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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

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While we all have our own tastes this book would not have suffered by the exclusion of the anecdotes with respect to a monkey's anatomy and tits and tats. In addition, the author in his next book should guard against the repetition of stories.

With the limitations inherent in a book of this type MacDonald has done a commendable job in gathering, sorting and tying together the anecdotes. In my opinion, most would consider the cost of the book money well spent.

President's Page

by Senior Judge Ian Dubienski

It seems only yesterday, I was attending the formation conference for the Canadian Association of Provincial Court Judges in St. John's, Newfoundland.

While at that time there seemed to be some question as to whether or not we could develop a national organization, it soon became clear that whatever impediments there were could be swept aside in a common desire to develop a court that would have a national appearance made up of the various provincial organizations, federalist and unified with a common objective of judicial excellence.

Over the years, it has grown considerably and now embraces the criminal, family and civil jurisdictions of the various provinces.

Because of this sense of unity and development of a distinguished court, we, as an Association, have gained the confidence of the various governments who, aside from our judicial duties, often depend on consultation with us, more particularly, the federal Department of Justice and the Ministry of the Solicitor-General.

It is my hope that in the next year, we will be able to further reinforce these relationships and continue to play an important part in the development of the administration of justice in Canada in these jurisdictions.

To this end, we expect to strengthen our programs in judicial education through our education committee which is now "The Canadian Judicial College" and a subcommittee who will be looking into placing the membership of this committee on a regional basis to take into account the disparate but unifying factors in our court.

Also, we will be studying the matter of judicial appointments and judicial independence in conjunction with the Canadian Bar Association, while surveys and representations will be made with regard to judicial compensation and court structure.

I would most sincerely hope that all judges at the provincial court level will eventually become members of this Association and take active part in the work that is now so highly regarded by the governments and the public.

I hope that I will be able to attend the annual provincial meetings and enjoy the judicial rapport that was so evident at the annual National Conference in Winnipeg.

I am greatly honoured by my election as President of the National Association of Provincial Court Judges and I pledge to serve and bring credit to the Association in the coming year. I would ask that judges who have comments contact me so that it can be brought to the attention of the Executive to improve Association communication and the achievement of our ideals and objectives.

In Brief

Newfoundland

The Government of the Province of Newfoundland has established a Commission on salaries and other benefits for Provincial Court Judges in Newfoundland. The Chairman of the Commission is Mr. David Osborne, C.A., LL.B.

The National Judges Association has been requested to submit a brief to the Commission and this will be done as soon as possible.

The terms of reference of the Commission are as follows:

I. To determine whether salaries paid to Provincial Court Judges should be revised and, if so, whether they should be revised to reflect the amount of time in practice which the Judge performed prior to appointment; whether a set rate should be set for those Judges who are legally trained but have not been practitioners; and whether another rate should be set for lay judges without legal training.

II. To determine an appropriate range of salary for all Provincial Court Judges, however classified.

III. To determine how salary adjustments should be negotiated.

IV. To examine the pension program available to Provincial Court Judges and to make recommendations as to its adequacy.

V. To consider what travel benefits, car allowances and annual leave should be given members of the Provincial Judiciary.

VI. To consider whether the Government should provide judicial robes, tabs, vests and an annual clothing allowance to members of the Provincial Judiciary.

VII. To consider whether provision should be made for educational or sabbatical leave.

VIII. To consider such other related matters as will contribute to a vigorous and strengthened Provincial Judiciary.

IX. To report to the Minister of Justice by December 31, 1985.

Ontario

Provincial Court Judge Clare E. Lewis has resigned as a Judge of the Provincial Court of Ontario, to accept the position of Public Complaints Commissioner, which will investigate civilian complaints against Metro police.

Attorney General Ian Scott, in announcing the appointment stated, "We considered a lot of names and it struck me, in the end, that Judge Lewis's background was most suitable." He added "I think the serious long list was probably 15 names, and Clare was our first choice."

Judge Lewis feels that the switch from Judge to Complaints Commissioner is going to take some time to adapt to. "A Judge can't come down off the bench and sit down and talk to the groups that are in conflict. I think a Commissioner can." That was one of the reasons why Judge Lewis resigned from his position as a Provincial Court Judge. He has long felt that, generally speaking, Judges should not accept other positions while holding on to the position of a Judge. In his letter of resignation he stated: "I have come to appreciate the significance of the issue of the independence of the Judiciary. It is a concept which is fundamental to the integrity of our Bench which must be actively sought and jealously guarded. Accordingly, I have come to the conclusion that the offices of Judge and Public Complaints Commissioner are incompatible!"

As a Provincial Court Judge, Clare Lewis had a high profile in the Canadian Association for Provincial Court Judges.

In 1981 he was Convention Chairman. In 1982 he was Secretary of the Association, and at the time of his resignation, he was Chairman of the Committee on the Law. He is currently a candidate for a master's degree in criminal law at Osgoode Hall Law School. He was also President of the Ontario

Court Jesters.

by Peter V. MacDonald, Q.C. Agincourt: Methuen Publications. 1985. Pp. 208. ($19.95)

Book Review by Judge Dennis E. Fenwick, Provincial Court of Saskatchewan

In **Court Jesters** Peter V. MacDonald, Q.C. presents an anthology of Canadian legal humor to which over 300 individuals contributed.

Those involved in the legal profession will recognize the accuracy contained in MacDonald's quote of Professor Dale Gibson of the University of Manitoba:

> Whenever lawyers relax, stories are told - stories about bizarre cases, eccentric witnesses, unusual clients and remarkable colleagues; stories about tactical gaffes, brilliant ripostes and slips of the tongue; stories of wit, stories of pomposity, stories of compassion. This vast body of anecdotal lore serves many useful functions: to illustrate and perpetuate the traditions of the profession, to remind lawyers of their limitations, and to celebrate the variety and colour of the legal panoply.

Humour is the tonic which makes the practice of law more tolerable, the elixir which removes the frustration of being damned and praised, hated and loved for equally inappropriate reasons. Humor is a welcome break from the electric excitement of hearing your 7,000th breathalyzer case.

MacDonald recognizes, as the reader will, that frequently legal stories are attributed to a great many different people and there are many stories you will recognize but likewise there are many which will be new.

Court Jesters is not without its startling and unsubstantiated statements ("believe it or not, judges are human"). However, it also contains some keen observations (George Walsh describing a cold-hearted judge - "his smile is just like a silver plate on a coffin).

A few samples of the anecdotes will serve to illustrate the contents of the book and, I believe, whet your appetite:

- On one occasion, lawyer Tommy Horkins represented a man whose face was bleeding and bruised.

"Mr. Horkins," the magistrate said, "what happened to your client?"

Tommy replied:
"He gave a voluntary confession, Your Worship."

- On the occasion of Her Honour Janet Boland, Judge of the County Court, being elevated to the Supreme Court and becoming Madam Justice Boland, Crown Attorney Ted Kielb saluted her at her swearing-in by saying:

  "It's nice to see a lady like you giving up 'Your Honour' to be a 'Madam.'"

- Lawrence Greenspon had an opportunity to cross-examine a peace officer who he had seen a few weeks earlier when he attended an evening of entertainment presented by the Ottawa Police Male Choir. The officer had worn a wedding dress in one of the skits. Greenspon didn't have any questions for the officer but couldn't resist the following cross-examination:

  Q. "...have you ever had occasion to wear a dress?"

  A. "Pardon?"

  Q. "Have you ever had occasion to wear a dress?"

  A. "Yes, sir, I have."

  Q. "Okay. I have no other questions."

- Vancouver lawyer Rolf Weddigen issued a statement of claim on behalf of the insurers of Her Majesty's post office trucks. He issued it in Her Majesty's name and the first paragraph thereof stated:

  "The plaintiff is a married woman who lives at Buckingham Palace in the City of London, England, where she carries on the business of a Sovereign."

  (There is no mention of whether or not the defendant sought an order for security for cost, the plaintiff being ordinarily resident out of the jurisdiction).

Court Jesters is a book that you will want to put down. Reading this book is a bit like eating sugar cubes with honey ... whatever the initial appeal you soon become satiated. If you long for a deep depression, read a book on the 10,000 best jokes from cover to cover. It will be appreciated that humour is better shared than read alone.

prepared, analyzing and comparing the discussions and conclusions. This will provide a statement of the basic philosophies and principles adopted by the Judges in arriving at their dispositions during the Seminar discussions. This exercise we believe will benefit the Youth Court Judiciary in providing guidelines, and thus promote greater uniformity in the exercise of dispositional alternatives.

The final report for this Dispositional Project should be available by October of '85 and will be submitted to the Director of the Young Offenders Directorate at the Ministry of the Solicitor General and to the participating Provincial Departments and Youth Court Judges.

This project has been, perhaps, the most ambitious and far reaching one your Committee has attempted thus far and we believe its final report will be of substantial benefit to our Youth Court Judges in this problematic area of dispositions.

3. Your committee is presently in consultation with the Department of Justice, Ottawa with a view to providing an input in the discussions related to the acceptance and implementation or otherwise of the Bagley Report on Child abuse. We have applied for a small grant of $16,000 to do a study relative to this report and the Department has advised us that a final decision on our grant application will be made this autumn.

4. As it affects the structure and future operation and involvement of this Committee with the ongoing work of the C.A.P.C.J. this past year will undoubtedly be among the most crucial and important in its history.

At the last annual meeting of this Association our Constitution was amended to provide a more effective and satisfying role for the Youth Court Committee in the C.A.P.C.J. structure. A completely new format was approved for the Family and Youth Court Committee with particular emphasis on its representative membership and mode of appointment. We have been in the process of implementing this new structure over the past year and consequently the members of our Committee for the next two years will be almost totally new with provision for new appointments from alternating regions after each two year period. The membership and officers of our Committee for the incoming year will be recommended to the President during this annual meeting.

