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"BEROBED, BOTHERED AND BEWILDERED"

Oh to be a Provincial Court Judge
Who deals with the crap and the garbage and sludge

Police and Mounties are there every day
He tries to be fair but what can he say
Overworked and underpaid
Can't take the risk of getting laid

He can be young, he can be old
Some are quite timid, others are bold
Many need Rolaids up there on the bench
As they listen to arguments from below in the trench

But case after case and day after day
He's the first line of justice – in his own special way
Whether it's murder
Or whether it's booze
And whether it's a preliminary
And a jury they choose
Whatever the nature
of the charges they bring
We can't live without you
You ring-a-ding-dings.

– *Weldon Graser, Q.C.*

what judges are doing in other parts of the province. It helps you sort of establish a uniformity of approach to similar problems."

He also valued the lectures on new legislation, such as the Family Law Reform Act and major revisions to the Child Welfare Act. "The whole family law scene is changing so rapidly that it is vital we have these meetings to keep up."

For his evening outing, Judge Robert Walmsley of the Belleville family court chose to visit a Toronto hostel for women and their children, called Women in Transition. It was a touching and enlightening experience.

"Having been through something like this is real. It means something to you. You have a better understanding of the problems women in similar situations are faced with. Problems with jobs, housing, husbands not paying support.

"Those women are very brave. They've got a lot on the ball and a lot of spirit. I guess the one thing that impressed me most is that they weren't just out for themselves but for the betterment of other women in the same situation."

Judge James Robson of the family court in Sudbury said one of a judge's problems is that "nobody ever tells you you're doing something wrong.

"In our work, people have to live with the consequences of our court. So if you got a raw deal, you will be continually reminded about it for the rest of your life. We have got to be right the first time.

"Being on a course like this, we get to see what everyone else is doing and get a consensus. Sometimes you learn the error of your ways. You pick up the tricks of the trade – things that have worked or that have failed. Things that will help you be a better judge."

* * * *

(Court Management . . . Continued from P. 26)

programme of continuing education might be tied into the court management function.

Judges are, of course, not the only specialized personnel active in the judicial process. Practising lawyers, like judges, would benefit greatly from continuing legal education programmes. Lawyers who are made aware through continuing education of new developments in the law would likely become more efficient (and expeditious) in the conduct of litigation.

CONCLUSION

Canadian courts, like others throughout the world, are faced with serious problems of congestion and delay. Action to correct these problems must be taken soon. It may be necessary to reorganize the present administrative structure within our courts and implement more expeditious procedures.

Whatever the solution, our courts, as institutions within society, and our judges, as guardians of those institutions, must ensure that they dispense justice with expedition. If justice and expedition are not compatible, then expedition must be sacrificed. But to the extent that they are compatible, justice with expedition is a goal we all seek and an objective we can achieve provided we work together toward that end.

President's Page

By Judge G.G. Cioni
President, C.A.P.C.J.

As my tenancy of this privileged space is closing rapidly, I should like to use this opportunity for personal comment on the past year. I am particularly happy to do so in this, the third issue of our Journal within the past six months and on the eve of our 6th Annual Meeting. The presence of the Journal is significant and I again wish to acknowledge Rod Mykle's unstinting efforts. The strongest single impression that I have from this year is that of the diversity and size of our country and of the practical problems facing a national organization. They can be met only by confidence gained from personal contact and understanding, enhanced by regular and effective communication, such as the Journal can give. Policies and programs are the flesh of any such creature, but a sense of belonging, by contact and dialogue, is the skeleton.

I have had the opportunity to meet judges in their own provinces, to attend their meetings, and to enjoy the courtesy, hospitality and friendship that were shown to Mary Jane and myself wherever we went. The pleasure is, and will remain, ours. I hope that we were able, as well, to establish in both directions the connection of the C.A.P.C.J. with the individual provinces and members. I commend the need for this contact to my successor.

I thank the Executive Committee, the officers and provincial representatives for their support, in attendance, counsel, work and inspiration; theirs is the unique gift of truly independent thought earnestly and fairly given. I would single out Judges Rice, Mykle, White and Goulard for their efforts, and Chief Judge Allan Cawsey for a generous attitude toward the time I was able to spend on Association business.

In our three official languages, cheers, au revoir and ciao.

Comme le privilège qui ressort de mon mandat d'utiliser cette page est sur le point d'expirer, je profite de cette opportunité pour exprimer mes sentiments personnels avant que ne prenne fin mon terme d'office.

J'en suis s'autant anxieux de ce faire, alors que notre Journal a connu trois publications au cours des derniers six mois et que par ailleurs nous en sommes à la veille de notre sixième Congrès Annuel.

L'existence d'un Journal est un apport précieux et pour la publication duquel je ne saurais que trop louer le dévouement de notre collègue, le juge Rod Mykle.

J'ai surtout été impressionné par les problèmes d'ordre pratique auxquels fait face une organization nationale dans un pays aussi vaste et diversifie. Tels obstacles ne peuvent être autrement surmontés que par une marque de confiance individuelle ainsi que par suite d'une plus grande compréhension, à la faveur de contacts régulier et efficaces, et c'est là le rôle prépondérant d'un Journal.

Si la définition des politiques et lébauche des programmes constituent en quelque sorte la chair de cette créature qu'est le Journal, le sentiment d'y appartenir, par le dialogue et le contact en représente l'ossature.

J'ai eu maintes occasions de rencontrer bon nombre de juges dans leur province respective, de participer à leurs réunions, d'apprécier la marque de courtoisie, l'hospitalité et l'amitié que l'on n'a point manquer de manifester en toutes circonstances à mon endroit ainsi qu'à l'égard de mon épouse, Mary Jane. Et ce fut pour notre plus grand plaisir à nous. Je me plais à croire que nous avons pu également établir d'excellentes relations entre l'Association et les membres des diverses provinces. C'est là une préoccupation que je porte à l'attention de mon successeur.

Je tiens à remercier chaleusement notre conseil Executif, ses officiers et les représentants provinciaux pour leur appui, leur présence constante, leurs conseils, leur

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Editorial

by Judge Rodney Mykle

Life on the prairies is a life of extremes — at least in terms of temperature. After one of the coldest and longest winters on record, we are now sweltering in one of the hottest and driest summers in recent memories. One thought that keeps many of us going through muggy hearings in non-air-conditioned courtrooms and interminable drives on dusty roads through parched countrysides, is the heavenly vision of Prince Edward Island in September.

I must confess that the pleasant anticipation of nibbling crustaceans in Charlottetown, bathed by cool Atlantic breezes, occasionally overtakes more portentious thoughts that we should be having on the issues that will face us at the Association's annual assembly.

One area of direct concern to all who sit on provincial benches is the proposal to overhaul the various levels of the existing court system, to provide one trial and one appeal level in each province. It is a subject under current study by the Association under Chief Judge Cawsey of the Alberta Provincial Court, who is expected to report on the matter at the convention. The proposal is not a new one, but in the past few years has developed a new impetus. In this regard, the paper by Professor Noel Lyon included elsewhere in this edition is a major contribution to the discussion.

The proposal has many strong arguments in its favour in terms of improved service to the public and increased efficiency and specialization within the bench itself. It deserves serious and thoughtful consideration by the Association, with hopefully a recommendation by the membership for an official position to be taken.

The Journal had hoped to have Professor Lyon's paper reproduced in both English and French. Unfortunately, the French version has not arrived by press time. However, it will be included in a subsequent issue.

And now, having been portentious for a moment, you will excuse me while I lapse into thoughts of oysters Rockefeller . . . and lobster Newburg . . . See you in Charlottetown . . . and moules a la marinière . . . and Clams Mornay . . .

La vie sur les Prairies est sûrement une vie d'extrèmes — au moins du point de vue de température. Suivant un hiver les plus froids et de les plus longues durées, notre été maintenant nous amène des chaleurs les plus ultra-chaudes et les plus dessechés que nous nous souvenons. Une pensée très soulageante, malgré les auditions qui se déroulent dans les salles d'audiences qui sentent le renferme et qui n'ont pas de climatisation dans les cours voisines, est la vision exquise de l'Isle du Prince Edward en septembre.

Je doit dire, l'anticipation de grignoter les crustaces à Charlottetown, tout en etant rafraichis par les brises de l'Atlantique, il me semble que peût être nous deverions faire l'effort de concentrer sur les questions importantes qui nous serons posées à l'assemblée annuelle.

Le domaine de grande importance qui s'adresse à tous ceux qui président dans les cours provinciales est la proposition de reviser les niveaux diverses qui existent présentement dans le système de nos cours et qui établirais un jugement et un appel chez chaque province. Ce sujet est actuellement sous étude par l'Association sous les auspices du Juge en Chef Cawsey de la Cour Provinciale de l'Alberta, qui doit nous faire connaître ses réflexions à l'assemblée. Cette proposition ne nous parait pas nouvelle; cependent, ces quelques dernières années elle a été discutée plus fréquemment. A cet egard, l'étude preparée par le Professeur Noel Lyon est une contribution importante à cette discussion.

La proposition, tel qu'elle, a plusieurs thèses solides en ce qui concerne l'amélioration du service au public, aussi bien que l'augmentation de l'efficacité et la spécialisation du siège judiciel. Elle mérite la considération sérieuse et pensive de l'Association, avec bon espoir qu'une recommendation sera émit par ses membres qui accomplirais une position officielle.

Le Journal espérait d'avoir la thèse présenté en anglais aussi bien qu'en français, mais malheureusement, la traduction du français n'est pas disponible à temps pour l'impression. Cependant, elle sera inclus dans une édition subséquente.

Et maintenant, ayant touché légèrement sur quelques questions sérieuses qui seront

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LIFE BEYOND THE BENCH

by Victor Malarek

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The formalities quickly dispensed with, the two husky police officers gave the family court judge what he had come for – a glimpse of life on the other side of the bench.

"We're picking up a lot of 12-year-old drunks," Constable Rick Purdy said, shaking his head. "It's really sad."

Both police officers, who work in street clothes, are with the Metropolitan Toronto Police youth bureau in Division 33 – Don Mills.

North York Family Court Judge H. Douglas Wilkins had been assigned to go on patrol with them, but on this night, a Monday of bone-chilling cold, there was little action.

Some of the disturbing stories about what is happening with youngsters in Don Mills were not new to Judge Wilkins, who sees such tragedies in his courtroom every day. Nonetheless, he was interested in the officers' comments and the approaches they use with juveniles.

For more than an hour he keenly quizzed Constables Purdy and Munro about the youth bureau. He then joined them on a patrol of the local hot spots in a dark green, unmarked cruiser.

Meanwhile, in and around Toronto, about half of Ontario's 70 family court judges were out doing something similar.

Some, like Judge Wilkins, were assigned to a youth bureau. Others were touring a training school, a juvenile detention centre, a group home, a children's hospital, a unit for disturbed adolescents in a psychiatric hospital or a hostel for women in crisis.

The visits were part of an intensive week-long course for family court judges.

The rest of the province's family court judges gathered at the Chelsea Inn for an informal get-together before starting the same course.

Chief Judge H.T.G. (Ted) Andrews, of the provincial court family division, said the course was designed "to hit his judges from several fronts.

"One is continuing education in which we deal with new legislation, case law and reviewing recent decisions.

"Another is to reaffirm the judge's concern with the administration of his court . . . to reaffirm that this is a people-oriented court, and that we don't deal just with issues but with people.

"Our court is unique in that we have a much more direct relationship with court clientele. We have to be sensitive to their needs, hopes, anxieties and fears. It's the only court I know of where the Government pays for Kleenex to be put in the courtroom.

"A third thing we try to do is try to bring him out of the sort of legal egghead role and put him back into the community to increase his awareness of the social dimensions of his work through direct contact with some of society's victims."

Judges "can get a little isolated without realizing it, sitting up there on their Mount Olympus," Judge Andrews added with a laugh. "I have to admit that I impose the training program on them to keep them from just this sort of thing. They have to know what's going on in the community because we depend so heavily on community resources."

Judge Wilkins echoed those thoughts in an interview after his outing with the youth bureau. "It's important, being a judge, that your function in a courtroom is not restricted by a narrow point of view. It's important to understand the outside agencies, and get some idea of what the people on the street are going through first hand."

