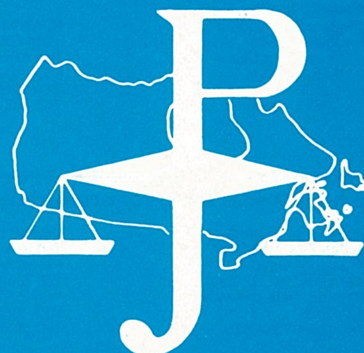

PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

VOLUME 13, NO. 4 DECEMBER 1989

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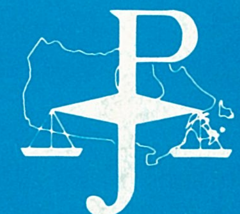

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CHANGES?

New Provincial Representative?

Let the Executive Director and the Journal Editor know without delay!

New Compensation Terms?

Let Judge D.M. McDonald, Calgary know as soon as possible!

* * * * * *

CHANGEMENTS?

nouveau(elle) représentant(e) de la province?

Je vous prie, informez le directeur exécutif aussi bien que le rédacteur en chef du journal sans délai!

nouveaux termes de la compensation/ rémunération?

Informez m. le juge D. M. McDonald de Calgary le plus tôt possible!

President's Page

by/par Judge Ron Jacobson/M. le juge Ron Jacobson

As we enter the 1990's, and move toward the year 2000, we anticipate the next century with enthusiastic optimism and high expectations. Although there have been setbacks this year for some of the provincial associations and for the CAPCJ itself, there have been some significant positive changes which are most welcome.

There must be leadership and a vision for the future. Some provincial governments have been responsive to their justice ministers and their visions for the better administration of justice in Canada. Some notable steps are being taken by these government leaders who are determined to achieve their goals by taking and supporting required action now.

Effective and proper administration of justice, especially judicial independence, is for the benefit and protection of society. Last September, at our annual conference, Ian Scott, Ontario's Attorney General, outlined his objective to unify courts in his province. Other examples of creative policies can be found in the North West Territories, Manitoba, Yukon and British Columbia. The Government of Canada will have the opportunity to make its position known to the United Nations on many aspects of the administration of justice next August.

Chief Judge Bob Halifax is about to implement a new policy that will meaningfully involve natives in the NWT judicial process as Justices of the Peace.

In Manitoba, The Honourable Jim McRae, Minister of Justice has introduced legislation to greatly improve the operations and independence of the provincial court. A compensation committee shall be appointed every two years to review salaries and benefits including pensions, vacations, sick leave, travel expenses and allowances. After submissions of the report to the Minister, action must be taken within specified times. After the Legislative Committee receives the report of a standing committee:

> ...the government shall proceed to implement the report in accordance with the vote of the Legislative Assembly...

The Minister has already followed the spirit and principle of the proposed legislation, for the selection of new provincial court judges for that province.

Continuing judicial education is also being given top priority in Manitoba. Three, two-day

A l'aube d'une nouvelle décennie, l'approche de l'an 2000 suscite en nous un optimisme enthousiaste qui nous remplit d'espoir. En dépit des contretemps qu'ont connu cette année certaines des associations provinciales et l'ACJCP elle-même, nous avons tout de même réalisé d'importants progrès dont nous pouvons nous réjouir.

L'avenir exige que l'on fasse preuve de leadership et de prévoyance. Certains gouvernements provinciaux ont bien accueilli la prescience dont ont fait preuve leurs ministres de la justice et les projets qu'entretiennent ces derniers en vue d'améliorer l'administration de la justice au Canada. Comme en font foi certaines mesures dignes de mention qu'ils sont en train d'adopter, les chefs de gouvernement sont décidés à atteindre leurs buts en prenant et en appuyant dès maintenant les mesures nécessaires pour y arriver.

Le bien de la société et la protection de ses intérêts exigent une administration efficace et correcte de la justice et tout particulièrement l'indépendance des juges qui en sont chargés. Lors de notre colloque annuel au mois de septembre dernier, le Procureur Général de l'Ontario, Ian Scott, donnait un aperçu de son objectif qui est d'unifier les tribunaux de sa province. Les Territoires du Nord-Ouest, le Manitoba, le Yukon et la Colombie-Britannique nous offrent d'autres exemples de politiques innovatrices. Au mois d'août, le gouvernment du Canada aura l'occasion d'exprimer devant les Nations-Unies son avis au sujet de plusieurs questions ayant trait à l'administration de la justice.

Le Juge en Chef Bob Halifax est sur le point d'instaurer une nouvelle politique qui aura pour effet d'impliquer de façon significative les autochtones dans le système judiciaire des Territoires du Nord-Ouest en leur confiant des postes de juge de Paix.

Au Manitoba, l'Honorable ministre de la Justice Jim McRae a présenté un projet de loi visant à apporter de grandes améliorations au fonctionnement et à l'indépendance de la cour provinciale. On nommera à tous les deux ans un comité de la rémunération qui aura pour tâche de passer en revue les salaires et prestations et notamment les pensions, les vacances, les congés de maladie et les frais et allocations de voyages. Lorsque le rapport aura éte présenté au ministre, on devra agir dans un délai précis. Lorsque le Comité Législatif aura reçu le rapport que lui fera un comité permanent:

seminars are scheduled for each year. Plans are underway to allow the Education Chairperson two days each week for preparation instead of the present one day.

In the Yukon, a sabbatical five year program at three-quarters salary has been implemented for the territorial judges. One outstanding feature is that the decisions of the Chief Judge in implementing the plan are free from executive and legislative interference.

Under the "Access to Justice" program in British Columbia, the Honourable Bud Smith, Attorney General for British Columbia, intends to provide personal computers (P.C.'s) to each provincial court judge, together with the necessary software, support and training programs. In referring to new technology developments, the Attorney General said that the "breakthrough offers the justice system...an exciting new challenge and a tremendous new opportunity" to make the justice system "more accessible, more understandable, more reliable, more relevant and more efficient." This information technology not only improves job performance, but also the ways in which the public may be served. He concluded:

> "The opportunity is here to be at the leading edge of justice systems technology. We can use technology to give the people of B.C. an even better justice system, a system they can understand, and use with confidence and trust."

The Western Judicial Education centre, which one Alberta Bencher has described, "as the leading edge of continuing judicial education in Canada" is attempting a bold and imaginative two year project called the "Gender Neutrality Initiative." The focus is on sexual discrimination and ways to remove it from the administration of justice. The WJEC has also planned two more Sentencing Workshops. The next one will be at Lake Louise in May 1990 and the 1991 Workshop may be held at Yellowknife.

In October, I met in Calgary with representatives from the Canadian Judicial Centre, The Candian Judicial Council, The Canadian Institute for Advanced Legal Studies and the Canadian Institute for the Administration of Justice. There was a real sense of co-operation and determination to co-ordinate traditional activities and responsibilities, and to plan for the future in order to achieve maximum benefits from our limited resources. One immediate outcome is the Master Calendar which will be distributed to all Judges this month.

The CAPCJ has been invited by the Honourable Douglas Lewis, Q.C. to join in the "consultative process' with the federal Department of Justice to finalize Canada's position with respect

> ...le gouvernement verra à mettre en oeuvre les dispositions de ce rapport conformément au vote exprimé par l'Assemblée Législative (sic)...

Le ministre s'est déjà conformé à l'esprit et au principe de ce projet de loi dans le choix qu'il a fait des nouveaux juges de la cour provinciale de cette province.

Au Manitoba, on donne également priorité absolue à la formation permanente des juges. Trois colloques, d'une durée de deux jours chacun, sont prévus chaque année. On est en train de projetter la façon de donner à la personne qui assume la présidence du comité de l'éducation* deux journées par semaine pour se préparer alors qu'elle ne jouit présentement que d'une seule journée pour ce faire.

Les juges qui siègent au Yukon bénéficient maintenant d'un programme en vertu duquel ils jouissent de cinq années sabbatiques aux trois-quarts de leur salaire. Ce programme est exceptionnel en ce que les décisions rendues par le Juge en Chef pour y donner effet sont à l'abri de l'intervention du législateur et du pouvoir exécutif.

En Colombie-Britannique, le procureur général, l'Honorable Bud Smith, a l'intention de se prévaloir du programme "Access to Justice" pour équiper chaque juge de la cour provinciale d'un ordinateur personnel ("P.C."), accompagné des logiciels et des programmes et support et de formation nécessaires. En ce qui a trait aux innovations technologiques, le procureur général affirmait que "ces découvertes sensationnelles offrent au système judiciaire la stimulation de nouveaux défis à relever et de formidables perspectives d'avenir" pour le rendre "plus accessible, plus intelligible, plus fiable, plus utile et plus efficace". En plus de faciliter l'exécution du travail, cette technologie informatique nous permettra également de mieux servir le public.

Pour conclure, il affirmait:

> "Nous avons maintenant l'occasion d'être à l'avant-garde de la technologie judiciaire. Nous pouvons faire appel à cette technologie pour donner aux citoyens de la Colombie-Britannique un système de justice encore meilleur, un système qu'ils peuvent comprendre et auquel ils peuvent faire confiance lorsqu'ils y font appel."

Le *Western Judicial Education Centre,* dont un membre de l'Assemblée Législative de l'Alberta a dit qu'il était "à l'avant-garde de l'éducation permanente des juges au Canada",

In Lighter Vein

While sitting in youth court recently Judge R.N. Conroy of Saskatoon encountered "the careless, the thoughtless and the stupid", all in one week. He has supplied us with the following examples:

The careless were the two thieves who stole a stereo from a car in the dark of night. They were arrested the next morning when the police called to return the wallet and identification one of the thieves carelessly left behind on the victim's car seat.

* * * * *

The thoughtless was the hapless thief who crept onto the police compound and hot-wired a car. He was caught on the scene. When asked by Judge Conroy how he ever expected to drive the vehicle off the fenced, barricaded and chained compound, the youth replied: "Oh yeh, I never thought of that."

* * * * *

There is no other word but stupid for the two youths who broke into a Saskatoon establishment and rifled a filing cabinet where they found a Polaroid camera. Not wanting to steal a broken camera, they tested it at the scene by taking snapshots of themselves. The pictures, taken in front of the broken filing cabinet, were discarded in the waste basket, where the police found them the next morning.

* * * * *

A Few Smiles and Chuckles

Some murderers prone to violence — *Charlottesville (Va.) Progress*

* * * * *

Absenteeism is no problem at Perth prison — *Dundee Courier and Advertiser, Scotland*

* * * * *

Nude dancing appealed to Supreme Court — *New Haven (Conn.) Register*

* * * * *

Gerald John — already remanded in custody on a charge of sexual assault against a 35-year-old nurse — was sentenced to seven days in Provincial Court Tuesday on a charge of causing a disturbance. — The Evening Telegram.

A talk will be given on the planet Mars by Mr. A.R. Hutchings and, as always, visitors will be welcome. — Exeter Express and Echo, England.

Ce n'est qu'une blague!

Question: Une fée, un avocat hors de prix et un avocat bon marché sont ensemble dans une pièce. Sur la table se trouve un billet de 100 $. Soudain, la lumière s'éteint. Quand elle revient, le billet a disparu. Qui l'a pris?

Réponse: C'est l'avocat hors de prix....parce que les deux autres personnages sont des produits de votre imagination.

* * * * *

LA DÉVEINE

Poeticus*

WHO ARE THE VICTIMS?

Society calls them
Degenerates
Opens up institutions
Feeling they've
Paid taxes
Done their part.

Some get lucky
Find a good home
While others still
Are abused
Sexually used.

Self respect is low
Where has this been
Learnt?

Who are the victims?
Owners of homes
Broken into?
Businesses robbed?

Some are lost
Within the system
Others yet
Still salvageable . . .

To be shunned
From society
Is that the answer?

Building more hate
Waiting to rebel . . .

Maybe there's
Another way

Save a kid from the streets today
Set an example
Open your eyes
And see . . .

Who are the repeat offenders

Robert V

BROKEN BOTTLES AND BUTTS

Long hair
Torn jeans
Worn out shoes
No money in your pockets
Nothin' to do
I got kicked out of school
Principals and teachers all say the same
"It's your bad attitude!"

But do they know the scene?

I go home
It's the same
Beer bottles all over the house
The half-empty 40 on the table
No food in the fridge
Mom and dad are at it again
Or is it the same fight that started
Five years ago?
Who knows who cares?
That's really it
Who cares?

But it's my bad attitude!

I try to escape to my room
They don't even notice I'm home
No "Hello son. How was your day?"
Just the constant yelling
Only stopping when they've gone
Out for more booze
Or passed out on the floor

No one to talk to
Whose fault is it?
Why is it like this?
Because of me?
Maybe if I wasn't around
Fuck! I wish I was never born!

Who knows! who cares?
That's really it
Who cares?

