AN ADDRESS TO BE DELIVERED BY
THE HONOURABLE CHIEF JUSTICE N.T. NEMETZ
TO THE

CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE
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OVER THE YEARS I HAVE HAD THE OPPORTUNITY OF DISCUSSING SOME OF THE ANOMALIES WHICH EXIST IN CANADA'S COURT STRUCTURES WITH SOME OF OUR MINISTERS OF JUSTICE AND AT LEAST THREE OF BRITISH COLUMBIA'S PROVINCIAL ATTORNEYS GENERAL, AND SUGGESTED THE CREATION OF A SPECIAL COMMISSION SIMILAR TO THAT RECENTLY ESTABLISHED IN ONTARIO. IN MY VIEW, IT IS AN ESSENTIAL STUDY FOR EVERY PROVINCE, LONG OVERDUE, BOTH IN RESPECT OF CIVIL AS WELL AS CRIMINAL LAW. I CAN ONLY HOPE THAT THE MINISTER OF JUSTICE WILL ADDRESS THIS IMPORTANT PROBLEM SO THAT THE JURISDICTION OF FEDERAL COURTS AS WELL AS THE STRUCTURE OF COURTS ADMINISTERING CRIMINAL LAW CAN BE REVIEWED. THE ATTORNEY GENERAL OF B.C. HAS ONLY THIS YEAR CREATED SUCH A COMMITTEE, ALBEIT AN EXECUTIVE COMMISSION HEADED BY THE DEPUTY ATTORNEY GENERAL.

HOWEVER, TODAY IS NOT THE TIME TO ENTER INTO A DISCUSSION OF THE ENTIRE RANGE OF SUBJECTS APPLYING TO THE RESTRUCTURING OF OUR COURT STRUCTURES. RATHER, I PROPOSE TO DEAL WITH A PARTICULAR SUBJECT MATTER WITHIN MY EXPERIENCE AS CHIEF JUSTICE OF AN APPELLATE TRIBUNAL FOR ALMOST TEN YEARS. THAT SUBJECT RELATES TO THE RISING CASELOAD OF ALL APPELLATE COURTS IN CANADA AND THE EXAMINATION OF ONE PROPOSAL WHICH MIGHT ALLEVIATE THAT CASELOAD AND INCREASE JUDICIAL EFFECIENCY. I LEAVE ASIDE IN THIS PAPER THE CASELOAD PROBLEM OF THE SUPREME COURT OF CANADA.

IT IS MY OPINION THE TIME HAS COME FOR THE APPELLATE COURTS IN CANADA WITH LARGE APPELLATE CASELOADS, I.E., ONTARIO, QUEBEC AND BRITISH COLUMBIA, TO EXAMINE THE CONCEPT OF AN INTERMEDIATE COURT OF APPEAL, A REFORM ADOPTED IN RECENT YEARS BY SOME 36 AMERICAN STATES. I HAVE HAD THE OPPORTUNITY OF EXAMINING THE STATUTES ADOPTED BY SOME OF THESE STATES WHICH HAVE CREATED INTERMEDIATE COURTS. BY AND LARGE, THIS VARIETY OF RESTRUCTURING OF APPELLATE MACHINERY PROVIDES THAT DUPLICATION OF HEARINGS CAN BE REDUCED TO A MINIMUM, AND MAY OFFER ONE MEANS OF REMEDIAL ASSISTANCE TO THE PROBLEMS WHICH NOW EXIST IN THE COURTS OF APPEAL IN THE LARGER PROVINCES.

WHAT, THEN, ARE THESE PROBLEMS?

IT WILL BE REMEMBERED THAT PRIOR TO WORLD WAR II MOST OF THE APPELLATE COURTS IN THE UNITED STATES AND CANADA SAT EN BANC. NORMALLY SUCH APPELLATE COURTS WERE COMPOSED OF TIGHTLY KNIT TRIBUNALS OF NINE OR FEWER JUSTICES. THIS EN BANC SITTING HAD ONE GREAT ATTRIBUTE -- THERE WAS LITTLE DOUBT THAT THE DECISION RENDERED BY A MAJORITY WAS TRULY THE MAJORITY DECISION OF ALL MEMBERS OF THE COURT. HOWEVER, THAT EN BANC CONFIGURATION WAS SOON TO GO.

