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In Lighter Vein

BANK BANDIT BUNGLES FIRST ROBBERY ATTEMPT

VANCOUVER (CP) — The man stood in line, patiently waiting his turn.

And when he finally reached the teller at a downtown bank, he got right to the point.

"This is a holdup," he growled at the Bank of Montreal employee. "Gimme all your money."

But the young female teller was puzzled.

"Where's your gun?" she asked.

"My friend's got it and he'll use it," warned the would-be robber.

"Where's your friend?" asked the teller.

"He's at the back of the line," came the reply.

"What's he wearing/"

"A brown jacket."

She stepped aside and surveyed the line of customers.

"He's gone."

"Well, give me the money anyway," demanded the man, now visibly flustered.

"Wait right there," the teller replied. "I'll have to ask my boss."

She turned and was gone.

Seconds later she returned. The man was still there.

"You can only have $150," she informed him.

"Oh, that'll do," he agreed without hesitation.

The man then took the cash and ran for the door.

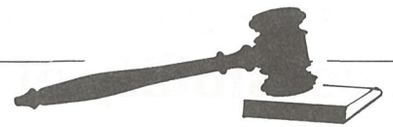
He was greeted by two police officers, who gave him a ride to their headquarters.

"New at this, are you?" one officer asked as they drove away.

"Yes," he confessed. "It's my first time."

The man, whose name was not released, has been charged with attempted robbery, police said yesterday.

President's Page



With each and every day of my career as a Judge, I sense an ever deepening awareness of the onerous responsibility we as Judges of the Provincial and Territorial Courts of this great Nation share as custodians of the law. Together with that awareness, I also sense that more than ever in judicial history, our society looks to us and the courts over which we preside to discharge our custodial responsibilities with a greater perception for natural justice. It has been said **"the law and justice must be brought together, so that whatever is just may be lawful and whatever is lawful may be just".** I believe Canadian society today would find great empathy with that philosophy.

The Constitution Act of 1981 which gave us our new truly Canadian Constitution with its enshrined Charter of Rights and Freedoms continues to make our citizens aware in a more enlightened manner of the splendid opportunity for true nation building that is their heritage. The fruition of that dream for a truly just society, however, largely depends on the ability, desire and willingness of our courts to breathe life into that new constitution. Should we fail in discharging the great duty and opportunity which is surely ours, the new constitution of Canada, instead of becoming the hallmark of decency of a great nation, may well be destined to that ignoble obscurity which would befit a Nation that lacks the fervor for the values the constitution itself seeks to inculcate in us.

Parliaments and legislatures have their distinctive and vital roles in enacting laws, but it can be truly accepted that the courts and judges of a nation as the "custodians" of the law continue to be the bonding agent between the lawmakers and the people. The degree of fairness, reasonableness, decency and dignity which flow from that body of law to the people is the measure of fairness, reasonableness, decency and dignity which flow from that body of law to the people is the measure of the ability of our judicial edifice to make the law a living instrument to further enrich and enhance our total society.

The importance of our division of the court system, the Provincial Court, cannot be overstated when it is recognized that it deals with in excess of ninety-five per cent of all criminal litigation. This fact alone keeps us ever conscious of how important it is that peoples perception of "our" court be favourable, for it is likely their only contact with the Canadian Justice System. Conversely, should their impressions be unfavourable, they might forever hold the system in mistrust.

Chief Justice Marshall said **"Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained or until liberty be lost in the pursuit".** U.S. vs Nourse (34 U.S.) 8,27. This is a correct statement of the commodity it is our duty as judges to deliver; it is a statement which reflects the awesome responsibility we as judges share as "custodians of the law".

I take this opportunity to wish you and yours a healthy, happy and prosperous 1985.

The Path to Improving the Accessibility of the Law in Canada

An Address
by The Right Honourable Brian Dickson,
Chief Justice of Canada,
to the Annual Meeting of
The Canadian Bar Association at
Winnipeg, Manitoba on August 28, 1984

Mr. Chairman, Ladies and Gentlemen:

This is my first opportunity to address an annual meeting of the Canadian Bar Association as Chief Justice of Canada. I thank you for the opportunity. I am especially pleased that this should take place here in Winnipeg, a city I still consider in my heart as my home.

Pour des raisons qui vont au-delà de ma propre perception de cette ville sur le plan personnel et professionnel, je suis également content qui l'Association du Barreau ait choisi Winnipeg cette année comme lieu de rencontre pour sa réunion annuelle. Comme organisation nationale, l'Association du Barreau a Toujours Reflété, et continue de reflêter, le caractère bilingue de notre pays. Les membres de cette association se sont toujours dévoués à la cause du bilinguisme à l'intérieure de la profession juridique. Je suis particulièrement heureux de prendre la parole ici à Winnipeg à l'occasion de cette rencontre annuelle de l'Association du Barreau Canadien car cela me permet d'exprimer à vous tous ma confiance que la tradition d'appui au bilinguisme qui existe partout au Canada se poursuivra.

Winnipeg is the source of so many of my connections with the Canadian Bar Association extending over more than 35 years. In particular, many of you may know of the contribution of my old firm of Aikins, Macaulay to the Canadian Bar Association, providing five former presidents of the association, including the founder and first president, Sir James Aikins. Sixty-nine years ago, in Montreal, Sir James delivered his first presidential address to the Annual Meeting of this association. The title of that address was "The Advancement of the Science of Jurisprudence in Canada".

The main theme of Sir James' speech was that a National Bar Association, whose first stated object was the advancement of skill and knowledge related to the law, had an important role to play not only in improving the administration of justice but also in shaping Canada's identity and fostering national unity. Across the expanse of almost three-quarters of a century, Sir James' observations have lost none of their relevance for the practising bar, for the bench or for the schools of law. The experience of these last seven decades provides abundant support for the proposition that improvements in our understanding of the law and in our skill in applying it have public as well as private benefits. The consequences of our efforts in advancing the administration of justice go beyond the interests of the legal profession and its individual clients to touch the life of the nation as a whole.

The consistent challenge facing those who practice law and those who expound it has been and still is to protect the health and the relevance of the legal system by ensuring that it remains responsive to the needs of Canadian life. This, as I see it, is the meaning and the importance of a call for a distinctive Canadian jurisprudence: the law that governs Canadians and regulates their affairs must be relevant in both substance and procedure to contemporary Canadian reality. For Sir James Aikins the challenge posed by contemporary Canadian reality was to develop a coherent and consistent jurisprudential framework capable of joining the disparate regions of Canada into a commercial as well as a political union.

Today's reality of an independent, bilingual, multicultural Canada in which civil liberties are protected by an entrenched **Charter of Rights and Freedoms** poses new and different challenges of a jurisprudential nature. I have spoken on other occasions of the substantive legal dimension involved in developing a distinctively Canadian jurisprudence and of my optimism regarding the progress of our courts to this end.

Making the law responsive to contemporary Canadian reality means more, however, than simply articulating a distinctly Canadian legal doctrine. It also means bringing this doctrine, and the law in general, within the reach of those whom it is intended to benefit. People have a right to justice and it is our job as lawyers and judges to see that they get it. Unless the law provides a realistic, effective and available remedy, all its theoretical excellences are for nought. It is this second aspect of current Canadian jurisprudence which might compendiously be called its "accessibility" that I would like to discuss this morning.

Bringing the law within the reach of Canadians has, in my view, both a figurative and a literal dimension. Figuratively, it means educating Canadians about their legal system and how it affects them on both an individual and a collective basis. Literally, it means making it practical for them to use that system. Allow me to address the educational issue first.

the zoom lens when motions for summary judgement are made under Rule 18.

The magnification of the zoom lens allows constant observation of the thread of argument, and the golden thread that runs through the fabric of every criminal trial is almost dazzling. The magnification is strong enough to show the finer points of counsel's agrument and the inconsistencies in the Crown's case. If a civil case appears only as a tiny image, even under magnification, then the glasses flash a **de minimus non curat lex** sign.

Without the magic helpers a judge would never recognize an estoppel; with them an estoppel looms up like a stop sign festooned with flashing red lights. Equally distinguishable are the plumages of a **causa sine qua non** and a **causa causans**, the latter having much more prominent casual connections, somewhat similar to the canals on the moon. Nonfeasances stand out as white, malfeasances as black.

The colour enhancer shows agruments in their best light but filters out purple prose and blocks arbitrary points of view. It cearly distinguishes between red herrings and the edible kind.

The handy-dandy duration expander — also known as the hunch confirmer — cuts in at the end of the first day to reveal that the two-day case will probably take a week. The expander also raises the $100,000 limit to allow for inflation. Turn the knob the other way and it changes from an expander to a minimizer to reduce mountains back into molehills, and to contract the $100,000 limit to allow for contingencies.

For middle distance the glasses sometimes can confuse. For example, one day in Division A Chambers Neil Fleishman walked in the door with his greenvest and I thought it was a walking pool table.

The Japanese have perfected a sensor for incorporation in the glass called Model BS 1000, which alters the lens colour as the level in counsel's argument increases. When the level reaches 1000, the peak of toerability, the lense are bright red and might even start to melt at the edges. Powerful advocates are lobbying the Federal Government to ban their importation. If it goes to court the Pollution Control Board is coming is as **amicus curiae**.

While the glasses are capable of translating Latin into English, they flash a REJECT sign at some lawyer's Latin. A REPEAT sign follows and if it is still incomprehensible it flashes SPELL IT and, finally, FORGET IT.

All wearers of these magical glasses are afflicted by an unfortunate side effect which strikes the moment they tke them off. It is marked by a fixed look with eyes wide open, and by rigid body movements which are particularly noticeable when a group of judges walk in lockstop down Hornby Street for lunch at the Lawyer's Inn. The medical term which describes this fixed stare and rigid walk is, of course, STARE DECISIS.

The best thing about the magic glasses is that they enable the judge not only to see that justice is done but also to see whether justice is being seen manifestly to be done.

And that brings me to the subject at hand. Traditionally lawyers are mistrusted. The cry to Kill all the Lawyers always rallied the mob. Now the cry is to Save the Whales but Kill the Lawyers. Judges are also suspect. Fraternity between judges and lawyers must be on a restricted basis; injustice is manifestly seen to be done when a judge dines with any counsel engaged in the case before him. In numberous ways a judge must maintain certain appearances and avoid others. While it is quite appropriate for judges to attend Bar Association events, social or business, it is inappropriate for judges to join with Benchers on their deliberations because it just looks too cosy. This goes against my grain, because I am a reformed Bencher — as many judges are. Judges are just Benchers with longer teeth.

The fact is that judges take a vow of detachment along with their oath of fealty. This does not mean they have to be wholly detached, but, like some English houses, semi-detached. If they are not some litigants will say they are fraternizing with the enemy or consorting with the devil.

The Judges' Magic Glasses

By the
Honourable Mr. Justice Lloyd McKenzie*

I'm going to let you in on a state secret. When our Sovereign Lady appoints a new judge she gives him or her a special appointment to the Royal eye-glass dispenser, London Drug Optical, for a pair of magic eyeglasses — they have a built in computer. These magic spectacles are not single vision or bifocals or trifocals, but invisible omnifocals. They deny no sight or insight. Suddenly the wearer is given a whole other way of seeing — it is a world transformed.

In no time the judge begins to discern the shortcomings of counsel — particularly junior counsel. The capacity for making this discernment increases with age.