Kicked out of school
Torn jeans and ripped shoes
Mom and dad are at it again
Bottles all over the house
Half a forty on the table
Whose fault is it?
Maybe if I wasn't around
Fuck! I wish I was never born!
Who knows who cares?

You take the shotgun from its shelf
It's loaded. You pump it
Wrap your mouth around the barrel
Pull the trigger with your toes
Last thought flashes through your brain.

Who knows who cares?
That's really it
Who cares?

But it's my bad attitude!

Robert V

*The foregoing poems were provided by Judge D. M. Arnot of the North Battleford, Saskatchewan Provincial Court. He received them at a Learning Disabilities Council meeting. The poetry was composed by a young offender who had been in custody for robbery. Except for his first name the author remains anonymous but the poems are published with the consent of Judge Arnot. The original of the first selection came to us untitled and we have taken literary licence to call it "Who are the Victims?"
A special thanks to the author for this "food for thought".

to the 8th United Nations Congress on The Prevention of Crime and Treatment of Offenders to be held in Cuba, August 27 to September 7, 1990. We have requested that Canada's Consultation Document be sent to each CAPCJ provincial representative. A more complete package has already been mailed to the officers of the CAPCJ and some committee chairpersons.

The CAPCJ should be able to provide assistance to the federal government in connection with the following topics:

- continuing judicial education
- sentencing and alternate dispositions
- prevention of delinquency
- juvenile justice
- domestic violence
- the role of lawyers and of prosecutors
- international criminal courts and international criminal law
- independence of the judiciary

Judge Ernie Bobowski is well under way in preparing a paper on judicial independence; Senior Judge Charles Scullion and the CBA liaison committee may make a joint submission on the role of prosecutors and lawyers; Judge Tom Davis' Committee on the Law has a wide variety of challenges; and Judge Kent Kirkland's Committee on Youth Courts and Family Law has much to contribute. In addition to his other responsibilities, Judge Doug Campbell, and the Canadian Judicial College Director, will consider all of the educational requirements. The benefits from the Gender Neutrality Initiative and the WJEC Sentencing Workshop Series should be particularly helpful to Canada's position.

If you are interested in any of these studies, please contact the chairperson or your provincial territorial representative. Act quickly because these are very limiting time factors.

This past Fall, I've been able to attend Provincial Association Meetings in Quebec, Manitoba and British Columbia. At each conference there have been well prepared and informative education programs as well as fruitful business sessions. I also wish to thank the hosts and members at these meetings for their warm and friendly hospitality and for having me fully participate in their activities.

To all Judges and their families across Canada, Mariette and I wish you Seasons Greetings and all the very best in the New Year!

innove en instaurant un audacieux projet d'une durée de deux ans nommé le *"Gender Neutrality Initiative"*. Ce projet s'attarde avant tout au sexisme et aux moyens de l'éliminer dans l'administration de la justice. Le WJEC projette également la tenue de deux autres Ateliers sur le Sentencing. Le prochain aura lieu au Lac Louise au mois de mai 1990 et l'Atelier de 1991 aura lieu à Yellowknife.

Au mois d'octobre, j'ai recontré à Calgary des représentants du Centre Canadien de la Magistrature, de l'Institut Canadien d'Administration de la Justice, du Conseil Canadien de la Magistrature et de l'Institut Canadien d'Études Juridiques Supérieures. Il y régnait un véritable esprit de coopération et de détermination pour coordonner les activités et les responsabilités traditionnelles et pour prendre des dispositions pour l'avenir afin de tirer le meilleur parti possible de nos ressources limitées. Le Calendrier Perpétuel qui sera remis à tous les juges ce mois-ci en est une conséquence directe.

L'Honorable Douglas Lewis, C.R., a invité l'ACJCP à participer à la ronde de consultations avec le ministère de la Justice du Canada afin de mettre au point les derniers détails de la position que défendra le Canada lors de la Huitième Session des Nations-Unies portant sur la prévention du crime et la façon dont sont traités les contrevenants qui aura lieu à Cuba, du 27 août au 7 septembre 1990. Nous avons demandé que le mémoire de consultation que présentera le Canada soit envoyé à chaque représentant provincial de l'ACJCP. Un dossier plus complet a déjà été posté aux dirigeants de l'ACJCP et à certaines des personnes qui en président les comités.

L'ACJCP devrait être en mesure de prêter secours au gouvernement fédéral à propos des questions suivantes:

- la formation permanente des juges
- le Sentencing et les dispositifs subsidiaires
- la prévention de la délinquance
- la justice pour les jeunes délinquants
- la violence conjugale
- le rôle joué par les avocats de la défense et par ceux de la poursuite
- les tribunaux criminels internationaux et le droit pénal international
- l'indépendance des juges

Le juge Ernie Bobowski est bien avancé dans la préparation d'un exposé sur l'indépendance des juges. Il est possible que le juge doyen Charles Scullion et le comité de liaison de l'Association du Barreau Canadien fassent un exposé conjoint portant sur le rôle joué par les avocats de la poursuite et par les avocats de la defense. Le comité de la législation dont le juge Tom Davis fait partie a un grand nombre de défis à relever. Enfin, le comité du juge Kent Kirk-

land sur les tribunaux de la jeunesse et le droit de la famille a beaucoup à nous apporter.

En plus de ses autres responsabilités, le juge Doug Campbell et le directeur du Collège Canadien de la Magistrature* étudieront toutes les exigences pédagogiques. Les avantages qu'on pourrait tirer du 'Gender Neutrality Initiative' et de la série d'ateliers sur le Sentencing du WJEC devraient s'avérer une aide précieuse à la position défendue par le Canada. Si vous êtes intéressés à n'importe laquelle des études precitées, veuillez communiquer soit avec la personne qui préside ou celle qui représente votre région provinciale. Faites vite car le temps presse!

Au cours de l'automne dernier, j'ai eu l'occasion d'assister aux assemblées des Associations Provinciales du Québec, du Manitoba et de la Colombie-Britannique. Ceux qui ont assisté à chacune de ces conférences ont bénéficié de programmes prédagogiques bien structurés et très instructifs et ont pu participer à des séances d'affaires qui leur seront très utiles. Je tiens également à remercier de leur chaleureuse hospitalité et de leur bienveillance nos hôtes et les membres qui ont assisté à ces assemblées. Je les remercie de m'avoir permis de prendre part à leurs activités.

À tous les juges et à leurs familles d'un bout à l'autre du Canada, Mariette et moi vous offrons nos meilleurs voeux en cette période des Fêtes et vous souhaitons une Bonne et Heureuse Année!

*N.d.T.: de l'anglais "Canadian Judicial College"

Reminder

To all members of the Executive and Provincial Representatives

Executive Meeting
Montreal

April 6, 7, 8, 1990

Hotel to be arranged

* * * * *

Rappel

À tous les membres de l'executif et les représentants des provinces

Réunion exécutive
Montreal

6, 7, 8, avril 1990

l'hôtel sera aménagé

that this offence may be committed if a false sexual complaint is made. Some attention is devoted to the legal meaning of "consent" and the fact that in law some people are incapable of giving consent because of their age. The importance of the age of the parties involved in the sexual activity, in determining whether the conduct is legal or not, is also emphasized.

The penalties provided in the Criminal Code, for various sexual offences are set out, with some reference to the Young Offenders Act as well. Lastly, the book lists certain precautions that should be taken to prevent illegal sex from happening and offers some general advice, both to a victim and an offender if the illegal activity has already occurred.

The authors are careful to indicate that this book is not designed to give legal advice about a specific situation and that for this type of advice a lawyer should be consulted.

A glossary at the end of the book defines those terms used in the book, that a person outside the legal system might not be familiar with.

While the book is not designed for use by the legal community in dealing with sexual offence cases, it might be helpful to those who are asked to speak to young people about the laws that apply in this area.

In the preface, the authors indicate that the book is designed to encourage young readers to understand the legal aspect of sex and then to make their own decisions. In my view they have achieved their aim by setting out the relevant law in clear, concise, and simple terms which can easily be understood by someone with no knowledge of the law.

AVIS

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Book Reviews

YOUNG OFFENDERS LAW IN CANADA
by Priscilla Platt, LL.B.
Butterworths, Toronto
1989

Book Review by Judge Timothy T. Daley
Judge of the Family Court for the
Province of Nova Scotia

When the Young Offenders Act (YOA) became law in Canada on April 2nd, 1989, it ushered in as well, a significant amount of debate as to its value, thrust and shortcomings. Much that has been written can be called mediocre at best. Some lends some understanding of the Act, straight to the point with the potential to make a significant contribution toward interpreting and applying the YOA. The text "Young Offenders Law in Canada" meets the latter criteria.

The text, written in the classical legal style, covers with thoroughness and imagination, the philosophy, procedures and practical problems related to the administration of youth justice in Canada. The document tries to make sense of the statutory provisions, to outline the practice and define what the legal issues are as they arise. For those who subscribe to Butterworth's Young Offenders Service, a striking similarity will be noted between the Service and this text: the author is also one of the editors of the Service.

"Young Offenders Law in Canada" is not a quick read. It is, however, a useful reference text and would be a valuable addition to the judicial library. The issues are well referenced: proper sections are referred to and the caselaw, as it has emerged, is amply footnoted and indexed in the Table of Cases. The author does not waste the reader's time with googley gook but rather deals straight out with each issue as it arises.

In a text of this quality, it is difficult to single out parts which may be of particular interest to the reader because each part is well researched and relevant. The author has addressed the different thrusts of the **Juvenile Delinquents Act** (the medical model) and the **Young Offenders Act** (the justice model) and the Criminal Code, and critically comments on some of the unique features of the YOA in this vein. For example, in her concluding remarks to the chapter dealing with Alternative Measures, Ms. Platt observes:

> Moreover, the process (diversion programmes) lacks the fundamentals of justice, as the term is understood. Decisions concerning the young persons are made in private by individuals who are not impartial, and in circumstances where there is no appeal mechanism to review the decision. Given that the YOA already ameliorates the position of young persons who have committed offences, the necessity of a diversionary system is questionable.

Perhaps the best chapters in the text are those on sentencing and Review of Disposition. She notes the thrust toward individualized sentencing and addresses the challenge of fashioning a disposition appropriate to the offence and the offender by referring to the unsettled and inconsistent caselaw.

A drawback to the text is that it is dated in the sense that the reader is limited to pre-publication caselaw. Presumably the author will provide periodic updates as unanswered issues or changes in the caselaw occur.

"SO, THERE ARE LAWS ABOUT SEX!"
by Wendy Harvey and Thom McGuire,
Butterworths
42 pages

Book Review by Judge Linda M. Giesbrecht
Provincial Court of Manitoba

The subtitle of this small book, "Answers on Legal Sex for Canadian Children and Youth", generally describes what the book is about, and specifies the readers to whom it is directed. The purpose of the book is to introduce young people to the legal aspects of sexual activity, in laymen's terms. This book is not intended to be a detailed review of the criminal law as it relates to sexual conduct, nor is it designed for use by the legal community.

The authors use simple language, clear examples and numerous cartoon-like sketches to illustrate sexual conduct which is legal and illegal. The authors do not attempt to offer advice to young people on moral issues, but merely inform them of the laws that may apply to their sexual behaviour.

The book is well organized into eight brief chapters, commencing with a discussion of how laws are made in our legal system, and why certain sexual activities are illegal. The various sexual offences in the Criminal Code are set out and briefly described. Mention is also made of the offence of public mischief and it is pointed out

Editorial Page

The British model on which our Canadian justice system is based is full of concise maxims which attempt to encapsulate and concentrate the rules of fairness to which we strive to adhere. For example there is the notorious dictum of Lord Hewart who said that justice must not only be done but that it should 'manifestly and undoubtedly be seen to be done'.

Legal tomes are replete with such writings. But there are those among us who would argue that such maxims amount to no more than a set of argot created by legal technocrats, for legal technocrats and that justice remains too remote and inaccessible to the public generally.

We can sympathize with that viewpoint in some respects. For example, since 1982 the Charter of Rights has stood as a bulwark in Canada against the violability of individual rights and arbitrary treatment at the hands of government institutions. However, availing of the benefits of the Charter has tended to make matters more technical, more legalistic and thus more difficult for the populace generally. The result of that is an ever increasing need for universal access to legal services and assistance.

Sir Winston Churchill, the eminent British peer and statesman, is credited with having said that the measure of the state's humanity is seen in the way it treats those who offend against its laws.

We would enlarge on that and say the measure of the state's humanity can particularly be seen in the way it treats its alleged offenders who have a defence but have neither the technical ability to advance it themselves nor the resources to hire a lawyer to act as their attorney and advocate.

It would be our contention that this represents a significant fault in our justice system. We recognize that legal aid services are available across the country and that the provincial and territorial courts remain accessible as the "people's court". However, cognizance must also be taken of the fact that legal aid, as it presently operates, is widely available only to those who face charges of what society sees as substantially serious crimes. It matters little how seriously the accused regards the charge against him.

