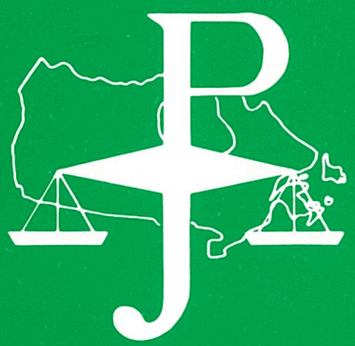

MERCURY GRAPHICS

PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

VOLUME 10, No. 2 JULY 1986

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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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The Provincial Journal is a quarterly publication of the Canadian Association of Provincial Court Judges. Views and opinions contained therein are not to be taken as official expressions of the Canadian Association's policy unless so stated.

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Tel.: (506) 453-2120 (Off.)

President's Page

by Associate Chief Judge Ian Dubienski

I have just returned from the Annual Meeting of the Ontario Association of Provincial Criminal Court Judges in Toronto, a most enjoyable culmination to a series of provincial meetings since my appointment as President of the Association.

Previously, I had the pleasure of meeting with the judges of Newfoundland, Quebec, British Columbia, Ontario Family Court, and Alberta. Regrettably I could not attend Nova Scotia and Saskatchewan due to other commitments. I also attended a good portion of the very successful Judges' School at Val-Morin, Quebec, and the mid-season Executive Meeting in Montreal.

I have yet to take part in the Annual Meeting of the Canadian Bar Association at which time I hope to make representations to the Executive. The Association anticipates obtaining the Bar's active support as it supported the federally-appointed judges to meet the problems of the provincial court judges.

Of course, I look forward with pleasure to the Annual Meeting of our Association in Saint John, New Brunswick next September, for the gathering of national representation and attendant collegiality.

I can assure you that the meetings with the judges and their spouses from across Canada have been the most exciting and rewarding experiences of my sojourn on the Bench over the past twenty-five years. The hospitality to my wife and myself has been most warm and enjoyable. We will long remember all the kindnesses and friendliness accorded us during our visit.

I am intensely proud of the fact that I was chosen this year to represent the Canadian Provincial Court Judges, a most distinguished Bench that shoulders the main burden of the administration of criminal justice in Canada. One can clearly ascertain the high integrity, proficiency, insight, and dignity with which our judges view their responsiblities, with the appropriate concerns and sense of duty for society. I have seen the similarity of problems in all jurisdictions, albeit with local flavours, but with a national thread of dedication to the law that binds us all together, unified, to achieve the goals of the justice system.

All have expressed to me their desire to support the National Association and to work together to strengthen it, and together achieve the final establishment of a truly unified and effective court.

While I was in Toronto, the Zuber Commission was established. An examination of the terms of reference reflect much of what has been endorsed by the Canadian Association of Provincial Court Judges for many years, with particular reference to the establishment of a unified criminal court which would allow also for the establishment and unification of civil and family court matters.

It is to be hoped that all provinces will research court reform but cooperate so that what is achieved will be uniform. It would be unfortunate if some provinces individually develop different systems of court. The advantage of our present system, although complex and cumbersome, at least is the same in every province. It would be hapless to have a disjointed system devised in the name of reform.

One year is a remarkably short time to be able to achieve a personal mark in an organization as widespread as ours. I think the objective of each President of the Association should be to give good leadership and to assist in the growth and the strengths of the Association so that it can develop a unified approach through all associations under its banner.

I sincerely thank my Executive for its support, the work of the Committee Chairmen, and the indepth contribution of the Provincial Representatives. A widespread organization such as this needs the cooperation of all. I also especially extend to Judge Douglas Rice on behalf of all Provincial Court Judges our most sincere appreciation for his selfless work on our behalf as Executive Director over the years. May he now enjoy his extra free time with his family and other interests.

See you all in Saint John!

In Brief

Ontario

Appointments:

1. His Honour Judge Alex W. Davidson, Toronto, was appointed as Senior Judge for Metro-East replacing His Honour Senior Judge S. Gordon Tinker who commenced reduced service at the Old City Hall.
2. Her Honour Judge Judythe P. Little of Kenora was appointed a Provincial Court Judge effective May 12, 1985. Judge Little will preside both in the Family and Criminal Division of Kenora.
3. His Honour Judge Harry W. Edmonstone of St. Catharines was appointed Senior Judge for Area Three, replacing His Honour Senior Judge Johnstone L. Roberts who retired.
4. Clare E. Lewis, Q.C., Toronto, Commissioner of Public Complaints for Metropolitan Toronto, former President and member of the Association, was elected as Honorary Life Member in recognition of his service and dedication to the Bench and the Association.

Anniversaries:

The following Judges celebrated their 25th anniversary in 1986 of their appointment to the Provincial Bench:

His Honour Judge Robert B. Dnieper, Toronto

His Honour Judge H. Bruce Hunter, Morrisburg

His Honour Chief Judge Frederick C. Hayes, Toronto

1986 Annual Meeting and Education Conference

The 1986 Annual Meeting and Education Conference of the Ontario Provincial Court Judges Association (Criminal Division) was held from May 28th to May 31st, 1986, at L'Hotel, Toronto, Ontario.

The meeting was chaired by the President, His Honour Judge Robert D. Reilly of Kitchener with his Honour Judge V.A.R. Lampkin of Toronto as Conference Chairman and Senior Judge Charles Scullion arranging the education programme.

Guests of the Association included His Honour Associate Chief Judge Ian Dubienski of Winnipeg, the President of the Canadian Association of Provincial Court Judges, and L'honorable juge Yvon Mercier, President of la Conférence des juges du Québec.

The ladies enjoyed a luncheon and a tour of historical Osgoode Hall, the home of the Supreme Court of Ontario for over one hundred years and the focal point of Ontario's judicial system.

The theme of the Conference centred around a detailed discussion of an in-depth report of the administration of criminal justice in Ontario prepared by His Honour Judge David Vanek and his committee, which included the following areas:

(1) evolution and development;

(2) constitutional validity of extended jurisdiction;

(3) contemporary role of the Provincial Court (Criminal Division);

(4) contemporary perception of the role of the Provincial Court;

(5) defects inherent as dual-tiered criminal court structure;

(6) summary of conclusions and recommendations.

The Association also voted to change its name to Association of Provincial Criminal Court Judges of Ontario (L'Association des juges princiaux des tribunaux criminels de l'Ontario).

The formal dinner and dance was held on Friday evening, May 30th, 1986, and special guests included:

The Honourable W.G.C. Howland, Chief Justice of Ontario, and Mrs. Howland.

The Honourable William D. Parker, Chief Justice of the High Court of Justice of Ontario, and Mrs. Parker.

His Honour Chief Judge Frederick C. Hayes, Chief Judge of the Provincial Court (Criminal Division) of Ontario, and Mrs. Hayes.

His Honour Chief Judge H.T.G. Andrews, Chief Judge of the Provincial Court (Family Division) of Ontario, and Mrs. Andrews.

PRE-REGISTRATION FORM

C.A.P.C.J. ANNUAL MEETING

SAINT JOHN, NEW BRUNSWICK
September 17, 1986 — September 20th, 1986

NOTICE OF INTENTION TO REGISTER

To: Judge Blake C. Lynch
Room 103, Justice Building
Queen Street, P.O. Box 6000
Fredericton, NB
E3B 5H1
Tel: (506) 453-2120

1. I plan to attend the Annual Conference at Saint John, New Brunswick, September 17th to 20th inclusive, 1986.
2. I will be attending as an Executive Committee Member (i.e. Officer, Provincial Representative or Committee Chairman), Delegate (other than Provincial Rep.) or other

   _____(please specify)
3. With spouse or guest: yes/no_____

   Spouse or guest's first name _____

   Other guests: Number _____ Ages _____
4. I plan to arrive on: Date _____

   Time _____

   Via _____
5. Special problems affecting visit _____

   _____
6. Name (Please print) _____

   Office Address _____

   _____

   Residence Address_____

   _____

Please complete and RETURN AS QUICKLY AS POSSIBLE

Mr. David Lutz
Solicitor
Saint John, N.B.

8. Saturday morning, September 20th

   - Panel on "**The Independence of the Judiciary in Canada**".
   - Speakers - M. Louis-Philippe de Grandpre
     Canadian Bar Association

   - Judge Hiram Carver
     Chairman - Judicial Independence Committee

   - Chief Judge Kosowan, Alberta

   - Judge Robert Reilly, Ontario
     President, Ontario Provincial Court Judges' Association (Criminal Division)

9. Closing out the Social events will be the Annual Dinner and Ball on Saturday night, September 20th. Guest speaker - The Honourable Mr. Justice la Forest, Supreme Court of Canada.

10. **Ladies Program:**

    The ladies can look forward to:
    Thursday - a bus tour.
    Friday - continental breakfast;
    hospitality suite;
    demonstration "Colour Draping";
    demonstration "Clothing Designer".

    Saturday - Luncheon with guest speaker Peter Lockett.

11. **Pre-registration:**

    A pre-registration form is attached. Please forward to Conference Chairman as soon as possible. The Hotel Rate is $76.59 (single or double, tax included) per night.

12. **Registration Fee:**

    - $165.00 - Judge
    - $75.00 - Spouse or Guest

13. **Conference Chairman** is

    - Judge Blake Lynch
      Provincial Court
      Room 103, Justice Building
      Queen Street, P.O. Box 6000
      Fredericton, New Brunswick
      E3B 5H1

      Telephone: (506) 453-2120

His Honour Chief Judge S. Douglas Turner, Chief Judge of the Provincial Court (Civil Division) of Ontario, and Mrs. Turner.

His Honour Associate Chief Judge Ian Dubienski, President, Canadian Association of Provincial Court Judges.

L'honorable juge Yvon Mercier, President of la Conférence des juges du Québec, and Madame Mercier.

His Honour Judge William MacLatchy, President, Ontario Family Court Judges Association, and Mrs. MacLatchy.

His Honour Judge Marvin A. Zuker, President of the Provincial Court Judges Association (Civil Division) and Mrs. Zuker.

Mr. Harvey Bliss, Q.C., of Toronto, National Executive Member, Canadian Bar Association.

Mr. Morris Manning, Q.C., of Toronto, Counsel, and Mrs. Manning.

Mr. Gordon Henderson, Q.C., of Ottawa, Counsel, and Mrs. Henderson.

Mr. Clare E. Lewis, Q.C., Commissioner of Public Complaints for Metropolitan Toronto, and Mrs. Lewis.

During the dinner, His Honour Chief Judge Frederick C. Hayes presented an Honorary Life Membership to Mr. Clare E. Lewis, Q.C., Commissioner for Public Complaints for Metropolitan Toronto, former President and member of the Bench, for his service and dedication to the Bench and the Association.

