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Journal

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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

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Speaking of hymns, I am reminded of the following biblical pasage / en parlent des hymnes, ça me fait penser à l'extrait biblique suivant.

COURT REFORM IN ANCIENT TIMES/
LA REFORME DE LA COUR DANS LE TEMPS ANCIEN

Oh the morrow Moses sat to judge the people, and the people stood about Moses, from morning till evening. When Moses' father-in-law saw all that he was doing for the people, he said, "What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening?" And Moses said to his father-in-law, "Because the people come to me to inquire of God; when they have a dispute, they come to me and I decide between a man and his neighbours, and I make them know the statutes of God and his decisions." Moses' father-in-law said to him, "What you are doing is not good. You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone. Listen now to my voice; I will give you counsel, and God be with you! You shall represent the people before God, and bring their cases to God; and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do.

Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. And let them judge the people at all times; every great matter they shall bring to you but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you. If you do this, and God so commands you, then you will be able to endure, and all this people also will go to their place in peace."

So Moses gave heed to the voice of his father-in-law and did all that he had said. Moses chose able men out of all Israel, and made them heads over the people, rulers of thousands, of hundreds, of fifties, and of tens. And they judged the people at all times; hard cases they brought to Moses, but any small matter they decided themselves. Then Moses let his father-in-law depart, and he went his way to his own country.

Le lendemain, comme Moïse siégeait pour juger le peuple, et que le peuple se tenait devant Moïse, depuis le matin jusques au soir, Le beau-père de Moïse avant vu tout ce qu'il faisait au peuple, lui dit: Qu'est-ce que tu fais au people? D'ou vient que tue es seul asis, et que tout le peuple se tient devant toi, depuis le matin jusques au soir? Et Moïse répondit à son beau-père: C'est que le peuple vient à moi, pou s'enquérir de Dieu. Quand ils ont quelque cause, ils viennent à moi; alors je juge entre l'un et l'autre, et je *leur* fais entendre les ordonnances de Dieu et ses lois. Mais le beau-père de Moïse lui dit: Tu ne fais pas bien. Certainement, tu succomberas, et toi et même ce peuple qui *est* avec toi; cela *est* trop pesant pour toi, et tu ne saurais faire cela toi seul. Encoute donc mon conseil; je te conseillerai, et Dieu sera avec toi. Sois pour le peuple auprès de Dieu, et rapporte les causes à Dieu; Instruis-les des ordonnances et des lois, et fais-leur entendre la voie par laquelle ils doivent marcher, et ce qu'ils auront à faire.

Et choisis-toi d'entre tout le peuple des hommes vertueux, craignant Dieu, des hommes véritables, haïssant le gain déshonnête, et établis sur eux des chefs de milliers, des chefs de centaines, des chefs de cinquantaines, et des chefs de dizaines; Et qu'ils jugent le peuple en tout temps; mais qu'ils te rapportent toutes les grandes affaires, et qu'ils jugent toutes les petites causes; ainsi ils te soulageront et ils porteront une parti *de la charge* avec toi. Si tu fais cela, et Dieu te le commande, tu pourras subsister, et même tout le peuple arrivera heureusement en son lieu.

Moïse donc obéit à la parole de son beaupère, et fit tout ce qu'il avait dit. Ainsi Moïse choisit de tout Israël des hommes vertueux, et il les établit chefs sur le peuple, chefs de milliers, chefs de centaines, chefs d-cinquantaines, et ches de dizaines, Qui devaient juger le peuple en tout temps; mais ils devaient rapporter les choses difficiles à Moïse, et juger de toutes les petites affaires. Et Moïse laissa aller son beaupère, qui s'en retourna en son pays.

President's Page

by Associate Chief Judge / par le juge en chef adjoint Ken Page

Travels

From Vancouver '87 to Halifax '88 and in between visits to most parts of the country. I attended the annual meetings in Alberta, Newfoundland, Quebec, Ontario and Saskatchewan as well as The New Judges' School in Val Morin and the Spring Executive Meeting in Montreal in March. I did miss visiting Nova Scotia last September but look forward to being there this year for our Annual Meeting. Regretfully I was unable to visit Manitoba or New Brunswick for their Annual Meetings due to other commitments. To all of you who have so graciously extended your hospitality to Alisen and me our sincere thanks. We will long remember all the kindnesses accorded to us during our visits.

The Canadian Judicial Centre

By now you are all aware that David Marshall of the Supreme Court of the Northwest Territories was appointed Executive Director of the Centre in March of this year. At the time of writing this report an Associate Director of the Centre has not yet been appointed nor has a site for the Centre been selected. Both of these decisions are high priority items for the Interim Management Board of the Centre. A meeting to decide these issues is now scheduled for June 28th and it is my hope that decisions will have been made in this regard before this report is printed. You should be aware that the Executive of your Association unanimously passed the following resolution at the spring Executive Meeting which took place in Montreal on March 26th and 27th.

> "In order to maintain the quality and importance of on-going education for Judges of all Courts across Canada as expressed in the Stevenson Report, it is resolved by the Canadian Association of Provincial Court judges that the criteria for selection of the Director and/or the Associate of the Canadian Judicial Centre be the following:
> (1) that at least one of the above be bi-lingual
> (2) that they represent both Provincial and Federal Courts
> (3) that both receive equal remuneration and benefits."

I expect that this resolution will be respected by the Board with the possible exception of salary and benefits. This is a difficult issue due to funding restrictions faced by the Centre but I

Voyages

Vancouver en 87, Halifax en 88 et plusieurs visites à travers le pays entre temps: Je suis allé aux réunions annuelles en Alberta, à Terre-Neuve, au Québec, en Ontario, en Saskatchewan ainsi qu'à la nouvelle école des Juges à Val Morin et à la réunion exécutive au printemps à Montréal. Je n'ai pas pu me rendre en Nouvelle-Ecosse en septembre dernier et suis d'autant plus content d'y venir pour notre réunion annuelle. C'est avec regrets que je n'ai pas pu assister aux réunions tenues au Manitoba et au Nouveau Brunswick à cause d'autres engagements. J'aimerais remercier tous ceux qui nous ont si gentiment reçu, Alisen et moi. Nous en gardons tous les deux de très bons souvenirs.

Le Centre Judiciaire Canadien

Comme vous le savez tous, David Marshall de la Cour Suprême des Territoires du Nord-Ouest a été élu Directeur Exécutif du Centre en mars dernier. Au moment où j'ai écris ce rapport ni un directeur adjoint ni un site pour le Centre n'ont été choisis. Ces deux choix sont des priorités que le conseil intérimaire de gérance du Centre devront décidés sous peu. Une réunion à cet effet est prévue pour le 28 juin et j'espére que l'on aura les résultats même avant que ce rapport soit publié. J'aimerais vous faire part d'une résolution, prise à l'unanimité par l'exécutif de votre association, à la réunion du 26 et 27 mars tenue à Montréal.

> Dans le but de maintenie la qualité et l'importance de l'éducation permanente des Juges du Canada à telle que suggerée par le rapport Stevenson, l'Association Canadienne des Juges des Cours Provinciales a adopté des critéres quant au choix du directeur et/ou de son adjoint pour le Centre Judiciare Canadien tel qui suit:
>
> (1) qu'au moins un de ceux ci-haut mentionnés soit bilingue
> (2) qu'ils représentent les tribunaux provinciaux et fédéraux
> (3) qu'ils reçoivent tous les deux une rémunération et des bénéfices identiques.

Je m' attends à ce que cette résolution soit respectée par le counseil sauf une possible exception quant aux salaires et bénéfices. Ceci constitue un sujet difficile à cause des restric-

hope it can be resolved so that the Centre can begin to function in the interests of both Benches.

Judicial Compensation Committee

By now you will have received the 1987 Judicial Survey prepared by our Committee Chairman, Ron Jacobson, with the aid of Judge Doug MacDonald. I think you will agree that it is a most worthwhile endeavour and one which must be kept up to date. In this regard Provincial representatives are earnestly requested to pass on current information to Ron Jacobson immediately since this survey will be the base upon which the work of your Committee on compensation will progress.

At the Spring Executive Meeting it was decided that the CAPCJ Executive Provincial Representatives adopt a compensation policy for all Provincial Court Judges of not less than parity in remuneration and benefits with Federal, County/District Court levels.

To implement this goal the Compensation Committee has sought the support of the Canadian Bar Association. The liaison between our Associations has strengthened in recent years and it is growing stronger. Traditionally the Bar has supported the Section 96 Bench in their endeavours and they now offer their support to our Bench. Perhaps it is time for our Judges to consider, or reconsider, the prospect of membership in the Canadian Bar Association. I would ask all of you to think carefully on this.

On June 18th Judges Scullion and Beaudoin of our Committee will be meeting with the Executive of the Canadian Bar Association in Ottawa to discuss our aims and the involvement by the Bar to implement them. In August I will attend the Canadian Bar meeting in Montreal to further these goals and at our Annual Conference in September in Halifax the President of the Canadian Bar Association will address our Conference. These are good links being forged and ones which I hope will lead to uniform National treatment with respect to salaries and benefits for all Provincial and Territorial Court Judges.

Reflections

It has been a busy but rewarding year. In moving about this land and meeting the Judges who make up the Bench I have been constantly impressed by the dedication they bring to their profession and the support they express for this Association. It is so important to create unity in this country with respect to the Administration of Justice. We all share the same problems albeit with local flavours. My hope is that this Association will strengthen and grow to provide for

tions de fonds éprouvées par le centre néanmoins j'espère que ce problème sera résolu dés que le centre pourra commencer à fonctionner ceci dans l'intérêt commun de la magistrature.

Comité de Compensations Judiciaires

Vous avez dû recevoir un sommaire judiciaire pour 1987 préparé par le Président du Comité, Ron Jacobson, avec la collaboration du juge Doug MacDonald. Il s'agit d'un effort trés appréciable et qui doit être mis à jour constamment, vous l'admettrez comme moi. Aussi, les représentants provinciaux se doivent de communiquer toutes informations courantes au plus tôt à Ron Jacobson étant donné que ce sommaire servira de base pour le travail du comité sur les compensations.

A la réunion du printemps passé il a été décidé que la ACJCP représentants provinciaux de l'Exécutif ont adopté une politique de compensations envers tous les juges de la Cour Provinciale à base paritaire des rémunerations et bénéfices du Cours du Fedéral, de Comté Territoires.

Afin d'atteindre ces fins, le Comité de Compensations a obtenu le support de l'Association du Barreau Canadien. Les rapports entre ces deux associations se sont solidifiés au cours des récentes années. D'une facon traditionnelle le Barreau s'est référé à l'article 96 l'AANB et il a maintenant offert son appui. Il est peut-être temps que nos juges considèrent ou reconsidérent la possibilité de se joindre à l'Association du Barreau Canadien. Je vous demande tous d'y réfléchir sérieusement.

Le 18 juin les juges Scullion et Beaudoin de notre comité se réuniront avec l'Exécutif de l'Association du Barreau Canadien à Ottawa pour discuter de nos buts et de la participation du Barreau afin de nous aider à les réaliser. En août, j'irai à la réunion du Barreau Canadien à Montréal pour mieux discuter de nos buts et en septembre, lors de notre conférence, le Président de l'Association du Barreau Canadien nous adressera la parole. Ceci constitue donc des liens solides et j'espère qu'ils aideront à obtenir un traitement national uniforme quant aux salaires et bénéfices pour les juges de toutes les cours provinciales et territoriales.

Reflexions

Cette année a été trés occupée mais ce travail m'a apporté beaucoup. Je suis vraiment impressionné par la dédication de nos juges envers la profession ainsi que leur support en ce regarde notre association. Il est trés important que nous sachions créer cette unité concernant l'administration de la justice à travers tout le

IN LIGHTER VEIN

(Editor's Note: It seems that all I can remember of my attendance at the "New Judges Program" a dozen years ago is the work we did. It appears that our colleagues who attend these days, however, do considerably more than just work and the following would appear to be a testimonial to the feelings of harmony and camaraderie fostered by the program. Both conveners and participants alike of the 1988 version of the "New Judges Program" deserve the "praises" echoed in this "hymn").

THE JUDGES' THANKSGIVING — A HYMN

(Tune: Praise God From Whom All Blessings Flow)

We think Quebec is simply grand —
At Far Hills Inn near Val Morin
Where our association met
To teach judicial etiquette.

We've wineo and dined with Gallic flair
On "tarte au sucre" and "fruits de mer"
Et aussi de rôti de boeuf
The "Anglos" never get enough.

From whom do all these blessings flow?
From Cuddihy and Bordeleau
And for supplies of wine and beer
We thank our friend André St. Cyr.

Composer: Wolfgang Walmsley
24 March 1988

* *

We are indebted to our British Columbia colleagues for the following two inserts:

... and then there was the R.C.M.P. Constable on patrol in Cunliffe Barnett country on a very cold day who came upon a motorcyclist stalled by the roadside who was swathed in protective clothing and helmet.

"What's the matter?" asked the Constable.
"Carburetor's frozen."
"Just piss on it. That'll thaw it out."
"I can't".
"O.K. I will."

The Constable did so. The procedure was effective. The bike started and the rider drove off.

Some time later the detachment office received a note of thanks from the father of the motorbike rider. It read:

"On behalf of my daughter who recently was stranded ..."

. . . . . from the transcript of remarks made by Judge W.H.S., Dixon of the Juvenile and Family Court in Vancouver, at the Magistrates' Conference at Penticton June 14th, 1961:

In conclusion, you gentlemen have got to adopt a sort of a hard shell, because no matter what you do, you are going to be criticized.

— If you are under 50, you lack mature judgment

— If you are over 50, you are on old fogey.

— If you are married, you let your wife tell you what to do.

— If you are not married, you don't have an understanding of family problems.

— If you have children, you should do a better job with your own before you tell others how to raise them.

— If you have none, you are out of touch with the younger generation.

— If you put a child on probation, you are mollycoddling him.

— If you send a child to an institution, you are depriving him of his constitutional rights.

— If you give information to the press, you are a publicity hound.

— If you don't release news stories on juvenile cases, you are hiding something.

— If you attend Judges' meetings, you are looking for a free vacation; and

— If you don't attend, well you are just not interested in keeping up with developments in the field.

de droit et de jurisprudence. L'appel lui-même est accompagné de mémoires dans lesquels les avocats exposent leurs arguments, de volumes contenant les procès-verbaux et les jugements des juridictions inférieures, des livres qui font autorité sur le sujet, le tout représentant souvent plusieurs milliers de pages. Les documents concernant la loi 101 qui a fait du français la seule langue officielle du Québec — et sur laquelle la Cour suprême n'a pas encore rendu son jugement — représentent 50 volumes.

Un de ses collaborateurs rapporte que le vendredi soir, le juge en chef Dickson prend quelquefois avec lui quatre serviette bourrées de documents qu'il doit lire pour le lundi matin. Un vendredi soir, le juge Estey avait emporté chez lui trois cartons et deux serviettes de livres; il est revenu le samedi pour prendre un autre carton. En outre, les juges doivent lire les arrêts pertinents repérés par leurs collaborateurs dans la bibliothèque de la Cour, dont les rayons couvrent mille ans de droit anglo-saxon.

Antonio Lamer, cinquante-quatre ans, est le plus jeune membre de la Cour suprême. Il a passé son enfance dans les quartiers durs de l'est de Montréal: «Dans le bloc où j'habitais, tous les gars sont passés par le pénitencier, sauf deux: moi, qui suis devenu avocat, et un autre qui est dentiste.»

Selon lui, la charte va encourager la reconnaissance des droits de l'individu, c'est-à-dire des droits que nous avons en tant que personnes et non en tant que membres de groupes majoritaires ou minoritaires. «Il n'y a rien de plus important que la personne», dit-il. Et c'est justement parce qu'ils ont la tâche d'interpréter la Charte des droits que les juges de la Cour suprême du Canada sont peut-être les personnes les plus puissantes du pays.

