MERCURY GRAPHICS

PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

VOLUME 10, Nos. 3 & 4 DECEMBER 1986

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.

Editorial communications are to be sent to:

The Provincial Judges Journal
Provincial Court Building
230 - 20th Street East
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S7K 2H6

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(902) 678-4594 (Off)

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2625 Yale Street
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V5K 1C2
Tel: (604) 255-5131 (Off)

Association Journal
Judge Richard J. Kucey
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230-20th St. East
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Tel: (604) 294-3761 (Off)

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Judge Kenneth Crowell
Provincial Court
P.O. Box 1059
Middleton, N.S.
Tel: (902) 245-4567 (Off)
(902) 678-4594 (Off)

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Cour Provinciale
Palais de Justice
Montmagny, Que. G5V 1P6
Tel: (418) 248-0881 (Off)

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Administrative Judge
Provincial Court of B.C.
200 East 23rd St.
North Vancouver, B.C. V7L 4R4
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Editor's Page

As 1986 draws to a close, I would like to take this opportunity to extend compliments of the season to each of you.

This issue of the Journal, is, in effect, a "double issue" and will be my final issue as your editor. It is with some regret that I step down, as I have enjoyed meeting and working with so many wonderful people over the last three years.

The Executive of the Canadian Association of Provincial Court Judges has always been helpful to me, as have the Provincial Representatives, and of course, the Provincial Editors. At times, it seemed that papers and articles of interest prepared by Provincial Court Judges were scarce, but to all who contributed, I thank you, and I urge you to co-operate and contribute material to your new editor.

I have not reported in this issue on the social activities and festivities of the conference at St. John, but I have included several of the Committee Reports. Suffice it to say that the hospitality was absolutely wonderful, pleasant and relaxing. All who were involved in the planning of the conference worked hard to make it a memorable event for all of us. Judge Blake Lynch must be singled out, as he worked to the point of exhaustion to ensure that everything when smoothly.

The work we do as Judges is stressful and sometimes we forget just how important it is to maintain a sense of humor, to "get us through the day". In that regard, I am happy to have become acquainted with Peter MacDonald, Q.C., the author of *Court Jesters*. Peter also has a regular column in the *National,* and the jokes and puns, and humorous incidents he has collected, have lightened many a day for me. With that I urge you all to contact Peter and provide him with more material for his next book "*More Court Jester*", which is scheduled to be published in the summer of 1987.

Once again, I extend my sincere thanks to all who have assisted me in my work, and I encourage you to contribute generously of your talents to the new editor.

President's Page

by Judge Douglas Rice

As I write I am still in the process of recovering from the Saint John Conference. I trust that those who had the opportunity to attend the Conference enjoyed themselves and that the educational sessions provided a source of interesting and valuable information. My appreciation to Judges Lynch, Desjardins and company for their efforts.

The following week I travelled to the Keltic Lodge in beautiful Inginish, Nova Scotia, for the annual meeting of that Province's Provincial Court Judges, and was awarded their usual warm hospitality.

Now that I am beginning to fully appreciate the responsibility of the Office of President of your Association, I find it necessary to establish my priorities for the year ahead.

The primary purpose of the Canadian Association of Provincial Court Judges is, and always has been, judicial education. I accept, as virtually inevitable, the concept of a Canadian Judicial Center. Earlier, I was selected by the Executive Committee, and now continue to take upon myself the responsibility of your representative on the proposed five person interim management committee of the proposed Center, together with Chief Judge Harold Gyles and a representative of the Canadian Judicial Council and the federally appointed Judges, plus a chairman.

If the report of Mr. Justice Stevenson is adopted by the Chief Justice of the Supreme Court of Canada and the Attorney General, meetings should soon commence. It is my intention to seek consultation with Judge Jean-Marie Bordeleau, our Director of Education, and others, to make our position clear as what we feel would be acceptable to us. I invite, indeed solicit, the views of Provincial Associations and individual judges as to what they would like to see incorporated in such a Center, with particular emphasis on the needs of the Provincial Court.

In addition to our involvement with the proposed Center, we must also expand existing educational programmes and develop new programmes if we are to continue to expect federal and provincial funding. At the moment, primarily ideas are urgently needed. These ideas may be for projects or programmes at the national or provincial level, and I would appreciate receiving your ideas at anytime.

Perhaps the greatest breakthrough in the past few months is in our relationship with the Canadian Bar Association. The CBA has established a task force, chaired by Mr. John A. O'Keefe of Charlottetown, P.E.I., to establish a relationship with the Judges of the Provincial Court. We were fortunate enough to be able to meet with Mr. O'Keefe in Saint John. I would suggest that the meeting was a learning experience, at least for him.

We have asked that the CBA develop a policy nationally for the position of the Provincial Courts, as they see it, and to support the Courts through its Provincial branches, in a manner similar that Association's support of federally appointed judges. I have asked immediate Past President Judge Ian Dubienski to act as liaison on our behalf.

I have requested that the Committee Chairmen remain in their present positions. Many have tasks yet to be completed. I trust that the coming year will see the labors of past years arrive at successful conclusions.

In Saint John there was talk of the "Old Guard", and the need for fresh faces. I cannot disagree. If you are sincerely interested in a greater participation in our Association, please write and tell me.

Finally, I challenge the Provincial Representatives to accept their responsibility as such. Keep the Executive Director and myself informed of your wishes, so we may be of service.

Judicial Independence

Ed. Note: The report of the Committee on Judicial Independence was discussed at the Annual Meeting of the Canadian Association of Provincial Court Judges held at Saint John, New Brunswick, in September 1986. The Committee is comprised of two hard-working, dedicated Judges — Judge H. J. Carver (Chairman) and Judge R. A. Fowler (Member). While space does not permit publication of the full report, the following **Statement of Principles** was adopted.

Statement of Principles

Preamble

AN independent and impartial Provincial Court is essential in order to guarantee the rights and freedoms of all Canadians.

A Judge of the Provincial Court is not a civil servant but an autonomous judicial officer.

THE Provincial Court is part of the historic separation of powers among the legislative, executive and judicial arms of government.

• • •

Recognizing the foregoing, Provincial Courts across Canada ought to be governed as far as possible by uniform legislation embodying the following principles:

(1) In each province or territory there should be constituted an independent Judicial Council to:

(a) hear and determine any dispute or complaint brought before it by or against a judge of the Provincial Court;

(b) consider all proposed appointments to the Provincial Court and make recommendations on the suitability of the candidates for the judiciary.

There should be in place in each jurisdiction a procedure to give effect to its decisions and recommendations.

(2) No person shall be appointed a judge unless he or she has held membership at the Bar for at least ten years and no appointments shall be made except on the recommendation of the Judicial Council;

(3) Judges of the Provincial Court shall be appointed on the basis of integrity, ability and experience;

(4) Provincial Court Judges shall hold office during good behaviour;

(5) The Provincial Court must have judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function;

(6) Provincial Judges shall devote themselves exclusively to their judicial duties and shall not engage in any other occupation, profession or business;

(7) The salaries and basic benefits paid to Provincial Court Judges shall be adequate and appropriate to uphold the principle of judicial independence, be uniform across Canada, commensurate with the salary and basic benefits paid to and received by federally appointed trial court judges and be guaranteed by law;

(8) Once the residence of a judge has been established, such residence shall not be changed except with the consent of the judge;

(9) A Provincial Court Judge shall have the same immunity from civil proceedings as does a Judge of a Superior Court of Criminal Jurisdiction and shall be compensated for any costs incurred in maintaining such immunity;

(10) The Provincial Court, including all support staff, while it is sitting, as well as the person of the judge and his or her family at all times shall be provided proper security.

Association Canadienne des Juges de Tribunaux Provinciaux
Rapport sur L'Independance de la Magistrature

Declaration de Principe

Preambule

L'indépendance et l'impartialité des tribunaux provinciaux sont essentielles si l'on veut assurer les droits et liberté de tous les Canadiens.

Un juge d'une Cour Provinciale n'est pas un fonctionnaire mais un officier de la magistrature autonome.

Le tribunal provincial participe à la séparation historique des pouvoirs législatif, exécutif et judiciaire du gouvernement.

En reconnaissance de ce qui précède les tribunaux provinciaux, partout au Canada, devraient être régis par des lois uniformes incarnant les principes suivants:

(1) Un Conseil de la magistrature indépendant devrait être constitué dans chaque province ou territoire et dont la fonction serait:

(a) d'entendre et trancher tout désaccord ou plainte dont il serait saisi par ou contre un juge d'un tribunal provincial.

(b) d'étudier toutes les nominations proposées à un tribunal provincial et faire des recommandations quant à l'aptitude d'un candidat pour la magistrature.

Il devrait exister dans chaque juridiction une procédure donnant effet à ses décisions et recommandations.

(2) Aucune personne ne sera nommée juge à moins qu'elle n'ait été membre du Barreau pendant au moins 10 ans et aucune nomination ne sera faite sauf sur la recommandation du Conseil de la magistrature;

(3) Les juges des tribunaux provinciaux seront nommés en tenant compte de leur intégrité, de leurs capacités et de leur expérience;

(4) Les juges de tribunaux provinciaux occuperont leur poste durant bonne conduite;

(5) Les tribunaux provinciaux devront avoir le contrôle judiciaire des décisions administratives portant directement et immédiatement sur l'exercice de la fonction judiciaire;

(6) Les juges provinciaux se consacreront exclusivement à leurs devoirs judiciaires et n'auront aucune autre occupation, profession ou entreprise;

(7) Les salaires et avantages de base payés aux juges de tribunaux provinciaux seront suffisants et appropriés afin de maintenir le principe de l'indépendance de la magistrature, ils seront uniformes partout au Canada, proportionnés aux salaires et aux avantages de base payés et perçus par les juges de cours de justice nommés au niveau fédéral et garantis par la loi;

(8) Lorsque la résidence d'un juge aura été établie, cette résidence ne sera pas modifiée, sauf du consentement du juge;

(9) Un juge de tribunal provincial jouira de la même immunité à l'égard des poursuites civiles qu'un juge d'un tribunal supérieur de juridiction de droit pénal et recevra une compensation pour tous frais encourus afin de maintenir cette immunité;

(10) Le tribunal provincial, y compris tout le personnel de soutien, au moment où le tribunal siège, de même que la personne même du juge et sa famille, seront, en tout temps, pourvus de mesures de sécurité adéquates.

Report of Executive Director and Treasurer (CAPCJ)

Mr. President, members of the Executive Committee of the CAPCJ.

This is my first report to you as your Executive Director and Treasurer. Please bear with me for the usual deficiencies coupled with the fact of a bitter labour dispute in my home province, which has curtailed all activities in and around Provincial Courts in Newfoundland including the use of my secretary as "Man Friday" around the Provincial Court at St. John's.

Reporting in this fashion is further complicated by the fact that I assumed this role midway through the year. The change was made at the beginning of the fiscal year of the Association, as it should have been, but midway through the Association's calendar year. This created the obvious difficulties in trying to pick up things already in progress.

At the outset I wish to express my deepest appreciation to my predecessor, Judge D. E. Rice, for his efforts in the smooth transition of the office. It is impossible to imagine how things can be taken for granted in what prima facie appears to be a relatively simple undertaking. Judge Rice's ten years as Executive Director has produced massive amounts of paper and sorting out what is needed and relative for smooth continuous operation is not an easy task. However, the transition has taken place effective April 1st, 1986, but actually occurring on June 6, 1986, during my visit to St. Stephen, New Brunswick. At the same time of this meeting, I attended a meeting of the Conference '86 committee and offered my assistance to Judge Lynch et al for the annual meeting.

In addition, I published the annual newsletter re the annual conference and have sent two Executive Memos, most of which related to this Conference. To comply with a deadline of June 30th, I drafted and forwarded our response to

Another story involving legal lingo comes to us from Provincial Court (Criminal Division) in Toronto. Answering questions concerning a previous offence, an accused man told Judge Rober Dnieper that another member of that court, Judge Joseph Addison, had sentenced him to 60 days in jail and two years' probation. The dialogue went as follows:

THE COURT: My brother Addison put you on probation?

ACCUSED: No, Judge Addison.

THE COURT: That's my brother Addison.

ACCUSED: That's your brother? I didn't know that.

• • •

Chief Justice Allan McEachern, of the Supreme Court of British Columbia, tells this story about his colleague, Mr. Justice Wilfred J. Wallace:

"When he was a young lawyer, Wallace J. as he now is, displayed the qualities of quickness and with that are so necessary for counsel. He was appearing before Judge Swencisky and near the end of the case the learned judge asked a witness a dangerous question. Wallace, fearful for the answer, jumped to his feet and said: 'If Your Honour is asking that question on behalf of my learned friend, then I wish to object. If Your Honour is asking that question of my behalf then I wish to withdraw it.'"

• • •

A salute and a story from Regina lawyer Morris Shumiatcher. "As your *Court Jester* entertains us with each issue of the *National*," he writes, "I continue to appreciate the window you open upon the good-natured humor of the Bar."

After that nice start, Mr. Shumiatcher continues:

"In a matrimonial property case I recently tried, my client, the wife, was being vigorously cross-examined by Tony Merchant, who represented the husband. The following questions and answers appear in the transcript of trials:

Q. When did your father-in-law die?

A. June of 1982.

Q. Are you sure it wasn't July?

A. Well, I hope not, because we had the funeral in June."

Ah. transcripts! Keep sending them my way — if they're funny. Who doesn't love to read a lively burst of Q-A to brighten the day? The one that follows is a case in point.

A London, Ont. man was charged with assault causing bodily harm. The witness, a baker, picked up the accused, who was hitchhiking near a park at 3:30 a.m. Once inside the car, the accused placed his hand on the complainant's thigh. Here's the dialogue between Crown and witness:

Q. What happened after the accused placed his hand on your thigh?

A. I stopped the car and ordered him to get out.

Q. Then what happened?

A. He swore at me as he got out of the car.

Q. And what did you do?

A. I opened the driver's door, got half out of the car and yelled, "You're a fruit! Get lost!"

Q. What happened then?

A. He came around the front of the car. He hit me in the face with his fist. He broke my glasses and chopped my upper plate.

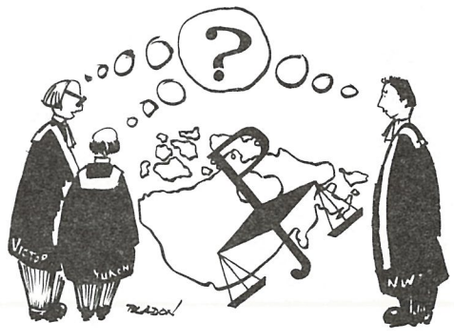
Q. Then what happened?

A. He kicked me in the balls and then ran away.

Crown Attorney: Now let us review for the jury exactly what happened: You said that the accused punched you in the face with his fist and broke your glasses, then he kicked you in the testicles — is that correct?

A. No! No! Then he kicked me in the balls!

• • •



In Lighter Vein

ed. note: *The following anecdotes have been compiled by Peter MacDonald, Q.C.* and have appeared in the* ***National****. They are reprinted here with the kind permission of Mr. MacDonald.*

** Peter Vincent MacDonald is a practicing lawyer in Hanover, Ontario. His address is:*
302- 10th Street
Hanover, Ontario W4N 1P3

My thanks to Mr. Justice George Murray, of the Supreme Court of British Columbia, for that contribution. He also sends this one:

"The late George Annable was appearing before the dreaded Manson, J. in Chambers on an application for letters of administration without bond.

"The judge asked, 'Are all the children *sui juris*?' and he received the following answer; 'Oh, yes, My Lord—they're all very healthy.'"

• • •

Mr. Justice Allan Wachowich, of the Alberta Court of Queen's Bench, presided at a break-and-enter trial in which a 17-year-old unmarried pregnant witness was asked whether she found a contraceptive on the floor after the commission of the crime.

"What's a contraceptive?" she inquired.

• • •

Ronald J. Fromstein, a lawyer in Ajax, Ontario, sent me a Notice of Motion, pertaining to a motion brought under the Vendors and Purchasers Act, which read in part:

"TAKE NOTICE that a motion will be made to the Court on behalf of the above-named Purchasers at the Court House, 605 Rossland Road East, Whitby, on Thursday, the 1st day of September, 1983, at 10:00 o'clock in the forenoon, or so soon thereafter as Counsel can be hard, for an Order declaring . . ."

• • •

Judge James T. Robson, of the Provincial Court (Family Division) in Kitchener, Ont., recounts some things said by nervous witnesses. A few:

- "I seek apathy from the Court."
- "My kid had impetango." (A skin condition brought on by too much dancing?)
- "I get a free apartment with all the infringements."
- Social Worker: "Access should be in the discrimination of the Children's Aid Society."
- "My boy needs help. He should be seen by a good gynecologist."

Santa slid down my chimney the other night, a bit ahead of schedule, and delivered a big bag of Christmas goodies for me to distribute to my faithful renders. Eagerly, I dumped the loot on the floor and before my jolly visitor could say"ho, ho, ho," I was chortling "ha, ha, ha." Here's why . . .

London, Ont. court reporter Gail McGilvray, who had the last word in my November column, opens the festivities this time. In preparing the transcript of a doctor's evidence in a civil case, Gail was called upon to type the words "degenerative disc disease" at frequent intervals. On the verge of punchiness, and fearing that something might have gone amiss, Gail cast an eagle eye over the copy. Sure enough, the plaintiff had contracted a "degenerative dick disease."

• • •

Robert J. Lane, a lawyer in Shellbrook, Sask., sends a gem — a court-certified transcript of an arraignment in Provincial Court in Prince Albert. The accused, charged with breaking and entering, represented himself.

Ready? Here goes:

Charge read. Election given and explained.

THE COURT: Do you understand it now or would you like further explanation?

ACCUSED: I understand it.

THE COURT: Do you feel that you're prepared to elect and plead today or do you want me to adjourn it so that you can take advice?

ACCUSED: I'll take it.

THE COURT: You want to elect today? How do you elect?

ACCUSED: You.

THE COURT: And how do you plead, guilty or not guilty?

ACCUSED: I plead not guilty.

THE COURT: How many Crown witnesses will there be?

ACCUSED: Only one — the one I broke into the store with.

the Stevenson Working Paper on the Canadian Judicial College concept. Also, early in the transition period I made contact with the Federal Government with respect to our contract for the '86-'87 fiscal year and have now received same and, in fact, have received the first portion of the Department of Justice's contribution through funding. In addition, memos of account to Associations regarding annual dues were circulated, as well as Provincial Governments and Territories through the various Chief Judges with respect to the annual grants. Most of which has now been received.

