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SALARY DIFFERENTIAL

It appears to me that the appropriate approach is to analyze the issue on a concrete basis.

We have a provision, section 96 of *The British North America Act, 1867*, and a constitutional convention that has become, in a number of respects, a customary practice.

My presentation therefore will not deal with all the emotional issues such as: Would I be seen as petty by the appellate judges?

There is no point in answering this question because if the theory of differential treatment appeared to have merit, no one would have anything to criticize. Moreover, the Canadian Superior Courts Judges Association would probably not have had to adopt a so-called neutral position.

I believe that the main argument of the dissidents is that a hierarchy exists between the members of a trial court and those of an appeal court, not because of the particular status of the members but because of the court that they belong to.[1]

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[1] I use the term “dissident” because clearly those who support the position of Mr. Justice Nuss were the first to not accept their association’s decision to remain neutral. They are supporting a contrary report on this issue.

Alternatively, it is also alleged that it would be appropriate to establish this difference to foster vocations among the members of the trial court. It would be one way to attract them to the Court of Appeal. Without distorting the Ministerial prerogative, is it not necessary to note that the Minister is the only person to decide on an appointment to the Court of Appeal without taking into account a committee's opinion? His or her decision crystallizes through the approval of Cabinet and the order of the Governor General.

Last, even if it is only implied, the importance of the cases, the duty related to them and the required level of competence cannot be ignored. This is part of what is unsaid.

A LITTLE HISTORY

I believe it is necessary to trace the history of the evolution of our judicial institutions (the exercise of the third power).

Following the *Quebec Act*, the territory was divided into the provinces of Upper and Lower Canada.

In criminal matters and matters involving the monarchy (fees payable to His Majesty), it was the King, through the privy council, represented in the colonies by the Governor and the Governor General, who traditionally reserved for himself the jurisdictions of last resort.

But in 1793, the statute entitled **Act for the Division of the Province of Lower Canada for Amending the Judicature thereof, and for Repealing Certain Laws therein Mentioned** created both a superior court of first instance with civil and criminal jurisdiction, the Court of King's Bench, and an appeal court composed of members of the Privy Council and some judges of this court.

This court, a court of general jurisdiction with several divisions, was converted to a court of appeal in 1843, although it remained, in part, a court of original jurisdiction.

It was not until 1849 that the Court of Queen's Bench (during Queen Victoria's reign) became a court of appeal in civil matters, while maintaining its original jurisdiction in criminal matters; it was the only court that could hear trials by jury until 1920. The Superior Court still has this jurisdiction.

The judges of the former Court of King's Bench who were not assigned to this court of appeal became judges of the Superior Court. This designation was already being used to describe this court. Thus, we can read in section XXIII, page 96 of this 1793 statute - George III, chapter 6:

> XXIII. And be it further enacted by the authority aforesaid, that the Governor, Lieutenant Governor or Person administering the Government, the members of the Executive Council of this Province, the Chief Justice thereof, and the Chief Justice to be appointed for the court of King's Bench at Montreal, or any five of them (the Judges of the court of the district wherein the judgment appealed from was given, excepted) shall be constituted and are hereby erected and constituted, a superior court of civil jurisdiction or provincial court of appeals, and shall take cognizance of, hear, try and determine all cases, matters and things appealed from all civil jurisdictions and courts, wherein an appeal by law is allowed; provided always, that no member of the court of appeals, shall be considered disqualified from sitting on appeals, from the district of Three Rivers, excepting the Judges who may have given the judgment appealed from.
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> (Text reproduced as is)

This recognition of the inherent power of a member of a superior court of general jurisdiction was perpetuated throughout the history of our institutions until the present day and is very pronounced in section 96 of *The Constitution Act*.

Since that time, members appointed by the Governor General to both the trial court and the court of appeal have the same legislative roots. They are equal in all respects and have full powers to act in either court according to how the province organizes its court of appeal. The province clearly does not have any power to distinguish among the judges who have been appointed in the same way.

We note however that, quite naturally, a hierarchy has developed in the courts in which federally appointed judges work. This is only a practical and functional hierarchy since both courts are superior courts.

In 1849, if it was felt that it was necessary to change the appeal jurisdiction under the *Act Uniting Upper and Lower Canada,* it was because the Court of King’s Bench had a dual civil jurisdiction, allowing its judges to hear appeals of decisions by judges of the same court. Because there were not different courts, but only one court with a number of divisions, there was an appearance of bias since judges from the same jurisdiction were judging each other. The Court of Queen’s Bench thus became a court of appeal composed of members of the former court, which became the Superior Court.

Let us also keep in mind that, in our judicial system, we routinely see a single judge hearing an appeal of a judgment rendered by another judge and there is no appearance of bias because the decision being appealed to the Superior Court was made by a lower court, now referred to as courts of special jurisdiction, as is the case with the Court of Québec.

