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Editorial
Page 1

President's Page
Page 2

U.S. Television After Chandler
Page 3

The Case for Cameras in the Courtroom
Page 5

The Case Against Cameras in the Courtroor
Page 9

Abolishing the Preliminary Hearing?
Page 12

In Brief
Page 14

Courtroom Security in Ontario
Page 20

Le Temoin Face a La Justice
Page 22

The Witness and Justice
Page 25

The Victim of Crime
Page 27

Other Views
Page 31

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Dates to Remember

September 14-17, 1982	C.A.P.C.J. Annual Meeting	Bessborough Hotel, Saskatoon, Saskatchewan
Oct. 24 - Nov. 3, 1982	New Judges' Training Program	Park Lane Hotel Ottawa, Ontario
July 26-29, 1983	C.A.P.C.J. Annual Meeting	Explorer Hotel, Yellowknife, N.W.T.
Sept. 24-28, 1984	C.A.P.C.J. Annual Meeting	Hotel Newfoundland St. John's, Nfld.
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July 15-19, 1986	C.A.P.C.J. Annual Meeting	Algonquin Hotel St. Andrews by the Sea, N.B.

The focus of this editorial is on the provision which would permit the Crown to comment on the failure of an Accused person to testify in his or her defence.

The trade-off — and how appalling it is that the trade-off system has become so entrenched in our law reform process — for this dangerous provision is a section that would prevent an Accused person being questioned about past convictions unless he or she has given evidence against the co-Accused or has been involved in perjury or fraud.

The fundamental point must be made that the right not to testify goes to the heart and soul of our criminal justice system. Indeed, it is the very pulse of our system that allows an Accused person to say to the State: "Put up or shut up — you brought me to Court and charged me with a crime — now prove it," — and then to sit back in dignity with lips sealed tightly while the Crown attempts to prove its case.

While in many cases the Accused may choose to testify, and many often do, that right of an Accused person to choose to remain silent without fear of recrimination through comment by the prosecutor must be preserved.

Rather than adopting a limiting approach, the drafters of the *Act* should have reinforced this right which has been entrenched in our law for centuries and is fundamental to any free society and further protected it by denying Appellate Court Justices the power to invoke the guillotine provisions (Sec. 613)(1)(b)(III) on the basis that the Accused did not testify at trial.

And had the drafters demonstrated a realistic understanding of how the criminal justice system works, they would have recognized the injustice which can be caused by this provision to the Accused person whose very appearance, shyness, verbal inadequacy or emotional state might well lead to a conviction for the wrong reasons.

As for the trade-off, little comment is required. We all know only too well from experience and from the psychological studies that even the best-intentioned, best-instructed juries have difficulty in limiting evidence of a previous criminal record to use as a tool in assessing credibility.

This change, in itself, should have been made long ago.

Harold J. Levy
Criminal Lawyers' Association Newsletter

COURTROOM SECURITY...

(Continued from page 21)

court security co-ordinator. This telephone is now fully operational.

Other Measures

We have reviewed at length three possible measures which might be adopted for security purposes. These are the armour-plating of diases, the use of video surveillance equipment, and the prior scanning of court lists to determine security risks. A number of reasons have led us to the opinion that, while these options should be available for special cases where they might be appropriate, it should not be necessary to employ them routinely on a province-wide basis. It would be inconsistent with good security practice for us to discuss these matters in more detail.

Conclusion

During the coming months, a comprehensive survey will be conducted of all court facilities in Ontario to determine their particular security needs. This review will be conducted by police experts, working together with local members of the judiciary and court officials. The local county law associations will also be involved in the exercise.

Based on the results of this survey, we believe that early in the autumn, we would be in a position to make final recommendations to establish a system of court security, articulating its general principles for security precautions, which could then be modified to take into account the particular needs and circumstances of individual court facilities.

Thus we anticipate that our final report will be presented to the Bench and Bar Committee in the autumn of 1982.

Editorial

by Judge Rodney Mykle

CAMERAS IN THE COURTS

Whether we like it or not, the issue of television cameras in courts across Canada is one which will soon be raised by media representatives throughout the country.

Although there has been scant attention paid to the ultimate results of such a development, increasing pressure will be placed on courts both civil and criminal to allow television coverage of proceedings.

The Bench and Bar Committee in Ontario, under the chairmanship of Chief Justice Howland, is actively studying the issue. The Canadian Broadcasting Corporations has requested permission to film actual court cases in its proposed eight-part series based on Jack Batten's "Lawyers". The Supreme Court of Canada has allowed coverage, both of ceremonies surrounding the retirement of Justice Pigeon and of the constitutional decision. Television experiments in courts in roughly 30 American states have been broadcast in Canada with increasing frequency.

As Lorne Abugov commented in the Dalhousie Law Journal, "Canadian courts can ill afford to sit by idly while a legal revolution of sorts rages south of the border."

Therefore, the issue exists now, and judicial officers must be prepared not only to understand the implications — both positive and negative — of this new media offensive, but also to prepare a response to it.

In this issue of the Journal you will find a survey of some of the attitudes and findings of those who have been involved in television pilot projects in the United States. The information contained in these three articles is by no means exhaustive, but is presented as a "primer" for judges who are interested in giving the issue more than a cursory glance.

In the United States, media representatives mounted a successful campaign to put the onus on courts to justify why television coverage ought not to be allowed, and in some cases were able to win state legislatures over by default.

In Canada, as the debate begins, we should not allow that mistake. Given the nature and shortfalls of present court coverage as it exists now, the onus should, at the very least, remain with the broadcaster, not the court.

President's Page

by Senior Judge Robert B. Hutton

My last letter which appeared on the President's Page in the June issue of the Jouirnal was dated May 5th, 1982. Since that date, my Presidential travels have continued.

On 25th May 1982 my wife Jean and I travelled to Edmonton and the next day drove to Jasper for the Alberta Judges Annual Meeting from 26th to 29th May. The beautiful scenery was coupled with the kind hospitality of outgoing President Lionel Jones and Mrs. Jones and more of the same from all those present including Chief Judge Kosowan and incoming President Tom McMeekin and their spouses.

Jean and I returned to Edmonton by car on May 29th and to Ottawa by plane on May 30th. I then left Ottawa early in the morning of May 31st to travel to Vancouver to attend a Seminar on Reparative Sanctions co-sponsored by the Solicitor General of Canada and the Attorney General of British Columbia. I believe that all the Provincial Judges in attendance were interested in finding out what was being done across the country in the use of sentencing alternatives. The Seminar had an International flavor since we heard from United Kingdom and American speakers.

I returned to Ottawa on June 3rd but left again on July 6th to attend The Atlantic Regional Educational Seminar at Charlottetown. The Seminar was well organized and executed. You will be interested to know that five Justice of the Supreme Court of Prince Edward Island attended most of the functions including another Panel on the Charter of Rights and Freedoms put on with the able assistance of the Canadian Institute for the Administration of Justice. The chief Judge and all the P.E.I. Provincial Judges did a splendid job for us, and Judge Jacques Sirois from New Brunswick, who is Co-Chairman of the Education Committee of the National Association, was well supported by all concerned. The Chairman of the Education Committee, Judge Jacques Lessard, and the other Co-Chairman, Judge Robert Halifax, were also in attendance.

The timing of the Executive Meeting in Winnipeg meant that our Executive Director and I had to travel from Charlottetown to Winnipeg on June 10, for meetings of the Convention 1982 Committee and the Finance Committee on Friday and the main Executive Meeting on the Saturday. Judge Rod Mykle was present and will no doubt be reporting to you on the matters dealt with by the Executive.

After my return to Ottawa on June 12th, I was able to do some Judging for a while with only a minor interruption on June 21st to attend a meeting of The Ontario Executive in Toronto. That meeting was called to deal with the continuing problems we are having in the implementation of the recommendation of The Ontario Provincial Court Committee.

On 14th July 1982, Jean and I drove to St. Andrews By The Sea, New Brunswick, to attend The Annual Conference of The New Brunswick Provincial Judges until our return on 17th July. We again express our appreciation for the hospitality of all New Brunswick Judges and in particular outgoing President Fred Taylor and Mrs. Taylor. The new President is Judge Jacques Sirois mentioned earlier in this letter.

We now have left in our travels The Annual Meeting of The Canadian Bar Association, in Toronto, August 29th to September 2nd and then we plan to drive to Saskatoon in September and I will start my year as Past President by a holiday motor trip to visit relatives and friends farther west.

It has been an honour and a very unique privilege to be the President of The Canadian Association of Provincial Court Judges.

Other Views

Stricter Laws for Drinking Drivers

I believe the Canadian public wants stricter laws for drinking drivers.

If the organized bar is satisfied that the public is justified in this desire, then it is our responsibility to carry their message to our legislators without delay.

The motor vehicle can be and has been a lethal weapon in the wrong hands.

We all are aware of horror stories involving friends, neighbours or relatives whose life or ability to continue functioning as fully able individuals has been snuffed out by a drunk driver.

I am not a fan of incarceration. Generally speaking, I have little confidence in its value as a deterrent and I am appalled by its ability to corrupt rather than rehabilitate.

However, your drunk driver is not your average criminal. They cover the spectrum of social and economic levels. To a drunk driver the possibility of jail is a real deterrent.

The Swedish experience, where tough penalties appear to have helped keep impaired people off the road, would seem to corroborate this view.

If the Canadian public knew with certainty that a specific type of conviction for impaired driving would result in being automatically jailed, there would unquestionably be fewer drunks on the road, and, therefore, fewer tragedies.

The Criminal Code of Canada does, of course, provide for the possibility of jail for any conviction of impairment while driving. It also provides for a mandatory minimum of 14 days in the case of a second offence and three months for third and subsequent offences.

One of the problems, however, with our present legislation is that it is not applied uniformly throughout Canada and there is no certainty of jail in some jurisdictions no matter how many convictions may be registered against an individual.

Due to the wording of the present legislation, there remains a discretion within each provincial attorney-general's department to proceed with an offence as a second or subsequent offence or to deal with it as a first offence even though it may not in effect be that.

In addition, there are policy differences throughout Canada as to how second and subsequent offences are calculated.

For example, in Manitoba a charge will be proceeded with as a second offence if the time between the date of the last conviction and the commission of the next offence is one year or less.

This discretion is unfair because it can be applied unevenly depending, for example, on whether you plead guilty quickly to your first offence or had a protracted post-charge period before trial. The very existence of this discretion detracts from the potential deterrence of the possible jail sentence.

I believe that with the proper advance warning, the public would, for example, welcome a law that automatically jails any driver whose blood alcohol level reaches or exceeds .15, as is the case in Sweden.

I would suggest that the Criminal Justice section in conjunction with the Law Reform Commission of Canada actively pursue this matter.

Sam Wilder, President,
Manitoba Branch, C.B.A.
(Reprinted from *The National)*

Silence — Safeguard or Noose

Because of our preoccupation with the new *Charter,* little attention has been paid to the draft *Uniform Evidence Act* which could lose its "draft" status sooner than we think.

As noted by Ken Chasse in Chasse's Cases this issue, a Bill could be tabled as early as July and could become legislation perilously quickly.

Mr. Chasse's compilation of major changes to the law of evidence indicates that there is reason for great concern not only from the Defence Bar but from all those who are concerned with Canada's civil liberties.

Last issue's editorial focused on the draft *Act's* provision changing the onus of proof on the Crown of the voluntariness of statements from proof beyond a reasonable doubt to proof on the balance of probabilities.

the effect of increasing official crime rates because of increased detection by police or because of increased reporting by victims (e.g., by making citizens more aware of crime). As a consequence, official crime statistics may not reveal any reduction in crime and may show an increase, even though the actual level of crime has decreased.

In addition to victimization rates, victimization surveys can also provide several other kinds of data that can be useful for the planning and evaluation of a wide range of criminal justice system policies and programs. This includes data on the factors associated with the risk of being victimized; data on the impact of crime, such as measures of physical injury and financial loss from crime; data on the fear of victimization and its harmful effects; and feedback information on the performance of various sectors of the criminal justice system. Furthermore, rather than a general survey of all victims, an in-depth analysis of a particular crime such as burglary can be achieved by combining data from a crime-specific victimization survey with other data such as offender self-reports and police statistics. Such data can be useful for the planning and evaluation of programs to reduce crime and to minimize the impact and fear of crime. They can also be used for establishing better services to meet the needs of victims and to orient other criminal justice programs.

Conclusions

The increasing focus on victims through the kinds of programs and research described in this paper can serve to make the criminal justice system more humane and just by minimizing the cost, trauma, and inconvenience to victims. Furthermore, these initiatives may also encourage victims to cooperate more fully with criminal justice agencies, which may increase the cost-effectiveness of the police and courts. For example, they may result in victims reporting more offences to the police, which may lead to more offenders being apprehended. Recent studies also indicate that victims may also be less likely to refuse to serve as witnesses as a result of these kinds of programs, thus resulting in fewer court delays and cases being dropped. Consequently, despite the current restraint programs of governments, one may expect a further expansion of these types of programs in the future. This may then lead to the emergence of a "victim justice system" rather than one that addresses itself primarily to criminals.

The Witness . . .

(Continued from page 26)

government grant, a study on the feasibility of setting up a network of services for victims and witnesses of criminal acts.

Government approval having been obtained for an agreement in principle, the study is now under way under the direction of an officer chosen by the Committee.

I have offered my services to assist in implementing this pilot project.

The preliminary phase of the project comprises a twofold study: analysis of services to be set up specifically for witnesses and victims, and an inventory of material resources to be made available.