The provision of legal aid service also operates on different parameters in different provinces and territories and this makes for a very imperfect and uneven level of justice service across the country. We would suggest that this variance in the system amounts to a disservice not only to those persons who find themselves on the defending side of an action or a charge but also to those who are on the other side as well as the witnesses who sit in the middle.

In effect everyone becomes victimized when uneven or unusual litigation occurs even though the unfairness and inequality arises because of a paucity of resources on the part of either party.

Even though provincial courts are those closest to the people and may be perceived to be less formal than the supreme or district court they cannot be expected to make up for the lack of other services in the justice system. A defendant on a breathalyzer charge who stands to lose his driver's license and perhaps his subsistence level employment, not to mention incurring a heavy fine, or a single parent pursuing a maintenance or custody matter in a provincial court is just as entitled to competent legal services before that court as he would be in the supreme court. Yet, in reality that is not what takes place thus giving rise to the cry of one level of justice for the rich and one for the poor.

We are of the view that access to justice should be no more uneven in this country than is access to medical care. If we may take literary licence with Lord Hewart's dictum; before justice can be seen to be done, it must in fact be done.

Sir Edward Coke, the great English jurist who lived from 1552-1634, had it right when he stated in 2 Coke, *Institutes,* 55 "Justice ought to be free, because nothing is more iniquitous than venal justice; full because justice ought not to halt; and speedy because delay is a kind of denial."

M. Reginal Reid
Editor-in-Chief

News Briefs

NEWFOUNDLAND

Appointments

His Honour Judge Richard LeBlanc, effective September 1, 1989. Judge LeBlanc is sitting at Wabush, Labrador.

New Executive

The annual Meeting of the Newfoundland Provincial Judges' Association was held at Corner Brook from October 10-13, 1989.

The following comprise the Executive emanating from that meeting:

President	- Judge Bruce LeGrow Stephenville
Vice-President	- Judge Owen Kennedy St. John's
Secretary/ Treasurer	- Judge David Peddle Gander
Past-President	- Judge Gerald Barnable Placentia

NOVA SCOTIA

The Annual Meeting of the Nova Scotia Provincial Judges' Association was held in Digby, Nova Scotia from September 20-23, 1989.

The following are the Executive of the Association for 1989-90.

President	- Judge Robert Ferguson Family Court Sydney
First Vice-President	- Judge Lewis Matheson Provincial Court Amherst
Second Vice-President	Judge Ross Archibald Provincial Court Amherst
Secretary	- Judge John MacDougall Provincial Court Truro
Treasurer	- Judge Fran Potts Provincial Court Dartmouth
Past President	- Judge Patrick Curran Provincial Court Halifax

ALBERTA

Retirements

His Honour Judge A.W. Ludwig, Calgary, Criminal Division, effective November 14, 1989.

Judge Ludwig served on the Bench from September 30, 1980.

His Honour Judge I.A. Blackstone, Calgary, Small Claims Division, effective October 16, 1989.

Judge Blackstone served on the Bench from October 14, 1980.

Appointments

His Honour Judge James Arthur Wood has been named Assistant Chief Judge in Lethbridge, Alberta. His new appointment is effective from November 3, 1989.

His Honour Judge Stanley Moore was appointed to serve in the Small Claims Division, Calgary, effective November 15, 1989.

His Honour Judge Peter M. Caffaro has been appointed to the Criminal Division at Edmonton effective November 20, 1989.

New Executive

In September 1989 The Alberta Provincial Judges' Association held its Annual Meeting at Edmonton in conjunction with the CAPCJ Annual Convention.

The following were the executive elected at that meeting:

President	- Judge F. W. Coward Lethbridge
Vice-President	- Judge Delores M.N. Hansen Edmonton
Secretary/ Treasurer	- Judge D.C. Abbott Edmonton
Past-President	- Judge William C. Kerr Calgary

BRITISH COLUMBIA

New Executive

The annual meeting of the Provincial Judges Association of British Columbua was held on Saturday, November 28, 1989. The executive for the forthcoming year is:

President:	- Judge Stewart Enderton Nelson
Vice President:	- Judge Jane Auxier Vancouver
Treasurer:	- Judge E. Dennis Schmidt Campbell River
Secretary:	- Judge William G. MacDonald Surrey
Past President & Provincial Representative:	- Judge J. Paradis Vancouver

10 of this year.

For cases where real evidence was excluded see *R. v. Pohpretsky* (1987), 58 C.R. (3d) 113 (S.C.C.). The accused was convicted of impaired driving. A blood sample was taken from him while he was in a delirious state. The Crown conceded that the taking of the blood was an unreasonable search contrary to section 8 of the Charter. The Supreme Court applied *Collins* to exclude the evidence and acquit on the basis that the effect of the police conduct was to conscript the appellant against himself. Also see *R. v. Dyment* (1989), 45 C.C.C. (3d) 204 where a blood sample taken by a doctor, not at the direction of the police but handed over to the police, was excluded because of a serious breach of a person's privacy.

Despite the numerous decisions handed down by the Supreme Court, ambiguity regarding the application of section 24 still exists. Uncertainty abounds regarding the application of subsection 24(2) where evidence is only indirectly obtained through a Charter violation. Similarly, the precise nature of the required relationship of the Charter violation to the evidence sought to be excluded remains undefined.

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- were there other investigatory techniques available?
- would the evidence have been obtained in any event?
- is the offence serious?
- is the evidence essential to substantiate the charge?
- are other remedies available? (pp.283-284)

Lamer J. also noted that while the English version of the test of subsection 24(2) uses the words "would bring the administration of justice into disrepute," the French version reads "could bring the administration of justice into disrepute" thereby significantly lowering the threshold for section 24 application. (p.287)

Most significant about this seminal Supreme Court decision is the following distinction. According to Collins[8] factors which might affect the repute of the administration of justice are to be differently considered depending on whether the admission of the evidence would affect the fairness of the trial. In this regard, Lamer J. said:

> It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. **Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone.** The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel. **(Emphasis added)** (p.284).

This distinction has received much criticism from the academic community. Professor Ron Delisle offers these thoughts:

> The distinction would appear to turn on the basis that the real evidence existed irrespective of the Charter violation while the confession did not. The distinction is based on a false premise. What is important for the purposes of a trial is the discovery of incriminating evidence. The real evidence existed prior to the violation but was discovered and produced for our examination, by an unconstitutional denial of the accused's right to be secure against unreasonable search or seizure. The accused's awareness of her own involvement in the misdeed existed prior to the violation, but was discovered and produced for our examination, by a statement gained through an unconstitutional denial of her right to counsel. Unless someone can persuade that one right is inherently more important than the other, the admission or exclusion of the evidence should be approached in the same way. As a result of *Collins,* however, exclusion will depend on the nature of the evidence obtained and the nature of the right violated. Violation of the right to counsel, producing an incriminatory statement might readily yield exclusion, whereas a violation of the accused's right to be secure against unreasonable search or seizure would only yield exclusion if there was a flagrant violation[9].

Despite criticism received, the Supreme Court has continued to apply this distinction. It would seem that those who invoke section 24 of the Charter must establish a causal link between the Charter violation and the evidence. If not, the evidence is admissible. For example, in the Supreme Court's decision in *R. v. Simmons* (1989), 45 C.C.C. (3d) 296, the Court found that a strip search conducted by Customs inspectors under the authority of sections 143 and 144 of the *Customs Act* was done in circumstances amounting to detention. The accused was not advised of her right to counsel, and was not advised of her right to challenge the demand that she submit to the body search. The search revealed that the accused had adhesive bandages wrapped around her waist. Concealed in the bandages were plastic bags containing cannabis resin. While the Supreme Court found that there was a violation of her paragraph 10(b) rights, they held that the evidence should, nevertheless, be admitted because it was "real evidence" that existed independently of the Charter violation. Similar reasoning in considering the exclusion of unconstitutionally obtained evidence has been applied in *R. v. Ross,* (1989), 1 S.C.R. 3 and *R. v. Black,* (unreported) handed down August

[8] The determination being referred to is whether the admission of the evidence in some way affects the fairness of the trial.

[9] Ron Delisle. "Corbett v. The Queen: Judicial Discretion and the Rules of Evidence." (Paper presented at the 1989 Canadian Judicial Council's Superior Court Judges Seminar, Calgary, Alberta, August 13-17, 1989) (p.23)

The Law Reform Commission's Position on a Unified Criminal Court

by Stanley A. Cohen, B.A., LL.B., LL.M.*

Let me begin by familiarizing you with the *context* (historical and political) in which our proposals have been formulated. This may be a trifle mundane but it will help to better situate our efforts and give you a better idea of the prospects for reform.

History

The Law Reform Commission of Canada was created in 1971 as a permanent institution to monitor the criminal law and make recommendations for its reform. The *Law Reform Commission Act* leaves no doubt that Parliament contemplated an *independent body* that would *study the criminal law continuously* and *advise Parliament* on such measures as might be necessary to ensure that the law remained *efficient, modern* and *coherent in principle.* Section 11 defines the mandate of the Commission:

> keep under review on a continuing and systematic basis the statutes and *other laws* comprising the laws of Canada with a view to making recommendations for their *improvement, modernization* and *reform, removal of anachronisms* and *anomalies,* reflection in and by the law of the distinctive concepts and institutions of the common law and civil law legal systems in Canada, and the reconciliation of differences and discrepancies in the expression and application of the law arising out of differences in those concepts and institutions, the *elimination of obsolete laws,* and, the development of new *approaches* to and *new concepts* of the law in keeping with and *responsive to the changing needs of modern Canadian society* and of individual members of that society.

The most important characteristics of this mandate are its permanence and the independence of the Commission from the Government, signifying a recognition of the need for constant revision of the law and for advice from a body that is uninvolved in the daily operations of government. The independence of the Commission is underscored by its reporting structure, which has it reporting to Parliament (through a responsible Minister) rather than to a government department.

There are many ways to measure the success of a law commission — its effect on the public consciousness of legal issues; the use made of its work by the judiciary etc. Measured by these criteria the Commission has experienced substantial success. However, by one criterion, taken alone in isolation from the others I have mentioned, the first decade of the Law Reform Commission's activity was not successful. Parliament translated none of its recommendations for reform of the criminal law into legislation. (I hasten to add that since 1981 the Commissions' record in this regard has improved considerably.) The reasons for this are complex and need not be examined here.

From the outset the Commission interpreted its mandate expansively and ambitiously. Its first research programme, published in 1972 the Commission identified five major areas of proposed future activity, including that of criminal procedure. It is our Criminal Procedure Project that produced the Working Paper on Court Unification that is the subject of my remarks to you to day.

The Commission also espoused codification of Canadian criminal law, both substantive and procedural, as the objective of its research plan. After extensive consultation and the publication of many study papers and working papers, the Commission began in 1976 to submit reports to Parliament in some of the subject areas identified in the first research programme.

The "Modern era" in criminal law reform as far as the Commission is concerned may be said to have commenced with a blunt speech by the then Chairman of the Law Reform Commission of Canada, Mr. Justice Antonio Lamer given on 4 July 1977 to the Canadian Congress of Criminology and Corrections in Calgary. In it, he advocated a moratorium on all legislative reform in the criminal law, except for measures on procedure and evidence, until the Government had developed a comprehensive policy to guide future reform in the law. The effect of this speech was to force the Government to commence a fundamental re-evaluation of the objectives and the machinery for criminal-law reform in Canada.

After many months of internal discussion the first positive act towards the development of a comprehensive policy was taken when the then Minister of Justice, Senator Jacques Flynn, announced the creation of the Criminal Law Review on 26 October 1979.

* From an address given at the CAPCJ Annual Convention, Edmonton, September, 1989.
Mr. Cohen serves the Law Reform Commission of Canada as Coordinator, Criminal Procedure Project and Special Counsel on the Charter of Rights.

The Code Review Process

Two years were to pass until more concrete expression was given to Senator Flynn's declaration. However, a few general principles were established: *The Minister of Justice would carry ultimate responsibility for the management of the Review and for the introduction of legislation,* but the *Review would build upon the work of the Law Reform Commission* and proceed with *regular consultation* among federal and provincial representatives according to a *fixed plan of work*. It was agreed that a general statement of policy should be prepared to guide both the process of the Review and its substantive aims. The Report of the Law Reform Commission entitled *Our Criminal Law* was accepted as a suitable point of departure for this purpose, and the result was the publication in 1982 of a government policy statement entitled *The Criminal Law in Canadian Society.* This little known document was the first statement of policy published by the Government of Canada on the general principles of criminal justice and the first clear commitment by the Government to a process of legislative reform in the criminal law. The document is quite astonishing in its candor with respect to the defective state of the criminal law in 1982.