ATTENTION

A message as old as the Journal itself/ùn message aussi vieux que le Journal lui-même.

The Journal will, in the final analysis, be as strong as the material submitted to it. Submissions from all parts of the country are encouraged and solicited, as with this cooperation the Journal can exist as a clearinghouse for ideas and issues that are presently facing the provincial bench, and can provide a means of knowing ourselves better.

Comme analyse dernière, le Journal sera aussi robuste que ses contenus. Nous vous prions, d'un bout à l'autre de notre beau Pays, de bien nous faire parvenir vos soumissions, car c'est seul qu'avec votre coopération que le Journal pourrait existé comme déblaiement des idées et les discussions qui, présentement, font face a la Magistrature, et pourrait, avec autant d'importance, nous fournir avec des moyens qui nous permettraient de mieux s'entrendre.

its member Associations a vehicle which will promote national unity not only in the administration of justice but also in equal treatment for the Judges of this Bench.

I wish to thank my Executive, the Committee Chairmen, the Provincial representatives and especially all of you for the support and encouragement you have given me in this my year in office.

pays. En somme nous éprouvons tous, des problèmes similaires avec quelques différences régionales. J'ose espérer que notre association se renforcira et grandira afin de subvenir aux besoins des membres de notre association que ce soit pour promouvoir l'unité nationale de l'administration de la justice et pour l'égalité des traitements de nos juges.

Je voudrais remercier tout spécialement les membres de l'Exécutif, les présidents du comités les représentants provinciaux ainsi que vous tous pour le support et l'encouragement que vous m'avez témoigné au cours de cette année.

— NOTICE —

1988 C.A.P.C.J. CONFERENCE
Chateau Halifax
Halifax, Nova Scotia

SEPTEMBER 10, 1988 to
SEPTEMBER 13, 1988

"Now is not too early to plan your attendance!"

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Editorial Page

Children, particularly young children, have never been ideal witnesses in court. The reasons for that are numerous but quite easy to comprehend. Those reasons have nothing to do with whether a child is likely to be truthful, and they have very little, if anything, to do with memory or ability to recall events. Indeed, studies show it has more to do with ability and willingness to recount than to recall.

In the past the matter of eliciting evidence from child witnesses has not been particularly problematic because there were few prosecutions to which a child's testimony was crucial. In more recent times, however, there has been a dramatic change generated by the increased number of prosecutions for sexual abuse of children. In the majority of those cases the child's evidence is crucial because more often than not the child is both the sole witness to the event, apart from the accused who cannot be compelled to testify, and also the victim of the abuse.

Our adversarial system, as it has evolved, has not been conducive to eliciting evidence from children. In describing events we have demanded a precision of language that has been virtually beyond the capacity of a child's vocabulary. In fact, cases of sexual abuse of even older teenagers have been known to fail because of the inability to describe the particular sex act and parts of the anatomy upon which abuse was perpetrated. However, it is not surprising that a child with limited vocabulary facing the starkness of a courtroom filled by strange adults would feel too intimidated to elucidate a topic already subject to the taboo our society has constructed around sexual activity and the ''private parts''. Combine that with the fact that the child was often under threat of grievous harm from the accused, also present in the courtroom, and it is easy to conclude that a child would have to be very mature indeed to make a good witness.

With those factors in mind, lawmakers in recent years have attempted development of a wider range of techniques to make it easier for children to give evidence. For example, the use of ''anatomically correct'' dolls has been introduced to help alleviate the limitations imposed by vocabulary; screens shielding the witness from the view of the accused and *vice versa* are now permitted in order to remove non-verbal intimidation of the witness by the accused in the courtroom; and videotaped interviews of young children in private have been sanctioned by law and are now in use in our courtrooms.

Still the difficulties of adjudicating cases with child witnesses has not been eliminated. For example, just recently a case of sexual assault made local headlines when it was dismissed at the preliminary hearing stage because a young child failed to adopt the evidence shown in the videotape as her own.

One can understand the public consternation at the idea that, as colloquially expressed, the case was dismissed just because the child would not identify herself as the person in the video when all present could clearly see it was her.

To see a case fail on that basis alone can be disturbing to the public. But, of course, those of us in the legal profession realize it is not as simple as it appears and that ''adopting'' evidence as your own involves much more than simply ''identifying'' it as yours.

As to how much further we can go in facilitating the giving of testimony by young children before eroding the right of the accused ''to make full answer and defence'' by testing the veracity and credibility of witnesses' testimony is anyone's guess. One thing seems clear, however; we need more innovations yet before all of the difficulties associated with child witnesses are overcome.

Judge M. Reginald Reid
Editor-in-Chief

justes et qui, par conséquent, ont vu un puissant instrument de réforme dans les grands principes proclamés par la Charte. «Cette charte est stimulante, innovatrice, dit Willard Estey, et en plus elle passionne tout le monde.»

Mais ce texte a aussi grandement accru la charge de travail de la Cour suprême, qui n'a les moyens d'entendre qu'une centaine de causes par an. Deux catégories de gens ont un droit d'appel automatique devant elle. D'abord, les justiciables dont l'acquittement prononcé par un tribunal criminel a été renversé par une cour d'appel provinciale saisie par le ministère public. Ensuite, ceux dont la condamnation a été maintenue par une cour d'appel, lorsque l'un des juges a exprimé une opinion contraire sur un point de droit.

En 1987, la Cour suprême a entendu 32 appels de ce type et 31 causes invoquant la Charte des droits et libertés. Il ne restait de la place que pour 29 appels ordinaires portant sur les milliers de causes jugées chaque année dans des domaines comme la famille, la commerce ou les biens. «Nous ressemblons à une compagnie aérienne qui a vendu trop de sièges, observe le juge Estey. Notre avion peut emporter 100 passagers, alors qu'il y en a 1000 qui veulent monter à bord.»

Willard Estey, soixante-huit ans, regarde la télévision pour «l'espace, le sport et l'actualité» et lit des revues scientifiques et des magazines d'aviation. Il s'intéresse à ce dernier sujet depuis la deuxième guerre mondiale, pendant laquelle, détaché auprès de l'armée de l'Air américaine, il a participé à des raids aériens sur le Japon.

A l'extrémité opposée du couloir se trouve le bureau de William Rogers McIntyre qui, avant sa nomination à la Cour supréme du Canada, en janvier 1979, était juge à la cour d'appel de Colombie-Britannique.

Né à Lachine, au Québec, William McIntyre, soixante-dix ans, a été avocat pendant vingt ans à Victoria. Il trouve que le climat, à Ottawa, est «abominable» et que la Cour suprême impose à ses membres «un labeur impitoyable». Selon lui, la Cour a commis l'erreur d'accepter trop de causes, et le nombre de celles-ci devrait être réduit de moitié. «J'ai envie de prendre ma retraite, ajoute-t-il, et je crois que la majorité d'entre nous voudrait en faire autant.» Pour les juges, l'âge de la retraite obligatoire a été fixé à soixante-quinze ans.

Gerald Le Dain, un avocat montréalais de soixante-trois ans nommé à la Cour en mai 1984, trouve, lui aussi, le rythme de travail effrayant. «Je ne me vois pas travailler ainsi jusqu'à soixante-quinze ans. J'aimerais avoir le temps de profiter de mes petits-enfants avant que le match ne soit fini pour moi.» C'est une image qui lui va bien: il rêvait autrefois de devenir joueur de base-ball professionnel. Aujourd'hui, il se contente de jouer au tennis et de lire des récits de guerre, qui le fascinent pour ce qu'ils révèlent sur »les comportements humains sous pression».

Le juge Gérard La Forest, né à Grand Falls, au Nouveau-Brunswick, et âgé de soixante-deux ans, a été nommé à la Cour suprême en 1985. Il partage les sentiments de ses collègues sur la charge de travail: «Servir son pays, dit-il, est la seule raison qui justifie qu'un être sensé puisse désirer venir ice.»

Certains avocats se plaignent de la priorité accordée par la Cour suprême aux causes relevant de la Charte, car elle réduit leurs chances de faire juger des causes civiles ordinnaires. Dans un mémoire déposé en 1987, l'Association du Barreau canadien préconisait la création d'une cour chargée des affaires criminelles pour soulager la Cour suprême. Celle-ci s'y est opposée. Ses membres ont fait valoir qu'ils avaient la responsabilité d'entendre les appels au criminel en plus des autres types de causes, et qu'ils réussiraient à en entendre plus si les avocats étaient plus concis. En 1987, la Cour suprême a examiné 386 demandes d'appel et en a reçu 66.

Le 4 mars 1982, Bertha Wilson, soixante-quatre ans, est devenue la première femme à siéger à la Cour suprême. Née en Ecosse, elle a pratiqué le droit à Toronto et été juge à la cour d'appel de l'Ontario. Les arrêts de la Cour suprême, affirme-t-elle, doivent être rédigés «en tenant compte du contexte social dans lequel ils seront appliqués».

L'autre femme qui siège à la cour, Claire L'Heureux-Dubé, a été nommée en 1987 alors qu'elle était juge à la cour d'appel du Québec. Agée de soixante ans, elle pratique régulièrement le ski et fait presque tous les jours de la natation à 6 h 30 du matin dans la piscine d'un hôtel d'Ottawa. La ville de Québec, où elle a passé la plus grande partie de sa vie, lui manque, ainsi que le «style familial» de la cour d'appel. «A Québec, je travaillais aussi comme un forçat, se rappelle-t-elle, mais nous étions des forçats heureux.» Elle ajoute que ses collègues de la Cor suprême ont tout fait pour l'aider à s'acclimater, et que c'est maintenant chose faite. Elle travaille souvent jusqu'à 2 heures du matin.

La somme de lectures qu'un juge doit absorber dépasse l'entendement. Un dossier de demande d'appel peut se baser sur six volumes

CONNAISSEZ-VOUS CES PUISSANTS PERSONNAGES?

par Rae Corelli

Ils sont neuf: sept hommes et deux femmes. Ils ont tous renoncé à leur carrière dans l'enseignement ou dans la pratique privée du droit pour accepter un poste de magistrat. Ils travaillent souvent quatre-vingts heures par semaine et, avec un âge moyen de soixante-quatre ans, composent la Cour suprême la plus jeune de l'histoire du Canada. Et aussi la plus puissante.

Cette puissance accrue date en grande partie de la matinée du 17 avril 1982, jour où la reine promulgua la Constitution du Canada et la Charte des droits et libertés. Depuis, tout le droit est soumis à la Constitution, et c'est à la Cour suprême qu'il appartient, en dernière instance, d'interpréter la nouvelle Charte des droits et libertés.

La Cour suprême est logée dans un immeuble de quatre étages en granit, à la façade ornée d'une colonnade, juste à l'ouest du Parlement. Un drapeau canadien est hissé chaque jour à un mât planté à l'extrémité ouest de l'immeuble. A l'est, un autre mât n'arbore son drapeau que pendant les sessions de la Cour, c'est-à-dire du 1er octobre au 17 décembre pour la session d'automne, du 25 janvier à Pâques pour la session d'hiver, et de Pâques au 25 juin pour la session de printemps.

Derrière les portes de bronze se déploie un majestueux hall en marbre. Tous les avocats qui se présentent pour plaider leur cause dans les salles d'audience lambrissées de noyer doivent passer par un détecteur de métal. Les autres visiteurs attendent dans le hall qu'un gardien se soit assuré par téléphone qu'ils ont bien rendez-vous. Au deuxième étage, près de l'ascenseur public, un autre garde est assis devant une porte virtrée, verrouillée. Derrière cette porte, les bureaux des juges et de leurs secrétaires donnent sur un couloir pavé de marbre qui court sur trois côtés de l'immeuble.

Le juge en chef actuel, Brian Dickson, se lève pour m'accueillir et, la main tendue, se dirige vers moi avec la démarche caractéristique de quelqu'un qui porte une jambe artificielle. Il a perdu presque toute sa jambe droite en 1944, en France, où il servait dans l'artillerie.

Depuis que la Cour suprême du Canada a été chargée d'interpréter la Charte des droits et libertés, souligne le juge Dickson, elle est devenue «un peu semblable» à celle des Etats-Unis. «De plus en plus, nous nous intéressons aux travaux de la Cour américaine, poursuit-il, non pas pour l'imiter servilement, mais plutôt comme point de départ avec lequel nous pouvons être d'accord ou en désaccord.»

Le juge Dickson parle avec assurance du droit et de la justice, en choisissant ses mots avec soin. Mais lorsque la conversation aborde sa vie privée, il est visiblement mal à l'aise.

Le juge en chef et sa femme habitent dans une ferme à 40 kilomètres à l'ouest d'Ottawa. Ils y élèvent des chevaux, et Brian Dickson, qui a soixante-douze ans, commence habituellement ses journées à 6 heures du matin par trois quarts d'heure d'équitation. Avocat à Winnipeg et juge au Manitoba avant sa nomination à la Cour supréme en avril 1984, il travaille presque tous les soirs, souvent le week-end, et il passe une bonne partie de ses trois mois de vacances judiciaires d'été à rédiger des arrêts. Il n'est pas allé au cinéma depuis dix ans et ne lit guère de livres sur un autre sujet que le droit. Son salaire est de 155 700 $ par an. Celui des autres juges est de 143 900 $. Les avocats des grandes villes du Canada ayant l'âge et l'expérience d'un juge de la Cour suprême gagnent deux ou trois fois plus.

Dans le bureau voisin de celui de Brian Dickson, le juge Willard Zebedee Estey se laisse tomber dans un fauteuil et repousse quelques piles de dossiers pour pouvoir poser ses pieds sur la table à café. Avant d'être nommé à la Cour supréme du Canada, il était juge en chef de la division de première instance de la Cour suprême de l'Ontario. Il faisait partie de ces nombreux juges de première instance ou de cour d'appel qui, pendant des années, se plaignaient de devoir appliquer des lois qu'ils estimaient in-

* Le Juge, Jean Beetz, qui était juge à la cour d'appel du Québec avant d'être nommé à la Cour suprême en 1974, décline poliment mais fermement toute entrevue.

Dupuis que la compilation de cet article, M. le Juge Willard Zebedee Estey a pris son retraite. M. John Sophinka, un avocat distingué de Toronto, a été nommé pour lui remplacer.

Cet article est publié avec la permission spéciale du Périodiques Reader's Digest Limitée et du Maclean Hunter Limitée. Il a paru dans l'édition du Sélection du Reader's Digest de mai 1988.

News Briefs

QUEBEC

Nominations

Cour provinciale

M^e^ Jean Alarie, sous-ministre associé aux Services judiciares au ministère de la Justice et qui occupait la fonction de sous-ministre par intérim au même ministère, a été nommé le 30 mars 1988, juge de la Cour provinciale pour le district de Québec, avec effet à compter du 11 avril 1988.

DÉCES

C'est avec beaucoup de chagrin que nous avons appris le décès de notre collègue le Juge Raymond Boily de la Cour provinciale à Québec, survenu le 12 mars dernier. Il avait auparavant été vice-président à la Commission de police du Québec. À Madame Boily et à toute la famille, nous offrons nos plus sincères condoléances.

ONTARIO

Appointments

His Honour Judge John D. Takach, Brampton, effective April 5, 1988. Judge Takach is a former Crown Attorney, Director of Crown Attorneys, Deputy Director of Criminal Law, Assistant Deputy Attorney General, Criminal Law and at the time of appointment was Deputy Solicitor General.

Judge Takach is also widely known for his co-authorship of the following: (1) McLeod, Takach and Segal, **Criminal Code Driving Offenses,** (2) **Breathalyzer Law in Canada,** and (3) McLeod, Takach, Morton and Segal, **The Canadian Charter of Rights.**

Deaths

His Honour Judge Frederick J. McMahon, Toronto, deceased March 6, 1988; appointed October 1, 1969; retired July 31, 1982. Honorary Life Member of the Association of Provincial Criminal Court Judges of Ontario since October 23, 1982.