They are unbeatable for making findings of fact — without them the judge would never pick out the needles of truth hidden in the evidentiary haystack or have half a chance of finding nonpecuniary loss after taking the functional approach.

The top half of the trial judges' glasses focuses only on questions of fact. This half also makes the fine distinction between admissibility and weight — indeed they give a reading on the true metric weight of any piece of evidence. Theoretically, appellate judges wear only the bottom half which focuses on questions of law alone — Lambert, J.A. often wears them off the bench. Appellate judges often can't resist the temptation to borrow the trial judge's glasse and, because they are not used to them, they sometimes see his mice as elephants and his elephants as mice.

The magic glasses have some odd characteristics, e.g. they cloud over and become opaque just before 10 A.M. so a seeing-eye clerk is required to lead the judge to the bench. On arrival the judge is unable to recognize counsel until they have put in an appearance, even though they may be friends of 30 years standing. (Of course counsel cannot be heard either if they are wearing brown shoes or mini-skirts or ice-cream pants, like Peter Butler.)

An unfortunate feature recently forced upon judges enables them to see the bottom line. Repeated invitations to view this phenomenon strains the temper more than the eyes.

The right lens has a tiney aperture drilled in it through which the judge can see the evidence as a whole.

The prettiest distant view is afforded by the zoom lens of the Future Income Stream. This tends to overspill its banks when plaintiff's counsel is addressing the jury. In the same landscape is a mountain called Nonpecuniary loss. Several well-beaten trails lead up it, but there are signs posted on them saying "Closed — By Order — Supreme Court of Canada". Only one, almost indiscernible trail, is open, and it is marked by a sign — Beverly McLachlin's Way — The Functional Approval to Non-pecuniary Loss. Another trail marked "Danger" leads to the Rough Upper Limit. When you look at the Future Income Stream and reverse the zoom lens you see the present value of the Future Income Stream.

Any damages outside the range of the zoom lens are too remote. If a piece of evidence shows only in a dim, blurred fashion it may be seen as part of the res gestae. Images of obiter dicta are tricky. When a judge doesn't like a pronouncement of a higher court because it conflicts with his own view of the law, he can take a second look, and behold, it turns out on close scrutiny not to be ratio but mere obiter dicta. The glasses are also quite exceptional in their ability to distinguish the facts of one case from another. They give an immediate reading on relevance and materiality. The trick here is to close the left eye (closing both eyes for long periods of time is sometimes almost irresistible but not allowed) — anyway, to close the left and to focus with the right eye on the courtroom clock. If the evidence does not fit within the evidence frame in the right lens then it is inadmissible. This practice accounts for the high incidence of judicial clock-watching. They also need to check the clock frequently to see if it is at this particular point in time.

With the zoom lens the judge can see the gist of an argument or the nub of the case even before plaintiff's counsel has been five minutes into his opening. This feature is particularly discerning in motions for nonsuit because without it you would never know whether there is a scintilla of evidence to support the plaintiff's case. Scintillas are such minute particles as to be invisible to the naked eye. Litigible issues loom larger but can be hidden in shadow and will often elude even

We live in an age of mass communication. Newspapers, television, radio and film can take us virtually everywhere and show us virtually everything. As a result, the public has grown more interested in a wider variety of subjects than ever before. Insofar as this new public interest embraces the law, and the courts, it is potentially an important and beneficial phenomenon. The success of institutions in a democratic society depends on an educated and enlightened citizenry. What is necessary therefore is to ensure that the view of the legal system disseminated by the media constitutes education rather than miseducation. To some extent we can ensure this, whether as judges, lawyers or academics by reasonable cooperation with the media. We can give comprehensive answers in response to genuine requests for information and take the time to explain the background that will make sense of a legal issue of current interest.

I have some doubts, however, whether this is a complete answer. The media are not only organs of information, they are also vehicles for entertainment. In this latter aspect, which also extends to their "news" coverage, they tend to search for the unusual, the sensational, and the confrontational as a means of attracting an audience. The difficult problem that both the legal and the journalistic professions must deal with is how to prevent this natural gravitation toward the dramatic from painting a misleading and counterproductive picture of what the law is and what it does.

This is an especially difficult problem when related, for instance, to the issue of television in the courtroom. This is a question that has come before the Canadian Judicial Council and may come again. I would note that there has been much said on both sides of the issue. Showing Canadians what goes on inside a courtroom can certainly be one of the best ways of educating them about the legal system and how it works. On the other hand there is a real danger that the presence of cameras, the so-called "media frame", will distort the process of justice, inviting dramatics and confrontation, whereas even-handed adjudication calls for a low-key, even "boring" approach and for compromise.

Whatever we may decide in the future about televising judicial proceedings, I think the public profile of the courts and the law will remain high, and rightly so. Especially since the entrenchment of the **charter** the legal system has acquired a new and profound relevance to all Canadians. The courts are now addressing a wider audience than ever before and I think should be conscious of this fact.

Our courts, by reason of the **charter** have begun to assume the role of referee between the individual and the state. Confident, as I am, of the high quality of the Canadian judiciary, I have the utmost faith in the ability of our courts to fulfill this new role. Nonetheless, the public is entitled, in my opinion, to be reassured that our judges are appointed on the basis of merit and legal excellence alone. For that reason I think we will all await with interest the conclusions of the Canadian Bar Association's committee on judicial appointments.

I would like to turn now to the second aspect of bringing the law within reach of Canadians, that of making it practical for them to use the legal system. As I see it the challenge here is to make the legal process easily accessible at reasonable cost and with a minimum of delay. I intend to discuss this challenge mainly as it manifests itself in the courts.

Effective communication with the court is a basic precondition for accessibility to the judicial system. At the Supreme Court of Canada we have long since recognized that the bilingual character of this nation requires that litigants and their counsel feel free to use either of Canada's official languages in any and all proceedings before us. Other courts have adopted a similar policy and it is perhaps not unreasonable to look forward to a fully bilingual Canadian legal system.

Practical accessibility does not only mean being able to get to court but also being able to get a timely decision. One of the most serious problems presently confronting our courts is that of delay. To put it bluntly, it takes too long for cases to work their way through our court system to a final resolution. Figures may vary from place to place, but in at least one jurisdiction it now takes an average of seven years for a civil case to move from the issuance of a writ to the final disposition of an appeal. The successful party's "victory" in such circumstances can hardly be anything but a hollow one. Little wonder that one hears stories of plaintiffs, successful at trial, who nevertheless offer to settle in order to avoid an appeal. While in other jurisdictions the parties may not be confronted with the prospect of a six-year delay, a difference in the severity of the problem must not make it any less a cause for concern.

There is after all an element of truth to the old adage that slow justice is no better than speedy injustice. Our goals must surely be that of speedy justice for all litigants, civil or criminal. Lengthy delays in civil cases favour affluent litigants over those of more modest means. Delay distorts the financial effect of the ultimate verdict on the parties and may

impose severe emotional strains. In family law cases involving the custody of children the suffering extends beyond the litigants to innocent third parties. In criminal cases the possibilities for injustice arising from delay are equally obvious.

Where delay is the result of deliberate manoeuvering by the parties, the courts already have the necessary sanctions to control it. In my view they should not hesitate to use these sanctions to penalize intentionally dilatory tactics. Furthermore, courts should be much less tolerant of delay caused by dalliance or procrastination on the part of counsel.

Much of the delay that litigants encounter is, however, not the result of lawyers' stalling, but of institutional weakness. To some extent I think this aspect of the problem of delay can be ameliorated by a concerted move to minimize inefficiencies in the way courts function and to improve their productivity. We have recently begun to confront this issue at the Supreme Court of Canada.

It is clear that at the Supreme Court level, some delay is unavoidable. The jurisdiction of the court is a supervisory one. Our function as I see it, is to develop the law as a whole, to oversee the articulation of uniform legal principles throughout the Canadian judicial system. We are not a court of error. Except in very rare cases, we are simply not in a position to deliver judgment immediately, from the bench. In order for the court to give the guidance that it is meant to provide, it is necessary to take time to deliberate on policy matters, time for research, reflection and careful draftsmanship. Mr. Justice Frankfurter spoke of the "spacious reflection so indispensable for wise judgment". There will therefore always be some interval, perhaps even a significant one, between the hearing of an appeal and the delivery of judgment.

While there may not be anything the Supreme Court — nor any other court for that matter — can do about this sort of **necessary** delay, there is a good deal that we can do about **unnecessary** delays. We intend to implement a number of measures designed to cut down our backlog of cases, minimize delay and, in general, improve the productivity and efficiency of our court.

Starting in the autumn term we shall be increasing our sitting days by some 25% over their present number. We shall also begin to "cascade" appeals so that there is always a new appeal ready to be heard when the previous one has ended. I do not expect that we will abandon our present schedule of two weeks of hearing appeals followed by one week off to work on judgments since that would only transfer the backlog from appeals waiting to be heard to appeals standing for judgment. I do, however, anticipate that in the foreseeable future we may begin asking counsel to participate in a pre-hearing conference to establish a reasonable amount of time for presenting oral argument and that the court will enforce the time limits agreed upon.

These measures are designed to reduce delay by making the most efficient use of the time available to the court for hearing appeals. Applications for leave to appeal are a second area on which we are focussing attention with a view to increasing the productive use of our time and simultaneously improving accessibility. There is perhaps no more important aspect of the Supreme Court of Canada's procedure for hearing appeals than leave applications.

With very few exceptions the only cases that come before us are those for which we have granted leave. The leave granting power, which allows the court to control its own docket, is absolutely crucial for the court's supervisory jurisdiction. It allows the court to select cases purely on the basis of legal importance to Canadian jurisprudence rather than financial importance to the litigants. The court can only choose, however, from among the cases brought before it. The cost of sending counsel to Ottawa on the chance that the court will grant leave can act as a powerful disincentive, especially to those who reside far from the nation's capital and whose means are limited.

In the past year we conducted an experiment with teleconferencing by satellite as a possible solution to this problem. Counsel in British Columbia and a leave panel in Ottawa were connected via television cameras and monitors for the purpose of arguing motions for leave to appeal. The experiment was a complete success and I am pleased to say that our main courtroom is currently being redesigned to accommodate permanent audio-visual facilities capable of connecting the court with various locations throughout Canada for leave applications. This innovation, along with the installation of permanent facilities for simultaneous translation of all proceedings in all courtrooms will remove two of the most significant obstacles standing in the way of widespread accessibility to our court.

Paradoxically, however, the same widespread accessibility that is an absolute prerequisite to the court's selection of its caseload can also be a burden on its efficient operation and an unfortunate source of delay. At the moment, we do not pre-screen applications for leave to appeal. Every unsuccessful litigan

court or while a person's licence to drive has been suspended by a province because of a conviction for a driving-related offence under the **Criminal Code**.

Facilitating Enforcement

The **Criminal Code** now allows breath samples to be taken for evidence of impaired driving or "over .08" driving. To further ensure the accuracy of breath tests, an amendment to the **Criminal Code** would require that an alcohol standard test be performed in every case to determine that the instrument used in the breath test is in proper working order.

Sometimes a breath sample cannot be obtained because of the suspect's physical or mental condition. Without such evidence, it may be very difficult to obtain a conviction of impaired driving, and virtually impossible to obtain one of "over .08" driving. A proposed amendment would authorize the taking of blood samples by a medically qualified person where a police officer has reasonable grounds to believe that a person has driven at any time within the preceeding two hours while impaired by alcohol.