The Government acknowledged in *The Criminal Law in Canadian Society* that the criminal law lacked coherence as a system of jurisprudence. It also acknowledged that since 1892 Parliament had created a mass of penal offences in the Code and other statutes without concern for consistency in concepts of criminality. It conceded that the bulk and complexity of the criminal law have made it generally inaccessible or incomprehensible to the public. In sum, the Government stated that the criminal law was a prolix, anachronistic and obsolete profusion of prohibitions that failed not only as a coherent and efficient system of jurisprudence but as an adequate reflection of basic social values.

Broadly speaking, the review contemplated three phases for completion, beginning with Phase (1) research and the formulation of preliminary recommendations, proceeding to Phase (2) substantive decisions on policy, and concluding with Phase (3) implementation.

In May of 1988 the Commission's Draft Code of Substantive Criminal Law (or, at least the bulk of it) was tabled before Parliament in the form of Report 31 — entitled *Recodifying Criminal Law.* This act essentially discharged the Commission's formal obligations with regard to Phase I in the field of substantive criminal law.

Thus far, the operational response to this aspect of the Review has not been very encouraging. The public pronouncements of the two Justice Ministers who have had responsibility for law reform since the appearance of our draft Code have largely been of a "go slow" nature and, if there is a target date for legislation, (and this is an open question) it seems to be 1992 — the 100th anniversary date of the present Code.

In the meantime some of our fears concerning duplication and overlap seem to be occurring. The federal-provincial working groups that have been established have begun a process of examination of the work produced to date — work that these very people have been involved in over many years — and they seem to be doing so, in many areas, from the ground up.

The Present Juncture (Criminal Procedure)

The current activities of the Criminal Procedure Project are directed toward the ultimate production of a new Code of Criminal Procedure. This is the complementary process to that undertaken by the Substantive Criminal Law Project.

The Procedure Project has already published working papers and reports on many subjects, principally in the police powers area but also on the subject of the trial process (as is evident from working Paper 59 on the Unified Criminal Court).

Other Working Papers are now in production on such subjects as Extra-ordinary Remedies; Remedies; Appeals; Presumption of Innocence; Double Jeopardy Pleas and Verdicts; Trial Within a Reasonable Time; The Judge and the Conduct of Trial; Powers of the Attorney General; Costs in Criminal Cases; and Pleas Discussions and Agreements.

As we have done with substantive criminal law, we plan to consolidate and recodify the criminal procedure of Canada along the lines of our recommendations and in keeping with the general philosophy formally articulated in our recent Report to Parliament on *Our Criminal Procedure.* Draft legislation has already been prepared with respect to the completed studies on police and investigatory powers which have culminated in Reports. These drafting exercises have entailed the production of a working document which is keyed to existing Criminal Code provisions and to Commission proposals and includes a brief commentary. All of our studies on the police and investigatory powers have been surveyed in this manner and a consolidated and annotated draft part of the Code is well into production. A similar process will be employed in relation to the other parts of the Code of Criminal Procedure once all of the initial studies have been completed.

and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

VI. EXCLUSION OF EVIDENCE PURSUANT TO SUBSECTION 24(2)

Prior to the enactment of the Charter, the law in Canada, as illustrated by *R. v. Wray,* (1971) 1 S.C.R. 272, was that the Trial Judge had no discretion to exclude relevant evidence of real probative worth where the judge believed the evidence was obtained illegally or improperly. The Charter has altered that situation significantly by imposing a strict duty upon the courts in certain situations to exclude evidence obtained in a manner which infringes or denies any of the rights or freedoms it guarantees. To date, the Supreme Court has issued some seventeen 24(2) rulings[6], the most recent being *R. v. Black* (unreported) handed down on August 10 of this year. Instead of briefly reviewing all of the decisions, a detailed focus on one of the more important decisions is provided, namely *R. v. Collins* (1987) 1 S.C.R. 265. *Collins* strikes a middle ground between the automatic exclusion rule of the United States (the poison fruit of the poison tree doctrine), and the Common Law rule that generally admitted all relevant evidence regardless of how the authorities obtained it.

In *Collins* the accused was charged with the possession of heroin for the purpose of trafficking. The police were conducting a surveillance of a tavern in connection with a heroin investigation. When the accused's husband left the premises, the police followed, searched his car and found heroin. They returned to the pub and an officer grabbed the accused by the throat to prevent her from swallowing any evidence that might be in her mouth. During the struggle the officer observed a green baloon in the accused's hand which contained heroin. Justice Lamer, writing for the majority, held that the throat search for drugs was contrary to section 8, (search and seizure) because there were no reasonable grounds for the search, only mere suspicion. In finding that such a breach warranted the exclusion of the evidence the Court gave the following instructive comments.

> Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s.24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this conduct, the administration of justice was brought into disrepute. Section 24(2) could have well been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings. The further disrepute will result from the admission of the evidence in the proceedings, and the purpose of s.24(2) is to prevent having the administration of justice brought into further disrepute by the admission of the evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. It will also be necessary to consider any disrepute that may result from the exclusion of the evidence. It would be inconsistent with the purpose of s.24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission (pp.280-281).

The obvious question which arises is what tests are to be applied to determine when the administration of justice will be brought into greater disrepute by excluding rather than admitting the evidence. Dale Gibson makes a persuasive argument that the admission of public opinion polls would be appropriate for the purpose of indicating the likelihood of community disrepute under s.24(2)[7]. Mr. Justice Lamer, however, had adopted the reasonable person test:

> ...the relevant question is: Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case? The reasonable person is usually the average person in the community, but only when the community's current mood is reasonable (p.282).

To facilitate the exercise of the discretion given to judges under section 24, Mr. Justice Lamer delineated a number of factors which could be taken into account:

- what kind of evidence was obtained?
- what Charter right was infringed?
- was the Charter violation serious or was it of a merely technical nature?
- was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith?
- did it occur in circumstances of urgency or necessity?

[6] There are 17 cases, namely: *R. v. Therens,* (1985) 1 S.C.R. 613; *Rahn v. R.,* (1985) 1 S.C.R. 659; *Trask v. R.,* (1985) 1 S.C.R. 655; *Clarkson v. R.,* (1986) 1 S.C.R. 383; *Mills v. R.,* (1986) 1 S.C.R. 863; *Hamkill v. R.* (1987) 1 S.C.R. 301; *Sieben v. R.,* (1987) 1 S.C.R. 295; *Collins v. R.,* (1987) 1 S.C.R. 265; *Pohoretsky v. R.,* (1987) 1 S.C.R. 945; *R. v. Manninen,* (1987) 1 S.C.R. 1233; *R. v. Tremblay,* (1987) 2 S.C.R. 435; *R. v. Strachan* (1989), 67 C.R. (3d) 209; *R. v. Ross* (1989), 67 C.R. (3d) 209; *R. v. Genest* (1989), 67 C.R. (3d) 244; *R. v. Simmons* (1989), 45 C.C.C. (3d) 296; *R. v. Jacoy* (1989), 45 C.C.C. (3d) 46; *R. v. Dyment* (1989), 5 C.C.C. (3d) 204; *R. v. Black* (August 10, 1989, unreported).

[7] Dale Gibson, The Law of the Charter: General Principles (Toronto: Carswell, 1986) pp.236-246.

defences are too great. Some transgressions may be considered so heinous, that no defences are permissible, and a theory of "strict liability" for Charter violations may be applicable.[4].

It would seem that Provincial Court Criminal Division Judges are incapable of giving damages as a remedy. While the Supreme Court challenged Trial Judges to devise imaginative remedies to serve the needs of individual cases, the Court also cautioned that such remedies must remain subject to constitutional restraint, that is they must remain within the ambit of criminal powers[5]. A case coming out of the Ontario Provincial Courts is indicative of the law in this area. In *R. v. Sybrandy* (January 19, 1983), 9 W.C.B. 328 (Ont. Prov. Ct.), Judge Sherwood considered the case of an accused charged with breach of probation. Following her arrest, the accused was held for approximately 40 hours before being brought before a justice of the peace and released. The judge was of the opinion that a breach of the Charter had occurred, but since no evidence was obtained as a result of the violation, there was no basis for dismissing the charge. Judge Sherwood stated that the Provincial Court Criminal Division is not given any civil jurisdiction by the Charter to award an accused damages; instead the appropriate remedy would be a reduction of sentence.

3. EXEMPTIONS

Exemptions or "reading out" provides an alternative to the standard remedies of "striking down" legislation, or "severing" the offending section. With exemptions, the entire law remains in force but is not applied to persons whose Charter remedies are infringed by its effect. In his paper "Accentuating the Positive, and Eliminating the Negative: Remedies for Inequality Under the Charter," Dale Gibson asserts that "reading out" will become a valuable remedy in relation to the application of section 15 (equality) and section 27 (multiculturalism) of the Charter. Gibson states that equality cannot be achieved in a multicultural society by treating everyone identically. What is required therefore, is statutory interpretation that takes into consideration the cultural and religious differences of various groups. The decision of the Ontario Court of Appeal in *R. v. Videoflicks Ltd.* (1985), 14 D.L.R. (4th) 10, is the best example. Rather than finding Sunday closing legislation invalid, Justice Tarnopolsky held that the law had no force or effect with respect to businesses operated by Orthodox Jews. Although the legislation in question was ultimately declared completely invalid in the Supreme court's decision *R. v. Big M. Drug Mart,* thereby invalidating Justice Tarnopolsky's exemption remedy, the Supreme Court has acknowledged the use of exemptions in two other cases: *R. v. Albright (1987) 2. S.C.R. 383, and R.* v. *Smith,* (1987) 1 S.C.R. 1045.

4. EXTENSIONS

Whereas the exemption remedy addresses a statute's over-inclusiveness, extensions, or "reading in" addresses the situation where legislation is under-inclusive. For example, what if a statute granted a special monetary benefit to single mothers, but not to single fathers? Undoubtedly this would violate section 15 of the Charter. To strike down the provision favouring mothers would achieve equality but at the expense of the deserving recipients. The Federal Court faced a similar dilemma in *Schachter v. Canada et al* (1988), 18 F.T.R. 199. In his decision, Justice Strayer of the Federal Court, Trial Division ordered benefits extended to natural fathers under the *Unemployment Insurance Act.* The appeal from that decision will be heard shortly by our Court.

Critics of the extension remedy argue that it constitutes too much of an interference with the legislative arm of government. The arguments for accentuating positive remedies as outlined in Part I of this paper apply. The argument is that where political decisions contravene constitutional rights, courts should not be reluctant to award "appropriate and just" remedies. It is further argued that, insofar as extensions require governments to take positive action, they are no more intrusive than the mandatory injunctions ordered in the *Manitoba Language Reference.* The Supreme Court has not yet considered the availability of extensions.

5. DECLARATORY RELIEF

A final comment needs to be added regarding the ineffectiveness of declarations as a remedy with regard to Charter cases. Although declarations maintain judicial deference towards the legislative arm of government, the declaration fails to be a remedy for the aggrieved individual. Declarations may be a useful remedy when other remedies are not available; within the context of the Charter this is usually not the case. One cannot deny the moral and persuasive force of a declaration, the difficulty however is that "voluntary" address is expected, but not necessarily forthcoming. In the *Solosky* case (1979), 105 D.L.R. (3d) 745, the Supreme Court of Canada held that declaratory relief is available in cases where there is a real, not hypothetical dispute, between the parties. At page 755, Dickson J. (as he then was) stated:

> Once one accepts that the dispute is real

[4] **Donna Greschner, "Selected Charter Remedies" (Paper presented at the Canadian Judicial Council's 1989 Superior Court Judges Seminar, Calgary, Alberta, August 17-19, 1989) pp.8-9**

[5] ***R. v. Mills*** **(1986), 67 N.R. 241 at 253.**

The Place of the Unified Court in the Codification Exercise

The Commission's Early Interest

The origins of the Commission's interest in the unified criminal court and indeed, court unification generally, can be traced, very nearly, to the inception of the Commission itself. The Commission had been a recognized proponent of the unification of courts for many years (primarily in the field of family law) before it began to publicize its interest in unifying criminal courts.

In the very First Research Program of the Law Reform Commission of Canada specific reference is made of the need to examine two fundamental matters — the Criminal Code's existing classification of offences scheme and the jurisdiction of the courts. These subjects are of particular importance to the manner in which we might set about resolving many of the specific problems that constitute the core concerns of the Criminal Procedure Project: the separate trial and appeal procedures for indictable and summary conviction cases, the election and re-election procedures for the more serious indictable cases, the procedures for the preliminary inquiry, the variety of pre-trial procedures bearing on criminal discovery — these and many more specific procedures do not exist in neat isolation. Rather, they exist as related parts of our whole multi-court system which, in turn, is inextricably linked with our system of offence classification. Therefore it would have been extremely difficult, if not quite inadequate, to attempt to examine the individual features of the system without conducting a searching examination of its basic structure.