Priority objectives are the following:

1. Creation of a general reception centre for witnesses.
2. Designing waiting rooms to be exclusively reserved for witnesses.
3. Creation of a telephone information service for witnesses and victims and to serve as a link between all existing services.
4. Printing and distribution of information.
5. Information service on the progress of proceedings in each Court.
6. Control service for the summoning of witnesses.
7. Service for the return of property seized with substitution of other methods of establishing proof.

These are preliminary measures which we intend to develop as other requirements become apparent.

This project is not the only one of its kind in Canada. In Winnipeg, for example, a similar project is in progress under the direction of Chief Justice Harold Gyles, and another in Calgary, where the accent is being placed on the return of property seized to its legitimate owner.

Each of these measures can result in a number of initiatives of varying scope, provided we obtain the collaboration of all other participants in the system.

This task is truly within our reach, and the prestige of the Magistrature is a valuable asset which will help in overcoming obstacles.

This, then, is the concern which I expressed in my talk last year and which I have again taken the liberty of laying before you, all too briefly I fear.

I wish to thank you for your kind attention and for the indulgence with which you have received my expression of a concern which I am well aware you share with me.

U.S. Television After *Chandler*

by Fred W. Friendly

The author is Edward R. Murrow Professor Emeritus at the Columbia University Graduate School of Journalism. He discusses Chandler v. Florida, *in which a unanimous U.S. Supreme Court held that televised trials are not unconstitutional.*

In theory, the decision by the United States Supreme Court that states may permit televised coverage of trials unlocks the door to a vast new area of reporting by the medium through which most Americans get their news. In practice, however, television still must overturn a number of barricades -- legal, historic, economic and emotional -- before it can assign a crew to a courtroom as routinely as a newspaper can send its pencil-pushing reporters; that is, if television sends anyone at all.

The majority of trials, even criminal trials, are drawn-out affairs, and broadcast journalists may not clamour to boldly go where no cameras have tread before. "Unless it's an Abscam thing," said Ron Kershaw, news director for WNBC-TV in New York, "you really can't afford to have a crew sitting there spinning out tape." Still, reporters and press lawyers hailed the Supreme Court ruling as a victory that expanded the guarantees of access for news gatherers, though it does not require individual states to let courtroom proceedings be photographed, televised or broadcast on radio. Indeed, televised trials are still barred in the Federal Courts and remain officially disapproved by the American Bar Association. Rather, the 8-0 opinion, written by Chief Justice Warren E. Burger, said there is nothing in the Constitution's fair-trial protections prohibiting such coverage.

"An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matters," the Chief Justice wrote. "The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute ban on all broadcast coverage."

The Court endorsed letting state Supreme Courts decide coverage. Twenty-seven states permit cameras in at least some proceedings. But 10 of the 21 states that allow coverage of criminal trials require the defendant's consent, which lawyers routinely oppose on grounds that the presence of cameras signals a case's notoriety and could exert pressure on juries to convict. Thus, Fred Graham, reporting on the Supreme Court for the CBS television network, expects trial cover age to expand only in the handful of states such as Iowa, Massachusetts and Nevada where consent is not required. And that coverage, he says, cannot be extensive, given time and cost considerations.

Take the case that formed the basis for the ruling -- a burglary conviction involving two Miami Policemen, Noel Chandler and Robert Granger. Of several days of trial, fewer than three minutes were broadcast, and these, as Justice Burger pointed out, covered only the prosecution side of the case. That television will focus on the dramatic moments of a trial -- the prosecution, the defendant on the stand, the verdict, the sentencing -- has reinforced fears in some quarters that the medium will inherently avoid the dry, technical legal issues often at the heart of a case. Indeed, critics maintain that the nature of television is to turn any event into entertainment, trivializing matters that are significant.

Not necessarily, says David S. Hepp, executive producer for Inside Albany, a public television program in New York, noting that the unsensational becomes interesting when made visual. New York's highest tribunal, the Court of Appeals, permitted television cameras starting Jan. 1 and his crews televised arguments on the constitutionality of the state's "dead man" statutes, which generally prohibit using oral bequests as the basis for challenging wills. The reporter, he said, simply filled in the legal background not covered in the arguments; coverage itself posed no major technicial problems. "With so many decisions in government deferred to the Courts," he added, "covering noncriminal activities will help people understand the system better."

The amount of Court time broadcast and its substance were not issues in the Supreme Court appeal; the constitutional right to a fair trial was, and in that, say broadcasters, filmed stories do not differ from printed accounts. Gabe Pressman, the WNBC reporter who has actively

sought to open courtrooms to cameras, said broadcast journalists could and would apply the same ethical standards as the pencil press. Covering any story, he said, requires "selectivity and subjectivity".

The exercise of such discretion in New York and several other states, however, is blocked by legal bans, which the Supreme Court decision left intact. New York's Court of Appeals seems eager to open criminal trials to camera scrutiny, but it cannot unless the legislature amends or repeals the section of the state Civil Rights law barring broadcasts or photographs of proceedings at which witnesses may be subpoenaed to testify.

New Jersey has no restriction, and its Supreme Court approved television in criminal and other Courts on an experimental basis in May, 1979. Justice Mark L. Sullivan, who headed the Court's Committee on Media Relations, said the response has been a surprising, and disappointing, four or five requests from television stations. "The coverage has really amounted to one day or phase of the proceedings," he said.

The state has had more success in attracting still-camera coverage, although Robert Brush, the picture editor of The Record who has co-ordinated pooled coverage of half a dozen cases in Bergen and Passaic Counties, says the majority have also been "one-day things". The photographer, he explained, will get enough shots of the judge, the lawyers and the defendant to last the length of the trial. But Mr. Brush is sure, too, that the photographs make coverage more exciting, and readers more interested. And it is through audience attention that camera coverage, particularly television camera coverage, may lead to a better judicial system.

Proponents of televised Court proceedings give several reasons, including serving the public information function of taking the mystique out of the courtrooms and making the public courtroom a greater reality by making it more accessible. As well, it is pointed out that religious services are televised without any loss in solemnity or dignity and modern equipment alleviates any concerns over disruption of proceedings.

Opponents, on the other hand, voice concerns about distraction of participants and perhaps witness hesitation. Dangers of show-boating by lawyers are also mentioned. As well, television may only carry those sensational (and unrepresentative) trials demanded by the public appetite so that legal TV may become the wasteland that present TV is said to be. Historically, TV in the courtroom has had little to be proud of American Bar Association Canon 35 prohibiting radio and media broadcasting in the courtroom dates from the infamous Hauptman trial for the Lindberg kidnapping. In 1965, in the famous **Bill Sol Estes** case, the United States Supreme Court held that the accused's right to a fair trial had been denied because of the 'media circus' that took place (including televised proceedings) over defence objection.

In oral argument in Chandler, certain concerns about media constraint were raised by the Judges:

"What would have happened if a Florida television station, immediately after presenting filmed coverage of the trial, asked viewers to call in with their views as to . . . guilt or innocence?"

Another concern:

"Is it not possible that jurors, if they return a not guilty verdict, will be subject to criticism by a public that has seen on television only the evidence of guilt?"

Similar concerns have surfaced concerning the Florida police trials that may have provoked three days of racial rioting in Florida after it ended in a not guilty verdict, according to a recent **National Law Journal** report:

"During the seven-week trial, Miami TV viewers watched as a succession of police witnesses straddled a prone figure and re-enacted their version of the beating that killed Mr. McDuffie. the viewers heard the medical examiner testify in detail about the extent of the victim's injuries and, finally they saw Mr. McDuffie's mother collapse in hysterics after the acquittal.

"Minutes later the riot began.

"Did the filmed coverage of the trial, permitted under a pioneering state Court rule, help provoke the three-day racial uprising that left 14 dead?

"Miami lawyer Joel Hirschhorn says it did, and he plans to carry that contention to the high Court next fall. Mr. Hirschhorn is the attorney for two Miami Beach police officers who are appealing a burglary conviction in a case that is expected to make law on the use of cameras in Court.

"Mr. Hirschhorn says the Miami TV stations' selective coverage of the trial's more lurid moments — most stations aired only three to four minutes of testimony each day — was one hell of a contributing factor to the riot.

"I categorically disagree — it's

(Continued on page 8)

also begun various innovative programs to improve the criminal justice response to these cases. There is evidence to suggest, however, that changes in practice by the police and courts will be more effective if these are implemented in conjunction with an independent victim advocate service whose primary concern is to assist the victims not only to overcome their initial trauma, but also to provide legal counselling to assist the victims in their dealing with the justice process.

Various kinds of services to meet the needs of elderly crime victims have also been established recently in some jurisdictions. Research on crime against the elderly indicates that although the elderly are not victimized more often than other age groups, they tend to be more fearful of crime, that this fear has more negative consequences for their quality of life, and when they are victimized they are frequently in need of specialized services. In order to minimize these problems, programs have been started (particularly in United States, through the Criminal Justice and the Elderly Program of the National Council of Senior Citizens) to provide such services as special police-senior citizen crime prevention programs, post-incident counselling, emergency shelter, and aid in improving the security of their residences. Other services include transportation of elderly victims to and from court, and special procedures to ensure a speedy return of stolen property.

Some jurisdictions have also established victim/witness assistance programs that apply to many other kinds of crime victims. Some programs focus on victims of particular types of crimes, such as those from break and enter (e.g., emergency repair of premises), while others are more general in that they provide counselling, information, referral and legal advocacy through a "victim hotline." Also, for those victims asked to act as witnesses, some programs provide improved scheduling and notification of required court appearances, transportation to and from court, child care while in court, special court reception rooms for victims, and regular notices to keep them informed of the progress of the criminal proceedings. While different programs vary in focus, some, such as the one in New York City, have been established recently to provide comprehensive and integrated services to all victims and witnesses.

Victim/witness assistance programs have been particularly prevalent in the United States where the Law Enforcement Assistance Administration (LEAA) has been carrying out its "crime victim initiative" since 1974. Over the past five years, LEAA has invested about $50 million to fund projects to provide services to crime victims. A wealth of information is available from these projects, and in most cases, this knowledge has been "packaged" by LEAA so that other jurisdictions may set up similar or improved programs. To date, the development of victim services in Canada (other than those dealing with the financial needs of victims) seems to have been largely restricted to those related to family violence and rape, although the interest in setting up other programs appears to be growing.

Victimization Surveys

The third area of focus has been the systematic collection and use of information from victims. Since 1967 victimization surveys have been conducted in several countries, particularly in the United States where the Bureau of Census has been conducting national as well as city-based surveys since 1972. Although the kinds of information available from such surveys and upon the nature of the questionnaire used, the most common data have been the estimates of victimization rates for crimes such as break and enter, theft, robbery, assault and auto theft. These estimates are more extensive than those available from police statistics because many crimes are never reported to the police. Evidence from the victimization surveys in the United States indicate that approximately 40% of all crimes against persons (e.g., assault) and about 60% of all crimes against property (e.g., theft) are never reported to the police. A similar pattern of findings has been obtained in Canada and in other countries. For example, preliminary data analysis from the Greater Vancouver victimization survey recently carried out for the federal Ministry of the Solicitor General indicated an over-all reporting rate of only 39%. Some crimes are more frequently reported to the police than others; in the Vancouver survey and in another survey by Waller and Okihiro in Toronto, 62% of break and enter victims indicated that the police had been notified whereas the rate of reporting in Vancouver was only 33% in the case of assault.

The fact that both reported and non-reported crime can be estimated from victimization surveys has proved to be particularly useful for evaluating the effectiveness of crime prevention programs because of a paradox that exists when police crime statistics are used for this purpose. Studies have demonstrated that programs designed to prevent crime may also have

Issue 2), in addition to the fact that such third parties may be financially able to pay victims for their losses, another advantage is that this practice, should it become prevalent, "may provide strong incentives to businesses, property owners and governmental agencies to take reasonable and necessary crime prevention steps to assure general security to their patrons, tenants, and visitors."

The second traditional avenue open to crime victims for obtaining financial remuneration for their losses is through claims to private insurance. Although precise information is not available on the extent to which this is actually done, a problem with this approach is that many potential victims may be unable to afford such insurance either because they are poor or because they live in high crime areas and may have difficulty obtaining policies at reasonable cost. A way of minimizing these problems has recently been established in the United States through creation of a federal crime insurance program, which provides for burglary and robbery insurance to persons and businesses which are unable to obtain such insurance from private sources at affordable rates. The popularity of this program would suggest that similar schemes may be attempted in other countries.

The third and fourth ways of minimizing the financial impact of crime on victims are more recent. One is through crime compensation programs where claims are made to a governmental body which reviews each case and makes the awards. The first such program was established in New Zealand in 1963. As was described in recent articles by Lamborn and Parizeau, government sponsored victim compensation programs have since been established in many countries throughout the world. In Canada, these currently exist under federal-provincial cost-sharing agreements in all provinces and territories except for the provinces of Prince Edward Island and Nova Scotia.

The funds for the victim compensation programs in most jurisdictions come from the general revenues of governments so that the financial burden for these programs falls on all taxpayers. However, an innovative exception to this practice is the so-called "fine schemes" such as those of Pennsylvania and Florida. In these states, special legislation authorizes the courts to impose an additional $10 fine ("crime victim's imposed costs") against persons convicted of certain kinds of criminal offences. These funds then go to the state's general fund, but are specifically earmarked for victim compensation. Thus, the general philosophy of these fine schemes is to shift part of the financial burden of compensating needy crime victims from taxpayers to the offenders themselves.

The fourth kind of program to provide financial aid to crime victims is restitution, where offenders are ordered to repay their victims for at least part of their losses. In Canada, the use of restitution orders as one of the sentencing options has actually been possible since 1954, but at least until recently, was rarely used by the courts. However, the use of restitution appears to be increasing in many jurisdictions, and in Ontario, for example, more than 3,000 offenders are currently making repayment to their victims as part of their conditions of probation. This represents 10% of the probation cases in the province, which compares to its use in only approximately .1% of the cases in Canada in 1969.