FOLLOWING WORLD WAR II IT BECAME IMPOSSIBLE TO HANDLE THE RAPID ACCRETION IN APPELLATE CASELOAD BY THE USE OF ONE PANEL OF JUDGES. ACCORDINGLY, ONE PROVINCE AFTER ANOTHER ADOPTED A MULTIPLE PANEL SYSTEM WHEREBY THE COURT WAS SPLIT INTO GROUPS COMPOSED EITHER OF THREE OR FIVE IN ORDER TO DISPOSE OF THE INCREASING CASELOAD. MANIFESTLY, IF YOU HAVE A SYSTEM WHERE A NUMBER OF PANELS OF THREE JUDGES ARE SITTING SIMULTANEOUSLY, THE PROBLEM OF CONSISTENCY ARISES AS BETWEEN THE JUDGMENTS DELIVERED BY THE DIFFERENT PANELS. ALSO THE LEGAL PROFESSION FINDS ITSELF IN THE POSITION OF DEALING WITH DECISIONS WHICH MAY NOT REPRESENT THE MAJORITY VIEW OF THE COURT AS A WHOLE. SOMETIMES IN CRIMINAL APPEALS, FOR EXAMPLE, IT IS THE LUCK OF THE DRAW THAT FINDS EITHER THREE HAWKS OR THREE DOVES SITTING IN ONE DIVISION. EVEN MORE DISCONCERTING IS THAT A MAJORITY OF TWO INDIVIDUALS MAY DETERMINE THE LAW FOR THE ENTIRE COMPLEMENT OF THE COURT'S JUSTICES.

CONSIDERING THAT ONTARIO AND QUEBEC EACH HAVE A COMPLEMENT OF 16 JUSTICES AND B.C. 13 (NOT COUNTING SUPERNUMERARY JUSTICES), TWO JUSTICES MAY SPEAK FOR THE OTHER 14 OR OTHER 11. UNDER THIS SYSTEM THE APPOINTMENT OF NEW JUSTICES TO COPE WITH AN INCREASING CASELOAD WILL FURTHER AGGRAVATE THIS PROBLEM.

(TELL TURKISH STORY)

FURTHERMORE, SINCE 1982, I.E., THE PATRIATION OF OUR CONSTITUTION, WE ARE FACED WITH APPEALS ARISING OUT OF INTERPRETATION OF THE CHARTER OF RIGHTS AND FREEDOMS. DESPITE THIS NEW JURISDICTION THE PROVINCES WITH THE LARGEST CASELOADS ARE DISPOSING OF SOME 98% AND 99% OF THE APPEALS ARISING IN THEIR JURISDICTIONS. ONLY A VERY SMALL NUMBER OF APPEALS GO ON TO OTTAWA. IN ORDER TO HANDLE THE MASSIVE APPELLATE CASELOAD -- TOTALLING SOME 1000 IN B.C. AND QUEBEC, AND SOME 2,000 IN ONTARIO -- THE VAST MAJORITY OF THE APPEALS HAVE TO BE DISPOSED OF ORALLY. IN B.C. 70% OF CIVIL OPINIONS ARE DELIVERED ORALLY, AND OVER 90% OF CRIMINAL OPINIONS.

UP UNTIL A FEW YEARS AGO IT WAS POSSIBLE TO VIEW THE PRIMARY FUNCTION OF THE APPELLATE COURT AS THE REVIEW AND CORRECTION OF ERROR MADE IN THE TRIAL COURTS. DEVELOPMENT OF A RATIONAL AND COHESIVE JURISPRUDENCE WAS SECONDARY. THAT WAS SEEN AS ESSENTIALLY THE ROLE OF THE SUPREME COURT OF CANADA. OF COURSE, IN THOSE DAYS ACCESS TO THE SUPREME COURT WAS RELATIVELY EASY. BUT ALL THAT HAS CHANGED. FIRST THE SUPREME COURT ACT WAS AMENDED TO ALLOW APPEALS TO THAT COURT ONLY WITH LEAVE. AND LATERALLY THE SUPREME COURT HAS ATTEMPTED TO REDUCE THE NUMBER OF APPEALS FROM SOME 120 TO 60 CASES PER YEAR. IN THE MOST RECENT AMENDMENTS TO THE SUPREME COURT ACT EVEN CRIMINAL APPEALS MAY REQUIRE LEAVE. ACCORDINGLY, FOR THE VAST MAJORITY OF THE LITIGANTS THE PROVINCIAL APPELLATE COURTS ARE THE COURTS OF LAST RESORT FOR THE LITIGANT.

