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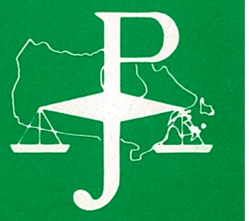
THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES



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The Provincial Journal is a quarterly publication of the Canadian Association of Provincial Court Judges. Views and opinions contained therein are not to be taken as official expressions of the Canadian Association's policy unless so stated.

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Ramada Renaissance, Edmonton, Alberta

September 13-17, 1989

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NAME OF COURT: _____

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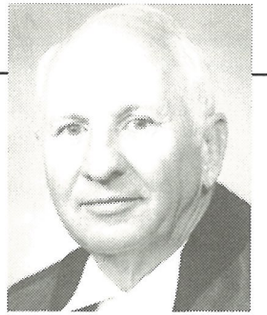
President's Page



by/par Judge Kenneth Crowell/M. le juge Kenneth Crowell

It hardly seems possible that the months have flown off the calendar so rapidly. While the sands of time have quickly spilled, it has been a period of some major changes (either concrete or recommended) which have been substantial influence upon the position of Judges individually, and upon the Association generally.

SALARY CONSIDERATIONS

In the specific category the Nova Scotia salary Tribunal has submitted its binding report to Government setting remuneration at $85,000 for April 1, 1988 and $89,000 for April 1, 1989. While these figures fall well short of the submissions and proposals presented it was interesting that the Tribunal considered its mandate was

"to select an amount which would fairly remunerate the Judges, satisfy the need to maintain the public image of Judges, and yet would be an appropriate amount to add to the burden on the taxpayers of the Province. This amount should not be locked to the salaries of civil servants, lawyers, Superior Court Judges, Board or Commission chairmen or any other group."

The Ontario Legislature is presently considering the recommendations of the Ontario Provincial Courts Committee re remuneration, allowances and benefits of Provincial Court Judges. The Committee recommends a salary of $105,000 for April 1, 1987 and a cost-of-living increase, based upon the Consumer Price Index, be effected for subsequent years.

The Province of British Columbia is presently considering the Report of the Justice Reform Committee, while a Committee is active in the area of remuneration for provincially appointed Judges.

The Quebec court has been restructured and the issues of remuneration, allowances and other benefits are presently being considered.

Several other jurisdictions are involved with similar considerations, the net result should bring about a narrowing of the disparities between federally appointed Judges and those in the Provincial courts.

MEETING: DEPARTMENT OF JUSTICE

I was pleased to be a member of a Committee with First Vice-President Ron Jacobson and Executive Director Keith Libby which had a very productive, and hopefully fruitful, meeting with

Il semble guère possible que les mois se soient envolés du calendrier aussi rapidement. Pendant que le sable du temps s'est vite écoulé c'est aussi une période de quelques changements majeurs (concretisés ou recommandés) qui auront une influence substancielle sur la position de chaque juge et pour l'Association en général.

CONSIDÉRATIONS SALARIELLES

Dans cette catégorie spécifique le Tribunal des salaires de Nouvelle Écosse a soumis son rapport obligatoire au Gouvernement établissant la rémunération à $85,000. pour le 1er avril, 1988 et $89,000. pour le 1er avril, 1989. Alors que ces chiffres sont bien en déça des soumissions et propositions présentées, il est intéressant de constater que le Tribunal considerait son mandat comme suit:

"Choisir un montant qui rémunérerait les juges équitablement, satisferait le besoin de maintenir l'image de marque des juges, mais serait un montant approprié à ajouter au fardau des contribuables de la province. Ce montant ne devrait pas être lié au salaire des fonctionnaires, avocats, juges de la cour supérieur, présidents de Tribunaux ou commission ou tout autre groupe."

L'assemblé legislative de l'Ontario considère maintenant les recommendations de Comité des Cours Provinciales de l'Ontario quant à la rémunération, appointements, et prestations des juges de la Cour Provinciale. Le comité recommande un salaire de $105,000. pour le 1er avril, 1987 et une augmentation de coût de la vie basée sur l'indexe des prix consommateurs pour les années suivantes.