The new Executive Committee and officers elected for 1986-87 are as follows:

President:	His Honour Judge R.D. Reilly	Kitchener
Past-President:	His Honour Judge R.D. Clarke	Thunder Bay
1st Vice-President and President-elect:	His Honour Senior Judge C. Scullion	Toronto
2nd Vice-President:	His Honour Judge C.R. Merredew	Pembroke
Secretary:	His Honour Judge D.V. Latimer	Milton
Treasurer:	His Honour Judge W.S. Sharpe	Milton
Members of the Executive:	His Honour Senior Judge P.R. Belanger	Ottawa
	His Honour Judge W.W. Cohen	Sault Ste. Marie
	His Honour Judge W.P. Hryciuk	Toronto
	His Honour Judge S.W. Long	Toronto
	His Honour P.R. Mitchell	Hamilton
	His Honour Judge L.T. Montgomery	Orillia
	His Honour Judge J.D.R. Walker	London
	His Honour Judge R.J. Walneck	Thunder Bay
Representative to C.A.P.C.J.	His Honour Judge R.D. Clarke	Thunder Bay

Ontario

Ontario Provincial Court (Civil Division) Judges' Association — Annual Meeting

The Annual Meeting of the Ontario Provincial Court (Civil Division) Judges' Association was held on May 1 & 2, 1986. At the Meeting, Judge Marvin Zuker was re-elected President, with Judge Charles Tierney as Secretary and Judge Benjamin Lamb as Treasurer.

The Meeting heard a very interesting address by Professor Peter Russell on the Canadian Judiciary which was based on his forthcoming book. We also heard from Mr. Paul French who is counsel to the Provincial Court Judges. Mr. French spoke to us on Judicial Independence and the Implication of the *Valenti* decisions.

Professor R.J. Gray of Osgoode Hall conducted a seminar with respect to Defamation. He was followed in the afternoon by Ms. Kathryn Feldman, Barrister, who spoke to us on New Developments in the Law of Damages for Breach of Contract. The education portion of the Meeting was extensive and extremely stimulating.

The Annual Dinner was held at Carman's Club. Senior Judge Charles Scullion, Vice President of the Ontario Provincial Court (Criminal Division) Judges' Association, and Judge William McClatchy, President of the Ontario Provincial Court (Family Division) Judges' Division, with his wife, were our guests. An enjoyable evening was had by all.

Judge Moira Caswell, Chairman of the Education Committee confirmed that there will be a two-day seminar held in October, 1986. Judges Marvin Zuker and Stewart Kingstone were appointed as delegates to the Annual Meeting of the C.A.P.C.J..

A Commentary On The Law Of Search And Seizure As Contemplated In Bill C-18, And The Impact On the Charter Of Rights On These Provisions (Part 2)

by Chief Judge C. A. Kosowan, Provincial Court of Alberta

Searching Law Offices: Solicitor-Client Privilege (cont'd)

Section 444.1 is a new section and deals specifically with seizure of documents from a law office. This section is an attempt to codify the practice in this area as reflected in the most recent decisions of Canadian Courts like *Re Borden & Elliott and The Queen,*[79] *Re B X Development Inc. and The Queen,*[80] *Re Alder and The Queen,*[81] *Simon Descoteaux et al v. Mierzwinski.*[82]

The real nagging questions involving the issuance of search warrants and solicitor-client privilege were posed by Arnup J.A. in *Re Borden & Elliott and The Queen,* as follows, but were not answered:

> "The criminal code is silent as to at least two important procedural aspects of the issue and execution of a search warrant. It gives no direction to the Justice hearing the application as to whether he should put any limitation upon the type of document to be seized under it, having regard to possible claims of privilege as between solicitor and client. What particularity should he require in the information as to the nature of the documents? If particulars cannot be given, what limitations, if any, should be expressed in the warrant itself? Secondly, what procedure should be adopted by the solicitors whose premises are being searched, where they regard themselves as under a duty to raise their client's privilege? At the present time their remedies would appear to be limited to bringing a motion to quash the search warrant. If the Crown authorities are not as reasonable and co-operative as they were in this case, the damage may have been done before the legal question can be resolved. In extreme cases there may even be a breach of the peace.
>
> In cases arising under the Income Tax Act, R.S.C. 1952, c. 148, as amended by 1970-71-72, c. 63, s. 232 provides a code of procedure for deciding these difficult questions of solicitor-and-client privilege arising under that Act. The section was enacting only after a protracted series of representations from the bar and others.
>
> We were invited in this case to set out our views with respect to the appropriate procedures, for the benefit of the Crown and of the legal profession. We do not think it appropriate for us to do so. The need for considering possible legislation is abundantly apparent from cases such as the present, but the Court's function must be limited to dealing with each individual case as it arises."[83]

Four years after this observation of Arnup J.A., the Supreme Court of Canada in a unanimous decision in *Simon Descoteaux et al* v. *Mierzwinski* stated, per Lamer J., the deficiencies in the law in this area and the limits of the means of the judiciary to compensate for the deficiency as their role is not primarily legislative.[84] Section 441.1 is largely a response to what was said in these cases, especially the observations of Lamer J.

The procedure in s. 444.1 allows for seizure and examination of documents with respect to which solicitor-client privilege is claimed. It requires the peace officer to give a reasonable opportunity for this to be claimed and provides that the documents must be packaged and sealed without examination by the peace officer. Then, on application, a *Superior Court Judge* determines if the privilege applies. If the time restrictions for making this application are not complied with, the Judge can order the documents released to the officer who seized them or to some other person designated by the Attorney General. These applications are to be heard in private.

The Judge hearing the application is empowered to allow the Attorney General to inspect the documents where the Judge is of the view it would assist him in reaching his decision. Where the Judge determines that the documents are privileged, they are inadmissible as evidence.

This section produces two unusual situations.

(1) It is somewhat anomolous that a Provincial Court Judge or a justice may issue

3. Delegates and others attending should plan to arrive before 7:30 p.m., Wednesday, September 17th, since the Annual President's Reception will be held. This event is hosted by the New Brunswick Law Society.

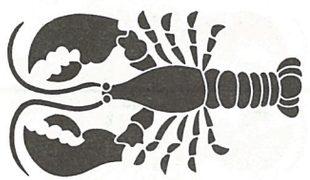
4. The Conference will convene on Thursday, September 18th at 9:30 a.m. with the usual official openings and welcoming addresses.

5. The Educational Program begins on Thursday morning, September 18th, with its theme, "**Witnesses & Victims of Crime**". This topic will be chaired by **Judge Patricia Cumming.** Panelists are:
   - Mr. Eugene Westhauer, Q.C.
     Department of Justice
     Fredericton, N.B.
   - Mr. David Chapman
     North Sidney, N.S.
     (father of a murdered boy)
   - Judge Jacques Lessard
     Montreal, P.Q.
   - Mrs. Carolina Giliberti
     Department of Justice
     Ottawa, Ontario
   - Mrs. Catherine Kane
     Department of Justice
     Ottawa, Ontario
   - Mrs. Beverley Stewart
     Co-ordinator, Witnesses and Victims of Crime project, New Brunswick.

6. Thursday night, September 18th, at about 7:30 p.m. will be a New Brunswick night. The events surrounding this evening's affair are closely guarded by conference chairman Judge Lynch.

7. The Educational Program continues, Friday morning, September 19th.
   (a) **Canadian Judicial Centre Project**
   - Chairman - Judge Bordeleau, Ottawa
   - Speakers - Mr. Justice W. A. Stevenson, Alberta Court of Appeal (Co-ordinator of the Project)

   (b) **Rules of Evidence and the Sexually Abused Victim**
   - Chairman - Judge Lucien Beaulieu, Toronto (Member of Youth Court Committee)
   - Speakers - Mr. Neville Avison
     Department of Justice
     Ottawa, Ontario



CONFERENCE '86
CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
SAINT JOHN, NEW BRUNSWICK
SEPT. 16 - SEPT. 20

1. **NOTICE OF ANNUAL MEETING** - The Annual Meeting of the CAPCJ will be held at the Saint John Hilton Hotel, Saint John, New Brunswick, on Saturday, September 20th, 1986, at 2 p.m. (local time). By order of the Executive Committee.

   DATED at the City of St. John's, Province of Newfoundland, this 11th day of June, 1986. (sgn) Judge Edward J. Langdon, Secretary, CAPCJ.

   AGENDA

   (1) Report of Secretary;
   (2) Report of President;
   (3) Report of Secretary, including the minutes of 1985 Annual Meeting;
   (4) Report of Treasurer, and presentation of Auditor's Statement;
   (5) Report of Executive Director;
   (6) Report of Standing and Special Committees;
   (7) Report of Resolutions Committee;
   (8) Report of Nominations Committee;
   (9) Election of Officers and Appointment of Auditors;
   (10) Consideration of Amendments to Constitution (if any);
   (11) New Business;
   (12) Adjournment.

2. **REMINDER** - EACH PROVINCIAL ASSOCIATION IS ENTITLED TO SEND A PROVINCIAL REPRESENTATIVE AND A MAXIMUM OF THREE (3) DELEGATES AT THE EXPENSE OF THE CANADIAN ASSOCATION OF PROVINCIAL COURT JUDGES.

3. **SUMMARY OF PROGRAM:**

   1. The Chief Judges of the Provincial Courts will meet on Monday, September 15th, and Tuesday, September 16th. Hosted by Chief Judge Andrew Harrigan, Chief Judge of the Provincial Court of New Brunswick.

   2. The Executive Committee will meet on Wednesday, September 17, at 9 a.m. A working lunch will be provided.

warrants for seizure of documents from a law office, but he cannot pronounce on their privileged nature.

(2) It is also anomolous that a judge should effectively determine whether or not evidence is admissible in a trial on which he is not sitting.

It seems that the draftsmen followed the advice of the Supreme Court of Canada in *Descoteaux* case but did not heed the words of Lamer J. in full. He had said, in conclusion, at p. 416:

> "I would also like to add that the justice of the peace from whom a warrant to search a lawyer's office is being sought, *if he is not a judge by profession,* would be well advised, although in no way obliged to do so, to refer the applicant to a judge of a court of criminal jurisdiction or even a judge of a superior court of criminal jurisdiction."
>
> (emphasis supplied)

Detention and Disposal Of Things Seized

Section 446 of the Criminal Code dealing with 'detention of things' seized has been repealed and substituted by a new section 446 and section 446.2 dealing with 'order for restitution or forfeiture of property obtained by crime'. The new section 446 is an unusually long section with seventeen subsections (see appendix). It establishes a new regime for dealing with seized property, the emphasis being shifted from detention of seized property to providing for its return to the lawful owner as soon as reasonably possible, with substantial judicial control over the powers to ensure this end is achieved.

The provisions relate to anything which a peace officer has seized "under a warrant issued pursuant to section 240 or 443 or 443.1 or under section 445 or otherwise in the execution of his duties under this or any other Act of Parliament". It appears from this that a peace officer who has seized anything in relation to a Federal statute offence has a duty to deal with the seized item, whether or not it was seized pursuant to a warrant, in accordance with the new provisions.

In all cases of seizure, a report must be filed with a justice. The primary obligation on the peace officer is to return the seized item unless he is not sure who is lawfully entitled to possession, or its continued detention is required for investigational or court purposes. Even when such an item is returned, the peace officer is nevertheless required to obtain a receipt on its return and file a report with a justice.

Where a peace officer does not return a seized item, he is required either to bring the item before a justice or report to the justice regarding the seizure. Such a report is to be in newly created Form 5.2.

Once the matter is before the justice, the obligation shifts to the justice to determine whether detention of the item is required. The justice is required to order the item returned to the lawful owner unless the *prosecutor satisfies him* that continued detention is required for investigational or court purposes. If the justice is satisfied that detention is required, then in so ordering, he is obliged to ensure that reasonable care is taken for the preservation of the item until the matter is concluded. Clearly this procedure is a reversal of the present section which requires the property to be detained unless the prosecutor agrees otherwise.