His Honour Judge Robert J. Graham, D.S.O., C.D., U.E., Oakville, deceased March 13, 1988; appointed March 20, 1969; retired February 26, 1983. Honorary Life Member of the Association of Provincial Criminal Court Judges of Ontario since 1983.

His Honour Judge John W. Burridge, Woodstock, deceased March 31, 1988; appointed February 27, 1974, Kitchener; retired September 10, 1984.

His Honour Judge Thomas J. Graham, Toronto, deceased April 21, 1988; appointed January 2, 1964; retired July 31, 1984. He was an Honorary Life Member of the Association of Criminal Court Judges of Ontario.

ALBERTA

Appointments

His Honour Judge Brian Fraser, effective May 12, 1988. Judge Fraser will be conducting the rural circuit out of Edmonton.

His Honour Judge Clayton Spence, effective July 4, 1988. Judge Spence will be sitting in Fort McMurray.

Retirements

His Honour Judge H.H. Aime, Fort McMurray, effective May 1, 1988.

YUKON

Resignations

Chief Judge D. Ilnicki, Whitehorse, effective June 2, 1988. Chief Judge Ilnicki has taken up residence with her family in Ottawa.

ALL YOU EVER WANTED TO KNOW ABOUT THE SUPREME COURT BUT DIDN'T HAVE THE OPPORTUNITY TO ASK

by Judge M. Reginald Reid (Editor-in-Chief)
Provincial Court of Newfoundland

On May 11, 1988 the Right Honourable Brian Dickson, Chief Justice of Canada, was hosted to a luncheon by the Law Society of Newfoundland, St. John's. At the luncheon, attended by members of the Law Society, the Judiciary and the Press, the Chief Justice gave a brief address in which he outlined "the process behind the judgments" in the Supreme Court. What follows is an outline of what His Lordship had to say as noted by your editor.

During his address the Chief Justice suggested that much of what transpires in the formulation of judgments in the Supreme Court is unknown not only to the general public but also to those of us in the legal profession. Today, however, in the age of the Charter of Rights and Freedoms the Supreme Court has become a much more visible institution. It is much more in the public eye and while the Justices do not seek publicity for themselves or the Court, it is recognized that the public may want the Court to be more open and visible.

The Chief Justice noted that a significant number of cases come to the Supreme Court as a matter of right. He noted there exists:

(a) a right of audience on a reference;

(b) an appeal as of right when an acquittal is reversed at the appellate level; and

(c) an appeal as of right when there is a dissent on a point of law in a Provincial Court of Appeal.

As a matter of right, from 90 to 100 cases a year come before the Court. This, unfortunately, takes away the control "we have over our workload" the Chief Justice declared.

His Lordship remarked that just recently the Supreme Court started to use video conferencing with T.V. and satellite, and this has proven to be "remarkably successful." It was used by 77 applicants last year. It was found to be equally as good as if counsel were before the Court in person. It enabled counsel to present full argument without leaving their home cities, resulting in savings of counsel time and client's money. The use of such electronic appearances "gives people greater access to the Court" which in itself is a desirable goal.

During the course of his address, the Chief Justice noted "it's sometimes said by people who should know better . . . . . (the Court) . . . . is only interested in Charter cases." However, he asserted "this is not borne out by the facts." He pointed out that one-third of the cases coming before the Court come as a matter of right. In 1987 there were 386 applications for leave to appeal, of which 66 or 67 percent were granted.

The Chief Justice informed the gathering that the list of cases waiting to be heard is slowly shrinking, there being less than a year's wait now for cases that have been subscribed. This goal is being accomplished by:

(a) sitting more days;

(b) limiting time on oral argument, and

(c) hearing more cases per day.

It was pointed out that unlimited oral argument can be time-consuming and indeed exasperating. Speaking of exasperation, the Chief Justice was reminded of a story about a Supreme Court Justice who listened at length to counsel go over points of law already very familiar. The Justice said to the lawyer: "really, Counsel, give me credit for knowing somthing about the case", to which counsel replied: "that's the mistake I made in the Court below."

The moral of the story is that oral argument cannot be cut off entirely, but quality of argument has no bearing on the length. By limiting oral arguments to one hour each, the Court is able to hear two cases a day and hence accelerate the time it takes to get a case through the Supreme Court process.

Feedback on this new procedure is positive according to the Chief Justice. Concerning the time limit on oral arguments he pointed out that it

(a) concentrates the thought wonderfully;

(b) means counsel is better prepared; and

(c) since the Justices read the materials and know the issues ahead of hearing the ar-

tribunaux ont souligné la nécessité d'appliquer des peines qui découragent les autres personnes de commettre des infractions semblables. Cette préoccupation s'accorde avec l'objectif poursuivi par le législateur en matière de défense de l'intégrité de la personne et de sa protection contre les actes sexuels non désirés.

Dans les affaires rendues sous le régime des articles 246.1 et 246.2, les tribunaux ont également considéré que la violence aqui accompagnait l'agression constituait un facteur aggravant. Les tribunaux ont ainsi fait ressortir de façon adéquate l'aspect violent que comporte ce genre d'agression.

En règle générale, les tribunaux n'ont pas considéré que les antécédents sexuels ou le mode de vie de la victime justifiaient une peine moins lourde sous le régime des articles 246.1 et 246.2. En fait, dans certaines affaires où les antécédents de la victime avaient été soulevés, les tribunaux ont précisé qu'ils n'avaient rien à voir avec la sévérité de la peine. Ainsi, dans la décision *R. c. Terceira*[40], le fait que la plaignante était prostituée n'a aucunement influencé la détermination de la peine. De la même façon, dans la décision *R. c. Page*[41], le fait que la plaignante faisait de l'auto-stop au moment où le prévenu l'a fait monter à bord n'a pas été considéré comme un facteur atténuant.

Bien que le mode de vie et les antécédents sexuels de la victime ne semblent pas influencer la détermination de la peine, la présence ou l'absence de pénétration continue à être considéré comme un facteur aggravant par les tribunaux. Cette conception peut se justifier si les rapports sexuels sont considérés comme une atteinte plus grave à l'intégrité physique de la personne que les autres actes sexuels non désirés. Néanmoins, en faisant ressortir cet élément sans tenir compte du degré général de violence exercée contre la victime, cette dernière risque d'être forcée à mettre l'accent sur les détails physiques de l'agression. Cela pourrait entraîner le harcèlement de la victime à l'audience.

Il y a toutefois lieu de s'inquiéter encore plus de la façon dont les tribunaux déterminent les peines dans les affaires mettant en cause des victimes en bas âge. Bien que l'âge de la victime et l'abus d'une situation de confiance sont invoqués comme circonstances aggravantes, beaucoup d'affaires qui mettaient en cause des victimes en bas âge se sont soldées par l'imposition des peines minimales[42]. Étant donné la gravité et l'étendue du problème de l'abus sexuel des enfants, ces peines relativement légères sont quelque peu anormales. Si cette tendance se maintient, la protection des enfants contre les relations sexuelles demeurera limitée.

En ce qui concerns l'article 246.3, le nombre d'affaires publiées jusqu'à maintenant est trop limité pour qu'on puisse déceler les tendances des tribunaux en matière de détermination de la peine.

39. *Ibid.*, à la p. 10.2.11.
40. *Supra.*, note 29.
41. *Supra.*, note 25.
42. *R. c. Munsie, supra,* note 11; *R. c. Sandeman-Allen, supra,* note 14; *R. c. Milligan, supra,* note 21.

sous le régime de l'article 246.1, les tribunaux chargés d'appliquer l'article 246.2 ont de façon générale jugé non pertinente la question du comportement de la plaignante soulevée par l'avocat de la défense. Dans la décision *R c. Terceira*[32], par exemple, la cour a jugé que le fait que la plaignante était une prostituée n'atténuait pas le degré de gravité de l'infraction. Par ailleurs, la cour n'a pas considéré, dans la decision *R. c. Baynham et al.*, pertinent le fait que la plaignante avait pénétré de son plein gré dans la résidence où l'infraction avait été ensuite commise:

> **(TRADUCTION)**
> La question à laquelle je fais allusion est l'étourderie dont aurait fait preuve la plaignante en décidant de pénétrer dans la maison. Le fait que la plaignante ait manqué ou non de jugement en posant ce geste n'a rien à voir . . . Prétendre le contraire revient à dire que, en l'espèce, la plaignante, ou toute autre personne placée dans des circonstances analogues, "a couru après" pour reprendre l'expression populaire. Il s'agit la d'une façon inacceptable et intellectuellement irrationnelle d'aborder ce genre d'affaire[33].

En adoptant ce raisonnement, les tribunaux s'écartent des aspects plus condamnables des règles de droit abrogées en matière de voil qui sous-entendaient que les femmes sexuellement actives étaient suspectes et n'avaient pas droit à la pleine protection de la loi[34].

En ce qui concerne l'article 246.3, il est difficile de déceler une tendance en matière de détermination de la peine, étant donné le nombre limité d'affaires publiées[35]. Dans l'arrêt *R. c. Smith*, l'accusé avait battu et étranglé la plaignante jusqu'à ce qu'elle se taise et l'avait menacée de mort. Il l'avait ensuite forcée à se livrer à des attouchements buccaux sur sa personne et avait pratiqué plusieurs actes sexuels sur la victime sans toutefois avoir de rapport sexuel complet. La cour prononça une peine de trois ans d'emprisonnement et rendit une ordonnance lui interdisant pour cinq ans le port d'armes. La cour estima qu'il s'agissait là de la peine minimale pour ce genre d'infraction et souligna la nécessité que la peine serve de préventif général et le fait que l'accusé avait de bonnes chances de se réadapter.

Dans l'arrêt *R. c. Conners*, la cour a infligé une peine de 14 ans d'emprisonnement[37]. Dans cette affaire, l'accusé avait enlevé une enfant de 7 ans, l'avait séquestrée pendant 12 heures et l'avait forcée à se livrer à des actes sexuels. La cour a estimé que les acts de violence commis n'étaient pas suffisamment graves pour justifier une peine d'emprisonnement à perpétuité. La cour jugea cependant à propos de prononcer une peine de 14 ans d'emprisonnement, eu égard aux peines infligées à d'autres prévenus pour des infractions similaires, la gravité de l'infraction et le fait que l'accusé avait été condamne pour attentat à la pudeur quelques années auparavant.

Conclusion

Les peines maximales prévues par la loi pour les trois paliers d'agression sexuelle sont plus élevées que les maxima prévus par la Code pour les infractions comparables éconcées dans les dispositions antérieures à 1983. Si l'on fit exception de la limite maximale prévue par le texte de loi, les articles 246.1, 246.2 et 246.3 donnent bien peu d'indications aux tribunaux sur la question de la gamme appropriée de peines applicables pour les différents paliers d'agression. Suivant Nadin-Davis, cela ne se découle pas d'une volonté du législateur d'encourager les tribunaux à appliquer des peines plus lourdes, mais de son désir d'accorder une plus grande souplesse aux juges en matière de détermination de la peine en vue de faciliter les condamnations[38].

En ce qui concerne les articles 246.1 et 246.2, la variété de peines infligées par les tribunaux semble traduire la souplesse des nouvelles dispositions. Si ces dernières facilitent effectivement les condamnations, les personnes seront mieux protégées contre les agressions sexuelles grâce au principe de la dissuasion.

Certains ont fait valoir que, compte tenu de degré de pouvoir discrétionnaire exerce par les juges en matière de détermination de la peine sous le régime des articles 246.1, 246.2 et 246.3, on pourrait assister à un retour en force, à l'étape de la détermination de la peine, de certains des aspects discutables des règles de droit abrogées en matière de viol. En règle générale, les peines imposées dans les affaires que nous avons analysées dans la présente étude ne suivent pas cette tendance. Dans ces affaires, les

32. *Supra*, note 29.
33. *Supra*, note 28, à lap. 489 (motifs intégraux du jugement).
34. Pour une analyse des anciennes dispositions sur les antécédents sexuels de la victime, voir: troisième partie du chapitre II du présent rapport, à la p. 68.
35. Les les deux décisions publiées jusqu'à maintenant sont *R. c. Smith* (1984) 12 W.C.B. 480 (C.A.C.-B.) et *R. c. Connors* (1984) 60 N.S.R. (2e) 219 (C.A.N.-É.).
36. *Supra*, note 35.
37. *Supra*, note 35.
38. Nadin-Davis, *supra*, note 4 à la p. 10.2.02.

gument, they are able to get down to the substance of the case quickly.

Immediately following oral presentations the Justices have a Conference where the initial reaction of colleagues to a case is ascertained. The Chief Justice noted that in a surprising 75 to 80 percent of the cases the Justices are unanimous in their opinion as to what the final disposition should be. A "goodly number" of the cases that come as of right are dispensed with from the Bench.

Some cases require grappling when the Justices come to write decisions. At the meeting in the conference room following oral argument, an established procedure is followed which basically determines the final course of the opinion to be written. That procedure ensures that each Justice has an opportunity to express his/her view with the most junior Justice going first and then each in order of seniority. A good idea of how the case will finally be decided comes from this expression of views but no formal vote is taken.

Following this process the opinion is written in draft form and circulated, at which time it is determined if there is to be dissenting opinion, concurring opinion or unanimous decision.

To assist the Justices in preparation of their written decisions, there are two law clerks for each Justice. Competition is keen for those positions as the Court receives annually "100 or so" applications for the 18 positions. This is seen as rather positive for it gives the Court the benefit of 18 of the "brightest and most capable young minds in the legal firmament in Canada." The Chief Justice indicated the 18 clerks for 1989 have already been selected.

The Chief Justice expressed satisfaction that the work of the Justices is paying off in making the Court more accessible to the public and at the same time reducing the waiting time for cases coming before them.

**"Keep your eyes open.
Two prisoners are missing!"**

HOW JUDGES GET INTO TROUBLE*
WHAT THEY NEED TO KNOW ABOUT DEVELOPMENTS IN THE LAW OF JUDICIAL DISCIPLINE

by Yvette Begue and Candice Goldstein

Defining judicial misconduct, and developing procedures to deal with it, are problems that are still being worked out today in recent cases and rulings from judicial conduct commissions. The difficulty this presents becomes even greater, because as a society we make the independence of the judge paramount but also insist on accountability. Judges are held to a stricter code of conduct than other people because their role demands that there is not even a hint of impropriety. This extends to off-the-bench conduct.

Before modern judicial conduct commission systems were developed, the traditional methods of dealing with serious misconduct by judges were impeachment, address and recall. Since these procedures were cumbersome, they were rarely invoked; additionally, they only provided for removal, which was not appropriate in most cases of misconduct. In 1960, the first state judicial conduct commission was established, followed by many others, until today all 50 states, the District of Columbia and the federal circuits have some mechanism for receiving, investigating, and adjudicating complaints against judges.[1]

Since 1972, when the ABA Model Code of Judicial Conduct was approved, 47 states and the District of Columbia have adopted it in one form or another. The Code consists of statements of norms for judicial behavior in the form of canons, with an accompanying text that delineates specific rules, which are followed by commentaries. (The three noncode states are Montana, Rhode Island and Wisconsin.) The constitutional and statutory provisions that define judicial misconduct also establish judicial conduct commissions.

Misconduct that is punishable often involves violations of the Code of Judicial Conduct, persistent failure to perform the duties of office, habitual intemperance, and conduct prejudicial to the administration of justice. Typical sanctions include admonition, censure, suspension and removal from office. Removal from office is the most severe, because it may have additional serious consequences, such as loss of retirement benefits, ineligibility to hold future judicial office, and loss of license to practice law.