La province de Colombie Britannique considère présentement le rapport de la Commission de la Réforme Judiciaire alors qu'un comité est actif quant à la rémunération des juges nommées par le Provincial.

La cour du Québec a été restructurée et les questions de rémunération, allocations et autre

officials of the Department of Justice in Ottawa.

The thrust of the "submissions and proposals" was a change in the emphasis and financial relationship of CAPCJ with the Federal Government. Clearly additional monies are required if our Association is to effectively fulfill its role within the Canadian Judicial system.

The Ottawa meeting also afforded an excellent opportunity for discussions and assessment of our Association's relationship with the Canadian Judicial Center.

COMMONWEALTH MAGISTRATES AND JUDGES ASSOCIATION

Canada recently hosted the 8th conference of the Commonwealth Magistrates Association. Executive members, Judges, and Magistrates were present from near and far. It is extremely interesting to meet other members of the judiciary, to compare notes and to learn of their problems and concerns. The name of the Association has been broadened to reflect the large number of Judges that are now members. When compared to many jurisdictions, the Judges in Canada are very fortunate, and it is my opinion that we should do everything possible to encourage and support the members of the judiciary in other parts of the Commonwealth.

VISITATION

No one wants a travelogue, but in passing, Avis and I want to express our sincere appreciation for the tremendous hospitality received on our visits to British Columbia, Alberta and Newfoundland, and looking forward to joining with fellow Judges (and spouses) in other jurisdictions in the coming months.

prestations sont maintenant considérées.

Plusieurs juridictions sont impliquées dans des considérations semblables: le résultat net devrait réduire les disparités entre les juges nommés par le fédéral et ceux des cours provinciales.

MEETING: MINISTÈRE DE LA JUSTICE

J'étais content d'être membre d'un comité avec le premier vice président Ron Jacobsen et le Directeur Général, Keith Libby, qui a eu une rencontre très productive et, j'espère' féconde avec les fontionnaires du Ministère de la Justice à Ottawa.

L'idée maîtresse des "soumissions et propositions" était d'un changement de l'emphaze et des relations financières de l'ACJCP et le Gouvernement Fédéral. Clairement de l'argent additionnel est requis si notre Association doit remplir sont rôle d'une façon effective au sein du système judiciaire canadien.

Le meeting d'Ottawa a offert une excellente occasion de discuter et d'évaluer les relations entre notre Association et le Centre Judiciaire Canadien.

L'ASSOCIATION DES MAGISTRATS ET JUGES DU COMMONWEALTH

Le Canada était l'hôte récemment de la 8e conférence de l'Association des Magistrats du Commonwealth. Membres de cadre, juges et magistrats étaient présents de partout. Il était extremmement intéressant de rencontrer d'autres membres du judiciaire, de comparer nos notes et d'apprendre leurs problèmes et inquiétudes. Le nom de l'Association a été élargie pour refléter le grand nomre de juges qui en sont membres maintenant. Comparés à ceux de beaucoup de juridictions, les juges au Canada sont fortunés et je suis d'avis que nous devrions tout faire pour encourager et soutenir les membres du judiciaire partout dans le Commonwealth.

VISITE D'INSPECTION

Personne ne veut un récit de voyage mais en passant, Avis et mois voulons exprimer notre appréciation sincère pour l'hospitalité magnifique que nous avons reçue lors de notre visite en Colombie Britannique, en Alberta et à Terre Neuve et anticipons rejoindre nos collègues juges (et époux/ses) dans les autres juridictions les mois prochains.

In Lighter Vein

During a hearing in which he was apparently urged to distinguish a similar case, a learned and erudite Master of the Superior Court of one Province is said to have written:

> Any legal system which has a judicial appeals process inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder.
>
> He lamented further:
>
> I am bound by decisions of Queen's Bench Judges, by decisions of the Provincial Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial court occupy the bottom rung of the superior courts judicial ladder. I do not overrule decisions of a judge of this court. The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around.