A suspect who, without a reasonable excuse, refuses to comply with a lawful request for a blood sample would be subject to the penalties that apply to the offence of impaired driving and "over .08" driving. This is now the case for a driver who refuses to provide a breath sample.

To protect the rights of the suspect as much as possible in such cases, the following safeguards would apply:

- Blood samples could only be requested when, due to the condition of the person, breath samples cannot be obtained. Where a persn is conscious, a blood sample could be taken only with the consent of the suspect upon the demand of the police officer. Where someone has been killed or injured and the suspect cannot consent to the taking of a blood sample because of his physical or mental condition, for example, if he is unconscious, a blood test would be mandatory but only if judicial authority is obtained in advance. If necessary, judicial authority could be obtained by means of a telephonic warrant.
- A suspect would be entitled to have a blood sample taken for the purposes of an independent blood analysis to ensure the accuracy of blood-alcohol readings.
- Only a qualified medical doctor or a qualified person acting under a doctor's direction would be authorized to take a blood sample.
- A blood sample would not be taken if, in the view of a medical doctor, it would endanger the life or health of the suspect.

Since doctors will be acquiring blood samples with the consent of the suspect or pursuant to a judicial warrant, the law will protect them except in cases of negligence.

As a further means of improving the enforcement of impaired driving laws, the Bill contains a number of procedural measures, including the streamlining of court procedures.

Impaired Boating and Flying

The proposed amendments would bring **Criminal Code** provisions on impaired boating into conformity with the new impaired driving laws. Also, a new offence of impaired flying would be created, again with the same penalties as for impaired driving.

The provisions relating to impaired driving, boating and flying would be grouped together in the **Criminal Code.**

Other Measures Against Impaired Driving

Impaired driving is essentially a social problem. Many Canadians from all walks of life are willing to drink and drive, to risk human life and limb because as a number of studies show, they don't think they will get caught and they don't think they will have a car accident.

While legislation prescribing tougher penalties for impaired driving is a necessary first step, increased attitudes toward the impaired driver are necessary as well. The Department of Justice is examining ways in which limited government funds can achieve the greatest impact in changing people's attitudes.

Information Paper
Impaired Driving

Objectives

The provisions on impaired driving would:

- expand the scope of criminal liability where an impaired driver has caused injury or death;
- provide tougher sentences for dangerous or impaired driving;
- facilitate the enforecement of impaired driving laws, through judicial authorization for blood samples;
- make impaired driving laws apply to aircraft and marine vessels as well as to motor vehicles.

Expanding Liability

The **Criminal Code**, particulary in ss. 234 and 236 now prohibits impaired driving* and "over .08" driving**. The **Code** also contains offences such as manslaughter, criminal negligence causing death and criminal negligence causing bodily harm which are sometimes used to deal with more serious cases of impaired driving offences which specifically prohibit driving that causes death or injury in the absence of criminal negligence. The Bill would create four new indictable offences:

- (1) dangerous or (2) impaired driving causing death
  — maximum penalty of 14 years imprisonment; and
- (3) dangerous or (4) impaired driving causing bodily harm
  — maximum penalty of 10 years imprisonment.

Sentencing

The proposed new sentencing measures are intended to provide tougher penalties generally, and to allow the courts more flexibility in fitting the punishment to the circumstances fo the crime and to the nature of the offender:

* driving while one's ability to do so is impaired by alcohol or drugs.

** driving with a blood-alcohol concentration exceeding 80 mg. in 100 mL of blood.

- The minimum sentence for a first offence of impaired driving or of failing to provide a breath sample would be increased from $50 to $300.
- Under these provisions, the minimum penalties would be the same for both the relatively minor summary conviction offences and for the serious indictable offences, namely:
  first offence - $300
  second offence - 14 days imprisonment
  third or subsequent offence - 90 days imprisonment

  The maximum penalty for summary conviction offences would be 6 months imprisonment and/or a $2,000 fine. However, for proceedings upon indictment, the maximum penalty would be increased from the current 2 years to 5 years, and there would be no limit on the fine that could be imposed.
- The maximum penalty for dangerous driving would be increased from the current 2 years to 5 years.

As a further deterrent the Bill provides for several other sentencing measures that could be imposed in addition to a fine and/or a prison sentence.

- Anyone convicted of impaired driving or "over .08" driving, or of failing to provide a breath or blood sample, would automatically be prohibited from driving for a minimum of 3 months for a first offence, 6 months for a second offence, and 1 year for a third or subsequent offence, up to a maximum of 3 years in all cases. For other more serious driving offences, it would be left to the discretion of the court whether or not to issue a prohibition order. For example, the court might decide not to do so where the convicted driver has been sentenced to a long prison term. Where the court chooses to issue such an order, the prohibition period could be much longer-even for life in some cases. No restricted or intermittent driving privileges would be permitted during the period of prohibition.
- Courts would be able to order the immobilization for up to one year of the motor vehicle used in any of the driving offences if the vehicle is owned by the accused, the owner would be notified and given an opportunity to make representations to the court before an immobilization order is made. The accused would be entitled to apply for a variation of the order if unforeseen circumstances subsequently arise.
- The Bill would make it a criminal offence, punishable by up to 2 years imprisonment, to drive a motor vehicle while prohibited from doing so by the

tin a court of appeal is entitled to present a 15-minute oral argument in favour of his application. Our current practice is to hear leave applications in three panels of three judges every second Monday throughout the term. Increasingly, however, leave applications have been spilling over into Tuesdays. The simple fact is that the more time we spend on leave applications the less time we have to hear appeals. With the foreseeable increase in leave applications caused by improved accessibility and by **charter** litigation, the time pressures we are under threaten to become acute. We are accordingly considering pre-screening leave applications on the basis of written materials alone, with obvious cases either for granting or for denying leave being disposed of without oral argument; only applications raising doubt as to whether or not leave should be granted would result in oral argument, presented either in person or via satellite.

Whether or not such procedures are adopted in the near future, I am certain that at the very least the court will soon institute restrictions on the written material that may be submitted for leave applications in order to save the judges' time and eliminate the copious irrelevances with which we are too often faced at present.

A further step we are contemplating to improve our efficiency and thereby reduce costs and delay is electronic caseflow management. Connecting the word processors currently used by most judges' secetaries to a central computer would provide instant updates on the status of each appeal and leave application as well as a means for cross-referencing the issues raised by each. This would promote the efficient consolidation of appeals and prevent inadvertent duplication or inconsistency in the leave granting process.

While I believe strongly that improving judicial productivity is an important and effective response to the problem of delay in our court system I doubt that it is a complete answer. It may well be that our judicial resources, no matter how efficiently they are employed, are simply being stretched too thinly in some parts of the legal system. Similarly, the barriers to accessibility resulting from the cost of the trial process will not disappear even if unnecessary delays are successfully minimized. Perhaps an additional anwser is to be found in the increased use of arbitration and mediation instead of litigation in civil matters. Perhaps also it is time to reconsider some previously rejected options for dealing with the costs of legal services. Then again perhaps only the legislature can intervene with the necessary comprehensive solutions. It is clear to me, in any event, that the problems of accessibility caused by delay and by cost cannot be solved by the judiciary alone. We must have the active participation of both practising and academic lawyers in the search for workable solutions.

I must say that I was somewhat disappointed in this regard to learn from Mr. McKercher that a recent attempt by the National Executive of this association to set up a committee to deal with court administration, delays and costs, failed to generate an;y interest. I would hope that a renewed attempt along the same lines would meet with a different response.

I think it can be fairly said that the broad concerns I have highlighted over the availability and effectiveness of the individual's access to the law are relevant across Canada. Many of the steps, which can and should be pursued to broaden and enhance the accessibility of our legal system will be of universal application in all regions of the country. It must not be forgotten, however, that Canada is a country which enjoys an enormous diversity in heritage and cultural tradition, not to mention population and resources. All Canadians are the beneficiaries of the natural enrichment of our society that this provides. And in improving the accessibility of the Canadian legal system account must be taken of this diversity.

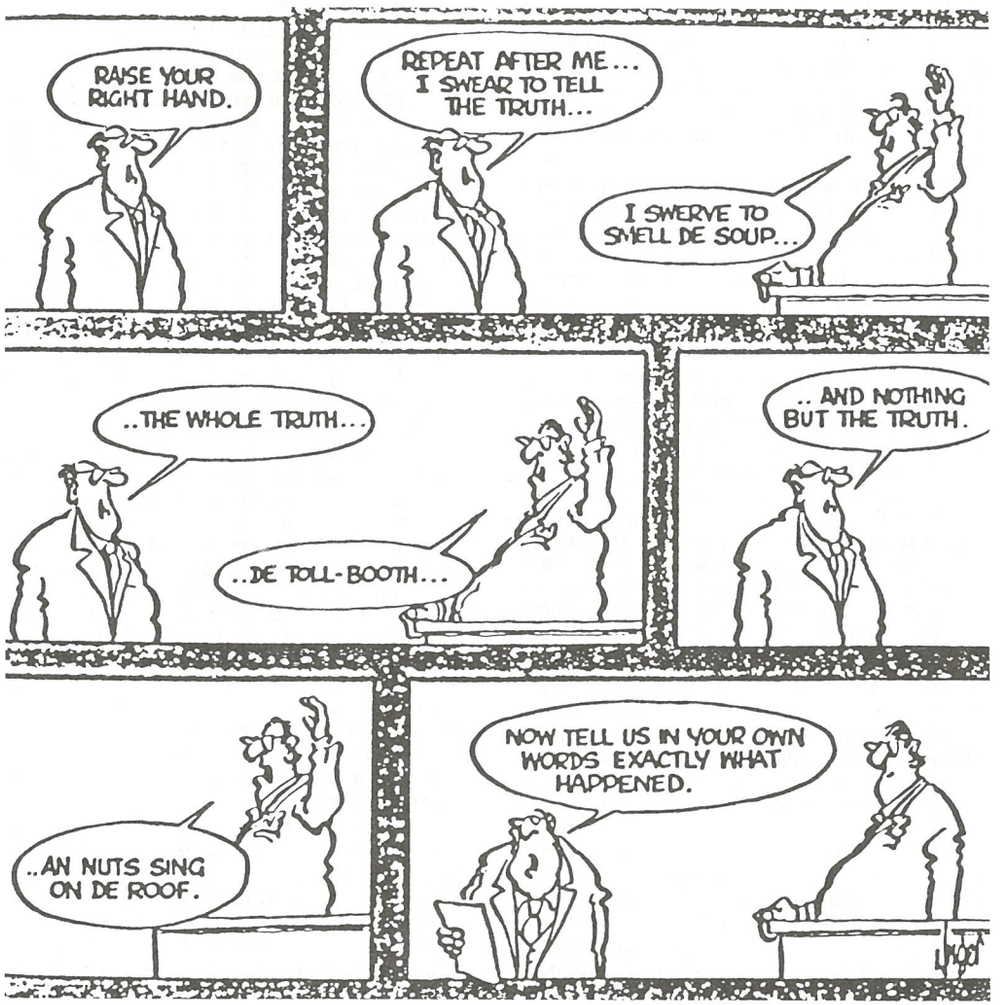
Dans différentes régions du pays, il peut se révéler nécessaire de recourir à des moyens uniques et particuliers de minimiser les coûts et les délais et de familiariser le public avec le droit et ses mécanismes. En même temps, le droit et les institutions qui le défendent, doivent servir tous les Canadiens de façon égale et, ce qui est tout aussi important, doivent être perçus ainsi. L'élaboration de solutions qui répondent aux divers besoins qui peuvent exister dans différentes régions, sans compromettre le vonctionnement impartial de notre système judiciaire, constituera l'un des grands défis qu'il faudra résdoudre. De cette mainière nous nous assurons que ce système continuera de répondre à la réalité Canadienne contemporaine.