This article discusses some of the recent decisions of judicial conduct commissions and courts that discipline judges, focusing on those decisions that suggest trends or define misconduct in particular areas. It is important to keep in mind how young the field of judicial discipline is — only 25 years-old — and consequently, how important the development of a comprehensive body of law is to commissions, judges and the public.

ON-BENCH CONDUCT

Bias and Appearance of Partiality.

Bias and appearance of partiality cases often refer to violations of Canons 1, 2 and 3 of the Code of Judicial Conduct. Canon 1 requires that judges uphold the integrity and independence of the judiciary; Canon 2 calls upon judges to avoid impropriety and the appearance of impropriety in all activities; and Canon 3 requires judges to perform the duties of their office impartially and diligently.

Bias is one of the most common complaints lodged against judges.[2] Apart from the obvious, such as hearing cases involving family members, bias is often difficult to determine. Even more troublesome is the question of the appearance of partiality — where the judge's conduct simply looks bad. In actual bias, the harm is to the individual litigant. In appearance of partiality situations, the emphasis is on the damage done to public confidence in the judiciary.

In studying bias cases, it is helpful to keep in mind that the issue may be raised in a variety of legal contexts, such as routine motions to disqualify, complaints filed with a judicial conduct organization or, less often, challenges based on constitutional grounds.[3] For example, in *Gardiner v. A. H. Robins Co.*,[4] a 1984 federal case, Judge Lord refused to accept a settlement

1. I. Tesitor, D. Sinks, Judicial Conduct Organizations, 19-27 (2d ed. 1980) (table listing when commisions established and whether by constitutional amendment, statute, or court rule).
2. *See e.g.*, Fretz, Peeples & Wicker, Ethics for Judges, 25 (National Judicial College 1982). "Canon 3C concerning disqualification of a judge to sit in a case is the most litigated section of the Code."
3. *See* Abramson, etc., *Judicial Disqualification under Canon 3C of the Code of Judicial Conduct* (American Judicature Society 1986).
4. 747 F.2d 1180 (Cir. 1984).

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menacé la victime à la pointe du couteau et lui avait infligé des sévices corporels en la battant. La cour a jugé que ces incidents constituaient des facteurs aggravants.

L'âge de la victime et l'abus d'une relation de confiance semblent constituer des circonstances aggravantes. Qoui qu'il en soit, dans une foule d'affaires mettant en cause notamment des jeunes victimes, les tribunaux ont appliqué les peines minimales. Ainsi, dans l'arrêt *R. c. Munsie*[21], l'accusé s'était livré à des actes de cunnilinctus sur un enfant de 2 1/2 ans. La cour lui infligea seulement une peine de trois mois assortie d'une période de probation de trois ans, au motif qu'en dépit du jeune age de la victime, aucune relation de confiance n'existait avant l'infraction. Pareillement, dans l'arrêt *R. c. Sandeman-Allen*[22], le tribunal a appliqué une peine de 9 mois et imposé une période de probation de 3 ans dans une affaire où l'accusé avait manipulé les organes génitaux d'une enfant de 2 ans et avait éjaculé dans sa bouche.

Dans les affaires où les peines les moins sévères ont été appliquées, les tribunaux ont été influencés par les chances de réadaptation de l'accusé ou le peu de probabilité qu'il récidive[23].

Tant dans les affaires où les peines maximales et minimales ont été appliquées, les tribunaux ont fait ressortir la nécessité de donner plus d'importance à l'effet général de dissuasion lorsqu'il s'agit de déterminer la peine qu'il convient d'infliger pour l'infraction prévue à l'article 246.1. Dans les affaires où ils ont appliqué la peine minimale, les tribunaux ont toutefois donné une importance considérable à la nécessité de décourager le prévenu en cause de commettre à nouveau la même infraction[25].

En règle générale, il ne semble pas que les facteurs atténuants ou aggravants dont les tribunaux ont tenus compte pour déterminer la peine dans les affaires rendues sous le régime de l'article 246.1 laissent entrevoir un retour aux aspects condamnables des dispositions de fond et de preuve en vigueur avant 1983. De façon générale, les tribunaux n'ont pas jugé pas pertinents à la détermination de la peine les antécédents sexuels de la plaignante ou son train de vie. Ainsi, dans une affaire, le fait que la plaignante faisait de l'auto-stop au moment où l'accusé l'avait fait monter à bord de sa voiture fut considéré comme une circonstance neutre par le tribunal[26].

D'autre part, la présence ou l'absence de pénétration semble continuer à influencer la sentence. En mettant l'accent sur ce facteur, le tribunal fait porter le procès sur la divulgation de détails sexuels intimes plutôt que sur la violence physique exercée. Cela risque de soumettre les victimes au harcèlement à l'audience.

Les peines infligées en vertu de l'article 246.2 sont légèrement plus lourdes que celles qui sont prononcées sous le régime de l'article 246.1, ce qui réflète le fait que cette infraction est plus grave[27]. Les peines les plus lourdes varient d'un peine d'emprisonnement de huit ans à une peine d'une durée indéterminée[28] (suivant les dispositions relatives aux criminels dangereux). Les peines les moins lourdes varient de deux à quatre ans d'emprisonnement[29].

Tout comme dans le cas de l'article 246.1, les peines les plus lourdes infligées en vertu de l'article 246.1 concernent des cas comportant un degré de violence particulièrement élevé[30]. Les chances de réadaptation semblent avoir été considérées comme un facteur atténuant dans les décisions rendues en vertu de cet article[31].

Dans les sentences prononcées en vertu de l'article 246.2, les tribunaux ont souligné la nécessité que la peine serve de préventif général et particulier au crime.

Tout comme dans le cas des affaires rendues

19. *R. c. McPherson* (1984), Cdn. Sentencing Digest par. 75A.6 (C.S.T.N.-O.).; *R. c. Nungag* (1984) 12 W.C.B. 179 (C.S.T.N.-O.).
20. *R. c. Munsie, supra*, note 11; *R. c. Sandeman-Allen, supra*, note 14; *R. c. Smaaslet, supra*, note 11; *R. c. Kippenhuck, supra*, note 11.
21. *Supra*, note 11; voir également l'arrêt *R. c. Milligan* (1984) 12 W.C.B. 433 (C.A.C.-B.) dans lequel la cour a infligé un peine d'emprisonnement de six mois et une ordonnance de probation de trois ans dans un cas d'agression sexuelle d'un enfant de trois ans.
22. *Supra*, note 14.
23. *Ibid.*, *R. c. King, supra*, note 11; *R. c. Baillie, supra*, note 11; *R. c. F.T., supra*, note 14.
24. C'est-à-dire la nécessité de dissuader les autres membres de la société de commettre des infractions semblables par opposition à l'effet préventif spécifique qui vise à dissuader le prévenu en cause à commettre des infractions semblables.
25. *R. c. Page* (1984) 12 W.C.B. 479 (H.C.J. Ont.); *R. c. Milligan, supra*, note 21: *R. c. McCann* (1984) 3 W.C.B. (C.S.C.-B.); *R. c. Williams, supra*, note 14.
26. *R. c. Page, supra*, note 25. Voir par contre: *R. c. Brown, supra*, note 9 et "Judge's comments on assault case anger women's groups", *supra*, note 8.
27. Comme le démontre la peine maximale prévue par la loi pour cette infraction.
28. *R. c. Terry* (1984) 11 W.C.B. 390 (Cour de comté Ont.); *R. c. Lyons* (1984) 65 N.S.R. (2e) 29 (C.A.N.-É); *R. c. Baynham et al.* (1983) 12 W.C.B. 379 (H.C.J. Ont.). En ce qui concerne l'accusé Tuckey, la cour a infligé une peine de 8 1/2 ans d'emprisonnement.
29. *R. c. Tustin* (1984) 12 W.C.B. 115 (H.C.J. Ont.); *R. c. Baynham et al., supra*, note 28. En ce qui concerne l'accusé Walsh, la cour a infligé une peine de 4 ans d'emprisonnement; *R. c. Terceira* (1984) 13 W.C.B. 167 (Cour comté Ont.).
30. *R. c. Terry, supra*, note 28; *R. c. Lyons, supra*, note 28; *R. c. Baynham et al., supra*, note 28 en ce qui concerne Baynham et Tuckey; *R. c. Williams* (1983) 10 W.C.B. 401 (C.A.N.-É.); *R. c. Fulton* (1984) 12 W.C.B. 450 (H.C.J. Ont.).
31. *R. c. Tustin, supra*, note 29; *R. c. Baynhgam et al., supra*, note 28 en ce qui concerne l'accusé Walsh; *R. c. Terciera, supra*, note 29.

preuve en matière d'agression sexuelle risquent de refaire surface au moment de la détermination de la peine[7]. Parmi ces caractéristiques, on note: 1) une importance exagérée à l'absence de pénétration; 2) le fait que les antécédents sexuels du plaignant en général ou ses rapports sexuels antérieurs avec l'accusé en particulier soient considérés comme des facteurs atténuants[8]; 3) l'opinion suivant laquelle le mode de vie de la victime augmente d'une certaine façon ses risques d'être agressée sexuellement[9].

Si les peines infligées sont réduites de façon sensible à cause de ces facteurs, certains des objectifs du législateur seront mis en péril. La protection des victimes potentielles par l'application du principe de la dissuasion sera diminuée et le problème du harcèlement des victimes devant le tribunal perdurera.

À la lecture des peines infligées dans les décisions rendues sous le régime des articles 246.1, 246.2 et 246.3, on constate dans quelle mesure les diverses peines appliquées et les facteurs considérés par les tribunaux pour les fixer tiennent compte des objectifs du législateur dans ce domaine litigieux.

En ce qui concerne l'article 246.1, on constate que les peines les plus lourdes varient de 7 à 12 ans d'emprisonnement[10] à l'extrémité supérieure de l'échelle jusqu'à une condamnation avec sursis de trois mois[11] à l'autre extrémité. En comparaison, les peines variaient de 3 à 8 ans sous le régime des dispositions abolies en matière de voil[12]. Ainsi donc, pour ce qui concerne l'article 246.1, les peines les plus souvent appliquées à l'heure actuelle semblent traduire jusqu'à un certain point la plus grande souplesse prévue par les modifications de 1983.

Parmi les facteurs qui influencent le degré de rigueur des peines appliquées en vertu de l'article 246.1, on note la nature des actes sexuels, le degré de violence exercée, le fait que la victime ait été menacée de mort, l'abus d'autorité de la personne en position de confiance et les chances de réadaptation de l'accusé.

En règle générale, dans les affaires ayant donné lieu à des peines de quatre ans ou plus, il y avait eu relations sexuelles[13]. Les tribunaux ont infligé des peines moins lourdes lorsqu'il n'y avait pas eu relation sexuelle complète mais seulement fellation, cunnilinctus ou manipulation des organes génitaux[14].

Le degré de violence exercée par l'agresseur semble également constituer un facteur qui a amené les tribunaux à appliquer des peines plus lourdes[15]. Ainsi, dans l'arrêt *R. c. Imlay*[16], la Cour a jugé que l'accusé était un criminel dangereux et lui a infligé un peine de 14 ans d'emprisonnement pour avoir attaqué une jeune femme et lui avoir tordu et brisé le bras. Le fait de menacer la victime de mort et d'utiliser une arme ont également donné lieu à des peines plus lourdes. Dans l'arrêt *R. c. Barr*[17], l'accusé était entré par effraction dans le domicile de la victime et avait menacé à la pointe du couteau de la tuer si elle criait. La Cour a imposé une sentence de huit ans d'emprisonnement en soulignant que dans ce genre d'affaire, la peine normale pourrait varier de 6 à 8 ans. Dans le même sens, dans l'arrêt *R. c. Lafford*[18], la cour a confirmé une peine de huit ans dans une affaire où l'accusé avait

7. *Ibid.*, à la p. 10.2.11.

8. Voir: "Judge's comments on assault case anger women's groups," *Ottawa Citizen*, 17 mai 1985, p. A-5, à propos d'une affaire dans laquelle un juge de la Cour suprême de l'Ontario en est venu à la conclusion, pour fixer la peine applicable à la suite d'une inculpation d'agression sexuelle, que la gravité de l'infraction était diminuée en raison du fait que la victime avait déjà eu des relations avec l'accusé.

9. Voir, par exemple: *R. c. Brown* (1983) 34 C.R. (3e) 191 (C.A. Alb.) cité par Boyle *supra*, note 2 à la p. 176, dans laquelle le tribunal a réduit à quatre ans d'emprisonnement une peine de huit ans, au motif que la plaignante avait une part de responsabilité étant donné qu'elle était mointée à l'appartement de l'accusé entre 2 h et 3 h du matin; voir également: "Bowlby J. catches flak over courtroom remarks," *Ontario Lawyer's Weekly*, 22 février 1985, p. 2, à propos d'une affaire dans laquelle le juge Bowlby avait, lors du prononcé de la sentence dans une affaire d'agression sexuelle, qualifié la plaignante, qui était effeuilleuse, de personne exercant un métier qui favorisait la (TRADUCTION) "concupiscence".

10. *R. c. Lizotte* (1985) B.C.D. Crim. Sent. 7517-03 (C.A.C.-B.); *R. c. Barr* (1985) B.C.D. Crim. Sent. 7517-01 (C.A.C.-B.); *R. c. Bouck* (1983) Cdn. Sentencing Digest par. 75A.5 (C.A.C.-B.); *R. c. Lafford* (1983) 11 W.C.B. 47 (C.A.N.-E.).

11. *R. c. Baillie* (1984) 12 W.C.B. 458 (H.C.J. Ont.); *R. c. Munsie* (1983) 9 W.C.B. 487 (C.A.C.-B.); *R. c. King* (1984) B.C.D. Crim. Sent. 7517-06 (C.A.C.-B.); *R. c. Smaaslet* (1985) B.C.D. Crim. Sent. (C.A.C.-B.); *R. c. Kippenhuck* (1984) 45 Nfld. and P.E.I.R. 179 (C.A.T.-N.); *R. c. Herritt* (1984) 12 W.C.B. 179 (C.A.N.-E.).

12. R.P. Nadin-Davis, *Sentencing in Canada*, Toronto, Carswell, 1982, p. 234 à 237; en revanche, Ruby fait varier entre 1 et 12 années les peines d'emprisonnement pour viol. Voir Boyle, *supra*, note 2 à la p. 173.
Lorsqu'on compare les différentes peines appliquées pour l'ancienne infraction de viol et la nouvelle infraction d'agression sexuelle, il importe de se rappeler que certaines des formes les plus graves d'agression sexuelle qui auraient anciennement donné lieu à une inculpation de viol feront maintenant l'objet d'un accusation en vertu des articles 246.2 et 246.3, et non en vertu de l'article 246.1.

13. *R. c. Barr, supra,* note 10; *R. c. Bouck, supra,* note 10; *R. c. Lafford, supra,* note 10; *R. c. T.* (1984) 12 W.C.B. 114 (C.A. Alt.).

14. *R. c. Munsie, supra,* note 11; *R. c. Sandeman-Allen* (1984) 12 W.C.B. 82 (C.A.C.-B.); *R. c. Smaaslet, supra,* note 11; *R. c. Kippenhuck, supra,* note 11; *R. c. Baillie, supra,* note 11; *R. c. F.T.* (1984) 12 W.C.B. 346 (C.A. Alt.); *R. c. Williams* (1984) 60 N.S.R. (sd) 29 (C.A.N.-É.)

15. *R. c. Barr, supra,* note 10, *R. c. Bouck, supra,* note 10; *R. c. Lafford, supra,* note 10; *R. c. Lizotte, supra,* note 10; *R. c. Imlay* (1984) 75 N.S.R. (2e) 57 (C.A.N.-É.).

16. *Supra*, note 15.

17. *Supra*, note 10.