IT HAS BECOME APPARENT THAT SINCE 1982 THE COURTS OF APPEAL, IN ADDITION TO THEIR TRADITIONAL FUNCTION AS COURTS OF REVIEW AND ERROR, ARE ASSUMING A MUCH GREATER RESPONSIBILITY FOR SHAPING THE SUBSTANCE OF THE LAW IN THEIR RESPECTIVE PROVINCES. WE TAKE PRIDE IN BRITISH COLUMBIA IN THE WAY WE HAVE CONTRACTED NEW RULES AND PROCEDURES IN ORDER TO KEEP THE BACKLOG TO A MINIMUM AND TO HEAR APPEALS RELATIVELY SWIFTLY. BUT TO BELIEVE THAT SUCH DISPOSITION WILL CONTINUE IS TO BE UNREALISTIC. MOREOVER, FOR ACHIEVING THIS EFFICIENCY WE HAVE HAD TO PAY A PRICE. OUR ABILITY TO GIVE ADEQUATE CONSIDERATION TO APPEALS THAT RAISE QUESTIONS BEYOND THE IMMEDIATE INTERESTS OF THE PARTIES IS GREATLY LIMITED.

WE HAVE ON A NUMBER OF OCCASIONS SAT IN PANELS OF FIVE JUSTICES. HOWEVER, WE MUST, PERFORCE, RESTRICT THE INCREASING NUMBER OF APPLICATIONS FOR THESE ENLARGED PANELS. TO ACCEDE TO THESE REQUESTS WOULD SO DELAY THE HEARINGS OF APPEALS THAT WE WOULD SOON BE BACK TO WHERE WE STARTED IN REMEDYING THE FORMER PROTRACTED TIME IT TOOK TO OBTAIN A DATE FOR A HEARING.

THEN THE QUESTION ARISES: HOW CAN WE ADDRESS THE PROBLEM OF DOING JUSTICE ON TWO FRONTS -- THE ONE, REVIEW FOR ERROR: THE OTHER, TO CONSIDER THE RAMIFICATIONS AND DIRECTION OF THE LAW IN GENERAL? MANIFESTLY, WE REQUIRE MORE TIME FOR MATURE REFLECTION AND INTERNAL DISCUSSION IN CASES OF IMPORTANCE NOT ONLY IN A THREE-JUSTICE PANEL BUT IN APPROPRIATE CASES BY THE FULL COURT. THIS COULD NOT ONLY PROVIDE FOR BETTER JUDGMENTS WITHIN THE PROVINCE, IT WOULD, I WOULD HOPE, ALSO INDICATE TO THE JUDGES OF THE SUPREME COURT OF CANADA THAT THE VIEW OF THE ENTIRE PROVINCIAL COURT OF APPEAL HAS BEEN PLACED BEFORE THEM.

THIS PROBLEM OF FRAGMENTED JUSTICE HAS NOT GONE UNPERCEIVED IN ENGLAND. THERE, THE HOUSE OF LORDS DISPOSES OF ABOUT 50 CASES A YEAR, AND THE COURT OF APPEAL IS UNDER STRESS BECAUSE OF ITS CASELOAD. THEY HAVE, OF COURSE, CONTRIVED A NUMBER OF REMEDIAL PROCEDURES, ESPECIALLY IN THEIR CRIMINAL CASELOAD TO ALLEVIATE THEIR DIFFICULTIES. THESE PROCEDURES ARE SET OUT IN A COMPARATIVE STUDY OF ENGLISH AND AMERICAN APPELLATE PROCEDURE IN A BOOK BY PROFESSORS MEADOR, ROSENBERG, AND CARRINGTON. FOR EXAMPLE, SOME 25 GOVERNMENT-EMPLOYED LAWYERS ARE AVAILABLE TO VET LEAVES TO APPEAL IN CRIMINAL CASES BEFORE MOTIONS FOR LEAVE ARE HEARD BY A SINGLE MOTIONS JUDGE. TWO, RATHER THAN THREE, JUSTICES HEAR CERTAIN CATEGORIES OF APPEALS AND, OF COURSE, EVERY MEMBER OF THE TRIAL BENCH IS AVAILABLE TO SIT ON CRIMINAL APPEALS.

IN ONTARIO FOR YEARS WE HAVE SEEN THE MECHANISM OF A DIVISIONAL COURT ATTEMPT TO DEAL WITH THE PROBLEM. IN 1980 THE COURT OF APPEAL OF ONTARIO MET TO DISCUSS THE FUTURE OF THE COURT IN THE LIGHT OF THE INCREASING CASELOAD. A COMMITTEE WAS APPOINTED UNDER THE CHAIRMANSHIP OF ASSOCIATE CHIEF JUSTICE MACKINNON. IT WAS THE UNANIMOUS VIEW OF THAT COMMITTEE THAT THE BEST LONG-TERM SOLUTION FROM THE STANDPOINT OF THE BETTER ADMINISTRATION OF JUSTICE AND JUDICIAL SATISFACTION IN THE QUALITY OF THEIR WORK WAS THE ESTABLISHMENT OF AN INTERMEDIATE COURT OF APPEAL.