It seems to me that we are at a critical moment in the evolution of our judicial system. Our legal institutions are the products of centuries of growth and gradual accommodation to changes in society. Recently the tempo of change has accelerated. Society has grown more complex and so have the disputes that require resolution. Canadians, whether as active litigants or as interested observers, are looking to the courts with increasing frequency. I am very optimistic about the capacity of our courts, with the assistance of

counsel and academic commentators, to meet this challenge. Working together, I believe we will arrive at correct and equitable solutions to the issues and questions we currently face, even though many of them have never before been the subject of litigation. We are developing a distinctively Canadian jurisprudence, the substance of which is increasingly relevant to a very wide cross-section of Canadians. We must ensure that the fruits of this jurisprudence reach those whom it is intended to serve. On this subject also, I feel strong optimism, and I call upon the members of the Canadian Bar Association, and the legal profession as a whole, to join in our efforts to meet this challenge.

HERMAN

by Jim Unger



for the offences of obtaining prescriptions from six months to twelve months when they are prosecuted by summary conviction.

(5) **Stricter Penalties**

Proposed amendments would stiffen penalties where it is believed that certain criminal behavior is increasing or that society ought to sanction it more severely:

(a) **Municipal Corruption/Secret Commissions.** A proposed amendment would increase the maximum punishment for municipal corruption from two years' imprisonment to five, to make it consistent with punishment provided for other types of government corruption. The penalty for corruptly offering or accepting secret commissions would also be increased to five years.

(b) **Forcible Confinement, Extortion and Conspiracy to Commit Murder.**

- The maximum term of imprisonment for forcible confinement would be doubled to ten years to deter the increasing incidence of this crim.
- To deal with increasing extortion of business executives, the maximum punishment would be increased from fourteen years to life imprisonment.
- The penalty for conspiracy to commit murder would be increased from fourteen years to life imprisonment. This would place it at the same level as manslaughter, robbery, hostage-taking and extortion.

(6) **Air Safety**

In an effort to reduce hazards and increase public safety, proposed amendments would provide that the following people would be guilty of an offence punishable by indictment or by summary conviction at the option of the Crown:

(a) persons who knowingly operate an unsafe aircraft or who operate an aircraft in a manner that is dangerous to the public.

(b) persons who operate an aircraft while their ability to do so is impaired by alcohol or a drug.

(7) **Implementation of International Conventions**

Events of recent years have demonstrated the vulnerability of all nations to the threat of hostage-taking. The prospect of nuclear materials in irresponsible hands is even more serious. In response to the perceived dangers, Canada has participated in the drafting of two international conventions. The Government considers ratification of these conventions to be of great important. Related to ratificaton are certain amendments to the **Criminal Code,** the **Extradition Act** and the **Fugitive Offenders Act:**

(a) Hostage-Taking. The increase in recent years in the number of hostage-taking incidents by terrorists and others has resulted in the elaboration of the United Nation's **International Convention Against the Taking of Hostages.** The purpose of the Convention, signed by Canada in 1980, is to facilitate the prevention, prosecution and punishment of acts of hostage-taking. The agreement obliges its parties to make hostage-taking an offence punishable by severe penalties. It also requires the extradition or prosecution of alleged offenders found on states parties' territories. The Convention will apply to hostage-taking incidents that involve an internatonal component. The proposed amendments to the **Criminal Code** that deal with hostage-taking, if enacted, will reflect Canada's obligations under the international agreement.

(b) **Offences Relating to Nuclear Materials.** The spread of the nuclear industry around the world has increased the possibility of criminal or terrorist acts involving nuclear materials. the **Convention on the Physical Protection of Nuclear Materials**, signed by Canada in 1980, obliges its parties to create offences relating to the misuse of nuclear material. Proposed amendments to the **Criminal Code** would allow Canadian courts to try Canadians accused of offences involving nuclear material, wherever committed. The proposed amendments would translate Canada's international legal obligations into Canadian criminal law.

terized and non-computerized information from unathorized acquisition, disclosure or use. A federal-provincial group is studying this issue.

(2) **Credit Card Theft**
Credit card offences have been modified to copy with the rising trend in credit frauds.

- Credit cards will be subject to the offences of forgery of documents and dealing with forged documents.
- Prosecutions for credit card offences may be instituted in a province other than the province in which the offence is alleged to have been committed. This amendment deals with the jurisdictional problem when a credit card is carried from province to province for fraudulent purposes.

(3) **Crimes of Violence**
Certain measures are aimed at dealing with the increasing incidence of certain kinds of violent crime.

- An amendment to the offence of threatening would expand the crime to include face-to-face threats or threats made in any other manner.
- The definition of a weapon would be extended to include objects used for the purpose of threatening or causing injury to a person.
- Possession of incendiary devices such as molotov cocktails would be illegal.
- All procurement offences will be eligible for wiretap authorization in an effort to deal with the movement of organized crime into procurement of persons for the purposes of soliciting.

(4) **Drug Control**
In recent years, the Department of National Health and Welfare has obtained strong evidence of the increasing use of medical prescriptions of various drugs for non-medical prescriptions of various drugs for non-medical purposes. As many as 200 medical practitioners a year come to the attention of the Department as possible prescribers for such pruposes and over 3,700 persons a year are know to have sought or obtained narcotic prescriptions illegally.

At present, both the practitioner who knowingly prescribes narcotic or "controlled" drugs (i.e., those listed in Schedule "G" of the **Food and Drugs Act**) for non-medical use and the person who seeks or obtains medical prescriptions for these drugs without informing the practitioner of other prescriptions obtained in the preceding thrity days, are subject to a fine of $500 or six months imprisonment or both.

Two other problems exist in this area:

1) since the practitioner merely issues a piece of paper to the "patient", he cannot be charged with trafficking in drugs; and
2) because offences of this type are normally discovered only by inspection of reports from pharmacits, filed with the Department of National Health and Welfare, (a process which takes several months) not only has the evidence been consumed, but the six-month period of limitation has expired. As a result, many offenders escape punishment altogether.

To deal with the increasing problem of diversion of drugs from medical to non-medical use, the following amendments are proposed:

1) to place in the **Narcotic Control Act** the offence of seeking or obtaining narcotic prescriptions, without disclosing the receipt of previous prescriptions over the preceding thrity days. The penalties for this new offence would be similar to those now provided for possession of a narcotic drug.
2) to place in the **Food and Drug Act** the offence of seeking or obtaining "controlled" drug prescriptions, without disclosing the receipt of previous prescriptions over the preceding thirty days. Penalties for this offence would be similar to those now proveded for possession of a "restricted" drug.
3) to broaden the definition of "traffic" to include "the prescribing of" narcotic drugs (in section 2 of the **Narcotic Control Act**) and controlled drugs (in section 33 of the **Food and Drugs Act**).
4) to clarify that "trafficking" in controlled and restricted drugs need not involve evidence of commercial consideration (at present a matter of some doubt in the courts).
5) to extend the period of limitation

Courts, Cameras and Fair Trials: Confrontation or Collaboration?

by Professor A. Wayne MacKay
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This paper was delivered at the annual meeting of the Canadian Association of Provincial Judges, St. John's, Newfoundland, September 26, 1984).

I. Introduction

Relations between the media and the legal establishment in Canada have been characterized by misunderstanding, mutual suspicion and confrontation. In many respects, lawyers and journalists have been speaking a different language and content to reside in their own solitudes. This problem has become more acute since the **Charter of Rights** arrived on the Canadian scene and the media and the general public have demonstrated a growing interest in the courts. As Chief Justice Brian Dickson indicated in his August speech to the 1984 annual meeting of the Canadian Bar Association in Winnipeg, the courts are now addressing a broader audience than ever before.

In the course of this speech the Chief Justice called for co-operation between lawyers, judges, law professors and journalists in making the law more accessible to a broad segment of the general public. In particular he called upon all members of the legal structure to co-operate with the media and to be patient in explaining our complex laws. As he indicates in the following passage he is well aware of the concerns that lawyers have about the "art of journalism".

> The media are not only organs of information, they are also vehicles for entertainment. In this latter aspect, which also extends to their "news" coverage, they tend to search for the unusual, the sensational, and the confrontational as a means of attracting an audience. The difficult problem that both the legal and the journalistic professions must deal with is how to prevent this natural gravitation toward the dramatic from painting a misleading and counterproductive picture of what the law is and what it does.[1]

Others have been equally critical of journalists.[2] Similarly journalists have been suspicious of lawyers and judges, who appear to speak a foreign language and are willing to explain either the laws or the legal system. Lawyers and judges may also appear to be uncooperative and even condescending in their approach to the media. The time has come to attempt to break down the barriers.

II. Rights in Conflict?

The critical question in media/court relations is the access of the press to the judicial system. This issue raises three sections of the **Charter of Rights** - section 2(b) (freedom of the press and other media of communication), section 11(d) (guaranteeing a fair trial) and section 7 (security of the person), which may be read as importing a right to privacy. Indeed, a fourth section of the **Charter** is also relevant to the general reasonable limitations clause in section 1. Judges in banning television would be acting under state authority and thus would fall within the application section of the **Charter** (s. 32).

Section 2 is argued by the press to import a right to know on the part of the general public. This can only be meaningful if access is granted to not only the printed press, but also the electronic media which is expressly listed in section 2. This broad public access may in some cases jeopordize the rights of the accused to a fair trail and the rights of jurors and witnesses to a reasonable degree of privacy. The conflict between the values of a free press and a fair trial have sometimes been over-stated and often both values can be pursued simultaneously.[3] Nonetheless, there is a perceived conflict in which lawyers and judges tend to come down on the side of the individual's rights to privacy and a fair trial; while journalists champion the right of the public to know through the vehicle of a free press. The difficult challenge is to balance and protect all of these basic values.

III. The American Experience

Before considering the early **Charter** jurisprudence it is instructive to consider the American experiences. Although I am less optimistic than my colleagues, Professor Clare Beckton, that the American model can or should be imported into Canada,[4] it does provide a relevant reference point. As Professor Beckton suggests in her article, Canadians can look to the United States for guidance in developing a coherent theory of free expression including freedom of the press. However, we should seek only guidance and not a model because the only workable theory will be a Canadian one.

The First Amendment to the United States Constitution provides that — "Congress shall

make no law ... abridging the freedom of speech, or of the press." In interpreting this Amendment the United States courts were plunged into the debate about cameras in the courtrooms. The first salvo came from the American Bar Association with the Canons of Judicial Ethics No. 35 in 1937, which reads as follows:

> Proceedings in court should be conducted with dignity and decorum. The taking of photographs in the court room during sessions of the court of recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.[5]

This provision was spurred by the sensational coverage of the Bruno Hauptmann trial. Mr. Hauptmann had been charged with the kidnapping of the Lindberg's baby. However, by 1972 the position of the American Bar Association had softened considerably as reflected in the form of Canon 31(7).