18. *Supra*, note 10.

in the Dalkon Shield litigation without the presence of three corporate officers in the courtroom. When they appeared, Judge Lord accused the officers of permitting women to wear a "Deadly depth charge in their wombs" and of "violating every ethical precept." On appeal, the corporate officers claimed Judge Lord had violated their due process rights, including denying them an opportunity to be heard by an impartial tribunal. The court of appeals rejected Judge Lord's defense that because the comments were made in a judicial setting, they did not show bias and ordered the statements stricken from the record. Judge Lord's statements were made without the benefit of a trial and without hearing all the evidence.

In *In re Eads,*[5] a 1985 Iowa case, a judge who was friendly with two lawyers became disturbed at what he believed to be the unethical manner in which one lawyer handled the divorce action of the other lawyer's wife. When the attorney refused to change his course of conduct, and his firm supported his manner of representation, the judge began a two-year campaign of harassment against the lawyer and his firm, including warning him that judges rate lawyers for Martindale-Hubbell, and behaving in such a hostile manner that the firm was obliged to advise its clients to seek other representation when their cases were assigned before the judge. The Iowa Supreme Court issued a public reprimand and ordered the judge suspended from office for 60 days.

A second issue in the bias cases is the showing necessary to establish misconduct. For example, in *U.S. v. Murphy,*[6] the criminal defendant discovered after his conviction that the judge and prosecutor were close friends and had, with their families, vacationed together twice, the second time after the trial. In a post-conviction motion, the defendant unsuccessfully moved to have the judge recused. On appeal the court interpreted this motion as an attempt to have the conviction set aside, which was properly denied because a showing of actual partiality is required to have prior judicial acts set aside.

In contrast, the *In re Wait*[7] decision held that actual favoritism need not be shown where a judge heard six cases involving his relatives. The mere appearance of partiality here was enough to justify removal from office.

When a determination of bias is made, the commission or court must decide whether the litigants' rights have been damaged sufficiently to interfere in the actual litigation. In *Judicial Qualifications v. Schirado,*[9] a judge head two cases in which he had previously been involved as an attorney. The court not only censured the judge but also had copies of the order of censure sent to the litigants in anticipation of possible motions to vacate. In *Aetna,* the decision was vacated and remanded. In both cases, actual partiality was involved and the courts fashioned remedies tailored to the individual litigants. In contrast, the *Murphy* court, while acknowledging the possible harm to public confidence in the judiciary, did not set aside the defendant's conviction where the appearance of partiality was at issue. In *Murphy,* however, the court was probably influenced by the fact that the defendant's attorney knew of the friendship between the judge and prosecutor because he also was a close friend of the two.

Legal Error VS. Abuse of Judicial Authority. Another type of on-bench misconduct is abuse of judicial authority, including improper use of the contempt power. In reviewing these cases, courts and commissions must separate legal error from misconduct. The Code of Judicial Conduct and state discipline mechanisms were never intended to correct judicial error; judicial error is left to the appeals process. But a pattern of denying litigants their rights — or even a single, particularly egregious error — violates Canon 1,[10] 2A,[11] and 3A (1)[12] of the Code of Judicial Conduct and is conduct prejudicial to the administration of justice.

Some cases illustrate a pattern of judges repeatedly denying important rights to litigants. These judges ordered unrepresented defen-

5. 362 N.W.2d 541 (Iowa 1985).

6. 768 F.2d 1518 (7th Cir. 1985).

7. 490 N.E.2d 502 (N.Y. 1986).

8. No. 84-1601, slip op. (U.S. April 22, 1986).

9. 364 N.W.2d 50 (N.D. 1985).

10. "A Judge Should Uphold the Integrity and Independence of the Judiciary. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective." Canon 1, ABA Model Code of Jud. Conduct (1973).

11. "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities
A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2A, ABA Model Code of Jud. Conduct (1973).

12. "A Judge Should Perform the Duties of His Office Impartially and Diligently. The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:
A. Adjudicative Responsibilities
(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism." Canon 3A(1), ABA Model Code of Jud. Conduct (1973).

dants to jail in civil cases in lieu of fine or for failure to complete public service work that had not been court ordered;[13] sent debtors to jail without providing a hearing on ability to pay;[14] employed improper methods to obtain payment for public defender services from indigent criminal defendants;[15] filed to advise litigants of their right to remain silent and to have a blood-grouping test in paternity cases;[16] and threatened a defendant with a harsher sentence in order to discourage the defendant from requesting a public defender.[17] In response to this behavior, courts imposed censure,[18] suspension[19] and/or removal from judicial office.[20]

Where, following a series of judicial errors in a single case, the defendants committed suicide, two decisions conflict on whether that constituted judicial misconduct. *In re Pauley*[21] and *In re Thomson*[22] provide an interesting contrast.

Magistrate Pauley failed to advise a person arrested for burglary of the nature of the complaint against him, his right to counsel and right to a preliminary hearing. The judge then jailed the accused until a secretary was available to type the warrant. While in jail, the man committed suicide.

Thomson involved a trial rather than an arraignment. The accused was charged with shoplifting. At trial, the prosecutor and public defender were absent. The defendant arrived late and missed Judge Thomson's remarks regarding right to counsel. During the testimony, the defendant was uncontrollable; he stood up and moved around. Before being sworn as a witness, the defendant confessed to having drug and alcohol problems. He later changed his plea to guilty. Judge Thomson imposed a 30-day jail sentence but failed to inform the defendant of the reasons for his sentence. Two hours later, the defendant killed himself in his jail cell.

In *Pauley,* the West Virginia Supreme Court ordered a six-month suspension. In contrast, the New Jersey Supreme Court dismissed the misconduct charge against Judge Thomson, holding that his rulings constituted appealable error.

Two recent cases involving judicial reaction to criticism highlight the tension between legal error and abuse of judicial authority. These judges responded to their critics by threatening them with contempt. In one case, a Georgia judge agreed to a 30-day suspension from office without pay after admitting he had threatened a critic with contempt.[23] The critic had written derogatory letters about the judge to a newspaper. In Alabama, Circuit Judge Sheffield initiated contempt charges against the author of a letter to the editor criticizing the judge's ruling in a friend's divorce case. The evening before the contempt hearing, Judge Sheffield[24] indicated in a newspaper interview that the letter contained false information. The following day, he presided over the contempt hearing despite the defense attorney's request that he recuse himself. Judge Sheffield proceeded to impose a $100 fine for the contempt, which he rescinded the next day after he determined that he had erred.

The Alabama Supreme Court found that Judge Sheffield violated the Code of Judicial Conduct by commenting on the case to a newspaper reporter and failing to recuse himself from the case. However, the court held that initiating the contempt charge did not violate the Code, since clear and convincing evidence did not show that Judge Sheffield acted in bad faith in issuing his show cause order. According to the court, bringing the contempt charge was merely an erroneous legal ruling correctable on appeal. The court concluded that erroneous legal rulings are subject to discipline only when accompanied by bad faith; that is, malice, ill will, or improper motive. The court noted that judicial independence would be threatened if judges needed to worry about legal errors causing ethics violations.

In contrast to the Alabama court's ruling that only bad faith errors are disciplinable, the California Supreme Court determined that a judge's good faith though improper use of the contempt power constituted conduct prejudicial to the administration of justice.[25] The judge had employed wrongful methods to obtain payment from indigent criminal defendants for public defender

13. In re Benoit, 487 A.2d 1158 (Me. 1985).
14. *Ad.*
15. In re Gubler, 688 P.2d 551 (Cal. 1984).
16. In re Reeves, 469 N.E.2d 1321 (N.Y. 1984).
17. In re Damron, 487 So.2d 1 (Fla. 1986).
18. In re Gubler, 688 P.2d 551 (Cal 1984).
19. In re Benoit, 487 A.2d 1158 (Me. 1985).
20. In re Damron, 487 So. 2d 1 (Fla. 1986); In re Reeves, 469 N.E. 2d 1321 (N.Y. 1984).
21. 318 S.E.2d 418 (W. Va. 1984).
22. 494 A.2d 1022 (N.J. 1985).
23. In re Judge No. 693, 321 S.E.2d 743 (Ga. 1984).
24. In re Sheffield, 465 So.2d 350 (Ala, 1984). *See* Shaman, Brickman, *Judicial reaction to criticism,* 7 Jud. Conduct Rptr. No. 3 at 5 (Fall 1985), for discussion of this and other cases on judicial reaction to criticism.
25. In re Gubler, 688 P.2d 551 (Cal. 1984).

Les infractions en matière d'agression Sexuelle de 1983: questions juridiques d'actualité concernant la determination de la peine.

Aux termes de l'article 246.1, le premier niveau d'agression sexuelle est une infraction hybride. À ce titre, elle peut donner lieu à un poursuite sommaire ou à une poursuite par voie de mise en accusation. Si la poursuite procède par voie sommaire, le contrevenant est passible d'une amende d'au plus 500 $ ou d'une peine d'emprisonnement de six mois ou des deux.[1]

À l'article 246.2, l'agression sexuelle armée, les menaces à une tierce personne ou l'infliction de lésions corporelles sont considérées comme des infractions graves. Il s'agit d'un acte criminel qui rend son auteur passible d'une peine d'emprisonnement de quatorze ans.

L'agression sexuelle grave est la forme la plus grave d'agression sexuelle. La peine maximale prévue pour cette infraction est l'emprisonnement à perpétuité.

La tableau suivant[2] indique l'échelle de gravité des infractions des trois niveaux d'agression sexuelle en question par rapport aux infractions comparables qui existaient avant les modifications de 1983:

Attentat à la pudeur d'une personne de sexe féminin	5 ans	Agression sexuelle	10 ans
Attentat à la pudeur d'une personne de sexe masculin; tentative de viol	10 ans	Agression sexuelle armée, etc.	14 ans
Viol	Emprisonnement à perpétuité	Voires de fait grave	Emprisonnement à perpétuité

Bien que les peines maximales pour les trois niveaux d'agression sexuelle sont fixées par la loi, la peine à infliger sera déterminée par les juges suivant les faits de chaque espèce. Les nouvelles dispositions contiennent peu de directives à cet égard[3]. Si l'on se fie aux peines qui étaient jusqu'à maintenant appliquées à l'égard des infractions sexuelles abrogées, les juges donneront beaucoup d'importance au principe de la dissuasion pour déterminer la peine à appliquer à l'égard des formes les plus graves d'agression sexuelle.[4]

Dans son article intitulé ''Making Silk Purse? Sentencing: The 'New' Sexual Offences'', Paul Nadin-Davis affirme qu'en modifiant la peine maximale prévue par la loi pour les différents degrés d'agression sexuelle, le Parlement ne cherchait pas à rendre plus ou moins lourdes les peines applicables pour les infractions sexuelles. Il cherchait plutôt à accorder une plus grande latitude aux juges en matière de détermination de la peine et à faciliter ainsi les condamnations[5]. Suivant Nadin-Davis, si l'on fait abstraction de cette volonté de donner un plus grand pouvoir discrétionnaire au juge, (TRADUCTION) '' . . . il existe peu d'indices au sujet de la volonté du législateur en ce qui concerne la détermination de la peine''[6].

Étant donné la plus grande latitude accordé au juge en matière de détermination de la peine à la suite de l'adoption des modifications de 1983, beaucoup des caractéristiques condamnables des anciennes dispositions de fond et de

RENVOIS

1. C'est la peine générale applicable pour les infractions punissables sur déclaration sommaire de calpabilité. Voir le paragraphs 722(1) du Code.
2. C.L.M. Boyle, *Sexual Assault,* Toronto, Carswell, 1984, p. 172.
3. *Ibid.*
4. R.P. Nadin-Davis, ''Making a Silk Purse? Sentencing: The 'New' Sexual Offences'' in *The New Sexual Assault Legislation*, Vancouver, Continuing Legal Education, 1983, p. 10.2.01, aux p. 10.2.08 et 10.2.09.
5. *Ibid.*, à la p. 10.2.02.
6. *Ibid.*, à la p. 10.2.04.

*L'article suivant est un extrait du rapport de 1985 préparé par Gisela Ruesbaat pour le Ministère de la Justice du Canada intitulé *La loi sur les agressions sexuelles au Canada une évaluation.* Il est presenté ici parce qu'il indique un bon exemple des questions juridiques d'actualité au sujet de la détermination de la peine ainsi que la manière dans laquelle nos decisions juridiques les affectent.

of offence. The need for general deterrence and the fact that the chances of the accused's rehabilitation were good were stressed by the court.

In *R* v. *Connors* a sentence of 14 years was imposed.[37] In this case the accused abducted a 7 year old for 12 hours during which time he forced her to commit sexual acts. The court felt that the violence involved was not sufficient to justify a life term. However, considering sentences imposed on others for similar offences, the seriousness of the offence and the fact that the accused had been convicted of indecent assault a few years earlier, the court found that a 14 year term was appropriate.

Conclusion

The maximum penalties set by statute for the three levels of sexual assault are higher than the statutory maxima for the comparable offences set out in the pre-1983 provisions. Apart from the upper limit set by statute, however, sections 246.1, 246.2, and 246.3 provide little direction to the courts in terms of the appropriate range of sentence for the different levels of assault. According to Nadin-Davis, this was done not to encourage the courts to impose higher penalties, but to provide greater sentencing flexibility to judges, thereby facilitating conviction.[38]

In terms of sections 246.1 and 246.2, the diverse range of sentences imposed by the courts seems to reflect the flexibility built in to the new provisions. If this indeed facilitates convictions, greater protection from, sexual assaults will be provided to individuals through the operation of the deterrence principle.

It has been suggested that given the degree of discretion exercised by judges in determining sentence under sections 246.1, 246.2, and 246.3, some of the more problematic features of the repealed rape laws may be revived at the sentencing stage. Generally speaking, sentencing cases reviewed in this study do not follow this pattern. These cases emphasize the need to impose sentences which deter others from committing similar offences. This is consistent with the legislative goal of protecting the integrity of the person from non-consensual sexual contact.

Sentencing cases decided under sections 246.1 and 246.2 have also viewed violence accompanying the assault as an aggravating factor. This approximately emphasizes the assaultive aspects of such attacks.

Generally, courts have not considered the complainant's sexual history or lifestyle as justifications for less severe penalties under sections 246.1 and 246.2. In fact, in certain cases where the conduct of the complainant was raised, its irrelevance to the severity of sentence was emphasized by the courts. In *R* v. *Terceira*[40] for example, the fact that the complainant was a prostitute did not affect the setting of sentence. Similarly, in *R* v. *Page*,[41] the fact that the complainant was hitchhiking when picked up by the accused was not viewed as a mitigating factor.

Although lifestyle and previous sexual conduct do not seem to affect sentencing decisions, the presence or absence of penetration is still seen as an aggravating factor. This may be justifiable if intercourse is viewed as a more serious violation of bodily integrity than other non-consensual sexual acts. Nevertheless, if this feature is highlighted without regard to the general degree of violence involved, complainants may be compelled to focus on the intimate physical details of the attack. This may result in courtroom harassment of complainants.

Of even greater concern however, is the court's approch to sentencing in cases involving victims of tender years. Although the age of the victim and the abuse of a position of trust are cited as aggravating factors, minimal sentences were imposed in a number of cases involving child victims.[42] Given the gravity and extent of the problem of sexual abuse of children, these relatively light sentences are somewhat anomalous. If this pattern continues, the protection of children from sexual contact will be limited.

With respect to section 246.3, the number of reported cases to date is too limited to indicate any sentencing pattern.

37. *Supra,* footnote 35.
38. Nadin-Davis, *supra,* footnote 4 at p. 10.2.02.
39. *Ibid.*, at p. 10.2.11.
40. *Supra*, footnote 29.
41. *Supra*, footnote 25.
42. *R* v. *Munsie, supra*, footnote 11; *R* v. *Sandeman-Allen*, *supra*, footnote 14; *R* v. *Milligan*, supra, footnote 21.

services. Specifically, he made attorneys' fees payable before fines, leaving defendants subject to further proceedings — such as revocation of probation — with respect to nonpayment of fines when the defendants were unable to pay both the attorney's fee and the fine. According to the supreme court, a judge's bad faith use of the contempt power would be willful misconduct in office. Willful misconduct is more serious than conduct prejudicial.