THERE WAS GENERAL AGREEMENT THAT THE PRESENT COURT OF 16 SHOULD NOT BE FURTHER EXPANDED. THAT COMMITTEE REJECTED THE NOTION OF ESTABLISHING DIFFERENT COURTS FOR CRIMINAL AND CIVIL APPEALS. THAT WOULD, THEY SAID, DESTROY THE BENEFIT OF HAVING GENERALIST JUDGES. I AGREE WITH THE CONCLUSIONS REACHED BY MY ONTARIO COLLEAGUES. THAT VIEW HAS ALSO BEEN ADOPTED BY THE RECENT ZUBER COMMISSION IN ONTARIO.

THE PROBLEM WE ARE ADDRESSING TODAY WAS FIRST NOTED IN ONTARIO IN 1968 BY CHIEF JUSTICE McRUER. HE SAID IN PART:

> UNDER PRESENT CONDITIONS IT IS QUITE IMPOSSIBLE FOR THE JUDGES OF THE COURT OF APPEAL IN ONTARIO ADEQUATELY TO MEET THEIR RESPONSIBILITY AS JUDGES OF THE COURT OF LAST RESORT IN THE PROVINCE. THEY ARE COMPELLED, BY FORCE OF CIRCUMSTANCES, TO DISPOSE OF CASES ON A SORT OF ASSEMBLY LINE BASIS.

IN 1977 MR. JUSTICE KELLY AGAIN TACKLED THE PROBLEM IN ONTARIO. HIS PROPOSALS HAD MANY OF THE ELEMENTS CONTAINED IN THE MODERN INTERMEDIATE COURT MODEL. UNFORTUNATELY HIS SOLUTION WAS NOT ACCEPTABLE, PRINCIPALLY I THINK, BECAUSE OF ITS COMPLEXITY. OF COURSE, TEN YEARS AGO HE DID NOT HAVE THE ADVANTAGE THAT WE NOW HAVE IN OBSERVING THE EXPERIENCE OF THE UTILIZATION OF INTERMEDIATE COURTS OF APPEAL IN THE UNITED STATES.

IT IS NOW SOME SEVEN YEARS SINCE I WROTE TO THE THEN ATTORNEY GENERAL OF BRITISH COLUMBIA SETTING OUT THE PROBLEM WHICH WE ARE DISCUSSING. IN MY BRIEF I DREW TO HIS ATTENTION THE VIEWS OF THE AMERICAN BAR ASSOCIATION WHICH IN A REPORT (STANDARDS RELATING TO COURT ORGANIZATION) STATED THAT AN INTERMEDIATE APPELLATE COURT IS NEEDED IN THE FOLLOWING CIRCUMSTANCES, AND I QUOTE:

> (1.13 APPELLATE COURT.) THE APPELLATE COURT SHOULD FULFILL THE JUDICIAL FUNCTIONS OF REVIEWING TRIAL COURT PROCEEDINGS AND DEVELOPING THE LAW. WHERE THE VOLUME OF APPEALS IS SUCH THAT THE STATE'S HIGHEST COURT CANNOT SATISFACTORILY PERFORM THESE FUNCTIONS, A SYSTEM OF INTERMEDIATE APPELLATE COURTS SHOULD BE ORGANIZED.

FURTHER THE REPORT STATED:

> (3.01 INTERNAL ORGANIZATION OF APPELLATE COURTS.)
> (A) SUPREME COURT. IN HEARING AND DETERMINING THE MERITS OF CASES BEFORE IT, THE SUPREME COURT SHOULD SIT EN BANC. EXCEPT FOR THOSE WHO MAY BE DISQUALIFIED FOR CAUSE OR UNAVOIDABLY ABSENT, ALL MEMBERS OF THE COURT SHOULD PARTICIPATE IN THE DECISION OF EACH CASE. THE COURT SHOULD NOT SIT IN PANELS OR DIVISIONS, WHETHER FIXED OR ROTATING, OR DELEGATE ITS DELIBERATIVE AND DECISIONAL FUNCTIONS TO OFFICERS SUCH AS COMMISSIONERS.