> A judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
>
> (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
>
> 1) the means of recording will not distract participants or impair the dignity of the proceedings;
> 2) the parties have consented and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and production;
> 3) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
> 4) the reproduction will be exhibited only for instructional purposes in educational institutions.[6]

This change of heart was in part dictated by improvements in the state of media technology, but more directly by the desire to down play the double standard applied to the print and electronic media. Decisions of the United States Supreme Court also reflect this change of position. In the 1964 decision, **Estes** v. **Texas,**[7] the Supreme Court ruled that the exclusion of cameras from the courts did not violate First Amendment rights to freedom of the press. The newspaperman could not bring his typewriter or printing press into the courtroom nor could the television person bring a camera. However, the focus was upon physical disruption of cameras and television crews and the Court invited reconsideration when less obtrusive technology was developed.

New technology was developed and cameras were allowed into the courts on the basis of the modified canon of ethics. Not only was this accepted by many judges it was in some cases applauded as having a favourable effect.[8] While the early rulings only granted television access with the consent of the accused, the Supreme Court ultimately dispensed with the need for such consent. In **Chandler** v. **Florida**[9] Chief Justice Berger upheld the granting of access to the television cameras, even in the face of protest from the accused. In his judgments he emphasized the improved state of technology since **Estes** v. **Texas.** The United States had come full circle on this issue. There are now more than thirty states which allow television access to their courtrooms.

IV. The Early Charter Cases

To date there have been no Canadian cases on the access of the electronic media to the courtrooms. Prior to April 17, 1982 there were few cases that directly addressed issues of free expression at all. Those which did examine such issues described free speech as a means to democratic parliamentary institutions.[10] Even this pre-**Charter** rationale for freedom of expression could be read as involving some guarantee of access, by the public and the press on their behalf, to democratic institutions and even the courts. Since the arrival of the **Charter of Rights,** the argument for an implicit right of access is strengthened by the breadth of section 2(b) itself.

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

While this guarantee, like the others in the **Charter,** is subject to the reasonable limits clause in section 1 of the **Charter,** it is still a sweeping provision. The wording of this provision was inspired more by the **International Covenant on Civil and Political Rights,**[11] which Canada signed in 1976, and the **European Convention on Human Rights,**[12] which came into force in 1953, than by the American First Amendment. There was some debate about

justified; if it is, the documents would be returned, in their sealed packets to the possession of the solicitor or client.

(2) **Prohibition of Publication of Searches**
Police search of a person's premises may produce negative results, while public disclosure of the search can do irreparable damage to an individual's or a corporation's reputation. In order to protect the reputations of innocent people in such cases, a proposed amendment would prohibit the press or other media from publishing the identity of the person whose premises have been searched or the location thereof, unless a charge results and the accused appears in court, or the person involved consents to publication. The proposed amendment would not restrict public access to information that is filed with the court in order to obtain the search warrant or a copy of the warrant itself. The public would retain the right to directly acquire this information; the only restriction would be to the publication, through the media, of specified portions of such information, unless the person whose premises have been searched consents to publication or charges are laid.

(3) **Pre-Trial Publicity**
A proposed amendment to section 467 of the **Code** would give the Crown the right to request non-publication orders, in respect of preliminary inquires. This is the right enjoyed, at present, only by the accused. The purpose of the amendment is to protect the public interest in holding a trial in the original venue. Unnecessary publicity can sometimes prejudice that interest and lead to a change of venue.

(4) **Return of Property**
Where property has been seized by police as evidence of a crime, a review will be required at each stage of the proceedings to determine if the property is still required as evidence. If not, the amendments proposed would ensure that the property will be quickly returned to the owner.

(5) **Language of Trial**
In June 1978, parliament enacted amendments to the **Criminal Code** providing the accused the right to demand a trial before a judge, or a judge and jury who speak his language, if his language is one of the official languages of Canada. The Act provided that the new provisions be proclaimed in force in any province with respect to indictable offences and summary conviction offences simultaneously, or with respect to indictable offence cases first and summary conviction offences later. However, some provinces have bilingual provincial judges who hear indictable and summary offences cases, but they do not have bilingual superior court judges who can hear only indictable offences cases. In response to provincial concerns, a proposed amendment would permit the language of trial provisions, as they concern summary conviction cases, to be proclaimed first.

III. Dealing with Emerging Kinds of Crime

(1) **Computer Crime**

Proposed amendments dealing with the abuse of computer systems respond to growing public concern about the unauthorized interference with, destruction of, or alteration of computer data, and the unauthorized use of computer systems.

Basically there are three aspects to the problem of abuse of computer systems: one, the unauthorized acquisition or destruction of hardware (e.g. the actual machines, instruments, tapes, printouts); two, the unauthorized acquisition or destruction of computer systems data; and three, the unauthorized use of computer services. At present, the **Criminal Code** does not provide adequate protection for those adversely affected in the latter two situations.

Proposed amendments would include as an offence in the **Code**, the wilful destruction, alteration, or interference with the lawful use of computer systems data. In addition, a proposed new section would make it an offence to dishonestly and knowingly without authority: obtain a computer system service; intercept a function of a computer system; or use a computer system with intent to commit any of the above-mentioned offences. These amendments would bring the criminal law up to date in respect to the relatively recent advances in computer technology and their critical and sometimes highly sensitive uses. The Department of Justice is continuing to study the more fundamental issues involved in determining the most appropriate way to protect both compu-

pus to secure release of a prisoner. It is proposed to repeal this section because it conflicts with the **Canadian Charter of Rights and Freedoms.**

(4) **Powers of Judges at Trials and Preliminary Hearings**

A number of amendments concernig powers of Judges and Justices of the Peace would reduce delays in the court system.

- Provisions is made for a Justice to replace another Justice who has started a preliminary hearing. This would avoid the necessity of recommencing a hearing when a Justice dies or is unable to continue a preliminary inquiry.
- An amendment to s. 464(5) would speed up the preliminary inquiry process by removing any requirement that proceedings must take place before a particular Justice until a Justice actually starts to hear evidence.
- Evidence taken by commissioners from witnessess outside Canada will be allowed in summary conviction matters. This would reduce delays in bringing witnesses from outside the country in long and complex cases such as prosecutions for income tax evasion.
- The proof of previous convictions will be facilitated where the name of the accused is the same as that in a certificate of previous conviction.

(5) **Consolidation of Summary and Indictable Procedures**

A number of amendments would provide uniform rules to be applied to all levels of court and would simplify and consolidate rules relating to summary convition and indicatable proceedings.

- A new s. 731 would consolidate summary conviction provisions with those pertaining to indictable offenses where they are compatible.

(6) **Appeal Procedures**

Changes are proposed to streamline appeal procedures.

- Amendments would allow a single Judge of a Court of Appeal to hear applications for leave to appeal and to review bail orders made by Superior Court judges. These duties are now performed by a full court of three judges.
- An amendment would clarify that a Court of Appeal can dismiss an appeal based on a procedural irregularity at trial where the accused has suffered no prejudice as a result.
- Summary conviction appeals will be modernized by the abolition of the stated case. A new procedure is proposed based on a transcript of evidence or an agreed statement of fact.

(7) **Preferred Indictments**

Under present law, if an accused is discharged at a preliminary inquiry, the Crown may prefer a direct indictment or lay new charges. The former is accomplished with the consent of either the Attorney General or the court in which the accused is to be tried. In almost all the provinces the practice is to obtain the required consent from the Attorney General. Judicial consent may create the appearance of a conflict of interest: judges performing executive rather than judicial functions. A proposed amendment would provide that only the Attorney General or the Depty Attorney General could consent to the preferring of a direct indictment prosecutions, the judge's consent would still be required.

II. Protection of Rights

(1) **Seizure of Documents: Solicitor-Client Privilege**

A clear need exists to establish procedures, in relation to the seizure of documents, which will balance the interests of law enforcement officials on the one hand, and citizens seeking legal advice on the other. This need is evident in cases where documents may be subject to solicitor-client privilege. Proposed amendments would establish procedures to ensure that solicitor-client privilege is respected.

Police officers who seize documents from a lawyer's office would be required, if solicitor-client privilege were invoked, to place the documents in a sealed and appropriately labelled envelope, which would be given to the Sheriff for safekeeping.

Upon a motion to this effect, the envelope would be given to a Judge of a Superior Court of criminal jurisdiction, who would determine whether the allegation of solicitor-client privilege is

whether the press should be expressly mentioned and it was decided that it should be; but only as one aspect of freedom of expression and not as a separate right.[13] The reference to "other media of communication" was a matter of bringing traditional concepts up to date.

There are a number of early **Charter** cases interpreting section 2(b). So far none of these involve the access of television to the courtrooms. However, there will undoubtedly be such a case in the near future. The present freedom of expression cases can be grouped into three general categories.

1. Press Access to Juvenile Trials

One of the early cases was **Edmonton Journal** v. **A.G. Alta and A.G. Can.**[14] which raised the question whether section 12 of the **Juvenile Delinquents Act**[15] (mandating **in camera** trials for juveniles) violated the free press guarantee of section 2 of the **Charter of Rights.** Dea J. upheld the section as constitutional and concluded that there was no right of access implicit in the free press guarantee of section 2 of the **Charter.**

An opposite conclusion was reached on the same question in **Reference Re Constitutional Validity of Section 12 of the Juvenile Delinquents Act.** This Ontario ruling stated:

> The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.[17]

This review was supported in **Re Southam Inc. and the Queen**[18] where the Ontario Court of Appeal held that access to the courts was an integral part of freedom of expression. MacKinnon C.J.O. concluded:

> ... such access, having regard to its historic origin and necessary purpose, must be considered integral to and implicit in the guarantee given to everyone of freedom of opinion and expression, including freedom of the press.[19]

These cases support the conclusion that the access of cameras to the courtrooms is inevitable and the real question is when and in what form. If access is implicit for the print media can the electronic media be treated differently? The kind of access may be limited by section 1 of the **Charter** and balanced against other rights, but it will come in some form. It is hard to avoid the express inclusion of "other media of communication" in section 2(b).

2. Prior Restraints and Extraordinary Circumstances

Another line of cases which suggest that the **Charter** may mandate some television and radio access to the courts, are those which involve bans on publcity as a form of prior restraint. Citing American cases with approval, most judges have held that such prior restraints are offensive to the **Charter of Rights** except in extraordinary circumstances. **R.** v. **Robinson**[20] was one of the early cases to articulate this view. The court rejected a ban on publishing the name of an accused murder.

The narrow definition of what constitutes extraordinary circumstances is elaborated in **Re R. and Several Unknown Persons.**[21] This case involved several people charged with gross indecency. It was held that an order seeking a ban on the publication of the names should be denied. This was not a proper exception to the rule against prior restraint. The right of the public to know was held to outweigh the embarassing consequences for the named accused.

One extreme case which led to a finding of extraordinary circumstances is **R.** v. **McArthur.**[22] What was in issue was the publication of the identity of certain witnesses who were inmates of a prison. The court held that a ban on the publication of their identity was constitutional because of the potential serious consequences that could arise from such publicity. This would not be a matter of simple embarassment for the witnesses but could well threaten the safety, or even their life, within the prison environment. This may be a backdoor recognition of a right to privacy for some witnesses.