Language Used to Address Lawyers and Litigants. Racist comments by judges violate the obligation to maintain the appearance of impartiality required by Canon 2A. The *In re Agresta*[26] decision from New York is typical of the serious attention racist remarks receive from discipline authorities. While presiding over the sentencing hearing of a defendant who was black, Judge Agresta attempted to elicit information about a black person whom the judge referred to as the "real culprit." He asked in open court: "I know that there is another nigger in the woodpile, I want that person out, is that clear?" The New York Court of Appeals, the state's highest court, affirmed the discipline commission's censure of the judge.

Two recent cases indicate that belittling comments to women are also subject to discipline. In one case, a judge referred to a woman attorney as "lawyerette" and asked her why she wasn't wearing a tie.[27] A few years later, at a hearing in chambers, the judge referred to another woman attorney employed by the attorney general's office as "attorney generalette." The court censured the judge for this and other conduct.

In New York, a district court judge was admonished for commenting on the figures of women lawyers.[28] In some instances, the judge suggested that the women could obtain what they were asking of the court because of their physical appearance. The comments occurred in the course of the judge's official duties but not within the hearing of the general public. The discipline commission considered in mitigation the judge's good reputation and his acknowledgement that his comments were inappropriate. Further, the commission remarked that had the comments been made within the hearing of the public, a more severe sanction might have been warranted.

OFF-BENCH CONDUCT

Abuse of Position — Ticket-fixing. In this section, three types of off-bench conduct will be examined: abuse of position, personal improprieties and campaign improprieties. One interesting point to note in the area of ticket-fixing is that in several New York cases[29] the judges were removed from office. In contrast, in a recent Iowa decision,[30] the magistrate was only reprimanded and suspended for four days. This difference in sanctions may be explained by two factors. First, New York has engaged in a well-publicized campaign against ticket-fixing. Second, in the Iowa case, the magistrate suggested possible dispositions to the traffic court judge but did not actually preside over the case or alter court documents, as occurred in the New York cases.

Abuse of Position — Prestige of Office. Abusing the prestige of the office is usually a more subtle problem than ticket-fixing or receiving favors. One definition of this type of misconduct is the attempt to obtain special treatment for oneself simply on the basis that one is a judge. For example, in *In re Tschirhart*,[31] a judge became upset at a bank's efforts to collect on a loan he had guaranteed for his son. The judge visited the bank, identified himself as a judge and demanded special treatment. He further threatened to withdraw court funds on deposit with the bank. After the bank filed suit, he called the bank's counsel and told him that as a judge he was "not insignificant." For this and other conduct, he was censured.

In *In re Muszinski*,[32] a judge, angry at being disturbed while having lunch at a restaurant, ordered a police officer to turn off his radio despite the officer's explanation that he was prohibited from doing so by police regulations. He later summoned the officer to this courtroom by letter on official stationery and threatened him with contempt. Censure was also imposed in this case.

Finally, in *In re Gorby*,[33] a judge attending a high school football game became angry at the school band director when he failed to direct his band to show more spirit in their playing. The judge knocked the band director's hat off and in the ensuing struggle two spectators were injured. Later, the judge and his son met the director in the police station parking lot and attacked

26. 476 N.E.2d 285 (N.Y. 1985).
27. In re Kirby, 354 N.W.2d 410 (Minn. 1984).
28. In re Doolittle, Unreported Determination (N.Y. Comm'n June 13, 1985).
29. In re Seiffert, 480 N.E.2d 734 (N.Y. 1985); In re Reedy, 475 N.E.2d 1262 (N.Y. 1985).
30. In re Harned, 357 N.W.2d 300 (Iowa 1984).
31. 362 N.W.2d 235 (Mich. 1984).
32. 471 So.2d 1284 (Fla. 1985).
33. 339 S.E.2d 697 (W. Va. 1985, modified 339 S.E.2d 702 (W. Va. 1985).

him again. Judge Gorby was suspended for six months without pay, later reduced to five months because he demonstrated remorse and heightened sensitivity to the maintenance of public respect for the judiciary and its officers.

The severity of the sentence in *Gorby* might be explained by the fact that the conduct led to misdemeanor charges. In summary, these cases suggest that while courts believe that abusing the prestige of the office constitutes misconduct, it does not justify removal of the judge.

Abuse of Position — Political Activities. In *In re Staples,*[34] a 1986 Washington decision, a judge became actively involved in a campaign to have the county seat transferred. Judge Staples organized a committee, made campaign speeches and circulated petitions. The commission recommended that Judge Staples be admonished for violating Canon 7A(4), which prohibits political activity unrelated to the administration of justice. The commission argued that this referred to such issues as court procedure. The court disagreed, taking a broader view of Canon 7A(4). Judge Staples' activities had not been shown to impair the performance of his judicial duties. Because his activities were nonpartisan in nature, fears of bias were unfounded. The court concluded that judges should not lose their rights as citizens by assuming the bench. The court felt that excluding judges from legal reform processes would deprive citizens of a wealth of expertise. The opposite argument, of course, is that the appearance of partiality would cause loss of public confidence in the judiciary.[35]

Personal Improprieties. The underlying issue in the personal improprieties cases is whether personal, offbench conduct should be regulated, and if so, how to evaluate that conduct in a manner fair to judges. Various standards have been suggested, ranging from applying criminal law standards to using a "community morality" test.[36] A significant factor in the caselaw appears to be whether the conduct becomes public.

For example, in *In re Tschirhart*,[37] a 1985 Michigan case, a judge was arrested and acquitted of defrauding a taxi driver of his fare on a visit to a legal brothel in Nevada. The judge later discussed the visit with a reporter, stating that he had enjoyed his visit and would do it again. The Michigan Supreme Court censured him, not for the actual visit to the brothel, but rather for making inflammatory remarks to the press. In the Commission decision and Recommendation, one commissioner argued in a concurrence that the judge should also be disciplined for visiting the brothel, because houses of prostitution were illegal in Michigan and Judge Tschirhart should be evaluated according to Michigan Laws.[38]

In *In re Hyland*,[39] a 1985 New Jersey case, a judge became the subject of public scrutiny when his secretary claimed sexual harassment and wrongful discharge. Judge Hyland admitted to having sexual relations with her and exchanged sexually-related literature and gifts with her in chambers. While the secretary's charge of sexual harassment and wrongful discharge were not proven, Judge Hyland was nonetheless publicly reprimanded for his indiscreet conduct. The court noted that such a relationship was suspect because 1) as her employer, the voluntariness of the relationship was questionable and 2) the liaison could lead to the impression that the judicial office had been compromised.

In both cases, the personal, off-bench conduct became public and as such, many have deserved investigation. But it is also worth noting that the conduct happened to involve the sexual activities of the judges.

Canon 3B(3). Canon 3B(3),[40] often known as the "Squeal Rule," requires judges to report unethical conduct on the part of other judges or lawyers. Until recently, courts rarely invoked this section of the Code in determining whether or not misconduct had occurred.[41] Since the cases applying Canon 3B(3) thus far have involved other misconduct, it is not clear whether a court would sanction a judge simply for not reporting misconduct by others. However, the trend seems to be that failure to report misconduct will at the very least be considered in determining the severity of the other misconduct.

34. J.D. No. 2, slip op. (Wash. May 22, 1986).
35. In re Randolph, No. A-46, slip op. (N.J. Jan. 7, 1986) (court employee not allowed to remain active in various public and private civic organizations because the organizations, such as NAACP and Mental Health Board, had potential for public controversy.)
36. Tapp, *Workshop on off-bench conduct held,* 7 Jud. Conduct Rptr. No. 3 at 5 (Fall 1985) *See also* Lubet, Beyond Reproach: Ethical Restrictions on the Extrajudicial Activities of State and Federal Judges (American Judicature Society 1984).
37. 371 N.W. 2d 850 (Mich. 1985).
38. Michigan Judicial Tenure Commission Annual Report 1984-85 at xxxxiv.
39. No. D-24-85, Unreported Order (N.J. Dec. 6, 1985).
40. "A judge should take or initiate appropriate disciplinary procedures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Canon 3B(3) ABA Model Code of Jud. Conduct (1973).
41. In re John G. Laurie, No. 84-CC-5, Order (Ill. Cts. Comm'n May 15, 1985), (judge who, *inter alia,* did not accept but also did not report proferred gifts by attorneys on two separate occasions violated Canon 3B(3) was suspended for one month without pay.) In re Gerald Gassman, Unreported Determination (N.Y. Comm'n Mar. 5, 1986), (judge, who, *inter alia,* did not notify the proper authorities of another judge's attempt to influence him and obtain the release from jail of three of his friends violated Canon 3B(3) was admonished.)

Cases of both the upper and lower end of the spectrum stress the need to focus on general deterrence[24] in determining the appropriate sentence for an offence under 246.1. In cases at the lower end of the scale however, the courts weighed heavily the need to deter that particular accused.[25]

In general, mitigating and aggravating factors considered by the courts in the sentencing cases decided under 246.1, do not suggest an adoption of the more objectionable features of the pre-1983 substantive and evidentiary provisions. The complainant's previous sexual history or lifestyle were generally not considered relevant to the determination of sentence. In one case, for example, the fact that the complainant was hitchhiking when the accused picked her up in his car, was found to be a neutral factor by the court.[26]

The presence or absence of penetration on the other hand, still seems to be considered as relevant to sentence. By concentrating on this aspect, the court shifts the focus of the inquiry from a concern about physical violence to the disclosure of intimate sexual details. This focus may contribute to courtroom harassment of complainants.

With respect to section 246.2, sentences imposed are somewhat higher than those under section 246.1, reflecting the more serious nature of the offence.[27] Sentences at the upper end of the scale range from 8 years to an indeterminate period[28] (under the dangerous offender provisions). At the lower end of the scale sentences range from 2 to 4 years.[29]

As with section 246.1, sentences in the upper range were imposed under section 246.2 in situations involving a particularly high degree of violence.[30] The possibility of rehabilitation seemed to be viewed as a mitigating factor under this section.[31]

The need for both general and specific deterrence was stressed by the courts in imposing sentence under 246.2.

As with section 246.1, when the complainant's conduct was raised by defence counsel under section 246.2, it was generally found to be irrelevant by the court. In *R* v. *Terceira*[32] for example, the fact that the complainant was a prostitute did not make the offence any less serious in the eyes of the court. Similarly, the fact that the complainant voluntarily entered a residence where the offence ultimately occurred, was found irrelevant by the court in *R* v. *Baynham et al.:*

> The issue to which I refer is the alleged foolishness on the part of the complainant for having entered this residence in the first place. Whether the complainant was or was not foolish in doing what she did at the time is, in my view, a non-issue . . . . To suggest otherwise leads only to the conclusion that this complainant or anyone else in similar circumstances 'asked for it,' to use a common expression. That is an unacceptable and intellectually unsound approach to matters such as these.[33]

These cases in particular represent a retreat from the more objectionable features of the repealed rape laws which suggested that sexually active women were suspect and not entitled to the full protection of the law.[34]

With respect to section 246.3, the limited number of reported cases to date make it difficult to detect sentencing patterns.[35] In *R* v. *Smith*,[36] the accused beat and choked the complainant into silence and threatened her life. He then forced her to perform oral sex acts upon him and committed several acts upon her, short of intercourse. A sentence of 3 years plus a five year firearms prohibition was imposed. The court considered this a minimum sentence for this type

24. That is, deterring others in society from committing similar offences as opposed to specific deterrence, which refers to deterring this particular accused from committing similar offences.
25. *R* v. *Page* (1984), 12 W.C.B. 479 (Ont. H.C.J.); *R* v. *Milligan, supra,* footnote 21; *R* v. *McCann* (1984), 13 W.C.B. (B.C.S.C.); *R* v. *Williams, supra,* footnote 14.
26. *R* v. *Page, supra,* footnote 25. But see: *R* v. *Brown, supra,* footnote 9 and "Judge's comments on assault case anger women's groups," *supra,* footnote 8.
27. As indicated by the higher statutory maximum for this offence.
28. *R* v. *Terry* (1984), 11 W.C.B. 390 (Ont. Cty. Ct.); *R* v. *Lyons* (1984), 65 N.S.R. (2d) 29 (N.S.C.A.); *R* v. *Baynham et al.* (1983), 12 W.C.B. 379 (Ont. H.C.J.). With respect to the accused Tuckey, a sentence of 8½ years was imposed.
29. *R* v. *Tustin* (1984), 12 W.C.B. 115 (Ont., H.C.J.); *R* v. *Baynham et al., supra,* footnote 28. With respect to the accused Walsh, a sentence of 4 years was imposed; *R* v. *Terceira* (1984), 13 W.C.B. 167 (Ont. City. Ct.).
30. *R* v. *Terry, supra,* footnote 28; *R* v. *Lyons, supra,* footnote 28; *R* v. *Baynham et al., supra,* footnote 28 with respect to Baynham and Tuckey; *R* v. *Williams* (1983), 10 W.C.B. 401 (N.S.C.A.); *R* v. *Fulton* (1984), 12 W.C.B. 459 (Ont. H.C.J.).
31. *R* v. Tustin, supra, footnote 29; *R* v. *Baynhgam et al., supra,* footnote 28 with respect to the accused Walsh; *R* v. *Terciera, supra,* footnote 29.
32. *Supra,* footnote 29.
33. *Supra,* footnote 28, at p. 489. (Complete reasons for judgment.)
34. For a discussion of the former sexual history provisions see: Part II, section 3 of this report at p. 60.
35. The two reported cases to date are: *R* v. *Smith* (1984), 12 W.C.B. 480 (B.C.C.A.); *R* v. *Connors* (1984), 60 N.S.R. (2d) 219 (N.S.C.A.).
36. *Supra,* footnote 35.

If sentences are significantly reduced as a result of these factors, the realization of certain legislative goals will be negatively affected. The protection provided to potential victims through the operation of the deterrence principle will be reduced. Also, the problem of courtroom harassment of complainants will continue.

A review of the sentencing cases decided under sections 246.1, 246.2 and 246.3, reveals to what extent both the range of sentence being applied, and the factors considered by the courts in setting sentence, reflect legislative goals in this issue area.

With respect to section 246.1, sentences imposed range from 7-12 years[10] at the upper end of the scale to a suspended sentence to 3 months[11] at the other end. This compares with a range of between 3-8 years for the repealed rape provisions.[12] At least as far as section 246.1 is concerned therefore, present sentencing patterns do seem to reflect to some degree the greater flexibility provided by the 1983 amendments.

Factors affecting the severity of sentence under section 246.1 include: the nature of the sexual acts engaged in, the degree of violence involved, whether any threats were made on the victim's life, the abuse of a position of trust, and the chances of the accused's rehabilitation.

Generally, in cases where sentences of four years or more were imposed, acts of intercourse took place.[13] Less severe penalties resulted where acts short of intercourse were performed such as fellatio, cunnilingus, or genital manipulation.[14]

The degree of violence involved in the assault also seems to be a factor resulting in the setting of sentences in the higher range.[15] In *R* v. *Imlay*[16] for example, the accused was found to be a dangerous offender and a four year sentence was imposed where a young woman was attacked and her arm twisted and broken. Threats on the life of the victim and the use of a weapon have also resulted in higher penalties. In *R* v. *Barr*,[17] the accused broke into the victim's home, held a knife to her throat and threatened to kill her if she screamed. A sentence of 8 years was imposed here — the court remarking that in cases of this type the normal range would be 6 to 8 years. Similarly, in *R* v. *Lafford*[18] a sentence of 8 years was upheld where the accused made threats with a knife and inflicted bodily harm on the victim by beating her. The court considered these events as aggravating factors.

