January 9, 2008

BRIEF TO QUADCOM ON PROPOSED SALARY DIFFERENTIAL BETWEEN TRIAL AND APPELLATE JUDGES

1. Although my pecuniary interest in the matter may be considered as almost academic (I shall achieve the statutory age of compulsory retirement in July, 2008) I thought that my personal, and perhaps unique, judicial experience might be of some relevance and assistance to the Commission particularly in reference to the proposal made by approximately two thirds of the judges of appellate courts in Canada that they should receive a substantially higher remuneration than other judges of the superior courts.

2. I was appointed to the Superior Court of Quebec in January, 1972. I believe that this makes me the longest serving judge of any superior court in the country. In 1973, I became Associate Chief Justice. In 1983, I "abandoned" (the statutory term) the position of Associate Chief Justice to accept an appointment to the Federal Court of Appeal. In 1996, I requested for reasons related to a personal disability (I had become legally blind) a transfer to the Trial Division of the Federal Court. This request had the formal approval of both the Chief Justice and the Associate Chief Justice of the Federal Court but it went unacknowledged by the Minister for over 5 months at which time the Chief Justice exercised his own powers to order my transfer on an ad hoc basis to the Trial Division and the corresponding transfer of Mr. Justice Pierre Denault to the Court of Appeal. My formal appointment as a member of the Trial Division, now the Federal Court, was finally effected in June 1998 just prior to my attaining supernumerary status and over two and a half years after I had requested it.

3. Thus, in formal terms I have been a judge of an appellate court for 15 of my 37 years as a judge and a trial judge for the remainder. The reality is slightly different: I spent 13 years sitting as an appellate judge and 24 years as a trial judge. If appellate and trial judges were paid differently, on what basis would my pension be calculated?

4. In general I am in agreement with the submission made by Justice Campbell of Prince Edward Island and I support his position. It is hardly surprising that approximately two thirds of the appellate judges support the request for higher pay; although courts of appeal are sometimes accused by trial judges of living in an ivory tower divorced from reality, I do not think that they are collectively as other - worldly as all that!

5. It is perhaps more significant that almost one third of the appellate judges do not support the demand - probably because, to their credit, they recognize that the request is mischievous and divisive of the desirable collegiality which exist amongst judges of the higher courts.

6. I can testify from my personal experience to the fact that the workload of a trial judge is heavier and more stressful than that of a judge of a court of appeal. The trial judge must assume sole responsibility for his or her judgments. He or she must also research, prepare, correct and sign every single decision without being able to rely for other than moral support on colleagues. Indeed, I think that it is primarily because of the collective and collegial nature of appellate decision making that appeal courts are placed higher in the judicial hierarchy than trial courts; that two (or more often three) heads are better than one is not only common sense, it is good law. Most trial judges who have accepted appointment to a court of appeal will admit that they have found their new careers to be less hectic and more conducive to contemplative decision making. I think that is as it should be, but it is a poor justification for paying appellate judges a higher salary.

7. In fact, one may well ask what mischief the appellate judges who have supported the submission think they will remedy if their request is granted. Certainly, there has not to my knowledge been any difficulty in recruiting judges to sit on appeal courts in Canada, even from amongst the highly paid members of the private bar. In this connection I note that the person who prepared and signed the appeal judges' submission was himself at the time of his appointment a very distinguished private practitioner and had never served as a trial judge.

8. In fact the proposal for a salary differential between trial and appellate judges is not only divisive and a break with Canadian tradition; it actively creates a mischief where none now exists. My own career is an example. While it is not very common for appeal judges to request transfer to a trial court it has happened on a number of occasions, usually for reasons which are found to be valid and to contribute to the better administration of justice. I hope that my last ten years of service have been productive but if I had had to suffer the hardship (and indignity) of a pay cut I would probably have chosen the retirement to which I was then statutorily entitled and set myself up in a private and lucrative practice as an arbitrator. I would also draw attention to the fact that it frequently happens that a judge leaves a position on a court of appeal to accept appointment as Chief Justice or Associate Chief Justice of a trial court. Acceptance of the proposal by the appellate judges might seriously restrict the Prime Minister's field of choice in seeking suitable candidates for vacant chief justiceships.

9. While I am not intimately familiar with the present system for screening proposed judicial appointments I understand that it results in the creation of a single "pool" of suitable candidates for appointment to vacancies, both appellate and trial, as they occur; acceptance of the proposal for a salary differential would necessarily result in the need to create separate lists for each level of court.

10. Finally, I would add one comment on a matter in which I appear to differ from all other submissions to the present Quadrennial Commission: in my view the decision of the previous Quadrennial Commission that to recommend a salary differential would be outside its mandate was both wise and correct in law. Your statutory mandate should not be viewed in isolation; it must be set against the matrix of the Canadian court system as it

has developed historically and presently exists. That system has always comprised equal treatment for trial and appeal court judges. On the other hand, differences in salary levels between the Supreme Court of Canada and the other federally appointed courts and between the latter and the Provincial courts have always existed. I submit that your mandate is to recommend remuneration for judges within the existing court system; it is not to propose a drastic restructuring of that system. What is proposed by the appeal court judges' brief is different in kind from earlier proposals to pay extra remuneration to judges, such as Chief Justices and others, for performing administrative and leadership duties while in office. It would in fact create a new class of judges in Canada, something for which there is no precedent that I know of. I urge you rather to follow the sound precedent set by your predecessors and to reject the appeal judges' brief.

11. I would be pleased to answer any questions that you may have.

Respectfully submitted,

James K. Hugessen