As with the present provisions, the three month limitation period for detention is maintained, unless a further time is ordered upon summary application, with three days notice to the person from whom the property was seized, or unless proceedings are instituted in which the thing detained may be required. Such detention orders may be renewed for a period of up to one year, after which only a Superior Court Judge has jurisdiction to make a further order.

The new provisions maintain the obligation on the justice to forward anything detained to the appropriate clerk of the court where the accused is committed for trial.

Section 446(5) places an obligation on the *prosecutor,* where he determines that continued detention is no longer required, to apply to the judge or justice who made the order, for an order disposing of the property. The judge or justice must give the person from whom the property was seized, and anyone else who claims ownership or a right to the property, an opportunity to be heard.

An additional onus is placed on the prosecutor, where no proceedings have been instituted and the order for detention has expired, to apply for an order returning the property. This effectively places the responsibility on the prosecutor to oversee police activity in relation to seized items (446.6). Provision is also made for the person from whom the item was seized to apply for an order returning the item where the order has expired and pro-

ceedings have not been commenced (446.7). Section 446(8) allows an application to be made even prior to the expiration period where the judge or justice is satisfied that hardship will result unless such application is so allowed.

Any other person who is lawfully entitled to possession can make an application at any time for the return of the seized item. Upon such an application, the item will not be returned unless the judge or justice is satisfied that the application is lawfully entitled to possession and the detention period has expired or detention is no longer required. Where the detention period has expired (and proceedings have not been instituted) there appears to be no discretion to order the item detained. Where a justice or judge determines detention is no longer required, the item is to be returned to the person from whom it was seized, if possession was lawful, or otherwise to a person lawfully entitled to possession, if known.

This is a summary of only the first ten subsections of s. 446. It raises at least two important concerns for us.

(1) In addition to the person who was the subject of search and seizure, and from whose immediate possession the things were taken, section 446(7), (8), (9) and (10) recognize the rights of possible third parties asserting claims to rightful possession or ownership of things seized and therefore grant standing to such persons to apply to have their property restored. In *Beach* v. *A.G. of Canada,*[85] the Alberta Court of Appeal considered the issue of standing with respect to an application under the present s. 446(3) for the return of seized goods and concluded that the only persons entitled to apply to have property returned are the lawful owner and the person from whom the goods were seized. In contrast, the new provision affords standing to persons with possessory interests in seizing things falling short of actual ownership. Apparently, the Parliament has accepted the recommendation of the Law Reform Commission of Canada and adopted this scheme which is quite similar to Article 280-3(1) of the American Law Institute's Model Code.[86] No clear procedure similar to an 'interpleader' is laid down in the provisions, although there is procedure laid down for an "aggrieved party" to appeal. So presumably, now cases will arise in which the judge or justice will be required to make a determination on competing ownership interests. This will no doubt be a somewhat unusual procedure, at least for a justice hearing the application who traditionally has not had to make determinations of any sort in relation to ownership of property.

(2) Section 446(8) which allows an application for return of seized goods to be made even before the expiration period where the judge or justice is satisfied that hardship will result unless such application is so allowed, also causes concern because it provides no criteria for deciding as to what is hardship and how is it to be balanced against the interests of the Crown. The way this provision is worded, it seems that such an application can be made even where charges have been laid.

It is submitted that some recent precedents will be helpful in interpreting these deceptively simple provisions. The Law Reform Commission recommends the adoption of these provisions to ensure as much as possible that things detained are restored to the person entitled to possession if the things are not required to be detained as evidence or if their evidentiary value can be preserved by alternate means.[87] It is asserted that while police authorities should not be hindered in their investigations of crime, it is also true that individual rights and liberties should not be abrogated or infringed unless there is a lawful reason for doing so. *Ghani* v. *Jones.*[88] The states power to seize and detain property must be tempered by considerations of reasonableness and accountability. Having regard to the intrusive dispossession of property involved in searches and seizures and the substantial consequential effects on individual rights, the onus must fall clearly upon the Crown, the dispossessing party, to establish that there exists a legitimate justification for the continued detention of the things. This general principle is already well established in case law. In *Leitman* v. *Mackey*[89] the accused was arrested on gaming charges and a large sum of money found in his pocket was seized and retained by police. In ordering that the money be returned, Landreville J. stated:

> "[T]he onus that arises . . . of establishing that a chattel seized is of evidentiary value in criminal proceedings is on the Crown and not on the person apprehended."

The nature of onus should require the Crown to establish, on a balance of probabilities, that the property forms the subject matter of an offence or is otherwise reasonably necessary to be detained as evidence. *R.* v. *Birnstihl.*[90] As Landreville J. in *Leitman* v. *Mackey* explained the requisite relationship between the crime alleged and the property seized, a person should not have his watch seized when arrested for speeding and held until the disposition of the case.[91] The police or Crown should

quiry." With respect his assessment thereof may be too restrictive.

In any event, the written consent of the prosecutor is necessary for such re-election "down". Those words "at any time before" would seem to mean that once the accused has elected for a preliminary inquiry, that he can never come to trial thereon in provincial court without the prosecutors written consent. If this is a correct statement, then we may well be worse off than we were as a result of *R v Davies* (1979) 6 WWR1, which at least, by implication, permitted a re-election "down" before the preliminary inquiry commenced. Now it appears that once the accused makes his election for a preliminary inquiry, that is it, and unless the Crown gives its written consent, that election cannot be changed to a provincial court trial, although it could be argued that the words used relate only to a preliminary inquiry then in progress, and therefore the right to re-elect may by implication therefrom, be still there before the Preliminary commences. However I have the feeling of grasping at straws, and "at any time" would seem to mean "at all times".

The only avenue that might still be available to contradict this result would be the procedure suggested in *Re Retzer v The Queen,* (1978) 43 CCC (2nd) 483, wherein the Ontario Court of Appeal held that the "Magistrate", presiding at the preliminary hearing, had jurisdiction to permit the accused to withdraw his election and to re-elect, as if he had made no prior election, without requiring the consent of the Crown. Some little support for this position, in Alberta, may be found in the case of *R v Bercov,* (1949) 96 CCC 168, which decision, although involving matters exclusively within the jurisdiction of the then Supreme Court of Alberta, did permit an accused to withdraw his consent to trial by judge alone, and thus have a trial by judge and jury, up to any time prior to the commencement of the trial.

However the writer is not very hopeful in this regard. It seems that the bottom line, in these new provisions, is that Parliament has confirmed that a provincial court judge, presiding at a preliminary hearing, is nothing more than a "justice" conducting an inquiry, as per Section 463. That is that although, as such, he can make rulings on evidence, and discharge an accused, where the information does not reveal an offence known to law, (*R v Bolduc* (1980) 60 CCC (2nd) 357, (Que C.C.)), or on other grounds, and in many other respects conduct his "inquiry" as a court of law, nevertheless once the accused, by his election, puts the provincial court judge concerned in that position of an "inquirer", then, forever after, that "inquirer" shall be deemed to have no jurisdiction to hear such matters as re-election applications.

Hence the requirement of written consent by the prosecutor, even though it has long been accepted that jurisdiction cannot be bestowed, by consent, where it does not otherwise lie. The rationale seems to be that

Corrigendum:

In the last issue of the Provincial Judges Journal (Vol. 10 #1 - Mar. 86) an important omission was made, in that some text was inadvertently deleted from Judge Marshall's paper entitled "The Effect of Bill C-18 on Elections & Re-elections Under the Criminal Code," and was not detected during proofreading. The following pages should be inserted after the words "meaningful, in that" where they appear in line 5 on page 17 of the last report. Sincerest apologies to Judge Marshall and our readers. — Ed.

it mentions, the circumstances where there will, or will not, be a preliminary inquiry, and what will happen if the accused does not elect.

There may be an area of confusion created when the accused or his counsel, asks to reserve the election, in view of the use of the word "now", which clearly seems to state that the deemed election shall be made for the accused, if he does not elect "now".

(6) In accordance with, the expansion of the scope of the inquiry, and the new designation, the wording of the warning to be given to the accused, at the end of the Crown's case, has also been expanded, and it reads as follows:

> "Having heard the evidence, do you wish to say anything in answer to the charge or any other indictable offence, in respect of the same transaction, founded on the facts that are disclosed by the evidence? You are not bound to say anything, but whatever you do say will be taken down in writing and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour and nothing to fear from any threat that may have been held out to you to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you at your trial notwithstanding the promise or threat."

As pointed out in Carol A. Snell's summary at p 23, it will be difficult for the accused or his Counsel to say anything "in answer to any other charge in respect of the same transaction founded on the facts, without some indication from the Judge, or someone, as to what such "other charge" may be.

(7) Similarly, the wording of the disposition, at the completion of the inquiry, regarding a committal or a discharge, has been expanded, and it reads as follows:

"(a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or

(b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction".

Perhaps in anticipation of some of the concerns epxressed earlier herein, Section 475(2) provides for identification of all such "uncharged offences upon which there is a committal, by way of such an endorsement on the information. Further, in such circumstances, unless there is prejudice to the accused, any defect apparent on the face of the information will not affect the validity of any such committal.

It is to be noted also that the accused will now be "ordered" to stand trial, and no longer "committed to do so. Apparently this is believed to be more precise.

B. THE RE-ELECTION

(8) The present re-election provisions in the Code have been repealed, and have been replaced by new provisions in Section 491-495 inclusive,

(9) In particular, Section 491(1)(a) permits a re-election "down" to a provincial court, "at any time before or after the completion of the preliminary inquiry", with the written consent of the prosecutor.

This seems, clearly, to permit the re-election up to, at least, the time of the arraignment in the Superior Court, as is done now, but in practice, only for guilty pleas. However, David Doherty Q.C., in his valuable paper entitled "Elections and Re-Elections", given at Winnipeg in July 1985, as part of the Federation of Law Societies Conference on a National Criminal Law Program, at page 44 therein, with reference to his summary of these re-election provisions, states this re-election "down' to provincial court, is available, "at any time before the completion of the preliminary in-

not be entitled to detain things as a matter of convenience or on speculation only. A simple assertion by the Crown, however sincere, that the things are required for evidentiary purposes should not be enough. Rather, the Crown should be obliged to provide some valid reason why things cannot be returned. Esson J. of B.C. Supreme Court said in *Major* v. *A.G. of B.C.*[92]:

> "[T]he general proposition that the right to detain seized articles depends upon being able to show that they are required for the purpose of evidence is part of the law of Canada."[93]

Recent authorities like *Re Butler and Butler and Solicitor General of Canada*[94] (holding that the fact that the objects seized may be material to possible future proceedings in another country or may be utilized in the cross-examination of the accused at trial are not adequate bases upon which to justify their continued detention) or *Ghani* v. *Jones*[95] (holding that it is not legitimate to detain things as a means of preventing the person from whom they were seized from leaving the country pending the completion of police inquiries) may be useful in interpreting the new provisions.