Victim/Witness Assistance

The second general category of programs and research related to victims are those that deal with the social, emotional, and practical needs of victims and witnesses. These victim/witness assistance (or advocacy) programs and their associated research are quite varied, but can be distinguished on the basis of the kind of crime victims served.

The type of victim service that has probably been the most common in most jurisdictions has been that designed to meet the needs of abused children. These generally have been provided through child welfare agencies, but a promising recent development in this area are the multi-agency team management approaches involving police, medical, legal, and child welfare agencies.

Other forms of victim services that have also become fairly common in many areas are those provided by rape crisis centers and by transition houses for women victims of family violence. These services would appear to be largely due to the mounting influence of the feminist movement which has stressed that the psychological and practical needs of raped or beaten women were not being met by existing agencies. This recognition of the inadequacy of traditional services for battered women has also recently resulted in other kinds of programs being established, such as those in London, Ontario, where specially trained counsellors assist police officers in responding to calls of domestic violence. As was described by the U.S. Civil Rights Commission in its 1978 report on the problems of battered women, police and court officials themselves have

The Case for Cameras in the Courtroom

by Stephen E. Nevas

The author is First Amendment Counsel to the U.S. National Association of Broadcasters. This article is reprinted from the ABA Judges' Journal.

At intervals in life, all of us come face-to-face with pressures to change. We are measured in large part by the decisions and actions we make at those moments. Judges, lawyers, and journalists alike face the test of whether or not there will be camera and microphone coverage of legal proceedings. Our actions will determine the people's access to court proceedings for a long time to come. If we succeed, there may be little fanfare. Failure will be very clear to all of us.

For nearly 50 years, emerging electronic and visual media, using their best techniques and equipment, have attempted to cover what happens in courtrooms. Often in the past, we of the media tripped over our own heavy wires and were foiled by cumbersome gear and bright lights. Courts themselves failed to provide us with clear and usable rules governing camera and microphone access. As a result, the news media, bench, and bar all lost.

The news media are again at the courtroom door. Our microphones are no different than those currently in use in courtrooms, which were installed to enable everyone within to hear clearly. We of the media want to pool sound and pictures so that no more than one electronic camera and one still film camera together with a single all-purpose set of microphones need ever be present. Our goal is to help the public hear and see what happens in court under court-issued rules that assure no physical disruption.

Courts have demanded that technology provide less obtrusive hardware, and the media have risen to the challenge. Astute judges acknowledge that the new tools of our craft are dramatically different from those used in former efforts to cover legal proceedings. In state after state, courts have concluded the risks of physical intrusion into the important processes of justice no longer exist.

Now we find ourselves facing a long, new list of reasons why the ban on camera and microphone coverage should remain in place. Our presence, it is claimed, will turn witnesses into clams and lawyers and judges into hams. Jurors will fear for their safety if the community recognizes them. The media's job is not to educate. We are sure to exploit and distort the legal process for crass commercial purposes. We, it is claimed, are insensitive to the supposed privacy rights of those in court. If, and only if, we can prove that the judicial process will remain unaffected by a wider audience, should we be allowed to photograph and broadcast its work. That test is especially tough. Is it warranted or even necessary?

ARE WE RECONSIDERING OPEN COURTS?

The emphasis on behavioral research, often as a precondition to permanent rules for camera and microphone coverage in court, has been allowed to overshadow basic legal principles. It is as though decisions about the openness of the legal process are being reconsidered or are to be made for the first time. It is as if the question of how many should be allowed to witness the work of the courts is to be made on the basis of how those who participate feel about being seen and heard in court.

Which question are we now asking of the justice system: How many citizens should be provided with a means to see and hear what takes place in court, or do we have a means at hand to increase citizen knowledge of our courts? If it is the former question that demands a response, then no amount of behavioral research will help. The debate will be about a political issue. But if the question is the latter one, then our task is to find ways to adapt the principles that underlie the justice system to the new opportunities presented by journalism and technology.

Most of the research effort has gone into surveys using questionnaires to plumb the attitudes of those who participated in trials covered by cameras and microphones. The approach, admittedly unscientific, has hardly produced worrisome results.

During a period of experimentation in Florida with aural and visual coverage of trials, the Judicial Planning Office Coordination Unit of the Office of State Courts Administrator obtained completed questionnaires from 1,349 nonjudicial trial

participants. This attitude survey, among other things, revealed that:

1. It was felt that the presence of electronic media disrupted the trial either not at all or only slightly.

2. The ability of the attorney and juror respondents to judge the truthfulness of witnesses was perceived to be affected not at all. The ability of the jurors to concentrate on the testimony was similarly unaffected.

3. Both jurors and witnesses perceived that the presence of electronic media made them feel just slightly more responsible for their actions.

At the end of the experimental period, the Florida Supreme Court issued permanent rules authorizing camera and microphone coverage of all trials without the consent of the parties.

The Bar Association of Greater Cleveland later borrowed the Florida questionnaire. The size of the Cleveland sample was much smaller. Only 84 nonjudicial trial participants took part. Answers from three judges were added.

Both questionnaires employed a five-step scale. For example, jurors in both surveys were asked: "To what extent were you concerned that people would know you were serving on a particular jury and try to influence your decision as a result of the media coverage of the trial?" The response scale was constructed from "Not at all" to "Slightly," "Moderately," "Very," and "Extremely."

Despite the size of the Cleveland sample, the distribution of answers was often similar to that found in Florida. But, when the Cleveland Bar reported the results of its work, the scaled responses were lumped together into columns expressing only very positive or very negative attitudes, the responses inbetween having been arbitrarily assigned to one category or the other.

The Cleveland Bar's summary of its findings led then American Bar Association president Leonard Janofsky to remark in a speech to the Minnesota Bar Association that the Cleveland "statistics are not as dire as the bar suggests."

More narrowly focused research about the effects of extended media coverage has been conducted in two upper Midwestern states. At the University of Wisconsin, Professor James L. Hoyt ran an experiment under controlled conditions in search of differences in the testimony of witnesses who knew they were being televised and those who did not. He discovered that those who knew their words were being recorded recalled more specific detail in response to the examination than those told no camera was recording them. The televised witnesses recalled fewer incorrect details.

In a scientific test of whether an impartial jury could be found for the retrial of a criminal defendant, Kermit Netteburg, working at the university of Minnesota, reported that a large pool of potential unbiased jurors remained following intense electronic and visual media coverage of a notorious Minnesota murder trial.

IF MORE RESEARCH IS NEEDED

The relative few who work in or near courts can easily lose sight of how the justice system is perceived by everyone else. Courts wield vast power over life, liberty, and property. That much and little more is what most citizens know. When someone finds resort to the justice system necessary or is commanded to appear and serve as a juror, give testimony, or answer charges, stress may be unavoidable. It also can be heightened needlessly by a lack of knowledge about how courts do their work. Most of us fear most what we know least well.

It seems fair to postulate that almost everyone who faces a courtroom appearance will experience some anxiety. This also may be due in part to the requirement that justice be done in public. Recent behavioral research, nonetheless, proceeds from a tacit assumption that the stresses and strains of open trials are a new phenomenon solely attributed to the presence of modern cameras and microphones. Not a single study has examined comparable proceedings to see whether the effects of modern print coverage are any different than those of modern electronic coverage on parties, witnesses, judges, lawyers, and jurors. No study has ever taken into acount the novelty and tentativeness of modern courtroom coverage. Those two circumstances alone attract attention to cameras and microphones, inviting criticism and attack by litigants in search of new ways to bifurcate trials and deflect attention from basic issues.

CONSENT RULES IN COURT

Faced with the need to decide whether broadcasters and newspaper still photographers should be allowed to let their audiences see and hear legal proceedings, Florida and some other states wisely adopted a presumption of openness. If a party or participant objects to full media coverage in Florida, an opportunity is provided to move for its exclusion. The presiding judge hears evidence. The court makes findings of fact and conclusions of

The Victim of Crime

by Gerry J. Leger

The author is a member of the Research Division of the Ministry of the Solicitor General, Ottawa.

In addition to direct financial losses, victims of crime often suffer not only from physical injuries, but also from emotional harm which may include long-term feelings of fear, guilt and helplessness. This in turn can adversely affect their quality of life, especially for certain kinds of victims such as the elderly, the poor, victims of rape, and victims of domestic violence. Many victims also have a need for assistance in their dealings with the criminal justice process itself because they are usually ill-informed of their legal rights, and are often subjected to inconveniences such as by having their property held as evidence or by having to serve as witnesses in criminal proceedings.

And perhaps most important of all, crime victims need to feel that justice is being carried out and that the criminal justice agencies are operating with their best interests in mind. For many victims, however, this does not occur. Instead, as recent studies in victimololgy show, crime victims often end up feeling helpless and frustrated because their needs have been overlooked.

Society's attempt to deal with crime has largely been through its criminal justice system. However, the victim has tended to be the "forgotten person" of the criminal justice system because our police, courts and correctional services focus almost exclusively on the offender. For example, if someone is murdered, almost all the energy, time and financial resources spent on the case go to apprehend, sentence, incarcerate and rehabilitate the offender while the family of the victim receives little attention. A similar situation often exists in the case of less serious crimes such as theft where the offender is either sent to prison (at a current average cost of $18,000 per year) or is ordered to pay a fine which goes to the state rather than to the victim who suffered the loss. Because of the focus on the criminal, there has been a tendency to think that "justice" has been carried out if an offender has been arrested, convicted, and sentenced. However, as was noted by the Law Reform Commission of Canada in 1974, "Isn't it surprising that the victim generally gets nothing for his loss?"

Over the past decade, however, there has been a rapid expansion in programs, services and research relating to crime victims. These can be broadly conceptualized in terms of three interrelated areas: those programs and services whose major focus is on minimizing the financial impact of victimization; those that attend to the non-financial needs of crime victims; and thirdly, research studies that involve the systematic collection and use of information from surveys of crime victims. The purpose of this paper is to provide a brief overview of these recent victim-related initiatives.

Financial Aid to Victims

Although not specifically designed for crime victims, programs such as medicare, unemployment insurance, and welfare may serve to minimize the financial impact of crime for certain victims if they otherwise are eligible. In addition, there are four other general ways victims may obtain financial assistance. One of the traditional means available to victims for obtaining financial remuneration for their losses has been by the use of private litigation through civil courts. However, suing offenders is not always possible or practical, because many offenders are not apprehended, and in those cases where they are, bringing a suit can be expensive and be of little use because of the limited assets of many offenders. As a result, this approach has been rarely used by victims.

What appears to be more practical, has been the recent use of civil litigation on behalf of victims to obtain reparation from third parties such as organizations and individuals, on the grounds that these were negligent in providing due protection to victims. Successful examples of third-party litigation in the United States include a case where a woman raped in a hotel sued the hotel on the grounds that the hotel management had failed to provide secure shelter; an assault victim that was attacked in the hallway of her apartment building sued the landlord because he had failed to provide proper security; and a case of a rape victim who sued a public transit authority because it had failed to provide adequate lighting and supervision in the station where the rape occurred. As was noted in a recent *NOVA Newsletter* (Vol. 2,

objectives to be attained.

This is doubtless the reason why no obligation was felt to define the role of the witness except as someone who testifies orally under oath during the judicial procedure, without benefit of any particular status, but subject to specific penalties if he does not abide strictly by the prescriptions of the Criminal Code.

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 obligated to submit.

But the participation of the witness, whether freely given or given under compulsion, must nonetheless be freed of the unnecessary frustrations which too often characterize our rigidly applied penal procedure.

The entire dependence of the witness in the application of our justice system and the attendant criminal procedure is clear to all of us. Unless he has had prior experience, the ordinary witness is completely ignorant of the conditions under which he will be required to repeat before the Court the facts he has already given to a police officer.

Only for exceptional reasons may he excuse himself from the formal summons to appear in Court, on a date that is arbitrarily imposed on him, usually without prior consultation, and that has already been agreed upon by the parties in the case.

Unless he is instructed by the party responsible for having him summoned, in the procedure which will follow, he is obliged to cool his heels in the waiting room not knowing when he will be called upon to play his part in the process.

At the preliminary hearing stage, unlike the accused, the witness has no right to demand that his name be withheld from the news media, so that he is often the subject of distressing and tactless reporting. One of the parties may even, with a great lack of consideration for the witness, raise the question of some remote but relatively serious criminal offence with the questionable object of testing his credibility.

But I think that the most frustrating thing for the witness is to learn, after many hours of waiting, that he is not after all required and that he need not have come at all. This type of situation could be avoided by exercising a modicum of diligence.

This situation is not at all exceptional. Certain administrative statistics concerning the Montreal Courts show that in 1981 some 95,000 police and civilian witnesses were summoned and that less than 50 per cent actually testified. It is clear that there is great room for improvement.

Another source of dissatisfaction for the witness is that, having done his duty by testifying or by waiting to be called, he is then not even told of the outcome of the dispute. He does not know whether the part he has played in the criminal procedure or his reluctant consent to appear has played any valid role in ensuring that justice is done. In addition, a good many witnesses are victims of the criminal acts which brought about the proceedings in the first place.

A healthy image of justice is not created only by those who are directly involved in the justice system. It is a concern we must all share fully and we must act when and where we can. The principle of our neutrality poses no obstacle to action taken toward this end.

Efforts on our part to see that obliging the witness to appear before the Court does not become a measure of oppression but that he is enabled to play the role for which he has been summoned is one way of expressing our concern.