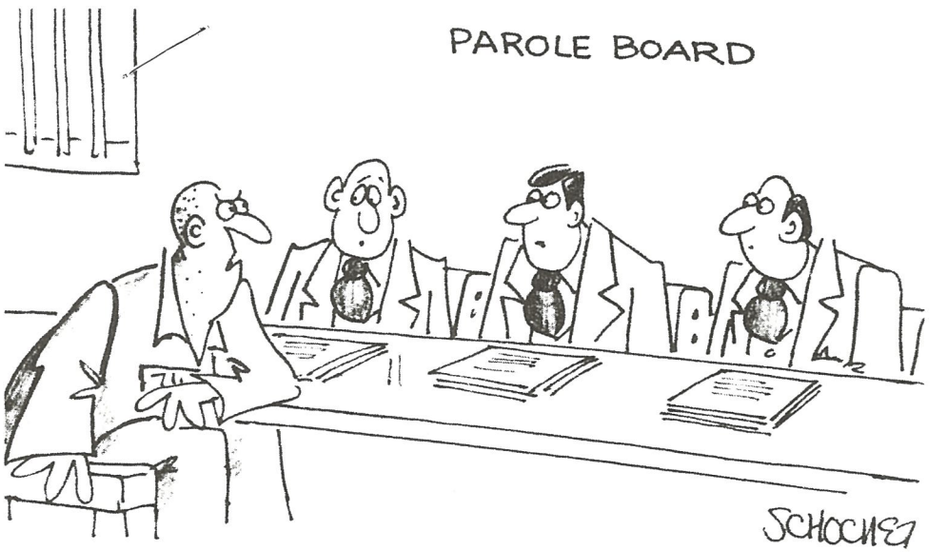
I would not want to conclude this report without giving special mention to a very loyal and hardworking member of our Committee since its beginning some eight years ago. I refer to Judge Guy Goulard of the Ottawa Family Court. Guy was the chairman of this Committee for four years and during the past two years was chairman of our Special Projects Committee and has been instrumental in persuading the Federal people to approve the several grants we have obtained over recent years for our various projects. We appreciate his efforts on our behalf and thank him for his special interest and skills in the management of our Committee. We wish him well in his new job as Supreme Court of Canada Registrar.

This is my final report as Committee Chairman and at the completion of my two year term I would wish to thank the President Judge Langdon and Judge Rice our Executive Secretary for their magnificient help and co-operation, and, especially is that true in our Committee's efforts to initiate a new structure and format for our future participation in this Association. And my sincere appreciation to all Executive members for two very enjoyable years of fellowship and work together.

Provincial Judges Association (Criminal Division).

Judge Lewis was the son of a factory worker salesman, and grew up in the Toronto area, working his way through University by driving trucks. He graduated from the University of Toronto law school in 1963 and adopted a lifestyle that emphasized work. His wife Sally, who was once an interim director of the Toronto bail program, is now completing her second year of law studies.

The National Association of Provincial Court Judges is indeed sorry to see him leave, but we all wish him well in his new career.



"I'm willing to work for my release. You guys got anybody you want bumped off?"

The Rule of Law: Judicial Independence and the Separation of Powers

by The Right Honourable Brian Dickson P.C.

Ed note: This address was delivered by the Rt. Honourable Brian Dickson, P.C. at the Canadian Bar Association Conference in Halifax, Nova Scotia on August 21, 1985.

Mr. Chairman, distinguished guests, Ladies and gentlemen. C'est toujours avec plaisir que je m'adress à l'Association du Barreau canadien, un organisme avec lequal j'ai eu des liens personnels et professionnels tout au long de ma vie.

I
The Rule of Law in Canada

In Canada the foundation of our social and constitutional order is a commitment as a society to live under the Rule of Law applied and protected by an independent judiciary. Our democratic traditions of responsible government, our conceptions of equality and justice, our freedom and integrity as individuals — all of these depend on the simple, but powerful, postulate that law is supreme. The Rule of Law as a fundamental principle of our Constitution extends back to the time of the Norman Conquest through to the **Magna Carta**, the Glorious Revolution of 1688, culminating in the **Act of Settlement of 1701**, finding its ultimate Canadian manifestation in the preamble to the **Constitution Act, 1982.**

The meaning of the Rule of Law is very simple and well known to us all: the law must stand supreme as the source and fabric of all social organization. It is the law which provides the framework for relations among individuals as well as between the individual and the state: the law delineates the scope of each person's liberties and responsibilities and defines the powers and duties of government. All obligations imposed on the individual and all restrictions upon his or her liberty must be justified by law, this is the most fundamental guarantee of equality and freedom we have achieved as a society. The Rule of Law protects individuals from arbitrary and capricious treatment at the hands of government and fosters confidence in each of us that the power of government to interfere with our lives is finite and ascertainable. It allows us to live together in freedom and harmony and provides the common ground for social progress and prosperity.

II
Judicial Independence

Realization of the Rule of Law depends in part on the judiciary who act as the final arbiters of all conflicts and disputes concerning interpretation and application of the law. The judiciary must, in order to fulfil its role properly and impartially, be separate in authority and function from all political organs. Pour que les litiges trouvent une solution équitable et juste, surtout ceux qui opposent les particuliers et le gouvernement, que ce soit en matière criminelle, administrative ou constitutionnelle, il faut assurer l'indépendance complète du judiciaire en le protégeant de l'influence ou de l'ingérence du gouvernement.

Nous admettons tous l'importance de l'indépendance judiciaire: pour toute personne ayant une formation juridique, c'est une vérité essentielle. Mais que veut-on exactement dire quand on parle d'indépendance du judiciaire et comment l'atteindre? A mon avis, plusieurs éléments entrent dans l'édification et le maintien d'un pouvoir judiciaire fort et indépendant, et c'est ce que j'aimerais aborder aujourd'hui.

Judicial independence means, in its most fundamental aspect, that judges be able to fulfil their duty of interpreting and applying the law. Individual judges must be unbiased and non-partisan in performing their duty. Judicial appointment, remuneration and continuing education of judges are important aspects of the question of individual independence in the judiciary and I will address these issues in due course. It is not enough, however, for individual judges to be independent. What is required in addition is institutional independence on the part of the judiciary, in other words, separate and independent judicial authority. The power to have the final say on interpretation and application of law, to resolve legal disputes

the Committee, though, I am currently an advocate of mediation, concilation and the total pretrial process. I would like to see more judges educated with respect to the benefit and the techniques related thereto."

With reference to inter-provincial communication, the Interim Report stated that:

"I would like to encourage the publishing of a 'Small Claims Reporter'. Since the advent of computers, it would be much easier to accomplish such a project over a long term. We provincial judges are very often in the vanguard as far as dealing with problems well before other courts grapple with new areas of law. Very rarely are we reported. Also, we do not know what each other is doing across the country, I feel that this is an important aspect of professional collegiality which should be explored.

"I am not sure whether this is a project that the Association can support or whether it is something for which government and/or private publishers' funds ought to be solicited. There seems to be some interest across the country in having some sort of communication on this level. It may be that it is simply a matter of feeding a central computer which can then be accessed by judges across the country."

Since the Executive Meeting, I have been encouraging judges to submit articles to the Provincial Judges' Journal. I feel that it is the responsibility of the Civil Division Judiciary to make sure that the Journal relfects the interests of all three Divisions.

Budget

The Committee budget of $2,000.00 was approved at the Executive Meeting in April 1985. This includes attendance of the Chairman at the Judges' Education Conference and the Annual Meeting.

Conclusion

The commitment of the Executive of the Association and its officers to encourage the participation of Civil judges in this organization is gratefully acknowledged by the Committee which looks forward to continuing dialogue. A personal tip of the hat to Judges Langdon and Rice as well as to Judges Claire Lewis, Bob Hutton, Rod Clarke, Charles Scullion and Yvon Mercier, who have been so supportive of your Chairman in her efforts to make this Committee a viable and useful one.

Report of The Family and Juvenile Court Committee of the C.A.P.C.J.

by Judge Charles L. Roberts

Your Committee has been involved in three main areas of activity during the past year.

1. We finalized the project begun in early 1984 with the production of a set of Uniform Rules of Procedure in the application of the Young Offenders Act. This project was made possible through a grant of $16,000 to your Committee from the Department of Solicitor General. A booklet of Procedures with accompanying Forms was sent to the various Provincial Youth Court bodies and relevant Government departments. We are planning over the coming year to monitor the degree of use to which these suggested Rules of Procedure are being applied and any suggestions for future modification or change.

2. Our main project for the past year, and which is still ongoing, is the provision of a booklet on Disposition Guidelines under the Young Offenders Act. A three-day Dispositional Seminar was held at Montreal in June of 1985, where we attempted to analyze and achieve a better understanding of the process of arriving at the most desirable disposition in cases under the Young Offenders Act. This Act provides for a wide discretion to the Youth Court Judge in arriving at a proper disposition, and, it was our feeling that a study of the different approaches used by Judges might be helpful in arriving at a Statement of what appears to be the most common approaches and practices in interpreting and applying the basic principles and philosophies of the Y.O.A. to specific cases. In essence that was the purpose of the Seminar. Some 75 Judges representing every province and Territory attended. We received a grant of $69,000 from Ottawa with the provinces meeting the cost of room and board for each Provincial Judge. Judge Langdon our Association President and Judge Rice Executive Secretary also were in attendance.

A report of the Seminar is now being

Report of the Civil Courts Committee To the Annual Meeting of The Canadian Association of Provincial Court Judges September (1985)

by Judge Pamela Thomson Sigurdson
Ontario Provincial Court (Civil Division)

History

This Committee was set up by the President with myself as co-Chairman and Judge André Desjardins as Chairman in 1983. Judge Desjardins set up lines of communication to the various courts across the country and gathered information with respect to authority and jurisdiction.

I was appointed Chairman and sole member by President Langdon in 1984. As such, I have continued to participate where appropriate in the various functions and decision-making processes of this Association.

I attended the Executive Meeting of the Association in April 1985 and presented an Interim Report.

Composition

I am pleased to report that Judge Huguette Marleau of Montreal has agreed to become a member and to work with me in expanding the activities of the Committee. Although I have written and spoken to the Presidents of the Judges' Associations in British Columbia, Alberta and Saskatchewan, I have been unable to find any judges who are willing to become members of the Committee as of this writing. I hope that this situation will change after consultation in Winnipeg.

Education Programme

Appended hereto is my Report on the Judicial Education Conference held in March 1985. As can be seen from this Report, the programme continues to be successful.

General Objectives

The Interim Report stated:

"... lobbying and liaison are the prime functions of the Committee. I see the Committee as working to encourage Small Claims judges to actively participate in their provincial associations and to work with the Committee as ad hoc members when called upon. I would like to see the Committee lobby for **uniformity**: uniformity of territorial jurisdiction; uniformity of substantive jurisdiction; uniformity of financial jurisdiction ($3,000.00 - $5,000.00). The Committee can work with judges in various provinces to encourage the government to change the name of Small Claims Court to 'Civil Division' if the judges and their Association deem it advisable in each province. Again, this is a question of attempting to get uniformity. The Committee can also work with the judges and the chief judges to attain some uniformity, or conformity, with respect to Rules of Practice.