Thus, a judge of the Superior Court may hear an appeal from a decision of the Court of Québec under Part XXVII of the Canadian *Criminal Code*.

This is also the case when a judge of the Superior Court hears an appeal from a decision of the youth court.

The power of the Superior Court to hear appeals was more widely used in the past than it is today because, until 1920, the Superior Court had an appeal division called the Court of Review where three judges sat to hear less important appeals.

Jurisdiction at the same level that was given to superior court judges appointed by the federal government still exists today. In Quebec, it is recognized in particular in section 12, chapter 16 of the *Courts of Justice Act*. A judge of the Superior Court may be appointed an assistant judge of the Court of Appeal during the absence or sickness of the regular judge. This section reads as follows:

> *12. Whenever, by reason of leave of absence granted to or the illness of any judge of the court, it becomes probable that such judge will be absent for one whole term or more, then, if the Chief Justice, or, in case of his absence or disability, the senior puisne judge who is able to act, certifies to the Governor General his opinion that the due administration of justice would be promoted by the appointment of an assistant judge of the court during absence or sickness, any judge of the Superior Court may be appointed assistant judge of the Court of Appeal, for such time as it appears probable that the absence or sickness of the judge first mentioned will continue, and such assistant judge shall have the powers and perform all the duties of an ordinary judge of the court.*

There is also the regular procedure by which a judge of the Superior Court may serve as a judge ad hoc in the Court of Appeal as a full member. Article 514 of the C.C.P. provides for this:

> *514. To ensure the proper dispatch of business of the Court of Appeal, the Chief Justice or, in his absence, the senior puisne judge may ask in writing the Chief Justice of the Superior Court to designate one or more judges of that court to sit in the Court of Appeal as judges ad hoc. A judge ad hoc shall have all the powers and duties of a puisne judge of the Court of Appeal.*

THE LEGAL SITUATION

Therefore, historically, there is no doubt that the puisne judges of the Court of Appeal and the Superior Court are of equal rank because of a common status, and they have precedence over each other governed by the date of appointment.

It seems clear that the remuneration of judges who are appointed in the same way and who can carry out the same functions must be the same.

The criteria used to establish this remuneration have been absolutely the same for 140 years. Until now, there has been no difference.

These universal criteria are also the same for the judges of the Supreme Court, but the reason for the differential is unique and related to the creation of the court. Accordingly, the argument in favour of differential treatment based on the treatment accorded to the Supreme Court cannot be used.

The Supreme Court of Canada has no constitutional underpinning; it is a unique court, independent of all other courts. The only original jurisdiction it has maintained is with respect to appeals, usually of a constitutional nature, that the Government of Canada has referred to it.

In fact, in 1867, under section 101 of *The Constitution Act*, the Government of Canada reserved to itself the power to constitute, at its expense, a different court of appeal that could deal with any dispute in the country that had been the subject of a lower court judgment, including the constitutional courts, in matters of both public and private law arising from the legislation of all the provinces and of Canada. This court has, in itself, a degree of superior hierarchy, which has been even more pronounced since 1949 when appeals to the Privy Council in London were abolished.

This unique court of general jurisdiction enacted its own rules relating to its functioning and organization at the internal and judicial level. The statute specifies that this court shall be constituted and maintained at Canada's expense. Given these conditions, is it surprising that, traditionally, the Government of Canada has given preferential treatment to the judges of its own court that is above the other courts?

The situation for the provincial courts of appeal is quite different. In Quebec, for example, the Court of Appeal has a so-called statutory jurisdiction. This jurisdiction is carved out of the general jurisdiction of the Superior Court of Québec, which is both a court of first instance that can hear all types of cases including those by way of evocation, and a court of appeal. Other than where some provincial statutes allow a direct appeal from a lower court (established by the province for the proper administration of its own laws), the bread and butter of the Court of Appeal comes from the Superior Court.

The situation of the two courts of appeal is therefore clearly different. The provincial court of appeal is not a court of last resort and is limited to hearing matters within provincial jurisdiction and sometimes disputes based on federal legislation, in particular, decisions under the *Criminal Code* and some disputes arising in the Superior Court, which has concurrent jurisdiction with the Federal Court on some issues.

THE ASSOCIATION'S POSITION OF NEUTRALITY

The main result of this neutrality is that it causes those who disagree with the Nuss report to become dissidents themselves.

However, all federally appointed judges are asked to show solidarity with the Canadian Association of Superior Court Judges and the Conference of Judges of the Superior Courts of Quebec.

If we confine ourselves to the eight recommendations of the Association, particularly the one that deals with the argument that all judges should be treated the same, I think that complete solidarity is achieved.

The restraint shown by the Association in not making a decision on a problem that has been raised among its members is creating a stir. Its position opens the door to dissidence, although it is the only group authorized and accredited to represent us and to negotiate on our behalf before the Judicial Compensation and Benefits Commission.