In a somewhat less extraordinary circumstance, a ban on publicity was held to be valid in the context of extradition. **Re Smith**[23] involved the extradition to the United States of a subject in the murder of actor John Belushi. In this situation the court ruled that such a limitation on the freedom of the press was a reasonable limitation within the meaning of section 1 of the **Charter.** This conclusion was affirmed on appeal with recognition of the court's role in promoting a fair trial for the accused.[24] The fair trail theme emerges in the third line of cases.

3. The Accused's Right to a Fair Trial

There is a counter thrust to the broad access approach discussed in the two previous categories of cases. These cases recognize that there can be conflict between the rights of the free press to access and the right of the individual accused to a fair trial. The latter right, although not expressly stated in those terms in the **Charter of Rights** is clearly guaranteed by such provisions as sections 11(d) and the broad guarantee of fundamental justice in section 7. When such conflict is found, the courts have generally held that a fair trial prevails over freedom of the press.

One case which emphasizes the accused's right to a fair trial as a reasonable limitation on freedom of the press is **Re Smith.**[25] The theme that the accused's right to a fair trial should prevail over the more generalized freedom of the press also had been developed in earlier cases. **R.** v. **Gebley** (sub nom **R.** v. **C.R.B.**)[26] and **R.** v. **Banville**[27] are but two prominent examples. However, some courts have also tilted the balance in favour of public access even in the face of claims that a fair trial would be prejudiced.[28] Such a conclusion is usually based upon the conclusion that there is really no conflict of rights and that public access is part of the accused's guarantee of a fair trial.[29]

The early **Charter** cases suggest that some access to the courtrooms will be granted to the electronic media. One aspect of this access is likely to be television cameras in some of Canada's courtrooms. Nonetheless, Canadian tradition and the **Charter** cases suggest that judges will move cautiously in the direction of such public access. This access will not be absolute but limited so as to prevent — (1) prejudicing the fair trial of the accused; (2) invading the privacy of witnesses and jurors and (3) interfering with the conduct of a trial.[30] Reasonable limitations will be placed on the exercise of free press rights. After the equality rights come into effect in April, 1985, the electronic media will also be able to argue that they must be given the same treatment as the print media.

V. Cameras in Canadian Courts: The Pros and Cons

Only the province of Ontario, in statutory form, bans cameras and the electronic media from the courtrooms and even the relevant provision of her **Judicature Act**[31] does allow for exceptions.

67. (2) Subject to subsection (3), no person shall,

(a) take or attempt to take any photograph, motion picture or other record capable of producing visual representation by electronic means or otherwise,

(i) at a judicial proceeding, or

(ii) of any person entering or leaving the room in which the judicial proceedings is to be or has been convened, or

(iii) of any person in the precincts of the building in which the judicial proceedings is to be or has been convened where there is reasonable ground for believing that such person is there for the purpose of attending or leaving the proceedings; or

(b) publish, broadcast, reproduce or otherwise disseminate any photograph, motion picture or record taken or made in contravention of clause (a).

(3) Subsection (1) does not apply to any photograph, motion picture or record taken or made upon authorization of the judge,

(a) where required for the presentation of evidence or the making of a record or for any other purpose of the judicial proceeding;

(b) in connection with any investive, ceremonial, naturalization or similar proceedings; or

(c) with the consent of the parties and witnesses, for such educational or instuctional purposes as may be approved by the judge.

In other provinces the exclusion of cameras from the courtrooms is merely a matter of judicial practice, which has been broken on rare occasions. In 1982 the Radio Television News Directors Association of Canada videotaped fifty hours of judicial proceedings in accordance with the exceptions set out in section 67 of Ontario's **Judicature Act.** This film footage was part of the videotape shown to the judges at the 1984 St. John's annual meeting. Consistent with similar experiments in the United States, the reaction of Bench and Bar involved in these experiments was much more positive than most people would expect. The thrust of the comments of judges and lawyers was that the cameras were inobtrusive, that there was no interference with the accused's right to a fair trial and that the dignity of the courts was perserved.

Earlier in 1981, after the United States Supreme Court ruling in **Chandler** v. **Florida**[32] the Ontario Bench and Bar Council sent a delegation to New York and New Jersey to investigate the use of cameras in these American courts. The American justices with whom they corresponded generally concluded that the television coverage, used primarily in short news reports, produced no significant problems and no mistrials.

If the Ontario Bench and Bar were interested in the experiment of cameras in court, their cautious enthusiasm was not shared by the Canadian Judicial Council. In 1983 this body passed a resolution oposing the use of

Information Paper Bill C-18

INTRODUCTION

The Criminal Law Amendment Bill (Bill C-18) proposes changes to the **Criminal Code**, an amendment to the **Weights and Measures Act** prohibiting fraudulent replacement of a motor vehicle's odometer, an amendment to the **Combines Investigation Act** aimed at clarifying the provisions prohibiting the sale of goods at prices higher than those advertised and amendments to the **Narcotic Control Act** and the **Food and Drugs Act** aimed at regulating the prescription of drugs for non-medical purposes.

The proposals of the Department of Justic were prepared in close co-operation with several other federal departments and agencies, including the Departments of Consumer and Corporate Affairs, External Affairs, Transport and the Solicitor General, the Privy Council Office and the Law Reform Commission of Canada. The government also took into account the recommendations of the Uniform Law Conference of Canada and consulted with the provincial Attorneys General, other government agencies, public interest groups and defence lawyers.

The Criminal Law Amendment Bill is consistent with the provisions in the **Canadian Charter of Rights and Freedoms**, and reflects the principles set forth in the policy paper, "Criminal Law in Canadian Society," which was released by the federal government in August 1982.

This paper outlines some of the more important aspects of the Bill.

I. PROPOSED AREAS OF CHANGE:

1. **Improving the Administration of Justice**

(1) **Procedure to Reduce Court Delays and Backlogs**

Delays in the criminal justice process and extensive court backlogs are the subjects of considerable criticism from the public, the judiciary and the legal profession. Many of the proposed amendments are aimed at creating a more effective criminal justice system: a system which balances the rights of the accused against the need to see that justice is not unduly delayed and that public funds are used in a wise and efficient manner. Two amendments in particular, directly address the problem of trial delay.

(a) **Pre-Trial Conferences.** A proposed amendment aimed at avoiding unnecessary procedural delays would allow judges to call pre-trial conferences. These conferences, which have been adopted in several jurisdictions on an informal basis, would be presided over by the court. They would consider any matters that would promote a fair trial. This proposal would provide statutory authority for the practice.

(b) **Disposition of Preliminary Matters.** Jury trials are often prolonged because of necessary interruptions. These breaks in the proceedings often deal with matters that must be considered in the absence of the jury. A proposed amendment would authorize judges and counsel to dispose of these matters before the jury is chosen.

(2) **Jurisdiction of Provincial Court Judges**

With respect to a number of property offences, s. 483 of the **Code** requires trial by Provincial Court Judge where the amount involved is less than $200. A proposed amendment would increase that limit from $200 to $1000.

(3) **Bail Hearings and Bail Review**

New provisions would modify bail procedure and avoid unnecessary proceedings.

- An amendment would allow Superior Court Judges to determine bail for all outstanding offences at one time. This would avoid current practice requiring the accused to appear at one level of court for serious offences and another level of court for less serious charges.
- Judges at bail reviews would be given increased powers to expedite proceedings.
- Judges hearing bail reviews under s. 459 (automatic review when trial is delayed) will have more conditions for release order available to them. This will make release possible in more instances.
- Wiretap evidence will be allowed orally and informally at bail hearings.
- Secton 459.1 of the **Code** prohibits application by way of **habeas cor-**

properly laid if such course of consideration and consultation is not respected?

Legal purists consider the former exercise of discretion under the J.D.A. to have been a dangerous invasion of civil rights. But discretion to charge and to proceed has always resided with the police and the crown. Is that situation less dangerous than an exercise of discretion in open court?

What I am seeing now are charges "coming down the chute" against kids who are easily to identify and who generally will plead guilty without a lawyer. The real criminal types cover their tracks better and cause problems with investigations. When charged they know their rights including their right to cousel "at every stage of the proceedings" and they cause bottlenecks in the system.

I suspect that the intent of the Y.O.A. was to take the extra time necessary to deal with the latter group and to divert most of the former "good kids" away from the court altogether. That is not, however, what is happening. The first group are the easiest to charge and deal with but, if an absolute discharge can't be given, they are being "set up" for more and more serious charges because they have already been identified and swept into the "system".

I am seeing youngsters convicted of breaching conditions of release who should never have been arrested in the first place. I am seeing youngsters convicted of escaping custody where it was known in advance that they were prone to overnight absences. There no longer appears to be any understanding of youthful "stupidity", "growing pains" or "calls for help". Y.O.A. does not allow for adjournments sine die, for conditional discharges, for interim probation, for child welfare involvement.

And does anybody understand what the court is supposed to do with a Section 33 review of disposition? Breach of probation under the Code (Section 666) can't be charged so we are left with Section 33 which surely doesn't even disclose an offence know to law. Kids put on probation or placed in open custody are being "set up" in my experience and charges and dispositions are escalating in consequence. The attitude of the Crown has also hardened and prosecutors who are appearing in Youth Court for the first time don't seem to be able to distinguish between 12 year olds and adult offenders nor the mental processes of each group.

Sections 40 to 46 of the Y.O.A. make a big "to do" about records and confidentiality. But has anybody seen any records being destroyed in the courts, police or in the offices of lawyers and child welfare authorities? Has it all been resolved by Section 45 (7) so that nothing operates unless a request has been made?

Now I really should add a few words about provincial offences. The usual ones we see are liquor, driving and petty trespass violations. As I understand P.O.A. the usual penalties imposed are fines and/or licence suspensions. But what do you do with kids who have no money and no licences? The Act does allow for restitution and community service but no enabling regulations have ever been passed. And probation is a possibility but what good is probation when the only terms are - don't commit the same offence, report to court if required and notify any change of address?

With respect to children (under 12) as I mentioned earlier, no offence is now possible. They are child welfare cases or nothing. A police officer has some authority to apprehend and to take the child home or to a place of safety but I can't see that anyone else (except a child care worker) has any right to lay a hand on a child committing what otherwise would be an offence.

Surely courts (like all other aspects of public service) should be concerned about the efficiency and effectiveness of what we do and that is the reason for this letter.

Some say that cost is not the concern of the courts but do we really believe that? If money isn't available to properly fund a program it follows that the program is compromised. Can we really say that recent legislation dealing with children and young people comes to grips with the realities of the court system and the needs of society?

The casualties that come before me on a daily basis make me wonder if Family Division might better be designated as a M.A.S.H. unit. Sure we see the odd real criminal but most of the others just need "straightening out". Delay and uncertainty ar far more harmful to these youngsters than some theoretical denial of rights. Have we now taken from them their right to receive guidance and disciplice? Does no one wonder why they used to respond so well in the detention home?

"Family Court deals with social problems that have legal implications and not the reverse." I heard that bit of wisdom from a high court judge many years ago when Young Persons in Conflict with the Law first came up for discussion. But if we allow ourselves to start thinking like that we had better leave our legal security blanket at home.