During my talk last year at St. Andrew, I suggested that it was perfectly correct for us, individually or as a group, to take steps to improve the situation for the witness and for the victim. I wish to tell you of one step I have taken.

Through certain work done for the Solicitor General of Canada, with which I was able to become familiar, last November I took the initiative of organizing a meeting with certain officers from this department with a view to promoting the creation of a network of services for witnesses and victims of criminal acts. This step was approved by our Chief Justice, Yves Mayrand, of the Court of Sessions of the Peace.

As a result a meeting was held in Montreal on December 4, with Chief Justice Yves Mayrand presiding. Present at this meeting were officers or representatives of the Solicitor General of Canada, the federal Department of Justice, the ministere de la Justice du Quebec, the Crown, the association of defence lawyers, the Magistrature, and the office of the Court Clerk.

This meeting constituted itself as a Coordinating Committee with the object of undertaking, by means of a federal

(Continued on page 30)

law. Should the losing party be reluctant to accept them, an expedited appeal is provided. Criminal defendants and the media are thereby afforded an extra measure of due process. The procedures are especially valuable when a defendent's Sixth Amendment rights are at stake.

In a number of other states, a disturbing course has been set. Uncertain if camera and microphone coverage should be authorized, this important decision is left to parties, witnesses, criminal victims, and even jurors. In a few states, the failure of all parties to approve extended media coverage blocks it. In all too many instances, participants are not even required to provide a reason for their objection or to demonstrate its validity. Rules that seemingly permit electronic and visual coverage have become an empty promise.

In some jurisdictions, the consent rules are piecemeal. A party, witness, lawyer, judge, or juror may, by objection, block coverage only of themselves. Try to picture a criminal trial in which the screen goes black when the defendant appears or a civil proceeding in which the audience sees only four jurors and neither the plaintiff nor judge. Should courts be a party to such public distortions of the work?

These so-called consent rules represent a serious abdication of judicial discretion. They require every judge to relinquish a measure of control in court to those required to be present or seeking the court's assistance. Those who are empowered by consent rules to give or withhold permission for extended media coverage are anointed with the questionable authority to decide if publicity helps or hurts their reasons for being there. Courts were never intended to become platforms for self-seekers and publicity hounds nor places where the law can be covertly invoked. Consent rules deny a measure of every judge's responsibility to prevent misuse of the justice system.

WHO SHOULD DO THE EDITING?

When it comes time to distill to its essence the opposition to wider coverage of our courts, one perceives a distressing preoccupation with how news accounts might be edited. The opposition has complained that the courts are not here to educate; that radio and television coverage won't heighten respect for the justice system; legal proceedings will be exploited for ratings; broadcasters will put accounts from court next to the kitty litter commercials; and that random selections from a lurid trial may do no more than excite and misinform the public. It is especially disturbing when such challenges come from judges.

I don't think that courts or any other institutions have the right to base one's ability to gather or publish information on whether they will agree with the message or the way it is expressed. Broadcasters and newspaper people alike have constitutional responsibilities to inform the public. They do not take them lightly. The news media have First Amendment rights to gather and deliver the news and the public has a corollary First Amendment right to receive information. The United States Supreme Court, in fact, has spoken very clearly:

> For better or worse, editing is what editors are for; and editing is the selection and choice of material *(CBS v. Democratic National Committee,* 412 U.S. (94, 124 (1973)).

No court has ever dared to tell a newspaper that its right to report from court depended on some agreement to publish the entire transcript or accounts of each witness's testimony. Newspapers, almost without exception, are commercial enterprises competing with broadcasters for the same advertising dollars. Yet no judge has ever seriously suggested blocking coverage in court on grounds that the publication of courtroom news was edited to boost circulation. And there have been no complaints about newspaper accounts of trials appearing next to kitty litter ads.

Broadcasters who have been permitted to record sound and pictures in court already have provided many Americans with their first views of small claims, traffic, and housing courts. Some of our audiences have seen their first appellate arguments. Others at home have watched and discovered that criminal trials are not so nearly dramatic as episodes of Perry Mason led them to believe.

If we believe in a free market of ideas and information, it is time to let editors edit.

CLIMBING THE SLIPPERY SLOPE

It has been said that what radio and television provide is warm-blooded journalism. They select the best moments to let their audiences see and hear so that the viewers may come to their own conclusions. This is where the electronic and visual media naturally excel. The media's ability to perform that role is in conflict with another philosophy that maintains that a symbolic public and media presence in the courtroom is enough. "Witnesses" are "not accustomed to public speaking" and "jurors are generally unaccustomed to public appearances," the arguments go. Variants of this type of reasoning maintain

that the people will be misled about their courts, respect for justice could be diminished, or the public will be misinformed.

These views, especially when there is effort to engrave them into public policy, provoke strange questions. Will courtroom seats for 75 silent spectators be enough for our purposes, 750 adequate or insufficient? Is it advisable that the rest of the populace will receive its news from court only via the second-hand accounts of newspaper and broadcast reporters? Should we limit the opportunity to distribute accounts from the courtroom to local outlets, or might regional but not national news coverage serve the purposes of justice?

We are on the slippery slope! How many eyes and ears in court are too many?

That question is posed, in effect, every time we wrestle over the admission of cameras and microphones to courtrooms where the public and media are otherwise entitled to be. It has become an unnecessary exercise.

A single electronic camera using no additional light, a single silent still film camera, and a connection to a single all-purpose set of microphones is all that is needed for people to see and hear what is being done in their courts. Almost universally, when these modern tools of journalism are in use, the reporters who crowd courtrooms for every important case retreat to a media pool room to watch and work. And courtroom tension decreases.

The debate about "how many is too many" can and should end. Any citizen can be called to account in court. Every citizen has a right to seek judicial assistance. The justice system belongs to all Americans. It is time to let them see and hear it operate.

U.S. Television . . .

(Continued from page 4)

reckless to make that allegation, retorts Norman Davis, vice-president of Miami TV station WPLG, which first petitioned for the Florida Court rule and will be filling as amicus brief in the **Chandler** case.

"It was the message and not the messenger that sparked the riot, Mr. Davis said.

"Miami attorney Ellis Rubin, who introduced the TV intoxication defense in the widely televised 1978 murder trial of Ronnie Samora, admits he has 'retreated a little' from his strong position in support of cameras in the Court.

"Both he and Mr. Hirschhorn said they were particularly troubled because the TV producers who covered the McDuffie trial selectively broadcast the more dramatic and inflammatory portions of the court proceedings.

"They were too sensational, said Mr. Rubin, noting that the Zamora trial and the recent trial of a black Miami school official were both covered in their entirety by local public TV stations. Channel 2, Miami's PBS station, says it did not broadcast the McDuffie trial because of a conflict in programming. The commercial stations carried excerpts only, as part of their nightly news programs.

"I don't think it should be up to a non-lawyer, a TV producer, to determine what the public should see and not see in a trial, Mr. Rubin said.

"TV executives and their lawyers emphatically deny that their coverage had been sensationalized, or that their broadcasts had contributed to the race riot.

"What happened in Miami is not susceptible to that kind of easy analysis, said Miami lawyer Don Middlebrooks, Counsel to WPLG. He pointed out racial tensions had been high in Miami for over a year.

"A basic principle of our argument is that filmed trial coverage is more accurage than coverage otherwise, Mr. Middlebrooks said. 'The McDuffie case would have been covered regardless, with sketch artists in the courtroom and photographers waiting outside."

"Frank Lynn, a reporter for Miami TV station WTVJ, a CBC affiliate, said he and the other local reporters were careful to show restraint in selecting what trial footage to air in the McDuffie case.

"For example, Mr. Lynn said he decided not to use the most graphic portions of the medical examiner's testimony because it described Mr. McDuffie's head injuries in too vivid detail.

"Mr. Lynn did say that 'with the benefit of hindsight that is always 20/20', he regretted having aired footage of Mrs. McDuffie's emotional reaction to the verdict.

"If I had it to do all over again I wouldn't have used it," he admitted.

The Witness and Justice

by Judge Jacques Lessard

The author, past president of the CAPCJ, is presently the Education Chairman of the Association. This presentation was first made at the Eastern Regional Seminar in Charlottetown in June, 1982.

In my capacity as President of the Canadian Association of Provincial Court Judges, last July I had the honour of addressing the annual convention of the New Brunswick Association of Provincial Court Judges, held at St. Andrew-by-the-Sea.

For reasons which I took care to explain in my talk, on this occasion I placed great stress on the respect we owe the witness in our criminal justice system, by emphasizing in particular my own concern about the treatment reserved for the witness in his participation in the administration of justice. (Ed. Note — See Judges Journal, September, 1981.)

A local paper referred to my words in an article entitled *Witness deserves full respect of Court.* Certain parts of my address were published, and one sentence in particular seems to have caught the attention of the author, who reported it in this way:

> He added that judges have the authority and the power to close certain gaps in the criminal justice system which sometimes lead to social injustice of which the first victim is the witness.

According to those of my colleagues who heard my address, it seems there was a certain amount of surprise in some circles that a member of the Magistrature and spokesman for a body of this importance should show such concern for witnesses. I must admit that, when I heard of this reaction, I did wonder if I had not been somewhat presumptuous in broaching such a subject, and asked myself if the situation of the witness was really my responsibility. Had I, in effect, overstepped the mark a little by expressing my opinions on so delicate a matter?

It must be recognized 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.

The summoning of witnesses, the use made of them in the criminal procedure, the material conditions to which they are subject, and the treatment reserved for them are no part of the function of the judge. 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.

It is for this reason that I am at this moment wondering if I can still speak with some authority on the matter.

However, if we do not have such authority, we cannot help giving voice to our inner feelings about the problems with which they are confronted.

Certainly — and it is perhaps justifiable to state it forcefully — judges are not indifferent to the problems witnesses often have to cope with, and it is no disparagement of our criminal justice system to wish for a more rational, more frugal, fairer use of the witness whenever possible.

But then, while recognizing the essential role of the witness in the criminal procedure, how can we show our concern for him? How can we manifest the respect due him in the absence of any legally conferred authority?

Obviously we may do so by the attitudes and behaviour that we personally adopt toward the witness or by certain initiatives we are in a position to take; we may also use such palliative measures as are open to us without derogating from our powers.

Allow me to pose the following questions.

Precisely how does the witness fare when confronted by the criminal justice system? How does the operation of the legal apparatus really affect him? What actually happens to him in his dealings with the Court?

In addressing myself to judges of your experience, who are in daily contact with witnesses, there would be no need to elaborate on the answers to these three questions were it not for the fact that it is essential to underline certain imperfections in our justice system which specifically affect the situation of the witness and which should be rectified.

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

provoquer une rencontre avec certains officiers de ce ministère, en vue de promouvoir la création d'un certain réseau de services à l'intention des témoins et victimes d'actes criminels, laquelle démarche reçut par la suite l'approbation de notre Juge en chef Yves Mayrand de notre Cour des sessions de la paix.

Suite à une convocation formulée avec l'autorisation de notre Juge en chef, une réunion tenue à Montréal le 4 décembre sous la présidence de ce dernier et à laquelle assistaient des officiers ou représentants des deux ministères de la Justice et du Solliciteur Général du Canada, du ministère de la Justice du Québec, de la Couronne, de l'association des avocats de la défense, de la Magistrature et de l'administration du greffe de la Cour.

Cette assemblée se constitua en Comité coordinateur, en vue de procéder, à la faveur d'un octroi du gouvernement fédéral, à une étude dans l'optique de l'implantation d'un réseau de services aux victimes et témoins d'actes criminels.

Une entente de principe ayant reçu l'approbation de l'autorité gouvernementale, cette étude est déjà en marche sous la direction d'un responsable dont la désignation a marqué le choix des membres du Comité.

Mes services ont été offerts en vue de collaborer à l'implantation de ce projet-pilote.

La phase préliminaire de ce projet porte sur une étude qui comporte deux volets: l'analyse des services à créer en faveur des témoins et victimes distinctement, d'une part, et l'inventaire des ressources matérielles dont nous pouvons disposer dans l'optique d'un tel réseau de services, d'autre part.

Je vous donne la nomenclature de certains services qui sont prioritairement retenus dans nos objectifs immédiats:

1. Création d'un centre d'accueil général aux témoins.
2. Conception de salles d'attente exclusivement réservées aux témoins.
3. Création d'une centrale téléphonique pour service d'information aux témoins et victimes et liaison entre tous les services existants.
4. Impression et distribution de matériel d'information.
5. Service d'information sur le déroulement de la procédure dans chaque instance.
6. Service de contrôle de l'assignation des témoins.
7. Service portant sur la remise de biens saisis avec substitution de d'autres méthodes de preuvre.

Ce ne sont là que des mesures préliminaires que nous développerons au fur et à mesure que nous rencontrerons ultérieurement d'autres exigences.

Ce projet n'est pas unique en son genre au Canada puisqu'il existe déjà des projets analogues actuellement en fonction dans d'autres parties du pays, notamment à Winnipeg, dans ce cas, sous l'initiative du Juge en chef Harold Gyles, et à Calgary où l'accent porte sur la remise des biens saisis en faveur de leur légitime propriétaire.

Or et sans y donner la même ampleur, chacune de ces mesures peut donner lieu à certaines initiatives, pourvu que nous puissions nous assurer la collaboration de tous les autres participants au système.

Cette tâche n'est vraiment point au-dessus de nos forces et le prestige de la magistrature est un atout précieux qui permet de briser les obstacles qui s'y opposent.

Voilà donc et peut-être trop succinctement exposé, cette préoccupation dont je fais état dans ma causerie de l'an dernier et pour laquelle j'ose récidiver devant vous.