Obviously there can be little doubt but that's a sage observation judiciously expressed, and I am sure that Provincial Court Judges can readily empathize with the learned Master.

What would the Master think, I wonder, if he had to not only defer to the big peckers in his legal hierarcy but had also to endure the kind of scornfulness that Provincial Court Judges must as we spotted recently in an Ontario District Court case. Remember, the case was in the District Court only because it was an appeal in a summary conviction matter, a step in the appeal process granted by statute for as everyone in the legal fraternity is taken to know, District Courts have no supervisory authority over other courts. They merely have statutory appellate jurisdiction. To conclude the point we quote directly from the case. You should know that Mr. Belleghem was counsel for the Appellant; Ms. Paparella acted for the Respondent.

HIS HONOUR: Do you have anything to say about the fact the practice continues in the court, of serving Court documents? Is that not contemptuous of the Court, to serve Court documents in the Court Room? I always thought it was, when I practised law, that you didn't serve documentation on people such as Notices under the Criminal Code, in Court.

MS. PAPARELLA: I haven't really thought about it, Your Honour, but I suppose if the Provincial Court Judges felt that way, they may have expressed their views. I am not aware of anyone indicating any displeasure with that practice. It works very well in remand Court, and I have seen no difficulty.

HIS HONOUR: I take it, Ms. Paparella, if you attempted to serve the document, that you may have problems because of your position? Being a member of the Bar, that that would be a contemptuous act. Does it make it less contemptuous because a police officer serves it?

MS. PAPARELLA: I don't see anything contemptuous with it, at all, Your Honour. It doesn't disturb the Court proceedings in any way.

HIS HONOUR: That's not a matter of whether it, in fact disturbs the Court proceedings, I didn't think documents of any kind, you don't go serving Writs or anything like that in Court, do you?

MS. PAPARELLA: That doesn't make it contemptuous I don't see any way.

HIS HONOUR: Well, it may, it may.

MS. PAPARELLA: I suppose that's a personal opinion, but I don't think so, Sir.

MR. BELLEGHEM: If I might, just to add to that, I think my friend's assertion that it doesn't bother the Provincial Court Judges, is an example of the requirement of this Court to exercise a supervisory jurisdiction. If it doesn't bother the Provincial Court Judges, I don't think that ends the matter because I don't think that that, I think that that would, to accept that, would be to abrogate the responsibility in this Court to supervise the jurisdiction of the Provincial Court Judges, because this is an Appellate Court.

The following anecdote comes from a Nova Scotia colleague:

Sergeant R. had been in the armed forces for twenty-five years. His duties had taken him all over the world. This fall, he and his wife began to have marriage problems. In early November they decided to separate and Sgt. R. moved out of the matriominal home. Three days later Sgt. R. walked back into the matrimonial home only to find his wife and another man "embracing". At least, that was how the crown put it.

When defense counsel rose, he said that the crown had been too delicate, that it had told the truth, but not the whole truth. Mrs. R. and friend were engaged in what you could say was a total embrace, while lying on the floor absolutely naked.

When Sgt. R. saw this, he became somewhat upset and thrashed both Mrs. R. and friend. He was charged with assaulting the two of them. The original charge was assault causing bodily harm, but no harm was alleged and he was permitted to plead guilty to the offence of simple assault.

Defense counsel recounted Sgt. R's many virtues, including his spotless record in the armed forces. In summing up and making a pitch for clemency, he said, "Everything was going fine for my client *until he got himself into a rut*".

I could still hear antlers clashing on the mountainside when I finished sentencing him.

This has two consequences. They do not require the skills and abilities which are necessary to work with juries, but nor do they receive the assistance juries provide in making the fact-finding decisions. Magistrates must decide all disputed questions of fact as well as law and their decisions must be accompanied by the stating of reasons.