Maybe I just belong to the wrong generation but maybe, just maybe, there might be one or two other judges out there who think as I do - that we are "for the birds" when we try to stuff kids into legal pigeon holes.

cameras in the court rooms. Whether such action was within their jurisdiction or judicially appropriate was questioned.[33] Undoubtedly a case on this very point will come before these justices who may have to disqualify themselves. None of the present members of the Supreme Court of Canada were involved in this resolution. The late Chief Justice Laskin, who was involved in the resolution, died and was replaced by Chief Justice Brian Dickson. There was no consultation with either the media or the general public in the passage of this resolution by the Canadian Judicial Council and it was a severe set back for media and court relations in Canada.

1. Arguments for Television Access to the Courts

There have been other efforts to chronicle the arguments for and against cameras in the courts but they are largely based on the American experience.[34] Some of these arguments are equally applicable in Canada. The best argument in favour of cameras in the courts is its potential for educating a broad slice of the Canadian public about the operation of its courts. Although most courts are open to the public, the actual attendance is usually quite small. Television in particular, and secndarily radio, reach a much broader audience than newspapers do. The impact on the audience of the electronic media is much greater. Thus advocates of camera access argue that the effect of the coverage will be to enhance respect for our court system.

Another argument is that the access of cameras will allow for direct eye-witness coverage of the proceedings, rather than interpretation from outside the courtroom door. This should enhance the accuracy of the account and allow the audience to observe legal proceedings, on a first hand basis.

It is also argued that the glare of publicity will increase the quality of performance by all participants. The witness who might be tempted to tell a lie in the comparative privacy of a courtroom will be less inclined to do so when his or her neighbours may be watching on television. Similarly, it is asserted that judges and lawyers will be encouraged to be on their best behaviour at all times. The accused would be ensured of a fair trial. Anticipating a rebuttal on this point, advocates argue that lawyers and judges are too busy and too professional to engage in theatrics for the television audience.

Another claimed benefit which would arise from the introduction of cameras into the courts, is journalists who are specialized in legal reporting. Because the direct court footage would lead to more legal reporting, it would be easier to justify the expenditure of funds in educating journalists about the law. The use of specialists, who are knowledgable about the law, has been strongly urged by those in the legal establishment.

The final argument is more of a rebuttal of a standard assertion against cameras in the courtrooms. With the modern state of technology there would be minimal physical disruption in the operation of the courts. This argument is supported by the reactions of judges and lawyers who were involved in experiments in the United States and in Ontario. The participants in these experiments generally concluded that cameras were inobtrusive and the electronic coverage did not interfere with the normal operation of the courts.

2. Arguments Against Television Access to the Courts

Contrary to claims that the electronic media unlike newspapers allows for direct coverage, there is considerable room for interpretation and distortion. Because of its pervasive impact, television may be the great distorter of all time. It is inevitable that there will be editing and the fear is that it will be designed to accentuate the dramatic and the sensational, rather than to provide a balanced account. As an example during the Grange Inquiry into the deaths of babies at the Toronto Hospital for Sick Children, a brief clip of Susan Nelles wiping her nose was interpreted as her being on the verge of crying. The focus of television coverage on Susan Nelles and Phyllis Tranor also may not be an accurate reflection of the full deliberations of the Inquiry.

As a counter to the argument concerning the promotion of respect for the justice system by the education of the public, opponents of cameras in courts emphasize the likelihood of distortions and misinformation. Because journalists are not trained in the legal system and their instincts lead them to the sensational side of affairs, the prospects for a balanced education about our courts are dimmed. There could be some very useful documentary work but the major form of coverage will be the fleeting news clip, as the background for a broad generalization about the legal system.

Rather than improve the performance of the participants in the court process, television cameras may lead to a lower quality performance. Some lawyers, and possibly even some judges, would resort to theatrics or "show boat" tactics which would be intended to advance personal reputations rather than

the search for truth. Cameras would add to the anxiety of witnesses and thus subtract from the value of their testimony. Similarly, jurors might be distracted from their sworn duty to concentrate on the evidence placed before them.

One of the major concerns expressed by the opponents of cameras in the courtrooms is that a trial in the public press will replace a fair trial in the courtroom. While this can already occur in either the printed media or interpretations by the electronic media, the fear is really with respect to the magnification of the problem. The American experience with televising the "Big Dan Tavern Rape Trial" in New Bedford, Massachusettes, in 1984 illustrates the difficulty of giving effect to the "presumption of innocence", when the whole proceedings fall under the glare of publicity. Advocates for cameras in the courts counter the meaning of a "presumption of innocence". However, such arguments may over-estimate the power of television to educate and under-estimate its tendency to promote sensational conclusions.

VI. Conclusion

It appears that the courts will not be able to escape increased media contacts as was emphasized by Chief Justice Brian Dickson in his Winnipeg speech. Absolute bans on the electronic media are likely to be found as violating freedom of the press, unless there are truly extraordinary circumstances. The real question is how to bring the "two solitudes" of the media and the courts together so as to promote the sometimes conflicting values of freedom of the press and the accused's right to a fair trial.

Greater co-operation between journalists and lawyers will only come as a result of efforts to break down the barriers by both groups. Lawyers should be more open and co-operative, clearer in explaining court etiquette and more understanding of the limitations imposed on journalists. The media, on the other hand, must become more knowlegable about legal matters, more sensitive to court etiquette and less sensational in their reporting. Lawyers must be more responsible in their reporing of legal matters.

What is needed is a clear articulation of the ground-rules for the access of the electronic media to Canadian courtrooms. These rules should be developed jointly by journalists, judges, lawyers and the general public. In some respects the attempt should be to anticipate what will be accepted by the courts as "reasonable limits" on the freedom of the press. This can be handled more effectively by preventive action than by **post facto** litigation.

As indicated earlier the arrival of cameras in the courtrooms is highly likely but it is also likely that their arrival will be a mixed blessing. Less time should be spent arguing about whether the electronic media should be allowed in courts and more spent on the means. Introduction of cameras into the appeal courts and the Supreme Court of Canada poses fewer difficulties than their introduction into the trial courts. The challenge is to use the electronic media to educate a broader slice of the public about the courts but preserve more traditional legal values implicit in the fair administration of justice. The task is difficult but it can be accomplished.

Concerns About The Young Offenders Act

by Provincial Court Judge
John F. Bennett

Anything I have read so far about the new approach to offences committed by children and young persons has been almost sickening in its praise of this new era of enlightenment. "How do I love thee? Let me count the ways!" might describe the euphoria. But are things really that great or have we been left with a situation which might better be described as "three pounds of butter in a two pound bag?"

Until recently these offences were dealt with by a Family Court judge who (presumably) knew something about the law and something about kids. Broad discretion was given the judge to proceed as would a competent and caring parent. Not surprisingly, society generally had the feeling that the court was too soft in dealing with juvenile offenders. Among legal scholars, however, the perception was that judicial discretion was an intolerable denial of legal rights.

We are presently living with the consequences of these two apparently contradictory perceptions. The public thought we were too soft. The legal purists thought we were too hard.

In Ontario the court jurisdiction has now been fragmented. Young persons ages 12 to 15 come before the Family Division of the Provincial Court both for criminal violations (under the Young Offenders Act) and provincial violations (under the Provincial Offences Act). As of April '85, 16 and 17 year olds will be prosecuted for criminal offences before the Criminal Division (sitting as a Youth Court). The existing Provincial Offences Court (presided over by J.P.'s) will continue to process 16 and 17 year old provincial offenders. Children under 12 can no longer commit an offence of any kind.

Judges have been stripped of any predisposition discretion. As I read the law, discretion must now be exercised by police and the crown in consultation with legal counsel for the young person. I don't know how else to read Sections 3 and 11 of the Y.O.A. Using "alternative measures" or "commencing or continuing judicial proceedings" or "taking no measures" must be considered. That's what the Act says.

In Ontario there exist no "alternative measures" (Sections 2(1) and 4). Can it not be argued that an essential element contemplated by the law has been denied any young person appearing before the court?

All the rights and freedoms stated in the Charter are also confirmed to young persons (Section 3) and "special guarantees" of the rights and freedoms are to be afforded. If these "rights" and "guarantees" are not respected, what is the status of charges against a young person brought to court?

The law makers have made it clear to judges that the welfare of young persons prior to conviction is none of our business. We are told that the "child welfare model" of the J.D.A. has been replaced by the "due process model" of the Y.O.A.

Back in the "old days" concerned police could charge problem youngsters under J.D.A. and have them appear in court without delay. This was an effective method to involve parents, probation and child welfare authorities under scrutiny of the court. Justice and assistance went hand in hand in all but the most serious cases and, even there, assistance remained an active consideration.

Now, assistance prior to conviction isn't even considered. If a kid needs help and Children's Aid chooses to "look the other way" the police might just as well "look the other way" as well. So far as the court is concerned it is "mind your own business".

Again, in the "old days" police could charge juveniles whenever the law was broken and, in most communities, the police could trust the court to provide appropriate confrontation and consequences. Of course, discretion to charge has always been part of the policing function and charges have not always been laid. But charging a kid in the "old days" was no "big deal" for police because they knew the court would be there to provide the necessary interpretation and discretion.

The situation now, however, is quite different. Once a charge is laid the judge has no discretions until a conviction is registered. Police should therefore "think twice" about laying a charge against a young person. And if the police officer is just trying to make some kid "get the message" it must be understood that a charge, once laid, will proceed through court to conviction or acquittal (unless, of course, it is withdrawn by the crown).

All of which takes me back to my earlier remarks about discretion that has to be exercised as well by the crown and with input from counsel. This is surely a part of the "special guarantees" afforded to young persons under the Y.O.A. Can a charge be considered as

PETER MACDONALD REQUIRES MORE

In the last issue of the Journal, Peter MacDonald's letter requesting "funny Canadian legal anecdotes" appeard. Mr. MacDonald advices that the book is "coming along beautifully" and that Mr. Justice Estey of the Supreme Court of Canada has consented to write the forward.

Please forward your legal anecdotes to him at the following address:

302 - 10th Street
Hanover, Ontario
N4N 1P3

LONG CAREER, LONG LIFE

John Prentice will be 99 years young on January 19, 1985, and he is still going strong.

He retired from the Provincial Court bench in 1961 when he was 75.

At an age when most people would nave called it quits, Mr. Prentice returned to private law practice for a further 20 years before retiring in 1982.

There were no "frills or fads" when he started his practice after graduation from law school 59 years ago.

John Prentice was born in 1886 on a Wellington County farm staked out by his grandfather from the "Queen's bush". He was in the lumber business until he entered law and graduated from Osgoode Hall Law School in 1926.

There were 160 in the graduation class. There was linoleum on the floor and simple partitions dividing the offices in the Bay Street building where he started."Now its all rugs, a secretary at the door to find out who you are, and you've got 30 or 40 lawyers working in one law firm. It's a different world altogether."

Prentice tried his hand in politics twice. In 1934 he ran as a liberal candidate in the provincial Parkdale riding and lost by 212 votes to his Conservative opponent.

He ran again the next year - federally, in the Parkdale riding and "got trimmed there, too."

He was appointed to the bench in 1938. During his career, he made more than 100,000 judgments and officiated at 3,000 civil weddings.

ONTARIO PROVINCIAL COURT JUDGES RECEIVE SALARY INCREASE

A salary increase of 4.23 per cent, retroactive to April 1, 1984, has been received by Ontario Provincial Court Judges.