But the most important aspect of the course, according to Judge Andrews, is not what happens in the classroom or out on the evening sorties – it's the interaction between the judges.

"By having these courses, they get a chance to deal with their personal anxieties simply through the exposure of these to their colleagues. Most of their anxieties deal with 'am I doing as good a job as I can'? Judges who don't have these anxieties, I worry about," Judge Andrews said.

For Ross Ball, family court judge in Scarborough, the course was "a cleansing thing. When you're sitting on the bench you go along in your normal manner and you don't realize you sometimes get into a rut. It (the course) corrects you from going into a rut. It puts you back on the main track."

"Being a judge is a lonely job," Judge Ball said. "You can't open up to lawyers about what's bugging you about a certain case. You can't really open up to your wife and family, because they don't really understand. The only time you get to discuss the problems of the job is on a course like this. You almost bare your soul to the other judges. It's the one group meeting you're involved in, in which you can really be yourself."

Judge John Caldbick, a switch-hitter, sits half the time in the family court in Timmins and the other half in the criminal division. The course gave him an opportunity "to find out

include maintainence of the work flow, avoidance of conflicts for the services of lawyers and witnesses, better utilization of jurors, and maximization judicial hearing time. Along with these advantages, certain disadvantages have been attributed to the central assignment system. First, judge-shopping is permitted to a certain extent and, secondly, lost time often arises owing to judges not having any legal issues before them to reflect upon between hearings.

Essentially, the difference between these two systems is slight. Each attempts to streamline case assignment in an efficient and expeditious manner. It makes little difference as to which method is followed. The choice would depend largely on the particular preferences of the policy board.

Either case assignment system may be implemented by establishing a calendar control centre. The objective of such a centre "is to provide a continuing current inventory of cases, their status, and the availability of counsel." In this way, a case may be monitored as it passes through the system and dealt with as promptly, efficiently and judiciously as possible.

2. AUTOMATION AND COMPUTERIZATION

We are living in a technologically advanced age. In advancing the objective of expeditious justice, we ought not to forget that fact. It is possible to use many new devices and machines in order to administer our courts more efficiently. Computers, for example, can be of immense asisstance in court administration, although, the cost of installation and operation may be prohibitive. Before deciding to rely upon new technological devices, therefore, it is essential that a cost benefit study be conducted in order to determine whether or not they are economically feasible. If costs appear to be too substantial, computer facilities could be shared with others.

Computers and other kinds of automated devices may be employed to help identify problem areas in court management and to monitor the results of any change. They can assist in determining the factors contributing to delay and congestion such as judge or lawyer unavailability, witness absenteeism, and improperly filed documents, and, in this way, "zero-in" on the problem areas. Action could then be taken to correct the situation.

The utilization of computers will not decide cases or create judge time, but the wise use of the computer will reduce the waiting time of busy lawyers, (litigants and judges), and make it possible to identify and deal with problems before they become acute.

3. PRE-TRIAL CONCILIATION

A proven device which can be employed to a greater extent than at present (either on a voluntary or mandatory basis) is pretrial conciliation. Obviously the practical result of successful pre-trial conciliation is that fewer cases need to go to court, and hence congestion in the court system is reduced.

As compared to litigation which goes to trial, pre-trial conciliation "is generally less expensive, more expeditious and also more readily accepted and understood by the public." In this way, conciliation also serves to enhance the dispensation of justice as well as reducing court congestion and delay.

Attempts at pre-trial settlement may be instituted on either a voluntary or mandatory basis. Pre-trial conciliation should only, however, be applied to cases wherethere is some hope or likelihood of amicable settlement. Where it is clear that no such hope exists, conciliation only adds to delay in the judicial process and is, in effect, an unnecessary burden. Therefore, a policy of "mandatory" judicially supervised pre-trial conciliation should really not mean mandatory in 100% of the cases. It seems clear that if the rules were to impose a policy of "mandatory" attempts at pre-trial conciliation, some mechanism must be devised to allow a judge or court official to decide which cases are amenable to pre-trial negotiation. In this way, conciliation will have the greatest impact on reducing court congestion.

The orderly conduct of pre-trial conciliation could be organized through an incorporation of this function into new or existing court management structures.

4. CONTINUING EDUCATION FOR JUDGES

One commentator wrote that "there is no doubt that the substantive quality and the efficiency (including the speed) of the judicial process depends to a large extent on the attitudes and qualifications of the judge." Implicit in this remark is the motion that if continuing education were to be provided on a regular basis for judges, they would become better able to dispense justice more efficiently. Or, perhaps more accurately, with continuing training, the quality of justice meted out would not decline as a result of the increased speed. Some have suggested that training should not be limited to recently appointed judges, but should be an ongoing education programme spanning the entirety of the judge's time on the bench. It is almost axiomatic to observe that a programme of continuing education, notwithstanding its contribution to expedition, would be an invaluable asset to the administration of justice in general. Again, a systematic

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Provincial Courts And The Administration Of Justice

by Noel Lyon

Professor Lyon is a professor of law at Queen's University, Kingston.

This report will offer an impressionist survey of the provincial court system in Canada, based on limited observation of courts in action and discussions with judges and court officials. It is based on experience that began in 1972-73, when, as the full-time member of the Law Reform Commission of British Columbia, I spent a year working in close collaboration with Chief Judge Brahan of the Provincial Court of British Columbia, helping him develop a model for a full-time, professional court that included a program of continuing education for judges.

While elaborate studies and institutional reforms are important elements in maintaining quality, they are only supportive of the continuing process of inducing the best from the people who operate the judicial system. The guiding purposes and principles for this latter process are well-established but sometimes neglected.

Visits to provincial courts in each of the provinces have left me with the impression that the people of this country are served well by those courts. The sense of purpose and professionalism among judges and court officers is high. If there are deficiencies in performance, chief judges, senior administrators, and others in positions of responsibility know of them, I am certain, and can reduce them if given the necessary support and if those outside the court system acquire the attitudes and create the conditions that are conducive to the sound administration of justice. I will deal in this report with these attitudes and conditions.

COURTS AND THE PUBLIC

A public that is well served by its courts is likely to know it, especially in the case of courts whose decisions touch the lives and liberties of a great number of ordinary citizens, as do those of the provincial courts of criminal, family and small claims jurisdictions. The Press could do a better job of educating the public about the work of the courts and its importance to the community, and will no doubt do so when the various initiatives being taken in this direction have had more chance to bear fruit. We can expect to see the reporting of individual cases complemented by increasing coverage of the courts an the administration of justice generally, as elements of government as important as the legislative and executive branches in a system of representative government under law.

However, it is not the Press, but the senior judiciary and the Bar, in my view, who set the tone of attitudes towards the provincial courts and their work, and here a change is due. Whatever reason may have once existed for excluding provincial court judges from full and welcome membership in the legal fraternity no longer exists. The old stereotype of a kind of zoo presided over by a semi-competent or incompetent layman or party hack *cum* magistrate no longer has any justification, and its continued acceptance does great damage to the administration of justice.

A recital of some of the behavior caused by this stereotype should suffice to indicate the antidote. Members of superior courts do not often fraternize with provincial court judges. In fact, it seems as though they tend to avoid such contact. While physical arrangements and common work lead naturally to collegial groupings, this does not explain the absence of periodic gatherings to discuss common aims and problems in the administration of justice. Nor does it explain the apparent desire in some provinces to keep the provincial courts in separate court buildings. Equally, the Bar has made a practice of honoring superior court judges in a variety of ways over the years, but has not, at least in the larger centres where judges are concentrated, shown the same interest in provincial court judges.

One could argue the validity of these examples, but the purpose here is not to condemn; rather it is to identify a harmful attitude which in my experience is widely held, as a prelude to suggesting how it might be changed. Although superior court judges work under considerable pressure, I think it essential that they should know more about the provincial courts, which serve as the foundation of the judicial system. The best way to begin, I think, would be to bring together small groups of judges from all the courts in a province to discuss matters of common interest. Seminars have worked well with provincial court judges and sentencing is but one of the many topics capable of engaging judicial minds in an exchange that can lead to mutual respect and appreciation of the difficulties of another judge's role. If sustained, these contacts lead to a camaraderie that does wonders for the morale of people who do demanding and isolating work.

In my opinion, nothing could do more to enhance the administration of justice in Canada than the full acceptance by superior court judges of their provincial court brethren as partners in a common undertaking. This is the hardest of changes, of course, because it cannot be wrought with money or reports or

committees, but only through that most elusive of goals, a change in human attitudes.

COURTS AND THE GOVERNMENT

I want now to talk about the role of the Attorney General. As chief law officer of the Crown and minister responsible for the administration of legislation relating to the administration of justice, the Attorney General has a special constitutional duty that has too often been subverted by neglect, cynicism, and partisan considerations. The Honorable J.C. McRuer, in the second volume of his Report on Civil Rights in Ontario, pointed out that the Attorney General has a separate, non-political function to perform that is not shared by any of his cabinet colleagues. In addition to ensuring that the law is upheld he serves as the link between the executive branch of government and the independent judiciary. This means that he must not only understand fully the important place of the judicial system and the absolute need for integrity and independence in it, but must continually instruct his colleagues on these constitutional requirements so that decisions about the administration of justice will be made in accordance with principle.

Considerations of political advantage have no place in such decisions. Judicial appointments should have no place in such decisions. Judicial appointments should not be party or government franchises, judges should not be viewed or treated as civil servants, and the running of courts should be left entirely to designated chief judges and not in any way interfered with by an attorney general or any member of his department. Fortunately, these constitutional requirements are now being respected in most of Canada, but there remains a residue of the view of provincial court judges as civil servants. There are even some instances of failure to appoint chief judges of provincial courts, which can only mean that the executive branch retains substantial control over the courts and judges. The only remedy for failures of this kind lies with the bench and the Bar, who must ensure that the attorney general understands and performs his consitutional duty. The Press and the public cannot be expected to take the lead, for they are not trained to understand the importance of the consititutional principles involved. They simply follow the lead of the legal profession.

JUDICIAL EDUCATION

One of the best things that has happened in the provincial courts has been the development of regular seminars and conferences, both within provinces and nationally. No comment is needed here except that it is an initiative to be encouraged in every way possible. When judges in groups concern themselves with matters of judicial philosophy and ethics as well as important questions of substantive law and procedure they are bound to become better judges. Couple this with sabbatical leaves and opportunities to participate in court reforms and innovations, and a career on the bench is certain to become more interesting and challenging. Perhaps the important need here is again one of attitude. Senior judges faced with heavy dockets are naturally reluctant to lose judicial man-hours for any reason, and governments are likely to regard as luxuries any activities of judges that do not involve hearing and deciding cases. Seminars thus tend to be seen as second-priority extras, to be supported only to the extent they do not interfere with the judges' "real" work. What is needed is recognition that these activities are essential to the sound administration of justice over the long haul. Prince Edward Island's statutory provision for sabbatical leaves is a move in this direction, as is British Columbia's enactment of a responsibility in its Judicial Council for judicial conferences and programs of continuing education for judges.

There seems to be an emerging trend toward recognizing professional or paraprofessional status for court officers such as administrators and clerks. However, some provinces are doing more than others in this regard and some systematic exchange of experience would be useful, as well as a regular news circular for national distribution to keep court officers aware of what is happening across the country in the justice system. The Attorney General's Department in Alberta has developed a regular bulletin called The Docket which provides continuing coverage of all aspects of the justice system. This bulletin might serve as a model for a national publication drawing on contributions from one centrally-located person in each province, giving court officers throughout the country a regular source of information on developments in every province. People in senior positions tend to pick up much of this information through their contacts but those who spend their days in courts and court offices do not. Many improvements can be made by individuals in the system adapting ideas to their own circumstances, without the need for legislation or funds. But they must be exposed to ideas, and often these emerge from studies or initiatives made possible by the allocation of resources in other provinces which may cost little or nothing to adopt elsewhere.

