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LOWER ALBERT ROAD
HONG KONG

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來函檔號 Your Ref.:

Room 1228
Central Government Offices (West Wing)
Tel: (852) 2810 3838
Fax: (852) 2804 6870

6 January 2006

Urgent by Hand

The Hon Miriam LAU Kin-ye, GBS, JP
Chairman of the House Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear *Miriam*,

Senior Judicial Appointment

In accordance with Article 88 of the Basic Law, the Chief Executive has accepted the recommendation of the Judicial Officers Recommendation Commission (JORC) to appoint Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the Court of Final Appeal.

The Chief Executive will announce his acceptance of the above recommendation of the JORC this afternoon. An advance copy of the press statement is at Annex A for Members' information. I should be grateful if Members would observe the confidentiality of the issue, pending the Chief Executive's public announcement.

Pursuant to Article 90 of the Basic Law, the Chief Executive shall obtain the endorsement of the Legislative Council of the appointment. In accordance with the procedures for endorsement of appointment of judges by the Legislative Council as agreed by the House Committee in May 2003, we enclose at Annex B a paper on the appointment for Members' information. Subject to the House Committee's referral of the matter to a subcommittee, representatives of the Administration and the Secretary of the JORC would be happy to provide additional information to Members and/or meet with the subcommittee to answer questions that Members may have. In this connection, Members may wish to note the Administration's intention to move the motion for obtaining the endorsement of the Legislative Council on the appointment at the earliest opportunity within this legislative session.

Yours sincerely,



(Ms CHANG King-yiu)
Director of Administration

cc All other LegCo Members

Press Statement

Senior Judicial Appointment:

Non-Permanent Judges of the Court of Final Appeal

The Chief Executive, Mr Donald Tsang, has accepted the recommendation of the Judicial Officers Recommendation Commission ("JORC") on the appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the Court of Final Appeal and, subject to the endorsement of the Legislative Council, will make the appointment under Article 88 of the Basic Law.

Mr Tsang said, "I am pleased to accept the JORC's recommendation on the appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the Court of Final Appeal. The two judges have eminent standing and reputation and their appointment will be a great asset to the Court of Final Appeal."

Article 90 of the Basic Law provides that the Chief Executive shall obtain the endorsement of the Legislative Council on the appointment of the judges of the Court of Final Appeal and the Chief Judge of the High Court. The Chief Secretary for Administration will seek the endorsement of the Legislative Council of the recommended appointment in due course.

The curriculum vitae of the recommended appointees are attached.

APPOINTMENT OF NON-PERMANENT JUDGES TO THE COURT OF FINAL APPEAL

INTRODUCTION

Pursuant to Article 90 of the Basic Law and section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap.484), the Administration intends to give notice in due course to move a motion, to obtain the endorsement of the Legislative Council of the appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the Court of Final Appeal (“CFA”). The curriculum vitae of the Judges are at the Appendix.

Appendix

BACKGROUND

The Court of Final Appeal

2. The CFA is the final appellate court in Hong Kong, hearing both civil and criminal appeals.

3. The CFA consists of the Chief Justice and the permanent judges. Non-permanent judges may be invited to sit. There are two lists of non-permanent judges:

- (a) The list of non-permanent Hong Kong judges; and
- (b) The list of judges from other common law jurisdictions (such judges will be referred to as “judges from other common law jurisdictions” or simply as “non-permanent common law judges”).

The maximum number of non-permanent judges is 30.

4. When hearing and determining appeals, the CFA is constituted by 5 judges as follows:

- (a) The Chief Justice (where the Chief Justice is not available to sit, he designates a permanent judge to preside);

- (b) 3 permanent judges (where a permanent judge is not available, the Chief Justice nominates a non-permanent Hong Kong judge to sit in his place); and
- (c) 1 non-permanent Hong Kong judge or 1 non-permanent common law judge selected by the Chief Justice and invited by the Court. A non-permanent common law judge has usually been selected and invited to sit, and the Chief Justice's intention is to continue this arrangement.

5. Under section 14(4) of the Hong Kong CFA Ordinance, a non-permanent judge shall hold office for a term of 3 years but that term may be extended for one or more periods of 3 years by the Chief Executive acting in accordance with the recommendation of the Chief Justice. There is no retirement age for a non-permanent judge.

Constitutional and Legal Provisions and Framework

Judicial Officers Recommendation Commission

6. Pursuant to Article 88 of the Basic Law and the Judicial Officers Recommendation Commission Ordinance (Cap.92), the Judicial Officers Recommendation Commission ("JORC") is entrusted with the function of making recommendation to the Chief Executive regarding the appointment of judges. The JORC consists of the Chief Justice as the Chairman, the Secretary for Justice and 7 other members appointed by the Chief Executive (2 judges, 1 barrister appointed after consultation with the Bar Council, 1 solicitor appointed after consultation with the Council of the Law Society and 3 persons not connected with the practice of law). Under section 3(3A) of the JORC Ordinance, a resolution is not effective if there are more than 2 votes not in favour. The recommendation of the JORC is then communicated to the Chief Executive.