The chief judges of the three divisions of Provincial Court now earn $79,838.00 per annum. Associate chief judges earn $76,037.00 and senior judges earn $73,194.00. Remaining judges receive $71,855.00.

Each year the ministry of the Attorney General makes a recommendation on judges' salaries, which goes to the Mangement Board of Cabinet and then to the entire Cabinet.

Because the judges must operate at arm's length from the government that pays them, they make representations regarding their working conditions through a three-member provincial courts committee, with representation from the judges and the government.

Notes

* The author would like to acknowledge the research assistance of Christian Van Dyck, a third year Dalhousie law student.

1. B. Dickson D.J. "The Path to Improving the Accessibility of the Law in Canada", A paper delivered at the Annual Meeting of the Canadian Bar Association, Winnipeg, Manitoba, August 28, 1984, at 6.
2. A.W. Mewett, "The Media and the Law: Editorial" (1984), **J. Crim. L.Q.** 145-46.
3. M.D. Lepofsky, "Section 2(b) of the Charter and Media Coverage of Criminal Court Proceedings" (1983), 34 C.R. (3d) 63-73.
4. C. Beckton, "Freedom of Expression — Access to Courts" (1983), 61 **Can. Bar Rev.** 101-23.
5. A.B.A. Canons of Judicial Ethics No. 35; first adopted in 1937 and extended to television in 1952.
6. Found in L.H. Abugov, "Televising Court Trials in Canada: We Stand on Guard for our Legal Apocalypse" (1979), 5 **Dal. L.J.** 694, at 702-03.
7. (1964), 381 U.S. 532. A broader rejection of an implicit right of access occurred in **Miami Herald** v. **Tornillo (1974), 418 U.S. 241. This was not a television case but one concerning the printed media.**
8. **State** v . **Solorzano** (1976), 546 P. 2d. 1295. A Florida experiment with the electronic media also received judicial approval in **State** v. **Zamora** (1977) in the Dade County Cir. Ct.
9. (1981), 101 S. Ct. 802.
10. **Alberta Statutes Reference,** (1938) S.C.R. 100 and **Saumur** v. **Quebec City,** (1953) 2 S.C.R. 299 (per Duff C.J. and Rand J. respectively).
11. G.A. Res. 2200 (XXL), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Dec. A/6316 (1966).
12. (1953), 213 U.N.T.S. 222.
13. **Special Joint Committee on the Constitution — Proceedings** 1980-82, December 11, 1980, at 24:7-22.
14. (1983), 42 A.R. 383 (Alta. Q.B.).
15. R.S.C. 1970, c. J-3 (now repealed).
16. (1982), 2 C.R.R. 84 (Ont. H.C.).
17. **Ibid.,** at 90-91.
18. (1983), 146 D.L.R. (3d) 408 (Ont. C.A.).
19. **Ibid.,** at 409.
20. (1983), 34 C.R. (3d) 92 (Ont. H.C.).
21. (1983), 8 C.C.C. (3d) 528 (Ont. H.C.).
22. May 7, 1984 (Ont. S.C.), digested in (1984), 4 C.R.D. 725, 300-308.
23. (1983), 34 C.R. (3d) 52 (Ont. H.C.).
24. ***Global Communications LTd.*** v. **State of California** (Ont. C.A.), January 19, 1984, digested in (1984), 4 C.R.D. 525. 70-71.
25. **Ibid.** and **supra,** note 23.
26. (1983), 38 O.R. (2d) 549 (H.C.).
27. (19) 45 N.B.R. (2d) 134 (Q.B.).
28 **R.** v. **Robinson, supra** note 20.
29. This position is asserted by M.D. Lepofsky in **supra,** note 3 and in "Constitutional Right to Attend and Speak About Criminal Court Proceedings — An Emerging Liberty" (1983), 30 C.R. (3d) 87.
30. **R.** v. **Thompson Newpaper Ltd.** December 8, 1983 (Ont. S.C.), digested in (1984), 4 C.R.D. 525. 40-41. This case ruled against a claim to examine documentary evidence.
31. R.S.O. 1980, c. 223.
32. **Supra,** note 9.
33. D. Henry, "Judicial Council acted too hastily on Cameras" (1984), February **National** (C.B.A.), at 8, is one example.
34. F.W. Friendly, "U.S. Television After Chandler" and S.E. Nevas, "The Case for Cameras in the Courtroom" and J.G. Day, "The Case Against Cameras in the Courtroom" (1982), 6 **Prov. Judges J.** (No. 3), 3-11, 24. A discussion of the Canadian experiment with cameras in the courtroom appears in "Publicity: The Soul of Justice" (1984), 8 **Prov. Judges J.** (No. 2), 5-9.

In Brief

FEDERAL JUSTICE MINISTER INTRODUCES MAJOR CRIMINAL LAW REFORM BILL

On December 19, 1984, Justice Minister John Crosbie introduced a major Criminal Law Amendment Bill in the House of Commons. This Bill is the Government's first step in a fundamental review of Canada's criminal law. Over the next few years, the federal government will be systematically passing new laws and overhauling old ones to produce a **Criminal Code** that responds to the needs of Canadians today.

The Bill contains a number of amendents to the **Criminal Code**. If accepted by Parliament, the Bill would:

- Impose stiffer penalties for impaired driving including new offences and new provisions for mandatory blood testing where a driver suspected of being impaired cannot provide a breath sample.
- Abolish the controversial writ of assistance, which permits certain RCMP officers enforcing drug laws to search premises without first obtaining a search warrant.
- Establish a system of "telephonic" warrants by which police officers could, in special and well defined circumstances, obtain search warrants by telephone or other telecommunications means, under the strict control of the court.
- Improve certain court procedures to increase the efficiency and effectiveness of the justice system. For example, an amendment is proposed to allow judges, prosecutors and lawyers to meet before a trial begins to sort out procedural difficulties and also to dispose of matters that must be considered in the absence of the jury.
- Other proposed amendments will enhance the protection of individual rights. For example, if information seized from the possession of a lawyer for evidence in a trial is alleged to contain confidence between a citizen and the lawyer, the information will be sealed and then examined only by a judge of a superior court. If the judge decides that such confidences are contained in the information, the documents involved would be returned in sealed packets.
- To protect the reputations of innocent people, the media would not be able to publish the identity of a person whose premises have been searched by the police unless charges have been laid, or unless that person consents to publication. The public would continue to have access to informationm filed by the police with the court in obtaining the search warrant.
- Provide for establishment by the provinces of fine option programs whereby an offender financially unable to pay a fine imposed under federal statute would be able to pay his or her debt by performing a community service.
- Provide penalties to deal with certain types of emerging crime such as tampering with computers and computer data banks, and credit card fraud.

"These reforms illustrate my firm commitment to ensure that the **Criminal Code** adequately responds to the needs of contemporary society", said Mr. Crosbie. "I'm particularly determined to meet the strong public demand for stiffer penalties against impaired driving. Changing the law is a first and necessary step in a larger program to reduce impaired driving. This legal regime of stiffer penalties is a strong signal to Canadian drivers that the federal government is serious about reducing alcohol-related traffic accidents."

"To complement these amendments, I will also be collaborating closely with the provinces to develop a legal system under which serious offenders would be treated to reduce their dependence on alcohol", added Mr. Crosbie. "The responsibility to reduce impaired driving is shared by all sectors of society, including community groups", Mr. Crosbie emphasized. "I have therefore commissioned for distribution over the next few months a commuity resource kit containng information and materials on impaired driving, and a how-to manual for community groups to organize local campaigns against impaired driving. Only concerted efforts by all Canadians can reduce the senseless and tragic suffering and loss of life caused by impaired driving".

An Information Paper released by the Department of Justice summarizes the proposed amendments in the following areas, namely,

- Improving the Administration of Justice
- Protection of Rights
- Emerging Kinds of Crime

and appears in this issue commencing on page 19.

An Information Paper on **Impaired Driving** appears, commencing on page 24.

CIVIL DIVISION CONFERENCE (Ontario)

The sitting members of the Provincial Court Judges' Association (Civil Division) held their semi-annual Education Conference at Niagara-on-the-Lake on October 25-26, 1984. The judges met to study the proposed Rules for the Provincial Court (Civil Division) which will be coming into force with the new **Courts of Justice Act** on January 1, 1985.

The Conference was arranged by Education Committee Chairman, Judge Moira L. Caswell, and members of the Court's Rules Committee took the meeting through the more important changes in the Rules.

Judges Charles Tierney, Reuben Bromstein, Marvin Zuker and Douglas Turner participated in an exhaustive study of the Rules and the implications of the wide-sweeping changes. These judges were assisted by Mr. S. McCann of the Ministry of the Attorney General who is also a member of the Rules Committee.

The spouses who attended the Conference enjoyed the ambiance of Niagara-on-the-Lake. In the evening, all of the judges and the spouses present enjoyed a gourmet meal arranged by Judge Ronald Radley.

On the final afternoon, a meeting of the Association was chaired by President Gordon Chown. Extensive discussions were had with respect to the upcoming sessions of the Provincial Courts Committee. Judges Tierney, Caswell and Sigurdson submitted their written reports of the enjoyable and challenging programme of the Annual meeting of the C.A.P.C.J. in Newfoundland.

It was decided that the Annual Meeting of the Association would be held on April 25 & 26, 1985.

ONTARIO

Appointments

His Honour Judge William J.C. Babe, Toronto, effective October 27, 1984.

His Honour Judge Derek T. Hogg, effective November 1, 1984.

His Honour Judge Ayres V. Couto, Toronto, effective November 1, 1984.

Retirements

His Honour Judge Thomas J. Graham, Toronto, effective July 31, 1984, appointed January 2, 1964, former Chairman of the Ontario Police Commission.

His Honour Judge James R.H. Kirkpatrick, Kitchener, effective June 26, 1984, appointed May 11, 1950.

His Honour Judge William G. Cochrane, Goderich, retired effective November 28, 1984, called to the Bar of Ontario 1941, Crown Attorney 1967-1977, appointed to the Bench December 17, 1977.

Deaths

His Honour Judge Frederick R. Barnum, Aylmer, formerly of St. Thomas, appointed March 31, 1960, retired January 3, 1975, Honorary Life Member, deceased September 27, 1984.

His Honour Judge Francis C. Powell, Parry Sound, appointed part-time July 4, 1946, full-time March 28, 1963, retired July 16, 1974, Honorary Life Member, deceased October 11, 1984.

Education & Sentencing Seminars

The Association is conducting four area Sentencing and Education Seminars. The program will include the Young Offenders Act and discussion of sentencing problems. A member of the Ontario Court of Appeal will participate in the sentencing discussions.

The Seminars will take place at:

Toronto - January 15, 1985, to January 18, 1985. Participant from Ontario Court of Appeal - Mr. Justice Thorson.

Kingston - January 29, 1985, to February 1, 1985. Participant from Ontario Court of Appeal - Mr. Justice Goodman.

Sault Ste. Marie - February 12 - 15, 1985. Participant from Ontario Court of Appeal - Mr. Justice Brooke.

London - February 26 to March 1, 1985. Participant from Ontario Court of Appeal - Mr. Justice Cory.

Appointments

Novia Scotia

His Honour Judge Robert B. MacDonald of New Glasgow.

Saskatchewan

His Honour Judge Patrick Carey - Saskatoon.
His Honour Judge Paul Trudelle - Regina.