The situation in provincial courts, as in all the courts, is fluid today. Reform is in the air, numerous studies of the courts have been carried out, and there has been much

RELATIONSHIP BETWEEN THE JUDGE AND THE COURT EXECUTIVE

Ideally, the court executive would be in charge of routine administrative matters. He would not, however, be independent of the judiciary. To the contrary, he would be totally accountable to the judiciary. Even though management tasks would be delegated to the court executive, the dictates of our tradition of judicial independence require that judges must ultimately be responsible for managing the courts. The primary judicial responsibility in this regard would be to formulate management policies for the court. It would then be up to the court executive to ensure that these polices are implemented (under the supervision and scrutiny of the judiciary). However, for this arrangement to operate in the most effective manner, judges must acquire at least some administrative knowledge and expertise. Otherwise, it would be difficult for the courts to exercise a supervisory function.

To institute these structural changes, a board of judges might be established within each province with a view to the formulation of policy. This board could be presided over by a single judge – probably the Chief Justice of the province. In addition to this policy board, committees of judges could be struck to examine different areas of court activities such as:

1. court reporting,
2. calendaring,
3. rules and procedures,
4. general administrative detail, including personnel and budgetary matters, and
5. relations with the practicing bar.

The purpose of these committees would be to share supervision of the foregoing areas among the judges at large, to supply advice to and support for the policy board and its chairman and the court executive. This type of arrangement would permit the judiciary to do what it is best qualified to do – concentrate on the adjudicative functions, and, at the same time, institute the policy directives governing judicial administration. This should also ensure a sound and efficient administrative system.

MANAGEMENT TOOLS AND TECHNIQUES

A great variety of management methods will have to be employed in order to administer a restructured court system. The following are some of those which might prove to be useful. This list is by no means exhaustive, but is merely a starting point from which other ideas may spring.

1. CASELOAD SYSTEMS

Consideration must be given to the manner in which cases are assigned to judges in order to determine whether or not the judiciary's time is being best utilized. For the efficient operation of the court, a systems approach to caseflow management might be effective. There are basically two means by which cases may be assigned to different judges. The objective of both is to allocate the judicial workload in a way which is both efficient and acceptable to the judges who compose the court. The two methods are the individual calendar or individual assignment system, and the master calendar or central assignment system.

A. The Individual Calendar or Individual Assignment System

Under this system of case management, each case filed is assigned to a judge. The judge to whom the assignment is made retains the case until its final disposition. All matters coming before the court having to do with that case are brought before the same judge. The judge knows he has the case permanently. Time can be taken to master the substantive and the procedural issues in the case. To the extent that memory allows, information about each case is retained until final disposition of the matter.

There are a number of advantages which have been attributed to the individual assignment system. First, as stated above, the judge has time to reflect upon the difficult issues in a given case. In addition, responsibility for the disposition of the case is fixed in the hands of one judge. Production is often increased. Judge-shopping by the bar is reduced or eliminated. And finally, utilization of court time is maximized.

B. The Master Calendar or Central Assignment System

When employing this system of case management,

all cases go into a pool. The case is perceived as composed of several phases that can be separated for processing purposes. Whenever one phase or aspect of the case is ready for a hearing or a decision, the case is assigned to a judge. Completion of this phase, whether disposed of by motion or by hearing, culminates in the case being returned to the pool. The case is held here for further assignment until the next phase is ready for processing.

A number of advantages have also been attributed to this assignment system. They

and injustice of the citizens, then sooner or later the body politic will move in to attack these problems. It will do so because it must. This is the lesson of history. Any class or group within a society which defaults in its responsibilities will sooner or later be divested of those responsibilities. Thus, it can be stated once again that the principal threat to judicial independence is the judicial failure to accept full responsibility for the orderly and efficient operation of the courts." (*A Management Philosophy for the Canadian Courts*, by Judge Perry Millar and Carl Baar)

SUGGESTIONS FOR IMPLEMENTATION OF NEW ADMINISTRATIVE SCHEMES

If courts are to be responsible for their own administration, it is necessary that they develop a management philosophy and strive for an "informed management expertise among the ranks of the judiciary."

To implement effective self-administration in our courts, the following have been suggested as appropriate components of a restructured system:

1. The establishment of a single directing authority over both administrative and judicial functions.
2. The provision of overall policy direction either through judicial committees, administrative judges or both.
3. Development within the judiciary of administrative expertise in order to implement a systems approach to caseflow management and court administration, and [to] deal with the complex problems of present day case volume.

WHO SHOULD MANAGE THE SYSTEM?

Achieving more efficient court management will not be an easy task to undertake. Who, then, is qualified to undertake the supervision of court management?

Judges are trained in the law and, through experience, become expert in the process of adjudication and judicial decision-making. Generally speaking, they are not concerned with administrative matters. Judges, at least initially, may lack administrative training, experience or expertise. This would suggest that judges are not necessarily the best candidates to manage a system as complex as our courts. This, of course, must be qualified. Should judges develop a managerial expertise among their own ranks, then they are quite possibly the best qualified individuals to directly manage the courts. For example, judges would be in the best position to comprehend all the judicial ramifications that an administrative decision might bring about. The development of managerial expertise is, however, a major undertaking which cannot be achieved overnight. Judges are of course busy people. They have little, if any, spare time in which to acquire this managerial expertise, and even those who eventually do acquire administrative expertise may not have time to both administer their courts and continue to exercise their adjudicative function. Indeed, past experience might indicate that, in a large and busy court, it is very difficult to effectively fulfill both positions simultaneously. Realistically, then, it is predictable that in the future we will have two distinct types of judges: those who adjudicate, and those who administer. Specialization of this sort may be the only realistic solution. However, the question remains, whether this is practically feasible given the present strain on judicial manpower and the unlikelihood of a large scale increase in the number of judges appointed. Accordingly, it is necessary to examine the possibility of selecting alternative personnel to manage the courts.

CREATION OF A NEW PROFESSIONAL — THE COURTEXECUTIVE

It has been suggested that the proper person to perform the managerial function would be a very specialized professional – the court executive.

This person would, of course, have to be highly qualified. Included among his areas of expertise would be the following: broad managerial skills; knowledge of the structure of the judicial system; familiarity with legal procedures; comprehension of computer sciences and data processing techniques; and skills in personnel recruitment, selection and placement. In short, braod and extensive qualifications are necessary. It might take considerable time to develop such a highly qualified and specialized expert. Nonetheless, in order to properly and efficiently manage an organization as large and complex as the courts, it is necessary to cultivate an;nurture such knowledgable administrators. In short, a new profession would have to be created. Interdisciplinary education programmes could be established to train individuals as court executive. Once again, this cannot be accomplished quickly. It will take time and considerable thought to properly establish such training programmes.

improvement of the administration of justice. The situation is similar in many ways to that which existed in England during the period of reform that culminated in the Judicature Act of 1875. What we need to guide the current reform movement is a conception of the model we should be working towards over the next two or three decades, for that is the appropriate time frame, given the nature of legal institutions and the lifetime duration of judicial appointments.

A NEW FUNCTIONAL MODEL

The dominant need, I think, is to work towards an end to the deep division that exists in our courts between superior courts and so-called courts of inferior jurisdiction. This we can do by substituting for the hierarchical model now entrenched in our thinking a functional model in which all judges belong to an integrated judiciary but are specialized as to function and noted for their competence as judges rather than their position in a hierarchy of ascending power and importance. We are back to attitudes. It is a change in the way we perceive the courts that I am proposing, as well as a change in the divisions of jurisdiction and lines of appeal. Justice of Appeal would be seen more as a function than a rank, each judge in the system performing that function for which he has been chosen as being well-suited. Human nature being what it is, we will never remove the sense of hierarchy entirely, but if we can get rid of its more extreme and artificial manifestations we will have moved respect away from a status base toward a more constructive rationale of a demanding professional task well-performed.

Our present judicial systems in the provinces have simply grown from the systems introduced in the nineteenth century to serve a largely rural society whose transportation and communication services were limited. The process of ad hoc adaptation has run its limit and we need a functional model towards which to steer. The logical place to begin is in the ordinary trial courts, where the administration of justice is largely concentrated.

The current division of functions into criminal, civil, and family jurisdictions makes sense. The persistence of these divisions and their obvious functional integrity suffice to justify their adoption as the component parts of a single trial court located in every region of a province and readily accessible to all citizens. With the professionalization of provincial courts there seems no reason why the criminal jurisdiction of this proposed single trial court should not be comprehensive, including all indictable offences and jury trials. Judges who spend all or most of their time sitting in criminal court are likely to develop the highest level of competence for this work, especially if they can be freed from routine work by trained lay magistrates (one current idea) and justices of the peace (a current practice in some jurisdictions).

The civil division of the single trial court should have a real civil jurisdiction and not just a small claims jurisdiction. The Quebec system provides a working model here. Long without either county or district courts, Quebec has developed a Provincial Court of civil jurisdiction that now runs to three thousand dollars. Small claims do not fall into a separate jurisdiction but are simply the subject of a special procedure in the Provincial Court. There seems no reason why the jurisdiction of a court presided over by a competent, legally-trained judge should depend on the monetary value of the claim. Complexity and importance of the legal issues in a case may call for a central trial court of concentrated and specialized judicial talent, but not money alone. Those who insist on the best, and therefore the most expensive, tribunal simply because of the amount involved should be told to go to arbitration and choose their own adjudicator and pay the cost of the proceedings. It is not an expense the community should bear. It follows that there should be no monetary limit on the jurisdiction of the civil division of the single trial court. There should, however, be access by application of the parties or initiative of the trial judge, to a central court in cases involving issues of complexity or special importance. I will describe that court later.

Family law administration is already moving toward a single trial division with comprehensive jurisdiction. Again there seems no reason why a court presided over by a competent, legally-trained judge should not have this comprehensive jurisdiction, especially in view of the special qualities needed to perform this work well. Access to a central court should be based on the same principles as apply in the civil division. The constitutional difficulties created by section 96 of the British North America Act, 1867, can be overcome if there is general agreement that they should be.

The foundation of the proposed model, then, is a single trial court located throughout a province, having a general jurisdiction, subject to access to a central court in special cases. That central court becomes our next concern.

THE CENTRAL COURT

The central courts in England and Canada are not just historical accidents. They make sense, but their rationale has been lost. The ultimate absurdity is the spectacle of a judge of

a highly concentrated, collegial and informally-specialized superior court hearing uncontested divorces. Why do we have superior courts? The most plausible reason, usually advanced in argument against fusion of superior courts with county or district courts, is that in order to maintain some consistency of interpretation of common law and statutes over time there must be a body of judges noted for their skill as jurists, operating in conditions that enable them to become strong generalists and masters of the law in one or two areas. This means relief from assembly lines of routine cases in favour of a steady diet of complex and difficult cases, time to read and think about the law, and frequent consultation with other judges engaged in similar work. It also means more compact superior courts than we have today, not the larger ones that would result from merger with county and district courts, and the selective caseload that would result from giving general jurisdiction to the trial division dispersed through the province.

Just as the Supreme Court of Canada had to be freed from the excessive burden resulting from the easy access in civil cases permitted by the ten thousand dollar rule, so provincial superior courts, if their separate existence is to continue to be justified, need relief from that great mass of routine work that impairs their ability to perform their distinctive function of writing the precedents that make up the great body of jurisprudence that guides other judges and lawyers. Their work should consist mainly of cases in which there is real doubt as to the proper interpretation of the law. This should probably include an intermediate appellate function like that of the Ontario Divisional Court, in which a panel of three judges hears certain matters like applications for judicial review of administrative action. Similar panels might hear civil, criminal, and family law appeals from the single provincial trial court, other than those that earn leave to appeal to the Court of Appeal through their legal importance.

Finally, the court of appeal in a province would be the most specialized tribunal, doing for the law of the province what the Supreme Court of Canada does for Canadian law – maintain consistency at the level of basic principles of law and interpretation and maintain some harmony with the law in other provinces. Appeals would be by leave only, as a general rule, so that the great bulk of appellate work would probably be done by Divisional Courts composed of three judges of the central trial court.