"All of this, of course, requires liaison with judges across the country. In addition, this Committee intends to set up close liaison with Family Courts Committee both in general and for purposes which are more specifically set out later. This Committee will continue to work with the Education Committee to ensure that a Civil Division programme is presented at the annual Judges' Education Conference as well as at the Eastern Regional Conference and the Western Judicial College, if called upon. At this point, I understand that education for civil judges will be concentrated at the annual Judges' Education Conference."

Projects

The Interim Report stated That:

"(The Committee) would like to coordinate with judges and chief judges across the country to encourage judicial exchanges. Particularly in the common law provinces, this would be of great benefit to all concerned in learning what goes on across the country. I feel very strongly that collegiality is professional responsibility.

"I would like to work with the Executive and the Family Courts Committee to set up a mediation education project. Mediation is becoming "de rigueur" in both Civil and Family litigation. It has, of course, played a prominent role in the development of labour law in the last few years. It is my distinct feeling that all judges in the Civil area - particularly those who do not do civil law on a full-time basis - should have some training in mediation. It is incumbent upon the Association to encourage mediation expertise among the judiciary who deal with civil and family matters. Particularly when we consider that most judges in Canada do deal with civil matters on some level or other and in some measure or other, the scope of this project could be quite wide. However, mediation should not be limited to the bench and its expertise. There may even be some feeling among the judiciary that it is not appropriate to do so at all. As Chairman of

and determine remedies, must be reposed exclusively in the judiciary. As Chief Justice Marshall stated in **Marbury v. Madison**[1]: "It is, emphatically, the province and duty of the judicial department, to say what the law is". All public power must be exercised according to law, and this is only possible where there is independent judicial authority. Protection of all the great values embodied in the Rule of Law - freedom, equality, justice — is inevitably dependent upon the existence of independent judicial power.

(a) **Historical Foundation**

In Canada, we are blessed with a strong and independent judiciary as an integral part of our Constitution. The history of the Constitution of the United Kingdom, to which our own is similar in principle, reveals continuous growth towards independent judicial authority. By the end of the fourteenth century the Court of King's Bench, the predecessor to our provincial superior courts, had separated from the **curia regis**, a select group of the King's counsellors, and the Court of Exchequer had been established. The power to decide legal disputes had shifted from the King to the courts. According to Blackstone, "by the long and uniform usage of many ages, our Kings have delegated their whole judicial power to the judges of their several courts, which are the grand depositories of the fundamental laws of the Kingdom".[2]

Since these early days judicial authority has matured into a strong and effective means of ensuring that governmental power is exercised in accordance with law. The separation of powers in Anglo-Canadian constitutional law is neither explicit nor complete, the most obvious example of this incompleteness being the overlap between legislative and executive power inherent in our system of responsible government. Nonetheless, as the great English legal historian Holdsworth points out "some of the powers in the Constitution were and still are, so separated that their holders have autonomous powers, that is, powers which they can exercise independently, subject only to the law enacted or unenacted. The judges have power of this nature because, being entrusted with the maintenance of the supremacy of the law, they are and always have been regarded as a separate and independent part of the Constitution".[3]

(b) **Canadian Constitutional Foundation**

In Canada, the constitutional foundation for the concept of judicial independence and the separation of powers flows from a variety of legal sources. First, the preamble to the **Constitution Act, 1867** states that Canada is to have a Constitution "similar in Principle to that of the United Kingdom": the long history of judicial independence in the United Kingdom was, in this way, transferred to Canada. Second, s.129 of the **Constitution Act, 1867** continued the courts previously in existence in the federating provinces into the new Dominion. The fundamental traditions of those courts, including judicial independence, were also continued. Third, and perhaps most explicitly, the judicture provisions of the **Constitution Act, 1867** and in particular, s.96, support judicial independence and power, at least at the level of superior, district and county courts. Fourth, the very nature of our federal system requires an impartial umpire of disputes between the federal and provincial governments: of necessity, the courts have always played that role. And fifth, the enactment of the **Charter** and, in particular, the explicit wording of ss.24 and 52, underline that the courts must play a new and important role as arbiters of disputes between the individual and all governments. These five legal sources combine to provide a strong constitutional foundation for judicial independence and separation of powers in Canada. Nonetheless, explicit entrenchment of these principles might well find a place on the agenda for constitutional amendment and would, in my view, be highly desirable.

III
Judicial Review

The primary indices and ultimate assertion of separate judicial authority in Canada are found in our history of vigorous and effective judicial review at both the administrative and constitutional levels. To begin with, judicial review of executive and administrative action is a well established fact in Anglo-Canadian law. Its long and honourable tradition as a buffer against incursions by the state on the rights of the individual extends back at least as far as **Semayne's case**[4] in 1604 and the great case of **Entick v. Carrington**[5] in 1765. The development of a body of jurisprudence known as administrative law, and landmark decisions such as **Anisminic**[6] in the House of Lords, and **Roncarelli v. Duplessis**[7] in the Supreme Court of Canada, strongly attest to the continuing vitality of judicial review of executive and administrative action.

Ce pouvoir de contrôle devient d'autant

plus essentiel pour protéger les droits et libertés des personnes que l'emprise et l'autorité de l'état continuent de croître. Presque tous les aspects de la vie privée sont touchés directement ou indirectement par le gouvernement. Il est impératif que le pouvoirs judiciaire permettant de remédierà l'exercice illégal de pouvoirs exécutifs et administratifs et de le prévenir se dresse entre le gouvernement et les personnes en tant que protecteur de leurs droits et libertés. Un pouvoir judiciaire distinct et indépendant est le garant ultime de la primauté du droit contre les excès de pouvoir de l'exécutif et de l'administration. On ne doit pas le mettre en péril.

It is, of course, necessary that in using their power to review over administrative and executive action, judges do not depart from their proper function of law interpretation and application. Care and restraint must be exercised to ensure that executive and administrative decisions, taken within the proper scope of statutory powers and duties, are undisturbed. I recognize the prominent and important place of specialized administrative tribunals to decide all matters that fall properly within their jurisdiction. Incursions by the judiciary into the **intra vires** and legitimate activities of such tribunals and other administrative decision makers is undesirable and anathema to the legitimacy of judicial power and the Rule of Law.

One of the most significant aspects of our constitutional order is that judicial review extends beyond the activities of the executive and administration to the activities of the legislature itself. In Canada, unlike the United Kingdom, legislative supremacy is not absolute but is, rather, subordinate to constitutional supremacy. Our Constitution is written and justiciable and it is the duty of the judiciary, as guardians of the Rule of Law, to ensure that it remains supreme. As the Supreme Court stated in the recent **Manitoba Reference**:[8]

> The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislative and government. It is, as s.52 of the **Constitution Act, 1982** declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.

Dés les premiers jours de la Conféderation canadienne, le pouvoir judiciaire s'est acquitté avec talent de son obligation d'assurer la suprématie de la Constitution en déclarant sans hésitation inconstitutionnelles les lois qu'il jugeait incompatible avec la Constitution. La théorie juridique considérable et importante sur la répartition des pouvoirs entre les articles 91 et 92, de même que sur les autre articles de la **Loi constitutionnelle de 1867**, atteste de la forte tradition du contrôle judiciaire des lois dans ce pays. On peut attribuer directement aux décisions judiciaires sur la répartition constitutionnelle des pouvoirs législatifs une grande partie de l'allure actuelle de la Confédération canadienne et de l'équilibre des forces politiques, économiques et culturelles qui a été atteint.

The role and importance of judicial review of legislation has been significantly enlarged with enactment of the **Constitution Act, 1982**. As we all know, a **Charter of Rights and Freedoms** now forms part of the law of the Constitution, the supreme law. The grounds for judicial review of legislation have been expanded to include the most fundamental rights and freedoms of Canadians, and it is the high duty of the judiciary to ensure that any limits on these rights and freedoms are reasonable and demonstrably justified in a free and democratic society. Inevitably, the courts will be called upon to resolve some of the most significant and controversial issues — moral, social, political and economic — facing our nation. The judiciary has truly been thrust into a prominent position in shaping a new social and constitutional order, distinctively Canadian in sensibility and outlook, and devoted to the protection of democracy, social justice, freedom and dignity.

When a law is inconsistent with the **Charter** the courts must not hestitate to strike it down. The fulfilment of the grand objectives which inspired the **Charter** is dependent in large measure on the strength and fortitude of the judiciary. The structure of the **Charter**, as embodied in sections 1, 24, 32 and 52, requires that judges be independent and free of governmental interference and influence, and that they prevent and remedy unconstitutional exercises of governmental power. Now that the judiciary is charged with the task of resolving disputes

what would be suitable for inclusion in a new Manitoba edition. No one present was too favourably inclined towards a court presided over by civil servants.

Something interesting emerged about reserved decisions. It was felt apparently that where the emotional atmosphere had reached a certain level the decision was reserved as a measure of self-protection. On the other end of the scale, in Quebec all decisions are required to be written which creates a backlog in transcription services.

The rationale for jurisdiction of $3,000.00 is that is the estimated cost of a proceedings in the Queen's Bench. I find this difficult to understand but no matter. There also seemed to be something of a resentment that the Manitoba Telephone Systems wanted to get its bills paid, if necessary by court action. There was also some wild talk about naming the court "The Consumer Grievance Forum" or "Judicial Collection Court" which I am sad to report was meant seriously. If you use titles like that then you will be halfway to getting just what the title implies.

Another interesting aside revealed that if you were a deputy judge in Ontario you would end up sitting at night to hear cases up to $1,000.00 which sounds rather a dogsbody of a job.

Unfortunately I was not able to attend the final session which was held on the final day. But Judge Sigurdson has been good enough to let me know by letter that they drafted a model Act. Well, Cromwell had some success in drafting a new Model Army that ended up cutting off a King's head. But I doubt if that was contemplated but in Winnipeg you never know.

What direction then should the Civil Courts Committee take in the future? These remarks about the Winnipeg sessions illustrate the disparity between Provincial approaches. But there still exists more similarities than differences in the general problem of dispensing expeditious and inexpensive justice in a court of law so there would seem to be some justification for maintaining contact between the provinces. Shared experiences can often prove beneficial provided one can practise the art of listening. Any helpful suggestions would be welcomed by Judge Sigurdson.

As a footnote on the role of a Judge in the Manitoba system the following note appeared in the All-Canada Weekly Summaries of February 14, 1985: Action commenced in small claims court - transferred to Court of Queen's Bench - small claims court established for uncomplicated cases and this case involved witnesses requiring interpreter, counterclaim exceeding jurisdiction of small claims court and possibility of appeal.

29:0491 **Plante v. Dalgleish** (Nov. 1, 1984, Man. Q.B., Kennedy, J.)