The courts will no doubt have to grapple with alternatives to detaining the things seized including the best evidence rule. In *Gordon* v. *Hunter*[96], Lord Denning stated that the best evidence rule had gone by the board long ago. He said:

> "The only remaining instance of it that I know is that if an original document is available in one's hands, one must produce it. One cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence."[97]

In Canada, the recent case of *R.* v. *Galarce*[98] dealt squarely with the application of the best evidence rule and the use of photographic evidence of stolen goods in a criminal trial. The accused was charged with theft under $200. He had been caught shoplifting and was apprehended by the store security officer. At the store, a photograph was taken of the package which the accused had removed from the shelf. The photograph was filed as an exhibit at the trial and the security officer's *viva voce* testimony was offered to explain the sequence of events. The trial judge dismissed the case on the ground *inter alia* that the Crown had failed to "put in the best evidence." On Crown appeal, Gerein J. allowed the appeal and stated that the trial judge had erred in acquitting the accused on the basis that the package itself was not produced. Gerein J. concluded that there is no absolute requirement that the stolen item be produced.

Although the notion underlying the best evidence rule is sound, the Law Reform Commission has concluded that the application of the rule has failed to keep abreast of advances in modern technology. This has also been recognized by the Federal-Provincial Task Force on Uniform Rules of Evidence which has recommended that the definition of what is an original must "keep up with the times."[99] Linden J. (as he then was) in *R.* v. *McMullen*[100] stated that "the sophisticated xeroxing equipment can produce copies that can hardly be distinguished from the original". Modern technology can guarantee a high degree of accuracy in producing duplicates.

And finally, situations may also arise where considerations relevant to the nature of goods which are not readily apparent and which are quite distinct from the physical qualities of the things seized may render it desirable that the things be restored. For example, the nature of the things may be such that the applicant requires them for the running of his business. The things seized may be records, documents or ledgers essential to the applicant's bookkeeping practices, and the inability to trace accounts receivable may place the applicant in a precarious financial position. This type of information should be considered by the judge.

As said earlier, s. 446(10) and (11) provide for an application by a person claiming to be the lawful owner of properties seized.

Section 446(12) delays execution of any order for thirty days or while the order is under appeal.

Section 446(13) and (14) provide that documents fall within the purview of this section but the Attorney General can certify true copies of documents which are admissible in evidence and, in the absence of evidence to the contrary, have the same probative value as the originals.

EXAMINATION OF SEIZED GOODS

Section 446(15) provides for orders permitting examination of seized articles by application on three days notice to the Attorney General. This is similar to the old s. 446(5). Under that section it was held by the Saskatchewan Court of Appeal in *R.* v. *Stewart*[101] that

a person seeking to examine a Court Reporter's notes and tapes of evidence taken at her summary conviction proceedings, which had been seized pursuant to a search warrant did not have an "interest" pursuant to s. 446(5). The court also held that since the rights of appeal in respect to a proceeding authorized by the Code are statutory, there is no right of appeal from an application for an order to examine goods.

In *Re Canequip Exports Ltd.* v. *Smith et al*[102] the question arose as to whether the "interest" referred to in s. 446(5) is limited to proprietory interest of litigant and whether it includes persons with legal concern in matters referred to in documents. Matas J. (as he then was) said at p. 362:

> "It is my conclusion that Parliament did not intend to restrict the meaning of the term 'interest' in the way suggested by counsel for the applicant; if any such restriction had been intended, it could have been expressed in the section . . . There was ample evidence before the learned magistrate to indicate a *legal concern* on the part of the commissioner; *by definition the respondents are persons who have an interest in the documents and are entitled to examine them."*
>
> (emphasis supplied)

It is interesting to note that the new section 446(17) provides for appeals by persons aggrieved with respect to orders made pursuant to subsections (8), (9) or (11) but not subsection (15). The situation therefore remains the same as before. Query: Can the Crown or the police officer who seized goods be described as persons "aggrieved" by an order under subsections (8), (9) or (11) and appeal the order of the justice or a judge? Since the Crown or the police have not been specifically mentioned, it seems that they cannot be "aggrieved" parties and they may not appeal those orders.

Section 446.2 is very important as it places mandatory obligations on a court hearing a trial to make orders in relation to any property obtained by the commission of the offence before the court. These obligations apply whether or not the accused was convicted or whether or not the seized property is actually before the court; provided it is not required as evidence in other proceedings.

As with other provisions for returning seized items, the order is to be made in favour of a person lawfully entitled to possession. If no such person is known, the seized items are forfeited to the Crown. [446.2(2)]

However, that order is not to be made with respect to proceedings against persons entrusted with goods or documents for offences under section 290 to 292 or 296 or with respect to property obtained by a person in good faith, without notice and for valuable consideration, where there is a dispute over ownership and a few other situations. [446.2(3)]

Finally, where the court makes an order for return of property, it is to "be executed by the peace officers by whom the process of the court is ordinarily executed". Thus, the obligation will ultimately fall upon the police officers responsible for the case for returning all property to the lawful owner.

It is clear from these new provisions that most of the case law relating to the detention and return of seized goods developed over the years has become obsolete and we will not have to interpret these new provisions under the weight of precedents, at least for some time to come.

Explosive Substances

Section 447 of the Code deals with seizure of explosives and there has been no change in this section by Bill C-18. This section constitutes an exception to the general rule that the officer making the seizure must bring everything seized before a Justice of the Peace.

Special Search Warrants

Section 181 of the Criminal Code provides for the issuing of special warrants by a Justice of the Peace where the search warrant is intended to apply only to the following suspected offences under

(1) Section 185 - keeping a common betting house;
(2) Section 186 - bookmaking, and certain specified ancillary offences;
(3) Section 187 - placing bets for consideration;
(4) Section 189 - lotteries and games of chance;
(5) Section 190 - breaches of the "permitted lotteries" section;
(6) Section 193 - keeping a common bawdy house.

The requirements of a section 181 warrant are:

(1) A report in writing must be submitted by the police officer. He is not required to swear any information under oath.
(2) The officer need not set out his grounds for believing "the offence is being committed"; however, there should be sufficient facts by the justice to be satisfied

Book Review

SO, YOU HAVE TO GO TO COURT!

— by Wendy Harvey, LL.B. and Anne Watson-Russel, Ph.D. (41 pages) Butterworths Toronto and Vancouver

Book Review by Provincial Court Judge Marion Wedge

This little soft-cover book is designed to be read to five to eight year old witnesses by an adult and for nine to twelve year old witnesses to read themselves. There are simplified boldface passages which may be read to and understood by the very youngest of witnesses.

Three chapters deal with the periods before court, the day in court and following court. There is also a section devoted to suggested ways to make the court appearance easier for young witnesses and a glossary of terms with which the child should become familiar.

The advisory process in our court system makes it nearly impossible to ensure that the experience will not be a painful one, one which may leave lasting scars on young witnesses. I think the authors of this book have devised a way to ease the pain a little. For example, they explain to the child that even if a Judge and Jury say that the accused is innocent, it doesn't mean that the thing did not happen or even that the Judge or Jury did not believe the child. The process is described as a jigsaw puzzle in which some of the pieces may have been missing.

Prosecutors, social workers and others involved in dealing with young victims of abuse who must be witnesses, would be well advised to obtain copies of this book to give to the children and their parents.

an offender from custody before the end of the sentence. Custody is of two kinds: open custody embodying residential centers, group homes, child care institutions, wilderness camps or like facilities, designated as places of open custody by the provincial government; and, secure custody where a young person may be securely contained or restrained, again as designated by the province.[4] An order for committal must specify the class of custody in which the offender is to be kept[5] and the committal is deemed to be continuous unless the youth court specifies otherwise.[6]

The control of the child's custody by the court, except as noted, is complete. If the young offender reaches the age of 18 years while serving his sentence in custody, the youth court is the only body which may transfer the offender to an adult correctional facility.[7]

The disposition of a young offender to custody is reviewable during the term of committal by the youth court or, a review board, if one is established by the province. The review board may review the custody of the offender and recommend to the youth court, the release of an offender. The youth court is to review the recommendation of the review board, not on its own motion, but on the application of the offender, his parents, the Attorney General or his agent or the provincial director. If there is no application to the youth court for review of the recommendation, it is to be implimented and the offender released on probation,[8] a form of statutory or mandatory post-release supervision as it is known in the adult correctional services or after-care supervision as found in some juvenile correctional services. Where the recommendation of the board is reviewed, the youth court may confirm, terminate or vary the original disposition.[9] One would assume the review boards, if they are set up in place of the youth courts, would not be used to bring release or discharge hearing behind closed doors, but would be open to the public on the same conditions and rules as apply to the youth court carrying out the same function.[10]

Where the sentence to custody is for more than one year, the youth court is obligated to automatically review the sentence at the end of one year. At any time before the one year automatic review, the sentence to custody may be reviewed on the application of the provincial director, the young person or his parents, or the Attorney General, at any time after six months from the date of the last disposition or before six months with leave of the youth court. Any disposition may be reviewed as follows:

> 28 (4) A disposition made in respect of a young person may be reviewed under subsection (3)
> (a) on the ground that the young person has made sufficient progress to justify a change in disposition;
> (b) on the ground that the circumstances that led to the committal to custody have changed materially;
> (c) on the ground that new services or programs are available that were not available at the time of the disposition; or
> (d) on such other grounds as the youth court considers appropriate.

After the review, the youth court having regard to the needs of the young person and the interests of the society, may confirm the original sentence, order the young person into open custody if the person was in secure custody, or release the young person to probation.[11]

In summary, the youth court acting within this new model not only continues the traditional role of sentencing the convicted offender but also takes on the nontraditional role of regulator of the custodial period after disposition. Regardless of the form of the release procedure, one is still left to speculate about the rationale for what, in the adult criminal justice system would be considered a radical change and the return to the old ways of the juvenile system with the added requirement for open hearings, and whether the trade off between public hearings and accountability through the courts and what rehabilitative expertise exists within the correctional facilities, will, in fact, bring about a better result in meeting the objectives of the young offenders law.

1. The Young Offenders Act, S.C. 1980-81-82, c.110.
2. The Juvenile Delinquents Act, R.S.C. 1970, c.J-3.
3. Supra, see footnote 1, ss.24(9) and 35.
4. Ibid, s.24(1).
5. Ibid, s.24(2).
6. Ibid, s.24 (12).
7. Ibid, s.24(14).
8. Ibid, ss.30(5), (16), (31).
9. Ibid, ss.31(2), and 28.
10. Ibid, s.39.
11. Ibid, s.28(17).

that the officer does have reasonable grounds for his belief.

It is somewhat ironic that with its insistence on "judiciality" and "particularity", Bill C-18 did not touch section 181 which is therefore still good law. However, in a recent decision, *Re Vella et al and The Queen*[103] the High Court of Ontario declared section 181 as "of no force and effect by reason of its inconsistency with section 8 of the Canadian Charter of Rights and Freedoms". Reference will be made to s. 181 in the following pages under "Charter Implications".

Search Warrants Under Provincial Statutes

There now exists in Canadian Law a proliferation of provincial statutes covering a multitude of subjects wherein some authorization is provided for search and seizure. Often the authority will provide for issue and execution of a search warrant, search without a warrant in specified circumstances; or some power of search of a quasi-search warrant nature such as a search order.

All or any combination of these procedures may be contained within single statues.