Here, then, is the basic model of a provincial judicial system:

1. A *provincial trial court* dispersed throughout the province and having three divisions:
   (a) *criminal division* with jurisdiction in all criminal matters.
   (b) *civil division* with unlimited monetary jurisdiction, subject to a procedure for having cases involving complex or important issues heard in the central trial court at the instance of parties or on the initiative of the trial judge.
   (c) *family division* with comprehensive jurisdiction in family matters, subject to similar access to the central trial court.
2. A central trial court with substantial appellate functions and special functions like judicial review, perhaps called the *provincial superior courts*. It would be a compact court since its members would not go on circuit (although they might arrange to hear particular cases on location) and the great bulk of trial work would be handled by the provincial trial court.
3. A *court of appeal* whose time would be devoted to appeals involving questions of legal principle, leaving questions of interpretation to the superior court. Decisions of this court would be subject to further appeal to the Supreme Court of Canada, as at present.

Certain questions emerge at once. What happens to the county and district courts? The obvious answer, in functional terms, is that their members would form the core of the civil division of the provincial trial court. This might be perceived as a demotion if viewed within the hierarchical model that now prevails, but a second look through the functional model outlined here would indicate that county, district and provincial court judges would all be assuming the stature of today's supreme court judges insofar as the latter perform ordinary trial court functions. In turn, supreme court judges would assume true superior court functions, exercising supervisory and appellate powers as well as carrying out fairly specialized trial functions. Judges of the present criminal and family divisions of provincial courts would fit naturally into the criminal and family divisions of the new provincial trial court, there to find increased jurisdiction nd powers.

A CONSTITUTIONAL HURDLE

The greatest obstacle is, of course, constitutional. On the case law interpreting section 96 of the British North America Act it seems certain that the judges of all courts in the proposed model, including the provincial trial court, would have to be appointed by the Governor General. Since the administration of justice in the provinces, including the constitution, maintenance, and organization of provincial courts of both civil and criminal

(continued on P. 21)

frequently silent and deserted in the afternoon with no business being done." Courtroom utilization is often low due to adjournments of otherwise full dockets. Judges, who theoretically have control over adjournments, are frustrated in their attempts to dispose of case backlogs and dispense justice because, in fact, as the system presently stands, judges have little or no control over the varied factors which result in adjournments. Indeed,

> "backlogs are to a substantial degree the result of adjournments, and every adjournment is the result of some event which . . . has occurred upstream, and which forces the court to grant the adjournment . . . In practice, the situation is out of the control of any single participant and the court lacks the tools for co-ordination."

Accordingly, it is necessary to discover the tools required for co-ordination and to use them to dispense justice in an expeditious manner.

IDENTIFYING THE MAJOR AREAS OF CONCERN

As previously stated, congestion and delay in the courts are, to a large extent, the result of administrative rather than legal inadequacies. To correct this deficiency, therefore, one must look to the present administrative system to determine how to improve the situation.

> "The challenge for effective use of judicial manpower is not in devising ways to make judges work. What is wanting are strategies for making judicial time more productive . . . Judicial workloads must . . . be managed. Increases in workload are expected to be absorbed – often without delay, the efficiency and effectiveness of the judiciary must be enhanced, i.e., by producing justice with less expenditure of time and efford per individual case." (*Managing the Courts*, by Ernest Friesen, et al.)

It is apparent, therefore, that it is necessary to address ourselves to court administration in order to devise means to successfully handle the increased case load and to reduce congestion and delay. It may, indeed, be necessary to alter the internal structure of the court system to cope with the many problems arising from escalating volume. Moreover, notwithstanding our tradition of judicial independence, it may no longer be possible to allow the courts to continue to control court administration without some for of external management.

OBSTACLES TO REFORM

There are, however, a number of obstacles which must be identified and overcome before any new administrative changes may be instituted, for these obstacles might limit the possible directions for change.

As with change in any institutional setting, one must necessarily be concerned with budgetary constraints. Most often, change involves an increase in cost and therefore, in advocating any reform of the existing judicial administrative structure, cost considerations must inevitably be entertained and, indeed might impose an obstacle to reform.

The judiciary has traditionally been granted control over case flow management. However, there is nothing to prevent the provincial legislatures from transferring increased control over court administration to the executive arm of government. Therefore, the potential for conflict between the judiciary and the legislative and executive branches of government exists. Commentators have observed that the present Canadian system of divided responsibility for court administration is unsatisfactory and inefficient and that it must be replaced.

JUDICIAL INDEPENDENCE

A serious and justifiable concern in any revised system of court administration is the danger that it might adversely affect our valued tradition of judicial independence. The cornerstone of our legal system is the independent position occupied by the judiciary. Judges do not need to account to government officials or anyone else in society. Their accountability, to borrow the words of the Chief Justice of Canada, "is only to the law and to the impartial and expeditious administration of justice under law". Any loss of this independence arising from a new administrative schem poses a serious threat to our judicial system. Indeed, it is in the public's best interest that judicial independence not be eroded. For this reason Chief Justice Nemetz of the British Columbia Supreme Court (as he then was) has urged that the judiciary itself must maintain control over matters relating to judicial administration. Moreover, the judiciary must not only maintain control, but it must maintain effective control. Judges must ensure that they heed the warning expressed in the following observation:

> "We are in an age of accountability, from which even the courts cannot escape. If in the long run the courts do control their own process in terms of eliminating backlogs, delays and adjournments, to the unnecessary inconvenience, aggravation

ACHIEVING EFFICIENT COURT MANAGEMENT

by Gerald L. Gall

Professor Gall is Associate Professor of Law at the University of Alberta, and is Associate Director of the Canadian Institute for the Administration of Justice.

In our Anglo-Canadian legal tradition, we firmly believe that each and every member of society is entitled to justice. If someone has been wronged by another, he must be given his "day in court". It has become apparent in recent years, however, that the length of time between the commission of the wrong and the aggrieved person's day in court is increasing. This delay is frustrating for litigants, witnesses, lawyers, judges, police and others and is considered by many to be a major weakness in our present legal system. The question which remains, however, is what can be done. The answer to this concern appears to be that through co-operative efforts on the part of all persons concerned with the administration of justice, solutions can be found and remedial measures implemented.

WHY THE BACKLOG?

At the outset, it is important to be aware that congestion and delay in the administration of justice is a universal concern in the modern day world. Indeed, it is such a widespread problem that as recently as 1970, a workshop on this very subject was held in Venice by the World Association of Judges. Our problems, therefore, are not unique, but nonetheless a solution is required that uniquely suits the Canadian legal system.

According to Judge Perry S. Millar and Professor Carl Baar, in a recent paper delivered to a joint meeting of the Canadian Association of Political Science and the Canadian Association of Law Teachers, Canadian courts are faced largely with administrative rather than strictly legal difficulties. The administrative problems have arisen from the increased case volume which has been evident since the 1960's. This increase, to a large extent, can be attributed to the maturation of the post war baby boom which, from the 1960's to the present date, has resulted in a population bulge in the age 16 to 30 category. (It is within this age group that most deviant behaviour manifests itself.) Another major reason contributing to the high case volume is the shift from rural to urban living which has dramatically increased in recent years. Other causes of court congestion include the expanded functions of the judiciary, the shortage of judges, the shortage of auxiliary personnel resulting from an insufficient supply of trained manpower, and other kinds of administrative weakness. It is clear, therefore, that the causes of congestion and delay are complex and many and it will be difficult, if not impossible, to find a single, simple and all-encompassing solution to the problem.

IS BACKLOG REALLY A PROBLEM?

As a preliminary consideration, it is necessary to consider the consequences of congestion in order to determine whether or not they are detracting from the quality of justice delivered.

Delay in the administration of justice has many undesireable ramifications. One of these is the heavy financial burden imposed upon litigants when a court action is stretched out over a lengthy period of time. This consequence of delay is particularily harsh on individuals at the lower end of the economic scale, and those on fixed incomes. Indeed, the prohibitive costs of lengthy litigation may even deny some persons their right to a day in court.

Another major difficulty arising out of increased case volume is that of adjournments. Increased adjournments often have the undesireable consequence of an altered quality of justice. Adjournments often mean squandered court time and increased delays in the disposition of the cases involved. Unfortunately these effects sometimes result in "acquitting the guilty and frustrating the innocent" since witnesses become unavailable (due to death, relocation, etc.), and are discredited (due to the decay of memories over time). Also, "repeated adjournments can alienate police and civilian witnesses and bring discredit to the image of justice." Such alienation and loss of faith in our legal system can only lead to frustration on the part of these individuals and invite their disrespect and lack of confidence in our system of justice.

Congestion in the courts, generally speaking, has an overall effect which reduces the quality of justice, since

> "the decision in a court is dependant upon the process. If the court lacks the resources to perform its functions, loses control over its procedures or contributes to the inadequacy or presentation, the individual before the courts will not receive justice."

Ironically, despite all the congestion in our courts, "court-rooms at all levels are

Quelques Idées Concernant le Service Correctionnel du Canada

par l'Honorable Allan Lawrence

M. Lawrence est le Soliciteur-Général du Canada. Ceux-ci sont des extraits des remarques telles que soumies devant la nouvelle prison de sécurité maximale de Colombie-Britannique.

L'inauguration d'un nouvel établissement comme celui-ci est le moment, pour nous, de sobres réflexions, car elle nous rappelle que notre société, comme toutes les autres d'ailleurs, n'a pas progressé jusqu'au point où les établissements à sécurité maximale sont superflus.

Toutefois, je suis heureux du fait que les détenus qui ont besoins du régime de sécurité maximale en Colombie-Britannique pourront maintenant vivre et travailler dans un environnement moderne, conçu pour leur offrir toutes les chances possibles de développement, tout en comportant les mesures de sécurité rigides qui s'imposent afin de protéger le public, objectif qui doit demeurer notre grande priorité.

Un établissement pénitentiaire représente la sanction ultime — le retrait du délinquant de la société. Les prisons, toutefois, ne doivent pas être vues uniquement comme des endroits où l'on séquestre les délinquants pour les punir de leurs méfaits. L'incarcération peut offrir l'occasion de changer, si le détenu accepte de relever le défi. Qu'un changement de ce genre soit possible est peut-être contraire aux notions couramment répandues, mais cela ne dément pas ce qui est effectivement notre expérience.

Les détenus des pénitenciers fédéraux ne sont pas dans l'ensemble des récidivistes endurcis. En Colombie-Britannique, environ 65% des détenus qui purgent à l'heure actuelle des peines fédérales font l'expérience de leur toute première période d'incarcération; 21% ont déjà purgé une peine, et seulement 14% sont revenus plus d'une fois dans nos pénitenciers.

Une autre opinion fort répandue est que tous les détenus des pénitenciers sont des délinquants dangereux ou violents. En Colombie-Britannique, seulement 34% des détenus présentement incarcérés purgent des peines pour des crimes contre la personne, tandis que 66% ont été condamnés à la suive d'infractions contre les biens ou d'infractions relatives aux drogues. En dépit du caractère sérieux de leurs crimes, il faut clairement s'attacher davantage à déterminer s'il y a des solutions de rechange à l'incarcération pour les délinquants qui ne présentent pas un danger réel et constant pour le public. S'il y a d'autres possibilités que l'emprisonnement, elles doivent être identifiées et mises en oeuvre.

A cette fin, mon Ministère a financé des projets-pilotes en matière de déjudiciarisation et de possibilités de sentences dans toutes les régions du pays.

La déjudiciarisation peut être définie, grosso modo, comme la solution "hors tribunal" de certains genres d'infractions criminelles. Il s'agit habituellement de crimes contre les biens, d'infractions de caractère non violent, et le délinquant n'est pas considéré comme dangereux pour le bien-être physique d'autres personnes.

C'est généralement un processus de médiation entre le délinquant et la victime où tous les efforts sont faits pour assurer un dédommagement à la victime ou encore un processus selon lequel le délinquant accepte d'effectuer un travail dans la collectivité.

En outre, le Service correctionnel du Canada a mis sur pied un programme qui consiste à acheminer les détenus pourvus des qualités requises vers des établissements à niveau de sécurité moindre, qui offrent des possibilités de contacts plus nombreux avec la collectivité grâce à leurs activités et à des programmes de libération de jour, toujours dans les cas de détenus qui ne créent aucun danger pour le public.