* (composed of Quebec 5, Alberta 1, Saskatchewan 2, Ontario 2, B.C. 1, Manitoba 1)

who, during the course of his comments, said that the system of legal education in Canada was probably the best in the world but that it was not achieving its full goal.

Winnipeg on the Civil Side

by Judge D.K. McAdam, Judge of the Provincial Court of British Columbia

It has been some time since I have been able to attend the Association Annual Meeting; the limited vacation time allowed does not permit much scope for such indulgences. It was therefore a novel experience to attend the sessions for the Civil Division. I do not recall anything of that kind on the agenda at Saskatoon in 1982.

It became apparent that on this occasion the programmes derived, in part if not wholly, on the energetic promotion of Judge Pam Sigurdson of Toronto. Her efforts attracted the attention of a *dozen Judges whose working hours are occupied at least part of the time with this poor relation of the Provincial Court System.

The first of the sessions consisted of the presentation of a paper prepared by Judge Andre Desjardins and stylishly delivered by Judge Yvon Mercier. That paper appears elsewhere in this issue. This paper concerned the origins and operation of the Quebec Small Claims Court which has resulted in a pragmatic blending of the common law and the civil code. If much of this was not new to those who had heard it from Chief Judge Alan Gold on other occasions, there has been an interesting development. As a result of a recent amendment, where a case raises a complex question of law the Judge may, with the consent of the Chief Judge, permit the parties to be legally represented, the costs being borne by the Minister of Justice of Quebec. This exception to the total ban on legal representation may not be considered by the Quebec Bar as a significant breakthrough, I would imagine, given the jurisdictional ceiling of $1,000.00.

There was a rather intriguing discovery that one of the courts that had been primarily studied before setting up the Quebec one, had been the one in force in Puerto Rico. It has always sounded an ideal place for some leisurely study. Only the bare fact was referred to and I must plead ignorance of what it revealed.

The second of the sessions was an address from Professor Dale Gibson of the University of Manitoba on the application of Section 15 of the Charter. The difficulty here was the speaker was quite unfamiliar with Small Claims Courts. This is not altogether surprising given that no such animal recognizable as a court exists in Manitoba. Section 15 was very much in fashion at the meeting.

Professor Gibson soldiered on regardless directing our attention to Human Rights legislation and the jurisprudence it has spawned in its wake. He teased us with such arcane subjects as wheelchair spaces in theatres, and hard questions such as 'Do you have to be a female to work in a ladies hairdresser?' I had always thought that that question had been put to rest by the movie "Shampoo," until I realized it was shown in the Neanderthal era prior to the proclamation of Section 15.

Law professors are very adept at producing cases and Professor Gibson was no exception. A large handful were produced from various jurisdictions, including a large proportion from B.C., some of which were the most extreme. "Something to do with the mountains" was all the explanation I could offer rather feebly.

For the third session we received a presentation from Professor Janet Baldwin, Associate Dean of the Law Faculty at the University of Manitoba. After explaining that the Manitoba Small Claims Court was an appendage to the County Court and for the most part administered by Court Registrars and Deputies, she revealed that what she really had in mind was to glean from the other provinces

arising between the individual and the government concerning fundamental rights and freedoms, judicial independence and separation from government are of the utmost importance.

The judiciary must be free from encroachment by government upon matters within its proper sphere; equally, however, the judiciary must not encroach upon the proper domain and jurisdiction of government. The legitimacy of judicial review under the Constitution is necessarily dependent on a sensitivity and diligence on the part of the judiciary to the limits of its proper function. As I have stated, the judicial function is restricted to interpretation and application of the law; it does not include legislating by judges. Though it is inevitable that law will be created by judges in the process of resolving disputes, interpreting and applying legislation, and following precedent, the courts have no business in questioning the wisdom and policy of legislation beyond what is required by the Constitution. Only the legislature is entitled to assess the wisdom of its programs, both in the abstract and in the practical sense of their impact on political support. Laws not inconsistent with the Constitution must be upheld, no matter how wise or unwise they may appear to be.

IV
The Practical Requirements of Judicial Independence

What then are the practical requirements of judicial independence? We have in Canada a strong and independent judiciary. Judicial review at both the administrative and constitutional level is vigorous and effective. I am optimistic that it will continue to be so. We must, however, be ever vigilant not to take for granted the need to protect judicial independence and authority. "We must not", in Chief Justice Desch⅜nes words, "consider ourselves immune from the temptations to which others have succumbed and it is essential that we protect the independence of the judiciary with zealous care"[9].

(a) **Appointment**

It is necessary, in the first place, that judges be appointed in such a way as to ensure the greatest individual independence possible. The judiciary as a whole is only as good as the people who compose it. It is therefore essential that judicial appointments be made on the basis of merit and merit alone. Judicial independence necessarily requires that a judge engage in his or her own task in as apolitical and impartial a fashion as is humanly possible. Judges must be appointed on the basis of their ability to dispense justice in an intelligent and impartial manner, not out of political and partisan motivation. Any reform in the system of judicial appointments which increases the consultation process with all of those who are knowledgeable about likely and qualified candidates is welcome and should be considered. I am pleased with the attention the federal and provincial governments and the Canadian Bar Association are giving to this subject. In particular, I look forward to studying the two new reports on judicial appointments and independence by Committees of the Canadian Bar Association.

(b) L'inamovibilité

Une garantie essentielle de l'indépendance des juges est évidemment leur inamovibilité. Depuis l'époque de **l'Act of Settlement, 1701**, il existe un postulat clair en droit constitutionnel anglais: un juge occupe sa charge á titre inamovible. Ce principe prévaut au Canada pour les juges des cours supérieures en vertu de l'article 99 de la **Loi constitutionnelle de 1867**, si ce n'est qu'ils peuvent être révoqués par le gouverneur général sur une adresse du Sénat et de la Chambre des communes. L'importance de garantir l'inamovibilité des juges est évidente: un pouvoir judiciaire fort et indépendant est simplement irréaliste si la charge d'un juge dépend de savoir si ses décisions et sa façon d'aborder le droit plaisent au gouvernement du jour. Sans l'inamovibilité, ni l'apparence ni la réalité d'une justice impartiale ne seraient possibles. Nous avons la chance qu'au Canada, l'inamovibilité des juges de cours supérieures soit garantie par la Constitution.

(c) **Remuneration**

The remuneration of judges is an issue essential to any discussion of judicial independence. Section 100 of the **Constitution Act, 1867** specifically states that Parliament is to fix and provide the salaries of judges. The level of these payments is provided for in the **Judges' Act.** If we are to have in Canada the high quality of judicial performance which Canadians are entitled to expect and due administration of justice requires, then judicial remuneration must be at a sufficient level to attract the most able candidates to the Bench. It is often the case that a candidate for the bench will suffer a loss of earnings upon appointment; nonetheless,

the disparity between a judge's earnings prior to appointment and his or her earnings after appointment should not be so great as to make acceptance of judicial appointments unfeasible.

In 1929, Hon. L.A. Taschereau, K.C., LL.D., then Attorney-General of Quebec, noted, in an address to this same Association, that: "The reason of the difficulty for finding recruits for the Bench is obvious: legal talents, at the Bar, command large incomes and our judges are underpaid".[10] Though matters have improved since 1929, the disparity between the income of a top level practicing lawyer and a federally appointed judge continues to be a source of concern.

In 1981, the **Judges' Act** was amended to create a body, independent of Parliament and government, to review, every three years, the question of judicial remuneration. Pursuant to that legislation, the first triennial Commission on Judges' Salaries and Benefits, was appointed on April 6, 1983. The Commission was concerned with reviewing and setting a level of remuneration "not totally disproportionate with that which senior members of the bar may reasonably expect to derive from their legal practices, while at the same time recognizing that the satisfaction to be derived from public service is both an incentive to judicial office and an incalculable part of judicial compensation".[11] The Commission made its report to the then Minister of Justice on October 6, 1983. A number of excellent recommendations were made. I hope these excellent recommendations will be acted upon and that we can look forward to their implementation at an early date.

(d) **Continuing Education**

The merit and ability of judges to fulfil their function of dispensing justice is not confined to the selection stage but is, rather, a matter of continuing concern throughout a judge's career. A judge must have the facilities and opportunity to keep his or her knowledge of the law up to date, and to be aware of the commentary and the not infrequent criticisms or suggestions offered by legal scholars. This is especially true as we enter the unchartered waters of the **Charter**, and as the judiciary becomes increasingly involved with some of the most vexing and controversial issues of the day. Recent efforts at facilitating judicial education are very encouraging. I have just attended the Cambridge Lectures where a wide range of important and very interesting legal questions were explored, discussed and debated by eminent scholars from all areas of legal endeavour. The value of this kind of series cannot be overestimated. Educational activities for judges, whether sponsored by the Canadian Judicial Council, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Canadian Institute for Advanced Legal Studies, or the Canadian Institute for the Administration of Justice should be applauded, and the funding necessary to sustain such activities forthcoming. My hope is that the educational requirements of judges will soon fall under the direction of a Canadian Judicial Centre, as an umbrella organization under the auspices of the Canadian Judicial Council and dedicated to the many needs of Canadian judges.

While educational seminars are valuable and necessary, they may not fulfil all the educational needs of judges. Periods of time to pursue further legal studies, either independently or through course work and seminars at law schools, are also desirable to allow judges who have served for many long years to renew themselves and refresh their knowledge in areas of interest. Such programs would clearly enhance the abilities of judges to carry out their duties and ultimately make for a stronger and better informed judiciary. I am encouraged that the Canadian Judicial Council and the Minister of Justice are currently in the process of creating guidelines for instituting a limited program of judicial educational leaves.

(e) **Administrative Independence of Courts**

Turning now from the practical requirements of individual independence to those of institutional independence of the judiciary, I share the growing concern of many members of the Bench and Bar that the separateness and scope of judicial authority in Canada may potentially be compromised by the absence of administrative independence of the courts.

We are fortunate in this country to have avoided any real conflict between the judiciary and executive. I believe that Mr. Crosbie and his government clearly understand the value and importance of an independent and secure judiciary. We, at the Court, and, so far as I am aware, other members of the judiciary, have received full cooperation from all members of the Federal Justice Department staff. Nonetheless, it is necessary, if our tradition of a strong and independent judiciary is to continue unhampered, that we ensure for the judiciary,

With regard to overcrowding of the profession, it does not seem to have affected the lowering of the competency of counsel so it can be measured. The competition has, to some extent, lowered fees but the effect of price-cutting on competence also cannot be measured.

It was generally conceded that there is no support for the allegation that young lawyers are the only ones who cause problems. The fact is that lawyers with practise in the area of 7 - 10 years are the ones who cause the most claims and have the most defaults.

