to a higher court level, not only for the increased salary, but for the imposition of additional duties and responsibilities.

If, however, the principle of hierarchy with its accompanying salary differential were to be rejected, and the governing principle becomes that every judge is paid the same, regardless of the judicial office they hold and the responsibilities they discharge, then fairness demands that all judges' salaries be moved up to the highest paid court level, that is the salary received by the judges on the Supreme Court of Canada, and contemplated increases proceed from that level. There would be no principled basis for doing otherwise. This suggestion alone should prove my point.

In conclusion, I support the principle of hierarchy in the court system from justices of the peace to the Supreme Court of Canada, with appropriate salary differentials at each level.

Sincerely,

B.L. Rawlins

THE HONOURABLE
MR.JUSTICE JOHN D. ROOKE

THE COURT HOUSE 611-4TH STREET S.W.
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COURT OF QUEEN'S BENCH OF ALBERTA

January 15, 2004

Mr. Rod A. McLennan, Q.C.
Chairman
Judicial Compensation & Benefits Commission
9th Floor, 99 Metcalfe Street
Ottawa, Ontario K1A 1E3

Transmitted by fax to 613-947-4442, e-mail and 10 copies by mail

Dear Mr. McLennan:

Re: Judicial Compensation & Benefits Commission - 2003

I write to bring to the attention of the Commission the submission of Justice Berger of the Alberta Court of Appeal, dated December 16, 1999, to the 1999 Commission, on the subject of salary differential for justices of the courts of appeal of Canada. A review of your website www.guadcom.gc.ca reveals that a copy is available in your archives.

While I leave it to the Commission as to whether to make any recommendation, and, if so, what recommendation, on this non-pressing issue, I believe you may benefit from the input of

this very insightful perspective, which I believe continues to have validity today as it did when originally written.

I note, as Justice Berger points out, that the Table of Precedence for Canada recognizes no different hierarchy in law between puisne justices of courts of appeal and superior trial courts.

I recommend Justice Berger's letter for your consideration as you consider this issue.

I do not wish to make an oral presentation at your scheduled hearings.

Yours truly,

John D. Rooke

J D R/vh

cc: The Honourable C.A. Fraser, Chief Justice of Alberta
The Honourable A.H.J. Wachowich, Chief Justice of the Court of Queen's Bench
The Honourable A.B. Sulatycky, Associate Chief Justice of the Court of Queen's Bench
The Honourable Mr. Justice R.L. Berger

THE HONOURABLE RONALD L. BERGER
JUSTICE OF APPEAL

COURT OF APPEAL OF ALBERTA
COUR DAPPEL DE L'ALBERTA

THE LAW COURTS
EDMONTON, ALBERTA
T5J OR2

December 16, 1999

Judicial Compensation and Benefits Commission
99 Metcalfe Street
8`h Floor
OTTAWA
ON KIA 1E3

SALARY DIFFERENTIAL BETWEEN TRIAL AND APPELLATE COURTS

Commissioners,

I am given to understand that the Quadrennial Commission may be invited to

address the question of a salary differential between appellate and trial judges. I write to oppose any such proposal. I do so as a puisne judge of the Court of Appeal of Alberta. While others may share my views, I speak only for myself and not for any court, organization, or group of judges.

This strongly entrenched tradition has served us well. It has strengthened collegiality and fostered mutual respect. Most importantly, the sound policy and operational reasons behind this traditional legal culture has promoted the kind of interaction that educates and enlightens members of both courts.

I was privileged to serve on the Court of Queen's Bench of Alberta from 1985 to 1996. Her Majesty's patent expressly names all Queen's Bench judges as ex officio members of the Court of Appeal. In this jurisdiction, members of the Court of Queen's Bench, to this day, continue to sit with the Court of Appeal on both regular and sentence appeal panels. This is in keeping with an established historical tradition in this Province. Prior to the creation of the Court of Queen's Bench in 1979 marking the amalgamation of the district courts with the trial division of the Supreme Court of Alberta, the latter was a single superior court with two divisions: trial and appellate. Apart from the issue of stare *decisis,* hierarchal distinctions were non-existent. Indeed, the Federal Order of Precedence among superior court judges in Alberta fixes precedence based on date of appointment rather than membership in one court or another.

This strongly entrenched traditions has served us well. It has strengthened collegiality and fostered mutual respect. Most importantly, the sound policy and operational reasons behind this traditional legal culture has promoted the kind of interaction that educates and enlightens members of both courts.