The Chief Executive

7. Article 48(6) of the Basic Law confers on the Chief Executive the power and function to appoint judges in accordance with legal procedures. Article 88 of the Basic Law provides that judges of the courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of the JORC. In the case of the appointment of CFA judges and the Chief Judge of the High Court, Article 90 of the Basic Law provides that the Chief

Executive shall, in addition to following the procedures prescribed in Article 88, obtain the endorsement of the Legislative Council. The Chief Executive shall also report such appointment to the Standing Committee of the National People's Congress for the record under Article 90 of the Basic Law. These requirements in relation to CFA judges are also stipulated in section 7A of the Hong Kong CFA Ordinance.

The Legislative Council

8. Article 73(7) of the Basic Law confers on the Legislative Council the power and function to endorse the appointment of CFA judges and the Chief Judge of the High Court. Article 90 of the Basic Law provides that the Chief Executive shall obtain the endorsement of the Legislative Council for the appointment of CFA judges and the Chief Judge of the High Court.

9. Thus, the system of judicial appointment by the Chief Executive acting in accordance with the recommendation of an independent commission, viz the JORC, as laid down in Article 88 of the Basic Law, together with the additional requirement of endorsement by the Legislative Council for the appointment of CFA judges and the Chief Judge of the High Court under Article 90 of the Basic Law, provides the necessary checks and balances, and reinforces the constitutional guarantee of the independence of the judiciary stipulated in Article 85 of the Basic Law.

Requirements and Qualifications for Non-permanent Judges from Other Common Law Jurisdictions

Basic Law Requirements

10. Article 92 of the Basic Law provides that judges of the Hong Kong Special Administrative Region shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

Statutory Qualifications

11. Under section 12(4) of the Hong Kong CFA Ordinance, a person shall be eligible to be appointed as a non-permanent judge from another common law jurisdiction if he is (i) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in

another common law jurisdiction; (ii) a person who is ordinarily resident outside Hong Kong; and (iii) a person who has never been a judge of the High Court, a District Court or a permanent magistrate in Hong Kong.

THE CURRENT APPOINTMENT EXERCISE

The JORC's Recommendation

12. In accordance with the Basic Law, the JORC has recommended the appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the CFA. The recommendation has been communicated to the Chief Executive.

The Chief Executive's Acceptance of the JORC's Recommendation

13. In accordance with Articles 88 and 90 of the Basic Law and sections 7A and 9(2) of the Hong Kong CFA Ordinance, the Chief Executive has accepted the recommendation of the JORC on the appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the CFA. Subject to the endorsement of the Legislative Council, the Chief Executive will make the recommended appointment.

Procedures and the JORC Meeting

14. The Chief Executive was satisfied that a quorum as required by section 3(3) of the JORC Ordinance was present at the meeting at which the recommended appointment was considered.

15. The Chief Executive noted that in considering the recommended appointment, the JORC took note of the following matters as set out in paragraphs 16 to 21 below.

16. At present, there are 17 non-permanent judges comprising 8 non-permanent Hong Kong judges and 9 non-permanent common law judges.

17. The availability of non-permanent common law judges for sittings of the CFA is limited as they have other commitments. In the light of the caseload of the CFA and in order to give greater flexibility for

dealing with the caseload, the Chief Justice considers that the number of non-permanent common law judges should be increased from 9 to 11.

18. The Chief Executive noted that as invited by the Chief Justice, the JORC considered the appointment of the following eligible persons as non-permanent judges from other common law jurisdictions to the CFA :

- (a) Mr Michael McHugh AC, a former Justice of the High Court of Australia¹; and
- (b) Mr Justice Thomas Munro Gault DCNZM, a former Justice of the Supreme Court of New Zealand².

19. The Chief Executive was informed of the considerations leading to the JORC's recommendation of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the CFA.

20. The Chief Executive also noted the curriculum vitae of these two Judges and that they have agreed to their names being put forward for consideration.

21. The Chief Executive noted that the resolutions of the JORC on the recommended appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent judges from other common law jurisdictions to the CFA were effective in accordance with section 3(3A) of the JORC Ordinance.

22. The Chief Executive was satisfied that the recommendation of appointment made by the JORC was effective and the procedure was proper and in order. The Chief Executive therefore accepted the recommendation of the JORC.

ENDORSEMENT OF THE LEGISLATIVE COUNCIL

23. Subject to the endorsement of the Legislative Council, the Chief Executive will make the recommended appointment.

24. Subject to the endorsement of the Legislative Council, it is intended that the recommended appointment would take effect in April

¹ Mr Michael McHugh retired recently on 1 November 2005.

² Mr Justice Thomas Munro Gault DCNZM will retire on 5 April 2006.

2006. The recommended appointees would be ready to take up appointment by then.

Administration Wing
Chief Secretary for Administration's Office
January 2006

Mr Michael McHugh AC

1. Personal Background

Mr Michael McHugh is a citizen of Australia. He was born in Australia on 1 November 1935, is married and has three children.