While the various provincial processes may vary in significant detail from the search warrant process of the Criminal Code, nevertheless the basic principles follow the Code closely as to requirements for obtaining the search warrant, circumstances in which searches and seizures may be made without warrant, and as to disposal of the goods seized. In any event the provisions under the Provincial Act for issuing the search warrant must be closely considered in each case, since they may vary from statute to statute, and from province to province and generally vary from the corresponding CriminalCode provisions.[104]

Even though this aspect of search warrants is beyond the scope of this paper, a recent amendment in the Liquor Control Act of Alberta has prompted its inclusion here. The Liquor Control Amendment Act, S.A. 1985 c.36 which was assented to on June 5, 1985 has repealed the old sections 114 to 117 of the Liquor Control Act and substituted new sections 114 and 117. (See Appendix B) These new sections have been written to clarify the various powers as well as to reflect Charter of Rights concerns.

Section 114 has been redrafted extensively to provide guidance to Inspectors who may conduct warrantless searches under certain circumstances. This section may be of importance to police agencies in light of new subsection (9) which allows an Inspector to call upon a peace officer for assistance in such a search and seizure operation. Note the requirements that the entry be at a *reasonable* time; that the inspector carry Board I.D.; and the provisions calling for receipts to be given to the person from whom the items were seized.

New section 115 prescribes powers for peace officers in relation to a search without warrant. Note the new requirement that the peace officer must have reasonable and probable grounds for acting without warrant and that in relation to searches under 115(1)(a) and (b) the search can be made without warrant only where obtaining a warrant "would cause a delay that could result in the destruction of evidence". Note also that the specific power to arrest found in old 115(2)(a) has been repealed. The Criminal Code will now determine when an arrest is legal.

New section 115 also contains similar provisions to those in old section 117, i.e., the seizure of vehicles, etc., and now provides an affidavit procedure.

New section 116 provides procedures for the forfeiture of liquor except where, on application, the justice orders it returned to the offender in certain types of cases.

New section 116.1 prescribes procedures for the application by an innocent third party for the return of property seized by the police from an offender in the course of an investigation.

New section 116.2 creates an entitlement to return of seized liquor where the offender is found not guilty or the charge is withdrawn.

Search Warrants Process and Public Access

The decision of the Supreme Court of Canada in *A.G. of Nova Scotia* v. *MacIntyre*[105] has added a new dimension to the law relating to search warrants which has been only slightly modified by Bill C-18.

This case involved an attempt by a journalist, Linden MacIntyre, to gain access to certain warrants and supporting informations relevant to a news story which he was pursuing. When the justice of the peace who had issued the warrants refused his request to see the documents, MacIntyre turned to the courts. Upon application to the Supreme Court of Nova Scotia, Trial Division, he obtained an order declaring executed search warrants and supporting informations to be court records open to examination by the public. On appeal by the

A.G. of Nova Scotia to the Appeal Division, the scope of the trial division's decision was enlarged by the Appeal Division. Hart J.A. held that not only was the public entitled to inspect search warrant documents whether or not the search warrant had been executed but that the members of the public were entitled to be present in open court when the search warrants were issued. The A.G. of Nova Scotia appealed to the Supreme Court of Canada and six provinces and the Federal Crown intervened in support of the Nova Scotia appeal to the Supreme Court.

By a 5:4 majority, the Supreme Court of Canada held that after a search warrant had been executed and any objects seized as a result brought before a justice, a member of the public is generally entitled to inspect the warrant and supporting information. The dissenting view of Martland J. was that access to these documents should be restricted to persons showing a direct tangible interest in them, a class which, in his view, did not include the respondent MacIntyre.

As Paikin points out in his comment[106] on MacIntyre, Dickson and Martland JJ. find themselves considerably at odds in their characterization of search warrant procedures. Dickson J. said at page 207 (26 C.R. (3d)):

> "The issuance of a search warrant is a judicial act on the part of the justice, usually performed *ex parte* and *in camera* by the very nature of the proceedings."

and at page 213:

> "At every stage the rule should be one of public accessiblity and concomitant judicial account-ability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law."

Dickson J. approached the problem on public policy basis. He said at pages 210-211:

> "By reason of the relatively few judicial decisions it is difficult, and probably unwise, to attempt any comprehensive definition of the factors to be taken into account in determining whether access is to be permitted. The question before us is limited to search warrants and informations. The response to that question, it seems to me, should be guided by several broad policy considerations, namely, *respect for the privacy of the individual, protection of the administration of justice, implementation of the will of Parliament that a search warrant be an effective aid in the investigation of crime,* and *finally, a stong public policy in favour of "openness" in respect of judicial acts.* The rationale of this last mentioned consideration has been eloquently expressed by Bentham in these terms:
>
> > "In the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is justice. Publicity is the very soul of justice. It is the keenest spur to exertion and surest of all guards against improbity. It keeps the judge himself while trying under trial."
>
> The concern for accountability is not diminished by the fact that the search warrants might be issued by a justice in camera. On the contrary, this fact increases the policy argument in favour of accessibility. Initial secrecy surrounding the issuance of warrants may lead to abuse, and publicity is a strong deterrent to potential malversion.
>
> In short, what should be sought is maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime." (emphasis supplied)

Martland J.A. in his dissent did not agree with this conclusion and said at page 205:

> ". . . my conclusion is that proceedings before a justice under s. 443 being part and parcel of criminal investigative procedure are not analogous to trial proceedings, which are generally required to be conducted in open court. The opening to public inspection of the documents before the justice is not equivalent to the right of the public to attend and witness proceedings in court. Access to these documents should be restricted, in accordance with the practice established in England, to persons who can show an interest in the documents which is direct and tangible."

It is noteworthy that while Martland J. relied on English and Canadian precedents, Dickson

person in whose care such child has been placed, or of the secretary of a children's aid society, or of the superintendent, or of the superintendent of the industrial school to which the child has been committed, without the necessity of hearing any further or other evidence.

(5) The action taken shall, in every case, be that which the court is of opinion the child's own good and the best interests of the community require.

21 (1) Whenever an order has been made under Section 20 committing a child to a children's aid society, or to a superintendent, or to an industrial school, if so ordered by the provincial secretary, the child may thereafter be dealt with under the laws of the province in the same manner in all respects as if an order had been lawfully made in respect of a proceeding instituted under authority of a statute of the province; and from and after the date of the issuing of such order except for new offences, the child shall not be further dealt with by the court under this Act.

(2) The order of the provincial secretary may be made in advance and to apply to all cases of commitment mentioned in this section.

An example of a provincial law enacted to accommodate Section 21 is the Nova Scotia *Children's Services Act,* Stats N.S. 1976, c.8, s.36:

36 (1) Subject to this Section, where a child is sentenced, committed or transferred to any training school under this Act or under any Act of the Parliament of Canada and it is provided that he may be dealt with in accordance with the laws of this Province, he shall be detained therein for the term or residue of his sentence and thereafter for an indefinite period not exceeding three years from the commencement of that sentence.

(2) With the approval of the Minister a child may be released by the person in charge of a training school to the custody of the Minister with or without such conditions as the child and the Minister agree.

(4) A child may be discharged by the person in charge of the training school with the approval of the Minister.

The *Young Offenders Act* essentially reenacts the policy of Section 20(3) of the *Juvenile Delinquents Act,* as it concerns release from custody and in place of the option to enact provincial laws, the Act has given a provincial director and a review board some opportunity to influence the release of a young offender from what is now called a place of custody, the former industrial or training schools.

The authority for the Youth Court to commit a young offender to custody is found also under the new Section 20:

20 (k) subsection to section 24, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding
(i) two years from the date of committal, or
(ii) where the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of committal;

Of immediate interest is the requirement for the committal to be for a fixed or specified period up to a maximum of two or three years as indicated in the Act. The *Juvenile Delinquents Act* was silent on the length of committal to a training or industrial school. Committals varied from fixed to indefinite terms up to a maximum of as, for example, in Nova Scotia, of three years depending on the enactments in each province.

Once the young offender is committed to custody, no authority other than a Youth Court Judge may transfer, release or discharge the offender from custody before the end of the term of the sentence except for a provincially appointed director who may transfer a young offender from open custody to secure custody for a maximum of 15 days for escape, attempted escape or serious midconduct; or, temporarily release the young person again up to a maximum of 15 days, for medical, compassionate, humanitarian, employment or rehabilitative purposes.[3] Generally, provincial statutes in this area gave an administrative person or group answerable internally and not accountable to the public except through the political process, unfettered discretion to release or discharge a juvenile delinquent whenever they so deemed it advisable to do so and for whatever reasons they wished.

The *Young Offenders Act* clearly defines the authority of the Youth Court Judge to remove

as (1)(a), (b) and (d) as these emphasize what appears to be a higher consideration: the protection of society.

3(1) (a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

3(2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1).

These sections, generally speaking, are consistent with the sentencing philosophy of the adult criminal justice system as put forth by Canadian superior courts in such leading cases as *R.* v *Grady* (1971), 5 N.S.R.(2d) 264, where Chief Justice McKinnon of the Nova Scotia Supreme Court, Appeal Division stated at 266

> "It has been the practice of this court to give primary consideration to protection of the public, and then to consider whether this primary objective could best be attained by (a) deterrence, or (b) reformation and rehabilitation of the offender, or (c) both deterrence and rehabilitation."

And Chief Justice Culliston, Saskatchewan Court of Appeal, in *R.* v *Morrissette* (1971), 1 C.C.C.(2d) 307 at 309, "Both trial and appellate Judges must be ever mindful of the fact that the principal purpose of the criminal process, of which sentencing is an important element, is the protection of society." Deterrence, reformation and rehabilitation within the correctional facility, where successful, are no doubt the tools of the criminal justice system by which society is protected.

A child found to have committed a delinquency was sentenced under Section 20 of the *Juvenile Delinquents Act* and among other sanctions, the court could

20 (1)(h) commit a child to an industrial school duly approved by the lieutenant governor in council.

The provinces had two options concerning the authority to release a delinquent from an industrial school: leave the authority with the juvenile court under Sections 20(3), (4) and (5); or, enact legislation of their own to deal with the delinquent in the industrial school including when and how the child would be released or discharged as per Section 21. The first option has not been available to the juvenile courts in Canada for more than two decades. These sections are as follows:

20 (3) Where a child has been adjudged to be a juvenile delinquent and whether or not such child has been dealt with in any of the ways provided for in subsection (1), the court may at any time, before such juvenile delinquent has reached the age of twenty-one years and unless the court has otherwise ordered, cause by notice, summons, or warrant, the delinquent to be brought before the court, and the court may then take any action provided for in subsection (1), or may make any order with respect to such child under section 9, or may discharge the child on parole or release the child from detention, but in a province in which there is a superintendent, no child shall be released by the judge from an industrial school without a report from such superintendent recommending such release, and where an order is made by a court releasing a juvenile delinquent from an industrial school or transferring such delinquent from an industrial school to a foster home or from one foster home to another under this subsection, it is not necessary for such delinquent to be before the court at the time that such order is made.

(4) When a child is returned to the court, as provided in subsection (3); the court may deal with the case on the report of the probation officer or other

J. refers to American precedents and especially to the decision of Powell J. of the Supreme Court of the United States of America in *Nixon* v. *Warner Communications Inc.*[107]

The decision of the Supreme Court in *MacIntyre,* it seems, has brought the law in this area closer to American jurisprudence. From the point of view of those who issue warrants and those who are responsible for the release of search warrant information, the most important part of the majority judgment is the following passage of Dickson J. at page 215:

> "Undoubtedly every court has a supervisory and protecting power over its own records. *Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose.* The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right."
> (emphasis supplied)

In summary, the ratio of *MacIntyre* can be described as follows:

(1) *AFTER* a search warrant has been executed *AND* any objects *SEIZED* as a result brought before a justice, a member of the public is entitled to inspect the warrant and supporting information.