While Magistrates now have judicial independence, many are still required to work under arrangements which are inimical to a free, independent mind. The Magistrate is often resident on a circuit for many years. He comes to know well all the people who are regular witnesses in court e.g. local police, fisheries inspectors, etc. At least on official occasions he must meet and socialise with some of them. This can place the Magistrate in an invidious position when dealing with cases where the credibility of witnesses is crucial. The Magistrate is in a much stronger position in terms of independence in Courts where the witnesses are not known to him and he does not have to live or reside with the people of a town, and where he therefore does not have to rationalise or justify his decisions to those people either mentally or otherwise. Judges have no such problem because they live anonymously in the cities. They enjoy greater independence in that respect and as a result their task is less stressful than that of Magistrates.

In NSW appeals from Magistrates' decisions in respect of penalty go to the District Court and are heard *de novo.* Therefore no binding principles of sentencing can emerge to guide the bench of Magistrates as a group. They must either look to other States, their colleagues, or their own individual common sense which sometimes turns out to be their own individual idiosyncracies...

Magistrates of Australia are shortly to have their jurisdiction extended even further. The Judges of the Family Law Courts are unable to cope with the volume of cases coming before them. In addition to maintenance, custody and access cases, Magistrates are to be asked to handle property disputes where the property in dispute does not exceed $20,000 and undefended divorces. All this leads me to suggest that the work of a Magistrate performed well, must be and indeed is, at least as onerous as that of a Family Law Judge.

As judges of both fact and law, Magistrates make decisions which are responsible for determining the overwhelming majority of disputes and allegations referred to Australian Courts for resolution. Magistrates are mindful of the need to continue this service to the public and indeed Magistrates in the past have made, and are still making, significant efforts to improve that service. In NSW the initiative was taken by Magistrates themselves to require that Magistrates have proper legal qualification and later that they be given judicial independence. And Magistrates continue to be in the forefront in developing and supporting programs for their continuing legal education.

However the time has now been reached when to improve the quality of justice even further in the lower courts, and more importantly in the justice system as a whole, governments must adopt policies and take decisions which will attract lawyers of even higher ability and talent to Magistrates' benches. This can only be done by raising the status of Magistrates and improving their terms and conditions of service. If it is done, Governments could then confidently take steps to transfer even more work from the higher courts.

The creation of Local Court Judges makes sense because it accords with the public perception of the courts, removes an artificial distinction between judges and magistrates, and by increasing status and working conditions would attract more barristers and solicitors of real quality to serve. Only by this means or through the development of a fully integrated Court system including the Magistrates' Courts could the needs be met.

Editorial Page

For most Judges, sentencing of offenders is the most difficult part of their job. This is so because sentences must be crafted not only to fit the crime but also to fit the person. It is not merely a truism but it is really trite to say that every case is different and every offender is different.

At the moment in Canada there is a paucity of comprehensive policies from Parliament on the principles that should govern the determination of sentences. Sentencing has become a mind craft developed by Judges and there have been few changes in the past century that have not originated with Judges.

As was done by various commentators, federal commissions and committees over the course of time, many problems with sentencing were identified by the Canadian Sentencing Commission which filed its report in 1987. Not the least of these problems is the matter of imprisonment of impecunious persons who default on fines imposed for some breach of the law.

There are no parliamentary policy guidelines on this problem which is so vexing for Judges and correctional authorities. However, the issue arose once again recently in the Supreme Court of Nova Scotia, this time in the context of a *Charter* challenge.

That case, reported elsewhere in this Journal, raised many questions of the constitutionality of such sentencing. Unfortunately, of the many questions raised, the case resolved only one and that resolution has potentially created much more work for our already overburdened courts.

From that case, however, two things appear obvious. On the one hand, the problem of incarceration of impecunious offenders for fine defaults is not likely to quietly disappear. On the other hand, given the large number of persons who apparently find themselves incarcerated for that reason, it is a problem that cries out for comprehensive government policy and guidelines.

Moreover, it seems only good common sense to say that imprisonment for no other reason than that one is unable to pay a fine should not be permitted as a rule of law. Yet, it is no solution to the problem to say that defaults should never be imposed on fines and that governments should be left to enforce fines through the civil process, for surely the imposition of a fine as a criminal penalty has a meaning and significance quite apart from a simple civil debt.

We would hope government would act expeditiously on this matter.