Je vous remercie donc de votre bonne attention et compte sur votre indulgence pour avoir aussi longuement entretenu des propos dont vous partagiez déjà la conviction.

Against Cameras . . .

(Continued from page 11)

Should consent of the parties be secured as a condition precedent to cameras in the courtroom?
Lawyers — 54% yes

Should feelings of victims be taken into consideration before having cameras in the courtroom?
Lawyers — 62% given consideration
Lawyers — 38% followed completely

OVERALL, WOULD YOU FAVOR OR OPPOSE ALLOWING CAMERAS IN THE COURTROOM?
Jurors — 50% opposed
Witnesses — 40% opposed
Attorneys — 69% opposed
Judges — 33% opposed

THE CASE AGAINST CAMERAS IN THE COURTROOM

by Judge Jack G. Day

The author is a judge of the Court of Appeals of Ohio, Eighth Appelate Circuit. This article is reprinted from the ABA Judges' Journal.

The Supreme Court of the United States has decided in *Chandler v. Florida* that the states were free to experiment with the television broadcast of trials, that such broadcasts were not "inherently a denial of due process," and that the burden of proving that a fair trial was compromised by a broadcast was on the defendant. These conclusions do not foreclose opposition to cameras in the courtroom.

Opponents can still attempt to persuade a state that the experiment is an inherent violation of the state constitution or is unwise as a matter of state policy. In addition, the federal issue is still open. Obviously, the Supreme Court has *not* said what it would do in future cases. It in implicit in *Chandler* that the court will opt for "inherent infection" if sufficient empirical date are developed to support it.

Some data and an abundance of argument already exist to oppose an extensionof the *Chandler* result. It follows that the field should not be left to the victors in that cause.

The traditional argument over cameras in the courtroom focuses on whether or not the broadcasting industry has sufficient technical skills to screen trial proceedings absolutely from physical or noise interference. I assume this argument to be correct, but it provides no justification for allowing cameras in the courtroom. Instead, overwhelming reasons for forbidding videotaping or televising trials still remain.

The judicial process is not designed or intended to educate, inform, or entertain the public. It is a search for truth. It is a solemn, frequently tedious effort that settles questions about the rights of litigants according to law. True, an open trial is essential to a fair trial and prevents subversion of process, but that objective is served adequately by a full transcript, a public presence, and media representatives in the courtroom. Additional public gains other that securing a fair trial are ancillary and must be considered bonuses, not goals.

While a trial may be dramatic, anything that promotes theatrics in the courtroom should be deterred. The thespians in the legal profession (both on and off the bench) need no urging, and the system should not encourage them by enlarging the audience.

The media like to talk about the right to know and the educational process, but their interest is mainly, and understandably, in good theatre. Therein lies the problem. The media determine what deserves airing and what does not, which trials are to be broadcast, and what portions of those trials. And that eclecticism is exercised without regard to a just balance, except as the editors see it. A two-minute televised news story - which is condisered very long - cannot do adequate justice to the complexities in many cases.

Thus, the supposed issue of the right to know is honored only speciously, because a whole case is seldom if ever presented on public or even nonpublic television. Legally, the media do not have to do this, since it is not the viewing audience's responsibility to determine guilt or innocence; thus, it is argued, the public needs no more than fragmented information further fractured by the accidents of interest and chance viewing. But why must we suffer distortion, when a real interest in the right to know is preserved by the public record available to anyone sufficiently motivated to read it?

The so-called educational objectives of televising trials are susceptible to much the same criticism. Knowledge about the facts and applicable law in a particular case cannot come in bits and pieces; random selections from a lurid trial may do no more than excite and misinform the public. What is the educational value of that?

Moreover, the media's educational goals are poorly defined. Do they want to explain the judicial process, clarify court procedures, or let the public know that justice is being done? The first two goals cannot be achieved by limited television exposure even if judges and lawyers were able to explain their reasons for objections, rulings, and orders. The last cannot be accomplished without a full exposition of trial issues and evidence, including considerable material of interest only to

attorneys, judges, and insomniacs.

On the other hand, what a fragmented version of a trial is apt to do is persuade the public to take sides on the basis of limited, even esoteric, information. The viewers' varying perceptions of the events they witness on their televisions could even do the administration of justice inestimable harm, because distorted views may lead to unfounded public decisions about both the judicial process and its product.

THE WITNESS/JUROR AS ACTOR

Regardless of the media's objectives, cameras in the courtroom make it a stage on which nonprofessionals must perform whether they like it or not. The average witness takes the stand with all the anxieties of a person not accustomed to public speaking compounded by the presence of a civil but hostile counsel. The possibility of legitimate humiliation is, at best, threatening. Add to that an immense radio-television audience, which can cause even experienced performers to suffer attacks of nerves, and the judicial process is not assisted, but impeded. Moreover, the wide dissemination of the faces and testimony of witnesses makes them fair game for ridicule, pressure and threats.

Jurors, too, are susceptible to public broadcast jitters, even though they do not have to perform like witnesses. The recognition that accompanies television exposure may intrude on their attentiveness and, in a notorious case, subject them or their families to unwelcome attention, harassment,or coercion. In additon, some nonsequestered jurors may have an irresistable urge to see themselves on television and, therefore, will be exposed to the hazards of partial repetition of the evidence.

Also, the rule separating witnesses may be impaired when a trial is broadcast, and witnesses may become judges of their own and other witnesses' credibility. If a suggestible witness sees or hears an earlier witness, the integrity of his or her testimony may be subverted. Indeed, a fair witness may become involved in a derogatory assessment of his or her recollection simply because of exposure to a different one.

Finally, no one can predict constitutional developments with assurance. And grave constitutional issues may be opened if trials are allowed to be broadcast selectively. Consider these questions: Would not disparate treatment raise an equal protection problem? Do the broadcast media have a right of access protected by the Sixth Amendment? Will the broadcast media determine which defendant's trial is to be broadcast and which not? What portion of a trial must be aired? If not all, how much is necessary and in what balance required to satisfy due process? Will public opinion punish before conviction?

Should these questions be answered in any way that requires substantial coverage for all criminal cases, one can predict staggering costs and numbing monotony. And who will pay the costs? Will there be a different rule for rich and poor?

It may well be that the enormous cost of television accounts for the relative brevity for the telecast experience so far. That same factor may provide some shield for the future. If so, the high price will have an intrinsic value.

FINDING AN IMPARTIAL JURY

Telecasting a trial can pose many problems if a new trial becomes necessary. What will be the source of an impartial jury on retrial if the first trial was made notorious before a wide public audience? Take, for example, the case of *Rideau v. Louisiana* (373 U.S. 723, 83 S. Ct. 1417 (1963)). The defense filed a motion for a change of venue, saying that the defendant would be deprived of his constitutional rights if he was tried in Calcasieu Parish because, during a televised interview from the jail in which the defendant was interrogated by the sheriff, he confessed to the crimes with which he was charged. The motion was denied and the defendant was convicted of murder and sentenced to death - a judgement that was confirmed by the Louisiana Supreme Court. On certiorari, however, the U.S. Supreme Court reversed the decision, holding that due process of law required a trial before a jury from a community of people who had not seen or heard the televised interview.

Now, as many states are reviewing their policies admitting cameras in the courtroom, there is important empirical data supporting the stand against such a practice. The Bar Association of Greater Cleveland conducted a study in early 1980 that surveyed the attitudes of judges, jurors, attorneys, and witnesses involved in either a major trial that received gavel to gavel television coverage or two other proceedings in which cameras appeared only episodically.

The data indicate that the presence of television cameras in the courtrooms has a substantial deleterious influence on a sizeable number of participants in the trial proceedings. Admittedly, litigants are not guaranteed a perfect trial, only a fair one,

justice pénale, l'entière législation contenue au code criminel gravite exclusivement autour de l'accusé et cela se conçoit en raison des seuls objectifs recherchés.

Voilà sans doute pourquoi l'on n'a pas senti l'obligation d'y définir le rôle du témoin sinon que de préciser qu'il s'agit d'une personne qui rend témoignage oralement sous serment dans une procédure judiciaire, sans lui reconnaître aucun statut distinctif et d'énoncer les sanctions dont il peut être frappé, à défaut de se conformer aux strictes prescriptions de cette législation.

Son obligation légale de participer à l'administration de la justice ne fait que refléter un devoir impérieux dont les membres de notre société se doivent de s'imposer pour assurer leur protection collective.

Telle est sans doute la contribution que chaque témoin doit apporter pour favoriser l'application de notre système de justice et en assurer l'efficacité dans la recherche des objectifs qui forment la pierre angulaire de notre système pénal, et cela, en dépit des contraintes auxquelles il est appelé à se soumettre.

Mais qu'elle soit volontaire ou contraignante, la participation du témoin, avec l'application rigide de la procédure pénale, doit néanmoins être exempte de mesures indûment frustratoires qui trop souvent la caractérisent.

Déjà, dans l'application de notre système de justice et de la procédure pénale qui s'y rattache, nous constatons l'entière dépendance du témoin. Ajoutons qu'à moins d'y avoir été initié dans une circonstance antérieure, le témoin ordinaire ignore les conditions dans lesquelles il sera appelé à répéter devant le Tribunal sa version des faits déjà donnée à un officier de police.

Sauf pour un motif exceptionnel, il ne peut se dérober à une assignation formelle de comparaître devant le Tribunal, à une date qu'on lui aura arbitrairement désignée, généralement sans consultation au préalable, et déjà arrêtée entre les parties en cause.

A moins qu'il ne soit instruit par la partie qui a pourvu à son assignation de la procédure qui va suivre, force lui est d'attendre dans la salle désignée pour les événements, ne sachant trop à quel moment il sera invité à participer au processus judiciaire.

A l'étape de l'enquête préliminaire et contrairement au droit de l'accusé, le témoin ne peut se réclamer d'une ordonnance de non publication dans les medias d'information, de sorte qu'il fait souvent l'objet d'une narration pénible ou maladroite de son témoignage quand ce n'est pas la mention d'une infraction criminelle lointaine et de gravité relative inconsidérément soulevée par l'une des parties dans le but quelquefois douteux de tester sa crédibilité.

Mais il n'est pas de pire frustration pour le témoin, d'apprendre après une longue attente dans la salle d'audience, que sa présence n'est pas essentiellement requise ou qu'elle aurait pu être évitée si la moindre diligence eusse été exercée.

Cette situation n'est pas exceptionnelle et si je m'en remets à la situation qui prévaut dans nos cours de justice de Montréal où certaines statistique relevées au niveau de l'administration démontrent qu'au cours de l'année 1981, quelque 95,000 témoins civils et policiers ont reçu une convocation, alors que moins de 50% on effectivement rendu témoignage, l'on peut au moins conclure à une amélioration souhaitable de la situation.

Il y a également cette insatisfaction du témoin qui s'étant soumis à son obligation légale de rendre témoignage ou demeuré dans l'attente d'une convocation devant le Tribunal est néanmoins tenu dans l'ignorance de l'issue du litige de sorte qu'il ignore dans quelle mesure sa participation effective au système pénal ou sa velléité de s'y soumettre a permis que justice ait valablement été rendue, et alors que pour un bon nombre d'entre eux ils sont par surcroît les victimes des actes criminels dont les litiges ont été disposés.

Une saine image de la justice ne relève pas de la responsabilité unique de ceux qui sont directement impliqués dans le système de justice. C'est également une préoccupation que nous devons tous également partagée dans la pleine mesure où notre intervention peut s'y prêter et le principe de notre neutralité dans le litige ne fait pas obstacle à ce que nous posions des gestes concrets dans ce sens.

Nos efforts pour éviter que la présence du témoin devant le Tribunal ne devienne purement vexatoire et nous assurer qu'il puisse véritable jouer le rôle pour lequel il est convoqué est une façon de nous exprimer.

Lors de ma causerie de l'an dernier à St. Andrew, je faisais la suggestion qu'il nous était loisible de nous livrer individuellement ou collectivement à certaines initiatives pour améliorer le sort du témoin et de la victime. Je vous fais maintenant part de la démarche suivante.

A la faveur de certains travaux effectués pour le compte du ministère du Solliciteur Général du Canada dont il m'avait été loisible de prendre connaissance, j'avais, au mois de novembre dernier, pris l'initiative personnelle de

Le Temoin Face a La Justice

M. le juge Jacques Lessard

En juillet dernier, l'on m'avait fait l'honneur, à titre de président de l'Assocication canadienne des juges des cours provinciales, de m'inviter comme conférencier à l'occasion de la convention annuelle de l'Association des juges provinciaux du Nouveau-Brunswick et qui se tenait à St. Andrew-by-the-sea.

Pour des motifs que j'avais pris soin d'exposer dans ma causerie, j'avais fait porter celle-ci sur le respect que l'on doit au témoin dans l'application de notre système pénal, en soulignant de façon tout particulière ma préoccupation personnelle en regard du traitement qu'on lui réserve dans sa participation à l'administration de la justice.

Un journal local avait fait écho à mes propos avec la publication d'un article titré "Witness deserves full respect of Court," en reproduisant également certains passages de mon allocution dont une phrase en particulier semble avoir retenu l'attention de l'auteur, et que ce dernier avait traduit:

> "He added that judges have the authority and the power to close certain gaps in the criminal justice system which sometimes lead to social injustice of which the first victim is the witness."

Aux dires de mes collègues qui furent témoins de mes propos, il semble que l'on n'ait pas manqué de s'étonner dans certains milieux de ce que cette préoccupation à l'égard des témoins soit énoncée par un membre de la magistrature et par surcroît le porte-parole d'un aussi important collège.