(B) INTERMEDIATE APPELLATE COURTS. IN HEARING AND DETERMINING THE MERITS OF CASES BEFORE IT, AN INTERMEDIATE APPELLATE COURT SHOULD SIT IN PANELS OF AT LEAST THREE JUDGES, WITH ALL JUDGES PARTICIPATING IN THE CONSIDERATION OF EACH CASE BEFORE THE PANEL OF WHICH THEY ARE MEMBERS. MEMBERSHIP IN THE PANELS SHOULD BE CHANGED PERIODICALLY, AT LEAST ONCE A YEAR. A COURT THAT SITS IN MORE THAN ONE PANEL SHOULD HAVE INTERNAL PROCEDURES FOR MAINTAINING DECISIONAL CONSISTENCY.

AS I HAVE ALREADY SAID, THE RESULT IS THAT THE SUPREME COURT OF SOME 36 STATE COURTS SIT EN BANC IN NUMBERS OF EITHER FIVE OR SEVEN.

WHAT HAS BEEN THE EXPERIENCE OF THESE COURTS? A FEW YEARS AGO A STUDY WAS UNDERTAKEN BY THE AMERICAN JUDICATURE SOCIETY. THE VARIATIONS AMONG THE EXISTING INTERMEDIATE COURTS WERE ANALZYED. THE REPORT POINTED OUT THE DANGER IN PROVIDING A MODEL WHICH DID NOT TAKE INTO ACCOUNT THE UNIQUE PROBLEMS OF A PARTICULAR STATE. THE MOST BASIC CONSIDERATION, OF COURSE, IS THE JURISDICTIONAL GRANT OF THE INTERMEDIATE COURT. THAT WOULD HAVE TO BE CONSIDERED IN CANADA. IT IS IMPORTANT THAT THE MODEL BEST ADAPTED TO A PROVINCIAL JURISDICTION SHOULD BE CHOSEN. OF COURSE, ALL MODELS MUST TRY TO AVOID THE PROBLEM OF DOUBLE APPEALS WITHIN THE PROVINCE.

I DO NOT PROPOSE TO DISCUSS THE PROCEDURAL STEPS WHICH WOULD HAVE TO BE TAKEN TO INSTITUTE THESE NEW COURTS, BUT I CAN SAY THAT IN MY DISCUSSIONS WITH SOME OF MY ONTARIO AND QUEBEC COLLEAGUES IT SEEMS THAT IF ANY CHANGES WERE UNDERTAKEN A REDUCED CORE OF JUDGES, AFTER ATTRITION, OF THE EXISTING COURTS OF APPEAL WOULD FORM THE NUCLEUS OF THE NEW TOP COURT UNDER WHATEVER NAME IT WOULD BE CALLED. THE NUMBERS COULD VARY FROM ABOUT FIVE TO SEVEN JUDGES, ALL SITTING EN BANC.

IT IS MY VIEW THAT A WISE DIVISION OF THE APPELLATE WORK CAN BE WORKED OUT IN CANADA ESPECIALLY IN THE THREE OR FOUR LARGEST PROVINCES. I SEE THE TOP PROVINCIAL APPELLATE COURT SITTING LESS FREQUENTLY THAN THE INTERMEDIATE COURT BUT GIVING WRITTEN REASONS IN THE MAJORITY OF THEIR JUDGMENTS. WHETHER THE PROVINCE DECIDED THAT THE COURT CONSIST OF FIVE, SEVEN, OR EVEN NINE, IT WOULD BE MY VIEW THAT THE COURT SHOULD SIT EN BANC SAVE IN EXCEPTIONAL CIRCUMSTANCES. THE INTERMEDIATE COURT WOULD CONTINUE TO SIT IN PANELS OF THREE AND SAVE FOR CERTAIN PER SALTUM APPEALS, LEAVE TO APPEAL WOULD BE A PREREQUISITE FOR GOING TO THE UPPER COURT.

AS YOU KNOW I WILL BE RETIRING IN SEPTEMBER OF THIS YEAR. I REGRET THAT I WILL NOT BE ABLE TO PRESS THIS POINT OF VIEW IN MY CAPACITY AS CHIEF JUSTICE. BUT, I PROMISE THAT I WILL DO MY UTMOST TO ATTEMPT TO CONVINCE GOVERNMENTS THAT CRISES IN COURT ADMINISTRATION ARE NOT INEVITABLE. THEY HAVE ONLY TO BE ADDRESSED EARLY AND WITH DETERMINATION. IT IS ORGANIZATIONS LIKE YOURS THAT CAN ACHIEVE THE REQUIRED RESULT OF EXPEDITED JUSTICE WITHIN THE FINANCIAL CAPACITY OF OUR CITIZENS.