(2) Access to warrants and supporting information *CAN BE DENIED IF*
(i) the ends of justice would be subverted by disclosure, or
(ii) the judicial documents might be used for an improper purpose.

(3) The presumption is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

MacIntyre was followed by Bracco J. of Alberta Queen's Bench in *Solomon et al* v. *McLaughlin et al.*[108]

The Law Reform Commission in its Report No. 24, Search and Seizure[109] made its recommendation covering this situation thus:

> No. 17 (1) Any person has the right, upon request, to examine a copy of a search warrant and supporting information following execution of the warrant.
>
> (2) No person shall publish in any newspaper or broadcast the contents of any search warrant or supporting information unless:
>
> (a) a preliminary inquiry has been held in respect of a person who has been searched or whose place or vehicle has been searched with that warrant, and that person has been discharged at the preliminary inquiry;
>
> (b) a person mentioned in paragraph (a) has been tried or committed for trial, and the trial of that person is ended;
>
> (c) the contents of the search warrant or information have been disclosed in judicial proceedings in respect of which publication or broadcast is not prohibited;
>
> (d) an order has been made under subsection (3).
>
> (3) Upon application by a person mentioned in paragraph (a), or by any person with the consent of a person mentioned in paragraph (a), a judge may order that the prohibition on broadcasting and publication imposed by subsection (2) be terminated.
>
> (4) In this section
>
> (a) "newspaper" has the same meaning as in section 261 of the *Criminal Code;*
>
> (b) "judge" means a judge of a superior court or judge as defined in section 482 of the *Criminal Code.*

Bill C-18 does not adopt the recommendations in its entirety. Instead the new section 443.2(1) and (2) dealing with 'Restriction on Publicity' and 'Definition of Newspaper' deal only marginally and indirectly with public access to search warrant information. It seems that *MacIntyre* ruling is in tact and the public's access to search warrant information will still be governed by this case. The "consent of every person referred to in paragraph (b)" in section 443.2(1) becomes relevant and necessary only when someone *after* obtaining access to the information wants to *publish it in a newspaper or broadcast it.* And that, too, only when a charge has not been laid arising out of that information.

Two questions arise in this context:
(i) Is *MacIntyre* applicable to search warrants under provisions other an s. 443? And,
(ii) Who has the jurisdiction to grant or deny access to search warrant information?

(i) Even though *MacIntyre* was directed to search warrants issued under s. 443 of the Criminal Code, it seems that on the basis of public policy of "openness" the supporting information and warrants under other sections of the Code, e.g., s. 181 and other Acts, e.g., The Narcotic Control Act and other Federal or Provincial statutes will all be accessible to the public once the warrant has been executed and something specified on the face of that warrant has been seized. The courts will perhaps arrive at this conclusion by first characterizing the executed search warrants as part of a court file or records, then by saying that court records are public documents and therefore accessible not only to the interested parties but to the general public. See *Howard Solomon and Southam Inc.* v. *James McLaughlin and The Queen*[110] in which Bracco J. held that pursuant to *MacIntyre,* the judicial records were public documents and therefore accessible public documents.

(ii) Bracco J. also held that pursuant to *MacIntyre,* every court has a supervisory and protecting power over its own records and can deny access to documents if the ends of justice would thereby be subverted. His Lordship also said that the power to grant or deny access to court records resides in the court and not in the clerk of the court who is only an administrative officer. Assuming that he is also a justice of the peace, even then, the power to grant or deny access to records under his administrative control resides in the "Court", i.e., a judge and not in the justice if he is not a judge in his own right.

MacIntyre was also applied in *Re Yanover et al.*[111] In this case the agent for the Attorney General for Ontario made an ex-parte application to Judge Scullion requesting that he prohibit access by interested parties and/or other members of the public to certain informations sworn before him in support of an application for the obtaining of a number of search warrants. The application was accompanied by the sworn affidavits of an R.C.M.P. Corporal and oral submissions were made by Counsel for the Attorney General. The relevant return of things seized had been made before Judge Scullion. In a very persuasive judgment, Judge Scullion comes to the conclusion that every court has the necessary jurisdiction to exercise supervisory and protective control over its judicial records and the effect of the *MacIntyre* decision is merely to shift the onus to the person denying the exercise of the act of access. He suggests that an application prohibiting disclosure can be granted where the harm done to the public interest may outweigh the right of a member of the public to have access to public records. He identifies the following areas which might be included:

(1) Disclosure of lawful electronic surveillance.
(2) Identity of confidential informant.
(3) Disclosure of police investigation techniques.
(4) Obstruction of continuing police investigation.
(5) Police abuse of the order of non-access.

At p. 224, Judge Scullion delineates the meaning of "Court" and he comes to the conclusion that "justice" in the context of the exercise of the supervisory power over court records refers to a judge and not to a justice of the peace who is not a judge in his own right. At page 226, he states:

> "Accepting the premise that the *Provincial Court, where a sworn information to obtain a search warrant is filed, has jurisdiction to control access to such records,* the following issues arise . . ."
> (emphasis supplied)

Judge Scullion also describes the procedure that a justice hearing an application for non-access should follow, as follows:

(a) *Exercise of Judicial Discretion*
The decision of the justice in determining whether an order of prohibited access should be made in respect of a sworn information to obtain a search warrant is an act of judicial discretion which should be granted only in exceptional circumstances.

(b) *Presentation of Case to Rebut Presumption of Access*
The applicant must present the court with sworn evidence or grounds of belief viva voce or by affidavit as to the reason why the general rule of access ought not to be observed. The application may be made ex-parte upon presentation of the sworn information to obtain a search warrant, *at the time of return of things seized, or when circumstances require, with leave of the court.*

(c) *Nature of the Order Prohibiting Access*
The court granting an order of prohibition of access to a sworn information to obtain a search warrant may formulate its order in a conditional manner:

(1) Document sealed for a specific time period or conditional on the occurrence of a specific event, and
(2) Partial non-access by access to a certified copy of the information with necessary deletions.

Release From Custody And The Judiciary Under The Young Offenders or A Sign Of Things To Come?

by Judge Timothy T. Daley,
Judge of the Family Court of Nova Scotia

The *Young Offenders Act*[1] was proclaimed, at least initially for those young persons who had been the subject of the repealed *Juvenile Delinquents Act,*[2] on April 2, 1984, amidst considerable fanfare and not without substantial criticism of its philosophical, fiscal and procedural thrusts. One area of the Act which received only passing comment, is the role the Youth Court Judge plays in the release of the young offender from custody.

Given the outcry against the policies and practices of the federal government on mandatory supervision and parole and the concerns of those responsible for sentencing offenders about the bureaucratic, closed hearings on the release of incarcerated offenders, it is not clear at this time if the *Young Offenders Act* embodies the opening salvo in a substantial new thrust toward judicial control of incarcerated offenders in the broader Canadian criminal justice system, is simply a reinstatement of the judicial control of earlier juvenile delinquent law, or an indication that the so called 'law and order' lobby has won the day over the 'human behaviouralist' lobby. The fact is that the role of the judiciary in young offenders law has come full circle at the release from custody stage. In short, the Youth Court judiciary now has full control of the release of the young offender from incarceration before the expiry of sentence, except for some statutory short term discretionary periods by an administrative authority and certain recommendations of a review board.

Whatever the reason behind this change, it is important to recognize and clearly understand the function the Judge of the Youth Court is now expected to carry out.

Historically, the juvenile law represented by the *Juvenile Delinquents Act* in Canada, and one of the major arguments used by its detractors, was its alleged parentism or paternalism at the sentencing stage with its emphasis on treatment and rehabilitation of a condition called delinquency, a condition of human misbehaviour based on a philosophy that young persons should not be stigmatized by the criminal law, rather than being concerned with the niceties of the criminal law such as notice to the accused, calling a crime a crime and personal accountability. The result now, of course, is the criminalization of the young person between the ages of 12 and 18 years of age and the complete exoneration of persons under 12 from responsibility and accountability of what would be criminal behaviour after the twelfth birthday. It does not take much imagination to foresee the results of this new policy in light of the sophisticated young person of today. In more recent times, the application of the *Juvenile Delinquents Act* had taken on some of the fundamental trappings of the criminal law at the trial level even before the major activity to enact the *Young Offenders Act.*

The treatment philosophy is seen in the following section from the repealed *Juvenile Delinquents Act.*

3. (1) The commission by a child of any of the acts enumerated in the definition "juvenile delinquent" in subsection 2(1), constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.

(2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.

38. This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

Whether or not the *Young Offenders Act* substantially changes this basic dispositional philosophy depends on how Section 3 and especially subsections (1)(c) and (2), are interpreted in light of the other subsections such

our basic constitutional document at the time of nationhood. Over the years, political and legal recognition of collectivities in addition to the French Canadians of Québec, led to constitutional entrenchment of broader linguistic rights for both French and English, as well as the recognition of aboriginal rights and the multicultural heritage of Canada. With legal and constitutional recognition, these rights may now be pursued through the courts. However, in order to ensure the continued existence of collectivities, these rights have been supplemented by catalytic programs of government and its agencies.

3) Economic, Social and Cultural Rights: This category has received virtually no entrenched constitutional recognition as an essential component of basic human rights. However, a historical and current survey of the relevant areas, indicates a high level of both public expectation and of governmental response through legislation. Since this category essentially involves the obligation of a State to its inhabitants, it is through direct government programs and legislation that these rights are most likely to be achieved. Nevertheless, public recognition and government commitment are moving towards a time when this category might well find express recognition in the *Canadian Charter of Rights and Freedoms.*

4) The Rights of Peoples Beyond Canada: Evolving Canadian governmental policy and non-governmental initiatives by Canadians suggest a growing recognition of an international obligation to respond when the human dignity of others is threatened by the inability of another state to protect the economic, social and cultural rights of its citizens. There is also growing recognition of an equal obligation to respond to violations of the rights of individuals and of collectivities of persons beyond Canada's borders. Such an obligation has not been conceptualized as a human right in Canada. Nevertheless, one can envision a day when it not only finds expression in government policy and practice, but also receives explicit articulation as a constitutional norm reflecting a fundamental value of Canadian society.

I hope that this survey of the Canadian experience may be of some interest in relation to the issues which we will be discussing. I am looking forward very much to hearing about the context and manner of implementation of human rights in other jurisdictions. It will be particularly valuable to learn more about your perceptions of the concepts of "Peoples' Rights" and "Self-Determination".