July and August are not very active months in any Association, but I was able to arrange a luncheon meeting on short notice with the new Minister of Justice and Attorney General of Canada on August 28, 1986, at St. John's, Newfoundland, during a meeting of the Planning and Priorities Committee of the Federal Cabinet. President-elect Rice and I met with the Minister for a couple of hours during a delightful Newfoundland luncheon. The Minister appeared quite interested in our activities and pledged his Department's continued support for our organization. I feel that I can speak for our President-elect, as well, in saying that our meeting was fruitful and timely; and at the invitation of the Minister, further dialogue is planned for the near future.

As your Treasurer, I have maintained the books and accounts of the Association to the best of my ability. Again, the transition has been smooth but more complicated than that of the Executive Director. I have paid all accounts presented to me with dispatch. Attached to this report is the financial statement for the period April 1st, 1986, to August 31st, 1986.

In closing I would like to thank you for your support over the last six months and wish to express my special appreciation to outgoing Associate Chief Judge Ian Dubienski for his support but especially for his frugality during his Presidential year.

CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES
L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

STATEMENT OF RECEIPTS AND EXPENDITURES
April 1, 1986, to August 31, 1986

RECEIPTS	BUDGETED	RECEIVED	BALANCE
Grants:			
Government of Canada	$ 70,000.00	$20,000.00	$ 50,000.00
Provincial/Territorial	33,000.00	22,500.00	10,500.00
Dues	30,000.00	14,950.00	15,050.00
Miscellaneous	2,000.00	0.00	2,000.00
	$135,000.00	$57,450.00	$77,550.00

EXPENDITURES	BUDGETED	EXPENDED	BALANCE
Executive Meetings	$ 18,000.00	$ 1,479.67	$ 16,520.33
Pres., Off. & Travel	7,000.00	1,957.19	5,042.81
Ex. Dir. Travel & Exp.	7,800.00	3,885.16	3,914.84
Audit	1,000.00	0.00	1,000.00
Constitution Review	250.00	0.00	250.00
Conference '86	31,500.00	135.47	31,364.53
Education Committee	43,000.00	100.29	42,899.71
Committee on the Law	1,500.00	0.00	1,500.00
Family & Young Offenders	4,500.00	0.00	4,500.00
Journal	13,670.00	6,401.10	7,268.90
Judicial Independence	1,317.30	0.00	1,317.30
Civil Court	1,500.00	0.00	1,500.00
Miscellaneous Expenditures	3,000.00	845.39	2,154.61
Appointment of Judges	500.00	0.00	500.00
	$134,537.30	$21,186.98	$113,350.32

Report of The Chairperson of the Canadian Judicial College

(Judge Jean-Marie Bordeleau)

In September of 1985, at the annual convention in Winnipeg, I was privileged to be appointed chairperson of the Canadian Judicial College, also known as the Education Committee, by Associate Chief Judge Ian Dubienski.

I have been involved in the Education Committee since 1979, and I served as venue chairman of the Judges Program held at Ottawa, when the chairman was successively the Honourable Judge Wong, Judge Perkins and Associate Chief Judge Dubienski. Over the years I have had the distinct pleasure of meeting nearly all of the newly appointed Judges, together with other Judges who attended the course.

In October of 1985, at the invitation of the President, I attended the Annual Conference of the Canadian Institute for the Administration of Justice in Toronto. It should be noted that my expenses were paid for by the Province of Ontario, and minimal cost was incurred by the Association.

In December of 1985, I met with the Honourable William Stevenson and Brian Grainger to discuss the Canadian Judicial Centre Project. I gave them my personal views on such a project, based on my experiences in Judicial Education with the Canadian Association of Provincial Court Judges.

In February of 1986, I attended the Atlantic Seminar held in St. John, N.B. The Chairman of the Seminar was Judge J.L. Jacques Desjardins of Grand Sault (Grand Falls), N.B. The conference was very successful and Judges from Prince Edward Island, New Brunswick, Nova Scotia and Newfoundland participated. It is hoped that the 1987 Atlantic Seminars will be held in the Province of Prince Edward Island in May or June. To this effect, I have communicated with Chief Judge Ralph C. Thompson and he is to contact his fellow Chief Judges in the above noted provinces to finalize a program.

I appointed the Honourable Stephen Cuddihy to be the venue and project chairman for the conference of new and older Judges. The Honourable Andre St. Cyr was appointed Chairman of the family program and Judge Pamela Thomson-Sigurdson was appointed Chairman of the civil division. The conference was held at the Far Hills Inn, Val Morin, Quebec from April 4/86 to April 11/86. A total of 45 Judges participated. All the provinces were represented with the exception of the Province of Saskatchewan and North West Territories, although it should be noted that Judge Robert Halifax participated as a lecturer. Again we are happy to welcome members of the Judge's Advocate General of the Canadian Armed Forces. Due to insufficient numbers, the Civil Division Program had to be cancelled but it is hoped that a sufficient number of Judges can attend the program in 1987.

I wish to express my sincere appreciation to Judges Cuddihy and St. Cyr without whose work and dedication this conference would not have been as successful.

The President, together with Judge Rice and Associate Judge Langdon, attended part of the conference as did Mr. Justice W. Stevenson and Mr. Brian Grainger.

The President-elect accepted my recommendation that the 1987 conference be held at the Far Hills Inn from March 20/87 to March 27/87. Judges Cuddihy and St. Cyr have agreed to act as Project Chairman and Family Court Chairman respectively. As a result of conversation and correspondence with Judge Pamela Thomson-Sigurdson, we are arranging joint sessions for all three benches to be held the Saturday, Sunday and Monday of the conference.

In closing, I would like to thank the President, Associate Chief Judge Ian V. Dubienski, Judge Douglas E. Rice and Associate Chief Judge Edward Langdon for their help and encouragement during my tenure as chairperson of the Canadian Judicial College.

Civil Courts Committee

by Pamela A. Thomson-Sigurdson

Reports of Civil Court Judgments

As I have mentioned in previous reports, the Committee is concerned about the poor promulgation of decisions in the Provincial Courts and, in particular, in the civil area. I am pleased to announce that the Committee has reached agreement with QL Systems Limited (Quic/Law) for the creation of a Small Claims data base. The data base for Ontario judgments is in place and we are awaiting feedback from the Law Society of Upper Canada with respect to its position regarding the creation of this data base. It is hoped that the Law Society (which has jurisdiction over all Reasons for Judgments) will have no objection to the creation of a separate data base. At this point, it is easier to create a Small Claims judgment data base rather than integrate Small Claims judgments with the other provincial reports which are already on stream. In the coming months, the Committee intends

not bound by rules. With respect to hearsay evidence, their position is: "If you think the evidence is reasonably reliable, admit it even though it is hearsay." On the other hand, every effort is made to avoid declaring a law unconstitutional. These prevailing attitudes, both explicit and implicit, appeared to me at first to be contradictory. On further reflection, however, I believe they express the judges' confidence in their own abilities, a lack of fear of criticism, and deliberate caution in embarking on a new enterprise.

By contrast, in the United States there appears to be a distrust of the judiciary. It is most obviously manifested by sentencing guidelines and mandatory sentencing acts designed to restrict or eliminate judicial discretion. Such rules and statutes are unknown in Canada. Canadian judges not only have broad sentencing discretion subject to appellate review, they also have the power after a verdict of guilty to enter what is known as a discharge. The verdict is not wiped out but the conviction is never entered. Thus, a person given a discharge may truthfully declare that he has never been convicted of a crime even though he has been found guilty. This avoids such consequences as deportation, ineligibility for certain employment, scholarships, and licenses. The judge has unfettered discretion to enter either an absolute discharge or a conditional discharge requiring some form of probation or reporting.

Canadian judges, though loathe to call upon constitutional authority, appear to have little hesitation in devising new doctrines to accomplish desired ends. The hostile criticism of resulted-oriented decision making, and the call for principled neutrality so popular in the United States, has no analogue in Canadian legal literature.

Two fascinating recent Canadian cases reveal the judicial adoption of a brand new legal theory of defense. In *Penka v. The Queen,* a ship sailing from Seattle bound for Alaska was blown off course by a storm and landed in Canada, where it was discovered to have on board a huge quantity of marijuana. It is a violation of Canadian law to import marijuana. The defendant successfully pleaded the defense of necessity—to avoid death at sea, it was necessary to land in Canada. The Supreme Court of Canada recognized the defense of necessity as an "excuse," not a "justification," under the Criminal Code. One might have thought that the old defense of lack of mens rea would have sufficed.

In another notorious case, a doctor who owned a chain of medical offices that performed abortions was prosecuted for violating a statute prohibiting abortions unless approved in advance by specified procedure of hospital review. The doctor pleaded that the necessity to safeguard the life and health of his patients did not permit the time-consuming procedures mandated by the statute. The jury acquitted the doctor. Significantly, no one raised the constitutional rights of the patients or the doctor. The Canadian Bill of Rights, unlike the United States Bill of Rights, specifically guarantees a right to bodily integrity.

Another notorious case, *The Queen v. Zundel,* involved criminal charges against a neo-Nazi who published literature proclaiming that there was no holocaust; that it was a Jewish fiction designed to promote Jewish world hegemony. The defendant was prosecuted under a statute prohibiting publication of literature "likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published." The jury convicted. The defense raised was truth, not freedom of the press, which is explicitly guaranteed by the Canadian Bill of Rights. The Court did not see a constitutional question.

There are few medical and legal malpractice, products liability, bankruptcy and defamation cases in Canada, and they apparently cause few practical or legal problems. Many Canadian police officers have not yet learned to read their "Miranda rights" to suspects. Canadian judges are notably uneasy with the exclusionary rule and only selectively rely on United States Supreme Court decisions; they have embraced *United States v. Leon,* giving it an expansive reading. It is sobering to recognize the widespread influence of disparate and perhaps anomalous American decisions on the law of other countries.

Perhaps Robert Burns did not realize how lucky he was not to have the power to see ourselves as others see us. When we do glimpse others' views of ourselves and our social and judicial practices, it can be a chastening experience. It can also be enlightening. I hope such interchanges among the judiciary, if widely adopted, might encourage reexamination of uncritically accepted and time-honored practices and attitudes.

uate school tuition is almost minimal by American standards. A similar difference prevails with respect to the legal profession. All Canadian judges, both federal and provincial, are paid approximately the same salaries, about $90,000. It is expected that the salaries will be raised to $100,000 in the near future. The average salary for the state judiciary in the United States is less than $65,000. American judges carry a much larger case load. Very few Canadian lawyers receive the fees of $200 an hour or more charged by many American lawyers. Although the value of the Canadian dollar is low in comparison to the United States dollar, the cost of living in Canada is, at least, commensurately lower.

Not only is the compensation of Canadian judges superior, so are the perquisites of office. Canadian judges are expected to travel first class. Their meetings are held at Canada's most luxurious and desirable resorts; court houses and chambers are almost always well appointed. Sabbatical leave is being seriously discussed. There is confidence that sabbaticals for emotional and intellectual refreshment and alleviation of stress and burnout will become a national policy and practice. All judges, federal and provincial, are appointed for life and all receive pensions of 75 percent of salary. There is little, if any, difference in status or esteem between federal and provincial judges.

Few Canadian judges are appointed to the bench who are under 40 years old. There is a well-founded feeling that judges who spend 20 or more years on the bench hold narrow viewpoints and anachronistic attitudes. In England, there is an unwritten rule that no one under the age of 45 shall be appointed to the bench. In contrast, within the past decade or two, countless recent law school graduates with minimal experience have been appointed or elected to the judiciary in the United States.

Another striking difference between American and Canadian trial judges is their use of law clerks. Although most Canadian judges do not have the volume of cases that many American courts have, they do write large numbers of opinions. Law clerks are not employed for each individual judge; the court hires a small number of clerks to do research for the court as a whole. Each judge does his or her own research and opinion writing. I did not encounter any Canadian judge who wanted a law clerk. Indeed, after reading "The Brethren," many were convinced that under no circumstance would they agree to have a law clerk.

Judicial Impartiality

Political activism is strongly disfavored in Canada. Until the past year Canadian judges were prohibited from voting. Although, obviously judges are appointed by the dominant political party, there is apparently far less political activism in the Canadian appointive process even though many judges were members of provincial parliaments, crown prosecutors, or held some other elective or appointive office. Once appointed, judges strictly avoid political involvements, or even friendships.

Appointments to courts composed of a small number of judges are invariably made from lawyers practicing in another community. Except for courts in large cities like Toronto and Vancouver, new judges must either commute from their hometowns or move to the place to which they have been appointed to sit. Judges tell me that they have had to move hundreds of miles in order to accept a judgeship. Others commute as much as 100 miles per day. Canadian judges do not regularly lunch with their former partners or associates. They appear to remain somewhat aloof from the practicing bar not only socially, but also during the conduct of trials. Sidebar conferences and discussions in the robing room are rare.

Another curious difference in preserving the appearance of judicial impartiality arises under Canadian pretrial procedures. The judge who engages in the pretrial is prohibited from hearing the case, even with a jury.

Public criticism of the courts is rare and muted. To date there have not been the scandals that have plagued many American state courts. Members of Canadian courts rarely criticize their colleagues either in speeches or opinions. Canadian judges express shock and dismay at the outspoken criticism of United States Supreme Court Justices expressed in dissenting and concurring opinions. It would be unthinkable for a Canadian judge to write, as did Mr. J. Stevens in *Phillips Petroleum v. Shutts*, "I trust that today's decision is no more than a momentary aberration."

Boards of judicial review and judicial ethics composed of non-judges do not exist in Canada. Apparently no one has seen the need for such extra-judicial oversight or control. Of course, this situation may change as Canadian courts begin to exercise the new powers implicitly granted to them by their Bill of Rights.

Comparing Authority

Canadian judges exercise extraordinarily broad discretionary powers, but are wary of using their constitutional authority. For example, in the discussions of recent Canadian cases, the judges expressed the opinion that they were

to approach the Chief Judges as well as any other appropriate authorities in British Columbia, Alberta, Saskatchewan and Quebec with respect to having their civil judgments included in the data base. We will be joining the British Columbia Court of Appeal, the Section 96 Courts in Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island as well as the Provincial Court (Criminal Division) in Ontario.

In return for allowing Quic/Law to publish our decisions and create a data base, the system will allow judges (currently only Ontario) unlimited free searching of the provincial reports as well as the Small Claims data base.

I am very pleased with the progress in creating an electronic Small Claims Reporter. I hope to report that all civil judgments from across the country are on-line in one data base in the very near future. I hope to have garnered the support of the Chief Judges and the provincial representative by the end of this Conference.

Judicial Education

Your Chairperson has worked with the Director of the Canadian Judicial College so that there will be a three to four day joint session at the Judges' Training Conference in March 1987. It is hoped that the budget of the College will allow for an additional day of exclusively civil courses to be offered.

I sincerely hope that we will be able to have a strong component of civil judges (both new and experienced) present in March 1987, particularly given the cancellation of the civil program in March 1986.

Liaison

The Committee is now on the mailing lists for Annual Reports from all of the Law Reform Commissions in Canada as well as being noted as a contact body for the Ministries of Consumer and Corporate Affairs across Canada.

Your Chairperson is in periodic contact with the Provincial Judiciary Committee of the Canadian Bar (Ontario Branch). I am given to understand that a recommendation with respect to the process for setting judicial emoluments will be made to the Attorney General of Ontario in the near future.

The Committee has started the process of becoming actively involved in the deliberations of the Uniform Law Conference of Canada. I would like some direction from the Executive. I had hoped to find an easy way of setting up a consultation process.

Mediation Training

I was fortunate to be assisted this summer by law students who did some preliminary work with respect to the Uniform Law Conference and the creation and administration of Uniform Codes in the United States. In addition, they assisted in a preliminary way with gathering information relating to the facilities available for mediation training.

Your Committee feels that the training in mediation would be of great benefit to civil judges who are hearing pretrials, whether formal or informal. The gathering information process is ongoing and I hope to be able to make a recommendation by the next Annual Meeting.

Miscellaneous

Your Committee has attempted to encourage judges in the civil area to make contributions to the Provincial Judges Journal. We will continue to do this as well as to set up lines of communication with judges who hear civil matters across the country with respect to the reporting of judgments as well as relating to information concerning the activities of this Committee.

You may be interested to know that the Provincial Court (Civil Division) Judges' Association is in the process of making a submission to the Zuber Inquiry in Toronto. I hope to be able to orally report on the recommendations which will be made in that Submission.

Once again, I would like to thank the members of the Executive for their active and continuing support of the Committee and the civil judiciary which it represents.

Report of The Executive Committee Regarding The Committee on The Law

by Sr. Judge Charles Scullion

I wish to report that Clare E. Lewis has resigned from the bench to take up new duties as the Public Complaints Commissioner for the Metropolitan Police Department and has resigned as Chairman of the Committee on The Law. The President, Judge Ian Dubienski, requested that I should fill in for Clare and I am happy to do so.

During the short period of time that I have been Chairman, I have been in touch with Mr. Tollefson, Co-ordinator of the Criminal Law Review of the Department of Justice. At his request, I have attended several meetings with His Honour Judge Bernard Grenier and Ms. Josselin Bujold to discuss amendments to the Criminal Code dealing with mischief and arson. These meetings consisted of Judges, Defence

Counsel, Crown Attorneys, Professors of Law and Police Officers and lively discussions were held regarding the amendments. In addition, the members of the Committee on The Law received material dealing with amendments to the Criminal Code regarding arson and vandalism and submissions have been made to His Honour Judge Bernard Grenier by the Committee regarding the above matters. In addition, we have been studying the new suggested amendments to the Criminal Code dealing with preliminary hearings, pre-trial hearings and discovery by the Crown and Defence Counsel.

Judge Paul Mailloux of Quebec has resigned from the Committee and in his place His Honour Judge Joseph Tarasofsky has kindly offered to take his place. The members of the Committee are:

Judge Gary Cioni — Alberta
Chief Judge Harold ff Gyles — Manitoba
Judge Joseph Tarasofsky — Quebec
Judge James McNamee — New Brunswick
Senior Judge Charles Scullion — Ontario

Rapport du Comité sur la Nomination des Juges

par M. le juge Yvon Mercier

Ce comité existe depuis un an. Il fut créé l'an dernier par notre président, dans le but d'évaluer la sitution en regard des conditions qui devraient prévaloir, dans la nomination des Juges. Même si ce comité en est à ses premiers pas, le problême est cependant aussi vieux que la première nomination des Juges, dans notre système.