Pour des raisons sociales et économiques, il est de bonne logique de réétablir le délinquant dans la collectivité, avec une surveillance adéquate, lorsqu'il s'est montré capable d'assumer des responsabilités nouvelles.

De même que le crime est engendré et entretenu dans la société, de même nos collectivités doivent permettre que se développent des habitudes de travail positives, des aptitudes sociales et de bons liens familiaux pour les personnes qui ont enfreint les règles de la société.

Ce sens de la collectivité est éveillé, dans nos pénitenciers, par des volontaires qui aident à offrir des programmes aux délinquants, et par des comités consultatifs de citoyens qui assurent un lien officiel entre l'établissement et la collectivité.

Le Comité consultatif de citoyens joue essentiellement le rôle d'un organe consultatif dont les membres viennent de la collectivité. Il favorise l'harmonie entre les habitants de la prison et ceux de la localité où se trouve l'établissement. Il y a souvent échange de services entre ces deux communautés, et le mot de passe est la coopération mutuelle.

J'espère que vous qui êtes ici aujourd'hui ne

verrez pas en la clôture de treillis métallique de l'établissement Kent un rideau d'acier qui doit tenir le public à l'écart. Nous sollicitons votre concours; nous encourageons votre participation; nous voulons faire de l'établissement une partie de votre collectivité, plutôt qu'un endroit entièrement à part.

L'introduction d'un programme d'unités résidentielles pour les détenus sous régime de sécurité maximale qui viennent à l'établissement Kent renforce cette intention. Les détenus et le personnel se partagent la responsabilité du fonctionnement de chaque unité, ce qui met en valeur l'obligation de l'individu tant à l'égard de son propre groupe d'unité résidentielle que du reste de l'établissement.

L'établissement Kent abritera des individus dont les peines sont de longueurs fort différentes. Certains pourront s'attendre à leur libération avant la fin de l'année. D'autres ne font que commencer une longue période d'incarcération. Il y aura même ici des détenus dont la condamnation ne prendra pas fin au cours de ce siècle-ci.

Le Service correctionnel du Canada doit offrir au délinquant des programmes qui lui donnent l'occasion de manifester un plus grand sens des responsabilités et de se rendre mieux maître de sa vie et de ses actes. La motivation est appuyée par un système d'encouragements et de récompenses.

Divers privilèges, comme des visites-contacts, des transferts à des établissements où la surveillance est moins rigide, ainsi que des absences temporaires sont consentis aux détenus qui font preuve d'un comportement satisfaisant.

La récompense ultime est une réduction possible de la peine du détenu. La réduction de peine pour bonne conduite, ou "remise" de peine, doit se gagner chaque mois grâce à une bonne conduite et à la participation aux programmes. Le détenu peut donc déterminer lui-même, en partie, sa propre date de libération.

Dans son document de travail intitulé "Emprisonnement-libération", publié en 1975, la Commission de réforme du droit a laissé entendre que la réinsertion sociale du délinquant sera facilitée si l'on crée des conditions de vie carcérale qui se rapprochent le plus possible des conditions de vie dans la collectivité.

Ce document précise: "En effet, de telles conditions permettent d'accorder une certaine valeur au comportement quotidien comme indice du risque de dangerosité. Plus la vie en détention est semblable à la vie à l'extérieur, plus l'évaluation du risque a des chances d'être exacte."

Le Sous-comité parlementaire sur le régime d'institutions pénitentiaires au Canada a approuvé les principes qui se traduisent dans la conception de l'établissement Kent et dans ses programmes.

Kent est un élément essentiel dans un régime de correction plus progressif. Il fournira une sanction ultime indispensable, afin que les établissements à sécurité moins rigide, le système de la libération conditionnelle, et les peines non privatives de liberté comme les amendes, les ordonnances de service communnautaire et la probation puissent exister avec des chances de réussir. Et Kent abrite moins de un pour cent de tous les délinquants condamnés en Colombie-Britannique. De fait, seulement deux pour cent de tous les délinquants de cette province sont dans des pénitenciers fédéraux. Mais l'existence de cet établissement permet à la grande majorité de délinquants condamnés — aux 99% qui restent — d'être traités d'une façon beaucoup plus humaine et en entraînant beaucoup moins de dépenses.

Les coûts doivent être mesurés sous le rapport humain aussi bien qu'en termes économiques. Le personnel de nos établissements ne fait pas que s'occuper d'un élément de la société qui a manifesté un comportement criminel. Un profil de notre population carcérale montre que la majorité des personnes incarcérées étaient aux prises avec d'autres problèmes comme la dépendance à l'égard des drogues et de l'alcool, l'isolement culturel, l'insécurité, le manque de connaissances professionnelles, des antécédents familiaux instables, et ainsi de suite.

Nous devons au détenu d'un établissement à sécurité maximale, et nous nous devons à nous-mêmes de lui fournir les outils, l'orientation et la formation qui conviennent, et de lui procurer l'environnement qui facilitera le rétablissement de sa dignité de citoyen. C'est là la manière juste de procéder, et c'est à la longue celle qui se révélera la plus économique. Elle nous permettra sûrement d'épargner de l'argent.

Si notre société et le Service correctionnel du Canada apportent au détenu ces éléments, ils auront alors rempli obligations. Le délinquant doit amener lui-même son propre changement; cette réalisation est à son honneur et constitue sa récompense.

C'est le principe de la responsabilité partagée entre le Service correctionnel du Canada, la communauté et le délinquant. L'établissement Kent a fait sien ce principe, et l'emblème du Service symbolise le défi à relever, la possibilité et la responsabilité.

J'espère que la promesse qu'ils représentent l'un et l'autre sera entièrement réalisée et reconnue. Si tel est le cas, les avantages rejailliront sur tous — détenus, citoyens, travailleurs correctionnels et, assurément, l'ensemble de la société canadienne.

sentence, restitution, fine, jail and penitentiary. I suggest it is fair to say that the court in selecting the appropriate sentence (no matter what the Crown or defence or both have recommended) can ensure that justice be done in the sentencing process. Of course, it is trite to say that I have no quarrel with the view that the court must act absolutely independently from counsel in such matters and must properly assess the penalty that it feels is best suited to the particular situation.

To sum up then, it seems to me clearly that if one were to set down some basic guidelines for Crown Prosecutors to follow that it should not be a difficult matter to control the negotiating process and any resulting bargains that flow from such a process. It seems to me as one Ontario lawyer said and I quote:

> "A lawyer is a lawyer, I suppose and naturally his training in this regard is going to stay with him."

If such is the case, then surely the defence are going to constantly be approaching the Crown with respect to their position about reduction of number of counts, reduction of the charge to a lesser charge; or asking what the Crown's position on sentence is going to be. I think this is a fact of life. It is one that we cannot ignore. Quite the contrary, I submit that it is the responsibility of both counsel to acquaint themselves with the case to discuss all aspects of the case and to perhaps determine if there is not some common ground upon which the criminal charge can be assessed and ultimately disposed of in open court without the necessity of a trial.

Surely we are capable of organizing ourselves to the extent that we acquit the heavy duty for the administration of justice that is thrust upon the Crown in a way that would be acceptable to the public, who after all are the beneficiaries of the criminal justice system.

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(Provincial Courts . . . Continued from P. 6)

jurisdiction, is exclusively a matter for provincial legislatures, and since the great bulk of law administered in those courts is provincial, except for the criminal law, federal appointment of all judges is not acceptable or appropriate. At the same time, Ottawa has a direct interest in those courts to the extent they apply laws of Canada, and also has some detachment from provincial politics, the latter being a desirable element in judicial appointments.

The best approach seems to be a constitutional amendment incorporating a variation on the joint appointment procedure set out in the Victoria Charter with respect to the Supreme Court of Canada. The mechanics would be a matter for negotiation, but one possibility would be federal appointment of superior court judges (including judges of provincial courts of appeal) from lists of candidates agreed on by the Minister of Justice for Canada and the Attorney General of the Province, and provincial appointment of judges of provincial trial courts on the recommendation of provincial judicial councils that include nominees of the Minister of Justice for Canada.

Court reforms under way in this country today necessarily work from the existing system, taking as given the attitudes and assumptions of the status quo. I have tried to stand back from the system, using what I have seen and heard as clues to where basic changes in the system might lead to major advances toward the objects of our reforms. The result is not profound, but is just a description of the judicial model toward which I think we are groping. If the model is sound, its adoption as a mental frame of reference by those responsible for court reform would lead to fast identification of the key pressure points where reform efforts should be concentrated. If the model is rejected, it may still serve to provoke thinking about goals and alternatives.

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be made by the Crown. It makes sense that the defence counsel is thereby in a much better position to give knowledgeable advice to his client about his position with respect to the pending prosecution. There would be room to explore the possibilities of a plea to a lesser number of charges or to a lesser charge or to explore the Crown's position on sentence. In short, it seems to me that counsel owe a duty not only to the client but to the public to explore this possibility, given the nature of the criminal law, and the potential for included charges or numerous charges, and for doubt arising as a result of defences that are acknowledged by law. (e.g. drunkenness reducing murder to manslaughter.)

Secondly, it is my view that the judiciary should not participate in any way whatsoever in any of the discussions, negotiations or bargains.

Thirdly, it is my opinion that the framework for the administration of justice in Canada has within it the key element for allowing plea negotiations and any resulting bargains to take place . . . that of control. It seems to me we have two prime sources of control to keep the discussions and negotiations within the bounds of propriety so that it can be an essential component of the administration of justice.

Let me elaborate a little. Firstly, as I have indicated, the Attorney-General, the elected representative and a member of Cabinet, can control the agents and the prosecutors in his provincial jurisdiction. He can go further and issue directives compelling such things as disclosure, and can through his deputies and directors keep close control over the agents and dictate policy and guidelines that can be used to conduct negotiations or bargaining. If an Attorney-General lays down guidelines for the conduct of plea discussions which are violated by a particular Crown Attorney, and the Administration picks it up, they can move quickly to correct the situation. If the guidelines need adjusting, the administration again can move quickly to set up proper guidelines to control the negotiation and bargaining. It is always to be remembered that the Attorney-General must answer in the Legislature for conduct by his agents in the proper administration of justice. Such public airing can greatly effect the administration of justice and can act as a powerful deterrent to prevent an Attorney-General or his agents from improper conduct in the administration of justice.

Secondly, I believe the judiciary have a very important role to play in terms of controlling negotiations or any bargaining. Let me say right at the outset that the judiciary are given a key role in negotiations or bargaining by virtue of Section 534(4) which reads:

> "Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea of guilty and, if such plea is accepted, shall find the accused not guilty of the offence charged."

When one looks at that particular section you will see that the two key players are the judge and the accused. The accused has the option to plead not guilty to the offence charged but guilty to an included or *other offence*. Should an accused person do this, then the court must make up its mind whether or not it will accept the plea should the prosecutor consent.

May I suggest that Section 534(4) has often been overlooked and should be used more frequently by all concerned with the proper administration of justice.

Next, I believe the judiciary have a discretion to accept or reject a plea. If the facts do not warrant a plea of guilty, they can have the plea struck, a not guilty plea placed on the record, and set the matter down for trial.

This is brought home by such cases as *Brosseau vs. The Queen* (1969) Supreme Court Reports, 181 and *Adgey vs. The Queen* (1973) 13 C.C.C. 177, also a decision of the Supreme Court of Canada. Hence, it is suggested that these two cases when read together clearly place a responsibility on the judge, first of all for accepting the plea when the charge is first read (here the judge must be satisfied that the accused does understand the charge and does understand his plea) and secondly, the judge must be satisfied that the facts to support the plea of guilty are indeed facts that support the specific criminal charge that has been pleaded guilty to. It seems to me that in this way the judiciary without ever actively getting involved in the negotiations or bargaining can control the process to a great extent when it is brought before the courts.