There should be more professional research with regard to standards because there seems to be an emphasis in referring to the practice of law as a business and thereby avoid the ethos for maintaining law as an ethical practice; that is, the art of the practice of law.

Because of this emphasis of law as a business, we see law firms being more interested in their physical situation, expending huge sums of money on overhead with the general feeling that there is less interest in ethics, service, responsibility, and competency.

The Law Societies should develop constant programs to help lawyers to avoid pitfalls, to provide services for consultation, and to continue education and advice to avoid temptations, and other problem areas.

With regard to funding, the areas requiring the most are education and research. It was unanimous that all aspects of legal education are now under-funded and that is why there have been no new developments.

There must be a general effort to see that proper funding is set up and new steps taken to develop new and innovative programs to meet the problems that are now evident.

With regard to funding, generally, the question is what to do. It would be by supporting approaches to develop support for legal research to encourage all governing bodies of law schools and the Bar to be in continuous consultation to find the needs and to develop support by research, documentation, and evidence of the needs that would enable the continuing research for legal education and competency.

There was particular note of the fact that in Canada, it is not generally accepted for the profession to contribute to law schools but to depend on government support. The profession must look more to its responsibilities and develop the habit of giving and supporting legal education. It is very interesting to note the difference of support by the legal profession and other professions such as medicine, science and engineering which have much higher levels of personal funding.

There was special appreciation given to the various law foundations which, up until now, have been very generous in supporting research and the development of new programs.

The conference gave a great deal of support for the need for research, social changes, the Charter of Rights, and other influences that need the research to enchance legal education and encourage the value of legal scholarship. There is a great deal of comment based on conjecture and belief but empirical research is really what is required, and what is the best method of meeting the objectives.

Finally, the Dean observed that the main theme running throughout the conference, other than that of the need of developing more extensive and better legal education, was that funding was a paramount requirement and that the profession should rise to the occasion to help in this situation by making the needs known to government and themselves coming to the universities to offer their help.

I found that to a great extent my appreciation of the conferences was similar to that of the Deans's.

He had the advantage of being able to attend several different workshops and to obtain the opinions of the various rapporteurs and make the above synthesis.

As a result, I approached the Chairman of the Federation and suggested that possibly representatives of our National Judicial Education Committee should become members of the Federation.

It was met with enthusiasm and I will be writing to the Executive Director with this view in mind so that we can develop permanent consultation and attendance at appropriate meetings.

I am certain that this is a considerable gain for I am not aware of any other judicial organization that would be as closely involved in the area of legal education, as we would then be.

I might state that a major visitor from the United States in the person of Dean David H. Vernon, retired Dean of the Iowa Law School,

there are important proposals to improve that could be made but due to the lack of money and personnel, one has a greater problem.

It is suggested that possibly continuing legal education should be done on a national basis with exchange between the various jurisdictions for content, faculty, and constant revision of curriculum.

Whether or not continuing legal education should be compulsory, there was general support for the compulsory element of continuing legal education for remedial problems concerning members of the profession; however, there was less support for general mandatory aspects of continuing legal education.

The point was generally made that the common law jurisdictions do not look enough at the civil law as a legal resource. It is obvious that the problem is language and how to define the law, but the common law jurisdictions need the culture. Therefore, the law schools should enter into comparative studies by exchange and actual curriculum's status.

With regard to the question of change, there was some discussion that the present degrees of LL.B. might be replaced by four years in one setting, that is the law school plus internship in a law firm, or two years law school and two years, being one year apprentice and one year under guidance.

However, the general view was to preserve the current pattern, but really to get down to developing a continuing and more co-operative approach to bar admission courses and develop more resources.

One could look to Quebec which has a joint committee with mutual representations between the law school and the bar admission course. This is to some extent followed in Manitoba but it could be deeper and fuller with a more prompt exchange of information between schools and admission courses with regard to education.

When one is looking at the criteria for admission to select students, it must be based on the academic, which was the general opinion.

There could possibly be more investigation on admission but that would be generally too costly and incapable of equal treatment, particularly in the question of interviewing. Therefore, it was believed that the present criteria are fair and appropriate.

It was suggested that selection could be done by lot and the tickets could be sold at a sufficiently high sum to help cover the deficits of the law schools. This, of course, was facetious, but indicated the desperate nature of the financing required for law school.

There is, of course, the problem of applicant character, and how to be assessed.

It was conceded that the question to be decided would be whether to take it into account or to develop a basis of testing. In general, this was considered an intrusion and it was a problem. It was conceded that at a law school level, they should probably not look at this problem but that it was an important element at admission status.

Looking at the question of criminal record, it was suggested that it should not preclude entry into law school but the candidate, if he has a record, should be warned that he get an opinion from the Law Society immediately to ascertain whether or not he would be precluded by the Law Society and therefore not be taken by surprise.

To some extent, the matter of character is a long way from resolution because it requires further investigation but present knowledge would seem to indicate that there is a gross relationship between illegal and inappropriate activity by lawyers to previous evidence of bad character and low academic achievement.

There was some question with regard to the portability of degrees and the general opinion is that it should be enhanced to allow more portability between Quebec and the common law jurisdictions, and the need to review the necessity of the three year practise rule between the provinces.

With regard to economics and numbers of students in practice and the problems in the profession, there were many good papers and the conference was assisted by the attendance of some economists who specialize in this area.

It was generally conceded that there are no measures to predict the demand for lawyers and therefore any prognostication would be dangerous. The profession and law schools cannot and should not show how, or try to justify how it could be done. One does not know whether the demand may increase and develop. What Law Societies should look at is the "retooling" of lawyers and provide courses for re-emphasis and change in specialization.

in Chief Justice Laskin's words, "independence in budgeting and in expenditure of an approved budget, and independence in administration, covering not only the operation of the courts, but also the appointment and supervision of the supporting staff".[12] Independence of the judicial power must be based on a solid foundation of judicial control over the various components facilitative and supportive of its exercise.

Present institutional arrangements in Canada are unsatisfactory in this respect. Financial and administrative control of Canadian courts is, for the most part, in the hands of federal and provincial Ministers of Justice. It is the Ministers of Justice who present and defend judicial budgets and who provide the courts with services and support staff. They play an integral part in matters of judicial remuneration and allowances as well as most other aspects of court finance and administration. Yet it is these same Ministers who must appear before the courts as attorneys for public prosecutions and who must defend the actions of governments against constitutional attack.

Effectively, the financial and administrative requirements of the judiciary for the dispensing of justice are in the hands of the very Ministers who are responsible for defending the Crown's interests before the courts. This ambiguity of function must be eliminated. Even if it can be said with confidence that the present arrangements have no actual deleterious effect on the impartial dispensing of justice, we must not forget the old adage that justice should be seen to be done as well as done. It is essential that the public have faith and trust in the judiciary as impartial adjudicators of all disputes of a legal nature. I fear that public faith and trust may be put at risk by the existing nexus between the judiciary and the Ministers of Justice. Preparation of judicial budgets and distribution of allocated resources should be under the control of the Chief Justices of the various courts, not the Ministers of Justice.

Control over finance and administration must be accompanied by control over the adequacy and direction of support staff. I am concerned that all courts be assured sufficient personnel to promote prompt and efficient administration of justice. In particular, the services of law clerks are useful at all levels of courts as the legal problems judges confront become increasingly complex and in-depth research all the more essential.

En ce qui a trait á la direction du personnel, les secrétaires, les bibliothécaires, les huissiers et les adjoints doivent exécuter leurs tâches sur les ordres des juges et des juges seulement. Bien qu'en pratique il soit juste de dire que les juges ont la direction du personnel de la cour, il est anormal que, commes les employés de la cour sont des fonctionnaires, plusieurs des aspects les plus importants des emplois, le recrutement, la permanence, la promotion, la formation, la classification des postes et la structure du régime du personnel, sont exclus du contrôle des juges.

At the Supreme Court of Canada we have gone some way towards achieving administrative independence. Under the **Supreme Court Act** the Registrar controls the staff, library and publishing of judgments under the supervision and subject to the direction of the Chief Justice. There are still, however, significant links between the Supreme Court and the Department of Justice and other departments of government, especially in relation to judicial remuneration, preparation of budgets, buildings and security, and recruitment, classification, promotion and remuneration of staff.

La Cour suprême du Canada est la plus haute cour du pays et elle constitue la cour d'appel finale et générale pour le Canada. C'est le dernier recours en appel de tous les tribunaux de tous les coins du pays dans tous les domaines du droit et elle a le dernier mot sur les questions juridiques les plus fondamentales et les plus controversées auxquelles fait face notre société. Son but est de surveiller l'évolution et l'articulation de la doctrine juridique dans l'ensemble du système judiciaire canadien afin d'assurer l'uniformité, la cohérence et, bien sûr, la justesse de l'interprétation. La **Charte** a donné un rôle de premier plan á la cour dans le façonnement du paysage juridique et social du Canada. The perception and reality of independence of the Court is essential. It is imperative that not even the slightest doubt exist concerning the independence of the Court from the government. I am anxious that the administrative dependence of the Court upon all government departments be much reduced if not eliminated.

(f) **Judicial Involvement in Royal Commissions**

I mentioned that justice must be seen to be done as well as be done. Judges must ensure not only that they are independent, but also that they appear independent. I am increasingly concerned about certain extra-

Perspectives on Justice in Contemporary Canadian Society

by Professor E.R. Ratushny
Director, Human Rights Centre Ottawa

Ed. Note: This KEYNOTE address was delivered to the 1985 Annual Conference of the Canadian Association of Provincial Court Judges at Winnipeg, Man. on Sept. 9/85

There is no question that the Canadian Charter of Rights and Freedoms is having a dramatic effect upon contemporary Canadian society. Almost daily, our newspapers carry reports of Charter arguments being advanced in court cases, of judicial decisions being rendered on the basis of Charter provisions and of longstanding practices in business and elsewhere undergoing extensive reassessment and modification in anticipation of the future impact of the Charter.

The prospect of change inevitably generates fear in the hearts and minds of many people. "Charter-phobia", then, should not be an unexpected phenomenon. Nor should "Charter-fatigue" particularly on the part of lawyers and judges, who must attempt to keep up to date with a massive volume of new case law introducing many new concepts. This has been coupled with an explosion of interest in the case-law of foreign jurisdictions such as the United States. It was not very long ago that a decision of the European court of Human Rights would have been considered totally esoteric for Canadian purposes. Today, it might cast a welcome light on the meaning of a perplexing provision of the Charter.