Les Juges et les avocats, de même que leurs associations, ont souvent discuté de ce problême de nomination des Juges et au cours des années, quelques idées nouvelles ont surgi. Sont-elles bonnes et est-ce que chaque province devrait adopter une procédure uniforme et obligatoire, à chaque fois qu'un Juge est nommé?

La plupart d'entre nous ici, serons d'accord pour dire que le Gouvernement devrait adopter certaines règles à cette fin.

Cependant, sur quels critères, autres que politiques, devrait-il baser sa décision? Nous conviendrons aussi que depuis toujours, la plupart des nominations ont un lien direct avec les convictions politiques et l'appartenance au parti au pouvoir de celui ou celle qui postule le poste. Par exemple, nous pouvons nous demander de quelle façon nous avons été nommés, et ne dirons-nous pas que notre nomination en est une excellente!

En dépit de ces considérations, nous avons examiné différents modes de nomination et avons constaté qu'il n'est pas facile de trouver la formule magique. Au moins, nous avons réalisé celà.

A la dernière réunion de l'exécutif de cette Association, j'ai distribué à tous les participants, une copie de la Loi et des Règlements se rapportant à la «Loi des Tribunaux Judiciaires» (S.R.Q. 1964 c. 20) laquelle fut adoptée le 6 juin 1969, par le Gouvernement du Québec. Ce document explique la procédure à suivre lors du choix des personnes aptes à être nommées Juges. Je vous donnerai ici, certains détails de l'article 2:

> «'Lorsqu'un Juge doit être nommé, le Ministre fera publier alors ou pendant les six mois précédent la vacance qui doit être comblée, un avis dans le Journal du Barreau du Québec ou dans un journal national, régional ou local, invitant les personnes intéressées à soumettre leur candidature et informant toute personne voulant proposer quelqu'un qu'elle considère apte à exercer la fonction de Juge, de le faire.»

La personne qui rencontre les exigences demandées par la Loi, doit fournir certains renseignements, par exemple, elle doit établir son appartenance au Barreau depuis les dix dernières années, en outre de plusieurs autres informations. Ensuite, le Ministre mettra en place un comité de trois personnes nommées par lui, incluant un président. Ces trois personnes sont, un juge de la Cour où il y a une vacance, un avocat membre du Barreau et une personne qui n'est ni juge ni avocat.

Une fois que le comité a rencontré tous les candidats, il remet son rapport au Ministre, le plus tôt possible. C'est alors que le Ministre fait sa recommandation. Il peut certes nommer un avocat ayant eu dans le passé, des liens avec son parti, mais au moins cet avocat a été recommandé par le comité et répond à certains critères.

Comme vous pouvez le voir, il y a place à amélioration, même si ce système nous apparaît comme l'un des meilleurs à date. J'ai eu l'occasion de lire la déclaration de principes, mise de l'avant par le Comité sur l'indépendance judiciaire, comtié présidé par le Juge Schollie d'Alberta. Plusieurs de ces principes pourraient facilement être inclus dans la déclaration de principes de ce comité. Il est d'une importance capitale que la nomination des Juges se fasse le plus objectivement possible, de façon à éviter toute critique, une fois la nomination faite. Vous devez savoir que certains membres du Barreau de l'Ontario

Oh Canada! Where Judges Go First Class

by Lois G. Forer

Editor's Note: This short paper is reprinted from an American periodical entitled, "The Judges Journal" which is published by the A.B.A. Press for the Judicial Administration Division of the American Bar Association. Judge Forer is a Judge on the Pennsylvania Court of Common Pleas, Philadelphia. Her most recent book, "Money and Justice" won an A.B.A. Gavel Award.

Although every American judge has probably participated in conferences with his or her colleagues, not many of us have been able to hear strikingly similar, if not identical, cases to those we have tried, analyzed by judges who use different procedures and who operate under a different concept of the role of courts and judges. From such an experience one learns that there are other ways of dealing with the same problems; some far better and others far less observant of the rights of litigants.

For two years I have participated in the seminars of the Canadian County and District Court Judges. These judges sit in trial courts of general jurisdiction hearing family, civil and criminal matters, with the exception of murder. At the seminars Canadian law professors and judges discuss recent developments in many areas of substantive and procedural law, using scholarly papers distributed several weeks prior to the meeting. The judges criticize and defend their own decisions and decisions of the appellate courts with much spirit. One of the most helpful sessions, entitled "Was I Wrong?" is devoted to a series of cases in which judges ask their colleagues' advice on troublesome decisions they have made during the past year.

The Canadian judiciary has included in their seminars for some years an English judge who analyzed the cases in the light of English law and practice. In 1984, after Canada adopted as part of its Constitution a Bill of Rights modeled on the United States Bill of Rights, I was invited to present the perspective of an American trial judge. The Canadian judges were particularly interested in what is to them a totally new concept, the courts' authority to declare a statute unconstitutional.

In the very friendly, informal conversations with the judges, as well as the structured sessions, it became apparent that our Canadian colleagues' view of their role, and the attitude of the citizenry towards the courts and judges, are very different from those of the American judiciary and public.

I should like to share with my fellow American judges some of my new information and impressions and suggest that we should invite Canadian, British and Continental judges to participate in our state and local judicial conferences. In even the most cursory discussion of a legal problem, it was apparent that the Canadian judges read American decisions with avid interest, critical awareness, and, perhaps, some apprehension. They regularly refer to English, Australian, and American law. Unfortunately, few American judges and lawyers make a similar effort to inform themselves of developments in the law of other jurisdictions. We might benefit from a less parochial view of the law and the function of the judge.

Striking differences in attitudes and practice between America and Canada co-exist with very strong similarities. On both sides of the border we are inclined to believe that there is little difference between Canadians and Americans. We are both former colonials; both derive our legal systems from English common law. Both nations are composed of immigrants of many different ethnic backgrounds. The two countries span the continent with vast territories and great natural resources, and were settled by pioneers with a tradition of individual independence and liberty. Most lawyers and judges believe that our legal systems are fundamentally the same.

Hidden Disparity

A simple comparison of Canadian and American statutory law would seem to confirm the belief that there are few significant differences in the federal and state or provincial laws and legal systems of the two countries. There are a few, little known facts that indicate the extraordinary disparity in attitudes toward courts and judges and the perceptions of the role of the judge in society generally held by the judiciary in each country.

In Canada, public services are more highly valued than in the United States. While salary is far from an infallible guide to worth, comparable or absolute, it certainly provides a strong indication of the value society places on the work and the worker. The salaries of Canadian school teachers, for example, are significantly higher than those of their counterparts in the States. At the same time, university and grad-

by improving their participation in the criminal justice system.

We believe that all of this can be accomplished without impairing the constitutional and statutory safeguards appropriately afforded all persons charged with crime. Our goal is not to reduce the rights guaranteed defendants but rather to assure the rights of victims and witnesses.»

Ce que l'on demandait alors aux juges était une reconnaissance de leur part des problèmes auxquels les témoins étaient soumis dans leur confrontation avec l'appareil judiciaire avec l'appui de leur intervention dans la mesure où celle-ci pouvait s'exercer.

Le concept du respect à l'égard du témoin ne peut difficilement se dissocier de sa réelle manifestation. Notre participation à cette convention, avec le thème qui nous a été proposé en est déjà une concrétisation, et notre encouragement à l'implantation de certains services jugés essentiels en est une autre formulation.

Comme juges au procès, (trial judges) notre préoccupation à l'égard du témoin peut se manifester sous diverses formes suivant les initiatives laissées à notre discrétion.

Le rituel d'une cour de justice avec tout l'apparât qu'elle présente ne fait point obstacle à ce que nous nous départissions d'une trop sévère et rigide attitude en ce qui concerne le témoin et dont le traitement se doit d'être à tout le moins quelque peu nuancé avec celui réservé à un accusé.

Sans nous prêter à une complaisance indue à son endroit, quelques propos de notre part pourraient lui suffire pour le satisfaire de ce que sa collaboration avec la justice ne se résume pas à un fardeau que la procédure pénale lui impose.

Si mes propos vous portent à croire que ma présentation est en quelque sorte un plaidoyer en faveur des témoins, je puis vous assurer que dans mon esprit, mes observations dépassent largement cet entendement alors qu'il s'agit plutôt de nous rendre à une constante réalité.

Le système permet de puiser dans une masse considérable de citoyens pour répondre aux exigences de la procédure pénale. Or, si nous devions faire le bilan entre la quantité de citoyens auxquels une citation à comparaitre a été signifiée et le nombre de ceux d'entre eux qui ont effectivement rendu témoignage devant le Tribunal, nous y trouverions une disproportion de grande incongruité et qui est source de ressentiment.

Suite à une étude personnelle, je pourrais à ce sujet vous citer des chiffres plus précis, mais votre expérience individuelle vous permet de vous en satisfaire. De cela également nous devons nous en soucier.

Voilà très succinctement les propos dont je voulais vous entretenir et auxquels je mets un terme en vous invitant chaleureusement à des échanges d'idées et dont je ne peux manquer d'en bénéficier.

Il était valable que notre intérêt à l'égard des témoins soit porté à la connaissance du public et il nous appartient maintenant d'en measurer notre action dans l'optique d'une saine administration de la justice.

En terminant, je vous remercie de votre aimable et bonne attention, de même que j'entends me prêter bien volontiers à vos interventions.

songent à publier un recueil contenant les forces et faiblesses, les tendances politiques et les travers des Juges de l'Ontario: Ce livre serait éventuellement publié par le «Law Union of Ontario», un groupe de deux cents avocats réformistes. Le volume serait vendu aux avocats désirant être informés sur l'évaluation du Juge. Que devons-nous penser de ce geste?

Des membres de notre exécutif nous ont suggéré de rencontrer des représentants du Barreau Canadien sur le sujet, ce qui ne nous fut pas possible jusqu'à maintenant. Cependant c'est bien notre intention de le faire. Dans les prochains mois, le Gouvernement du Québec veut reviser une réforme du mode de nomination des Juges et nous souhaitons que de nouvelles avenues soient mises de l'avant, pour réaliser davantage l'intégrité et l'indépendance de la Magistrature.

Notre comité acceptera avec plaisir toutes les suggestions que chacune des Provinces voudra bien nous soumettre. Nous pourrions tous en retirer un enrichissement, au profit de l'Association.

M. le Président, voilà le résumé des réflexions de ce comité. Avec encore quelques efforts il sera possible de trouver une formule convenable à toutes les Provinces du Canada, laquelle ensuite, pourra être transmise aux Gouvernements Provinciaux.

IMPORTANT NOTICE

CHANGE IN DATES FOR 1987 C.A.P.C.J. CONFERENCE

THE 1987 C.A.P.C.J. CONFERENCE WILL BE HELD IN VANCOUVER, BRITISH COLUMBIA, ON THE FOLLOWING DATES:

SEPT. 2, 1987 – SEPT. 5, 1987

(Both Dates inclusive)

— NOT AS PREVIOUSLY ANNOUNCED

PLEASE MAKE THE NECESSARY CHANGES IN YOUR DIARIES.

— Judge Jerome Paradis
'87 Conference Chairman
Vancouver, B.C.
Tel. (604) 980-4861

The Law About Evidence of Identification[1]

by His Lordship The Honourable Mr. Justice Roger P. Kerans
Court of Appeal of Alberta

Until now, no special evidence rules have existed for identification evidence. Identification was just another fact-issue, the eyewitnesses was just another narrative witness, and reliability of the witness of course is a question of weight for the trier of fact. Nevertheless, two related and special problems have become the subject of concern: first, witnesses who claim to recognize a stranger are, as a matter of notorious fact, sometimes mistaken; second, triers of fact, especially juries, might accept this mistaken testimony. Some call for new rule, and one can see the need for start of new or special rules.

Error by the Witness

There are two sources of attack on the reliability of the eyewitness; judicial experience, and controlled studies. The *Devlin Report*[2] is the leading expression of the former; as for the latter, a leading North American student is Dr. Elizabeth Loftus, whose recent book, *Eyewitness Testimony,*[3] has received wide recognition.

While consistently confirming a significant rate of witness error, empirical research has not yet been able to offer compelling data about what factors are critical. Professor Lindsay recently reports[4]:

> Surprisingly, the results of staged crime studies fail to indicate consistent effects for most estimator variables. For example, research fails to confirm strong effects of length of exposure (within the limits of the studies) on identification accuracy. Crimes of 45 seconds produced about the same rate of accurate identification as crimes of shorter duration (e.g. 20 seconds). Being the victim of the crime did not lead to a higher rate of accuracy than being a bystander. Race of the criminal and witness had no significant impact on the rate of accurate identification but did influence the rate of false identification — eyewitnesses of a different race than the suspect produced significantly *fewer* false identifications than did eyewitnesses of the same race. In general, it would appear to be difficult to define conditions under which accurate identifications might be expected.

Whatever the source of the insight, it is now accepted in Alberta as a matter of law that every identification of a stranger might be honestly mistaken, and the risk of error is sufficiently high that it should be the basis of a reasonable doubt.[5] As the *Devlin Report* said, ''It is only in exceptional cases that identification evidence is by itself sufficiently reliable to exclude a reasonable doubt about guilt.''

Credulousness by The Trier of Fact

The *Devlin Report* suggests and the research tends to confirm that a jury will, about 70% of the time, accept the identification of a stranger even when there is no support for it.[6] The Alberta Court of Appeal has also accepted that a judge sitting as a trier of fact has no special ability to isolate reliable from unreliable dock identification.[7] Hence these Alberta rules: (1) no conviction can be founded upon the untested and unsupported identification of a stranger by pointing out in the dock; (2) where the identification is allegedly supported (by other facts, a concurring witness, or tests) great care must be taken to be certain that the other evidence indeed tends to show that the identification is correct.

Protective Steps

The *Devlin Report* recommended three protective steps, and others have suggested yet another. I will attempt to review the present state of these in the law of Canada today.

(1) The General Warning

The general warning comes from an Irish case.[8] Many judges say something like this:

> In the history of our law not many people have been wrongly convicted; but on those occasions where somebody has been wrongly convicted, it is usually because of mistaken reliance on an eyewitness identification. However, honestly offered, such evidence might always be mistaken.

The Supreme Court of Canada in *Vetrovec v. The Queen*[9] speaks approvingly of a short, sharp warning about potentially unreliable evidence. The Alberta Court of Appeal has said that the general warning is never out of place.[10]

Je puis me permettre d'affirmer que nos débats ont été empreints d'harmonie et qu'il n'en est ressorti aucun malaise.

Ce qui importe de retenir est le fait que nous sommes parvenus à un accord permettant aux agents du système de départager entre eux l'application de certaines mesures cadrant avec les conclusions du rapport, et que nous avons désignées comme étant des engagements moraux.

Pour les fins de nos discussions, et en excluant les dispositions strictement administratives, je vous énumère succinctement les engagements que l'on a conçus à intérieur du credo réservé à l'intention des juges:

— Utilisation d'un langage moins hermétique en s'adressant aux témoins et en motivant les décisions susceptibles de les conserver;

— Ne recourir à l'ordonnance d'exclusion des témoins que dans la mesure où il nous apparaît vraisemblable qu'ils puissent être influencés par le récit de l'autres témoins;

— Assurer le respect de la vie privée des témoins en intervenant dans les cas de harcèlement ou d'interrogatoire abusif;

— Dans le cas d'une remise de l'audition, s'assurer de la disponibilité du témoin;

— Favoriser les ordonnances de réparations découlant de l'application des articles 653 et 663 du Code pénal;

— Favoriser la substitution par des photographies des pièces à conviction et en ordonner la remise à leurs propriétaires légitimes;

— Expliquer à l'égard du témoin toute décision susceptible d'intéresser ce dernier;

— Généralement, coopérer avec les autres intervenants dans le système pour éviter tout sentiment de frustration chez le témoin.

Entré en vigueur le 6 février 1984, ce service à la clientèle s'est développé avec une gamme additionnelle de services qui s'étendent maintenant aux autres juridictions.

Ce sont là, dans l'ensemble, des gestes qu'il nous est permis de poser et qui répondent, peut-être d'une façon imparfaite, aux besoins.

L'une des faiblesses de notre système, pour ne pas dire carence, consiste dans le fait qu'il prête le flanc, sous le prétexte d'une impérative nécessité, à une utilisation inconsidérée, irrationnelle et abusive des témoins.

Notre expérience personnelle et certaines études à ce sujet peuvent, à mon sens, nous permettres de soutenir une telle affirmation.

Il m'est permis d'affirmer que plus de 80% des causes criminelles sont disposées sans qu'un procès ne soit effectvement tenu, et pourtant, tout au long de la procédure pénale, les témoins sont généralement omniprésents.

L'on me dira sans doute que la présence d'autant de témoins a pu être déterminante dans solution des dossiers, mais la contribution qu'elle emporte ne manque pas de pécher par son extravagance.

J'en arrive à mon dernier point et qui est peut-être le plus délicat.

Il y a lieu de nous demander s'il n'y a pas lieu d'apporter certaines modifications dans notre attitude et notre comportement à l'égard des témoins dans l'exécution de notre fonction.

Bien que ce soit la première fois, à ma connaissance, qu'un organisme aussi important que le nôtre nous invite à nous livrer à nos réflexions personnelles, il y a eu néanmoins certains précédents.

Je me contenterai de vous rappeler que nos voisins du sud se sont penchés sur la question à l'occasion d'une Conférence tenue au Nevada, le 2 décembre 1982, sous les auspices de «The National Judicial College» et qui comprenait la présence d'un nombre impressionnant de juges de l'ensemble des Etats américains.

Dans le cours de telles assises, les juges, étant sensiblilisés au problème, avaient convenu d'accepter pour eux-mêmes certaines recommandations pour l'adoption de pratiques judiciaires de nature à alléger la lourde responsabilité imposée aux témoins.

La justification du geste imposé se retrouvait dans le préambule qui précédait l'adoption des recommandations formulées avec l'acceptation de certaines propositions que je limite aux suivantes:

> «We (the judges) have concluded that is our responsibility as trial judges not only to make improvements within the judicial system, but to take the initiative in coordinating the various elements of the criminal justice system and take the leadership role that is consistent with the doctrine of separation of powers.
>
> We are confident that our recommendations will greatly help witnesses to crime by improving the necessary information and services provided, and create increased respect for the judicial process

The principle of our neutrality poses no obstacle to action taken towards this end».