Je vous avouerai qu'après avoir connu cette réaction, je me suis demandé si je n'avais pas été quelque peu audacieux en abordant un tel sujet et me suis posé la question de savoir si vraiment la situation du témoin relevait de ma responsabilité, et aussi si je n'avais pas quelque peu outrepassé mes prérogatives en m'exprimant sur un sujet aussi délicat.

Il faut bien reconnaître que l'administration de la justice comme telle, bien qu'il soit souhaitable qu'il en fusse autrement, n'est pas de fait ni de droit du ressort du pouvoir judiciaire.

La convocation des témoins, l'utilisation que l'on en fait dans l'application de la procédure pénale, les conditions matérielles que l'on conçoit à leur égard, le traitement qu'on leur réserve échappent virtuellement aux attributions inhérentes à la fonction de juge. La législation existant ne nous consacre aucun regard sur le sort du témoin, sinon que de nous définir les sanctions que nous sommes en droit de lui imposer dans l'exercice de nos pouvoirs discrétionnaires.

Voilà pourquoi je me demande à l'instant même, si je peux encore parler avec quelqu'autorité sur le sujet.

Pourtant et si tant il est vrai que nous ne disposons pas d'une telle autorité, pouvons-nous éviter d'exprimer à voix haute nos sentiments intérieurs à l'égard des problèmes auxquels ceux-ci sont confrontés.

Bien sûr, et il est peut-être valable de l'affirmer avec force, que les juges ne sont pas indifférents devant les problèmes auxquels les témoins sont quelquefois en butte, et ce n'est pas décrier notre système de justice pénale que de souhaiter nous-mêmes une utilisation plus rationnelle, parcimonieuse et équitable du témoin dans la mesure où elle pourrait ainsi s'exercer.

Mais alors et tout en reconnaissant le rôle essentiel que le témoin est appelé à jouer dans l'exercice de la procédure pénale, comment peut-on démontrer notre préoccupation à son endroit et manifester le respect que l'on ne peut manquer de lui porter, et cela en l'absence de toute autre autorité qui nous soit légalement conférée?

De toute évidence, cette autorité se réfère en partie aux attitudes et comportements que nous pouvons individuellement adopter à l'égard du témoin, ou à des initiatives que nous pouvons prendre, ou encore à des mesures palliatives que nous pourrions concevoir, sans pour autant déroger à nos strictes attributions.

Mais auparavant, posons nous les questions suivantes:

Qu'en est-il précisément du témoin face à la justice? Dans la réalité, quelle expérience vit-il avec le fonctionnement de l'appareil judiciaire, et dans le concret, comment se déroule sa présence devant le Tribunal?

M'adressant à des juges aussi expérimentés et qui vivent quotidiennement la situation du témoin, je ne sentirais sans doute pas le besoin d'élaborer sur les réponses qu'il nous faut aborder à ces trois questions si ce n'est que dans le but de mettre en relief certaines imperfections de notre système de justice qui le touchent plus précisément et pour lesquels il serait recommandable d'apporter certains correctifs.

En raison des principes fondamentaux

but can that rquirement be met in an environment in which 50 percent of the jurors, 30 percent of the witnesses, and 54 percent of the lawyers are distracted? And isn't that ill effect compounded when 36 percent of the jurors, 43 percent of the witnesses, and 54 percent of the lawyers are nervous in the presence of the cameras? And when those emotions are coupled with a fear of harm by 65 percent of the jurors, 19 percent of the witnesses, and 24 percent of the lawyers, what then becomes of a "fair trial"?

A legal system that cannot equate due process with even the "reasonable possibility" of prejudice from the admission of illicitly acquired evidence can hardly be expected to tolerate prospects of unfairness of the dimension demonstrated in the Cleveland data. The Cleveland experiment should be run again and again across the country. If its results cannot be replicated, then it will be time to consider, and reconsider, the place cameras and microphones have in the courtroom.

AWARENESS AND EFFECTS OF CAMERAS IN THE COURTROOM ON JURORS, WITNESSES, LAWYERS, AND JUDGES
(Reprinted with permission from the *Cleveland Bar Journal,* Vol. 7, No. 51, May 1980)

AWARENESS OF CAMERAS IN THE COURTROOM

Jurors — 88% yes
Witnesses — 74% yes
Attorneys — 100% yes
Judges — 100% yes

PERCEPTION OF THE COURT AND THE EFFECT ON ITS PROCEEDINGS

What is the effect of cameras in the courtroom upon the dignity of the court?
Jurors — 47% decreased, 44% no effect
Witnesses — 21% decreased, 51% no effect
Attorneys — 23% decreased, 77% no effect
Judges — 33% decreased, 66% no effect
Is the presence of cameras in the courtroom disruptive of court procedures?
Jurors — 50% yes (12% very disruptive)
Witnesses — 32% yes
Atorneys — 61% yes
Judges — 33% yes
Do cameras in the courtroom make the public more informed on court procedures?
Witnesses — 92% yes
Attorneys — 92% yes
Judges — 66% yes

QUALITY OF CONCENTRATION OF THE PARTICIPANTS IN THE TRIAL

Did the cameras distract you?
Jurors — 50% yes
Witnesses — 30% yes
Attorneys — 54% yes
Judges — 33% yes
Did the presence of cameras in the courtroom make you nervous?
Jurors — 36% yes
Witnesses — 43% yes
Attorneys — 54% yes
Judges — 100% no
Did the cameras make you self-conscious?
Jurors — 48% yes
Witnesses — 47% yes
Attorneys — 46% yes
Judges — 100% no
Did the cameras make you more attentive?
Jurors — 82% no
Witnesses — 68% no
Attorneys — 77% no
Judges — 66% no

FEAR OF HARM BY PARTICIPANTS IN THE TRIAL

Jurors — 65% yes (12% extreme)
Witnesses — 19% yes
Attorneys — 24% yes
Judges — 66% no, 33% no answer

PLAYING TO THE CAMERAS

Did you watch yourself on TV?
Jurors — 21% wanted to see self
Jurors — 53% difficult to avoid watching self
Witnesses — 70% yes
Attorneys — 85% yes
Judges — 66% yes
Do cameras in the courtroom extend the length of the trial?
Attorneys — 62% yes
Is there a danger that the TV exposure an attorney would gain during trial might influence his decisions and advice to a client on whether to settle a case or enter a plea?
Attorneys — 84% yes
Do you feel that the TV exposure given to a judge who is up for election in the near future might influence his decisions, even subconsciously, during the trial?
Attorneys — 84% yes
Do cameras in the courtroom exaggerate the importance of the trial?
Jurors — 50% yes
Witnesses — 59% yes
Attorneys — 77% yes
Judges — 33% yes
Are trial participlants more flamboyant as the result of cameras in the courtroom?
Attorneys — 23% yes

CONSENT FOR CAMERAS IN COURTROOM

Should consent of the lawyer *be secured as a condition precedent to cameras in the courtroom?*
Lawyers — 62% yes

(Continued on page 24)

Abolishing the Preliminary Hearing?

Preliminary hearings are becoming long, wasteful of court time, impose severe hardship of witnesses, and ought to be replaced by a system of complete disclosure of the Crown's case, says a Special Committee of the Ontario Bench and Bar Council.

Chaired by Mr. Justice Arthur Martin of the Court of Appeal of Ontario, the report details several alternatives to the present system of preliminary hearings. The Attorney-General, Roy McMurtry, has forwarded the report to the federal Minister of Justice and to the Attorneys General of other provinces for discussion.

Approved by a majority of fourteen committee members to two, the report says, in part:

The Committee by a large majority is satisfied that preliminary hearings are becoming excessively long, making unnecessary and excessive demands upon judicial time and imposing severe hardship on witnesses who may be required to attend on several occasions as a result of adjournments. Statistics kept within the Ministry of the Attorney General of Ontario which show the relative percentage increase in workload in (1) Provincial Court (Criminal Division) trials; (2) County and District Court trials, and (3) Preliminary hearings in the Provincial Court support the conclusion. Annexed as Schedule "B" is a chart showing the percentage increase in workload from 1976 to 1982, which shows a thirty per cent increase in Provincial Court trials, a one hundred and sixty-one per cent increase in County and District Court trials and a one hundred and sixty-five per cent increase in preliminary hearings.

The Committee is unanimously of the view that any modification of the preliminary hearing must provide for a screening mechanism to protect an accused against being required to stand trial on a charge unless a judicial officer is satisfied of the existence of a *prima facie* case against him.

It became apparent to the Committee at a very early stage of its proceedings that one of the fundamental questions that the Committee would be required to consider was the purpose that the preliminary hearing legitimately serves, since any modification of the preliminary hearing should be responsive to its purpose. The Supreme Court of Canada has stated in the clearest terms that the purpose of the preliminary hearing is to determine whether there is sufficient evidence to put the accused on trial. The view of the Supreme Court of Canada as to the purpose of the preliminary hearing accords with that of the English Courts.

Thus, provided that the prosecution can establish a *prima facie* case by the witnesses it does call, it is not obliged to call any particular witness at the preliminary hearing even though that witness is a very important one such as the complainant in a sexual case, and even though the defence wishes that witness called; and a committal for trial will not be quashed for failure to call the witness.

Although the purpose of the preliminary hearing is to ensure that no one shall be required to stand trial unless there is a *prima facie* case against him, it has by long tradition and practice *incidentally* provided an accused with the opportunity of ascertaining the case he has to meet.

Ordinarily, the Crown does not restrict the evidence it calls at the preliminary hearing to the bare minimum required to enable the Justice to form an opinion that there is sufficient evidence to put the accused on trial, but if the Crown chooses to do so the only protection the accused has against surprise at the trial is the practice, strictly enforced in England, of requiring the Crown to serve the accused in advance of the trial with a copy of the statements of witnesses the Crown proposes to call at the trial who were not called at the preliminary hearing.

It is only in more recent times that the English rule of practice requiring the Crown to furnish the defence with copies of statements of witnesses intended to be called at the trial who were not called at the preliminary hearing has been considered in all parts of Canada as essential to a fair trial and as such strictly enforced by the courts.

It has become customary in Canada for defence counsel to use the preliminary hearing to probe for weaknesses in the testimony of the witnesses called by the Crown, to elicit information that may provide the foundation for an attack on credibility at the trial, and to tie the witness down. In the hands of skilful counsel and used with restraint, this type of cross-

from that of an airport. We have derived considerable assistance from security experts made available to us by the airport division of the Federal Department of Transport. However, we have been made keenly aware that the courts would pose unique difficulties for the use of such equipment. We have no desire to embark rashly upon a province-wide project of installing electronic metal detection devices, which may result in considerable inconvenience and delay to those who use the courts.

We believe that the advantages and disadvantages of such a system can best be assessed through the use of a pilot project. Accordingly, we recommend that the Ministry of the Attorney General take immediate steps to arrange for a pilot project lasting two or three months, in one of the major metropolitan court facilities. Such a project will, we believe, provide us with the factual information needed to assess whether the province-wide extension of this equipment is justified.

Emergency Buttons

The Committee has also been considering the potential for installing emergency button systems throughout the Ontario court system. Currently, one in eight of every court buildings in Ontario has such a system. We believe that emergency buttons are useful for summoning assistance in a fast and unobtrusive fashion. Accordingly, we recommend that the system be extended across the Province.

We have considered three possible systems: a wireless system, an alternating current code system, and a hard-wire system, and have concluded that a hard-wire system would be the simplest, most reliable, most cost-effective, and most flexible method. The total cost for installing this system in all Ontario courtrooms would be in the region of half a million dollars.

We believe that this option is one of the most effective responses to the competing interests in court security, and that buzzer systems should be routinely installed in every court facility, no matter how large or small. The button system would be installed in all courtrooms, motion rooms, and judges' chambers.

Courtroom Measures

There are, indeed, many aspects of court security, where the judge's innate discretion may be of considerable importance in preventing or minimizing outbursts. For example, judges in the past have reserved judgement until the next day, to permit tempers to subside. At times, they will leave the courtroom after the accused has been escorted from the court, in order to maintain the sense of decorum present when a judge is actually sitting. We hope that judges will continue to be sensitive to the various steps that they can take to minimize security problems.

Responsibility of the Legal Profession

One key recommendation in our earlier report was that the legal profession should be made more aware of its responsibility in the field of courtroom security. To this end, each lawyer in Ontario has received a letter from the Attorney General, the Chief Justice and the Treasurer of the Law Society of Upper Canada reminding each lawyer of the obligations owed in this area.

The letter advised counsel that they should notify court authorities when they suspect that a particular case may become inflamed to the point of violence, in order that appropriate steps may be taken to protect the safety of all in the courtroom. It explained the court security co-ordinator system which had been established in order to provide an effective and speedy response to anticipated incidents of violence. The procedure outlined was that the co-ordinator in the sherrif's office, upon learning of a potential problem, would notify the police authorities, and contact designated security officials in each court facility to forewarn them. In situations where time was of the essence, the profession was advised to contact the police directly through their emergency number. The Law Society of Upper Canada is currently considering the possibility of amending the Rules of Professional Conduct to deal with the lawyer's responsibility towards the court in alerting it to potentially dangerous situations. The purpose of such amendments would be to underscore the personal responsibility of each solicitor. The letter concluded by stressing that the co-operation of the profession was an indispensable ingredient in any effective system for preserving order and decorum in our courts. With the help of the profession, court staff would be able to respond effectively, so that the open public court system in Ontario could be maintained, and the safety of all in the courts protected.

Within Metropolitan Toronto, the profession was also advised of the special court security telephone line, which had been established in the office of the central

(Continued on page 32)

Courtroom Security in Ontario

The Ontario Attorney-General's Special Committee on Court Security recently released its Second Interim Report, in which it announces a comprehensive survey of all court facilities in Ontario to determine particular security needs. The report of the committee is reproduced in the following pages.