The need for such a study would seem to be clear enough. Even the most enlightened body of substantive law is of little value if the machinery for its administration is inadequate. Rethinking and reforming institutions, therefore, is a necessary step to be taken on the road to securing their excellence. Thus the Criminal Procedure Project commissioned various studies — one by Professor Darrell Roberts in 1973, another by Judge Bernard Grenier in 1985, and a third by a prominent barrister, Morris Manning in 1986 — to examine the ramifications and policy wisdom of court unification in the criminal law field.

Supporters of Unification

It is fair to say that the climate has not always been favorable to the reception of the idea of court unification. Fortunately for the Commission, others, over time, have recognized the virtue and value of reforming this basic institution. Dean Friedland in 1969 proposed a substantial restructuring of the Court hierarchy to the Ouimet Committee on Corrections. Not very long ago, the New Brunswick government attempted, unilaterally, to implement its own unified criminal court system. [an effort that was rebuffed by the Supreme Court of Canada in the *McEvoy* case] and a form of court unification occurred recently in the Province of Quebec with the unification of all of its various provincially appointed courts. Finally, perhaps the most significant developments in this area are now occurring before our eyes in the Province of Ontario as it presses ahead with its two stage programme of comprehensive court unification.

The Phenomenon of Merger

The slow process of the two tier unification of section 96 Courts (spoken of more commonly as "merger") in Canada is nearing completion. Two of the last hold-outs, Ontario and British Columbia, have recently commenced initiatives designed to result in the merger of their Supreme and District Courts. [Can *Nova Scotia* be far behind?] Even this form of *qualified* unification has been the focus of bitterness and division but the benefits appear to be incontrovertible. The focus is now shifting to more profound change; change that can overcome the obstacles that have been erected by history and by the peculiar nature of Canadian federalism.

Obstacles Posed by Federalism

Canada is blessed and cursed by its system of multiple jurisdictions — one federal government, ten provincial governments and two territorial assemblies. Since Confederation constitutional responsibilities over criminal law and the administration of justice have been divided between provincial governments and the federal government.

We are fortunate in that this division allows our provinces to legislate on matters requiring a sensitivity to local conditions and attitudes. We are bedevilled, because that same division leads to shared responsibilities over certain areas of the justice system that are not easily shared. Too often, Canadian legislators, in an effort to preserve jurisdictional prerogatives (or "turf" as it is known in the political vernacular) allow their disputes to inflict damage on the criminal justice system. Damage results from the gridlock, delay and paralysis that these disputes produce.

The legacy of this constitutional division of powers arrangement has been the confusing mixture of multi-tiered courts that we now possess: "Provincial" — provincial courts and "Federal" — provincial courts, all attempting to exercise substantial and important pieces of jurisdiction in the field of criminal law. Without delving into details with which all of us are

familiar, these courts have different names in different provinces and their actual jurisdiction varies from province to province.

In general, the Superior Court, by whatever name it is called, hears what are conventionally regarded as the most serious criminal cases. Yet, whether the system is three-level or two-level, the Provincial Court — ostensibly the lowest court in the hierarchy, hears and ultimately disposes of the vast majority of criminal cases, (most of these are "serious" cases, by whatever yardstick one uses).

For example, Ontario presently has a typical three-level system — Provincial Court, (County or) District Court and Supreme Court. Provincial courts in 1985 disposed of 96% of criminal charges. Saskatchewan has a two-level system. Its Provincial Court dealt with 99% of the criminal cases in the province in 1984.

In fairness one must qualify these statistics. Provincial Courts hear many guilty pleas. Therefore, while the percentage of criminal cases heard there is high, the actual proportion of court time spent by Provincial Courts on criminal cases may be lower than the percentage of cases dealt with there. Nonetheless, it is always the Provincial Court that deals with the great majority of criminal charges.

The Results of History & Constitutional Division of Responsibility

The existence of a multi-tiered court system for trying criminal cases has led to, or is mirrored in, the promulgation of procedural rules that are Byzantine in their complexity. As Judge Cawsey observed in 1979:

> It would be difficult to imagine a Criminal Court system more complicated than the one now used in Canada. There are absolute and elective trial jurisdictions; there is a system of preliminary inquiry, applicable as law for some offences, applicable as a result of the accused's election for some other offences, and not applicable at all for yet another group of offences; then there are a variety of re-election provisions some of which require the consent of the Attorney General and some which do not. There is the final authority of the Attorney General to require the trial to be by judge and jury notwithstanding the election of the accused and imposed upon all of this is the right of the Crown to proceed by a preferred indictment. Lawyers have revealed that they are not familiar with the various methods of trial. While it may be inexcusable for a lawyer to fail to understand a court system it is doubted that the public have any understanding at all of our criminal trial system because of its complexity.

One is able to forum-shop and sometimes even to judge-shop under the present regime, at least in part, because the multi-court system provides so many avenues for doing so. Professor Roberts was undoubtedly correct when he stated in his study (1973) for the Commission that

> ...[I]f one were asked to set about devising a criminal court system and could begin with a clean slate, there is little doubt that the result would be a one court system — perhaps even a Federal Court system. But of course the slate is not clean and we are not starting afresh. Not only do we have a multi-court criminal system but it is one that has been in existence for a long time. That means that the physical and human resources of the present system cannot be ignored; it means as well that the views and expectations of those operating in the present system, whether justified or not, must be taken into account; and it means that the constitutional basis of our present system and for any proposal for change must be carefully examined.

This, in essence, is what our Working Paper on the Unified Court sets out to accomplish and, in my view, (hopefully, in yours as well) it has succeeded.

It should be pointed out that a Working Paper is just that — a "working" draft. While it bears the imprimatur of the L.R.C.C. the views expresed are the tentative, rather than the final, views of the Commission. By the same token these are more than mere talking points. This paper has emerged after a broad process of consultation involving close consideration of two of the three study papers to which I earlier alluded. One took a more conservative and the other a more radical, stance than that which appears in Working Paper 59. While we may not be "wedded" to what you see in this Working Paper it is fair to say that we are "engaged".

The Problem in Perspective

Perhaps the most pervasive responses among lawyers, and jurists who come to our work for the first time is the question "what's the problem?" and the assertion "if it ain't broke, don't fix it". These are predictable remarks flowing from the innately "conservative" [deriving from the verb "to conserve"] nature of the legal profession. Lawyers are familiar with a great deal that is arcane, impenetrable and often illogical. Often they are quite prepared to live in the midst of a thicket rather than see the brush cleared away. They can find their way, so what else matters?

However, there is a problem and it has been identified, after due analysis, many times by many competent and respected commentators.

The Working Paper sets out, in substantial detail, our perceptions of the problem. I will attempt to summarize those views for you now.

Complexity, confusion, inefficiency and inequality are the principal defects of the *status quo.*

fusing twist to the situation. In *R. v. Cutforth* (1987), 40 C.C.C. (3d) 253, it was held that collateral breaches of the Charter should not be considered by the Trial Judge. In the court's opinion Charter infringements should not be addressed within the trial unless they are clearly relevant to the offences being tried. In this case, the accused was charged with driving while impaired. He alleged that his right not to be arbitrarily detained was violated because of his detention subsequent to the performance of breathalyser tests at the police station. The Trial Judge granted a stay of proceedings. In overturning the stay, the court of Appeal stated that the Trial Judge should not have considered the Charter infringements unless the breach corresponded to a recognized defence in law, or created evidence which should be excluded under section 24 of the Charter. According to the Court, the issue of the accused's detention was not relevant to the admissibility of the breathalyser certificate.

V. A REVIEW OF SELECT REMEDIES

The majority of material for this portion of the paper is taken from "Selected Charter Remedies" by Donna Greschner, paper prepared for the 1989 Superior Court Judges Seminar, August 13-17, 1989).

1. INJUNCTIONS

A.G. Manitoba v. Metro Stores Ltd., (1987) 1 S.C.R. 110, is the Supreme Court's first discussion of interlocutory injunctions and stays of proceeding under the Charter. Recently in *Yri-York Ltd. et al. v. A.G. Canada* (1988), 83 N.R., the Federal Court of Appeal held that its power to order a stay of proceedings was affirmed by *Metro Stores,* as that Court has statutory power to give relief in the nature of an injunction. *Metro* adopts the tripartite test developed for interlocutory injunctions from the classic decision of *American Cyanamid v. Ethicon,* (1975) A.C. 396 (H.L.) 460, and applies them to the Charter. The first test involves whether a "serious question" is to be tried. The second test, whether the plaintiff will suffer irreparable harm, raises the question of whether breaches of the Charter are monetarily compensable. Case law is mixed: violations have been held to be compensable. Case law is mixed: violations have held to be compensable, whether others have not[3]. The third test involves a consideration of the "balance of convenience". *Metro Stores* stands for the principle that when Charter rights are involved, consideration of the balance of convenience must take into account the public interest. In the *Yri-York* decision, the Federal Court of Appeal held that the public interest in enabling the courts to protect Charter rights weighs in favour of granting the application. However, this must be balanced against the consideration of whether or not the public would suffer significant harm if the application was granted. In making this judgment the quantity, and quality of the anticipated harm must be assessed.

2. DAMAGES

In both *R. v. Mills (supra),* and *R. V. Rahey,* (1871) 1 S.C.R. 588, the Supreme Court has endorsed monetary damages as a remedy for Charter violations. Despite this endorsement, claims for damages remain a rarity, with only a few having been successful. A recent search of reported case law reveals just over two dozen cases in which Charter damages were claimed, or in which the court commented upon their availability.

Three issues arise related to damage claims brought pursuant to Charter violations. The first issue to be addressed is whether compensation is the sole purpose of the damages remedy or can exemplary damages be awarded. The argument against the awarding of exemplary damages is that section 24 only authorizes remedies to individuals, and exemplary damages do not redress wrongs but punish and deter governments. The decision of the Federal Court of Appeal in *LeBar v. Canada* (1988), 90 N.R. 5, indicates that governments are also susceptible to exemplary damages when their actions are offensive. In that case, damages of $10,000.00 were upheld against the Crown for being "outwardly mute and disobedient in the face of a declaratory judgment".

The second issue concerns whether the plaintiff must prove that measurable loss flowed from the Charter violation, or will the fact of violation suffice to ground a substantial award of damages. The case law conflicts. In *Vespoli v. The Queen* (1985), 12 C.R.R. 185, the Federal Court of Appeal refused to grant damages because there was no evidence that the appellants suffered any loss as a result of illegal seizures. However, in both *R. v. Esau* (1982), 147 D.L.R. (3d) 571 (Man C.A.) and *Lord v. Allison* (1986), 3 B.C.L.R. 300 (B.C.S.C.), modest damages were awarded for the Charter infringement itself.

In relation to damage claims for Charter violations, the third issue is whether, and what kind of defences, will be permitted the government defendant. Possible defences could be good faith, or an absence of negligence or malice. Allowing no defences might increase the risk of a litigation flood, or might result in an unduly narrow interpretation of Charter rights. The purpose of awarding damage claims however, would be thwarted if the number and scope of the

[3] The issue of damages for Charter violations is more thoroughly discussed under the sub-heading immediately following.

continuing matter of dispute both in case law and in legal literature. The English version of subsection 24(1) refers to "court of competent jurisdiction," whereas the French version uses the expression "à un tribunal compétent." Section 57 of the *Constitution Act,* 1982, stipulates that "the English and French versions of the Act" are equally authoritative. "Tribunal" en français, translates as both court and tribunal. The question naturally arises whether administrative tribunals are courts of competent jurisdiction. Even if such boards are "courts" within the meaning of section 24, there is greater difficulty in determining when they are courts of "competent jurisdiction" to grant a Charter remedy.

The problem of whether administrative tribunals are entitled to rule on the constitutionality of the statutes they are called upon to apply occupies a lot of the time of the Federal Court. Recent decisions of the Federal Court of Appeal on this issue include: *Zwarich and A.G. of Canada,* (1987) F.C. 253, where the Federal Court of Appeal decided that under the *Unemployment Insurance Act* a board of referees does have the power to rule on the application of the Charter; in *Tetreault-Gadoury v. Canada Employment and Immigration Commission,* (1988) 88 N.R.6 (F.C.A.), the Court held that the Board had jurisdiction to refuse to apply legislation they judged to be unconstitutional, but had no jurisdiction to grant a section 24 remedy. For other instalments in this unsettled area of law see: *A.G Canada v. Sirois,* (1989) 90 N.R. 39; *A.G. Canada v. Vincer,* (1988) F.C. 714; *Terminaux Portuaires du Quebec v. Association des Employeurs Maritimes,* (1989) 89 N.R. 278; and *Poirier v. Minister of Veterans Affairs,* (1989) 96 N.R. 34 (F.C.A.)