Peut-être me serais-je montré moins affirmatif si je n'avais pas, au cours de mes recherches, répéré de nombreuses interventions où les juges ont tenté d'atténuer les rigueurs de notre système à l'égard des témoins impliqués dans le processus pénal.

C'est donc ici que j'entame mes remarques en réponse à la dernière question en précisant davantage les gestes que nous pouvons poser et les initiatives auxquelles nous pouvons nous livrer sans pour autant créer un affrontement ou causer un empiètement sur les principes fondamentaux de notre système pénal.

Tels gestes peuvent consister en des initiatives personnelles ou collectives, ou par une concertation avec d'autres intervenants dans le système de justice. Il y a également lieu de se demander si un certain changement dans nos pratiques et attitudes pourrait être d'un apport valable pour contrer les inconvénients du processus à l'égard du témoin.

A travers le pays, de nombreux projets-pilotes ont été conçus et où la participation des juges a largement contribué à leur implantation.

J'en limite l'énumération à ceux-là seuls qui ont été portés à ma connaissance.

Je vous parlerai en premier lieu du «VICTIM WITNES ASSISTANCE PROJECT» qui a pris naissance à Winnipeg en 1981. Je présume que ce projet subsiste encore.

Celui-ci comporte une gamme de services offerts indistinctement aux témoins et victimes d'actes criminels et qui sont de nature à répondre à des besoins bien précis.

La littérature que je possède fait mention d'un comité-aviseur qui avait été formé avec l'adhésion du Juge en chef de la Cour Provinciale, et la nomination d'un coordonnateur.

Il y a également cet autre projet qui a été crée en 1981, à Calgary, sous la désignation de «CALGARY VICTIM ASSISTANCE PROGRAM».

Bien que ce projet gravite davantage autour des victimes d'actes criminels, les services offerts s'inscrivent dans leur confrontation comme témoins avec le système pénal. L'organigramme annexé au projet me permet de croire à une certaine coopération de la part de la magistrature.

Il m'est permis de présumer que bien d'autres initiatives ont été prises dans le même sens à l'instigation ou avec la participation des juges et dont je n'aurais point eu l'occasion de prendre connaissance.

Encouragés par les gestes posés en autant d'endroits, nous nous sommes nous-mêmes dotés à Montréal d'un organisme qui s'intitule «LE SERVICE A LA CLIENTELE».

Il s'agit d'un réseau de services offerts généralement aux témoins et victimes d'actes criminels et dont je ne suis pas étranger à sa création.

Très brièvement, je vous dirai que ce projet a pris naissance au mois de novembre 1981, à la suite de certaines démarches faites auprès du ministère du Solliciteur-Général du Canada.

Ce projet consistait à faire l'inventaire des besoins des témoins et victimes d'actes criminels, tout en évaluant les services que notre administration qui porte le nom de «Direction régionale des services judiciaires de Montréal» était en mesure d'offrir à une telle clientèle.

Suivant une entente intervenue avec les officiers du ministère du Solliciteur-Général, et suivant la procédure adoptée ailleurs, nous avons formé un comité consultatif dont la composition comprenait note Juge en chef, Yves Mayrand, moi-même, l'avocat en chef du corps de la Police de Montréal, un de nos Sous-ministre de la Justice, un représentant des Substituts du Procureur-Général, le président de l'Association des avocats de la défense et autres agents de la justice.

Nous avons mandaté une recherchiste, Micheline Baril, dans le but de procéder à une étude exploratoire des besoins des témoins et victimes dans l'optique de l'implantation éventuelle d'un réseau de services à l'égard de ces derniers.

Cette étude a été faite à l'aide de certaines techniques des plus fiables, ayant consisté en entrevues avec les agents du système, observations dans les cours de justice, études faites sur le sujet au Canada et aux Etats-Unis, et autres méthodes d'évaluation qu'il serait fastidieux d'énumérer.

Ce travail de recherche s'est poursuivi pendant plus d'un an, alors qu'un rapport final fut déposé le 13 mars 1983.

Dans l'intervalle, le comité consultatif s'est réuni à de multiples reprises pour assister la recherchiste dans l'orientation de ses travaux.

Sur présentation du rapport, nous avons minutieusement analysé les recommandations qu'il contenait. Les rares suggestions qui étaient susceptibles d'embarrasser soit la poursuite soit la défense ont été écartées de notre considération.

(2) **Admissibility**

The *Devlin Report* and others suggest that an unsupported and untested dock identification of a stranger not be admissible. To date, no Canadian court has suggested that such evidence bears a sufficient mix of weakness and prejudice to invoke the limited exclusionary rule conceded in *R. v. Wray.*[11]

The Alberta Court of Appeal did the next best thing: in *Duhamel #1* it relied on Lord Widgery to approve a directed verdict in the face of untested dock identification and very weak supporting evidence.[12] Cases of dock identification alone continued however to be left to juries elsewhere, and they convict without interference.[13] Finally, in *Mezzo v. R.,*[14] published June 26, 1986, the Supreme Court overruled *Duhamel.* McIntyre, J., for a 5-judge majority, said:

> The problem which arises here has its roots in the tendency to overlook the division of duties inherent in a trial by judge and jury. No authority need be cited for the proposition that in a jury trial all questions of law are for the judge alone and, of equal importance, all questions of fact are for the jury alone. The distinction is of fundamental importance. It should be preserved so long as it is considered right to continue the use of the jury in the criminal law. Much of the difficulty that has arisen on this subject has been caused by a failure to recognize and preserve this distinction.
>
> It is impossible to disagree with Lord Widgery when he speaks of the danger of error in visual identification. Nobody could disagree with his assertion of the need for a careful and complete direction to the jury with regard to their treatment of such evidence. When, however, he introduces the suggestion that the trial judge should consider the quality of the evidence and, where he finds it wanting, take the case from the jury, he enters more controversial ground and authorizes the trial judge to encroach upon the jury's territory. Such a step blurs or even obliterates the clear line separating the functions of judge and jury. Questions of credibility and the weight that should be given to evidence are peculiarly the province of the jury. The term 'quality', as applied by Lord Widgery, is really nothing more than a synonym for 'weight'. To consider it, the trial judge exceeds his function.

(3) **Expert Evidence**

The U.S. Supreme Court, in *Neil v. Biggars* 409 U.S. 188 (1972), offered five factors it thought necessary to assess the reliability of eyewitnesses:

1. Opportunity to view the criminal at the time.
2. The degree of attention.
3. The accuracy of prior description.
4. The level of certainty of the witness.
5. The length of time between crime and confrontation.

These have since been assailed by scientists as unreliable, incomplete and inadequate.[15] Some[16] suggest that psychologists working in this field could, if they are permitted to testify, explain to the trier of fact not only the frailties of identification by eyewitness but the results of the latest research into the cogency of those factors upon which a jury might rely. To date, most Canadian courts[17] accept this robust English view:

> An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behavior within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.[18]

Clement, J. A., in a similar vein, criticized expert opinions about the reactions of an ''ordinary'' person:

> . . . what is involved is the intuitive perception of human nature of which Judges, and I include appellate Judges, are by common law deemed to be capable without the assistance of opinion evidence.[19]

For now, the best the courts offer is a version of the trickle-down effect:

> The conclusions which social scientists have reached in the field of identification, and particularly in the field of human behaviour, will always have their impact on the public at large from which juries are taken, as the information is disseminat-

ed and might eventually lead to legislation; it may also find its way, as it has in the past, in Judges' charges . . .[20]

To the extent that the arguments against admission are based upon the ultimate issue rule, it must be remembered that this rule was left in doubt by the Supreme Court of Canada in *Graat v. The Queen*.[21] Should not relevancy be the test? Evidence about the mistakes of other juries (real or mock) is of no evidentiary relevance. A warning about obvious pitfalls is a matter for the judge. Do you not have difficulty, however, in rejecting expert testimony which offers the trier of fact cogent reasons to doubt the conventional wisdom about when an eyewitness might be mistaken, or why?

(4) Review of Supportive Evidence (or lack of it)

The *Devlin Report* said that the judge should tell the jury, "the circumstances, if any, which they might regard as exceptional and the evidence, if any, which they might regard as supporting the identification". This is sometimes expressed only as preferred practice.[22] It is uncertain that an acquittal would be overturned for failure to do it. But in the recent case of *Canning*[23] a unanimous Supreme Court of Canada said:

> We are all of the view that while there was some evidence of identification of the accused, and while the trial judge did instruct the jury that caution should be exercised in approaching the identification evidence, he did not relate that need to the facts of this case. The result is that his charge on the issue of identification was inadequate — particularly with regard to the identification procedures adopted at the detention centre.
>
> We would, accordingly, allow the appeal, set aside the conviction, and direct a new trial.

In the light of the concern about the reliability of an eyewitness, a careful analysis of evidence which tends to support it (or not) becomes critical. What is supportive and what is not depends, of course, on the case at bar.[24] I will comment in detail only on four interesting areas: circumstantial evidence, line-ups, hypnosis, and alibis and identification.

(a) Circumstantial evidence

If the eye witness seizes the criminal and detains him and produces him in court to the judge, his ability to identify him evidently is supported by these facts. Similarly, the fact that an eye-witness to a crime happens to be a police officer (often so in traffic cases) who gives a Notice to Attend to the criminal can be a telling circumstance, as might a similar name, or address or the like. Many examples of other supporting circumstances can be found in the cases.[24]

(b) Line-Ups

The principal means of support for an identification of a stranger is to test the ability of the eyewitness. The line-up cases boil down to this: how effective, and therefore compelling, was the test?[25] If the problem is that the witness might make an honestly mistaken choice, how does it reduce the chance of error to require that choice be made amongst a pre-selected similar crowd? The answer, I think, lies in the nature of human recollection about faces. Most of us can pick out a face better than we can describe it. Those subtle variations invisage upon which the brain unconsciously relies only are effectively challenged by forcing a difficult choice. We assume that the sense of recognition expressed by an honest witness in those challenging circumstances renders the recognition relatively more reliable.

Recent research supports that assumption, but cautions against the danger of an inadequate test.[26] For example, a significant number of witnesses will identify somebody in *any* group shown. These can be eliminated if all witnesses are shown a group of persons or photographs who certainly do not include the offender. The latest research[27] indicates that later identification of a suspect by those who make such an error is very dubious. Those who do not make such a mistake are – as a group – more likely to be correct in any later identification.

A model testing procedure has been suggested by the Law Reform Commission,[28] and I commend it for your consideration. The charging judge *must*, I suggest, now point out to the jury (or publicly acknowledge if sitting alone) any weakness in the testing procedure[29] in the case before him. This would include the absence of some reasonable step, as for example a photograph of the line-up. He should warn of the danger of suggestion, intended or not. He perhaps also should point out to them that the line-up is the only appropriate testing method after the accused is in custody.[30] Moreover, I suggest that he must warn that all subsequent tests – and evidence – are only as good as the original test because, presumably, the witness, thereafter acting in the comfort of knowledge that he was right the first time, will now identify as the criminal the person previously seen.[31] This was emphasized recently when the British Columbia Court of Appeal

à cette occasion et sur lesquelles j'élaborerai davantage en abordant les autres questions que je posais plus haut.

Il est évident pour nous, et cela je l'ai répété lors d'une autre allocution que je prononçais cette fois à l'occasion d'un congrès tenu à Montréal, le 21 octobre 1982, par la Société de Criminologie du Québec, que l'on ne peut incorporer dans la procédure pénale certains droits aux témoins, non plus qu'aux victimes, sans pour autant saper à leur base les principes fondamentaux sur lesquels le système pénal lui-même a été érigé.

J'ajoutais également que l'on ne peut concilier dans une même législation deux ordres de priorité distincts, voir même opposés l'un à l'autre sans donner à cette législation un caractère d'ambivalence qui rendrait son application extrêmement complexe sinon impraticable.

En guise de conclusion, j'avais également précisé que ce n'était point tant le système pénal en lui-même qui faisait obstacle à ce que les témoins-victimes considérés somme tels puissent obtenir pleine justice mais plutôt la façon dont ils sont traités par les usagers du processus pénal.

Complétant mes observations quant à la première question posée, j'ajouterai que nous n'avons pas non plus cette autorité de formuler à l'égard du législateur une quelconque recommandation pour répondre aux besoins des témoins et que c'est en toute autre façon que nous pourrions intervenir.

Cette dernière phrase nous permet précisément d'aborder la seconde question qui porte sur la justification d'une intervention de notre part pour porter assistance aux témoins, afin d'atténuer à leur égard les rigueurs de notre système pénal.

Bien sûr, si nous devions conclure dès à présent que si l'application de la procédure pénale, de la façon dont elle est généralement appliquée, n'est point susceptible de causer la moindre frustration à l'égard du témoin, nous n'aurions pas à nous attarder sur la réponse à donner à la question ainsi posée.

Faisant appel à votre expérience aussi bien qu'à mes réflexions personnelles, il ne paraît pas que l'on puisse aussi allègrement en disposer.

Sans doute serez-vous disposés à conclure avec moi que la qualité aussi bien que l'efficacité de notre système pénal dépend pour une large part de la généreuse contribution que le témoin peut y apporter.

Dans l'application de notre système de justice et la procédure pénale qui s'y rattache, force nous est de reconnaître l'entière dépendance du témoin. De ce fait, il est inévitable qu'il puisse être soumis à certaines contraintes alors qu'il est soumis aux exigences du processus pénal. Son contact avec l'appareil judiciaire peut parfois lui paraître rude sinon vexatoire.

Je n'ai sans doute pas à vous faire l'énumération de tous les obstacles qu'il rencontre dans sa démarche pour se soumettre aux devoirs que la loi lui impose car ils vous sont sans doute aussi familiers qu'à moi-même.

Par suite de cette dépendance du témoin à l'intérieur du sytème, il ne peut donc compter que sur l'intervention et la compréhension des agents de justice.

L'absence de considération de ces derniers est susceptible d'engendrer une insatisfaction, voir même une frustration, ce sont là des sentiments qui ne sauraient être corrigés par de simples mesures coercitives à l'endroit du témoin.

Il y a donc là une responsabilité sociale que les intervenants dans le système se doivent de départager entre eux. La question qui se pose est celle de déterminer s'il nous est loisible d'y participer.

D'aucuns trouveront un empêchement majeur à une telle intervention de notre part dans ce sens en raison du caractère absolu de l'impartialité que nous nous devons d'observer, et cela en toutes circonstances, dans l'exécution de notre fonction.

Cet argument ne manque pas de force et à prime abord semble irréfutable. Il sera sans doute très intéressant d'entendre vos observations à ce sujet.

Je pose toutefois la questions suivante:

> Etant conscients de nos responsabilités n'avons-nous pas par surcroît acquis au cours de notre carrière cette discipline qui puisse nous permettre de manifester certains égards ou faire montre d'un certain humanisme à l'égard du témoin sans pour autant détourner notre attention de cet impératif devoir de neutralité?

Je soumets également à votre appréciation cette autre observation que je formulais dans mon allocution à Charlottetown:

> «A healthy image of justice is not created by only those who are directly involved in the justice system. It is a concern we must all share full and we must act when and where we can.

Les Temoins et Victimes d'Actes Criminels

par le juge Jacques Lessard, Cour des Sessions de la paix de Montréal

Lorsque j'ai été informé par la correspondance qui m'avait été adressée par le juge Desjardins que le comité d'organisation avait retenu comme thème à l'intérieur de son programme d'éducation la question des témoins et victimes d'actes criminels, il m'était venu à l'esprit qu'il s'agissait là d'une décision qui, sans que l'on puisse la qualifier de téméraire, ne manquait pas à la fois d'originalité non plus que de hardiesse.

Il s'agit évidemment d'un exercice fort délicat auquel nous sommes invités à nous livrer et où, en raison de la limitation des attributions se rattachant à notre fonction, nous nous devons de nous exprimer avec prudence et circonspection.

Sans doute qu'à l'extérieur l'on ne manquera de s'étonner de ce que les juges aient convenu de traiter ensemble d'un tel sujet, alors qu'il est à prévoir qu'une grande attention sera apportée aux propos que nous aurons échangés.

C'est d'ailleurs une expérience que j'ai vécue à l'occasion d'une allocution que je prononçais le 16 juillet 1981, lors d'une convention tenue par les juges du Nouveau-Brunswick, à St-Andrew, et que j'avais intitulée «RESPECT FOR THE WITNESS».

En cette circonstance, j'avais invité les juges à partager avec moi ma préoccupation à l'égard des témoins alors qu'ils sont confrontés avec l'application de la procédure découlant de notre système pénal, non sans avoir souligné au préalable l'importance du rôle du témoin dans l'administration de la justice.

Avant de poursuivre, je souligne que le thème qui nous est proposé semble traiter distinctement du témoin d'un acte criminel et de la victime elle-même.

Employant le seul langage que le code pénal m'autorise à tenir, j'entends réserver mes propos à la seule question du témoin, en laissant aux panelistes, pour lesquels de telles contraintes n'existent pas, de parler plus librement et avec plus d'emphase de la situation de la victime d'un acte criminel.

Pour bien nous situer dans le débat et dans l'hypothèse où nous serions conscients des problèmes auxquels le témoin est soumis et de la frustration qui en résulte pour lui, nous avons alors à nous poser les trois questions suivantes:

Existe-t-il une autorité quelconque qui puisse nous permettre de rémédier à cette situation?

Dans la négative, en quoi cette situation peut-elle justifier une intervention quelconque de notre part?

Répondant affirmativement à cette dernière proposition, quelle serait la limite des recommandations que nous pourrions formuler ou des initiatives auxquelles nous pourrions nous prêter?

Pour nous, les juges, la réponse à la première question peut être aisément formulée. J'ai d'ailleurs eu l'occasion de soumettre mon point de vue à ce sujet à l'occasion de certains débats auxquels j'ai participé.

Je rappellerai d'abord certaines remarques que j'avais formulées le 8 juin 1982, alors que je participais à un colloque tenu pour le bénéfice des juges des Provinces Atlantiques, à Charlottetown, et que je limiterai aux suivantes.

> «It must recognize that the administration of justice as such, although we could wish it other than it is at present, does not come under the judicial power either in fact or in law.
>
> Existing legislation gives us no control over the fate of the witness with the exception of the sanctions we have a right to impose on him in the exercise of our discretionary powers.
>
> Because of the basic principles of our criminal justice system the whole of the Criminal Code is concerned exclusively with the accused by reason of the objectives to be attained.
>
> His legal obligation to participate in the administration of justice serves only to reflect the duty of all members of our society to ensure the protection of the community.
>
> This is the contribution that each witness must make to promote our system of justice and to ensure that the goals forming the cornerstone of our criminal justice system are reached, despite the constraints to which he is obliged to submit.»