In our first interim report, we discussed at length the need for a balanced and realistic response to the issue of court security. We suggested that it was as undesirable to turn the courtrooms of Ontario into armed camps, as it would be to do nothing in the face of violent incidents. We suggested ways of reconciling the need to preserve our commitment to have an open public court system, with the need to preserve the safety of those working in that system, and the neutral and public image of the administration of justice.

Our report outlined a number of immediate security measures, which could be easily adopted in order to preserve security in the courts, on a short term basis. The report also identified certain possible options for security precautions, including various types of technical security equipment, which might be installed.

On April 28, 1982 the Attorney General released our first Interim Report on Court Security. That document outlined the basic approach we have taken to our task and identified some options that might be taken to preserve order in the courts while at the same time maintaining the dignity of the court process. Since the end of April, we have met again to consider more closely the benefits and the costs of some of the alternative methods of ensuring the safety of the public, the judiciary and the legal profession within the court system.

There are no easy answers to the problems of court security. Trained police manpower is effective, but it is a scarce resource and difficult to replace. Modern security technology also has a cost factor, and its effectiveness has been doubted. Whatever security precautions are adopted there will be additional expenditures of public funds and some considerable inconvenience for those who use the courts.

It is also necessary to be realistic about the nature of the threat confronting us. Canadian society is changing rapidly, but we have not had to face sustained terrorist attacks, indiscriminate bomb threats, or violent disruption of courtrooms by organized crime: those who would argue that we should emulate the response of authorities to the security problems of Belfast, Rome, Jerusalem or New York overlook the substantial differences between the problems in those cities and in Ontario courtrooms. Two lawyers and one litigant have been killed in Toronto courtrooms, killed as a result of emotions running out of control in private civil litigation; in one case, a matrimonial dispute, in the other, a dispute about election procedures in a religious organization. Our response to those incidents must recognize that all courts have to deal with individual litigants who may be obsessive, confused or even deranged. Unfamiliarity with legal procedures, or frustration about the law's delays, or the limits of its powers, may lead some litigants to lose their patience, their tempers or their restraint. In the vast majority of such cases heated words are all that result; but the court system must have the capacity to respond when anger or frustration are translated into violent action.

Finally, there are occasions in the criminal courts when accused are believed to be likely to attempt escape during a trial, sometimes with assistance from outside. Police and corrections officers are able to deal with such cases when they occur; Ontario has had, on balance, a good record in preventing either escapes or violence during criminal trials. In large part, this is due to the presence of trained police, present in various capacities.

Electronic Metal Detectors

In our earlier Interim Report, we briefly discussed potential use of metal detectors and electronic screening devices. These are permanently installed in some court facilities in the United States. In certain unique circumstances, the equipment has been used in Ontario courtrooms, when authorities have had reason to believe that there was a potential for violence, or attempts at escape on the part of accused.

Those who travel by air are familiar with similar equipment installed at airports throughout the world. However, the purpose, architecture, floor lay-out, and traffic flow in a major courtroom varies markedly

examination can be a valuable aid as a means of obtaining discovery of the Crown's case.

It is, perhaps, correct to say that this incidental purpose served by the preliminary hearing has been more highly developed and used in this country than in other common law jurisdictions. This aspect of the preliminary hearing can, however, lend itself to abuse by time consuming "fishing expeditions" and lengthy cross-examinations which serve no useful purpose. The preliminary hearing was never intended to be a first *trial*.

The provisions of s. 469 of the *Code* are also used to obtain discovery of the Crown's case at the preliminary hearing. After the evidence of witnesses called by the prosecution has been taken, the Justice is required by s. 469(3) to ask the accused if he wishes to call any witnesses and s. 469(4) requires the Justice to hear each witness called by the accused who testifies to *any matter relevant to the inquiry*. Under these provisions the accused can call prosecution witnesses (if he can ascertain their identity) in order to discover their evidence.

Neither the common law nor the Criminal Code provides for any general formal system of disclosure, and disclosure in the past has been largely discretionary. It is precisely because the law does not provide for any general disclosure procedure that the preliminary hearing, designed for a different purpose, has been made to serve the purpose of discovery. The Comprehensive Study Report of The Law Reform Commission of Canada, as published in 1974, expresses the view that because the preliminary hearing is designed for the purpose of ensuring that there is sufficient evidence to warrant putting an accused on trial, it is, and always will remain unsuitable for providing pre-trial "discovery".

The Report states at p. 71:

> Taking a new approach, why not reverse these two objectives? The first objective of pre-trial procedures should be to fully inform the accused of the prosecution brought against him. Then, having achieved this objective, the second of allowing for a completely unsupported charge to be dismissed and for an accused to be consequently discharged can then be achieved.

On the other hand, the preliminary hearing has staunch supporters, including Sir David Napley. It is said that cross-examination of witnesses at the preliminary hearing may elicit facts, data and leads which may unearth witnesses who would otherwise not be available. The system of 'disclosure', it is said, would not provide these 'discovery' aspects of the preliminary hearing. On the other hand, the strength of the Crown's case may convince an accused that he should plead guilty; that it will serve to delineate the issues and shorten the trial by making it apparent to counsel that it is unprofitable to pursue certain lines of defence. The preliminary hearing, of course, provides a means of perpetuating evidence. These are weighty arguments. It must be pointed out, however, that in many cases preliminary hearings do not result in shorter trials. Indeed the converse tends to be true; as preliminary hearings have become longer, trials have also become longer.

The majority of the Committee consider that the advantage to the accused of a preliminary inquiry can be compensated by providing a satisfactory system of pre-trial disclosure which has not hitherto existed, and that the interests of the accused can be effectively protected by the safeguards which the Committee recommends.

Ed. note — The report goes on to deal with a proposed committal for trial and disclosure system, in discussing the committee's view as to the adequacy of the disclosure provided for in the Attorney General's outline of the proposed disclosure system, committal for trial on written material, the right to require a witness to be examined under oath, and concludes its recommendations by suggesting that "legislation implementing a committal for trial and disclosure system to replace the present preliminary hearing should not be enacted until the proposed system has been in force on a voluntary basis for a sufficient length of time to permit an assessment to be made of its operation and sufficiency."

Space requirements have precluded publication of the complete report in the Journal; however, copies of the report (and the minority report) are available from:

Communications Branch
Ministry of the Attorney General
18 King Street East
Toronto, Ontario
M5C 1C5

In Brief

Security Pilot Project for Toronto

A pilot project will be undertaken to test electronic metal detectors as a means of enhancing court security, Attorney General Roy McMurtry announced.

Mr. McMurtry announced the project while releasing the Second Interim Report of the Attorney General's Special Committee of Court Security (see page 20 of this issue).

The Attorney General said that in keeping with the Committee's recommendation he expected the pilot project to take about three months. The exact location will not be disclosed at this time as the Committee wants to test the impact of sophisticated equipment.

"At the conclusion of the pilot project we should be in a position to assess the effectiveness of the most up-to-date equipment and technology available and to determine whether it can be used to improve court security without unduly interfering with the need for public access to our facilities," Mr. McMurtry said.

In addition to its recommendation for the pilot project, the Committee reported that it will undertake a comprehensive survey of the security requirements at court facilities throughout Ontario. The survey should be complete early in the autumn.

Mr. McMurtry said his officials are actively considering the Committee's other recommendations for improved security measures, including a system of emergency alert buttons.

Public Perception of the Absolute Discharge

Judge Jane Godfrey of British Columbia, an alumna of the 1981 New Judges' School, tells of an incident which happened not long after her appointment.

She found herself relieving for Judge Stu Johnson in Powell River. Judge Johnson has lived, practised, and presided in Powell River for many years and is well known to all the citizens there.

A man appeared before Judge Godfrey and pleaded guilty to a charge of wilful damage. He had kicked in somebody's door or busted somebody's window — something of that nature in any event. He told Judge Godfrey that he had not been himself on the day in question, that he could not imagine what had come over him, that he was very sorry and very embarrassed, that he had learned his lesson and would never do wrong again, and that he had paid for the damage done before coming to Court. Judge Godfrey was suitably impressed and granted an Absolute Discharge.

A person well known to Judge Godfrey was sojourning in one of the local drinking establishments that afternoon and while there, witnessed a most unusual event. A happily excited man burst upon the scene and was heard to loudly exclaim words to the effect:

"I just got back from court. I thought that Johnson was really going to throw the book at me but instead this dumb dame was there, and she let me off."

To Be Sworn or Not to Be Sworn?

We all have our moments of difficulty in conducting hearings on the competence of witnesses of tender years to be sworn. Here is an except from one of the easier ones.

By The Court
Q. What if you don't tell the truth, what happens?
A. I don't know.
The Court: The answer is: "I don't know." All right, he can't be sworn then.
By the Crown Attorney:
Q. Do you know what perjury is, witness? You're nodding yes; what is it?
A. Perjury is just —
Q. Pardon?
A. It's just the same like —
Q. Speak up so I can hear you.
A. Like —
Q. What? Speak up, what is it?
A. Making —
Q. Have you got a speech defect or something, son?
A. No.
Q. All right, what is perjury then?
A. It's just the same as making sex, a different type of sex.
Q. I can't hear you.
A. Making sex that's different.

A juvenile appeared before me because he had thrown a number of objects from the 12th storey of an apartment building. I wanted to impress upon him that articles thrown from such a height can cause considerable damage and asked him to provide the laws of physics which would show how fast an article was falling from that height.

The following is the result.

May 24, 1982

Dear Judge Fisher:

I went to the library and it didn't have any reference books that would be helpful, therefore I did the experiment myself.

From this experiment I learned that if I chucked a rock out the window I could kill someone, but if I chucked a piece of paper out the window, it wouldn't hurt anyone.

But I have learned not to throw things out the window.

Sincerely yours,
John H.

Ontario Association News

The 1982 Annual Meeting and Education Conference of the Ontario Provincial Judges Association (Criminal Division) was held at the Delta Meadowvale Inn, Mississauga, Ontario, from May 26th to 29th under the chairmanship of the President, Senior Judge W. Donald August of Brampton, Ontario.

The theme of the Conference was "Probation, to-day and to-morrow". Panelists and guest speakers discussed topics such as Probation Orders, terms and enforcement, Community Service Orders, Victim Offender program, court liaison. Other matters included the conducting of appeals under the Ontario Provincial Offences Act as well as an address by Mr. Edward L. Greenspan on the Charter of Rights.

Life Members

Honorary Life Memberships were presented to Judge Michael J. Cloney of Toronto and Judge John W. P. Anjo of Barrie in recognition of their service to the Bench and Association on their retirement.

The following officer members were elected at the Annual Meeting for 1982-1983.

Offices:

President, Judge Richard B. Batten, Peterborough.

Immediate Past President, Sr. Judge W. Donald August, Brampton.

First Vice-President, Sr. Judge Robert B. Hutton, Ottawa.

Second Vice-President, Judge Roderick D. Clarke, Thunder Bay.

Secretary, Judge Douglas V. Latimer, Milton.

Treasurer, Judge William S. Sharpe, Milton.

The Ontario Association is pleased to announce the appointment of Judge Guy W. Mahaffey of Sudbury, effective March 16, 1982, and the appointment of Judge Edwin A. Fairbanks, Hamilton, as Senior Judge, Area Two, effective February 16, 1982.

The Association also marks with pride the thirty-year anniversaries of Judge Ronald C. Jackson of Napanee and Senior Judge Honstone L. Roberts of Niagara Falls, and the twenty-five year anniversaries of Judge Henry R. Howitt of Guelph and Judge Donald F. Graham of Toronto.

Occupation: Barr.

And from Judge Pat Curran of Nova Scotia, who spends his time writing for the Weekly Criminal Bulletin (or so it seems), we have a report that his wife had an interesting experience the other day when the census taker for the Halifax City Directory came to the door.

After learning that the same people were living in the house as last year, the census taker looked under the heading "Occupation" and saw the abbreviation 'Barr." She said, "Is your husband still a bartender?"

Judge Curran's wife Janet, never one for unnecessary explanations, replied, "No, he's now a Judge."

That evidently was too much for the census taker, who beat a hasty retreat, no doubt full of nasty thoughts about the smart alecs of the world.

laquelle il a droit lorsque ces mesures sont prises. Le jeune aura d'ailleurs toujours le droit d'être jugé par un tribunal des jeunes.

Aux termes de la nouvelle loi, le public sera admis aux audiences des tribunaux des jeunes. Cette mesure est compatible avec le principe de la "common law" selon lequel non seulement la justice doit être rendue, mais elle doit l'être au grand jour. Le juge pourra toutefois en exclure quiconque, mais à certaines conditions.

La presse devra respecter l'annonymat de tout jeune concerné, qu'il s'agisse de l'accusé, de la victime ou d'un témoin.

Contrairement à la loi actuelle qui ne contient aucune disposition à cet effect, la nouvelle loi prévoit des mesures spéciales pour contrôler l'utilisation et l'accessibilité aux dossiers du tribunal des jeunes afin de protéger la vie privée du jeune infracteur.

Si un jeune qui a purgé sa peine ne commet pas d'autre infraction pendant une période déterminée (deux ans dans le cas d'une condamnation sur déclaration sommaire de culpabilité, qui entraîne normalement une peine maximale de six mois d'emprisonnement en vertu du Code criminel, et cinq ans dans le cas d'actes criminels), son dossier sera détruit. La loi actuelle permet de conserver un tel dossier.

Une procédure de révision compléte et innovatrice sera mise sur pied pour permettre au tribunal de modifier son jugement, afin que celui-ci demeure pertinent et corresponde aux besoins des jeunes, et pour protéger l'intérêt public le cas échéant. Toute décision de placement sous garde d'une durée de plus d'un an devra être réexaminée au moins une fois l'an.