Endnotes

1. "The Concept of Human Rights in Contemporary International Law" (1983) 1 Can. H.R. Yearbook 267,268.
2. *Ibid,* at 280.
3. See, generally, the discussion by Schacter, "Human Dignity as a Normative Concept" (1983) 77 Am. J. Int. L. 1.
4. *British North America Act, 1867,* 30-31 vict., c. 3 (U.K.)
5. R.S.C. 1970, c. C-34, s. 7.
6. R.S.C. 1970, c. B-11. However, the Province of Saskatchewan enacted the first such statute: *Saskatchewan Bill of Rights* S.S. 1947, c. 35.
7. *Constitution Act,* 1982.
8. R.S.C. 1970, c. W-2.
9. Apart from assigning legislative responsibility for Indians specifically to the Federal Government by s. 91(24) of the *British North America Act, 1867, loc. cit.* No other "people" were singled out in this manner.
10. Although certain legal rights were recognized by some earlier statutes such as the *Manitoba Act* (1870), R.S.C., App. II, No. 8.
11. R.S.C. 1970, c.I-6.
12. *Calder v. A.G.B.C.* (1973) S.C.R. 313.
13. Section 35. Section 25 also provides that the Charter guarantees are not to be construed so as to abrogate or derogate from aboriginal rights.
14. Apart from section 6 relating to "mobility rights" or the right to move from province to province "to pursue the gaining of a livelihood".
15. Apart from Section 35 of the Charter which refers to the rights of the "aboriginal peoples of Canada". It has already been suggested that this falls within the category of a "collective" right.
16. *Declaration of Philadelphia,* 1944, and now embodied in the ILO Constitution.

(d) *Sealing the Packet*

Once the justice has decided that an order for non-access should be granted, the evidence received by the court upon an application to prohibit access to the information, whether by affidavit or tape recorded viva voce, evidence under oath *should be sealed along with the notice of application and stored in the Provincial Court for safe keeping until ordered to be produced by a court of competent jurisdiction.* Parliament has legislated such a procedure and sealing of documents with respect to an application pursuant to Part IV.1 (s. 178.14) of the Criminal Code.

(e) *Reasons for Judgment*

Given that the court is exercising a judicial discretion based on the necessary implication that the court has the jurisdiction to control access to its records and, in the circumstances, prevent access to the sworn informations to obtain search warrants contrary to the presumption of public accessibility, *the court ought, in addition to its formal order, to provide reasons as to why the relevant document, in whole or in part, has been excepted from the operation of the general rule.*

(emphasis supplied)

Search and Seizure and the Charter of Rights

The proclamation on April 17, 1982 of the Canadian Charter of Rights and Freedoms (being Part I of the Constitution Act, 1982) represented a quantum leap in the law of Canada respecting the administration of criminal justice. In no other area of the criminal law has its effect been more immediately and forcefully felt than in the area of search and seizure, bringing into the system the combined effect of *sections 8 and 24.*[112] There are, indeed, six sections of the Charter which provide a total context of the spirit and tenor of the Charter within which all provisions of search and seizure are to be interpreted. These sections of the Charter are as follows:

(1) The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstably justified in a free and democratic society.

(7) Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(8) Everyone has the right to be secure against unreasonable search and seizure.

(9) Everyone has the right not to be arbitrarily detained or imprisoned.

Contextual And Functional Dimensions of Human Rights: A Canadian Perspective

by Ed Ratushny
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Editor's Note: This paper was delivered by Professor Ratushny on November 25, 1985, at the Center for International Legal and Economic Studies, Zagazig University, Cairo, Egypt.

Introduction

We are fortunate to be working in the field of human rights at the present time. In my view, this will prove to be not only a dynamic but also a creative period in both the development and application of the concept of human rights. In a recent article, B. G. Ramcharan of the United Nations Centre for Human Rights raised the following controversial questions:

> Do human rights pertain solely to individuals? May they appertain to groups or to peoples as well?
> Do human rights embrace only traditional civil and political rights or do they also embrace economic, social and cultural rights?
> Do newly asserted rights, such as the right to development, exist?
> Are they capable of existing as human rights, and, if so, again, would they appertain to individuals only, to groups, to peoples or to a combination of these?"[1]

The author concludes that the recognition of human rights is essentially a normative process requiring recognition by a competent organ. Nevertheless, there is an evolution in the stock of human rights:

> It is fallacious to confine the definition of human rights only to traditional categories or criteria. There are ongoing processes of discovery recognition; enlargement, enrichment and refining; and adapting and updating.[2]

I, therefore, consider this conference and the subjects which it is addressing to be most significant and timely. I have been awaiting with anticipation this opportunity to hear the views of so many distinguished international experts on these matters and wish to thank the Center for International Legal and Economic Studies and, particularly, Dr. Hilmy for having invited me.

The first topic listed for discussion is the relationship between peoples' rights and individual rights. Obviously, this is an issue which must be explored. However, in my view, it is regrettable that too often discussions in this area become a debate on the relative merits of individual rights *versus* collective or peoples' rights. Such an approach leads to the separation of rights into water-tight compartments and forces people to choose to support one category in favour of another. Geographical distinctions are often emphasized and the discussion may become a debate of social, economic and political ideology.

Such an approach is unfortunate because the concept of human rights should transcend such ideology. Human rights should represent a core of fundamental and universal human values which every political ideology should respect, protect and foster. All human rights have as their foundation the "inherent dignity" of all persons. This central phrase is embedded in the first line of the Preamble to the Universal Declaration of Human Rights. All human rights can be viewed as no more but, of course, no less, than the basic requirements for ensuring the preservation and enhancement of the human dignity of all persons.[3]

If this approach is accepted, how can it be argued that one category of rights is more important than another? Indeed, how can there be any justification for maintaining classifications at all? The real goal should be the implementation of human rights while overemphasis upon classification can become a tedious and sterile exercise. On the other hand, there is a need for a clear understanding of what different human rights encompass in order to address specifically the manner in which their protection and promotion might be achieved.

One reason for classifying human rights is the variety of contexts in which they must be considered. The intrinsic validity of a human right does not change. However, the manner and degree to which human dignity is most seriously offended will vary from one society to another. In my own country, for example, the most serious violation of human dignity may be the collective situation of the aboriginal peoples of Canada. Greater emphasis must be placed upon the amelioration of this situation.

and widely supported today. Environmental issues such as acid rain have given Canadians the clear message that the environment is an international concern that affects every individual. The present Government is currently reviewing aspects of Canada's foreign policy which will include its role in the international protection of human rights.

Canadians have come to recognize that we live in a world in which the rights of all of its Peoples are inter-dependent. This growing perception can be viewed as a form of "solidarity" which is a natural consequence of sharing that common humanity. It can be manifest in sharing the responsibility of achieving development throughout the world, in pursuing peace and disarmament and in ensuring a safe and healthy environment. Of course, it is difficult to articulate precise standards for this category of emerging human rights. However, it might be appropriate here to incorporate a similar approach to that which is expressed in the International Covenant on Economic, Social and Cultural Rights. That is to strive for progressive achievement by appropriate means based on available resources.

This notion of solidarity cannot be restricted to any category of human rights. If the obligation flows from the indivisibility of human dignity then the obligation cannot distinguish between political, civil, collective, economic, social or cultural rights. The concept of solidarity must extend to every category and the obligation to act must relate to every form of violation.

It is, of course, important in this context constantly to remind ourselves that solidarity with the peoples of the world in enhancing human dignity through the protection of human rights must not extend to any interference with the right of such peoples to determine their own destiny. Such self-determination is also an essential aspect of human dignity. The obligation to assist in the achievement of human rights bears no license to undermine the sovereignty of any state or to attempt to establish priorities or agendas for others.

Conclusion

There are many difficulties in attempting to classify human rights. I have not mentioned the Canadian Charter's "equality rights" provision, but it may be of some interest because of its breadth. It provides:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision is expressed in terms of an individual. However, it may be equally effective in protecting the rights of a collectivity. Moreover, its real value is in ensuring access to economic, social and cultural opportunities. It, therefore, encompasses all of the first three categories which I have suggested and certainly has relevance for the fourth category as well.

It was expressly recognized in the same section that an individual approach to problems of discrimination could not be totally effective. Provision was made for attacking "systemic" discrimination through programs of "affirmative action":

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Incidentally, the examples of collectivities which were given earlier all involve ethnic minorities. It is interesting to consider whether that is an essential characteristic or whether other groups such as disabled persons or elderly persons should also be considered to be a "collectivity". May a majority group which suffers discrimination, such as all of the women in a society, constitute a collectivity for legal purposes?

In spite of the difficulties, categorization may serve a useful purpose in identifying the kinds of human rights which are most urgently in need of attention in a particular context. The particular category might then indicate the kind of response which is necessary.

To summarize, the Canadian experience might be categorized as follows:

1) Individual Rights: The traditional political and civil rights were introduced through the British common law and have been constitutionally entrenched only recently. Since their greatest threat may be from Government and its institutions, they have been protected largely by the responsibility of Government to an elected Parliament and the availability of an authoritative and independent judiciary for adjudicating alleged violations.
2) Collective Rights: These were recognized in

While there is no constitutional guarantee of medical treatment, it is difficult to conceive how any government in Canada could now eliminate the system. It has probably gained the status of a fundamental feature of our society. A recent example along the same lines involved an attempt by the current federal Government to cut back on the program of old age pensions. There was a political outcry including public protests and the Prime Minister soon reversed the Government's position.

In my view, many of these programs have already reached the stage of public recognition where they constitute basic human rights in Canada even though they tend not to be described as such. It is simply a matter of time before they achieve formal constitutional recognition.

I fully recognize that the examples which I have provided may not constitute the areas of highest concern for some societies. It is important to recognize that the state of implementation of this category of rights is bound to vary more greatly because it is so directly dependent upon the resources available to the state in question. Article 2 of the *International Covenant on Economic, Social and Cultural Rights* speaks of each State Party "taking steps", "to the maximum of its available resources", "to achieving progressively" the full realization of these rights. Thus the importance of context is specifically recognized in the Covenant, itself.

While, in my analysis, the prime mechanism for achieving these rights is through the direct action of the state, the context of limited resources may make achievement of an acceptable level of progress impossible. Nevertheless, that situation should not be used to justify the derogation of other rights which are unrelated. Nor should it relieve a state of the obligation for the equitable development, deployment and distribution of those resources which are available. I believe that this obligation is not only implicit but also explicit in the *International Covenant on Economic, Social and Cultural Rights.*

Peoples' Rights

The notion of Peoples' Rights as a separate category of human rights has not been prominent from a Canadian perspective. As with Economic, Social and Cultural Rights, it finds no expression in our constitution[15] or laws or even in our normal vocabulary. Nevertheless, if the same analysis (of actual practice rather than form) is applied to this category as to the previous one, it is possible to discern an emerging concept of international obligation which can be linked to a corresponding human right.

I began by suggesting that all human rights are related to the basic concept of the human dignity of every person. The context may vary, requiring emphasis upon one category of rights rather than another in order to achieve that basic goal. However, the concept itself is indivisible and universal.

If that is the case, then the objective of protecting and enhancing human rights cannot stop at national boundaries or regional affinities. When a state has acted equitably to develop, deploy and distribute the resources of that state, yet those resources are still inadequate to achieve a basic level of dignity for its citizens, those citizens must have a right to look to the international community for assistance in achieving the common goal which underlies all human rights. I believe that the obligation to provide such assistance falls most directly, not upon international institutions nor upon national governments, but upon every individual. Again, the basis of that obligation must be that if some human beings are required to live in sub-standard conditions of human dignity, then the human dignity of all human beings is diminished. As the International Labour Organization has proclaimed: "Poverty anywhere is a threat to prosperity everywhere."[16]

Indeed, new approaches to International Law depart from the more traditional view that only states are its subjects. It is now becoming increasingly evident that individuals must form a central focus for international human rights law.