Ces remarques n'étaient que préliminaires à d'autres observations que j'avais formulées

approved admission of a line-up identification even when the witness could not afterwards make a dock identification.

(c) **Hypnosis**

The most recent means by which the Crown seeks to support the credit of an eyewitness is by an hypnotic test. During a trance the witness is asked again about the events in question. It is said that the witness will often recall much more detail, and damning detail. After the hypnotic episode, the witness then remembers this detail.

In a recent American case,[32] additional and compelling identification particulars were obtained under hypnosis. Before hypnosis, the two young victims were able to give only a general description of the assailant. In separate hypnotic sessions, they gave detailed descriptions from which a composite drawing was made. Later, both were able to identify their attacker in a line-up. We will, no doubt, see more of this sort of evidence.

In order to demonstrate that this episode should support, and not weaken, the credibility of the witness, it is necessary for the Crown to lead evidence to establish that memory can be enhanced during hypnosis, and that there were no improper suggestions. No doubt a trial judge would prefer a *voir dire* before the evidence of any expert as to the significance of hypnosis, or of the episode, reaches the jury. But it is not inconceivable that such evidence could reach the jury to assist them in attempting to decide whether or not to believe a recollection enhanced by hypnosis.[33]

In *Clark*,[34] these guidelines were offered:

(i) The person conducting hypnotic interview should be a qualified professional with training both in the use of hypnosis and expertise in psychiatry or clinical psychology.

(ii) The hypnotist must be independent of the party who requires his services. That is, he must be free to conduct the hypnotic interview in accordance with his professional standards rather than in concert with the party who employs him.

(iii) The hypnotist should be given only the minimum amount of information necessary to conduct the interview. This information should be communicated solely in written form.

(iv) The entire interview between the hypnotist and the potential witness should be recorded preferably on video tape, but there should at least be a complete audio record.

(v) The interview should be conducted with only the hypnotist and the subject present. If the party who employs the services of a hypnotist (whether the police or defence counsel), wishes to observe the interview, then arrangements will have to be made so that the interview can be viewed from another room by virtue of closed circuit television or whatever other mechanism is available.

(vi) Prior to the actual hypnosis of the subject, the hypnotist should conduct a lengthly interview of the subject to determine his medical history including information about the present or post use of drugs. The judgment and intelligence of the subject should be evaluated.

(vii) Prior to hypnosis, the hypnotist should elicit from the subject a detailed description of the facts surrounding the subject-matter of the hypnosis session, as the subject is able to recall them at that point in time.

(viii) The hypnotist should pay careful attention to the form and manner of his questions, the choice of his words and the avoidance of body language so that he is not either intentionally or inadvertently providing the subject with information.

(d) **Alibi**

When does the lack of an alibi or a bad alibi support identification? I would summarize the rules as follows:

(i) An alibi is given in evidence but is not believed. This cannot support identification and the jury must be so charged.[35]

(ii) An alibi is given in evidence and the Crown proves it to be false beyond a reasonable doubt. The Crown thereby has demonstrated consciousness of guilt by key evasions. This supports the identification, and the jury may be so charged.[36]

(iii) An alibi is given in evidence and in cross-examination the accused acknowledges not having offered it at the first available opportunity. Any adverse inference goes at best to credit; it cannot be evidence to support identity.[37]

(iv) An alibi is not given in evidence by the defence. An inference may be drawn that the accused was not in another place and that the eyewitness identification was not mistaken.[38] Therefore it is support, although not necessarily conclusive.

Only the last two of these are controversial and require detailed consideration.

(iii) An alibi is given in evidence and in cross-examination the accused acknowledges not having offered it at the first available opportunity. An adverse inference goes only to

credit; it cannot be evidence to support identity. The customary formulation is that:

> . . . it is a misdirection to suggest to the jury that they may infer that the story ultimately told in court is false because, had it been true, it would naturally have been raised earlier, but it is on the other hand legitimate to direct that the failure to raise it earlier may be considered in assessing the weight to be attached to it.[39]

There follows a "textbook" charge, taken from *R. v. Mahoney:*

> In considering the weight to be given to that alibi evidence you may take into account that he did not tell the police at the earliest possible opportunity he was somewhere else when the offence is alleged to have been committed *so they would have an opportunity of checking that alibi.* He is not obliged to disclose his alibi at the earliest possible moment to the authorities. But in considering the truthfulness of the story told by him at trial you may, if you see fit, take his delay in telling *the law* where he had been into account.[40]

In other words, the jury cannot infer guilt from lateness but may decide not to credit the alibi on account of lateness. I question the logic of this. If failure to co-operate with the police is not a sign of guilt, why is it a sign of untruthfulness? If one can be unco-operative and innocent, why cannot one also be unco-operative and truthful? With respect, what goes to credit is not the suggestion of recent revelation but of recent concoction. If I am right, the credit issue turns not on the earlier silence but the present explanation for that silence. Did he indeed assert his rights? Or had he merely not yet invented his story?

Let us explore this idea. There are three ways by which the jury might hear an alibi: from a Crown witness, from the testimony of the accused, and from the testimony of a defence witness other than the accused.

Except in the most unusual case, an alibi heard from a Crown witness is not less credible for being late if lateness is tied to Crown surprise. Why should the accused suffer if the Crown is surprised by its own witnesses? Lateness should not go against credit unless there is some reason to suggest recent concoction.

If, on the other hand, the alibi comes from a defence witness (other than the accused), his failure to go promptly to the police can be subject of adverse comment and inference as to credit: unlike the accused, he did not have a right to silence in the face of an accusation because he was not accused. One can assume that a good citizen would come forward. The failure to do so could come before the jury in the course of cross-examination or by rebuttal. It is evidence in itself of recent concoction. But the fact that the defence did not notify the Crown surely does not affect the credit of such a witness. Indeed, in *Mahoney* the charge quoted was criticized by Brooke J. A. as possibly misleading of the jury just because the alibi was offered principally by a witness other than the accused and the failure of the accused to come forward earlier could not affect the credit of the other witness.

Lastly, when the accused testifies yet another dimension arises. I suggest that mere lateness should not be the subject of adverse comment or inference as to credit or guilt. The proof of the pudding is that the lateness problem evaporates if he offers a compelling explanation for it. In cross-examination, recent concoction of the alibi can be suggested. In that context, his earlier opportunities to offer his story may be put to him and his explanation for his silence heard and weighed by the jury.[41] His answers may affect his credibility. Comment explanatory of this is not forbidden. But the adverse inference as to credit arises not from lateness but from his unsatisfying explanation from lateness.

The conclusion I offer is that there is no textbook charge. That inference (and comment) obtains which is appropriate to the circumstances of the case at bar. A trier of fact sitting alone should take care to make the necessary analysis in his Reasons.

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(iv) An alibi is not given in evidence by the defence. An inference may be drawn that the accused was not in another place and that the eyewitness identification was not mistaken. Therefore, it is support, although not necessarily conclusive.

Does this rule impinge upon the presumption of innocence?

The accused is entitled to wait until his trial to put forward his defence. One cannot infer guilt from pre-trial silence, especially after a caution[42] or at the preliminary hearing.[43] The failure to co-operate with the police is not a sign of guilt: it is no part of the law that the innocent, more than the guilty, throw over the right of silence and protest innocence from the start.[44] Indeed, the Crown should not lead evidence of extracurial silence because it proves nothing.[45]

Book Review

WILSON:
CHILDREN AND THE LAW (Second Edition)

by Jeffery Wilson and Mary Tomlinson
Butterworths, Toronto. (484 pages)

Book Review by
Judge Patricia M.B. Linn,
Provincial Court of Saskatchewan

As stated in the Preface by the authors, this book is an expanded and rewritten second edition of the 1978 volume and deals with most areas of the law which affect the child and his or her family in Canadian society.

Chapter 2 devotes 50 pages to Custody and Access, and thus contains some valuable information for those lawyers practising in the area of family law. The section on Enforcement of Custody Orders: Inter-Jurisdictional, is also quite useful and discusses the relevant Criminal Code provisions as well as the Hague Convention on the Civil aspects of International Child Abduction.

The book also addresses Child Protection and Adoption, Financial Support, and Children and Education. Chapter 7 — Crime and the Child, discusses extensively The Young Offenders Act, covering statements by young offenders, detention and bail, the right to counsel, transfer to adult court, and so on. It is a particularly indepth study of The Young Offenders Act that would be helpful to both judges and the practitioner involved with young offenders. The last 10 pages of Chapter 7 deal with offences under the Criminal Code in which the victim is exclusively a minor or in which the sentencing is affected by the minority of the victim. Sections of the Code discussed are, among others:

S.200 — Abandonment; S.216 — Infanticide;
S.251 — Abortion;
S.197 — Neglecting to provide Necessaries;
and the relevant Code sections dealing with sexual assault offences.

In summary, this book covers most, if not all areas of the law which deals with children, including the aspect of the child as a witness, and the child's presence in the courtroom. It is a scholarly review and thus a useful legal text for all professionals working with children. The one complaint may be the book's concentration on Ontario law for which the authors apologize in the Preface. With that caveat, I suggest the book would be a welcome addition to any law library.

93. Ibid, at p. 362
94. (1981) 61 C.C.C. (2d) 512 (B.C.S.C.)
95. Supra note 88
96. [1969] 1 All E.R. 451 (C.A.)
97. Ibid, at p. 453
98. (1983) 26 Sask. R. 122 (Q.B.)
99. See Report of Federal-Provincial Task Force on Uniform Rules of Evidence. (Toronto: Carswell 1982) 380
100. (1978) 42 C.C.C. (2d) 67 (Ont. H.C.), at p. 69
101. [1970] 3 C.C.C. 428 (Sask. C.A.)
102. (1972) 8 C.C.C. (2d) 360 (Man. Q.B.)
103. (1985) 14 C.C.C. (3d) 513 (Ont. H.C.)
104. Fontana, supra n. 8, p. 183
105. (1982) 65 C.C.C. (2d) 129; 26 C.R. (3d) 193 (S.C.C.)
106. Lee Paikin, "*Attorney General of Nova Scotia* v. *MacIntyre:* The Supreme Court Grapples with Public Access to Search Warrant Proceedings" 24 Cr. L.Q. 284
107. (1978) 435 U.S. 509
108. (1982) 137 D.L.R. (3d) 83 (Alta. Q.B.)
109. Report No. 24, Search and Seizure (L.R.C., Ottawa, 1984) 29
110. Supra Note 108
111. (1982) 26 C.R. (3d) 216 (Ont. Prov. Ct.)
112. Fontana, supra no. 8 at p. 291
113. *per* Boilard J. in *Re Gillis and The Queen* (1983) 1 C.C.C. (3d) (Que. S. Ct.) 545, at p. 550; and *per* Trainor J. in *Re Marquis Video Corp. and The Queen* (1985) 15 C.C.C. (3d) 9 (Ont. H.C.) at p. 13
114. (1983) 5 C.C.C. (3d) 12 (Ont. C.A.) at p. 16
115. (1983) 3 C.C.C. (3d) 497 (Alta. C.A.) at p. 503, aff'd. (1985) 14 C.C.C. (3d) 97 (S.C.C.)
116. (1982) 69 C.C.C. (2d) 162 (Alta. Q.B.)
117. (1985) 14 C.C.C. (3d) 97 (S.C.C.)
118. See Alan Gold, *Charter of Rights, Search or Seizure,* (1984) 27 Cr. L.Q. 22 at p. 24
119. (1985) 14 C.C.C. (3d) 513 (Ont. H.C.)
120. (1985) 15 C.C.C. (3d) 9 (Ont. H.C.)
121. See Fontana, supra no. 8 at p. 298 ff.
122. Ibid, at p. 298-99; See also Fontana, "*A Commentary On The Law of Search and Seizure, And Its Development Since The Charter of Rights*" (National Seminar for New Provincial Court Judges, Ottawa, March 1985)
123. Supra n. 119 at p. 523
124. See e.g. *R.* v. *Hynds* (1982) 70 C.C.C. (2d) 186 (Alta. Q.B.); *R.* v. *Kevany* (1983) 1 C.C.C. (3d) 511 (Ont. Co. Ct.); *R.* v. *Carter* (1983) 2 C.C.C. (3d) 412 (Ont. C.A.); *R.* v. *MacIntyre* (1982) 69 C.C.C. (2d) 162 (Alta. Q.B.)
125. Supra n. 116
126. (1984) 39 C.R. (3d) 137 (B.C. Co. Ct.)
127. See Editor's Note, 39 C.R. (3d) at p. 139
128. (1983) 5 C.C.C. (3d) 141 (B.C.C.A.)
129. (1983) 5 C.C.C. (3d) 156 (B.C.C.A.)
130. Namely, *R.* v. *Gibson* (1983) 37 C.R. (3d) 175 (Ont. H.C.); *R.* v. *Chapin* (1983) 7 C.C.C. (3d) 538 (Ont. C.A.); *R.* v. *Stevens* (1983) 7 C.C.C. (3d) 260 (N.S.C.A.)
131. (1984) 11 C.C.C. (3d) 193 (Ont. C.A.)
132. [1970] 4 C.C.C. 1; [1971] S.C.R. 272 (S.C.C.)
133. *R.* v. *Truchanek* (1984) 39 C.R. (3d) 137, at p. 178-79 (B.C. Co. Ct.)
134. *Newsletter* 2-4-41, at p. 46
135. Cohen, *The Impact of Charter Decisions on Police Behaviour,* (1984) 39 C.R. (3d) 264, at p. 280
136. See p. 68 infra. and no. 125 infra.
137. See s. 52(1) of the Constitution Act, 1982.

> "52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

Does the situation change after the Crown's case is closed? The moment the accused has been waiting for has come. If he remains silent, is the jury entitled to draw an adverse inference from the failure of the accused to call evidence of alibi? The adverse inference presumably is that the accused was not in another place and this supports the identification evidence.

Of course, no comment by the charging judge is permitted.[46] The question remains whether the jury (or judge sitting alone) can nevertheless take the failure to call evidence into account. Chief Justice Freedman said,

> The onus of proving guilt rests upon the prosecution from the beginning to the end of the case. The prosecution cannot invoke the accused's non-testifying as an element in the charge of that onus.[47]

Consider this reply from Laskin C.J.C.:

> What I have termed the initial benefit of a right of silence may be lost when evidence is adduced by the Crown which calls for a reply. This does not mean that the reply must necessarily be by the accused himself. However, if he alone can make it, he is competent to do so as a witness in his own behalf; and I see nothing in this that destroys the presumption of innocence. It would be strange, indeed, if the presumption of innocence was viewed as entitling an accused to refuse to make any answer to the evidence against him without accepting the consequences in a possible finding of guilt against him.[48]

This I suggest, was a re-statement of this 166-year old statement by Lord Tenterden in *R. v. Burdett*

> No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absense (sic) of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know, that, where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtility (sic) and refinement.[49]

The Laskin view prevailed in the Supreme Court of Canada in *Shelley*[50] and again in *Vezeau*.[51] The issue has been re-opened by the *Charter*, and the recent case of *Oakes*[53] casts doubt upon the Laskin analysis. Dickson C.J.C. there says:

> A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

This statement at first sight rules out any prospect of the resolution of a reasonable doubt by reliance on the failure of the defence to lead evidence to contradict a *prima facie* case, by which I mean one which tends toward guilt but where an innocent explanation is possible, as in a circumstantial case or a case of positive identification which might be mistaken.

Chief Justice Dickson did not consider the approval of Lord Tenterden's statement by the Supreme Court in *Coffin*[54], nor similar statements by that Court in *Wild*[55], *Vezeau*[56] and *Corbett*[57]. Moreover, the only issue before the court in *Oakes* was whether a statute might *oblige* a jury to draw an inference in the face of actual doubt about guilt. Neither Parliament's statutes nor a Court's orders can require a jury to ignore a doubt simply because Parliament (or a court) thinks that the doubt is irrational or perverse. It was that concept which the learned Chief Justice was addressing in the passage quoted, and not the converse proposition that a jury is free, in a case where the Crown case strongly tends toward guilt, to resolve any lingering doubt by relying upon the fact that no innocent explanation is offered in the evidence.[58]

NOTICE OF ALIBI

In addition to the suggestion of concoction, the late alibi raises a question about the administration of justice. Without notice of it, the Crown is surprised and cannot rebut without an adjournment to investigate. The Court is understandably reluctant to adjourn. The result is trial

by ambush, and the judge is for that reason inclined to view the last-minute alibi with a baleful eye. In *Rafferty*,[59] I suggested in *obiter* that a judge might refuse to hear evidence in rebuttal of an alibi if the Crown had not given notice of it to the accused. In that case, the accused gave notice of alibi. Can a judge go one step further and refuse to hear alibi evidence when no notice was given?

A U.K. statute now permits a judge to refuse to admit alibi evidence which is not properly notified,[60] but the Court of Appeal there has said that a refusal to admit would be "rare indeed".[61] The obvious difficulty is that a refusal to admit an alibi is even more disadvantageous to an accused than the admission of it with a comment that the lack of notice is a sign of guilt.[62] Nevertheless, it can be argued that the *Charter* right to be presumed innocent does not include the right to deny the Crown a fair trial. Some day the courts will be required to decide whether the need for a form of pleadings in criminal cases is not a reasonable limit on that right.[63]

Footnotes

1 By R.P. Kerans, J.A. (with assistance of Brett Townsend, Student-at-law) 1 May, 1986.
For delivery to the Provincial Court of Alberta, Annual Meeting, Jasper.
This paper is an up-date of one on the same subject published in the Criminal Law Quarterly. See (1982) 25 C.L.Q. 47.

2 Report to the Secretary of State for the Home Department of the Departmental Committee on *Evidence of Identification in Criminal Cases.* Chairman: The Right Honourable Lord Devlin. Report filed April 26, 1976. London: Her Majesty's Stationery Office. See also Glanville Williams, *The Proof of Guilt* (London, Stevens, 1955) (a Hamlyn lecture).

3 (Cambridge, Harvard University Press, 1979).

4 "Issues and Policy in Eyewitness Identification: Psychological Perspectives" (1985) 47 C.R. (3d) 252 at 255-6.

5 *R v. Atfield* (1983) 42 A.R. 294 (Alta. C.A.).