"La nouvelle loi," a éclaré M. Kaplan, "constitue une réforme importante du système canadien de justice appliquable aux jeunes; elle a la portée et la souplesse nécessaires pour assurer la protection du public tout en permettant de régler plus efficacement les problèmes des jeunes contrevenants. Je compte bien discuter, avec les provinces, d'une contribution financière du gouvernement fédéral pour les services aux jeunes contrevenants dans le cadre d'un programme de mise en oeuvre grâce auquel la transition de l'ancienne loi à la nouvelle se fera en douceur."

Crime on Credit?

Ontario residents may be able to use credit cards to pay Provincial Court fines as early as the end of this year, under a proposal being considered by Attorney-General Roy McMurtry. The A-G's ministry has recommended the move to plastic after a feasibility study by Alex Mackay, director of the Provincial Court offices. In Mr. Mackay's words, "We're here to serve the public, and that's how the public wants to pay." In future, ministry officials can see on the spot payments for such offenses as speeding, as well as accepting payments made at banks.

The Well-Tempered Criminal

From an unnamed Manitoba Provincial Judge earlier this year comes the ultimate plea for co-operation from the criminal:

"There is certainly a responsibility on any person who decided to engage in criminal activity that he should not do so in amounts beyond his or her ability to make restitution if caught."

Maritime Follies

Our Executive Director, Judge Douglas Rice of St. Stephen, N.B., has verified that the following information was in fact sworn and before the court earlier this year.

"This is the information of A.B., of RCMP Perth-Andover, N.B., acting on behalf of Her Majesty the Queen, hereinafter called the Informant.

"The informant says that he has reasonable and probable grounds to believe and does believe that C.D., or or about the 23rd day of December, A.D. 1981 at or near Malisett, an Indian Reserve, in the County of Victoria and Province of New Brunswick did commit an assault on E.F. by giving her a hicky, contrary to Section 245 (1)(b) of the Criminal Code of Canada."

I still say the story smacks of fiction.

Etobocoke Shorts

Judge Stewart Fisher is the editor of a delightful newsletter for the Ontario Family Court Bench, Quill and Wig, and the following are excerpts from that publication:

We thought that we had heard every excuse in the Etobicoke Family Court, but today we heard a new one:

The defaulter hobbled in on crutches, took the stand and when asked why he had not paid his wife, he turned to his wife and said, "You're really going to have a laugh at this. My foot is broken because a load of watermelons fell on me."

Q. Making sex, is that what you said?
A. Different.
The Court: I'm convinced more than ever now this fellow doesn't understand the nature of an oath.

Executive Meeting Held in Winnipeg

At a meeting on June 12, 1982 of the Executive Committee of the CAPCJ, Judge Jacques Lessard, Chairman of the Education Committee, announced that the annual seminar for newly appointed judges will be held in Ottawa from October 24 to November 3, 1982.

A tentative program has been distributed to Chief Judges, and a request has been made to them that they advise how many participants will be attending.

There have been few new Judges appointed this year, said Judge Lessard, and at the moment only 25 are expected for the course. It is preferred that there be a larger number present and a request will be made to the Chief Judges to name one or two more experienced trial Judges to attend, thereby gaining the maximum potential of the course.

In his report, Judge Lessard also touched on the preparation of video cassettes on sentencing problems presently being readied for the French program, initial discussions regarding a seminar on the conduct of bilingual courts, and the question of a national judicial college.

Judge Howard Collerman of Winnipeg extended an invitation to the Association to hold its annual meeting in Winnipeg in 1985, and Judge Douglas Rice of St. Stephen's, N.B. extended a similar invitation on behalf of his province with respect to the 1986 convention.

In speaking on the 1984 convention, to be held in St. John's, Nfld., Associate Chief Judge Edward Langdon reminded the committee that this convention will be a return of the Association to the place of its birth, and will be the beginning of a second decade for the Association. He is hopeful that all the original persons who attended will do so again.

Chief Judge James Slaven of Yellowknife brought the meeting up to date on preparations for the 1983 convention in the North West Territories, and is currently exploring alternate sources of funding to supplement the convention budget.

Judge Guy Goulard, Chairman of the Family and Juvenile Courts Committee, reported that training sessions concerning the new Young Offenders Act will commence in September of 1982. The Solicitor General has been approached for funding for each province to set up an education program for all Judges involved in Family Court work.

But how did you get him on the couch?

Reliance on psychiatric testing reached a new level in the United States recently with a decision by the New York Supreme Court to allow testing of a dog belonging to the victim of an alleged rape.

The defendant had contended that the failure of the victim's large German shepherd to react in an aggressive fashion cast doubt on her version of the event.

The Court found that the defendant's expert witness, the director of Animal Behaviour Therapy Clinic, had the requisite expertise, and ordered him to determine whether the animal had had guard or attack dog training and whether the dog responded aggressively to certain stimuli.

The Judgement reads,

"This case involves defense Counsel's discovery motion requesting the Court to order a physical behavioural and mental examination of a dog. The defendant has been indicted on charges of rape and sodomy. He allegedly committed these crimes in the victim's apartment after putting a pair of scissors to her throat. Defence Counsel asserts that the victim's dog, a large German shepherd, was present at the time and that the dog's failure to react in an aggressive fashion to the event, would cast doubt as to the victim's version of the event.

"While the specific issue in this case is unusual, it falls within a familiar category — the use of experts in an area outside of the common knowledge of Court and jury.

"It is clear that the examination must be conducted by an expert who is determined by the Court to be specially qualified to conduct the examination and, if necessary, give expert testimony.

"Dr. Peter Borchelt, Director of the Animal Behaviour Therapy Clinic, the defendant's expert witness, claims that an animal behaviour expert can tell whether a dog has had attack or guard dog training, and whether a dog will react aggressively to certain stimuli. Therefore, the dog may be examined at the district attorney's office to determine breed, gender, age, height, and weight, whether the dog has had guard or attack training, and whether the dog exhibits any aggressive behaviour in response to certain stimuli.

"However the application of defence Counsel to re-enact the incident with the actual victim or to use the dog in a test with

the victim to determine if there is a "protective aggression" tendency solely with respect to the victim is denied. Such a test is too fraught with logical variables to be subject to testimony and would in my view create a situation too speculative and prejudicial either for or against the defendant to warrant consideration by a jury. For the same reason, if the defendant is present at the test, no testimony may be given as to the dog's reaction or lack thereof to him."

YOUNG OFFENDERS ACT PROCLAIMED

The Hon. Bob Kaplain, P.C., M.P., Solicitor General of Canada, announced that the Young Offenders Act, Bill C-61, was given Royal Assent July 7.

The Young Offenders Act replaces the Juvenile Delinquents Act of 1908, which has for sometime been recognized as seriously out of date with contemporary practices and attitudes towards juvenile justice, and inadequate to meet the problems presented today by young people in conflict with the law.

The Solicitor General said that proclamation of the new law, tentatively scheduled for April 1, 1983 might be moved back to October 1, 1983, at the request of a number of provinces, in order to give them more time to prepare for implementation of the Act.

The key principles underlying the Young Offenders Act are:

— that young persons should be held more responsible for their behaviour but not wholly accountable since they are not yet fully mature;

— that society has a right to protection from illegal behaviour;

— that young persons have the same rights to due process of law and fair and equal treatment as adults, and that these rights must be guaranteed by special safeguards; and

— that young persons have special needs because they are dependants at varying levels of development and maturity and therefore also require guidance and assistance.

These principles reflect Parliament's intent to strike a reasonable and acceptable balance between the needs of young offenders and the interests of society.

For the first time, the young person's rights, from the moment he or she has been arrested or summoned, are made explicit. Special safeguards are provided to enforce these rights. These rights and safeguards include:

— the right to be represented by and have access to counsel,

— the right to be properly informed, and

— rights of appeal similar to those of adults.

Under the new Act the age of criminal responsibility will be raised from 7 to 12 years. This is consistent with the belief that children of tender years should be dealt with by way of alternatives to the criminal process.

One of the chief criticisms of Bill C-61 as introduced was that it maintained age disparity. The Solicitor General was pleased to note this problem has finally been resolved by the establishment of 17 years as a uniform maximum age. This will result in all young offenders ages 12 to 17 inclusive being dealt with in the juvenile justice system.

The new Act covers only those young persons charged with specific offences against the Criminal Code and other federal statutes and regulations. Provinces may enact legislation to deal with provincial and municipal offences. At their option, provinces will be able to give the youth court jurisdiction over these offences.

The new law sanctions the use of alternative measures to the formal youth court process for dealing with young offenders particularly in the case of less serious offences. Commonly referred to as diversion, such measures will provide the young offender with the opportunity to rehabilitate himself through such means as restitution and community service. In addition, the new legislation extends basic protections to young persons when such measures are resorted to. The young person will of course always retain the right to have any charge dealt with before the youth court.

Under the new Act youth court hearings will be open to the public. This is consistent with the common law principle that "not only must justice be done but it must be seen to be done." The judge however will have the authority to exclude any member of the public under certain conditions.

Reporting by the press will have to respect the anonymity of any young person involved, whether he or she is the accused, the victim or a witness.

Unlike the existing law which is silent on the matter, the new legislation contains special procedures controlling the use and access to youth court records, in order to respect the privacy of the young offender.

When a young person has completed his or her sentence and committed no further offence for a qualifying period (two years in the case of summary conviction offences — normally carrying a maximum penalty of six months imprisonment under the Criminal Code — and five years in the case of indictable offences) the court record will be destroyed. Under existing law, these records may be retained.

An extensive and innovative review process will be available permitting the amendment by the court of any disposition in order to keep it relevant and geared to the needs of young persons and to safeguard the public interest where necessary. A review will be mandatory at least once a year in the case of any custodial disposition exceeding one year.

"The new law is a major reform of the Canadian juvenile justice system and has both the scope and flexibility required to ensure public protection while at the same time providing better and more effective measures for dealing with delinquent youth. I am looking forward to discussing with the provinces a federal financial contribution for services to young offenders as part of an implementation program which will effect a smooth transition from the old law to the new," said Mr. Kaplan.

L'hon. Bob Kaplan, CP, député, Solliciteur général du Canada, a annoncé que la Loi sur les jeunes contrevenants, projet de loi C-61, avait reçu la sanction royale le 7 juillet.

La Loi sur les jeunes contrevenants remplace la Loi sur les jeunes délinquants de 1908, qui était considérée depuis un certain temps comme fortement périmée, compte tenu des pratiques et des attitudes contemporaines dans le domaine de la justice pour les jeunes, et incapable d'apporter des solutions aux problèmes que posent adjourd'hui les jeunes qui ont des démêlés avec la justice.

Le Solliciteur général a déclaré que la promulgation de la Loi, prévue provisoirement pour le 1 avril 1983, pourrait être reportée au 1 octobre 1983 à la demande d'un certain nombre de provinces qui désirent avoir plus de temps pour se préparer à la mise en oeuvre de la Loi.

Les principes-clés qui soustendent la loi sur les jeunes contrevenants sont les suivants:

— les jeunes doivent assumer une plus grande responsabilité à l'égard de leurs actes, mais ils ne doivent pas en être tenus totalement responsables car ils manquent encore de maturité;

— la société a le droit d'être protégée contre les comportements illégaux;

— les jeunes, tout comme les adultes, ont le droit à l'application régulière de la loi et le droit d'être traités équitablement par la justice, et ces droits doivent leur être garantis de façon spéciale; et

— les jeunes ont des besoins spéciaux parce qu'ils sont des êtres dépendants, à divers stades de développement et de maturité, et qu'ils ont donc besoin d'aide et de conseils.

Ces principes reflètent l'intention du Parlement de créer un équilibre raisonnable et acceptable entre les besoins des jeunes contrevenants et l'intérêt de la société.

Pour la première fois, les droits du jeune, depuis le moment où il est arrêté ou sommé de comparaître, sont clairement énoncés.

La nouvelle loi prévoit des garanties spéciales pour appliquer ces droits. Ces droits et garanties comprennent:

— le droit d'être représenté par un avocat et de pouvoir le consulter;

— le droit d'être bien informé, et

— des droits d'appel semblables à ceux des adultes.

En vertu de la nouvelle loi, l'âge de la responsabilité pénale passe de sept à douze ans. Ce changement découle du principe selon lequel les jeunes enfants ne devraient pas être justiciables de la procédure pénale.

L'un des principaux reproches formulés à l'endroit du projet de loi C-61 est qu'il maintenait l'écart entre les âges. Le Solliciteur général est heureux de constater que ce problème a finalement été résolu par l'adoption d'un âge maximal uniforme fixé à 17 ans. Ainsi, tous les contrevenants âgés de 12 à 17 ans inclusivement seront soumis au système de justice applicable aux jeunes.

La nouvelle loi ne s'appliquera qu'aux jeunes accusés d'infractions précises au Code criminel et à d'autres lois et règlements fédéraux. Les provinces pourront adopter une loi qui leur permettra de s'occuper des infractions aux lois provinciales et aux règlements municipaux. Elles pourront, si elles le veulent, donner au tribunal des jeunes compétence à l'égard de ces infractions.

La nouvelle loi entérine le recours à des mesures autres que la comparution devant le tribunal des jeunes dans le cas des jeunes contrevenants, notamment lorsqu'ils ont commis des infractions peu graves. Généralement appelées déjudiciarisation, ces mesures donneront au jeune contrevenant l'occasion de s'amender en recourant à des moyens comme la restitution ou la prestation de services communautaires. En outre, la nouvelle loi assure au jeune la protection fondamental à