Thirdly, and most importantly, the judiciary has the final say when it comes to sentencing. The court can impose the sentence it sees fit, bearing in mind the circumstances of the case. The courts have such a wide range of sentences at their disposal now that it seems to me that here again they would be able to exercise a fair degree of control over the particular case that is brought before them. As you know, the sentencing options range all the way from discharge, suspended

In Brief

TWO LEGAL AID PROJECTS RECEIVE FEDERAL FUNDING

Federal contributions towards two legal aid projects were announced by the federal Ministry of Justice.

Under the Department of Justice Special Projects Legal Aid Programme, the following organizations received contributions:

1) **Manitoba Legal Aid Society, Winnipeg (User Fee Study)** — $47,000. Legal Aid Manitoba introduced a user fee as well as a number of other fiscal restraint measures on April 1, 1978. The question of how to control legal aid costs without sacrificing quality of service is of concern to the legal aid community across Canada. This contribution will allow an assessment to be made of the effects of the user fee on legal aid clientele.

2) **Regina Community Legal Services Society, Regina (Native Counsel Project)** — $40,000. This project is designed to provide native people in the Regina area with legal aid services. The project particularly concentrates on the provision of services to native groups although individual services are provided in some instances. This will be the second year this project has been funded by the Department of Justice.

* * * *

SAY "CHEESE"

Another weapon will be introduced in British Columbia's war against drinking and driving. The video camera will join the police array of batmobiles, breathalyzers and province-wide year-round road checks.

For the past ten months the Vernon R.C.M.P. detachment has been the site of a highly successful pilot project where suspected impaired drivers, in addition to blowing into the breathalyzer, have had their voices and movements filmed as they carry out physical sobriety tests.

Drinking and driving motorists may now at first hand learn how foolish they may have been the night before when they see themselves in black and white on the morning after.

The videotaping is available for viewing by the charged driver and his defence counsel prior to a court appearance.

This viewing is said to be a very objective way to refresh a driver's memory as to exactly what condition he was in when he was taken off the road. It also better equips that individual to rationalize in his own mind as to whether he was guilty or innocent of a drinking and driving charge.

"The videotape has been used as evidence in the Provincial Court in Vernon, and it certainly appears that this kind of evidence has been of assistance to the court," a court official stated. "It is also interesting to record that in one case the videotape assisted the judge in reaching his decision to dismiss an impaired driving charge.

Evaluation of the Vernon project shows a reduction of at least 40% in the number of drivers who were pleading Not Guilty. This can result in obvious saving to the taxpayer, for the trials of impaired drivers are all costly events to the Court, Crown Counsel, police and the accused.

Criteria for selecting locations for the extended program will include those where a notable drinking-driving problem exists, where the enforcement index is high, and where there is a high rate of contested charges. The increase of areas in operation will also serve to provide a more extensive evaluation of this aid to law enforcement.

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CHIEF JUDGE MEETS MUNICIPAL OFFICIALS

Chief Provincial Court Judge R.A. Cawsey met with Sundre, Alberta's, Mayor Myron Thompson, the town council, RCMP and correctional officials last month to discuss a request for stiffer penalties from judges.

He told them he would relay their request to the 85 provincial court judges but added they were free to ignore such a request. He also added he offered no apologies for past decisions.

Attorney-General Jim Foster and Solicitor-General Roy Farran met with town mayors in Edmonton last November to discuss the court system. Judge Cawsey subsequently asked to meet with Sundre officials to exchange views on sentencing.

Judge Cawsey said he is concerned and upset that a large portion of the elected representatives in Alberta feel that the courts are not punitive enough.

"We can easily start being punitive, it's very easy to do. Then I wonder how many delegations are going to say soften up a bit . . . My concern is going to be reflected by relaying your concern to the judges. Some of them will completely ignore what I have to say. Some of them might get the message and they might agree. Some of them might not agree.

"My feeling is that a broad segment of the province has gone to considerable trouble to bring something to my attention. I can assure you it has been brought to my attention and it will be brought to the attention of other judges."

Judges are fallible, have different philosophies and must consider multiple factors in sentencing, Judge Cawsey told 16 people in the town's council chamber.

"But, for every soft judge that you point out, I hope that one day, through education, we will hit a happy medium in this province. We are never going to have uniform sentences. I don't think there is any device that has been devised, other than saying there is a specific penalty for a specific offence, that's the only way. Then you won't need a judge. All you will need is a computer. We haven't reached that position and I hope we won't, he said.

The sentencing process, Judge Cawsey commented, is a lot more elaborate than generally recognized.

"It is the most painful part of a judge's duty. It is the one duty a judge must perform for which he has absolutely no training. Lawyers don't take courses in sentencing. He goes into court and he must make the punishment fit the crime. He tries to satisfy in sentencing all the conflicting interests.

"The conflicting interests are, firstly, protection of the public and that is the number one factor. You can't stop there though. You can also protect the individual dignity. Thirdly, you can say you want to rehabilitate the offender. Fourthly, straight retribution or straight punishment. What's it going to be? I say the present philosophy, not shared by everybody, is that right now the whole object of the criminal justice system is, or should be, protection of the public. But how do you do it?" he asked.

* * * *

NOBODY'S PERFECT

"He is a crook. He is a fraud. He is a sponger. He is a whiner. He is a parasite. But of course he could still be telling the truth. It is a question of belief."

– Judge Sir Joseph Cantley,
at the trial of Jeremy Thorpe

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2nd DRINKING-DRIVING OFFENCE TO BRING JAIL

Manitoba Attorney-General Gerry Mercier has announced that, as of July 1, 1979, all drivers charged with drinking and driving offences under the Criminal Code who had previously been convicted of a similar offence within the previous year, would be charged with having committed a second offence.

A conviction for a second drinking and driving offence will result in a mandatory sentence of imprisonment.

Mr. Mercier indicated that this change in policy was another step in "the determined program of the Government of Manitoba to persuade drinking drivers to stay off the highways. The summer holiday season is upon us and we can expect that more cars will be on the highways as families take off on summer holidays. Unfortunately, we have become accustomed to the weekend death count of traffic accident victims. The drinking driver is involved in more than half of the serious accidents resulting in fatalities."

The policy will affect all drivers charged with offences under Sections 234, 234.1, 235 and 236 of the Criminal Code – the drinking and driving offences. The penalty on conviction for a second offence under any of these provisions is imprisonment for up to one year but not less than 14 days. Similar policies are in force in all other provinces in Canada.

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sentence of two years less a day to the court. The accused appealed the sentence. The majority of the Manitoba Court of Appeal said that it was not objectionable for a properly arrived at joint submission to be made nor under the circumstances was it objectionable to recommend a specific term subject always to the overriding discretion of the court to accept or reject any recommendation.

It would appear that the Canadian position is somewhat ambiguous in that some courts suggest there can be no plea bargaining; some courts definitely suggest that judges cannot participate in or initiate plea negotiations. On the other hand, some courts are prepared to listen to joint submissions; and in the case of statutes that have penal provisions like the Income Tax Act give effect to bargains that are struck under those particular Acts where a prosecution could have been proceeded with but wasn't because of a bargain.

CASE AGAINST NEGOTIATIONS

I thought it might be useful to attempt to consolidate the objections that are usually raised against negotiations or bargaining.

Firstly, it may be said that the real objectives of criminal justice are being obviated if the primary aim is to search out the truth and punish the guilty for the crime they have committed. Critics are really saying that by bargaining or negotiating, one is not punishing the person for the crime that has been committed. In addition, it is argued there is no safeguard for the accused, or the public for that matter, because the innocence or the guilt of the accused is not tested in court. In addition, there is the appearance of secrecy that seems to surrounding negotiations or bargaining. Bargaining and negotiations are not done under public scrutiny, but usually in a solicitor's office. Some people feel that justice is buyable, or if not buyable, dispensed according to friendship or some other ill-defined motive. In addition, it is argued if bargaining and negotiation are to become a way of life the Crown will be sorely tempted to overcharge so that they will be in a better position to negotiate. In addition, one's guilt or innocence or the sentence that one receives may depend upon negotiation skills as opposed to a decision by an impartial judge. In addition, it is argued that negotiations and bargaining take away power from the court and demean the court, in that the court is presented with a fait accompli.

I suppose the old saw referred to in *Rex vs. Hurst and others*; ex parte *McCarthy*: "That is it not merely of some importance but a fundamental importance that justice should both be done and be manifestly seen to be done" is the crucial case against negotiations.

CASE FOR NEGOTIATIONS

Are there any arguments to be made for the case for negotiations?

First of all let us look at it from the accused's point of view. Certainly an accused who feels that he has committed a crime may be most interested in the kind of sentence he is going to get, and if he wants to get it out of the way and avoid a costly corrosive trial, he will certainly want to plead guilty and obtain what benefit in the way of a sentence that he can, and get on with the rehabilitation that will be provided for him. In addition, of course, a negotiated guilty plea has the advantage of avoiding the long delay with the charge hanging over his head. In addition, from the accused's point of view he may be able to receive some compassion and certainly he can avoid the all-or-nothing alternative that is provided by the adversary system.

Indeed, some people might very much want to plead guilty and will find this a therapeutic event; and coupled with some compassion in the sentence it will be of a significant advantage for them.

Is there any advantage to negotiations or bargaining from the Crown or the public's point of view? I suggest there are some obvious ones, for example, it would tend to prevent backlogs. It would save court time; it would save costs in terms of additional buildings and staff. There may be some protection for the public in terms of getting criminals speedily put away where jail is thought necessary. It certainly avoids the long delays in getting the criminal matter disposed of. It would allow some compassion and flexibility in administering justice. The negotiated plea doubtless leads to a final disposition and saves many appeals and the cost of obtaining transcripts and overloading the appellate courts with appeal matters.

If I were to sum up I would say that Chief Justice Burger in the *Santobello* case put it as adroitly and as articulately as anyone.

CONCLUSIONS

Firstly, I believe that plea negotiations are necessary and in fact I would go one step further and suggest that it is the duty of both counsel for the defence and the Crown to enter into discussions with respect to a criminal prosecution. From the accused's point of view it makes common sense for his counsel to discuss the case with the Crown from the point of view of obtaining disclosure, and certainly disclosure ought to

General subsequently appealed to the Ontario Court of Appeal who dismissed the appeal saying:

> "We believe it would now be quite unfair not only to the Magistrate but to the accused for the Crown, by means of this appeal to change its position by asking for a substantial term of imprisonment. In effect, the appeal repudiates the position taken by Crown counsel at the trial and we do not care to give effect to that repudiation."

In the *A.G. of Canada vs. Roy*, Mr. Justice Hugessen in 1972 said in considering a Crown appeal on sentence that plea bargaining was not regarded with favour by the court; that the court was not bound by Crown counsel's suggestion; that before an accused's guilty plea could be accepted the court should be satisfied that the accused realized the sentence would be determined by the court; that the Crown upon an appeal would not be heard to repudiate its position taken at trial except in circumstances where the imposition of the sentence was illegal or that the Crown had been misled at trial or that the public interest in the orderly administration of justice outweighed the gravity of the crime and the gross insufficiency of sentence.

In June of 1976 the Quebec Court of Appeal in the case of *Perkins and Pigeau vs. R.* (1976) 35 C.R.N.S. 222 held that where the initiative for 'plea bargaining comes from the Crown or the defence such practice is unacceptable. Either the accused is guilty and must face the mandatory sentence imposed by law or he is innocent and must be acquitted."

In this situation the two accused had negotiated with the Crown and pled guilty to a possession charge and the Crown had agreed to withdraw the trafficking charge even though they had sufficient evidence to prove the trafficking or importing charge. The trial judge did not follow the Crown's recommendation of a three-year sentence and sentenced the accused to four years. The accused appealed; however, the appeal was dismissed.

In September of 1976 in the case of *Regina vs. Roy* (1977) 32 C.C.C. (2d) 97, the Ontario Court of Appeal ordered a new trial where the judge partway through the trial had invited the Crown and defence counsel to his chambers and indicated a range of sentence if the accused were prepared to plead guilty to a lesser charge. The judge then invited defence counsel to talk to his client.

The Court of Appeal was clear in the judgment saying that a judge sitting without a jury cannot initiate such discussions, after having heard evidence and still preserve the appearance of impartiality. In essence then, judges cannot initiate plea bargaining.