6 Lindsay, *op. cit.* footnote 4 p. 265.

7 *R v. Atfield*, supra, footnote (5).

8 *The People v. Casey (No. 2)*, [1963] I.R. 33 at p. 39. See also *R v. Todish* (1985) 18 C.C.C.(3d) 159 (Ont. C.A.); *R v. Sophonow* (1984) 12 C.C.C.(3d) 272, 17 C.C.C.(3d) 128.

9 (1982), 67 C.C.C.(2d) 1, 136 D.L.R.(3d) 89, 41 N.R. 606 (S.C.C.).

10 *R v. Lin and Lin* (1979), 13 A.R. 597 at pp.600-2. See also *R v. Bryzgorni* (March 19, 1982, Alta. C.A.). See, for Manitoba *R v. Sophonow*.[8] The Ontario Court of Appeal in *R v. Olbey* (1971), 4 C.C.C.(2d) 103, 13 C.R.N.S. 316, [1971] 3 O.R. 225 (C.A.) had said that a general warning is not bad. In *R v. Spatola* [1970] 4 C.C.C. 241 at p. 248, 10 C.R.N.S. 143 at p. 151, [1970] 3 O.R. 74 (C.A.) (this is similar to the English rule. See *R v. Long* (1973), 57 Cr. App. R. 871) it said that the warning is mandatory where the identification evidence is "offset either by evidence of a contrary nature or by evidence of a failure or inability of another witness equally in a position to see the alleged offender, to make an identification." I conclude that in Ontario a general warning is essential where there is any evidence inconsistent with the identification (as, for example, an alibi) or where there is a witness (as there almost always is) who might but did not support the identification; in short, in almost every case. The British Columbia Court of Appeal in *R v. McCallum* (1971), 4 C.C.C.(2d) 116, 15 C.R.N.S. 250, [1971] 4 W.W.R. 391 (B.C.C.A.) said that no formula of words is essential so long as it made abundantly clear to the jury that they must scrutinize the evidence of identification with the greatest care and that they must not convict unless satisfied beyond reasonable doubt.

11 [1970] 4 C.C.C. 1, 11 C.R.N.S. 235, [1971] S.C.R. 272.

12 *R v. Duhamel* (1980), 56 C.C.C.(2d) 46, [1981] 1 W.W.R. 22, 24 A.R. 215 (C.A.). But see *R v. Shand* (May 12, 1980, Ont. Co. Ct.), summarized in 4 W.C.B. 443. The court in *Duhamel* followed the English Court of Appeal in *R v. Turnbull*, [1976] 3 All E.R. 549, and distinguished the decision of the Supreme Court of Canada in *United States of America v. Sheppard* (1976), 30 C.C.C.(2d) 424, 34 C.R.N.S. 207 *sub nom. United States of America v. Shephard*, [1977] 2 S.C.R. 1067, on the grounds that the court there said only that a *prima facie* case includes one the trial judge happens not to believe; it did not decide that a *prima facie* case included one so weak as to be incapable of belief by any reasonable person.

13 See, for example, *R v. Hutton* (1980), 43 N.S.R.(2d) 541 (S.C. App. Div.) and, in the United Kingdom, *R v. Caird,* [1970] Crim. L.R. 656. Of course, such verdicts are also often upset as unsafe. See for example, *R v. Browne and Angus* (1951), 99 C.C.C. 141, 11 C.R. 297, 1 W.W.R. 449 (B.C.C.A.).

14 *Mezzo v. R,* S.C.C. unreproted as yet. An appeal from the Man. C.A. (1983) 35 C.R. (3d) 272.

24. *R.* v. *Kehr* (1906) 11 C.C.C. 52, at p. 57 (Ont. H.Ct.); see also *Re Kerwin and R.* Supra n. 18
25. *Re McAvoy* (1971) 12 C.R.N.S. 56, at p. 65 (N.W.T.)
26. *R.* v. *Solloway Mills and Company* (1930) 53 C.C.C. 261
27. ibid at p. 264. See also *Shumaitcher* v. *A.G. of Saskatchewan* 1960 129 C.C.C. 270; *Re Dare to be Great of Canada (1971) Ltd. and the Attorney General of Alberta* (1972) 6 C.C.C. (2d) 408, regarding description of documents
28. *Regency Realties Inc.* v. *Loranger* (1962) 36 C.R. 291 (Que. S.C.)
29. *R.* v. *Johnson & Franklin Wholesale Distributors Ltd.* (1973) 12 C.C.C. (2d) 221 (B.C.C.A.)
30. *Regina* v. *Trottier et al Ex Parte McLaughlin et al* (1966) 4 C.C.C. 321 (Que. C.A.)
31. Re Worrall (1965) 2 C.C.C. 1
32. See note 9 supra and the accompanying test
33. *Colet* v. *R.* (1981) 19 C.R. (3d) 84 (S.C.C.)
34. *R.* v. *Black* (1973) 6 W.W.R. 371 (B.C.S.C.)
35. R. v. Lyons (1892) 2 C.C.C. 218 (Ont.)
36. (1972) 8 C.C.C. (2d) 364 (B.C.S.C.)
37. *R.* v. *Colvin, Ex Parte Merrick et al* (1970) 3 O.R. 612, 1 C.C.C. (2d) 8 (H.Ct)
38. *Weins et al* v. *R.* (1973) 6 W.W.R. 757 (Man. Q.B.)
39. *Campbell* v. *Clough* (1979) 23 Nfld. & P.E.I.R. 249 (PEI S.C.)
40. *R.* v. *Brown* (1922) 38 C.C.C. 149 (Alta. C.A.)
41. *Re Kerwin and R.* (1983) 3 C.C.C. (3d) 264 (P.E.I.S.C.)
42. (1929) 52 C.C.C. 288 (Man. C.A.)
43. [1966] 4 C.C.C. 321 (Que. C.A.)
44. (1961) 36 C.R. 291 (Que. S.C.); see also *Re Black and the Queen* (1973)
45. ibid, at p. 299
46. (1972) 16 C.R.N.S. 338 (Man. Q.B.)
47. *Capostinsky* v. *Olsen et al.* (1981) 27 B.C.L.R. 97
48. (1971) 12 C.R.N.S. 56 at p. 65 (N.W.T.)
49. (1969) 7 C.R.N.S. 239 (B.C.S.C.)
50. *Sleeth* v. *Hurlburt* (1896) 3 C.C.C. 197 (S.C.C.)
51. ibid.
52. (1920) 33 C.C.C. 110 (Alta. S.C.)
53. (1960) 129 C.C.C. 267, 34 C.R. 152 (Sask. Q.B.)
54. (1972) 6 C.C.C. (2d) 408 (Alta. S.C.T.D.); see also *Re PSI Mind Development Institute and The Queen* (1978) 37 C.C.C. (2d) 263
55. (1974) 14 C.C.C. (2d) 4 (Ont. C.A.)
56. *Re Barton* (1979) 27 NBR (2d) 631 (NB QB TD)
57. (1914) 23 C.C.C. 383 (Alta. S.C.)
58. *Fanning* v. *Gough* (1908) 18 C.C.C. 66 (P.E.I.S.C.), See also *Rex* v. *Martin* (1930) 52 C.C.C. 367 (Sask. Dist. ct.)
59. (1964) 3 C.C.C. 381 (B.C.S.C.)
60. (1934) 62 C.C.C. 334 (Alta. S.C.). See also *R.* v. *Miller* (1951) 99 C.C.C. 79 (Ont. Co. Ct.)
61. (1972) 8 C.C.C. (2d) 52 (N.B.C.A.)
62. (1929) 3 W.W.R. 518, 52 C.C.C. 288 (Man. C.A.)
63. 52 C.C.C. 288, at p. 291
64. (1929) 2 W.W.R. 487, 51 C.C.C. 426 (Alta. C.A.)
65. (1971) 12 C.R.N.S. 56 (N.W.T.)
66. (1972) 8 C.C.C. (2d) 52 (N.B.C.A.)
67. *Campbell* v. *Clough* (1979) 23 Nfld. & P.E.I.R. 249 (P.E.I.S.C.)
68. *Re IMP Group Ltd. and The Queen*, (1981) 58 C.C.C. (2d) 510 (N.S.C.A.)
69. *Imperial Tobacco Sales Co.* v. *A.G. Alberta et al* (1941) 76 C.C.C. 84 (Alta. C.A.)
70. (1972) 8 C.C.C. (2d) 45 (Alta. S.C.)
71. (1972) 8 C.C.C. (2d) 49 (Sask. C.A.)
72. (1968) 2 C.C.C. 374
73. Report 19, Writs of Assistance and Telewarrants (L.R.C. Ottawa, 1983) 44, 105; See also *R.* v. *Carriere* (1983) 32 C.R. (3d) 117 (Ont. Prov. Ct.) which held the Writs of Assistance unconstitutional as contrary to Ss. 7 and 8 of the *Charter*. Also see Stuart, *Attacking Writs of Assistance*, (1983) 34 C.R. (3d) 360.
74. Ibid. at 79, 106
75. See Minister of Justice and A.G. of Canada, *NEWS RELEASE,* Ottawa, December 19, 1984 and the Backgrounder on Writs of Assistance, Telewarrants attached thereto.
76. See Supra. n. 73 at pp. 79-82.
77. See Fontana, supra n. 8 at p. 124
78. (1955) 111 C.C.C. 221 (B.C.S.C.)
78.a (1985) 44 C.R. (3d) 387 (Que. C.A.)
79. (1977) 30 C.C.C. (2d) 337 (Ont. C.A.)
80. (1977) 31 C.C.C. (2d) 14 (B.C.C.A.)
81. (1978) 37 C.C.C. (2d) 234 (Alta. S.C.)
82. (1983) 70 C.C.C. (2d) 385 (S.C.C.)
83. Supra n. 79 at p. 348
84. Supra n. 82 at p. 388
85. (1978) 13 A.R. 505 (C.A.)
86. See Post-Seizure Procedures, Working Paper 39 (L.R.C. Ottawa 1985) 56
87. Ibid, at 58
88. [1969] 3 All E.R. 1700 (C.A.) at p. 1706
89. [1963] 2 C.C.C. 356 (Ont. H.C.)
90. (1983) 9 W.C.B. 160 (Ont. H.C.)
91. Supra note 89, at p. 359
92. [1982] 4 W.W.R. 359 (B.C.S.C.)

acted to excess, the first posture of the judiciary should be to support their position wherever it is fairly, legally and honestly possible to do so."

In our own Provincial Court, excluding the evidence obtained by a strip search on *mere suspicion*, Porter P.C.J. said:

> "*The conduct of searches in this manner is not in my view to be condoned by the courts however polite the officer might be and to allow in evidence obtained in this manner would in my view bring the administration of justice into disrepute. To exclude it in my view is* much more likely to command the respect of the public for the administration of justice and *to ensure that the police do not continue what heretofore seems to have become a practice,* at least of this particular officer. I do not, as with respect I feel the opponents of the exclusionary rule do, underestimate the interest police officers have in seeing their cases through properly. *A clearly defined refusal of the court to accept evidence obtained in this manner is likely to ensure that much better methods of investigation prevail in the future.*"[134]
>
> (emphasis supplied)

And Professor Stanley Cohen in a recent article[135] said:

> "If the Charter is indeed to have a positive impact upon police behaviour, the message from the courts must be clear: flagrant disregard of constitutional standards will not be countenanced. The judiciary will not dirty its hands by distorting the rule of law in order to perfect a record sullied by official misconduct. While technical illegalities, harmless errors and official misjudgments predicated upon good faith will not be seen to damage the reputation of justice, the judiciary will not be partner to, or otherwise sanction, lawlessness in the overzealous pursuit of a criminal conviction."

Mme. Justice Veit has pointed out that the Charter is not a plastic tree; that it is a living tree and in interpreting its provisions we should look to our roots and traditions.[136] It is submitted that those roots and traditions include (in the area of search and seizure) the declaration of the supremacy of the Charter provisions,[137] the McDonald Commission Report (1980-1981), the Report of the Law Reform Commission of Canada, and the provisions of Bill C-18 which has specifically repealed, amended or modified the search and seizure provisions of the Code.

The amended and modified Criminal Code has been designed by the legislators "to respond to *the needs of Canadians today*". *Therens, Simmons* and *Truchanek* and other decisions discussed above indicate hopefully that the interpretation of these provisions will not suffer under the weight of the past.

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1. *A.G., N.S. and Grainger* v. *MacIntyre et al* (1982) 26 C.R. (3d) 193, 207 (S.C.C.)
2. *Semayne's Case* (1604) 5 Coke 91, 77 E.R. 194
3. *Entick* v. *Carrington and others* (1765) 2 Wils 275, 95 E.R. 807, (1558-1774). All E.R. Rep. 41 at p. 45
4. *Leach* v. *Money* (1765) 19St. Tr. 1001 at p. 1027, and *Entick* v. *Carrington*, supra
5. See Holdsworth, A history of English Law, Vol. XV, pp. 260 ff.
6. See Denning M.R. in *Ghani* v. *Jones* (1970) 1 Q.B. 693
7. (1972) 8 C.C.C. (2d) 343, at p. 354
8. See Fontana, The Law of Search Warrants in Canada, (2d) (1984) at p. 3
9. ibid. at p. 9
10. *Realty Renovations Ltd.* v. *A.G. Alta.* (1979) 44 C.C.C. (2d) 249

10a. per Dickson, J., in *A.G., N.S.* v. *MacIntyre*, supra note 1 at p. 207;

11. See Becker and Savage, Consultation Paper No. 4, Search with Warrant, Edmonton. (A paper for the Law Reform Commission of Canada) 12
12. Fontana, supra note 8, p. 64; *Re Worrall* (1965) 2 C.C.C. 1 (Ont. C.A.)
13. *Re United Distillers Ltd.* (1947) 3 D.L.R. 900, 88 C.C.C. 338 (B.C.S.C.)
14. *Re Kobernik* (1933) 39 C.C.C. 48, at p. 49 (Ont. S.C.)
15. *Re Worrall* (1965) 2 C.C.C. 1 (Ont. C.A.)
16. *Imperial Tobacco Sales Co.* v. *A.G. Alberta et al* (1941) 1 W.W.R. 401, 76 C.C.C. 84 (Alta. C.A.)
17. *Re Bell Telephone Company of Canada* (1947) O.W.N. 651 89 C.C.C. 196 (Ont. H.Ct)
18. *R.* v. *Moore* (1922) W.W.R. 629, 37 C.C.C. 72 (Alta. C.A.); see also *Re Kerwin and R* (1983) 3 C.C.C. (3d) 264 (P.E.I.S.C.)
19. *Poliquin* v. *Decarie* (1927) 29 Que, P.R. 407, 33 R. de Jur. 367
20. *Re George Chedrawy* (1981) 23 C.R. (3d) 30 (N.S.S.C.)
21. *R.* v. *Read, Ex Parte Bird Construction Co. Ltd.* 54 W.W.R. 93, (1966) 2 C.C.C. 137 (Alta. S.C.)
22. (1983) 6 C.C.C. (3d) 296 (Ont. H.C.) aff'd. 12 C.C.C. (3d) 1 (Ont. C.A.)
23. *Rex.* v. *Frain* (1915) 24 C.C.C. 389 (Sask. S.C.)

15 See, for example, *Wells and Murray*, (1983) 68 Journal of Applied Psychology (No. 3) 347.

16 See, for example, the authors cited by Lindsay, *op. cit.*, footnote 4 at pp. 252-3. But, *contra*, see McCloskey and Egeth *Eyewitness Identification What can a Psychologist tell a Jury?* American Psychologist, May, 1983 p. 550.

17 *R v. Audy (No. 2)* (1977), 34 C.C.C.(2d) 231 (Ont. C.A.). See also *R v. Low* (1980), 23 B.C.L.R. 207 (Co. Ct.); *R v. Martel*, [1980] 5 W.W.R. 577 (B.C.S.C.); *R v. Fajput* (November 13, 1981, Alta. Q.B.). See also "The Use of Eyewitness Identification Evidence in Criminal Trials" by D. Starkman, 21 C.L.Q. 361 (1978-79).

18 *R v. Turner*, [1975] 1 All E.R. 70 at p. 74 (C.A.).

19 *R v. Clark* (1974), 22 C.C.C.(2d) 1 at p. 17, [1975] 2 W.W.R. 385 at p. 402, 5 N.R. 601 (Alta. S.C. App. Div.), affd [1975] 1 S.C.R. v. [1976] 2 W.W.R. 570, N.R. *loc. cit.*, p. 599.

20 *Audy*, supra, footnote 19 at p. 235.

21 (1982) 2 S.C.R. 820.

22 *R v. Blackmore* (1970), 2 C.C.C.(2d) 397, 14 C.R.N.S. 62, [1971] 2 O.R. 21 (C.A.), affd C.C.C. *loc. cit.* 514*n*, 15 C.R.N.S. 126*n*, [1971] S.C.R. v.

23 *Canning v. R.*, S.C.C., published June 26, 1986.

24 See *R v. Nicholson* (1984) 31 Alta. L.R. (2d) 60 re the Notice to Attend, other examples of supportive evidence: *R v. Boland* (1977), 33 C.C.C.(2d) 211 (Ont. C.A.) — statements by accused; *R v. Depagie and The Queen* (1975), 27 C.C.C. 456, [1976] 1 W.W.R. 44 (Alta. S.C.T.D.), revd on other grounds 32 C.C.C.(2d) 89, [1976] 6 W.W.W. 1, 1 Alta. L.R.(2d) 30 (App. Div.) — statements to others by witnesses; *R v. Glynn* (1971), 5 C.C.C.(2d) 364, 15 C.R.N.S. 343, [1972] 1 O.R. 403 (C.A.) — proof that accused was a homosexual; *Marcoux and Solomon v. The Queen* (1975), 24 C.C.C.(2d) 1, 29 C.R.N.S. 211, [1976] 1 S.C.R. 763 — refusal of accused to join the line-up; *R v. Roy* (October 21, 1981, Que. Q.B., Appeal Side), summarized in 6 W.C.B. 470 — name of accused found on papers at the scene; *R v. Lussier* (1980), 57 C.C.C.(2d) 536 (Ont. C.A.) — evidence of accomplice accepted. The Alberta Queen's Bench expressed hesitation to consider hair similarity as supportive evidence; *R v. Nesbitt* (June 24, 1980), summarized in 5 W.C.B. 56. In *Chartier v. A.-G. Que.* (1979) 48 C.C.C.(2d) 34 at p. 52, 9 C.R.(3d) 97 at p. 138, [1979] 2 S.C.R. 474, the Supreme Court of Canada said that an uncertain identification by another witness is not supportive. The trademark-type "similar fact" is not support unless in the similar fact situation there is a positive identification: *Sweitzer v. The Queen* (1982), 68 C.C.C.(2d) 193, 42 N.R. 550 (S.C.C.).