I have spoken with many trial judges in Alberta. It would not be unfair to say that the adoption of a salary differential runs the very real risk of destroying the goodwill, collegiality and interaction that we have worked so hard to achieve.

There are, in addition, practical reasons to reject the proposal. If trial judges, under the authority of their patents, are to continue to sit with courts of appeal, it is arguable that a pay differential among puisne judges performing the same judicial function would be constitutionally barred. It has been suggested that the solution would be to pay trial judges who sit with the Court of Appeal a per diem or "ad hoc bonus". Under such an arrangement, the spectre of some trial judges earning more money than others would loom large - a prospect, I respectfully suggest, which should be firmly rejected.

On the other hand, if the proponents of a salary differential contemplate that trial judges would no longer sit on an ad hoc basis with appellate judges, I wonder whether the consent of Provincial Governments would be required. By way of illustration, in Alberta, s. 9 of the ***Court of Appeal Act*** reads as follows:

> "A judge of the Court of Queen's Bench may sit or act
> (a) in place of a judge who is absent,
> (b) when an office of a judge is vacant, or

(c) as an additional judge,

on the request of a judge of the Court of Appeal. "

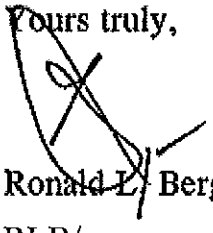
There are, arguably, other constitutional issues that must be addressed. As set out above, all judges of the Court of Queen's Bench of Alberta are ex officio members of the Court of Appeal. They hold office during good behaviour. Is it suggested that their ex officio appointments be revoked? What constitutional mechanism would be employed to achieve that end? If no revocation is anticipated, is it intended that the ex officio appointments be rendered nugatory by other than constitutional means?

It has also been argued that the nature of the work of the final court of appeal within a province justifies a salary differential. I suggest that this is not sufficient reason to justify the proposal. Members of appellate courts sit as a group, diffusing the workload and responsibilities within the group. Trial judges sit alone, often away from home in less than ideal working conditions and must make complex and difficult decisions without the opportunity or comfort of consulting with their colleagues. Trial judges must bear the responsibilities of their decisions and accept the attendant publicity and criticism alone. The appellate court has a collective responsibility and as such individual judges are rarely subject to personal criticism.

In addition to the foregoing, I urge you to question the suggestion that the workload of an appellate court judge is more onerous than that of a trial judge. No one would contest the proposition that appeal court judges have far more reading and far more judgments to write. But it would be a mistake to compare the appellate apple with the trial orange. I well recall sitting at a rickety kitchen table in St. Paul, Alberta, at two o'clock in the morning, attempting to craft a jury charge to be delivered at 10.00 a. m that addressed, among other matters, self-defence, provocation, drunkenness, unsavoury witnesses and similar fact evidence. If I had put my mind to the subject at that time, I might well have argued for a salary differential in favour of trial judges.

I wish you well in your deliberations.

Yours truly,



Ronald L. Berger

RLB/re

Sent by fax - hard copy to follow.

THE HONOURABLE MR. JUSTICE
D. W. SHAW

THE SUPREME COURT
OF BRITISH COLUMBIA

THE LAW COURTS
800 SMITHE STREET
VANCOUVER, B. C.
V6Z 2E1

January 16, 2004

The Judicial Compensation and
Benefits Commission
99, Metcalfe
Ottawa, Ontario
K1A 1E3

Dear Commissioners:

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,

Mr. Justice Duncan W. Shaw

THE HONOURABLE MR. JUSTICE
D. W. SHAW

THE SUPREME COURT
OF BRITISH COLUMBIA

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800 SMITHE STREET
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January 23, 2004

The Judicial Compensation and
Benefits Commission
99, Metcalfe
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Dear Commissioners:

This is further to my submission letter of January 16, 2004, in which I expresses disagreement with the idea of a salary differential between federally appointed trial judges and the courts of appeal. Since then, I have circulated my colleagues on the British Columbia Supreme Court by e-mail and asked them to advise me whether they "support" or "do not support" my

submission letter. Our court presently has 99 members. To date I have had 68 responses. Of those, 64 have indicated support and 4 advise they are neutral. None have taken the position that there ought to be a differential.

Respectfully submitted,

Mr. Justice Duncan W. Shaw