M. Reginald Reid
Editor-in-Chief

Feedback

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February 6, 1989

The Provincial Judges Journal

I write in response to Judge Seniuk's editorial comment published in the September 1988 issue of the Journal.

Judge Seniuk believes that the justice system has not significantly contributed to the plight of aboriginal people in Canada. He also says that provincial court judges are constrained by rules that deny them the ability to be an effective force for change.

I know Gerry Seniuk as a fine judge but on these issues I believe he is plainly and very wrong.

Judges and other members of the Canadian legal profession have faith and pride in our legal system; it has generally served us well. We have been known to beat our own drum pretty hard. One recent example of that tendency is the decision of the British Columbia Court of Appeal in *R v Strachan* (1986) 24 CCC (3d) 205 at pp 228-235; Esson J.A. there compares the Canadian and American experiences. He characterizes American society as one flawed by extreme racial prejudice and brutal police misconduct. He says these factors have impacted upon American judicial thought. Such institutional evils are rare in Canada according to this thesis.

But, as the report of the Canadian Bar Association committee on Aboriginal Rights in Canada (August 1988) correctly observes, the first citizens of this country do not share our self satisfying and self serving notions. Aboriginal people do not view our legal system as the protector of cherished values, but, rather, as the enforcer of rules made by others and too often not understood or accepted by them.

Provincial court judges cannot honestly say that we bear no responsibility for creating this situation and cannot contribute to changing it. We are not mere powerless pawns.

Canadian jails are populated by greatly disproportionate numbers of aboriginal people. Some of these persons are violent criminals who were sentenced accordingly. But many of them are there only because they could not pay a fine imposed by a provincial court judge, perhaps for fishing without a permit or causing a disturbance by being drunk. We all believe that we can explain and justify our decisions and orders on a case by case basis, but somehow we must come to understand that we really do punish too many aboriginal people and too often the punishment is too severe.

The child welfare authorities in every part of Canada will apprehend greatly disproportionate numbers of aboriginal children and provincial court judges still make too many wardship orders. We may not rubber stamp the applications of social workers as many judges in most of Canada did only a very few years ago, but I do not believe we have much reason to be satisfied. We still make wardship orders in cases where we assume that the failure of parents to attend court means that they do not care and in cases where we choose not to explore the possibilities of children being cared for within extended families.

One could go on at great length but it is not necessary.

Aboriginal people encounter provincial court judges more often than they encounter other judges; we give shape to many of their beliefs concerning our legal system. Most of us do not understand the lives and values of aboriginal people. We provide reasons for their common beliefs that the law often intrudes unfairly to punish people and take children away (and to give circuit judges and lawyers opportunities for sightseeing, fishing, and partying).

The Canadian Bar Association report correctly states that most of the changes needed to remedy the plight of aboriginal peoples in Canada require political initiatives. But the report also correctly states that "in some cases the changes must come from within the profession, including both the judiciary and practitioners".

One specific recommendation made in the report is that "The Canadian Association of Provincial Court Judges (is) urged to include Aboriginal Law and the traditions and customs of aboriginal people in (its) educational seminars and conferences". I believe that we should endorse and act upon this recommendation, and very soon.

Yours truly,
C.C. Barnett

JUDGE OR MAGISTRATE?*

Exctracts from the Address of
C.R. Briese, Chief Magistrate,
New South Wales
ASMA Conference, Hobart, June 1988

The Australian Magistracy has moved to a position where its role and official recognition of that role, is in a judicial no-man's land. No longer are the Magistrates of Australia lay persons administering justice, but in the eyes of Governments or even in the eyes of some members of the judiciary neither are they Judges. While Magistrates might in some official quarters be regarded as judicial officers, they are not permitted to have the title Judge and Governments do not accord them recognition as Judges in terms and conditions of service.

One of the eight States and Territories, Queensland, has its Magistracy structured in the Public Service, but putting Queensland to one side, elsewhere Magistrates and Judges of Australia are both structurally independent of the Government and together they operate as the judicial arm of Government. There is no difference between them in terms of structure. Judges are lawyers chosen from the practising barristers (and recently solicitors) of the States and Territories. Magistrates are recruited from the practising and non-practising barristers and solicitors either within or without the Public Service. There is no difference in terms of purely formal qualifications.