25 For detailed study, see G. Williams and H. Hammelmann, "Identification Parades", [1963] Crim. L.R. 479 and 545; "The Failure of Identification Procedures", 1974 New L.J. 1174; "Identification in Practice", 1976 New L.J. 950.

26 *Lindsay, op. cit.* footnote 5 at pp. 257-261.

27 *Lindsay, op. cit.* footnote 5 at p. 260.

28 "Police Guidelines: Pretrial Eyewitness Identification Procedures", 1983, Law Reform Comm.

29 See the reasons of Lamer, J. and Wilson, J. in *Mezzo*. See also: *R v. Sutton*, [1970] 3 C.C.C. 152 at pp. 163-4, 9 C.R.N.S. 45 at p. 58, [1970] 2 O.R. 358 (C.A.). See also *R v. Blackmore, supra,* footnote 43; *R v. Howorth* (1970), 1 C.C.C.(2d) 546, 13 C.R.N.S. 329, 13 C.L.Q. 109 (Ont. C.A.). See *R v. Sophonow* (1986) 2 W.W.R. 481 where Twaddle, J.A. adopts the guidelines set out in *R v. Turnbull* (1976) 3 W.L.R. 445, 63 Cr. App. R. 132. For the English rule, see *R v. Long, supra,* footnote 37. Of course, this rule also follows from the fact that the Court of Appeal will upset a conviction and enter an acquittal in the face of bad line-up evidence. See, for example, *R v. Babb* (1971), 17 C.R.N.S. 366, [1972] 1 W.W.R. 705 (B.C.C.A.), and *Nepton v. The Queen* (1971), 15 C.R.N.S. 145 (Que. C.A.).

30 *R V. Manegre* (May 10, 1982, Alta. C.A.).

31 *Babb* and *Nepton, supra,* footnote 29.

32 *State v. Greer*, 609 S.W. 2d 423 (Missouri C.A. 1980). See also *United States v. Awkard*, 597 F. 2d 667.

33 See *R v. Zubot* (October 19 and 23, 1981, Alta. Q.B.). Hetherington J. let the Crown experts testify about the effect generally of hypnosis and about the episode in question. The jury acquitted. See also *R v. Pitt*, [1968] 3 C.C.C. 342, 68 D.L.R(2d) 513, 66 W.W.R. 400 (B.C.S.C.); *R v. K.* (1979), 47 C.C.C.(2nd) 436, 10 C.R. (3d) 235, [1979] 5 W.W.R. 105 (Man. Prov. Ct.); *McIntyre v. Morgan* (1980), 120 D.L.R. (3d) 60, 27 B.C.L.R. 101, 20 C.P.C. 189 (S.C.); *R v. Booher (1928), 50 C.C.C. 271, [1928] 4 D.L.R. 795, [1928] 3 W.W.R. 203 (Alta. S.C.). See also United States v. Adams*, 581 F. 2d 193; *People v. Modesto*, 59 Cal. Rptr. 124. See also: Dilloff, "The Admissibility of Hypnotically Influenced Testimony", 4 Ohio North. L. Rev. 1 (1977).

34 *R v. Clark* (1984) 13 C.C.C.(3d) 117 at p. 125.

35 *R v. Clark* (1979), 48 C.C.C.(2nd) 440, 33 N.S.R.(2d) 636 (S.C. App. div.); *R v. Davison, DeRosie and MacArthur* (1974), 20 C.C.C.(2d) 424, 6 O.R.(2d) 103 (C.A.).

36 *Mawaz Khan v. The Queen*, [1967] 1 All E.R. 80 (P.C.). It is important to remember that not every lie by an accused in his alibi shows consciousness of guilt: *R v. Rallo* (1978), 44 C.C.C.(2d) 431 at p. 440 (Ont. C.A.).

37 *R v. Parrington* (1985) 20 C.C.C.(3d) 184.

38 *Vezeau v. The Queen* (1976), 28 C.C.C.(2d) 81 at p. 88, 34 C.R.N.S. 309 at p. 317, [1977] 2 S.C.R. 277.

39 R.N. Gooderson, *Alibi* (London, William Heinemann Ltd., 1977), p. 47.

40 *R v. Mahoney* (1979), 50 C.C.C.(2d) 380 at p. 386, 11 C.R.(3d) 64 at p. 73 (Ont. C.A.), but a special set of facts led the Court of Appeal to criticize it. However, it denied a new trial because the evidence was overwhelming and was upheld in this respect by the Supreme Court of Canada, 67 C.C.C.(2d) 197, 27 C.R.(3d) 97, 41 N.R. 582.

A puzzling aspect of the case is that Mr. Mahoney did not assert his right to silence in the face of the police caution. He talked to the police, but failed to mention his alibi. Is he now to be protected from adverse comment? For examples of approved comment on pre-trial silence, see *Russel v. The King* (1936), 67 C.C.C.28, [1936] 4 D.L.R. 744 (S.C.C.); see also *R v. Dawson* (December 3, 1981, Ont. C.A.), summarized in 7 W.C.B. 83; see also *R v. Parkington* (1985) 20 C.C.C.(3d) 184.

41 I suggest that one may put to him the warning offered at the preliminary inquiry pursuant to s. 469(1) of the Code and ask him why he did not reply. See *R v. Beach and Morris* (1909), 2 Cr. App. R. 189.

42 See the cases noted in *R v. Robertson* (1975), 21 C.C.C.(2d) 385 at p. 419, 29 C.R.N.S. 141 at p. 178 (Ont. C.A.).

43 *R v. Roteliuk* (1936), 65 C.C.C. 205, [1936] 2 D.L.R. 465, [1936] 1 W.W.R. 278 (Sask. C.A.). I question whether a distinction ought not to be made between testimony at the preliminary hearing and a statement made in response to the invitation made pursuant to s. 469(1) of the Criminal Code. In *Roteliuk*, the trial judge asked the witness if the accused had failed to "testify" at the preliminary hearing.

44 See *R v. Sullivan* (1966), 51 Cr. App. R. 102 at p. 105 where Salmon L.J. says that one cannot charge a jury that "if he were innocent, it is likely that he would have answered the questions".

45 See *Robertson, supra*, footnote 42 at p. 420 C.C.C., p. 179 C.R.N.S.

46 *Canada Evidence Act*, R.S.C. 1970, c. E-10, s. 4(5). There is no logical or historical reason why this injunction should apply to a judge sitting alone: See *R v. Binder* (1948), 92 C.C.C. 20, 6 C.R. 83, [1948] O.R. 607 (C.A.).

47 See *R v. Chambers and Obirek* (1980), 54 C.C.C.(2nd) 569 at p. 571, 9 Man. R. (2d) 13 at p. 15 (C.A.).

48 *R v. Appleby* (1971), 3 C.C.C.(2d) 354 at p. 365, 16 C.R.N.S. 35 at p. 46 [1972] S.C.R. 303.

49 (1820), 4 B. & Ald. 95 at pp. 161-2, 106 E.R. 873.

50 (1981), 59 C.C.C.(2d) 292, 21 C.R.(3d) 354, [1981] 2 S.C.R. 196.

51 (1976), 28 C.C.C.(2d) 81 at p. 88, 34 C.R.N.S. 309 at p. 317, [1977] 2 S.C.R. 277. For the English view see *R v. Mutch*, [1973] 1 All E.R. 178 (C.A.).

53 *R v. Oakes* (unreported as yet) S.C.C. published February 27, 1986.

54 *Re Coffin* 1956 S.C.R. 191 at 228.

55 *R v. Wild* 1970 4 C.C.C. 40 (S.C.C.)

56 See footnote 38.

57 (1973), 14 C.C.C.(2d) 385, 25 C.R.N.S. 296, [1975] 2 S.C.R. 275.

58 See, *contra, R v. Patrick* (1982), 63 C.C.C.(2d) 1, 128 D.L.R.(3d) 496 (B.C.C.A.), affd 66 C.C.C.(2d) 575*n* (S.C.C.), which relies in turn on *Kolnberger v. The Queen*, [1969] 3 C.C.C. 241, 2 D.L.R.(3d) 409, [1969] S.C.R. 213. Martland J. quite explicitly says at p. 244 C.C.C., p. 412 D.L.R. that he will not apply the rule in *R v. Burdett (infra)*, to "a case to which s. 134 [Since repealed.] applies". The case therefore has very limited application. The *Patrick* decision was upheld by the Supreme Court of Canada in oral reasons given June 18, 1982. My information is that they agreed with the reasons of Seaton J.A. But his *ratio* in *Patrick* is that the trial judge in fact drew no inference. His discussion, therefore, of what inference is permissible was *obiter*, and the Supreme Court of Canada did not necessarily agree with it.

59 *R v. Rafferty* (1983) 25 Alta. L.R.(2d) 334 at 345.

60 *Criminal Justice Act*, 1967 (U.K.), c. 80, s. 11(1): "On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi." Many American states have a similar rule.

61 Widgery L.J. in *R v. Lewis* (1968), 53 Cr. App. R. 76 at p. 80. See also *R v. Cooper* (1979), 69 Cr. App. R. 229, where a refusal

that, considering all the circumstances, the integrity of the court would not be affected, then the evidence should be admitted.

However, it appears to me that, in almost all instances where the court is asked to condone the denial of a constitutional right which amounts to the commission of a specific criminal offence, it would be compromising its integrity by permitting the evidence obtained thereby to be part of the proof."

The Ontario Court of Appeal also has rejected the "shock the community" test in *R. v. Simmons.*[131] Howland C.J.O. said at p. 218:

> "In my opinion, in determining whether the administration of justice has been brought into disrepute within s. 24(2), the following matters are of importance: the nature and extent of the illegality, the manner in which the evidence was obtained, the good faith or the lack of good faith of the persons who obtained the evidence, whether the accused's rights under the Charter were knowingly infringed, and the seriousness of the charge. This list is not intended to be all-inclusive. There may be other matters of importance which should be considered.
>
> If the evidence is obtained in such a manner as to shock the Canadian community as a whole, it would no doubt be inadmissible as bringing the administration of justice into disrepute. There may, however, be instances where the administration of justice is brought into disrepute within s. 24(2) without necessarily shocking the Canadian community as a whole. *In my opinion, it is preferable to consider every case on its merits as to whether it satisfies the requirements of s. 24(2) of the Charter and not to substitute a "community shock" or any other test for the plain words of the statute."*
>
> (emphasis supplied)

It is submitted that until the Supreme Court of Canada rules specifically on the issue of exclusion of evidence under s. 24(2), the test laid down by Howland C.J.O. above can serve as a guiding factor in our decision making.

Conclusion

The final expositer of the *Charter* is, of course, the Supreme Court of Canada. It has also, together with Parliament, sculpted and refined our modern conceptions of police power in the area of search and seizure. The court has been particularly active in this area since its declarations on the subject of illegally obtained evidence in *R.* v. *Wray.*[132] Subject to a few notable exceptions, it seems that the Supreme Court of Canada consistently favoured the value of efficient law enforcement over the value of individual liberty. *Chromiak* and *Rothman* are the typical examples of this approach. However, the most recent decisions in *Therens, Rahn* and *Trask* show a shift from that position and signal a clear departure from the emphasis on effective law enforcement to the emphasis on individual liberty. Needless to say, this change has come about because the individual liberty, or rights, are now *entrenched* in the Constitution which is the supreme law of the land. Pre-Charter decisions therefore will be less persuasive in the future in the area of interaction of the search and seizure and Charter provisions.

The concerns of effective law enforcement however cannot be underestimated. These concerns were raised in the *Truchanek*[133] case and His Honour Judge Hogarth in the course of his judgment replied thus:

> "The drug trade and its extensive sophisticated syndicated organization have spawned homicides, moral corruption, crime and depravity to a degree that would astound the knowing public if same could be revealed in its broadest scope, and nothing that I have said in this judgment must ever be construed to be an effort to minimize the support that must be given from all segments of the community to those who are engaged in the difficult, dangerous and costly duties in apprehending the offenders, pursuant to both our own criminal laws and our international obligations.
>
> But what is critical to such action is that the public, whose knowledge, understanding and support is essential, must have confidence in the institutions which exist for such purposes.
>
> If the public believe that the courts condone the arbitrary imprisonment, assault and gross intrusions which took place in this case, the effectiveness of the judicial structure will wane and the public will not respond to the legitimate demands of the courts for their participation and support.
>
> I would like to say further, without qualification, that, where police officers who have reacted immediately to an "on-the-spot" situation have had to "get tough" and sometimes, due to human reaction, have used force or otherwise

disclose a nexus between the infringed or denied right and the acquisition of the disputed evidence. After analyzing *R.* v. *Collins*[128] and *R.* v. *Cohen*[129] the court observed:

> "Upon a strict reading of the judgments, it appears that there are three divergent views as to the interpretation of the words "obtained in a manner" that infringed or denied the rights of the accused.
>
> In my view an appropriate analysis of the views of the majority is that in determining whether or not evidence was obtained by the offensive conduct the act of acquisition must be consequential upon the act which denied the accused his rights as opposed to being a coincidental or sequential part of all the events pertaining to the arrest, search and detention of the accused.
>
> Alternatively put, it must be said that the unreasonable conduct brought about the specific act of acquisition."

Judge Hogarth then examined some recent decisions[130] on the "shock the community" test and observed at p. 176:

> "In my view I find it difficult in the first instance to determine how Lamer J.'s dissenting obiter in the *Rothman* case, supra, which concerned the judge-made rule with respect to the admissibility of confessions, became the criteria for the interpretation of s. 24(2) of the Charter to the exclusion of all the usual principles of statutory interpretation. It appears to me, with the greatest respect, that to require the conduct to "shock the community" is emblematic of the resistance of the Canadian judiciary to accept the fact that s. 24(2) introduces into Canadian law new concepts. In addition, there is a marked difference between deceitful conduct and a deliberate denial of constitutional rights.
>
> If I may speak with the greatest of respect, in my view the plain meaning of s. 24(2) and the intent of Parliament commences with the proposition that evidence obtained by the denial of any right or freedom is to be excluded. I say this because such conduct, when it amounts to an offence, in most instances must clearly bring the executive arm of the administration of justice into disrepute, and hence to permit the Crown to use the "poisoned fruit" amounts to a condonation of such actions by the judiciary and thus it too would suffer the same consequences.
>
> However, the use of the words "in all the circumstances" clearly introduces the concept that there are situations where, despite an infringement or denial of rights, the judicial reputation would be unaffected by the admission of the evidence. Indeed, it is well known that certain extreme American decisions have created a reverse situation and by the exclusion of the evidence the reputation of the judiciary has suffered adversely.
>
> It appears to me that the question is what are "all the circumstances" that would indicate that the judicial reputation would remain intact despite the admission of the illegally-obtained evidence.
>
> . . . [I]t is impossible to detail all the factual situations which might arise. However, I would suggest that, firstly, in approaching the determination of the question, the concept of fairness and judicial impartiality must be rigidly maintained. It is not for the courts to prosecute the guilty. It is not for the courts to discipline the police to use only lawful means to obtain the evidence. Thus, if evidence is excluded it must be as a result of strict judicial impartiality necessarily applied for the protection of the integrity of the court structure. At the moment, if such impartiality is sacrificed to forgive and condone illegal police action for the purpose of ensuring the conviction of an accused, the Charter becomes meaningless.
>
> On the other hand, it is a fact of life that police excesses do occur and rights are denied, particularly where such excesses are not rigidly suppressed by appropriate internal action. To fail to accept this fact is to fail to consider "all the circumstances" in the exercise of the discretion granted by s. 24(2) and is to suggest that no discretion whatsoever has been granted.
>
> In my view the question of admissibility depends upon a disciplined judicial consideration as to whether or not the degree of misconduct of the police was so grave that the court, in order to preserve its own integrity, must not permit itself to become associated with it, regardless of the seriousness of the crime and the effect of the exclusion of the evidence upon its proof. If, upon admitting the evidence, it could be said

to extend the deadline for the giving of notice was criticized. This is in keeping with a tolerant tradition. See *R v. Trevarthen* (1912), 8 Cr. App. R. 97.

62 Gooderson, *op. cit.*, footnote 42 at p. 245. One should not conclude that the English notice rule is a failure because the courts there hesitate to enforce it either by refusing to admit late alibis or by applying adverse comment on them. Upon informal inquiry among bench and bar in the United Kingdom I am told that, while often late or otherwise deficient, some notice of alibi is usually given. The Crown has, therefore, at least some chance at preparation of rebuttal. And the paucity of cases on the new sections indicates that there have been no significant problems of interpretation.

63 See the Canadian *Draft Uniform Evidence Act* 5.88(1), 86 & 87. Perhaps concern over these provisions is why the *Draft Act* has never been put before Parliament.

A Commentary Of The Law of Search And Seizure As Contemplated In Bill C-18 And The Impact Of The Charter Of Rights On These Provisions (Part 3-Final)

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

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.

(12) Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

(24) (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Viewed within the context of these sections, any challenges to the search process can hardly be judicially looked upon as "mere technicalities". At any rate, sections 8 and 24 of the Charter are "explicit provisions which now must be considered in the interpretation of any statute or jurisprudence on the subject of issue of search warrants".[113]

In *R.* v. *Longtin*,[114] Blair J.A. characterized the right to be secure against unreasonable search and seizure as a new substantive right created by section 8. The roots of this right, however, have a long history. The purpose of the section was described by Prowse J.A., in *Southam Inc.* v. *Hunter et al*,[115] as follows:

> "This section does not confer powers of search and seizure on the government of Canada or the provinces but rather it is a limitation upon the powers they derive from other sources. It secures the public against the abuse of such powers. It deals with one aspect of what has been referred to as a right of privacy, which is the right to be secure against encroachment upon the citizens' reasonable expectation of privacy in a free and democratic society. However, in determining the rights given under s. 8 of the Charter, the public's need for effective law enforcement must be balanced against the individual's right to be secure against unreasonable search and seizure."