Moreover, prior to the coming into force of the Charter on April 17, 1982, we also witnessed and participated in a national political debate about whether Canada should have an entrenched charter of rights and, if so, what those entrenched rights should be. Just when we started to become accustomed to the Charter, three years after its adoption, the "Equality Rights" provision of Section 15 came into force. Public reaction ranged from ecstatic celebration to guarded optimism to dire predictions of impending disaster.

While such feelings of anxiety may be understandable, they are unfortunate and unnecessary. After all, the Charter merely represents those fundamental ideals which should permeate conduct and, particularly, government conduct in any healthy democratic society. The Charter demands of the Courts no more, but no less, than that these ideals be pursued in a manner which is reasonable "in a free and democratic society". The task is not simple and it will not be easy. But when has the achievement of ideals ever been simple or easy.

When the late Chief Justice Bora Laskin was sworn in as a member of the Supreme Court of Canada in 1970, he included the following in his address:

> I can take my seat here confident that I have no expectations to live up to, save those I place upon myself; I have no constituency to serve save the realm of reason; no influence to dispel, unless there is a threat to my intellectual disinterestedness; I have no one to answer to, save my conscience and my personal standards of integrity.

Of course, this does not mean that a judge is completely free to decide cases in accordance with a personal conscience or personal standards. Obviously, judges must decide according to law. Chief Justice Laskin was speaking of judicial independence in the sense of an absence of any bias in its broadest meaning. That he still considered legal doctrine and precedent to be of fundamental importance was demonstrated by his almost angry reaction to counsel who attempted to raise Charter arguments "in the alternative", without adequate forethought or preparation.

Judges of the Provincial Courts have also been known to encounter this phenomenon. I speak of the counsel who asks you to apply a section of the Charter to acquit the accused because the search was "obviously" unreasonable or because the "spirit" of the Charter was offended. Unfortunately, "in the limited time available we could find no case-law directly on point". In seeking the application of the Charter this is simply not good enough. All of our Courts are entitled to properly prepared arguments on Charter issues and, indeed, require them if the Charter is ultimately to make sense.

Although cases must be decided according to law, the Charter is now a part of our

$ déboursée par le requérant, sauf dans les cas où le débiteur était poursuivi par une personne morale et qu'il a demandé que l'affaire soit référée à la division des petites créances. Dans ces derniers cas il doit payer les déboursés encourus en division ordinaire, soit le timbre apposé sur le bref et les frais de signification (normalement environ 40,00 $).

Le jugement est final et sans appel. Il n'a cependant l'autorité de la chose jugée qu'à l'égard des parties et que pour le montant réclamé. Il ne peut être invoqué dans une autre action fondée sur la même cause devant un autre Tribunal.

Comme on peut le constater le législateur a voulu donner au jugement un caractère définitif tout en s'assurant qu'il ne pourra disposer d'une affaire plus importante mue en fonction des règles ordinaires. Par ailleurs il s'est également assuré que le plaideur malchanceux ne sera pas indûment pénalisé.

E) **L'exécution forcée**

Lorsqu'un jugement est rendu son exécution forcée devient la responsabilité du greffier qui agit comme saisissant des biens **meubles** du débiteur. Les seuls frais chargés au débiteur sont les frais de l'huissier et un honoraire de 10,00 $ ou de 20,00 $ selon que la somme réclaimée est de moins ou de plus de 250,00 $.

Le créancier peut également faire saisir les **immeubles** mais dans ce cas il doit se charger personnellement d'entreprendre les procédures.

IV L'efficacit Du Système

L'implantation du système n'a pas été chose facile. En effet non seulement a-t-il été nécessaire d'ouvrir de nombreux nouveaux greffes dans de petites localités, mais a-t-il fallu recruter et entraîner le personnel requis. Au surcroît les Juges ont dû se recycler et s'adapter à une façon de procéder à laquelle leur formation ne les avait pas préparés.

Tous ces efforts ont cependant été couronnés de succès.

La division des petites créances est bien perçue par le public qui n'hésite pas à y avoir recours. Sa popularité grandissante a eu comme résultat que le législateur a périodiquement augmenté sa juridiction de telle sorte que de 300,00 $ à l'origine elle est maintenant de 1 000,00 $. Par ailleurs le même systeme a été adopté pour le règlement des conflits relatifs aux baux de logement et le règlement des conflits relatifs à l'impôt sur le revenu provincial jusqu'à concurrence de 1650,00 $.

Le jugement global que l'on peut maintenant porter est que si un système contradictoire est définitivement un moyen plus sûr d'atteindre la vérité, et que si un système inquisitoire comporte plus de risque d'erreurs, ce risque vaut la peine d'être pris lorsque les sommes en jeu sont peu élevé puisqu'en réduisant les délais et les frais, un système inquisitoire donne aux justiciables un véritable accès à la Justice.

causes d'actions où le droit est plus difficile à percevoir (recours découlant de la loi seule ou affectant les droits futurs) et d'autre part les recours dont un Tribunal spécial est déjà chargé (loyers).

Par ailleurs, pour éviter que cette procédure simplifiée ne devienne un moyen abusif de percevoir à peu de frais des comptes en souffrance, il a prévu que les personnes morales ne pourraient s'en prévaloir tout en permettant cependant aux personnes physiques poursuivies par une personne morale selon la procédure ordinaire, de faire référer leur cause à la division des petites créances et s'éviter ainsi de payer des frais considérables. Finalement en excluant les acheteurs de créances il empêche les personnes morales de contourner la Loi en vendant leurs créances à des personnes physiques.

B) **La procédure écrite**

Toute personne qui détient une petite créance et qui désire la percevoir doit se présenter à un des nombreux greffes de la division des petites créances de la Cour Provinciale, où le greffier, après avoir perçu des frais s'élevant à 10,00 $ si la réclamation est de moins de 250,00 $ et à 20,00 $ si elle est de 250,00 $ et plus, inscrit sur une formule pré-imprimée de requête l'exposé de ses prétentions résumées en quelques courtes phrases. Par la suite, le greffier fait parvenir au débiteur par courrier recommandé, un exemplaire de cette formule et un avis lui indiquant qu'il peut, à son choix, soit payer la somme réclamée, soit en venir à une entente avec le créancier, soit contester le bien-fondé de la requête, soit appeler un tiers en garantie.

Si le débiteur avise le greffier qu'il a payé ou qu'il en est venu à une entente avec le créancier, le dossier est classé.

Si le débiteur ne donne pas signe de vie, le greffier rend jugement par défaut ou, dans les cas les plus complexes réfère le dossier au Juge pour qu'il rende jugement par défaut après avoir entendu les témoins.

Si le débiteur déclare vouloir contester le bien-fondé de la requête ou désire appeler un tiers en garantie, le greffier convoque les parties et leurs témoins à une audition devante le Juge.

Finalement si le débiteur a lui-même une créance découlant de la même cause d'action à faire valoir, il doit faire une requête distincte mais les deux causes sont entendues en même temps.

Comme on peut le constater la procédure est fort simple, rapide, peu coûteuse et ne nécessite pas qu'on ait recours aux services d'un avocat. Il est d'ailleurs à noter qu'une personne physique ne peut se faire représenter par un avocat et qu'une personne morale ne peut l'être que par une personne physique à son seul emploi.

C) **L'audience**

A l'audience le Juge interroge lui-même les parties et leurs témoins en apportant à chacun un secours équitable et impartial. Il doit suivre les règles de la preuve mais procède suivant la procédure la plus appropriée.

Il peut de sa propre initiative visiter les lieux ou ordonner une expertise. Si les circonstances s'y prêtent il peut tenter de concilier les parties, et, le cas échéant, une entente signée par les parties et le Juge équivaut à jugement.

Finalement, suite à un récent amendement, lorsqu'une cause soulève une question complexe, le Juge peut, avec l'accord du Juge en Chef, permettre aux parties de se faire représenter par un avocat. Dans un tel cas les honoraires des avocats sont à la charge du Ministre de la Justice.

Comme on peut le constater la division des petites créances n'est pas une Cour d'équité. Les causes doivent être jugées en fonction du droit substantif et des règles de la preuve. Le formalisme sauf en cas d'extrême complexigé, est cependant mis de côté au profit de la simplicité, de l'économie et de la célérité.

D) **Le jugement**

Le jugement est consigné par écrit et contient en outre du dispositif, les motifs de la décision. Le Juge peut accorder à la partie condamnée des modalités et des délais de paiement. La condamnation aux frais n'est que pour la somme de 10,00 $ ou de 20,00

law and it introduces the consideration of broader issues. Narrow formalism in judicial decision-making is rapidly disappearing. I believe that is a good thing. However, we must also be careful to ensure that such an approach is not simply replaced by the invocation of personal ideology. Such a result would pose a very serious threat to the rule of law itself.

In my view, the performance of the Supreme Court of Canada in relation to the Charter is, generally, encouraging. In the Big M Drug Mart Ltd. case, the Court held that the **Lord's Day Act** offended freedom of religion by attempting to bind believers in other faiths and non-believers by religious values rooted in Christian morality. In addition to a well organized and well-reasoned judgment, Chief Justice Dickson provides some rather beautiful prose:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms ... Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.
>
> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the **Charter** is to protect, within reason, from compulsion or restraint.

It is really freedom and liberty which are at the core of the Charter. It reflects not only our criminal justice system but also our democratic governmental structure and the attitude of tolerance to which our society should aspire.

In the Singh case, three judges who dealt with the Charter argument held that it was a breach of "the principles of fundamental justice" not to provide an oral hearing to refugee claimants. This case illustrates how the Charter can serve as a catalyst in achieving legal reforms. The decision-making process in relation to refugee claimants had been the subject of public criticism for some years. In that process, a claimant is interviewed by an immigration enforcement officer and the transcript is sent to a committee in Ottawa which then advises the Minister who then decides. Only in limited circumstances could an unsuccessful claimant actually appear before the Immigration Appeal Board for an oral hearing. There are now no less than **three** independent reports prepared for **three** successive Immigration Ministers recommending that the **Immigration Act** be amended to provide for an oral hearing in each case. However, legislative change never occurred. As a result of the Singh decision, the Government will be forced to act and legislation is expected when Parliament resumes.

In my view, this is the way in which the Charter will most effectively lead to changes in our laws. The Courts cannot provide detailed solutions. Rather, they can provide "breakthroughs" which can force governments to act. But legislation or regulation will still be the most effective manner of dealing with legal shortcomings. In **Singh**, the Supreme Court said that the procedure was not adequate. It did not comply with Section 7 of the Charter. However, the Court did not attempt to tell the Government exactly what procedures should be enacted. These are best worked out on a more comprehensive basis and taking into account additional factors which may not have been introduced in the litigation in question.