Judges deal with approximately 5% of the criminal cases in Australian Courts. Magistrates handle the other 95%. Those dealt with by Judges comprise the most serious offences and, for the most part, the most difficult and complex cases but by no means all. The judiciary requires Judges with high skills in the criminal law, the ability to critcally analyse evidence and communicate that analysis to the jury in terms and language which a jury can understand and appreciate. Upon conviction (or after a plea of guilty) Judges have the onerous responsibility of sentencing and this often means depriving people of their liberty for lengthy periods of time including life imprisonment ... theirs is a role which it is not easy to perform well ..

Judges supervise the work of Magistrates in the same way as Judges of the higher Judiciary supervise the work of Judges of the lower Judiciary. In their civil jurisdiction work, Judges, deal with the majority of what are accepted to be the most important and/or complex cases.

Magistrates deal with an infinite variety of cases. The majority are not complex in terms of legal problems; generally they turn on disputed questions of fact. But increasingly today Magistrates are dealing with cases which are complex, both legally or factually. Many committal inquiries last for weeks, months, occasionally years. Points of law are continually raised and argued. White collar crime is receiving a great deal of attention from investigating and prosecuting authorities. These cases, including committals and summary trials, are usually not simple and are strenuously fought by defendants using some of the best counsel in the land ... Liberal legal aid schemes now ensure that nearly all defendants before Magistrates are represented by lawyers ...

Over recent years the jurisdiction of Magistrates in both civil and criminal cases has been substantially enlarged. The NSW Crimes Act gives a Magistrate jurisdiction to hear various property offences summarily without the consent of the defendant. By virtue of amendments in 1983 and again in 1987, a defendant charged with, say, stealing property up to the value of $5,000 no longer has the right to trial by Judge and jury. He is tried summarily and furthermore the range of offences which can be dealt with summarily has been greatly extended so that virtually all property offences now come within that Section. Where the defendant consents and property does not exceed $15,000 the case may also be heard summarily. Magistrates in NSW now deal with such offences as culpable driving, malicious wounding, causing grievous bodily harm by negligent act, etc. In civil jurisdiction NSW Magistrates deal with claims up to $10,000 and where the claim relates to motor vehicle damage the limit is $20,000. These substantial increases mean that the complexity of civil claims before Magistrates has increased markedly over the years.

Magistrates in some other areas have a greater criminal and/or civil claims jurisdiction than in NSW. In the ACT civil claims jurisdiction is about to be raised to $50,000 and in Victoria to $40,000. Overall these changes mean that increasingly court work in Australia is being transferred from Judges and juries to Magistrates' Courts.

Magistrates while doing the work of Judges are working under certain handicaps, hardships and difficulties which Judges do not experience. In the first place, they do not work with juries.

*Reprinted from *Commonwealth Judicial Journal*, Vol. 7 No. 4, December 1988.

It is submitted in response to these arguments that a judge, upon being satisfied that he or she is dealing with a chronically poor offender, can simply decide not to issue the warrant without granting an extension to a date certain. This would remove the sword of Damocles from over the head of such an offender. Cannot the court grant in extension *sine die*? In such event, the onus will remain upon the crown to take the initiative to move to a default hearing and it is unlikely that it will do so unless it is satisfied that there is some information tending to support a finding that the defaulter has the competence to pay the fine.

In any event, I cannot conclude that ss. 646 and 722 of the *Criminal Code* are incapable of being applied by our courts in a manner that does not offend the *Charter.* If Ms. Hebb and others who are similarly situate are afforded their constitutional procedural safeguards and protections in the application of ss. 646(10) and (11) by our courts, I cannot conclude that impecunious persons will necessarily be incarcerated.

CONCLUSION

Some things are so offensive to the rule of common sense and so offend our sense of propriety that there is no need for precedent of law to condemn them or requirement of scholastic constitunal principle to denounce them.