Fundamental to the approach in interpreting section 8 is the determination of exactly what is an "unreasonable" search or seizure. Obviously, an illegal search, that is, one not authorized by statute or common law, would be an unreasonable one, particularly in light of the legislative history of section 8 described above. Support for this proposition is found in *R.* v. *MacIntyre*,[116] where the police had conducted an illegal search of a hotel room. Veit J. stated, at page 164:

"In the circumstances outlined above,

from which this tree has grown up and that involves the Canadian and the Anglo-Canadian jurisprudence surrounding the words that eventually were chosen to be used in the Charter.

Lord Wilberforce in dealing with the Bermuda Constitution in the case of *Minister of Home Affairs et al* v. *Fisher et al.*, [1980] A.C. 319 at p. 329 said this:

> "Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language."

And it seems to me that that is common sense with respect to the interpretation of our Canadian Constitution.

Therefore, it seems to me that while the results in the United States, Mr. Stoyles, would be very much in your favour and of course would go to the benefit of the other accused, and while the result in the United States is a result which we can examine with interest and while the American experience can perhaps provide assistance, we should first look to our own Anglo-Canadian roots for an interpretation of the rights of [the accused] in these circumstances.

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The basic test of admission of evidence in Canada, is of course the relevance of the evidence and it is clear that the evidence which is the subject of this application could not be more relevant—it is the crucial evidence upon which the Crown's case depends.

Justice Cardozo, in speaking of the American constitutional rights, has said, roughly, that the criminal law will in itself be brought into contempt of gossamer possibilities of prejudice nullify a sentence. To use a Canadian expression, in an analogous concern, it seems to me that in matters of this type we ought not to be weighing flies' wings in spiders' webs; that in my view would constitute the raising of gossamer possibilities in matters of criminal justice.

Illegal entries are of course not matters which should be taken lightly and I do not—they may lead to civil proceedings on your behalf, Mr. Stoyles. Potentially, such conduct can also lead to criminal proceedings; your counsel had indicated that members of the R.C.M.P. are today in Canada, sometimes being charged with such offences. There is the possibility as well of internal disciplinary procedures against police officers who effect illegal entries.

It does seem to me though, that in the robust tradition of Canadian law, we must look to whether the community would be shocked by the acceptance of this evidence. In other words, I am suggesting that the standards which have been spoken of in the line of cases, perhaps beginning with *R.* v. *Wray*, [1979] 4 C.C.C. 1, 11 D.L.R. (3d) 673, [1971] S.C.R. 272, and in British Columbia through *R.* v. *Pettipiece* (1972), 7 C.C.C. (2d) 133, 18 C.R.N.S. 236, [1972] 5 W.W.R. 129; *Hogan* v. *The Queen* (1974), 18 C.C.C. (2d) 65, 48 D.L.R. (3d) 427, [1975] 2 S.C.R. 574 (S.C.C.), and most recently of course in *Rothman* v. *The Queen* (1981), 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, [1981] 1 S.C.R. 640, we must attempt to weigh the rights of society against the undoubted rights of the accused and it must be a substantial and not a gossamer interference which would lead a court to refuse to admit or to give heed to the evidence.

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It seems to me that the ordinary person who would be dealing with our situation, which is a policeman on a beat who receives information about narcotics in a hotel, which is almost by definition a transient situation, would believe that the police officer is entitled to effect the illegal entry and seizure in order to obtain evidence of criminal wrongdoing and the ordinary man would not be shocked in my view, that such relevant evidence would be admitted into these proceedings. In my view, in any event, the admission of this evidence into these proceedings would not bring the administration of justice into disrepute.

I therefore find that the evidence ought not to be excluded on the basis of s. 24(2) of the Charter."

More recently, in *R.* v. *Truchanek*[126] Hogarth Co. Ct. J. in a "blunt and far-ranging decision"[127] rejected the "shock the community test". The decision in this case examines the question of a rectal search for drugs; a choke hold and skin search. A consent form which had been signed was held not to be a true consent. With respect to the s. 24(2) question, Hogarth Co. Ct. J. held that the facts must

justice as an impartial judge be in a position to reach his or her own conclusion based on reasonable grounds?''

Another effect of s. 8 and s. 24 of the Charter, taken together, has been to introduce into the Canadian search law a modified ''poison tree'' doctrine.[121]

Prior to the passing of the Charter of Rights and Freedoms in 1982 the law was clear that an unlawfully conducted search or a search based upon a technically irregular or invalid warrant, did not, *per se*, vitiate the tendering of evidence obtained as a result, nor did it affect the jurisdiction of the court to deal with the accused before it. The ''fruit of the poison tree'' doctrine was not part of our law, provided the tendered evidence otherwise conformed to the rules of evidence. Sections 8 and 24 read together, now invite the court now to ''enter the garden, approach the ''poison tree'', and savour the fruit in order to ascertain whether or not it is legally palatable. The test of legal palatibility here is found in the last phrase of s. 24(2): whether the admission of the evidence ''would bring the administration of justice into disrepute''.''[122]

The practical question left to the courts therefore is the determination of what is reasonable and what, in the circumstances is unreasonable. Mr. Justice Henry in *Re Vella et al and The Queen*[123] succinctly states the problem before the Court:

> ''The Canadian Charter refers only to the protection against ''unreasonable'' search and seizure and leaves it to the courts to define the limits of that expression. But what I am seeking is the objective standard against which to test the element of unreasonableness.''

The question of what is ''unreasonable'' has been commented upon in several cases.[124] The full implication and test for what is unreasonable must necessarily include section 24. While both 24(1) and 24(2) are applicable, the usual remedy sought upon a search and seizure issue is the exclusion of evidence under 24(2). The test here is both strenuous and detailed: The court must:

(1) arrive at a conclusion,

(2) that there was infringement or denial of a right or freedom (i.e., section 8 – violation),

(3) consider all of the circumstances, and whether

(4) admission of the evidence would bring the administration of justice into disrepute.

Clearly a large number of criteria must be met successfully by the applicant – but, if the criteria are met, ''the evidence *shall* be excluded''.

Can an exclusion of the evidence be made however only if the search complained of is concluded to be unreasonable when tested against *all* the criteria including the primary one: where there was an infringement or denial of a right (section 8). Conceivably the court could arrive at the conclusion that the search was unreasonable, but admit the evidence on the basis that to do so would not bring the administration of justice into disrepute?

The answer is found of course within the four corners of the section itself. It is not the *search* (producing the evidence) which must bring the administration of justice into disrepute, but whether ''the admission of it in the proceedings'' would do so.

Mme. Justice Veit of our Queen's Bench rejected the ''fruit of the poison tree'' doctrine in the application of s. 24(2) of the Charter in *R. v. MacIntyre*.[125] Her ladyship rejected the application of American jurisprudence in favour of the Anglo-Canadian tradition in the interpretation of the Charter provisions and applied the standards evolved by Canadian Courts, especially *Rothman's* case. In the course of her judgment, Veit J. observed:

> ''In my view, the first question to answer is: Was the entry and seizure by Constable McLeod an unreasonable search and seizure against which the accused Stoyles is protected by s. 8 of the Charter?
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> In the circumstances outlined above, there is no question in my mind that the entry and seizure with which we are concerned was an illegal one and I agree with counsel that an illegal entry is an unreasonable one within the meaning of the Charter.
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> • • •
>
> It seems to me in assessing the value of the American precedents, that from 1961 on in the United States such evidence would be excluded on the basis of their Constitution, that the *Constitution Act, 1982*, is very much the fruit of Canadian political maturity, that this is a tree which has been grown in our own backyard, not a plastic tree, in my view, that we bought in a store and put in our yard. It seems to me that we have to consider the roots

> there is no question in my mind that the entry and seizure with which we are concerned was an illegal one, and I agree that an illegal entry is an unreasonable one within the meaning of the Charter.''

However, where a search has been authorized according to law, or is otherwise permitted by law, then ''illegalities'' such as ones relating to errors on the face of a warrant or in the manner of execution may not of necessity make the search unreasonable. In such a case the court has to balance the seriousness of the illegality against the legitimacy of the search itself.

On the other hand the courts may have to determine whether searches which are entirely lawful are nevertheless unreasonable because the legislation empowering the search is itself unreasonable.

There has already been a substantial volume of litigation in which it is alleged that evidence seized by the police should be excluded from a criminal proceeding. Attacks are generally made on one of two distinct bases, namely:

(1) that the legislation empowering a particular search or seizure is not ''constitutionally'' valid; or

(2) that the particular search or seizure does not measure up to the standards required by the Charter.

The best example of the first approach (i.e., constitutionality of the legislation) is evidenced by the Supreme Court of Canada's decision in *Hunter* v. *Southam Inc.*[117] In this case the Director of Investigation and Research of the Combines Investigation Branch authorized, under s. 10(1) and (3) of the Combines Investigation Act, a search and examination and seizure of certain documents at the business premises of the Edmonton Journal. An interim junction sought by the Journal on the ground that s. 10 of the Combines Investigation Act was in violation of s. 8 of the Charter was dismissed on a balance of convenience. An appeal was allowed by the Alberta Court of Appeal which held that s. 10 was in violation of s. 8 of the Charter. On appeal by the Crown to the Supreme Court of Canada, held (8:0) that the appeal be dismissed. Dickson J. (as he then was) speaking for a unanimous Court described the Charter as a ''purposive document''. The Supreme Court of Canada held that the *Canadian Charter of Rights and Freedoms* is a purposive document, the provision of which must be subjected to a purposive analysis. Section 8 of the *Charter* guarantees a broad and general right to be secure from unreasonable searches and seizures which extends at least so far as to protect the right of privacy from unjustified state intrusion. Its purpose requires that unjustified searches be prevented. It is not enough that a determination be made, after the fact, that the search should not have been conducted. This can only be accomplished by a requirement of prior authorization. Accordingly, prior authorization, where feasible, is a precondition for a valid search and seizure. It follows that warrantless searches are *prima facie* unreasonable under s. 8. The party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness.

Section 10(3) of the *Combines Investigation Act* provides for a prior authorization of searches by a member of the Restricted Trade Practices Commission. The procedures established by s. 10(3), however, are constitutionally defective in two respects.

First, for the authorization procedure to be meaningful, it is necessary for the person authorizing the search to be able to assess the conflicting interests of the state and the individual in an entirely neutral and impartial manner. This means that while the person considering the prior authorization need not be a judge, he must nevertheless, at a minimum, be capable of acting judicially. *Inter alia*, he must not be someone charged with investigative or prosecutorial functions under the relevant statutory scheme. The significant investigatory functions bestowed upon the Restricted Trade Practices Commission and its members by the Act vitiated a member's ability to act in a judicial capacity in authorizing a s. 10(3) search and seizure and do not accord with the neutrality and detachment necessary to balance the interests involved.

Second, reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of search, constitutes the minimum standard consistent with s. 8 of the *Charter* for authorizing searches and seizures. Sections 10(1) and (3) of the Act do not embody such a requirement. They do not, therefore, measure up to the standard imposed by s. 8 of the *Charter*. The Court will not attempt to save the Act by reading into it the appropriate standards for issuing a warrant. It should not fall to the courts to fill in the details necessary to render legislative lacunae constitutional.

In the result, ss. 10(1) and 10(3) of the *Combines Investigation Act* are inconsistent with the *Charter* and of no force or effect because they fail to specify an appropriate standard for the issuance of warrants and designate an improper arbiter to issue them.

In a nutshell, s. 443 of the Criminal Code dealing with search warrants in criminal cases was the appropriate norm for such provisions.[118]

Another very recent example of this approach is *Re Vella et al and The Queen*[119] in which the Ontario High Court ruled that s. 181 of the Criminal Code which provides that a justice who "receives from a peace officer a report in writing that he has reasonable ground to believe and does believe that an offence under section 185, 186, 187, 189, 190 or 193 is being committed at any place within the jurisdiction of the justice may issue a warrant under his hand authorizing a peace officer to enter and search the place . . .", is of no force and effect by reason of its inconsistency with s. 8 of the *Canadian Charter of Rights and Freedoms*, which guarantees everyone the right to be secure against unreasonable search and seizure. Section 443 of the *Criminal Code* sets out the normal standard for the issuing of a search warrant and requires, *inter alia*, that the justice receive evidence on oath and that the justice himself be satisfied that there is reasonable ground to believe that an offence has been or may be committed and that evidence thereof may be found on the premises to be entered and searched. Under s. 181, however, the justice need only receive a report in writing not on oath, and while the justice has a discretion whether or not to issue the warrant, the section only requires him to do so on a report that a peace officer has reasonable ground to believe and does believe that an offence is being committed. The justice is not required by the section to make a finding on the evidence that such reasonable ground exists in fact. While it may be that in a particular case the justice, before exercising his discretion, will in fact make further inquiry into the validity of the grounds, whether or not they are disclosed in the report, the justice is not required to do so and it is not sufficient to leave it to the good sense, integrity and diligence of the individual justice to superimpose further criteria in the exercise of his discretion, which would import into the procedure the omitted elements of the normal standards as set out in s. 443 of the *Criminal Code* and the common law. Section 181 thus falls short of the objective safeguards and standards ordinarily required in Canada for reasonable search and seizure. The extraordinary procedure in s. 181, moreover, is not a reasonable limitation within the meaning of s. 1 of the Charter. There is no convincing reason for the exceptional procedure under s. 181. In particular, the fact that the section applies to offences which are in progress so that the warrant is intended, in effect, to authorize a "raid" by the police while the unlawful activity is continuing cannot explain, let alone justify, the exceptional procedure. Finally, it was not open to the court to read into the statute the necessary conditions so as to bring it into conformity with the Charter. It is for Parliament to enact appropriate legislation, and it ought not to be encouraged to abdicate its responsibility to uphold the Charter by its own diligence by transferring that function to the courts. Accordingly, where a search warrant has been issued pursuant to s. 181 of the *Criminal Code* that warrant must be quashed and items seized at the time returned to the owners notwithstanding that the property may be required as evidence in pending criminal proceedings.

In his judgment in this case Henry J. of the Ontario High Court considered and discussed the relevant sections of the Charter, the recommendations of the Law Reform Commission of Canada and a plethora of case law. He followed the *Hunter* v. *Southam* decision of the Supreme Court of Canada. He expressed disapproval of the "reading down" doctrine of interpretation vis-a-vis the Charter provisions at p. 537 as follows:

> "As I have said previously, in the pre-Charter era as also before the enactment of the *Canadian Bill of Rights*, the courts in the common law tradition did not hesitate, if required, to supply the omission of the Legislature and no doubt can do so now; I was at first tempted to take this course. But this begs the all-important question whether the section can or ought to survive the crucible of the Charter—the trial of the pyx, if I may put it that way. If I am right that the omission of the two safeguards of information on oath and independent assessment by the justice of the peace of the grounds for belief was intended by Parliament, why should the courts be expected to bring the enactment into conformity with the Charter? The current approach of the appellate court is to the contrary as seen in the cases of *Oakes* and *Southam* and *Hunter* to which I have referred. This route, I say respectfully, leads ultimately to removing from Parliament into the courts what are essentially legislative decisions as to the content of the law.
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> The fundamental objection to any process by which the courts are drawn into reading down a statute which *prima facie* comes into conflict with the Charter is that it tends to encourage Parliament to abdicate its obligation to state with clarity the inroads upon, and the safeguards that protect, the fundamental rights and freedoms of the individual. What the law is or ought to be is a matter for political decision and law-making.
>
> Parliament, which is as well aware of the imperatives of the Charter as are the courts, ought not to be encouraged to abdicate its responsibility to uphold the Charter by its own diligence by transferring that function to the courts.
>
> We are now entering upon a period where the entrenchment of the Charter will have, as it is intended to have, an important influence upon the lives of all Canadians. Its influence may well extend to other countries. Our courts have the role of construing and applying the principles of the Charter to everyday life. In so doing they should in my opinion take a broad and liberal approach, especially in defining its impact on the protection of fundamental rights and freedoms of the individual. The exercise is one of judicial statesmanship not of narrow application of black-letter law. The Consitution is still a living tree and should remain so. The courts should so apply the Charter as to aid and develop the process of guaranteeing those rights and freedoms in a real and practical way rather than to avoid the tough decision and by compromise to uphold a bad law.
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> I also do not consider it either sound or feasible to adopt a case-by-case approach. It is preferable that in minimal cases the courts should strike down a law that restricts or abrogates the guaranteed rights and freedoms than, by extricating such a law, to allow inroad upon rights and freedoms that are viewed as somewhat reasonable, not very harmful, not of widespread significance, or not unfair, to produce in the end a Charter of mediocrity to replace one that is intended to be of excellence.
>
> Section 181 was imported into the *Criminal Code* before the enactment of the *Canadian Bill of Rights* or the Charter; Parliament therefore could not have in mind the strictures they impose. So far as the information before me goes the provision was imported from England where it appears to be a departure from the common law and statutory standards. It is appropriate that if a special provision is here required that matter be left to future considerations by Parliament. In the meantime I should have thought that s. 443 provides adequately for the needs of police investigation; I have not been shown any persuasive reason to the contrary."

A good example of the second approach, i.e., that a particular search or seizure does not measure up to the standards required by the Charter is *Re Marquis Video Corp. and The Queen; Re Times Square Book Store and The Queen.*[120] Trainer J. held in this case that s. 443(1)(b) of the *Criminal Code*, which authorizes a justice of the peace to issue a search warrant with respect to anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence, imposes a duty on the justice not only to determine judicially that the items sought are in a specific location but to determine on reasonable grounds that the things to be seized relate to the offence charged. Thus, where a search warrant is sought pursuant to s. 443(1)(b) of the *Criminal Code* in relation to allegedly obscene material, the information to obtain the search warrant must provide evidence upon which the justice of the peace can form an opinion as to whether or not the material is obscene. Where informations to obtain search warrants with respect to allegedly obscene publications and video tapes describe only one magazine and otherwise merely contain an opinion by the police officer that certain video tapes and magazines are obscene then the search warrants must be quashed except with respect to the magazine which has been specifically described in the information. While the investigating officer may include in the information his opinion, he must in addition provide facts in support of that opinion so that the justice can arrive at his own conclusion independently and judicially. This does not require that each and every publication be placed before the justice or that any publication be viewed by the justice. The nature and sufficiency of the evidence is for the justice provided there is some basis for judicial determination.

Trainer J., in the course of his judgment, observed:

> "These applications were not brought under s. 8 of the *Canadian Charter of Rights and Freedoms*. However, 2. 443(1) of the *Criminal Code* must be read and interpreted in the light of the fact that search and seizure has been elevated to Charter status. The power to search must be strictly controlled without unduly restricting police in the conduct of investigations. Is it unduly restrictive to ask that a police officer place facts or evidence before the justice in order that the