Given the realities of provincial court judging, the law of review of the actions of administrative tribunals is probably an interesting point of law for Provincial Court Judges, but little more. What is relevant to their day to day activities are several related issues. It should be remembered that neither tribunals nor courts of limited jurisdiction, such as Provincial Courts, have the right to make declarations as to the constitutionality or validity of statutes and regulations. However, for every Provincial Court Judge, the words of Justice MacFarlane of the B.C.C.A. in *Schewchuk v. Ricard* (1986), 29 D.L.R. (4th) 439 must be kept in mind:

> It is clear that the power to make general declarations that enactments of Parliament or of the legislature are invalid is a high constitutional power which flows from the inherent jurisdiction of the superior courts. But it is equally clear that if a person is before a court upon a charge, complaint or other proceeding properly within the jurisdiction of that court, then the court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the provisions of the Canadian Charter of Rights and Freedoms, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, in that context, is nothing more than a decision of a legal question properly before the court. It does not trench upon the exclusive right of the superior court to grant prerogative relief, including general declarations.

Concerning the issue of "competent jurisdiction", Provincial Courts should also concern themselves with the comments of Justice McIntyre in *Mills v. The Queen* (1986), 67 N.R. 241 at 254:

> The superior court jurisdiction will not displace that of other courts of limited jurisdiction. Considerations of convenience, economy and time will dictate that remedies under s.24(1) will ordinarily be sought in the courts where the issues arise. Save for cases originating and proceeding in the superior court, resort to it will be necessary only where prerogative relief is sought.

This message from *Mills* is that it is necessary that Superior Courts have a discretion to decline jurisdiction where there is a Trial Court competent to award just and appropriate relief. In this way, it can be assured that the jurisdiction of Superior Courts will be invoked only where there is a need for such jurisdiction. In *Mills,* the Supreme Court was divided. McIntyre and La Forest, JJ. were of the view that the application for a remedy for a breach of paragraph 11(b) of the Charter (unreasonable delay) should have been made to the Trial Judge when the accused was committed for trial, rather than on a pre-trial motion to the Superior Court. Lamer J. in dissent, however, held that since a violation of paragraph 11(b) would vitiate the jurisdiction of a magistrate at a preliminary hearing, or indeed a Trial Court, an accused should be able to seek and obtain full relief in the Superior Court through an application under subsection 24(1) and/or the prerogative writs. *Mills* also stands for the principle that a Provincial Court Judge presiding at a preliminary inquiry under the *Criminal Code* is not a court of competent jurisdiction for the purposes of application for relief under subsection 24(1), as at that point of the proceedings, the Provincial Court Judge's remedial powers are restricted to committal or discharge.

The Alberta Court of Appeal has added a con-

Complexity and Confusion

The present two- and three-level structures generate confusion as to which court will hear which cases. Even lawyers have difficulty understanding the present system. Given this state of affairs, it is hardly surprising that the court structure is baffling to the public, to witnesses and to victims of crime as well.

The confusion is not attributable solely to differences in nomenclature, but to differences in the jurisdiction exercised by the various courts as well: Witnesses and victims often have little appreciation of why a particular trial takes place in one court as opposed to another. It is especially difficult to explain why cases moved from one court to another — for example, when the accused makes a re-election as to the mode of trial in accordance with the provisions of the *Code.*

Inefficiency

While it cannot be said that there is something inherently wrong with a court system that provides for up to three separate levels of trial court, the manner in which jurisdiction is parcelled out leaves grave reservations concerning the desirability of the *status quo.* Our multiple courts require the services of multiple administrations. Inevitable duplication, overlap and added cost is the result. While these court systems are not hermetically sealed from one another, a centralized and coherent administration to process efficiently the cases moving from one level to another is generally lacking. The end-product is administrative complexity and inefficiency. Bureaucratic failings in the form of scheduling gridlock and delay are apparent even to the uninitiated.

Delay in the criminal justice system arises from many sources and it would be misleading to attribute it solely to problems in court structure. By the same token it would be wrong to disregard the significant effects that our labyrinthine structures have on the genesis and evolution of the phenomenon of *delay.*

Lawyers who must appear before more than one court will often have problems arranging to be present at a time when judges, witnesses and courtrooms are available. Further, in criminal cases, police witnesses may have the same scheduling problems as defence counsel since they must also appear in more than one court on a regular basis. Thus, delay can be caused by the scheduling problems of those who must appear before the court, rather than by the actual volume of cases in a particular court or court level. This kind of delay will exist in a unified system but it is exacerbated by the existence of multiple levels of unintegrated trial courts.

Also, since cases often move from one court to another because of transfer or re-election of the mode of trial by the accused, each court dealing with a case must process it, complete its files, and perhaps prepare transcripts before the matter can proceed to another court. Further, there is little co-ordination of available court time between levels of court. As such, our multi-level court system has been described as "a natural mechanism for delay". Multi-level court structures invite manipulation by lawyers who see some tactical advantage in either delay or speed. Elections as to mode or forum of trial can be made accordingly so as to achieve either objective.

To some extent, the actions of court administrators and judges in the various court levels can actually work at cross purposes. For example, if the Provincial Court works efficiently to clear up a backlog of cases, those accused who seek delay will simply elect trial in another court which is already suffering a backlog of cases. Thus, the most efficient courts may remain so through a reduction in the volume of cases tried there, while delays worsen in the other already overburdened courts in the system.

Delay in a particular court or court level can actually cause new sources of delay to appear. In a backlogged court, the practice of double- and triple-booking cases may occur. This results from the administrative practice of estimating the proportion of cases that will not actually be tried on the scheduled date due to unavailability of witnesses or lawyers, guilty pleas, or stayed or withdrawn charges. By the same token lawyers may double- or triple-book their own appearances for a given day based on the likelihood that, for one reason or another, some of their appearances will be unnecessary. Because of the roughness of these projections of the future need for court time, there are inevitable conflicts. Where two matters have been scheduled at the same time one of them must be further delayed.

It is not that these problems will cease to exist in a unified court system but rather that a unified structure is best able, when properly managed, to address the problems with sensible and flexible responses.

Inequality

Multiple jurisdictions perpetuate the belief that there is a hierarchy of courts. The Canadian Provincial Judges Association summarized the matter succinctly in its presentation to the then Minister of Justice Jacques Flynn, in 1979:

> "A hierarchy of courts trying the same types of matters implies that the upper courts try a case better than other courts. If we accept the assumption that the

County Court Judge is somehow superior to the Provincial Court Judge but both are surpassed by an even more superior High Court Judge, we must also accept that different qualities of justice are being meted out. A hierarchy of courts with concurrent jurisdiction creates the impression of "good, better, best" justice."

Obviously the calibre of a judge ought not to vary with the court to which he or she is assigned. If it does, or if there is a perception in the larger community that it does, the reputation of the entire administration of justice is tarnished.

Such perceptions may exist for a variety of reasons: Inadequate court facilities are almost always associated with Provincial Court. Judges of Provincial Courts are paid less than judges of the intermediate and superior courts. Lower salaries may limit the field of candidates willing to accept appointments to the bench. Limits on the jurisdiction of Provincial Courts also reinforce the notion that these are inferior to other courts. Provincial Court judges cannot try murder cases. They cannot preside at jury trials. It is difficult to imagine a better device to show, erroneously, that Provincial Court judges are less competent than other judges.

The fact that other levels of court have supervisory jurisdiction over Provincial Court decisions reinforces the impression of inequality. Appeals from summary conviction matters are heard in County Court where it exits, and by the Supreme Court elsewhere. Review of Provincial Court decisions by prerogative writ is conducted in the Supreme Court.

We even perpetuate the mythology of "good, better, best" justice in our form of addressing the bench. Provincial and County Court judges are called "Your Honor", whereas judges of the Supreme Court are addressed as "my Lord", "my Lady", "your Lordship" or "your Ladyship".

Even the perceived independence of Provincial Court judges may not be as great as that afforded their Superior Court counterparts. In Ontario, for example, a Provincial Court judge may be removed for several specified reasons, including "conduct that is incompatible with the execution of his or her office" — an exceedingly vague ground of censure. Federally-appointed judges, on the other hand, hold office during good behaviour and can only be removed by the Governor General on an address to both Chambers of Parliament.

Canada's court structures, therefore, create an unhealthy atmosphere for the efficient and fair administration of criminal justice. They create an impression of inequality in the administration of criminal justice in a society that is formally and constitutionally committed to the eradication of inequality.

[Apparently not all commentators are convinced of the soundness of these equality arguments — at least where they are clothed in "equal pay for work of equal value" garb. Witness Professor Hutchinson's recent diatribe against the attempt by Quebec's Provincial Judges to narrow the disparity between their compensation and that of their federally appointed counterparts. (Globe & Mail, September 7, 1989): "...the worth of industrial action by such highly paid bureaucrats does not seem entirely supportable."]

A unified court can help to remedy many of the problems associated with the present system. Its most redeeming feature is its simplicity. A unified court offers the greatest potential for efficiency in the administration of both human and physical resources. It lends itself to centralization but allows flexibility in the placement of courts and judges. New case flow management techniques could be implemented more effectively in a structurally simplified court system. A unified criminal court will also do away with the perception that some criminal courts are inferior to others. It will be easier for the public and participants to understand the criminal justice system.

Effective reform of the problems identified in our Working Paper can only be accomplished by attacking these problems on several fronts simultaneously. Among the proposals that we have advanced in other studies are a better pretrial disclosure mechanism, time limitation periods, and improved trial election and re-election process and a simplified system for classifying offences under the *Criminal Code.* At the centre of this overall reform endeavour lies our proposal for a Unified Criminal Court.

Reforms of this nature are not without significant obstacles — a fact that was readily acknowledged in our Working Paper. However, we believe that with a modest degree of federal-provincial cooperation these difficulties could be readily overcome. The Working Paper presents a blueprint for accomplishing the necessary changes.

The Commission's Proposals

Our recommendations are few in number and are relatively uncomplicated once one removes the political factor from the equation. They are as follows:

ence towards the legislative arms of government should be preserved is an important issue in itself. That debate is postponed for another time. For the purposes of this paper, it is enough to acknowledge that under subsection 24(1) the courts have been given all the legal authority they require to award positive relief whenever appropriate, including mandatory injunctions, writs of mandamus, extensions of legislation and damages.

Theoretically, courts have received a "Charter" invitation to be innovative in the granting of remedies. The variety of remedies available are limited by only three factors:

1. the extent of the court's normal remedial jurisdiction;
2. the need for the remedy to be "appropriate and just" and
3. the breadth of judicial imagination.

The notion that a court is constitutionally incapable of making positive orders with respect to legislation was explored by the Supreme Court's judgment in *Re Manitoba* Language Rights, (1985) 1 S.C.R. 721, where the court ordered the translation of Manitoba's provincial legislation, established an appropriate amount of time for the translation to occur, and ordered that invalid unconstitutional legislation would nevertheless prevail to avoid chaos and the undermining of government. Undoubtedly the case represents a high point in judicial activism.

It would be beyond the scope of this paper to examine exhaustively all remedies available under subsection 24(1); however, a brief glimpse at the potential spectrum may be helpful. (In Part V certain remedies will be canvassed in more detail). In the realm of criminal cases, Charter remedies include acquittal and staying or quashing of proceedings. With regard to jurisdictional error by public authorities, Charter remedies include the prerogative remedies of certiorari, mandamus and prohibition. When challenging unlawful detention, pursuant to subsection 24(1), *habeas corpus* may be invoked. Another form of relief, of particular importance where other remedies are unavailable, is a judicial declaration as to the parties' respective rights and obligations. The equitable remedies of prohibitory and mandatory injunctions can also play a large role in Charter litigation. Courts should not feel restricted to their regular cache of remedial armaments. To date, other remedies deemed "appropriate and just" for the breach of Charter violations have included monetary damages, the awarding of costs, altering the timing of proceedings, quashing search warrants, return of seized goods, appointing counsel, reducing sentences, and even negating mandatory jail sentences where to do so would have been "cruel and unusual".

III. SUBSECTION 52(1) OF THE *CONSTITUTION ACT*

Courts should not forget that section 24 is not the exclusive source of remedies in the face of unconstitutional legislation. In *R. v. Big M. Drug Mart,* (1985) 1 S.C.R. 295, the Supreme Court stated that the provincial court judge was entitled to dismiss the charges against the store, simply on the basis of subsection 52(1) of the Charter, and not section 24, because the *Lord's Day Act* was legislation inconsistent with the freedom of religion guarantee found in subparagraph 2(a) of the Charter. Chief Justice Dickson instructs:

> If a court or tribunal finds any statute to be inconsistent with the Constitution, the overriding effects of the "Constitution Act, 1982" s.52(1) is to give the court not only the powers but the duty to regard the inconsistent statute to the extent of the inconsistency, as being no longer "of force or effect." (p. 353)

Professor Dale Gibson expresses the view that the courts are taking a generous view of the meaning of "law" under subsection 52(1)[2]. He bases his conclusion on the statements of Justice Dickson in *Operation Dismantle v. The Queen,* (1985) 1 S.C.R. 441:

> ...nothing in these reasons should be taken as the adoption of the view that the reference to laws in section 52 of the Charter is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in section 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within section 52. (p.459).