In June of 1976 the Supreme Court of Canada in the case of *Smerchanski vs. The M.N.R.* reported (1976) 35 C.R.N.S. 228, had an opportunity to look at a plea bargain by Smerchanski and the Minister of National Revenue. The parties had arrived at an agreement with respect to the amount of tax Smerchanski ought to pay to the Department. At the same time, Smerchanski also waived his right of appeal from previous reassessments by the Department.

The basic part of the bargain was that the Department would not pursue a prosecution for fraudulent tax evasion if Mr. Smerchanski would waive his rights to appeal and pay the tax.

Mr. Smerchanski ultimately appealed to the Supreme Court of Canada alleging that the waivers were illegal, that they were procured by undue influence or coercion or by implicit threat of prosecution and that they were contrary to public policy, and contrary to statute.

The Supreme Court of Canada dismissed the appeal. Chief Justice Laskin said:

> "The tax authorities held the threat of prosecution over Smerchanski but with good grounds, and the latter was aware of this and knowingly made a settlement, however draconian it may have looked to him in retrospect, which he was only too glad to make to escape the prospect of a conviction and of a jail term. Given that the tax department had good grounds for proceeding against Smerchanski and that Smerchanski himself knew it, and indeed acknowledged the tax liability even before the letter of commitment was signed and before the waiver agreement was executed, it could not be agreed that the settlement made on the terms of a waiver of rights to appeal was either illegal or voidable."

This is a rather interesting view espoused by the Supreme Court of Canada. However, it might easily be distinguishable as being a quasi-criminal matter, i.e. namely, a taxing matter as opposed to a true criminal law matter.

The last case that I want to refer to is the case of *R. vs. Simoneau* (1978) 2 C.R. (3d) s. 17, a decision of the Manitoba Court of Appeal.

The accused received a 3½-year sentence after pleading guilty to 29 break and enter offences committed while he was on probation. At trial both counsel, that is to say Crown and defence had recommended a

MORE RESTITUTION PROGRAMS PLANNED

Many more minor offenders in Ontario should be required to repay fully the victims of their crimes, according to Correctional Minister Gord Walker.

Discussions with judges across the province indicate that the concept of restitution is an idea whose time has come.

"The results of a pilot project in Ottawa and a probation restitution project in Kitchener have encouraged us to implement this form of justice on a much wider and more consistent basis," he said.

Correctional Services launched an Ottawa project in 1975, where 150 male offenders, all sentenced to serve time in a detention centre, have made full or partial restitution of close to $40,000 to victims of their crimes. Another scheme at Kitchener saw 200 offenders directly meet 250 victims of their crimes as part of a special probation restitution program initiated by the Mennonite community.

He pointed out that because preliminary studies in Ontario indicate that approximately 75 per cent of homes and businesses are not adequately insured against losses from thefts and vandalism, families and business firms are heavily penalized by petty crimes.

"Restitution directly compensates the victim for these losses, and offers the opportunity for our system to have the offender deliver justice to the victim," Mr. Walker said.

Taxpayers, who pay up to $18,000 per offender per year in jail costs, or $50 per day, every day of the year, will benefit if more minor offenders were employed under a controlled system of restitution, rather than being jailed.

Mr. Walker also said that offenders are offerd the chance for rehabilitation through socially constructive restitution programs which force criminals to confront the effects of their behaviour on their victims.

"Restitution is one means of re-educating the offender. Of course, it will not work for all offenders, but if we can encourage many young criminals to become responsible and active members of the community, isn't the concept worth a fair try?"

He said that ways to implement restitution programs included pre-sentence reports for judges, so that suitability of offenders for restitution orders could be properly determined.

L'hon. R. Roy McMurtry, Procureur général de l'Ontario, a annoncé la nomination de Monsieur Etienne Saint-Aubin de Sudbury au poste de coordonnateur des services en langue française auprès du ministère du Procureur général.

Monsieur Saint-Aubin, âgé de 30 ans, aura la responsabilité du développement et de l'exécution du programme de services en langue française du ministère, en ce qui concerne les services administratifs des tribunaux, le système des Procureurs de la Couronne et les procédures devant les tribunaux.

La nomination prendra effet le 20 août, et Monsieur Saint-Aubin aura son bureau à Toronto.

Monsieur Saint-Aubin, licencié de l'Université Laurentienne de Sudbury ainsi que de la faculté de droit de l'Université d'Ottawa (section Common Law), est parfaitement bilingue.

Il a été inscrit au barreau en 1976, et depuis, a agi comme Procureur adjoint de la Couronne pour le district judiciaire de Manitoulin et Sudbury où les services en language française du Ministère ont débuté à l'été de 1976 dans la Cour provinciale (Division criminelle).

Après une période de développement à Sudbury, les services en langue française furent étendus à la Cour provinciale (Division criminelle) à Ottawa, L'Orignal, Hawkesbury et Rockland en juin 1977, à Espanola en septembre 1977 et à Cochrane, Kapuskasing, Hearst, Smooth Rock Falls et Hornepayne en octobre 1977.

En plus, les services en langue française sont maintenant disponibles à la Cour provinciale (Divisions familiale) à Sudbury et Ottawa-Carleton, et on prévoit étendre ces services à d'autres régions et tribunaux. Ce développement a été rendu possible grâce aux amendements apportés l'an passé à la Loi sur les jurys et à la Loi sur l'organisation judiciaire.

Ces amendements permettent le choix de jurés bilingues et prévoient la désignation officielle de tribunaux bilingues et de comtés et districts où les services bilingues seront offerts.

Il se produira une nouvelle expansion de ces services, suite à la proclamation, en Ontario, des récents amendements apportés au Code criminel du Canada.

THE EXTRA-JUDICIAL ROLE

By Judge C.E. Perkins

Judge Perkins is a judge of the Ontario Provincial Court. These are excerpts from a panel discussion on the involvement of a judge in other fields of interest.

What is the propriety of a provincial Judge using his legal or judicial expertise in areas of responsibility outside the scope of his appointment to the bench – with particular reference to serving as police commissioners, arbitrators, commissioners on commissions of inquiry and teachers of law?

In order to consider this matter in an ethical context we must first set aside the avarice and larceny of which there is a little in the hearts of each of us – especially evident in our conversations about salaries and pensions. We must consider what we are – what a provincial Judge is in the constitutional sense – and what our duties are in that capacity.

I hope you won't think it presumptuous of me to tell you what you are – you are judges and you should know, but it has been a continuous source of amazement to me that in the province of Ontario, which took over responsibility for the Provincial Courts in 1968, there is just now emerging a glimmer of understanding by the legislative and executive branches of government and by the civil service that we are part of the third branch of government, the Judiciary. Indeed many judges reveal in their conversations that while they may give lip service to the principle, they still think of themselves as civil servants or public servants.

My point is that you *are* part of that third branch of government and each of us must insist upon recognition of our constitutional position and the rights and privileges which that deserves if we are to properly and effectively carry out the duties and responsibilities of our Judicial office.

There is due you as a provincial Judge, among many lesser rights and privileges, the right to independence and the duty to insist on such independence. To be independent of any pressures from any source not relevant to the issues immediately before you for determination.

Complete independence is humanly impossible, but you should be as independent of those external pressures as the other branches of government and the civil service with your help and co-operation can reasonably provide.

This independence is the reason for the loneliness which is the hallmark of a judge's life and makes some of these extra-judicial activities so tempting.

To adequately function as a provincial Judge you must also be independent in the sense of being free of any other time consuming obligations which would interfere with your handling of the case load which you must be prepared to deal with as a prime responsibility.

You should also be free of unreasonable financial worries and particularly you should not be in competition with other members of the Judiciary for financial advantage from extra-judicial jobs.

And the public must see you as an independent arbiter if justice is to appear to be done.

I suppose you are thinking that if we could approach perfection of these ideals of independence and the rights and privileges and the duties and responsibilities that such entails the issue of the propriety of extra-judicial role would not arise – there just wouldn't be any extra-judicial work.

But there is another side to the coin – just because we are appointed to the bench doesn't mean that we have to resign from the human race and we have a moral obligation to make available our talents if our fellow men require them outside the course of our usual employment. In the past we have been expected to serve on police commissions, we have been asked to serve as arbitrators or on commissions of inquiry, and some of our brethern teach at law schools and colleges. These are each very different forms of service and each instance of each form presents unique circumstances.

It is for this reason that a set of principles must be developed against which to test the propriety of each such instance.

I suggest to you that having in mind what you are as judges with the rights, powers and privileges thereof with their corresponding duties, obligations and responsibilities, the following should be those principles.

A Judge should not undertake any extra-judicial responsibility which intrudes on the time necessary to handle his case load.

A Judge should not undertake any extra-judicial duty concerning a matter which might be controversial in the minds of a significant number of the people in the community he serves as provincial Judge or in

Marshall, Brennan and Stewart sitting. The facts simply were that the accused was charged with two counts relating to gambling. He pled not guilty and then embarked upon negotiations with the District Attorney to plead to lesser charges and the District Attorney agreed not to make any recommendation as to sentence. The accused pled guilty but sentencing was adjourned. The sentence aspect of the trial was delayed for some time and when it finally came up, a new prosecutor appeared and recommended the maximum sentence. The trial judge gave the maximum sentence but said that he was basing his judgment on the pre-sentence report and not on anything the prosecutor said. The accused appealed all the way to the Supreme Court of the United States.

Chief Justice Burger had this to say generally about plea bargaining and specifically about the *Santobello* matter:

> "This record represents another example of an unfortunate lapse in orderly prosecutorial procedure, in part, no doubt, because of the enormous increase in the workload of the often under-staffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them. The disposition of criminal charges by agreements between the prosecutor and the accused, sometimes loosely called 'plea bargaining', is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full scale trial, the states and the Federal Government would need to multiply by many times the number of judges and court facilities.
>
> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during the pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pre-trial release; and by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned."

Later in the judgment the Chief Justice continued:

> "This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to ensure the defendent what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Justice Marshall pointed out that all defendents have a constitutional right to a jury trial and that a plea of guilty under such circumstances as appeared in the *Santobello* case cannot be construed as waiving the accused's constitutional right to that trial particularly when a prosecutor breaks the bargain because the prosecution in breaking the bargain undercuts the basis for the waiver of the constitutional rights implicit in the plea.

I am given to understand that the American system is moving toward minimum standards and accordingly, the American Bar Association has recommended standards that govern plea discussions and plea agreements.

The American system is governed by its constitution and by the attitude of the Supreme Court of the United States that plea bargaining is an essential and important element in the disposition of criminal cases. The problem lies in controlling the practice and apparently the American Bar Association are making efforts to standardize the practice and procedure relating to plea discussions or plea negotiations and plea bargains.

c) Canadian

In our Canadian system the Attorney-General of a province is not responsible to the judiciary but to the people by whom he is elected and accordingly it is up to the Attorney-General or the Crown to lay the charges or to withdraw charges, etc. It is up to the courts to try the charge as laid and to sentence appropriately if necessary.

What is the Canadian spectrum with respect to judicial opinion relating to plea negotiations? Perhaps this can be illustrated by looking at several pronouncements by Canadian courts.

Firstly, *Regina vs. Agozzino* (1971) C.C.C. 380, a decision of the Ontario Court of Appeal. Crown counsel agreed that imprisonment would not be asked for if the accused pled guilty to a charge of possession of counterfeit money. Accordingly, the accused did and the Magistrate followed the Crown's recommendation. The Attorney-

in open court. Clearly, by way of example, counsel for the defence may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering maybe from cancer, of which he is and should remain ignorant. Again, counsel on both sides may wish to discuss with the judge whether it would be proper, in a particular case, for the prosecution to accept a plea to a lesser offence.

It is of course imperative that so far as possible justice must be administered in open court. Counsel should, therefore, only ask to see the judge when it is felt to be really necessary and the judge must be careful only to treat such communications as private where, in fairness to the accused, this is necessary.