Of course, individual action frequently will be expressed through the instrument of a state government and the general obligation should be recognized and asserted as such by every government. Similarly, concerted action may be undertaken through international institutions. However, the source of the obligation is in sharing a common humanity and, in some situations, the most effective assistance may occur through non-governmental organizations.

In Canada, there appears to be a growing recognition of this obligation of citizens to share the responsibility for the protection of human rights beyond our borders. Non-governmental organizations such as the Canadian Section of Amnesty International, Oxfam and church organizations are receiving increasing public support for their efforts to help less fortunate persons in other countries. The cause of peace and disarmament is highly respected

However, in doing so, care must also be taken not to jeopardize the rights of others, such as women. These different interests should not be seen as being mutually exclusive. Rather, the importance of both must be recognized and an appropriate balance reached depending on the context. A variety of historical, social, cultural and economic considerations may come into play in determining not only how human dignity may be most seriously offended, but also the manner in which it can best be preserved and enhanced.

This leads to a second justification for discussing categories of human rights. Such classification can suggest the kinds of approaches which will be most functional in the promotion of human rights. Different societal responses may be necessary for different categories of rights.

If I am correct in suggesting that it is desirable to examine human rights in a concrete context with the goal of seeking their greater protection and enhancement, it may be useful for me to outline the Canadian context. Let me warn you beforehand that the categories which I suggest do not fit neatly into existing international documents. However, they do emerge from the Canadian reality. I suspect that the same may be said of the experience of some other countries as well.

I propose briefly to canvass the Canadian experience in relation to human rights with a view to illustrating both the contextual and the functional implications of our experience. There are two broad themes. The first is that there has been a progressive development in our history of tending to deal with human rights issues first in a political context, then in a legal context and finally on the level of constitutional principles. The second is that societal recognition of collective rights has been extremely important to the creation, as well as to the evolving maturity, of Canada as a nation. In fact, close scrutiny of the entire Canadian experience and actual practice renders it difficult to suggest that any category of human rights has prevailed over another.

Individual Rights in Canada

The approach to individual rights in Canada largely derives from our adoption of a constitutional system similar in principle to that of the United Kingdom. The essential features of such a system for the protection of individual rights involved a Parliamentary system of government and the Rule of Law including an independent judiciary.

Thus our basic constitutional document on achieving nationhood in 1867 contained no charter of the civil or political rights of individuals.[4] Perhaps the most relevant protection in relation to legal rights was a provision in our *Criminal Code* which specifically incorporated "Every rule and principle of the common Law" of England which established justifications or defences to criminal charges.[5] It may be notable that both before and after the constitutional adoption of the British tradition, Canada avoided the influence of the American and French documents of the Eighteenth Century in spite of both geographical proximity to the United States and considerable linguistic affinity with France.

It was not until almost one hundred years after nationhood, in 1960, that the Government of Canada formally recognized individual rights in the form of *The Canadian Bill of Rights.*[6] However, this document was a statute of the federal Parliament, not binding upon the provinces in areas of their legislative jurisdiction. Moreover, it was not treated as a fundamental constitutional document by the courts and, therefore, was largely ineffective as a basis for challenging other legislation. It was less than four years ago, on April 17, 1982, that *The Canadian Charter of Rights and Freedoms*[7] came into force, finally entrenching individual rights in our Constitution.

Individual human rights were largely respected in practice in Canada through a variety of specific laws such as those related to criminal procedure and through the application of common law principles. The essential safeguards in our experience were: 1) a system of government responsible to the people through Parliament; and 2) an independent judiciary. Nevertheless, it was only recently that individual human rights, as such, received legal and then constitutional recognition in Canada.

However, individual rights were never considered to be absolute in Canada and many judicial decisions in our history are deferential to state authority. Nor have these safeguards always been effective. For example, the internment and confiscation of the property of Japanese Canadians during the Second World War was recently recognized formally by the Canadian Government as a violation of human rights. Similarly, in retrospect, the invocation of the *War Measures Act*[8] in 1970 is considered by many to have been an over-reaction.

Perhaps the greatest threat to individual rights is in the coercive powers of the state and

its institutions. Protection against such threats, therefore, requires some mechanism independent of the state to inhibit arbitrary encroachments upon human dignity. The function of such a mechanism is not proactive but responsive. It is available to be invoked when an encroachment occurs, but its prophylactic effect is soon lost if it does not have authoritative power to impose punishment or remedies for abuses. The Canadian judiciary has been reasonably effective in this respect. However, in Canada, the most serious shortcoming of this traditional approach to individual rights is its limited effectiveness in responding to the rights of certain collectivities.

Collective Rights in Canada

The term "collective rights" is not used here to describe the rights of all of those present within a state. Rather, it is used to identify a group of individuals within a state who share common needs as a group which are essential to the inherent dignity of those individuals. They may also be described as "group rights".

Such rights may be distinguished from individual rights in the following way. Individual rights are largely protected when individuals are simply left alone to participate in society in the same manner as everyone else. Collective rights may require more. If simply left alone, the collectivity will be submerged by the larger society. Therefore, the state must take special steps to recognize the special human rights of the collectivity. It is only after special constitutional or legislative provisions have been enacted that mechanisms such as the courts can be invoked for protection of these rights. However, even with such provisions, a proactive governmental response may be necessary to ensure that collective rights are fully protected. Special governmental departments, programs or agencies may be appropriate.

Our constitutional document of 1867, specifically recognized certain collective rights. Section 93 preserved existing rights and privileges in relation to some religious denominational schools. Section 133 established the equality of the English and French languages in parliamentary and the Québec legislative assemblies and in court proceedings. These provisions can be seen as reflecting the concern of a French Canadian collectivity about losing its religious and linguistic heritage. The federal structure itself with the French Canadian population forming a majority in the province of Québec, was a form of protection for the rights of this collectivity. It is notable that the human rights of another significant collectivity, the indigenous peoples of Canada received no recognition at this time.[9]

The cultural, linguistic and political rights of French Canadians did not diminish as a controversial issue in Canadian society over the decades following Confederation in 1867. The controversy ultimately led to the "October Crisis" of 1970, the murder of a Québec Cabinet Minister and the invocation of a state of emergency. In 1976, the separatist Parti-Québecois, formed the Government of Québec and in 1980 it held a referendum to determine whether Québecers were in favour of negotiating a new political-economic relationship with the rest of Canada. The referendum proposal was rejected.

Nevertheless, during this period, a very clear need was demonstrated for the federal Government to respond to the fears, aspirations and basic human rights of French Canadians throughout Canada. Such a response included a massive affirmative action program for the increased representation of French Canadians at all levels of federal institutions as well as the legislative establishment of both French and English as official languages of the federal Government. The official languages of Canada were subsequently entrenched in our Charter, not only at the Federal level but also for the province of New Brunswick and for the Yukon and Northwest Territories. In addition, minority language educational rights were constitutionally entrenched for both French and English in the *Canadian Charter of Rights and Freedoms* in 1982.

In contrast, apart from pre-Confederation documents, the collective rights of Canada's indigenous peoples were recognized only very recently with their organization in the early 1960's as a political force.[10] In Canada, the term "aboriginal" is used to describe our indigenous population which is composed of the Indian, Inuit and Métis. The chronic unemployment, under-employment and economic deprivation of the Native people date from the turn of the century, when the sometimes unlawful process of banishing many of them to ghetto-like reservations was completed and Native people came under the jurisdiction of the *Indian Act.*[11] Disease, alcohol, separation of children from their families for schooling and the abolition of cultural practices such as the *potlatch* led to demoralization.

In 1969, the federal Government issued a White Paper outlining a policy of repealing the *Indian Act,* the phasing-out of the reserve system and, essentially seeking the integration of Native people into the "mainstream" of Canadian society. The policy reflected a goal of enhancing individual rights, but with potentially disastrous effects for the aboriginal collectivity. Protests from the Indians, Métis and Inuit, pursuaded the government to withdraw the policy in 1971.

Not long afterwards, the Supreme Court of Canada denied a claim by the Nishga Indians for aboriginal title to their traditional homelands but, in doing so, established that aboriginal title was a legally enforceable right in certain circumstances.[12] The federal Government also reversed its policy in this respect and began to negotiate the settlement of claims to aboriginal rights.

Today the *Canadian Charter of Rights and Freedoms* specifically recognizes and affirms "the existing aboriginal and treaty"[13] rights of the Indian, Inuit and Métis peoples of Canada. While agreement on the precise scope and content of these rights could not be reached, a process is in place for that purpose. After decades of neglect, it may not be surprising that some time will be required to reach an acceptable definition. What is significant is that the Government recognized an injustice and first sought to respond by seeking greater equality for individuals. When that response was rejected, because it did not address the collective human rights of aboriginal peoples, a more appropriate approach was taken which resulted in constitutional recognition of the aboriginal collectivity.

A crucial component of the current process is the direct participation of aboriginal peoples, themselves, in the formulation of the constitutional protections which will ultimately affect their destiny. It is, of course, becoming increasingly recognized that the participation of all persons in economic and political decision-making is essential to the full realization of economic, social and cultural rights.

The ethnic composition of Canada has changed dramatically since 1867. Subsequent waves of immigration from almost every part of the world formed a potent "Third Force" to balance the contervailing interests of the Anglo-Saxon and French Canadians. While not in a position to claim specific linguistic or educational guarantees, it did gain recognition of the multicultural reality of our country. This grouping of a variety of minorities who had immigrated to Canada over the last century, came to be recognized as forming a third collectivity in addition to the French Canadian and the aboriginal peoples. A separate Cabinet portfolio was created and, in 1975, the Minister of Multiculturalism began to shift attention from an emphasis on language and culture to group understanding. Section 27 of the *Canadian Charter of Rights and Freedoms* now provides that it shall be interpreted in a manner "consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Economic, Social and Cultural Rights in Canada

In Canada, Economic, Social and Cultural Rights are viewed primarily as reflecting the obligations of the government of a state to all of the people within that state. Among others, these would include the development, deployment and distribution of the resources of the state in an equitable manner. Again, the basic objective of permitting all persons to live with human dignity does not change. However, it is perhaps with this category that both the context and the functional approach towards achieving the goal become most significant.

In Canada there exist universal legislative programs for public education, unemployment insurance, medical treatment and hospitalization, old-age pensions, family allowances and others. These were all achieved through political and legislative rather than judicial processes and, perhaps as a result, Canadians tend not to speak of them in terms of "human rights". They are not included in the *Canadian Charter of Rights and Freedoms*[14]. This may be viewed as ironical in light of Canada's ratification of the *International Covenant on Economic, Social and Political Rights* as well as several Conventions of the International Labour Organization. Canada has also played an active role in institutions such as the I.L.O. and the U.N. Human Rights Commission.

Nevertheless, the adoption of some of this domestic legislation evoked the kind of ideological rhetoric which was alluded to earlier. For example, the first socialist government in Canada, in the province of Saskatchewan, was also the first to introduce a comprehensive medical care program. A fierce political battle ensued in which many medical doctors claimed that their compulsory participation in such a plan infringed upon their livelihood rights to be free to sell their services at a price which they would determine. The government saw its responsibility as providing accessible and affordable medicare to all citizens. A number of doctors moved out of the province and some moved out of the country. However, the program was established and eventually adopted throughout Canada.