However, there is one recent decision of the Court which I find both perplexing and disappointing. That is the judgment in **Dedman and the Queen** which was rendered some six weeks ago. Let me refresh your memory as to the facts. The accused was signalled by a police officer to stop his vehicle. The stop was **not** ordered because of the manner in which the accused was driving, nor because of reasonable suspicion that he had alcohol in his body, nor because of reasonable and probable grounds for believing that he had committed or was committing a criminal offence. Rather, it occurred as a result of a random vehicle stop program referred to as R.I.D.E. Under this

program, police officers ask for valid driver's licenses. However, that is only for the purpose of initiating conversation to determine whether the driver had been drinking. The police officer demanded a breath sample from Dedman and he subsequently was charged with failing to comply.

At the time that Dedman was stopped, there was no statutory authority to signal a driver to stop in these circumstances. However, in 1981, after Dedman had been charged but long before the Supreme Court Judgment, the Ontario Highway Traffic Act was amended expressly to authorize a police officer to require a driver to stop. The issue, then, was whether there was any **common law** authority on the part of a police officer to compel a motorist to stop in these circumstances.

The Ontario Court of Appeal avoided this issue by concluding that the motorist was under no compulsion to stop but merely did so voluntarily. The implication is that Dedman could have simply ignored the police officer's request and continue on his way. Mr. Justice LeDain, writing for the majority gave short shrift to this approach:

> In my opinion, police officers, when acting or purporting to act in their official capacity as agents of the state, only act lawfully if they act in the exercise of authority which is either conferred by statute or derived as a matter of common law from their duties. The reason for this is the authoritative and coercive character of police action.

This makes good sense. Surely, we want to encourage citizens to comply with the lawful exercise of authority by the police. Otherwise, how is the ordinary citizen to determine whether he or she is required to obey or not in these situations. In any event, we can all imagine what would have happened if Dedman had not stopped.

However, the majority judgment goes on to conclude that the police officer did have a common law power to stop the vehicle in this situation. The following test was adopted:

> The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

The judgment concludes that because of the seriousness of the problem of impaired driving and the limited interference with liberty which is involved, that interference was justified.

With great respect, that conclusion entirely begs the fundamental question of whether such a decision should be made by the Courts or whether it should be made by Parliament. I personally share the public concern about impaired driving. Indeed, I support programs such as R.I.D.E. because of their potential deterrent effect.

However, in a democracy, the extension of police powers should only occur through legislative enactment following public debate. Surely, the weighing of the seriousness of a social problem and the appropriate societal response is still, primarily, a government rather than a judicial function. That is particularly so in relation to police powers. Indeed, the Ontario Government had already responded by amending the **Highway Traffic Act** to authorize such police power so that the decision served no practical purpose with respect to the social problem in question. Of course, the Courts do have the authority and the responsibility to assess such governmental response against the standards of the Charter. But the Charter was not even involved in the Dedman case.

The extension of police powers "by implication" is a dangerous practice which the dissenting judgment described as "a slippery slope". The danger was described by Norval Morris:

> The criminal law controls the largest power that the state exercises over its citizens. Criminal Law is always on the cutting edge of abuse of power, and at the same time, it is not a particularly effective instrument for the social good. One needs to get principles right in the criminal law, not because doing so will make much difference to the community, but because if you get them wrong it is terribly bad for the community. Criminal Law (and of course this encompasses procedure and evidence) is a modest but necessary body of doctrine. It is not dramatic but it defines the maximum of power that any government can exercise over its citizens. That is not a dramatic issue, but it is a most important issue.

It is respectfully submitted that the Dedman decision should be confined in future

Code de procédure civile qui comprend maintenant plus de mille articles et qui à toute fin pratique, en raison de sa complexité, ne peut être mis en application que par l'intermédiaire d'avocats.

Ceci implique non seulement que les procès ne peuvent s'instruire qu'après un échange de pièces de prodécure sur une période de plusieurs mois, mais également que les parties devront débourser tant des honoraires judiciaires (déboursés et honoraires fixés par le tarif et habituellement payables par le perdant), que des honoraires extrajudiciaires (honoraires convenus entre l'avocat et son client et payables par ce dernier quelle que soit l'issue du procès).

Avant l'adoption de la Loi favorisant l'accès à la Justice, le Code ne faisait aucune distinction quant à la procédure à suivre pour percevoir une créance quelle qu'en soit l'importance.

Il s'en suivait que pour percevoir une créance de quelques dollars, une partie devait s'engager dans des procédures longues et compliquées à un coût qui la plupart du temps était plus élevé que le montant en jeu. Il n'est guère surprenant dans ces circonstances que la plupart des détenteurs de petites créances préféraient renoncer à leurs droits.

Une telle situation était inacceptable et au début des années 1970 le Gouvernement décida d'y remédier.

II La Philosophie Retenue

Il est apparu au Ministère de la Justice qu'essentiellement le problème en était un de délai et de frais, que ces délais et ces frais résultaient de la complexité des procédures et que cette complexité était inhérente au système contradictoire.

Après avoir étudié la plupart des régimes de perception des petites créances en vigueur en Amérique du Nord, dont notamment celui en vigueur à Porto Rico, il a conclu que la meilleure façon de résoudre le problème serait de remplacer, au niveau des petites créances, le système contradictoire par un système inquisitoire où il appartient au Juge plutôt qu'aux parties de mener l'enquête et de faire ressortir, en interrogeant lui-même les tèmoins, les faits sur lesquels il basera son jugement.

Dans un tel système il n'est pas nécessaire d'avoir recours à des procédures élaborées puisqu'on peut présumer que le Juge traitera les parties sur un pied d'égalité et qu'il n'y a pas lieu en conséquence d'assurer l'équilibre entre elles à l'aide de telles procédures. Elles peuvent se résumer à un simple exposé des prétentions du créancier et de la réponse que veut lui donner le débiteur, de façon, à permettre au Juge d'entreprendre son enquête.

Les procédures étant simplifiées et le Juge menant lui-même son enquête, le procès peut se dérouler rapidement sans que les parties aient à avoir recours aux services d'un avocat, donc à peu de frais.

III Les Principales Dispositons De La Loi

Tel que ci-haut mentionné la Loi favorisant l'accès à la Justice n'est qu'un amendement apporté au Code de procédure civile. Elle ne crée pas une Cour distincte pour entendre les réclamations de petites créances, mais prévoit plutôt une procédure simplifiée par laquelle les Juges de la Cour Provinciale doivent en disposer.

Il serait fastidieux et inutile de faire une revue complète de chacune des dispositions de la Loi et il est sans doute préférable de traiter généralement du champ d'application de la Loi, de la procédure écrite, de l'audience, du jugement et de l'exécution forcée.

A) Le champ d'application

La Loi prévoyant essentiellement une procédure simplifiée pour la perception des petites créances, elle se devait de définir au départ ce qu'est une petite créance et elle l'a fait en spécifiant qu'il s'agit d'une créance qui n'excède pas 300,00 $ (maintenant 1 000,00 $): qui a pour cause un contrat, un quasi-contrat, un délit ou un quasi-délit, qui est exigible par une **personne physique** d'un résident du Québec y inclus une personne morale. Par ailleurs sont exclus les demandes relatives à un bail de logement, aux pensions alimentaires, à la diffamation, aux rentes, et les demandes pouvant affecter les droits futurs des parties. Finalement l'acheteur d'une créance ne peut se prévaloir de cette procédure.

Comme on peut le constater le législateur n'a retenu comme causes d'actions que celles où les droits des parties sont le plus facilement identifiables (contrat, délit) et a mis de côté d'une part les

butions à la littérature juridique canadienne en aidant à la qualité de la recherche juridique.

En conséquence, des livres portant sur des sujets nouveaux auront préséance sur des livres déjà publié et réédités, à moins que les rééditions représentent une revision compléte des titres antérieurs.

Les livres d'intérêt général tel que des biographies légales, des travaux subventionnés ou des écrits de la commission de réforme des lois n'entrent pas dans les catégories retenues.

Les nominations pour le prix sont activement recherchées et des comités de sélection composés de memberes distingués de la profession légale, comprenant des avocats, des juges, des professeurs anglophones et francophones choisiront l'oeuvre gagnante.

Les fiduciares de la Fondation se réservent le droit de ne pas octroyer le prix pour une année, s'ils jugent qu'aucune oeuvre soumise ne répond aux critéres.

Le prix sera octroyé pour la premiére fois en 1986 pour un ouvrage de langue anglaise publié au cours des années 1983 ou 1984. En 1987, le prix sera octroyé pour un ouvrage en langue française publié en 1984 ou 1985. Par la suite il y aura alternance.

Les Candidatures Pour Le Prix

Les candidatures pour le prix devront être adressées au secrétaire du Comité de langue anglaise ou du Comité de langue française selon qu'il s'agit d'une oeuvre dans l'une ou l'autre langue. Toute personne peut proposer une canditature avec le consentement de l'auteur et formuler en même temps les raisons qui motivent cette proposition de candidature.

Le Secrétaire du Comité de langue anglaise est Monsieur Glen Howell. Bibliothécaire en chef à The Law Society of Upper Canada, Osgoode Hall, Toronto, Canada M5H 2N6: le Secrétaire du Comité de langue française est M. Guy Tanguay, Bibliothécaire en chef, Bibliothéque du Droit, Université de Sherbrooke, Sherbrooke, Quebec, J1K 2R1.

Date Limite

Les fiduciaires, en principe, prendront en considération les recommendations du comité pour l'octroi du prix.

Le Comité de langue anglaise doit procéder au choix du récipiendaire pour les annéés 1983 - 1984 au plus tard le 30 avril 1986. Le nom due gagnant sera annoncé par les fiduciaires à la réunion annuelle de l'Association du Barreau canadien tenue au cours le l'année.

Le Recouvrement Des Petites Creances Au Quebec

Préparé par M. le juge André Desjardins et rendu par M. le juge Yvon Mercier.

Le 29 juin 1971 le Gouvernement du Québec a adopté la Loi favorisant l'accès à la Justice (1971 L.Q. chap. 86) par laquelle il amendait le Code de procédure civile pour y ajouter un Livre Huitième intitulé "DU RECOUVREMENT DES PETITES CREANCES".

Cette Loi, qui était l'aboutissement de recherches intensives par le Ministère de la Justice, qui avait fait l'objet de consultations auprès de tous les organismes intéressés et qui avait même suscité des polémiques notamment avec le Barreau du Québec, se voulait être la solution des difficultés rencontrées par les justiciables dans la perception de leurs petites créances. Il convient donc dans un premier temps de faire une brève revue de ces difficultés et de la philosophie retenue pour les solutionner. Par la suite il y aura lieu d'en rèsumer les grandes lignes et d'évaluer son efficacité après plus de dix ans d'expérience.