Although not all persons who exercise statutory powers will have the ability to scrutinize their statutory authority in light of the Charter, it would seem they have a duty to consider any constitutional infringement that may arise in the course of exercising their power.

IV. WHAT IS A COURT OF COMPETENT JURISDICTION?

Pursuant to section 24 of the Charter, before a court or tribunal can grant a remedy it must establish it has the jurisdiction to do so. The issue of when a court is a court of competent jurisdiction to decide questions involving the *Canadian Charter of Right and Freedoms* is a

[2] Dale Gibson. The Law of the Charter - General Principles (Toronto: Carswell, 1986) p. 185-186.

Charter Remedies*

I. INTRODUCTION

It is a trite statement that a right is only as good as the remedy available. Like most trite statements, however, it is also a truism. With no enforcement positions, the civil liberties protected in the *Canadian Charter of Rights and Freedoms* would be rendered meaningless. Fortunately, there is little chance of this occurring for the framers of that document ensured that three remedial or enforcement measures were included. The first is found in subsection 24(1), providing a general right to seek an appropriate remedy from the courts. It reads:

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

The second remedial provision, found in subsection 24(2) is the right to have certain evidence excluded from court proceedings if obtained in contravention of the Charter. It reads:

> 24.(2) Where in proceedings under subsection (1) a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The third enforcement provision contained in subsection 52(1) of the *Constitution Act,* 1982, which although not technically part of the Charter, is applicable to its provisions. It reads:

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

The idea of "What is a right without a remedy?" was recently addressed in the Supreme Court decision of *Susan Nelles v. R.,* (judgment rendered August 14). In determining that Crown Attorneys and the Attorney General are not immune from suits for malicious prosecution, Justice Lamer took Charter considerations into account. In his opinion, an absolute immunity could not bar the seeking of a remedy pursuant to section 24 of the Charter:

> It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s.24(1) of the Charter to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his Charter rights have been infringed. The question arises then, whether s.24(1) of the Charter confers a right to an individual to seek a remedy from a competent court. In my view it does. (p.26)

It is not the intent of this paper to treat comprehensively the subject of constitutional remedies. In-depth analyses are available from other sources[1]. Due to time constraints, this paper will address only specific, "choice" aspects of the subject under the following headings:

> (1) identifying the trend towards positive remedies;
> (2) an analysis of subsection 52(1) of the Charter;
> (3) a brief analysis of the meaning of a court of competent jurisdiction;
> (4) a review of select remedies: damages, injunctions, reading in (extension of legislation), reading out (exclusion of legislation), and declarations; and
> (5) a study of the exclusion of unconstitutionally obtained evidence pursuant to subsection 24(2) of the Charter.

II. ACCENTUATING THE POSITIVE

Traditionally courts have felt uneasy when enacting positive remedies (thou shalt do), and have felt more comfortable with negative remedies (thou shalt not do). Courts regarded it as less intrusive to tell the government that it could not pass a particular law or pursue a specific line of action, than to tell it what law should be enacted or what line of action should be taken. Whether or not, or to what extent judicial defer-

* A paper prepared for the 1989 Provincial Court Judges Conference, Corner Brook, Newfoundland, October 11-12, 1989, by Darrel V. Heald, a Justice of the Federal Court of Appeal.

[1] See attached bibliography.

Working Paper 59 — Summary of Recommendations

Criminal Court

1. (1) Every province and territory should create a single court or court division called the Criminal Court.

(2) The *Criminal Code* should confer exclusive jurisdiction on the Criminal Court to try all crimes.

Appointments

Alternative A

2. (1) Judges of the Criminal Court should be appointed by the Governor General in accordance with the *Constitution Act,* 1867.

Alternative B

2. (1) Section 96 of the *Constitution Act,* 1867 should be amended to allow the provinces and territories to make appointments to the Criminal Court.

(2) As a transitional measure, judges from the Criminal Division of the Provincial Court should be appointed to the Criminal Court. Other judges who presently sit in the s. 96 courts and who wish to serve in the Criminal Court should be entitled to be appointed to it.

(3) For future appointments to the Criminal Court, the provincial and territorial governments should put forward binding nominations for two out of every three vacancies, with the federal government making the third.

(4) Salaries of Criminal Court judges should be equivalent to those paid to provincial Supreme Court judges.

Intermediate Reform

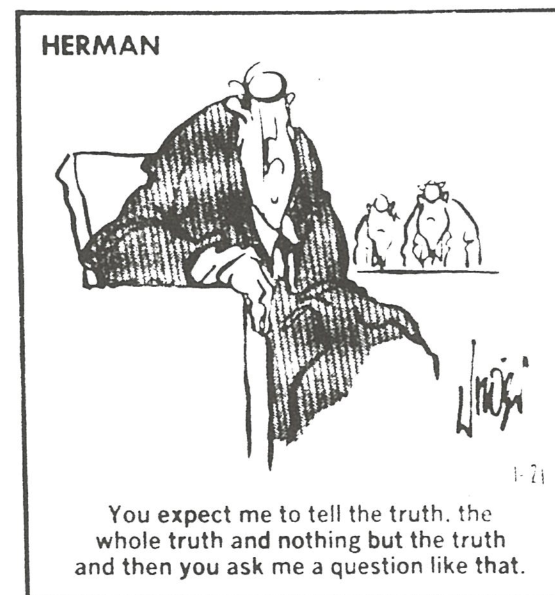
3. (1) Unification of criminal courts could, as an interim measure, be allowed to proceed in stages.

(2) In provinces with a three-level system of criminal courts, the number of levels should be reduced to two, consisting of a Provincial Court and a Supreme Court.

(3) Under a two-level system of criminal courts, the *Criminal Code* should confer jurisdiction on the Provincial Court to hear all non-jury trials.

(4) Within a period fixed by statute, all courts exercising criminal jurisdiction should ultimately be amalgamated in a single unified court.

(5) During the interim period fixed by statute, the administration of the criminal courts should be coordinated, rationalized, and to the fullest extent possible, centralized.



You expect me to tell the truth, the whole truth and nothing but the truth and then you ask me a question like that.

The Glorious Decision of The Supreme Court of Canada in *R. V. Vaillancourt:* An Analysis

by C. Cunliffe Barnett[1]

On February 27, 1982 Yvan Vaillancourt and a friend robbed the patrons of a pool hall in Longueuil, Que. Vaillancourt was armed with a knife and knew that his friend was carrying a gun. It seems however that he thought the gun was empty. It wasn't. Vaillancourt's friend shot and killed a man during the robbery.

Vaillancourt was charged with murder. The jury was told that if a person is a party to the offence of armed robbery and a killing occurs during the robbery, the person is guilty of murder although he was not the killer and did not know that a killing would likely occur. The jury convicted.

Vaillancourt appealed. He argued that the jury had been instructed incorrectly. The Court of Appeal rejected that argument.

Vaillancourt appealed to the Supreme Court of Canada. In that court he did not argue that he had been wrongly convicted merely because the law had been misinterpreted. Instead he mounted a frontal attack upon the law itself. His submission was that a law which condemns a person as a murderer when that person did not himself kill and did not even know that a killing was likely, offends fundamental principles now entrenched in the Charter.

On December 3, 1987 in a 7:1 decision the Supreme Court of Canada set aside Vaillancourt's conviction and ordered a new trial.

When I was asked to prepare some comment upon the Vaillancourt case, I recalled it rather vaguely and agreed. I figured it would do me no harm to read the decision. I had passed by the case earlier because it seemed to be just another decision dealing with the technicalities of murder. Other judges in other courts try those cases.

Well, I have read Vaillancourt now, and I have learned a little. For instance:

1. Some legal scholars maintain that Vaillancourt is the most important criminal law decision in Canadian legal history.
2. The Supreme Court of Canada really is serious about the notion that persons ought not to be convicted of offences or crimes unless they acted with a proven and appropriate measure of fault. Laws that permit conviction without such fault will be declared unconstitutional.
3. Vaillancourt was wrongly decided.
4. If the preceding statement is a little too radical for your liking, I shall merely suggest that you approach Vaillancourt with caution; it seems to me that the Supreme Court of Canada has recently poured at least a little cold water on some of the scholarly speculation that followed its decision in Vaillancourt.

Vaillancourt was convicted because sections 21 and 213 (d) [now section 230 (d)] of the Criminal Code, read together, defined his crime as that of murder. Other robbers before his time had suffered similar misfortunes following similar unexpected criminal misadventures. Although legal scholars had branded s. 213 (d) as "the harshest murder definition of any civilized country", Canadian judicial protests were necessarily muted: until the Charter came into force on April 17, 1982, Parliament enjoyed the essentially unquestionable right to define the essential elements of any given crime, and to limit the facts essential to be proved during a trial. Things are different now: the Supreme Court of Canada has very clearly said that the courts have the duty to strike down penal legislation which does not accord with the principles of fundamental justice. In a case of murder, according to Vaillancourt, those principles demand that the crown prove "at least objective foreseeability" — in other words, the fact that a reasonable person would have understood that death or grievous bodily harm was the likely result of the activity giving rise to the charge.[2] Because s. 213(d) fails that test, it is unconstitutional. That is the stringently limited ratio of the Vaillancourt decision.

The real scope and importance of the Vaillancourt decision is found in passages authored by-

1. Judge of the Provincial Court of British Columbia. This paper was presented at a seminar of that court in April 1989 and has since been updated by the addition of footnotes 2 and 3. The decision in Vaillancourt is reported: [1987] 2 SCR 636; 39 CCC (3d) 118; 60 Cr (3d) 289 and 47 DLR (4th) 399.

2. The June 8, 1989 decision of the Supreme Court of Canada in *R. v. Tutton* [1989] 1 SCR 1392 and *R. v. Waite* [1989] 1 SCR 1436 consider, but do not resolve, issues related to the "objective vs. subjective test" question. The cases specifically do not consider any constitutional issues. See R. v. Tutton at p. 1434.

lent s'insérer dans la foulée des rapports Brazeau et de Coster et avoir pour souci de rétablir l'équilibre rompu au cours des deux dernières décennies.

Voulant sans doute protéger l'intégrité de cette nouvelle institution qu'est le comité triennal, le rapport Vincent, dans la dernière phrase de son préambule, s'exprime comme suit:

> «La mise en application des recommandations du présent rapport devrait se faire le plus rapidement possible et ce, aussitôt que l'Assemblée Nationale aura été saisie de son contenu, afin d'éviter de porter atteinte au processus institutionnalisé du présent comité et de ceux qui seront constitués dans l'avenir.»

Ce matin, à quelques mètres de ce palais de Justice, les juges de la Cour du Québec ont senti le besoin de convoquer une rencontre parallèle à la nôtre.

Si j'ai résolu de tenir devant les membres du Barreau les propos que je viens d'avoir, c'est que j'entretiens l'inquiétude que la situation s'envenime. Ce serait alors néfaste pour l'administration de la justice au Québec.

C'est donc un appel au dialogue que je lance et dans cette perspective, j'ai confiance que les intervenants à ce dialogue feront en sorte que chaque démarche entreprise protégera le respect dont doit être entourée l'administration de la justice.

L'expérience de mes vingt années de magistrature m'a enseigné qu'il n'y a jamais de moments vraiment propices pour aborder ces délicates questions.

Les pires moments sont par contre ceux où la panique s'installe et ceux où la sérénité fait place au durcissement des positions.

Connaissant la bonne volonté de part et d'autre, j'ai la ferme conviction qu'on pourra rapidement s'acheminer vers une solution qui respectera les différents impératifs auxquels on doit souscrire dès le moment où on accepte que le pouvoir judiciaire est à la base du fonctionnement bien ordonné d'une société.

"It is of great consequence that the public should know what takes place in Court; and the proceedings are under the control of the Judges. The inconvenience therefore arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." (Chief Justice Lord Campbell in *Davison v. Duncan,* 7 E. & B. 229, 231)

térieur d'une province, les juges auraient tous été de nomination provinciale.

Mais certains impératifs ont milité en 1867 en faveur des articles 96 et 100 qui prescrivent que c'est le pouvoir central qui nomme les juges des Cours supérieures et fixe leurs traitements.

Les 279 juges de la Cour du Québec — dont une bonne partie ont siège à Montréal — constituent non seulement le groupe le plus nombreux des juges qui, au Québec, se partagent l'administration de la justice mais encore, à eux seuls, n'assument-ils pas 80% des affaires soumises à nos tribunaux par les justiciables?