4. The judge, should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential. Such cases, however, are in the experience of the court happily rare. One on occasion does appear to happen, however, is that a judge will tell counsel that having read the depositions and the antecedents, he can safely say that on a plea of guilty he will for instance, make a probation order, something which may be helpful to counsel in advising the accused. The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of not guilty. Even so, the accused may well get the impression that the judge is intimating that in that event a severer sentence, maybe a custodial sentence, would result, so that again he may feel under pressure. This accordingly must also not be done. The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g. a probation order or fine, or a custodial sentence.

Finally, when any such discussion on sentence is taking place between judge and counsel, counsel or the defence should disclose this to the accused and inform him of what took place."

It is to be noted in this case that defence counsel first urged his client to plead guilty and then during the adjournments, apparently went off to consult with the judge, and when he came back he again in strong terms urged the client to plead guilty. The client apparently thought this advice was being conveyed by the judge through defence counsel. The accused accordingly felt under an obligation to plead guilty.

This case appears to set down rules for plea negotiations in England. The case is not without difficulty, and that is apparent in the four rules proposed by the Lord Chief Justice. For example, I have some difficulty with the term "complete freedom of choice". I have some difficulty with the concept of counsel having access to the judge and discussions with he judge relating to pleas of guilty and prospective sentences. The criminal Court of Appeal in the initial part of the fourth rule suggests the judge should never indicate the sentence he is minded to impose; but later in the rule the Court suggests that in some instances it is satisfactory for the court to indicate the form that the sentence may take; i.e. probation order, fine or custodial sentence.

The problems are obvious once one involves the judge, because basically what an accused is looking for is some indication of the penalty. The usual benefit that an accused is seeking when he enters the negotiations is obtain a lighter penalty than he normally could anticipate. If the judge is to be involved and will not indicate the penalty, then perhaps an accused person is faced with a frustrating experience, and, I suggest, a difficult position.

It appears that the English position is that negotiations can be undertaken between counsel; that the defence must be free to do its duty; that the accused must have complete freedom of choice; that counsel must have access to the court but that the court shall not indicate the sentence except for perhaps the range.

b) **American**

The Americans have the most sophisticated approach to the problem of plea negotiations or plea bargaining. My initial observation, however, is that much of the approach that they have taken stems from certain clauses in the American Constitution.

I believe the case of *Santobello vs. New York* (1971) 10 CR. L. 3016, a a decision of the Supreme Court of the United States, is instructive. The judgment was delivered by Burger, C.J. with Douglas, White, Blackmun,

which he might be considered to demonstrate a bias for or against the Crown or for or against any group of persons.

And a Judge should not earn a significant percentage of his income from extra-judicial responsibilities.

Now let us look at the extra-judicial duties that I have been asked to consider against this set of principles.

The first of those is service as a Police Commissioner. It may be that a Judge would have the time to do this and that his income from this source may or may not be a significant portion of his income, however, in my view, the controversial nature of such a position is so obvious that in my view there is no good reason why a judge with any criminal jurisdiction should be a police commissioner and there are very good reasons why he should not.

The major responsibility of a police commission is the effective operation of the police commission is the effective operation of the police force under its supervision. The Judge is human, he is subject to all of the frailties of mind and body that flesh is heir to and unconciously always and sometimes consciously, a Judge serving as a police commissioner will look at the evidence of a police officer less critically and more favourably than the evidence of lay witnesses. He isn't going to let "his" commission appear to be ineffective because of a slip by one of "his" officers.

Let me tell you about a County Judge of my acquaintance who thinks that his work on the police commission is one of the most important of his tasks. On one occasion two Indian lads got a little too much beer in a beverage room and shortly after they left the hotel they rolled a white boy who reported the robbery to the police corporal who was on the police desk that night – a man who had many years of service as a constable. The culprits were soon picked up and brought to the station where the complainant, the two accused and the corporal were alone in the middle of the night. The corporal asked the white boy if he wanted to get his own back, and when he said he did, the corporal allowed him into each of the cells occupied by one of the accused where the complainant proceeded to assault each of the accused. Naturally this conduct was reported by the accused and charges were laid. The Judge who was on the police commission arranged for the corporal to come to trial before the Commission before he could come to trial before the Courts because the Judge said the corporal handled the matter properly and the Commission didn't want to be influenced by the evidence that would come out on the trial before the Court.

This is perhaps an unusually blatant example of bias, but I assure you it is a true story and it didn't happen too long ago.

And if there be a perfect Judge who could free himself of bias, could he ever convince the public that he was not so much a part of the enforcement branch of Justice that they would consider him a fair and independent arbiter – no way!!

You see, we have emerged from an era – a long era – when property rights were more important than human rights. During the past era the Judge was thought of as part of the enforcement branch of justice. He held his position primarily to punish the criminals who appeared before him – criminals who wouldn't be in front of him if they weren't guilty. This was society's attitude when judges were put on police commissions.

I strongly suggest that if you have any respect for your position as a criminal court judge you will refuse to serve as a police commissioner – the two positions are completely incompatible and, finally, what legal or judicial expertise is required in that position – none.

On the other hand legal and judicial expertise is a valuable talent in the area of labour arbitrations and commissions of inquiry.

Our society has replaced the violence which accompanies the principle of might makes right with the non-violent settlement of disputes through trials and arbitrations under the rule of law, and as the non-violent method is perfected violence lessens. Able arbitrators are a necessity in our society but there is a danger of destroying a judge's credibility if in the area where he serves as a judge he were to arbitrate a labour dispute with strong controversial or emotional overtones and be unable, as is most likely, to make both sides happy by his award.

In the area of labour arbitrations a judge has something to offer because he is comfortable in the adversary system – he understands how to weigh and analyse evidence but he may be open to all of the potential dangers which are referred to in the tests which I outlined. If the parties to a dispute select a judge as an arbitrator should he decide whether this particular arbitration meets the test and is proper to accept? The Judge himself is really too close to the matter to decide objectively. Someone else must make that decision, not only to apply the tests objectively but to protect the Judge from unwarranted criticism.

Because a Judge has so much to offer to the area of arbitrations and commissions of inquiry from his expertise, it is my view that we should find some way in which he could,

when requested, serve with propriety and I suggest there is a way.

First of all I propose that every Judge be paid a fixed amount for extra-judicial duties and that he receive only his expenses for any particular arbitration. This will separate the greedy from those who want to serve their fellow man.

Secondly, I propose that a Judge should not be permitted to accept any particular arbirtration assignment unless he has the permission of his Chief Judge or the administrative Judge to whom he is responsible. This will protect the arbitrator from any unwarranted suggestion that he is not meeting his principle responsibility as Judge.

And thirdly, it should be understood that a Judge will not be eligible to undertake any arbitration in the area to which he is assigned to serve as a Judge. This would minimize the possibility of his credibility as a Judge being injured by his involvement in a local emotional or controversial issue.

The third category of extra-judicial service that I would like to discuss for a moment is that of teaching law at a college or university. This is an area open to very few of us. There is little danger of such activity lessening the Judge's credibility, in fact, the possibilities are that it will greatly enhance his credibility.

Since only a few Judges can ever have this opportunity – since the pay offered is not great and the work involved in working up a course of study – presenting it – keeping it relevant and up to date – and testing students – will take a great deal of his after hours time, I feel that the law teacher should be able to accept the salary offered over and above his extra-judicial salary, however, he should be required to have permission from his Chief Judge or administrative Judge. In my view the status of our entire Bench is raised by having amongst its Judges persons considered qualified to lecture in law to law students.

In conclusion, may I review the tests which I believe should be applied to determine the propriety of any extra-judicial work offered to a criminal court Judge.

A Judge should not undertake any extra-judicial responsibility which intrudes on the time necessary to handle his case load.

A Judge should not undertake any extra-judicial duty concerning a matter which might be controversial in the minds of a significant number of the people in the community he serves as provincial Judge or in which he might be considered to demonstrate a bias for or against the Crown or for or against any group of persons.

And a Judge should not earn a significant percentage of his income from extra-judicial responsibilities.

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(Editorial . . continued from P. 2)

en jeu a l'assemblée, vous me le permetterez, je vous en prie, si je me retourne aux pensées des friandises de table, telles que les Huitres Rockefeller, l'Homard Newburg, les Moules a la Marinière, les Palourdes Mornay, etc. . . . Mes salutations, et je m'attends bien de vous rencontrer à Charlottetown.

(Continued from P. 11)

The provincial court judges of Nova Scotia no longer have the right to vote in the municipal elections in that province, although they may vote for Federal or Provincial members of parliament and the legislature. The change was brought about in amendments to the Municipal Election Elect; one of these provided that judges of the Supreme, County or Provincial Courts "shall not be entitled to be registered on the list of electors or to vote."

Another change involving the provincial court judges was passed at the same session. It has not yet been proclaimed but its effect will be to alter the name to Provincial Court from Provincial Magistrate's Court. Discussions are also underway between the Judges Association and the Hon. Harry How, Q.C., Attorney-General of Nova Scotia, concerning a new act which would provide a sharper dividing line between the judges and the remainder of the public service. President of the Judges Association is His Honour Leo MacIntyre.

(President's Page — cont'd from Page 1)

participation active et qui furent source d'inspiration; ce fut là un geste de grande spontanéité et de générosité.

Je ne peux éviter de souligner d'avantage les efforts valeureux des Juges Rice, Mykle, White et Goulard, ainsi que de témoigner de ma vive appréciation à l'égard de mon juge en chef pour son attitude généreuse en m'accordant tout le loisir de me consacrer aux affaires de l'Association.

Ajoutant ma langue maternelle aux deux langues officielles, je dis à tous, merci, au revoir et "ciao".

PLEA NEGOTIATIONS

by D.W. Perras

Mr. Perras is Director of Public Prosecutions for the Saskatchewan Department of the Attorney-General.

When I talk of plea negotiations, I think of a bargain as the result of the negotiations between counsel that have led up to an agreement by an accused to plead guilty in return for a promise of some benefit. The bargain usually centers around an attempt to achieve a lighter sentence. This can be done in a number of ways. For example, by obtaining the prosecutor's undertaking to recommend a specific sentence; or to say nothing about sentence; or to reduce the current charge to a lesser offence. On occasion there are other objectives to be achieved by an accused in terms of bargaining his guilty plea for some other advantage such as an agreement not to charge friends or family or an agreement by the prosecutor not to apply for a dangerous offender sentence.

I would like to briefly canvass the Anglo-American approach, look at the reasons for and against plea negotiations or plea bargaining and to advance some conclusions.

ANGLO-AMERICAN APPROACH

a) English

As I understand the English approach to the administration of criminal justice, the police are responsible for investigating and indeed prosecuting criminal offences. The police prosecute by obtaining or engaging counsel to prosecute the case for them. As I understand it, the Attorney-General has the right to intervene if he so desires. It is also to be noted that England does not have a federal constitutional structure of government.

Perhaps the English view is best represented by the case of *R. vs. Frank Richard Turner* (1970) 2 All E.R. 281 – a decision of the Criminal Court of Appeal led by Lord Chief Justice Parker sitting with Lord Justice Widgery and Bean, J. The accused, Turner, was on trial before a judge and jury for stealing a car. The Crown's case was partway through when negotiations between counsel commenced. Defence counsel strongly recommended that the accused plead guilty and advised him that if he did so, he would likely get a fine; otherwise, it appeared that, with his past record, he might get a jail term. The accused was reluctant but finally relented and pled guilty. He was fined by the trial judge. Subsequently, upon talking the matter over with his solicitor, the accused appealed, asking for a new trial. The criminal Court of Appeal ordered a new trial.

The Lord Chief Justice had this to say in ordering the new trial:

> "Before leaving this case, which has brought out into the open the vexed question of so-called 'plea bargaining', the court would like to make some observations which may be of help to judges and counsel, and indeed, solicitors. They are these:
>
> 1. Counsel must be completely free to do what is his duty, namely to give the accused the best advice he can and if need be, advice in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case. Counsel, of course, will emphasize that the accused must not plead guilty unless he has committed the acts constituting the offence charged.
>
> 2. The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty.
>
> 3. There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and both counsel for the defence and counsel for the prosecution. If a solicitor representing the accused is in the court, he should be allowed to attend the discussion, if he so desires.
>
> This freedom of access is important because there may be matters calling for communication or discussion, which are of such a nature that counsel cannot in the interests of his client mention them