2. Education

Mr McHugh was educated at various schools in Queensland and New South Wales. He qualified for admission to the New South Wales Bar by completing the New South Wales Barristers Admission Board examinations.

3. Legal Experience

Mr McHugh was called to the New South Wales Bar in 1961. He was appointed Queen's Counsel in 1973. He practised extensively as a trial and appellate counsel in all fields of law, but particularly in common law, criminal law, industrial law and constitutional law matters. He was counsel for the Australian Government in the *Royal Commission on Australia's Security and Intelligence Agencies* in 1983.

4. Judicial Experience

Mr McHugh has served as a Judge for almost 21 years. His judicial experience has covered all areas of Australian law: He was appointed to the Court of Appeal of the Supreme Court of New South Wales in 1984 and served there until February 1989 when he was appointed to the High Court of Australia. He has been a Justice of the High Court from 1989 until his retirement. In accordance with the *Commonwealth of Australia Constitution Act* 1900, he retired from the High Court on 1 November 2005 when he turned 70. He has served as Acting Chief Justice of Australia on a number of occasions during the absence of the Chief Justice.

5. Services and Activities related to the Legal Field

Mr McHugh served as Chairman of the Ethics Committee of the New South Wales Bar (1977-1981). He was also President of the New South Wales Bar Association (1981-1983) after being Vice-President of that Association (1977-1981). He was a member of the Law Council of

Australia (1981-1983) and President of the Australian Bar Association (1983-1984). He was President of the Media Law Association of Australia (1983-1984).

6. Awards

Mr McHugh was awarded the Honorary Degree of Doctor of Laws by the University of Newcastle in 1998. He was made a Companion of the Order of Australia in 1989 for services to the law and was awarded the Centenary Medal of Australia in 2003.

7. Publications

Mr McHugh is the co-author of *The Liability of Employers for Personal Injury* (1965) (with H.H. Glass); 2nd ed (1979) (with H.H. Glass and F.M. Douglas). Other publications include -

- (a) *The Law-Making Function of the Judicial Process* (1987);
- (b) *Democracy in the Law, "The Judicial Method"* (1998);
- (c) *Tensions Between the Executive and the Judiciary* (2002);
and
- (d) *The Strengths of the Weakest Arm* (2004).

In 2004, Mr McHugh gave The Inaugural Sir Anthony Mason Lecture on Constitutional Law at the University of Sydney on "The Constitutional Jurisprudence of the High Court of Australia (1989-2004)".

The Right Honourable Justice Thomas Munro Gault DCNZM

1. Personal Background

Justice Gault is a citizen of New Zealand. He was born on 31 October 1938. He is married with one son and lives in Auckland.

2. Education

Justice Gault was educated in New Zealand at Wellington College. He studied law at Victoria University of Wellington (LLM degree 1963).

3. Legal Experience

Justice Gault was admitted as a barrister and solicitor of the Supreme of New Zealand in 1962 and qualified as a registered Patent Attorney in 1963. He practised as a member of the firm of A J Park & Son specializing in intellectual property law until 1981. From 1981 to 1987 he practised as a barrister-sole in the fields of intellectual property law, competition law and general commercial law.

4. Judicial Experience

Justice Gault was appointed a judge of the High Court of New Zealand in 1987. In 1991 he was appointed to the Court of Appeal of New Zealand where he served until the end of 2003, becoming President of that Court in 2002. He was appointed in 1992 a member of the Privy Council (the court of final appeal for certain British Commonwealth countries), and sat from time to time in London until New Zealand established its own Supreme Court and ended appeals to the Privy Council. Justice Gault was appointed to the Supreme Court of New Zealand in 2004 upon its establishment. He will retire from that Court on 5 April 2006. He was appointed a judge of the Supreme Court of Fiji (a final court of appeal) in 2002 and has sat in that Court from time to time.

5. Services and Activities related to the Legal Field

Justice Gault served as a member of the New Zealand Institute of Patent Attorneys and was President in 1971-1972. He presided over an Intellectual Property Advisory Committee appointed by the Minister of Justice in the 1980s. He chaired the establishment committee of the New

Zealand Institute of Judicial Studies and was the chairman the Board of that Institute over the first four years of its operations.

6. **Recognition**

Justice Gault was appointed a Member of Honour of the International Association for the Protection of Industrial Property in 1998. He was created a Distinguished Companion of the New Zealand of Order of Merit in 2002 for services to law. He was appointed an Honorary Bencher of the Inner Temple in 2003.

7. **Publications**

Justice Gault is the Consulting Editor of the multi-volume work *Gault on Commercial Law*.

8. **Activities Outside the Law**

Justice Gault has an extensive background in administration of the game of golf. He was President of the New Zealand Golf Association from 1987 to 1993. He was appointed Captain of the Royal and Ancient Golf Club of St Andrews (the international governing authority) for the 2005 – 2006 year.