Furthermore, the Association did not accept the position, not to mention the decision, of the 2003 Commission, which certainly acted within its powers in expressing the opinion of Chairperson Jenkins:

> The 2003 Commission considered a submission of some appellate judges in favor of a differential, and in response raised a question about the boundary of its jurisdiction and concluded that it did not have jurisdiction to redesign the court system.

Is that not an articulate position that puts its finger on the main and perhaps the only issue? The Commission said it did not have the power to redesign the court system.

That is the confirmation of those who adhere to the opposite view to the one stated in the Nuss report defending a position of principle. To get around it, we would have to create a hierarchy of members of the provincial courts of appeal. Would the statute not have to be changed and at the same time would that not cause a constitutional amendment?

The agreement of all the provinces and territories should provide a different appointment for the judges of their courts of appeal to give them a unique and integral jurisdiction, independent of all other jurisdictions.

If that happened, no one would be able to find fault. But are the appeal judges not addressing the wrong forum?

Moreover, if a differential treatment is granted favouring members of the courts of appeal without changing the statute, problems would also arise, problems that could be characterized as constitutional.

Certainly, a “de facto” hierarchy would then be created, but a purely cosmetic one that, however, would have ramifications beyond remuneration.

Thus, the application of the *Courts of Justice Act*, which at this time requires only an order of the Governor General to appoint an assistant judge, would require that this order also deal with the financial issue of the remuneration of this assistant judge who is temporarily a member of the Court of Appeal.

The situation will probably be worse when judges ad hoc are appointed. This will no longer only involve an arrangement between chief judges of the superior courts but will also need the approval of the federal government, which could then consider whether it is necessary to appoint a judge ad hoc. There again, it will be the federal government that will pick up the tab.

Also, the situation connected to the Association’s neutral position, which is described as banal, is perhaps not. We are told, in short, that this involves a mere tinkering of the costs to signal a difference, adding that this already exists for the Supreme Court and for all the chief judges of the superior courts.

That cuts short the reasoning that is required. The differential enjoyed by Supreme Court judges and chief judges of the superior courts has a basis in law. It is a right. There are important reasons for treating the chief judges differently that involve the administration of the courts and, in particular, the allocation of the work among the members of a court, on top of that, not to be exempt from filling the judicial functions of puisne judges.

If we give bonuses for no reason, which is, it seems, the nature of

bonuses, where will we stop in the choice of differences?

To consider this, does the Commission not seem even more well-founded in declining jurisdiction, which is the main point of its statements?

Furthermore, where is the appearance of justice?

A citizen who will be heard by a panel composed of a judge ad hoc or an assistant judge, especially if that judge does not have the same privileges, would that citizen not be able to complain, even if there is no reason to, based on the perception that he or she has not benefited from the same justice as his or her fellow citizen whose property or freedom is also at stake?

Moreover, is the Court of Appeal not depriving itself of significant resources?

Justices Chevalier, Moisan, Biron, Letarte and, via a different path, Pidgeon and Deschenes, made a significant contribution in only referring to those who have been on the bench for a number of years ad hoc in the Court of Appeal. They were not envious of the regular judges with whom they were meting out justice.

With respect to the work, the answer is easy. Under the current system, all of the surplus judges of the Court of Appeal can be absorbed by the Superior Court judges who have the same skills. It is merely a question of administration; doing it this way puts a limit on increasing the number of appeal judges and also has the benefit of maintaining the collegiality that people say is so important.

CONCLUSION:

Before the Commission, we are not negotiating a collective agreement discussing remuneration in accordance with classifications, duties or responsibilities related to production or providing services; what we are discussing is institutional remuneration.

It seems to me that the only applicable principle is equal remuneration for all federally appointed judges. Otherwise, must it be said that some judges are more equal than others and perhaps that it is appropriate to create bonus payments for judges at this level?

Also, since we must counter both the position of those who support the Nuss theory and the disadvantages of the neutrality position adopted by our Association, we must act. For my part, it appears to me that questions of principle interest the administration of our chief judges, as can be seen from their obligation to participate in some way in maintaining a court of appeal in the face of temporary difficulties caused by a lack of judges.

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I do not see any objection to them doing it, even if they are allied with the Canadian Judicial Council. The Council expressed a view jointly with our Association before the Commission. The Council's neutrality seems justified to me since it is not an association that recruits members or that has a private mission based on its constituting statute. Nor is it accountable to the judges.

Furthermore, I believe that the hierarchy of our chief judges enhances their credibility.

Besides, did we not participate at the last quadrennial commission in the intervention of the Chief Judge of Quebec who supported not only the position of all the Superior Court of Québec judges but the position of some of his own.

JULES ALLARD, J.S.C.

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