The age of the victim and the abuse of a trust relationship seem to be aggravating factors.[20] Nevertheless, in a number of cases involving particularly young victims, sentences at the lower end of the scale were imposed. In *R* v. *Munsie*[21] for example, the accused performed cunnilingus on a 2½ year old child. A sentence of only 3 months plus 3 years probation was imposed on the grounds that, despite the young age of the victim, no previous relationship of trust existed. Similarly in *R* v. *Sandeman-Allen*,[22] a sentence of 9 months and 3 years probation was imposed where the accused fondled a 2 year old's genitals and ejaculated into her mouth.

In cases like these at the lower end of the scale, the courts were influenced by the accused's chances of rehabilitation or the unlikely possibility of a repetition of the offence.[23]

10. *R* v. *Lizotte,* (1985) B.C.D. Crim. Sent. 7517-03 (B.C.C.A.); *R* v. *Barr,* (1985) B.C.D. Crim. Sent. 7517-01 (B.C.C.A.); *R* v. *Bouck* (1983) Cdn. Sentencing Digest par. 75A.5 (B.C.C.A.); *R* v. *Lafford* (1983), 11 W.C.B. 47 (N.S.C.A.).
11. *R* v. *Baillie* (1984), 12 W.C.B. 458 (Ont. H.C.J.); *R* v. *Munsie* (1983), 9 W.C.B. 487 (B.C.C.A.); *R* v. *King,* (1984) B.C.D. Crim. Sent. 7517-06 (B.C.C.A.); *R* v. *Smaaslet,* (1985) B.C.D. Crim. Sent. (B.C.C.A.); *R* v *Kippenhuck* (1984), 45 Nfld. and P.E.I.R. 179 (Nfld. C.A.); *R* v. *Herritt* (1984), 12 W.C.B. 179 (N.S.C.A.).
12. R. P. Nadin-Davis, *Sentencing in Canada* (Toronto: Carswell, 1982) pp. 234-237; In contrast, Ruby sets the range at between 1 and 12 years for rape. See: Boyle, *supra,* footnote 2 at p. 173.
In comparing the range of sentences applied to the old offence of rape and the new offence of sexual assault, it is important to remember that some of the more serious forms of sexual assault which would formerly have resulted in a rape charge will now result in charges being laid under sections 246.2 and 246.3 and not under 246.1.
13. *R* v. *Barr, supra,* footnote 10; *R* v. *Bouck, supra,* footnote 10; *R* v. *Lafford, supra,* footnote 10; *R* v. *T* (1984), 12 W.C.B. 114 (Alta C.A.).
14. *R* v. *Munsie, supra,* footnote 11; *R* v. *Sandeman-Allen* (1984), 12 W.C.B. 82 (B.C.C.A.); *R* v. *Smaaslet, supra,* footnote 11; *R* v. *Kippenhuck, supra* footnote 11; *R* v. *Baillie, supra,* footnote 11; *R* v. *Baillie, supra,* footnote 11; *R* v. *F.T.* (1984), 12 W.C.B. 346 (Alta C.A.); *R* v. *Williams* (1984), 60 N.S.R. (Sd) 29 (N.S.C.A.).
15. *R* v. *Barr supra,* footnote 10; *R* v. *Bouck, supra,* footnote 10; *R* v. *Lafford, supra,* footnote 10; *R* v. *Lizotte, supra,* footnote 10; *R* v. *Imlay* (1984), 65 N.S.R. (2D) 57 (N.S.C.A.).
16. *Supra,* footnote 15.
17. *Supra,* footnote 10.
18. *Supra,* footnote 10.
19. *R* v. *McPherson* (1984), Cdn. Sentencing Digest par. 75A.6 (N.W.T.S.C.); *R* v. *Nungag* (1984), 12 W.C.B. 179 (N.W.T.S.C.).
20. *R* v. *Munsie, supra,* footnote 11; *R* v. *Sandeman-Allen, supra,* footnote 14; *R* v. *Smaaslet, supra,* footnote 11; *R* v. *Kippenhuck, supra,* footnote 11.
21. *Supra,* footnote 11; See also *R* v. *Milligan* (1984), 12 W.C.B. 433 (B.C.C.A.) where a 6 month term along with 3 years probation was imposed for the sexual assault of a 3 year old.
22. *Supra,* footnote 14.
23. *Ibid., R* v. *King, supra,* footnote 11; *R* v. *Baillie, supra,* footnote 11; *R* v. *F.T., supra,* footnote 14.

Campaign Improprieties. Campaign conduct cases often evaluate what constitutes permissable speech. For example, in *Berger v. Supreme Court of Ohio,*[42] a 1984 federal opinion, the court rejected a motion for a preliminary injunction against application of Canon 7B(1)(c) to the plaintiff, a judicial candidate. The plaintiff claimed that he was not free to criticize the excessive use of referees, nor to promise that he would encourage direct dispute resolution between litigants, in his campaign appearances. The plaintiff argued that his First Amendment rights were infringed but the court found no conflict between the Code of Judicial Conduct and the first amendment. The Code permits truthful criticism of judicial administration and incumbents, and the plaintiff could make pledges so long as he didn't appeal to the special prejudices of the voters. Because the judiciary decides individual cases, it would be inappropriate for judicial candidates to make the particularized pledges and predetermined commitments permitted of candidates for the executive and legislative branches.

DEFENSES AND MITIGATING CIRCUMSTANCES

Mootness, Prior Misconduct, Overlapping Misconduct. A common occurrence in judicial disciplinary proceedings is for a judge to resign and then raise the defense that the complaint is moot because the judge has resigned or the judge's term has expired. Court commissions have various policies to respond. Some courts are not permitted to remove a judge from office if the judge has already resigned, as was the case in *In re Maxwell*,[43] a 1986 South Carolina decision. There, however, the court still imposed a public reprimand and noted that the conduct involved would have justified removal had not the judge resigned. Other states take the policy view that judges must not be permitted to escape disciplinary proceedings by means of resignation, even if the judge's term has expired.[44] Finally, one court took a more pragmatic stance, holding that judges must be formally removed from office even after resignation in order to prevent reappointment or service as a reserve judge.[45]

Sometimes, commissions will consider prior misconduct by a judge in evaluating current misconduct. Judges typically argue in defense that the prior conduct is moot and should not be considered. However, in *In re Whitaker,*[46] the Louisiana high court held that conduct prior to assuming office was relevant to the probability that the conduct continued once the judge took office, and was also relevant in determining the appropriate sanction.

In contrast, a Minnesota decision recently held that prior and overlapping misconduct brought to light after the judge had already stipulated to other misconduct and agreed to a censure and fine, was not relevant to sanctions and did not deserve either a separate sanction or a more severe sanction.[47] The judge had stipulated to numerous violations, mostly involving judicial administrative duties. Before the court had a chance to accept the board's recommendation, the judge was charged with misconduct both prior to becoming a judge and during the period of time covered by the stipulation. The board recommended a separate censure for the second complaint. But the court found that a second censure for conduct occurring at the same time as the misconduct in the first complaint would not add anything of substance to the discipline.

Policy. When accused of misconduct, judges often raise the defense that they were merely following court policy, or the orders of their chief judges. The following three cases are interesting because the courts arrived at different sanction for rather similar offenses.

In re Greene,[48] a West Virginia 1984 case, involved a magistrate, who while following the instructions of the chief magistrate, refused to issue a complaint form to a defendant who wished to file a cross-warrant against his accuser. The court excused the judge because he relied in good faith on existing court policy and had no intention to prejudice the rights of the parties.

The following year, in *In re Wharton*,[49] also from West Virginia, the court publicly censured a magistrate, who, acting pursuant to court policy, contacted the prosecutor's office prior to issuing an arrest warrant to determine whether the warrant should be issued for a police officer on a non-support charge. By this conduct, the magistrate had failed to act neutral, detached and independent of the prosecutor. The court noted that magistrates must act as checks on the police power.

42. No. C-2-84-1227, Memo & Order (S.D. Ohio Sept. 17, 1984).
43. 340 S.E.2d 541 (S.C. 1986).
44. *See e.g.,* W. Va. Jud. Hearing Bd. v. Rommanello, 336 S.E. 2d 540 (W. Va. 1985).
45. In re Sterlinske, 365 N.W. 2d 876 (Wis. 1985).
46. 463 So.2d 1291 (La 1985).
47. In re Johnson, No. CX-83-909, Order (Minn. Sept. 28, 1984).
48. 317 S.E.2d 169 (W. Va. 1984).
49. 332 S.E.2d 650 (W. Va. 1985).

Finally, in *In re Walter*,[50] a 1985 Illinois case, a judge was censured for accepting fees for performing marriages outside of court on his own time. He was not found guilty of willful misconduct because his chief judge had referred the parties to him, thus giving the impression he condoned the practice.

The three cases are difficult to reconcile. The judge who refused to permit a criminal defendant to issue a complaint for a cross-warrant was excused although his conduct was seemingly as serious a violation of the law as accepting money for performing marriages or checking with the prosecutor's office before issuing a warrant.

Overburdened Court. Several judges have recently raised the defense of an overburdened court. Although courts in two jurisdictions rejected the defense in cases involving courtroom courtesy, the California Supreme Court indicated that, under certain circumstances, the defense would shield a judge from charges of untimely decision-making.

In *Mardikian v. Commission on Judicial Performance*,[51] a superior court judge failed to promptly decide 14 cases between 1980 and 1983, seven of which remained undecided in excess of the stage's statutory and constitutional 90 day time period. Instead of deciding the cases, Judge Mardikian entered orders "resubmitting" the cases without the consent of the parties.

The supreme court affirmed the commission's finding that, although the superior court system was extremely overburdened, and Judge Mardikian hard-working, the judge engaged in conduct prejudicial to the administration of justice. According to the court, when a heavy caseload makes prompt decision-making impossible for even the conscientious judge, no discipline will be imposed. However, trial judges are obliged to minimize the impact of the delay by assigning priorities based on the time necessary to decide the case and the effect of the delay on the parties. Since Judge Mardikian failed to assign a high priority to divorce cases involving child custody issues, and made no effort to give precedence to resubmitted cases over newer ones, he engaged in misconduct. The court ordered a public censure.

The overburdened court defense was used in two recent cases where judges were rude to litigants. These judges interrupted counsel,[52] used abusive language against both litigants and their counsel,[53] and sometimes expressed reluctance to hear cases at all.[54] One of these judges was censured;[55] the other censured, suspended for 25 days and fined $3,500.[56] According to the Maine Supreme Court, whereas the "appellate process effectively corrects legal error," the end result of rude treatment is irreparable loss of respect for the [judicial] system that tolerates such behavior."[57] Both courts acknowledge the difficulties that overworked, tired and vexed judges face, but concluded that, under any and all circumstances, judges must conduct court proceedings in a manner that will promote public confidence in the judiciary.

Substance abuse. The Michigan discipline authorities took a rehabilitative approach towards a judge suffering from alcoholism who had undertaken a course of treatment by the time the court heard the matter. Rather than remove a judge from office for alcohol-related conduct, the court suspended her from office for two months, followed by a six-month period of supervision.

District Judge Sobotka conducted several proceedings while intoxicated and was intoxicated during Law Day ceremonies in 1980.[58] At Judge Sobotka's hearing before the commission, she stated that she was an alcoholic and admitted that she had been habitually intemperate, that she unilaterally terminated substance abuse counseling which she had originally started to avoid formal action by the commission, and that she had failed to promptly render decisions in several cases before her. Judge Sobotka subsequently voluntarily entered an in-patient alcohol treatment facility, successfully completed the program, and was discharged from treatment with the recommendation that she seek out a women's support group and attend Alcoholics Anonymous.

The commission found that Judge Sobotka's conduct constituted habitual intemperance, conduct prejudicial to the administration of justice, neglect in the performance of judicial duties, and misconduct in office. The commission specifically determined that there was no evidence, ex-

50. No. 84-CC-4, slip op. (Ill. Cts Comm'n June 25, 1985).
51. 709 P.2d 852 (Cal. 1985).
52. In re Kellam, 503 A. 2d 1308 (Me. 1986); In re Sadofski, 487 A. 2d 700 (N.J. 1985).
53. In re Sadofski, 487 A.2d 700 (N.J. 1985).
54. In re Kellam, 503 A.2d 1308 (Me. 1986).
55. In re Sadofski, 487 A.2d 700 (N.J. 1985).
56. In re Kellam, 503 A.2d 1308 (Me. 1986).
57. *Id.* at 312.
58. In re Sobotka, No. 73651, slip op. (Mich. Feb. 13, 1985). For an overview of the approaches taken toward the alcoholic judge by discipline authorities, *see* Goldstein, *The role of alcoholism in judicial discipline decisions,* 16 Loy. U. Chi. L.J. 549 (Spring 1985).

THE 1983 SEXUAL ASSAULT OFFENCES: EMERGING LEGAL ISSUES IN SENTENCING*

According to section 246.1, the first level of sexual assault is a hybrid offence. As such, it can be prosecuted summarily or by indictment. If proceeded with summarily, this offence can result in a fine of not more than $500. or imprisonment for 6 months or both.[1]

Under section 246.2, sexual assault with a weapon, threats to a third party or causing bodily harm, is treated as a more serious offence. It is indictable and subject to a maximum penalty of fourteen years.

Aggravated sexual assault is the most serious form of sexual assault. The maximum penalty for this offence is life imprisonment.

The following chart[2] indicates the severity of the penalties for the 3 levels of sexual assault in relation to comparable offences in place prior to the 1983 amendments:

Indecent assault of a female	5 years	Sexual assault	10 years
Indecent assault on a male; Attempted rape	10 years	Sexual assault with a weapon, etc.	14 years
Rape	Life imprisonment	Aggrevated sexual assault	Life imprisonment

Although the maximum sentences for the three levels of sexual assualt are set by statute, the range of sentences to be applied will be determined by judges on a case by case basis. The new provisions provided little direction here.[3] If past sentencing practices associated with the repealed sexual offences are any guide, the principle of deterrence will be emphasized by judges in determining sentence for the more serious forms of sexual assault.[4]

In his article "Making a Silk Purse? Sentencing: The 'New' Sexual Offences," Paul Nadin-Davis has suggested that in changing the statutory maxima applicable to the different levels of sexual assault, Parliament was not attempting to increase or lessen the severity of the penalties applicable to the sexual offences. Rather, the intention was to provide judges with greater flexibility in setting sentence, thereby facilitating conviction.[5] According to Nadin-Davis, apart from enhancing judicial discretion, ". . . there is little either express or implied regarding Parliament's wishes in respect of sentencing patterns."[6]

Given the broader scope for the exercise of judicial discretion with respect to sentencing contained in the 1983 amendments, there is a danger that many of the objectionable features of the former substantive and evidentiary provisions relating to sexual offences will now reemerge at the sentencing stage.[7] Examples of this might include: (1) an undue emphasis on the absence of penetration; (2) considering the complainant's previous sexual history in general, or past sexual liaison with the accused in particular, as mitigating factors;[8] (3) viewing the complainant's lifestyle as somehow contributing to her chances of being sexually assaulted.[9]

REFERENCES

1. This is the general penalty for summary conviction offences. See: section 722(1) of the Code.
2. C.L.M. Boyle, *Sexual Assault* (Toronto: Carswell, 1984), p. 172.
3. *Ibid.*
4. R P. Nadin-Davis, "Making a Silk Purse? Sentencing: The 'New' Sexual Offences" in *The New Sexual Assault Legislation* (Vancouver: Continuing Legal Education, 1983) p. 10.2.01 at pp.10.2.08-10.2.09.
5. *Ibid.*, at p. 10.2.02.
6. *Ibid.*, at p. 10.2.04.
7. *Ibid.*, at p. 10.2.11.
8. See: "Judge's comments on assault case anger women's groups," *Ottawa Citizen*, May 17, 1985, p. A5, where an Ontario Supreme Court Judge in determining sentence for a sexual assault charge, concluded that the gravity of the offence was reduced due to the fact that the victim had been previously involved with the accused.
9. See for example: *R* v. *Brown* (1983), 34 C.R. (3d) 191 (Alta C.A.) as cited by Boyle *supra,* footnote 2, at p. 176, where an eight year sentence was reduced to four years on the grounds that the complainant was contributorily negligent in going up to the accused's apartment between 2:00 and 3:00 a.m.; See also: "Bowlby J. catches flak over courtroom remarks," *Ontario Lawyer's Weekly,* February 22, 1985, p. 2, where Judge Bowlby in a sentencing hearing for a sexual assault charge, described the complainant who was a stripper, as being in the profession of promoting "Lust."