Au Québec, à venir jusqu'à environ 20 ans, le législateur avait accepté que l'administration de la justice comportait, pour lui, l'engagement de chercher à atteindre et à maintenir un équilibre entre les conditions de tous les juges qui participaient à cette administration, qu'ils soient de nomination fédérale ou de nomination provinciale.

Depuis le début de la décennie '70, les choses ont évolué et si, d'une part, on peut affirmer que le Parlement du Canada a généralement fait honneur aux obligations qui sont à la base du principe de l'indépendance judiciaire, d'autre part, la situation a pris une autre tournure à Québec.

Devant une situation qui de plus en plus s'éloignait de l'équilibre antérieur, des redressements significatifs ont été demandés, avec, à l'appui, des études étoffées.

Les années 1988 et '89 ont par ailleurs fait apparaître de grands espoirs et je voudrais mentionner les principaux éléments de cette conjoncture:

1.- Le 17 juin 1988, était sanctionnée la loi créant la Cour du Québec qui regroupait la Cour provinciale, la Cour des Sessions de la paix et le tribunal de la Jeunesse.

2.- Le 31 août 1988, le gouvernement du Québec faisait en sorte que cette nouvelle Cour soit dirigée par une équipe solide et dévouée formée d'un juge en chef, de deux juges en chef associés et de sept juges en chef adjoints.

La présentation officielle de la nouvelle équipe de direction eut lieu avec ampleur et dignité dans le Salon Rouge de l'Assemblée nationale le 25 octobre 1988, autre manifestation du virage profond que le gouvernement voulait donner à cette nouvelle institution.

Dans ces moments heureux, j'ai partagé avec les juges de la Cour du Québec leur joie et leurs espoirs.

Dans les moments plus difficiles qu'ils traversent, je veux leur faire savoir publiquement que je ne me désintéresse pas de leur sort et ne suis pas insensible face à leurs inquiétudes grandissantes.

Sans cela, la fraternité qui doit unir tous les juges de cette province serait un mot vide de sens.

Dès le 7 septembre 1988, le gouvernement donnait un autre signe encourageant en appliquant l'article 124 de la *Loi sur les tribunaux judiciaires*[3], une nouveauté de la législation du 17 juin 1988:

> «124. A compter du 1er juillet 1988 et par la suite à tous les 3 ans, le gouvernement forme un comité composé de 3 personnes et chargé d'étudier si la rémunération, le régime de retraite et les autres avantages sociaux des membres de la Cour du Québec sont satisfaisants et de lui faire part de son avis à cet égard.
>
> Dans le cadre de son mandat, le comité doit notamment tenir compte de la valeur relative de la fonction de juge par rapport à celle des autres fonctions supérieures au sein de l'État.»

Non seulement le gouvernement agissait-il avec célérité mais encore confiait-il cette importante tâche à une équipe d'une valeur exceptionnelle:

Jean-Denis Vincent
Président et chef de la direction
La Corporation Financière Alliance-L'Industrielle

René Paquet, LL.L.
Associé principal
Jolin, Fournier, Morisset, avocats

Charles-Albert Poissant, f.c.a.
Président du Conseil
et chef de la direction Donohue Inc.

Le Comité procéda à de sérieuses études et produisit son rapport le 21 avril 189.

Conformément à la loi, le rapport était déposé devant l'Assemblée nationale le 18 mai 1989.

Au niveau des principes et de leur application, ce rapport et les conclusions qu'il propose semb-

[3] L.R.Q. c. T-16

Lamer J which might be characterized as dicta. He is very careful to observe that such passages are not essential to the actual decision in Vaillancourt but make no mistake: these are no mere judicial ramblings that other judges in other courts can properly overlook.

In plain and simple words the Vaillancourt decision says that:

1. Valid penal legislation must define crime in accordance with the principles of fundamental justice. This is required by s. 7 of the Charter. Parliament can no longer define apples to be oranges or robbers to be murderers.

2. Valid penal legislation must require the Crown to offer real proof of every essential element of the criminal act. This is required by ss. 7 and 11(d) of the Charter. Parliament can no longer give the Crown licence to cut crucial evidentiary corners during the course of a criminal trial.

The words of Lewis Carroll might make the points more aptly than mine. In "Through the Looking Glass" Alice and Humpty Dumpty exchanged views as follows:

> "'There's glory for you!' 'I don't know what you mean by "glory",' Alice said. 'I meant, "there's a nice knock-down argument for you!"! 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected. 'When I use a word, 'Humpty Dumpty said in a rather scornful tone, 'it means just what I chose it to mean — neither more nor less.'"

In "Alice's Adventures in Wonderland" the King instructed the jury as follows:

> "'Write that down,' the King said to the jury, and the jury eagerly wrote down all three dates on their slates, and then added them up, and reduced the answer to shillings and pence."

The Supreme Court of Canada says that the Charter now commands us to approach criminal matters in a more reasoned and rational fashion.

A couple of examples will, I believe, serve to illustrate the pragmatic importance of Vaillancourt.

Section 362(4) of the Code states that in a bad cheque case a presumption of fraudulent intent arises upon proof of the facts that the accused issued a cheque and that it was nsf. I suggest that Vaillancourt surely means this law is not constitutionally valid: do the stipulated facts alone logically exclude the possibility that the accused was merely a poor keeper of records and careless? I hardly think so.

Section 348(2)(a) of the Code states that in a B & E with intent case the crown need only prove that the accused broke and entered a place. The court can then go on to conclude that the commission of an indictable offence was intended. Is this law constitutionally invalid! I suggest not: in most cases the break and entry can reasonably be considered strong circumstantial evidence that the accused person intended to commit some criminal act inside the premises. This section of the Code is not an evidentiary shortcut: rather, it is a codification of the common law and is founded upon principles of common sense. The Charter does not command us to abandon those principles: see the September 1, 1988 decision of the Supreme Court of Canada in *R. v. Kowlyk* [1988] 2 SCR 59. See also the somewhat less authoritative decision in *R. v. E.R. and R.R.* [1977] 3 WWR 557.[3]

I could offer other examples, but I shall not. Vaillancourt really is a decision which you must read and consider with some care. It is a document of philosophical and practical importance. I have not attempted to do any more than get your attention and spark your interest.

I do want to express some cautionary comments. After the Vaillancourt decision was delivered, some respected legal scholars predicted that much more would inevitably and soon follow. it was said for instance that the old cases limiting the use of drunkenness as a "defence" in criminal cases were certain to be cast into the legal dustbin. But it has happened otherwise. On December 15, 1988 the Supreme Court of Canada decided the cases of *Bernard* [1988] 2 SCR 833 and *Quin* [1988] 2 SCR 825. These decisions reaffirm the old rules which speak of specific and general intent crimes and it is pointedly said that no apology is needed for the fact that these rules are based upon social policy rather than legal theory. The majority decision in *Bernard* makes for fascinating reading; it was authored by McIntyre J who was the lone dissenter in Vaillancourt! One suspects he savoured every word he wrote in *Bernard*! Con-

3. When this paper was written, the November 17, 1988 decision of the Ontario Court of Appeal in *R. v. Nagy* was not reported, and I was not aware of it. In that case (which is now reported: 45 CCC (3d) 350), the court held that the presumption in s. 349(2) of the Code offends s. 11(d) of the Charter but is justified under s. 1 of the Charter. I declined to follow the reasoning in Nagy in the case of *R. v. Fraser* decided in the Territorial Court of Yukon May 8, 1989 and noted 7 WCB (2d) 274. In that case I elaborated upon the reasoning expressed in this paper and held that the B & E presumption does not offend the Charter. *R. v. Nagy* was followed in the B.C. case of *R. v. Campbell,* decided June 16, 1989 and noted 8 WCB (2d) 74.

versely, the Chief Justice and Lamer J must have signed their dissenting judgment with at least a little bitter frustration. It is, I believe, safe to say that the *Bernard* decision was intended to place some judicial reign upon the more extravagant interpretations of the Vaillancourt decision.

I have only two more things to tell you.

First, I earlier said that Vaillancourt's case was wrongly decided. I say that because in *R. v. Stevens* decided in the Supreme Court of Canada June 30, 1988 and reported [1988] 1 SCR 1153, it was held that an accused person cannot invoke the Charter upon his trial for misdeeds done before the Charter came into force. Vaillancourt's lawyer tells me that he spent more than a few restless nights hoping that nobody would raise that issue during Vaillancourt's case, and nobody did.

Finally, whatever happened to Yvan Vaillancourt? He pled guilty to robbery in January 1988: the passing of sentence was suspended and he was placed on probation for 3 years.

NOTICE

1990 CAPCJ CONFERENCE

CHATEAU FRONTENAC

QUEBEC, QUEBEC

September 12, 1990 - September 15, 1990

"Plan your attendance now".

CONTACT:

Judge Louis Remillard

Cour du Quebec

300 boul. Jean-Lesage

Quebec City, Quebec

G1K 8K6

Tel: (418) 649-3540

Remarques de l'honorable Claude Bisson judge en chef du Québec a l'occasion de la journée du barreau de Montréal*

Mercredi 6 Septembre, 1989

Traditionellement, la rentrée des tribunaux, qui s'inscrit dans le cadre de la journée du Barreau au début de septembre de chaque année, est l'occasion propice pour faire le bilan de l'activité judiciaire de l'année écoulée.

A peu près au même moment où je débutais dans mes fonctions de juge en chef à la fin du mois de mai 1988, une nouvelle équipe prenait charge du ministère de la Justice du Québec: en avril 1988, Me Jacques Chamberland était devenu sous-ministre et, en juin 1988, l'honorable Gil Rémillard prenait la direction de ce ministère.

Grâce à la compréhension et à la clairvoyance que tous deux ont manifestées, j'estime que le bilan des relations des tribunaux avec l'administration est très positif.

Certes, il n'est pas facile de faire disparaître tous les irritants — dont le moindre n'est pas le délai dans la mise en place de services que nous considérons essentiels — mais ces irritants sont sans doute le nécessaire sous-produit de contraintes avec lesquelles il faut apprendre à vivre.

L'aspect réconfortant est de constater que les plus hautes autorités du ministère de la justice comprennent nos besoins et manifestent, comme c'est le cas présentement, un réel souci d'y donner suite.

Une rencontre comme celle de ce matin fournit également l'occasion d'exprimer certaines préoccupations.

Celle dont je voudrais vous faire part est en relation avec l'absence voulue et remarquée des juges de la Cour du Québec, y compris le juge en chef, les juges en chef associés et adjoints.

J'aurais pu, dans les remarques que je vous adresse, passer cette situation sous silence ou encore n'y faire qu'une brève allusion banale.

L'autre choix était de vous faire part de mes réflexions.

La première voie aurait été facile; la seconde l'était beaucoup moins. J'ai opté pour cette dernière.

Si j'ai résolu de m'engager dans cette voie, c'est parce qu'au niveau des principes, je me sens solidaire des autres juges, qu'ils soient de nomination provinciale ou fédérale.

J'aimerais toutefois faire deux commentaires préliminaires:

— les idées que j'exprime n'engagent aucun autre juge, qu'il soit de nomination fédérale ou provinciale

— ce n'est ni mon rôle ni ma fonction ni mon intention d'intervenir dans la technique du règlement du problème à la base de l'abstention des juges de la Cour du Québec pas plus d'ailleurs que dans l'échéancier que les autorités se sont fixées pour dénouer l'impasse.

Mes propos me sont plutôt dictés par plus de vingt années de magistrature et sont exprimés dans le respect des attributions de chacun.

La tradition constitutionnelle britannique à laquelle nous adhérons veut que le pouvoir judiciaire jouisse d'une place spéciale en parallèle des pourvoirs exécutifs et législatif.

La pierre d'assise du pouvoir judiciaire, c'est l'indépendance de la magistrature.

Dans l'état actuel des choses, cette indépendance ne veut pas dire que le pouvoir judiciaire est libre de toutes contraintes. Par ailleurs, c'est la responsabilité des pouvoirs exécutif et législatif de veiller à protéger cette indépendance. Je serais inquiet d'une société qui mettrait de côté cet engagement.

Cette indépendance judiciaire ne peut être assurée que dans la mesure où les pouvoirs exécutif et législatif se réconnaissent investis de la mission de pouvoir adéquatement aux conditions matérielles des juges.

Au Québec, j'estime que cette mission comporte plus particulièrement la recherche d'un maintien de l'équilibre historique dans les conditions de tous les groupes de juges qui participent à l'administration de la justice.

Les rédacteurs de la *Loi constitutionnelle de 1867*- ceux qu'on a appelés les Pères de la Confédération — ont voulu que l'administration de la justice relève des provinces.[2]

Normalement, il s'en serait suivi qu'à l'in-

[1] Publié avec la permission du juge en chef
[2] L'Acte de l'Amérique du nord britannique, 1867, 30-31 Vict. c. 3 (R.-U.) art. 92, para. 14