I Le Problème

Au Québec, bien que le Droit civil soit d'inspiration française, la procédure civile a été développée dans le cadre d'un système contradictoire, c'est-à-dire dans un système où les parties sont maîtres de la preuve. Dans un tel système il est nécessaire, pour assurer l'équilibre entre les parties, de se munir d'une procédure très élaborée, ce que le Québec a fait en adoptant au cours du siècle dernier le

application to its particular facts and not extended to other situations. No doubt the statutory scheme for programs such as R.I.D.E. will also be subjected to scrutiny under the Charter in future.

Some feel that the courts should be conscious of providing adequate powers to the police because of the inappropriateness of the police participating in the political process as an institution. The reality is that the police as a body are presently well-organized and active political participants. Anyone who doubts this should read the brief of the Canadian Association of Chiefs of Police which was referred to in the **Toronto Globe and Mail** of August 29. It is a very political document representing a very potent lobby. The police lobby has also been very active and highly visible on the issue of capital punishment.

The Globe and Mail article states that the Association of Police Chiefs consider proposals of the Canada Law Reform Commission to regulate police investigations to be "an instrusion in their territory". The President of the Association is quoted as saying that interfering with police autonomy "is a most insidious thing".

The suggestion is no less than shocking! Since when has the regulation of police powers in our society become the exclusive domain of the police? Since when has it become "insidious" for a democratic society to engage in public debate as to the appropriate balance between police powers and the liberty of individual citizens? Since when has it become inappropriate for the Canada Law Reform Commission to make recommendations for reforming Canada's laws? It was created for that very purpose.

With great respect, the suggestion that police "autonomy" extends to the laws which govern police powers is totally erroneous. It would be "insidious" for an Attorney General to suggest that a specific investigation should be dropped because the object of that investigation was a friend of the Government. Similarly, it would be "insidious" to try to influence police discretion in investigation and prosecution because the object was an "enemy" of the Government. But there is most certainly **nothing** "insidious" about reassessing the laws which govern police powers.

Even the slightest suggestion that the police are above or beyond the law must be vigorously rejected. There are too many examples in other nations, both historically and presently, of the dangers to democracy when repression through force is relied upon as the main vehicle for establishing order.

I happened to be involved recently in some work with the Ministry of the Solicitor General in Ottawa in attempting to develop an International Declaration for the United Nations on the Rights of Victims. One of the most difficult problems was not what rights victims should have, but who was a victim. The core of this problem became clear when it was appreciated that many of the countries with the greatest concern for having such a Declaration were countries in which the Rule of Law did not exist. As a result, there was strong support for including as victims, those who suffered harm even where the perpetrators were "Beyond the Reach of the Law". As we know, in too many countries today, the police and military have **carte blanche** to imprison, torture and kill for political ends and with little fear of any accountability.

As Canadians, we can be extremely proud of the basic condition of the society in which we live. That condition was not achieved through reliance upon coercive measures on the part of governments, the courts or the police.

It is true that there are a number of historical examples of responses to ethnic minorities to trade unions and to others which could be accurately characterized as harshly repressive or racist or otherwise discriminatory. However, in Canada, such incidents have tended to lead to the evolution of other democratic processes and institutions for the resolution of disputes and a healthy diffusion of power.

The most significant and traumatic threat to Canadian security in recent history was the "October Crisis" of 1970. In retrospect, many feel that the federal and provincial governments had greatly over-reacted to the threat and that, indeed, that over-reaction may have given impetus to the subsequent election of a separatist government in Quebec. What is clear today is that the separatist threat has dissipated considerably. The reason was not the invocation of coercive state powers. On the contrary, an open and democratic referendum was conducted. The **Official Languages Act** was passed. An "affirmative action" program was undertaken to increase the representation of French Canadians at the highest levels of Canadian

institutions: in important Cabinet posts, as deputy ministers, as the heads of Crown corporations and of federal agencies. In sum, the separatists lost the argument that there was no significant role for them in the Canadian government.

The federal government response to the Calder case provides another example. Although the Nishga Indians lost their case in the Supreme Court of Canada, the government accepted the decision as recognizing that aboriginal title was a legally enforceable right. Prior to this claim the government had denied the existence of such a right. As a result, the government announced that it was prepared to negotiate the settlement of claims to aboriginal title. As recently as 1969, the federal government had proposed a policy of eventual assimilation of Native people. Subsequent reaction and negotiation led not only to abandonment of the policy, but also recognition of aboriginal rights in our Constitution.

Obviously, we have not solved all of our social problems in Canada. What is important is that we continue to strive to do so. Federal-provincial negotiations, litigation, Parliamentary committees, Royal commissions, human rights commissions, ombudsmen, privacy commissioners, freedom of information commissioners ... at times these processes appear to be inconclusive and ineffective as well as tiresome. However, they are important. As long as citizens believe that their perceived unjust treatment is taken seriously by society they will be much less likely to resort to violence as a group or individually.

In my view, these features are of the essence of "JUSTICE" ... A society which is tolerant in the sense described earlier by Chief Justice Dickson in the Big M Drug Mart case;

... A society which is conscious of the coercive powers which it delegates to those who are its agents of force;

... A society which may not always get the right answers, but which will always listen to the grievances of its citizens and which will have credible processes available for attempting to respond to those grievances.

A number of current social realities are bound to have direct implications for the Provincial Courts throughout Canada. These include the despair with which many Native people still live, the ramifications of prolonged and large-scale unemployment amongst young people and the increasing instability of traditional family life. In a report for the Ontario Law Reform Commission in 1970, I made the following observation:

> The importance of the Provincial Courts (Criminal Division) cannot be overemphasized. If the primary goal of the court system is to serve the public ... then they are beyond doubt the most important courts in Ontario. The vast majority of our citizens who appear in court make their appearance exclusively in these courts, which have very great powers over the individuals tried therein. But it is not only persons accused of an offence who are affected by the administration of justice in these courts. Witnesses and other persons, such as friends and relatives attending as spectators, are also affected. Thus a great many attitudes about the quality of justice ... are likely to be formed on the basis of experiences in the Provincial Courts ...

While this study dealt with the Provincial Courts (Criminal Division), these comments are also applicable to the other Provincial Courts and their functions. The importance of the Provincial Courts in Canada has not diminished. If anything, that importance has increased.

The Report also expressed regret at the failure to allocate sufficient resources to the administration of justice in the Provincial Courts. Many Provincial Courts in Canada today continue to face massive caseloads with limited human and physical resources. The need for time to read, research and write decisions will continue to increase as the effects of the Charter multiply. It is important that provincial governments respond to these needs.

It is also important that judicial salaries are maintained at a level which will ensure that well-qualified persons are appointed to these Courts. At the time of writing the Report, the differential in salary between an experienced Provincial Court Judge in Ontario and a County Judge (excluding the latter's provincial supplement) was only $2,000.00. That gap is much wider today and a large increase is presently anticipated for the County and District Courts. It appears as though the problem of appropriate resources is one of which Governments must be constantly reminded and it is the duty of lawyers, such as myself, to raise this issue because of the difficulties which you, as judges, may have in doing so. I am afraid that the Bar has not always acted with sufficient energy and sensitivity in fulfilling these responsibilities.

In spite of these difficulties, I have no doubt that the Provincial Courts in Canada will continue to serve Canadians with sensitivity, dedication and fairness. It was an honour to be your keynote speaker.

The Foundation for Legal Research

Walter Owen Book Prize

In honour of the late Walter Owen, Q.C., P.C., well remembered as an eminent member of the British Columbia Bar, Lieutenant-Governor of the Province of British Columbia, President of The Canadian Bar Association and the first chairman of the Board of Trustees of The Foundation for Legal Research, the Trustees are proud to announce the establishment of a $5,000 prize for the most distinguished and valuable book on Canadian law published each year.

Criteria for Awarding the Prize

The prize will be awarded on an alternating English-French basis. The work must be substantial in nature and cover a topic of current interest in the practice of law. It should be highly valued by practitioners and academics.

The prize is intended to recognize excellent legal writing, and particularly to reward new contributions to Canadian legal literature, thereby enhancing the quality of legal research in Canada.

Accordingly, entire new works would be favoured over new editions of previous works, unless such editions were essentially complete revisions of previous titles. Books of general interest such as legal biographies, commissioned works and Law Reform Commission papers are not likely to receive consideration.

Nominations for the prize will be actively sought and panels of eminent anglophone and francophone lawyers, judges and academics will recommend the work to be awarded the prize. The Trustees of the Foundation reserve the right not to award the prize in any particular year. The prize will be awarded for the first time in 1986, for an English-language work published in 1983 or 1984. In 1987 the prize will be awarded for a French-language work, published in 1984 or 1985. Thereafter the prize will alternate.

Nominations for the Prize

Nominations for an award are invited and should be sent to the Secretary of the English panel or of the French panel, as the circumstances warrant. There need only be one nominator but the consent of the author should accompany the nomination together with a statement of the reasons for making the nomination.

The Secretary of the English panel is Mr. Glen Howell, Chief Librarian of The Law Society of Upper Canada, Osgoode Hall, Toronto, Canada, M5H 2N6. The Secretary of the French panel is Mr. Guy Tanguay, Bibliothécaire en chef, Bibliothéque du Droit, Université de Sherbrooke, Sherbrooke, Québec, J1K 2R1

Date for Awarding the Prize

The Trustees will be guided in the granting of the award by the recommendation of the panel. The anglophone panel will make its selection for the 1983-84 award for an English-language publication not later than April 30, 1986. The prize will be announced by the Trustees at the annual meeting of The Canadian Bar Association in that year.

La Fondation Pour La Recherche Juridique

Prix Walter Owen

A la mémoire de l'honorable Walter Owen, c.p., c.r., qui a été membre éminent du Barreau de la Colombie Britannique, président du Barreau canadien, Lieutenant gouverneur de la Colombie Britannique et président fondateur du Conseil d'administration de la Fondation pour la recherche juridique, un prix de $5,000.00 vient d'être créé, afin de reconnaître la qualité et l'importance d'un livre publié au Canada et traitant d'un aspect particulier du droit canadien.

Criteres D'eligibilite

Le prix sera octroyé alternativement pour une oeuvre en langue anglaise et en langue francaise. Le travail doit porter sur un sujet d'intérêt immédiat pour la profession juridique.

Le prix a pour but de reconnaître un texte marqué du sceau de l'excellence et veut, en particulier, encourager de nouvelles contri-