***This article is extracted from the 1985 report prepared by Gisela Ruesbaat for the Department of Justice, Canada, entitled *Sexual Assault Legislation in Canada an Evaluation.* It is presented here because it not only points out emerging legal issues but it is also a good indicator of how judicial decision making affects those issues.**

alleging, *inter alia,* that the act was unconstitutional, principally on due process grounds. In 1985, the D.C. Circuit Court of Appeals held that a determination of the validity of the act was premature because the investigation has not proceeded sufficiently.[78] Further, Judge Hastings had the right to appeal to the Judicial Conference should he eventually be sanctioned.

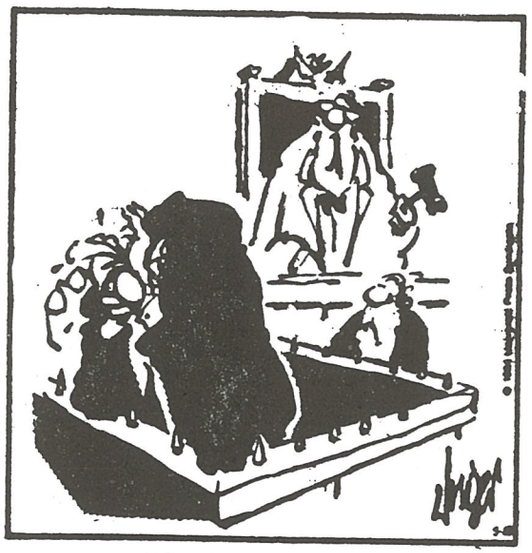
However, the Eleventh Circuit Court of Appeals more recently held that, at least insofar as the investigation had proceeded, the act is constitutionally valid.[79] The court noted the D.C. Circuit decision, but stated that its holding was in fact consistent with the other circuit, because the D.C. court withheld judgment on the validity of the act since nothing had at that time taken place under the ostensible authority of the act. In contrast, the Eleventh Circuit had been asked to rule on the validity of subpoenas issued by the investigating committee against members of Judge Hastings' staff and, therefore, could extend its ruling to the constitutional validity of the act to the extent that the act had been invoked.

Thus, the court held that the act did not violate the separation of power doctrine, nor did it impermissibly intrude upon the independence of judges or invade the House's exclusive authority to remove judges through impeachment proceedings.

* * *

Commissions are now proceeding against conduct that may not have been perceived as wrongful 25 years ago when the discipline apparatus was put into place. Belittling comments to women, for example, increasingly have come under fire as part of a larger program against gender bias in the courts. It is essential, however, that the general public and members of the legal community in particular become familiar with the important decisional law being carved out in the area of judicial discipline. Lawyers must keep abreast of changes in judicial conduct law in order to better protect both themselves and their clients. Judges must stay informed in order to uphold public confidence in the judiciary.

78. *Ad.* at 1102-3.
79. In re Certain Complaints v. Mercer, 783 F.2d 1488 (11th Cir. 1986).



"Good grief, man. It's only a parking ticket!"

cept for Judge Sobotka's admission of alcoholism, to establish that Judge Sobotka suffered from a disability. The commission recommended that Judge Sobotka be publicly censured, suspended from office for two months with salary, remit two months' salary to the state as a condition of reinstatement, and submit to supervision by the commission for six months thereafter. The terms of supervision included abstinence from alcohol; attendance at Alcoholics Anonymous twice weekly, confirmed in writing; and the employment of a court reporter and tape recorder to record all proceedings before the judge, with records to be made available to the commission on demand. The Supreme Court of Michigan adopted the commission's recommendation.

COMMISSION AUTHORITY AND PROCECURE

Scope of Commission Powers — Investigation; Subpoena Powers. Two issues appear in the caselaw involving investigative and subpoena powers — the personal privacy rights of individual judges, and the institutional integrity of privacy rights of organizations such as bar associations or grand juries.

In re Agerter,[59] a 1984 Minnesota case, highlights the personal privacy issue. The court upheld a subpoena issued by the Board on Judicial Standards to the extent that it required the judge to appear and answer questions concerning an alleged drinking problem but quashed the subpoena in regard to an alleged sexual relationship. There was a sufficient state interest in the information to justify questioning the judge on his drinking habits. Further, the information would be elicited in a confidential setting.

Further, there was evidence from more than one source concerning an alcohol abuse problem. In contrast, there was no showing that the alleged sexual relationship was a matter of public knowledge. To be questioned about one's sexual life even in a confidential setting was "humiliating, distressful and demeaning." The court noted that the board was not prohibited from investigating the alleged sexual misconduct, but could not justify the subpoena at this stage of the investigation.

In re Judicial Inquiry Board's Petition of Hayward,[60] a 1984 decision, confronted the issue of institutional integrity. Here, an Illinois appellate court upheld the quashing of a subpoena issued by the Judicial Inquiry Board against a local bar association seeking production of documents used in evaluating judges for retention election. The bar association had promised confidentiality to the lawyers and judges interviewed in order to obtain the information. The board asked for information on the judges not recommended for retention and any documents showing misconduct generally.

The court found that confidentiality was essential to the bar associations' evaluations. While recognizing that the board and the bar association shared the same goal of ensuring the integrity of the judiciary, the public interest was best served by allowing the bar records to remain confidential and thus preserving the bar association's service to the public. The court rejected the argument that the board was entitled to greater deference because it was created by constitutional amendment, noting that since the state constitution also requires judges be elected by the public, it would be foolish to do damage to an important source of information about the quality of judges. The court, however, failed to address the question of how the board is to do its job if it can't get information about judicial misconduct, and did not take into account that the board also promises limited confidentiality to its witnesses.

CONFIDENTIALITY

Confidentiality provisions have come under considerable challenge in the past two years, raising such issues as who should be protected by confidentiality and to what extent disciplinary proceedings should be confidential.[61]

First, some important procedural aspects of confidentiality have been addressed recently. In *Gubler v. Commission on Judicial Performance*,[62] a judge successfully challenged the commission practice of issuing press releases upon filing recommendations for discipline with the high court, arguing that the public could be misled into believing that the commission findings were final, when in fact judges have 30 days to file a petition for modification or rejection before the decision is final. The court reasoned that the commission's original practice unnecessarily jeopardized public confidence in the integrity of sitting judges and, therefore, the judicial process.

59. 353 N.W.2d 908 (Minn. 1984).
60. No. 84-266, slip op. (Ill. App. Nov. 13, 1984).
61. *See,* Shaman, Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process,* 58 Temp. L.Q. 755 (1985), for a comprehensive analysis of confidentiality rules.
62. 688 P.2d 551 (Cal 1984).

In contrast, *In re Alvino*[63] rejected a similar argument by a judge who requested an opportunity to persuade the New Jersey Supreme Court that a private reprimand or dismissal was appropriate instead of the judicial conduct committee's recommendation becoming public. The court reasoned that the potential for public cynicism was great where judges have the responsibility of disciplining other judges. Public confidence in the system was maintained by informing the public whenever the committee, composed of laypersons, lawyers and retired judges, recommended discipline regardless of whether the supreme court thereafter agreed or disagreed.

Another issue recently raised concerned the scope of the confidentiality privilege. In *Owen v. Mann*,[64] a 1984 Illinois decision involving a libel suit filed by a judge against a complainant, the court held that the complainant was not required to produce documents in his possession filed with the board concerning the judge. The court found that the complainant was protected under the confidentiality provision, which was constitutionally mandated and which could only be superceded by due process needs. The confidentiality rule was intended for the protection of witnesses as well as judges. One judge dissented, arguing that the confidentiality provision was intended only to protect the identity of witnesses; once their identity was disclosed, there was no point in hiding the content of the complaint.

In *First Amendment Coalition v. Judicial Inquiry and Review Board*,[65] the Third Circuit Court of Appeals recently held that a Pennsylvania provision requiring confidentiality of Judicial Inquiry Board proceedings, except where the board files a recommendation for discipline, is not violative of the First Amendment. The plaintiffs — a media and press coalition — had argued that the First Amendment requires public access to all cases in which a disciplinary hearing is held, regardless of whether the hearing results in a dismissal of recommendation for discipline. The court disagreed, finding that the public right of access is dependent upon a tradition and expectation of openness, which in the judicial disciplinary process was not present. The court rejected the argument that disciplinary hearings are the modern equivalent of impeachment proceedings, which are public. Finally, the court stated that secrecy helped maintain confidence in the judiciary by avoiding the premature disclosure of groundless complaints. Chief Justice Adams, in his dissent, argued the opposite was true — public access enhances confidence in the judiciary by avoiding the suspicion engendered by secrecy.

Finally, a somewhat unusual order was entered recently in Rhode Island involving the former state Supreme Court Chief Justice Bevilacqua.[66] The Rhode Island legislature issued a subpoena against the judicial conduct commission, seeking documents relating to a closed investigation of the justice which had resulted in his censure and four month suspension. The court upheld the subpoena, stating in summary fashion that because the judge had accepted his sanction without a hearing, he had waived any protection under the confidentiality provision.[67] The order has serious implications for commissions seeking to avoid formal hearings by allowing judges to stipulate to findings of misconduct.

ISSUES OF COURT ADMINISTRATION

Handling Court Funds. All of the recent decisions — with a single exception — order removal from office for judges who commingle or otherwise mishandle court funds.

In a typical case of this type from Mississippi, Judge Brown collected $21,000 between 1976 and 1983 in criminal fines and funds held in trust for the county and civil litigants.[68] He commingled this money with his personal funds, and converted it to his own use to pay personal expenses. Judge Brown maintained that he intended to repay each litigant but did not have sufficient funds. He made restitution in 130 out of 170 cases, but was not able to return approximately $1,400 because the litigants could not be located.

The Mississippi Supreme Court rejected the commission's recommendation that it order only public reprimand and $1,400 fine. Noting that removal had been imposed in several previous cases, the court instead followed the commission recommendation in part, but additionally ordered Judge Brown's removal.

63. 494 A.2d 1074 (N.J. 1985).
64. 475 N.e. 2d 886 (Ill. 1984). *See* Shaman, Begue, *supra* note 61 at 786-788 for a discussion of Owen and other similar libel actions.
65. 784 F.2d 467 (3rd Cir. 1986). *See* Shaman, Begue, *supra* note 61 qt 773-778 for a discussion of First Amend. Coalition.
66. In re Bevilacqua, No. 86-125 appeal, Unreported Order (R.I. Mar. 14, 1986). In re Bevilacqua, No. 86-25 Appeal, Unreported Order (R.I. July 24, 1986) (opinion was supposed to follow Order dated Mar. 14, 1986 but instead Chief Justice Bevilacqua resigned, obviating need for opinion.)
67. *See* Forbes v. Earles, 298 So.2d 1 (Fla. 1974). See Shaman, Begue, *supra* note 61 at 782-784 for a discussion of Forbes.
68. In re Brown, 458 So.2d 681 (Miss. 1984). *See also* In re Garner, 466 So.2d 884 (Miss. 1985). (where a judge failed to report and apparently kept over $3000 in fines received by her court, the court ordered removal from office); In re Newman, Unreported Determination (N.Y. Comm'n Sept. 28, 1984) (judge who failed to make timely deposits of money received over a two-year period and who failed to report cases or remit fund to the state was removed from office.)

The exception to the general rule of removal from office for mishandling court funds is from New York.[69] There, a town court justice failed to deposit the proper amount of court funds in his official court account. He and his wife (who was the court clerk) used undeposited cash from the court account for personal expenses, substituting checks for the court funds. Between 1978 and 1982, the deficit in Judge Sandburg's court account grew to over $800.

The commission determined that Judge Sandburg's neglect of administrative responsibilities constituted a breach of the public trust that ordinarily would result in removal. However, in contrast to the Mississippi court, the commission used mitigating factors — cooperation with the commission, maintenance of accurate records and absence of attempts to conceal the deficiency — to impose censure instead.

EVIDENCE
STANDARD OF JUDGING THE JUDGES

It is not uncommon for discipline authorities to apply an objective standard to evaluate whether a particular behavior by a judge violated Code. However, in two recent Maine decisions, the Maine Supreme Court imposed a "reasonable judge" standard in a case involving misapplication of the law, and a "reasonable person" standard in a complaint about a discourteous judge.

The Maine high court decided *In re Benoit*[70] first. Judge Benoit jailed a defendant in a civil case; jailed several judgment debtors for failure to make court-ordered payments to creditors without first providing a hearing on ability to pay; and jailed a third person for failure to complete public service work that had not been court-ordered. In three cases, he denied defendant's motions for stay of sentence pending appeal.

The commission alleged that Judge Benoit violated Cannon 3A(1). The Canon states in part: "A judge should be faithful to the law and maintain professional competence in it."[71] The Maine Supreme Court affirmed the commission, holding that in cases involving violations of Canons 3A(1) the appropriate standard is "whether a reasonable judge would conclude that the actions complained of were obviously and seriously wrong."

One year later, the court received another complaint, this time concerning Judge Kellam.[72] The commission alleged that he engaged in a pattern of discourteous and impatient treatment of litigants and witnesses.[73] The commission found that he violated Canons 3A(3)[74] and 3A(4).[75]

Before the court, Judge Kellam contended that the "reasonable judge" standard used in *Benoit* should apply to his situation as well, despite the fact that conduct governed by different canons was involved. The court refused. It held that a judge's duty of courtroom courtesy should be evaluated from the perspective of an ordinary, reasonable person, not an ordinary judge.

FEDERAL JUDICIAL DISCIPLINE

There is a small but growing body of law on the subject of federal judicial discipline. The Judicial Council Reform and Judicial Conduct and Disability Act of 1980[76] came into being only six years ago and its interpretation is still undergoing much revision. At present, perhaps the most interesting and relevant question being debted is the constitutionality of the act itself.

Following his acquittal on bribery charges, Judge Hastings became the subject of a complaint filed against him under the act.[77] In response, Judge Hastings filed several lawsuits,

69. In re Sandburg, Unreported Determination (N.Y. Comm'n June 6, 1985).
70. In re Benoit, 487 A.2d 1158 (Me. 1985). *See also supra,* notes 13, 14, and 19, and accompanying text.
71. *See supra* note 12, for full text.
72. In re Kellam, 503 A.2d 1308 (Me. 1986). *See also supra* notes 56-57, and accompanying text.
73. *See supra* notes 52, 54, 56-57, and accompanying text.
74. "A judge should be patient, dignified, and courteous of litigants, jurors, witnesses, lawyers and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control. Canon 3A(3), ABA Model Code of Jud. Conduct. (1973).
75. "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law; and, except as authorized by law; neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." Canon 3A(4), ABA Model Code of Jud. Conduct. (1973).
76. 28 U.S.C. §331, 332, 372(c), 604 (1982).
77. Hastings v. Jud. Conf. of U.S., 770 F.2d 1093, 1096-7 (D.C. Cir. 1985).