The *Charter* is a fresh but already treasured legacy that demands from our society those principles of fairness and justice which are inherent in the soul of a mature democracy.

Our Constitution enshrines a system of justice based upon a belief in the inherent dignity and worth of every individual. (see *Regina v. Big M Drug Mart Ltd.,* supra, page 47 *R. v. Oakes,* supra, at page 333 and *Reference Re Section (2) of Motor Vehicle Act (1985), 48 C.R. (3d) 289 (S.C.C.)* at page 317). That a person should be imprisoned only because of his or her inability to pay a fine is inconsistent with such a system.

I therefore conclude that the age limiting phrase should be removed from s. 646(10) so as to make it age neutral and it would thus be applied as reading as follows:

> 646 (10) Where a person has been allowed time for payment of a fine, the court shall, before issuing a warrant committing the person to prison for default of payment of the fine, obtain and consider a report concerning the conduct and means to pay of the accused.

As there is not evidence that the court in the instant case "considered a report concerning the conduct and means to pay" of Ms. Hebb I grant her an order quashing the Warrant of Commitment.

"If I've got to tell the whole truth and nothing but the truth, what sort of fair trial is this gonna be?"

News Briefs

ONTARIO

1. Appointments

Her Honour Judge Elizabeth L. Earle-Renton, Toronto, effective November 30, 1988

His Honour Senior Judge Gerald S. Lapkin, Toronto, effective November 30, 1988

His Honour Ian A. MacDonnell, Toronto, effective November 30, 1988

Her Honour Judge Lauren E. Marshall, Toronto, effective November 30, 1988

2. Death

His Honour Judge Donald C. Smith, Smith Falls, deceased December 16, 1988, appointed December 8, 1937, retired February 7th, 1985, Honorary Life Member, President of Association of Provincial Criminal Court Judges of Ontario 1973-1974.

Judge Smith was a graduate of Osgoode Hall and was called to the bar in 1933. He is remembered for his devotion to the law and his compassion for the people.

Judge Smith witnessed many changes both in the law and in working conditions during his 47 years on the bench as the following excerpt from a newspaper tribute written on the occasion of his retirement in 1985 shows:

> PERTH, Ont. — One of the longest sitting judges in the history of Ontario presided over his last court in September before retiring after 47 years on the bench.
>
> Judge D.C. (Donald) Smith, 74, has been the provincial court judge for Lanark County since he was appointed by the last Liberal government in Ontario in 1938.
>
> "I don't think there's any judge that has served longer than I have," he says, adding that one of the biggest changes he has seen over the years is the increased number of impaired driving charges.
>
> "When I was appointed magistrate they didn't have the breathalyzer," he notes, saying in those early days he heard one drunk driving case every two or three weeks.
>
> He was appointed Provincial Court Judge at the age of 27, one year after he ran unsuccessfully as a Liberal candidate in the provincial riding of Lanark.
>
> In those early days he had no court clerk, shared a stenographer and there was no such thing as Legal Aid or presentence reports.

3. Ceased to Serve

His Honour Senior Judge E.A. (Ted) Fairbanks - Hamilton. Effective January 31, 1989. Appointed January 6, 1964.

SASKATCHEWAN

D. Albert Lavoie was sworn in as a Judge of the Provincial Court of Saskatchewan on Friday the 6th of January, 1989, in Saskatoon.

Judge Lavoie, fluent in French and English, was admitted to the bar in 1975 and appointed Federal Queen's Counsel in 1987.

BRITISH COLUMBIA

New Appointments

A warm welcome is extended to the following new members of the Provincial Court Bench.

Marilynn Carole Borowicz
Lower Mainland Family Div., November 18

Mario Rigo Mondin
Lower Mainland Court Civil Div., December 5

Donald Lynn Sperry, Q.C.
West Kootenay, November 28

Judge Norman Collingwood
Administrative Judge, South Fraser Region

Judge Stuart Enderton
Administrative Judge, West Kootenay Region

Judge Philip d'A Collings
Administrative Judge, Lower Mainland, Family Div.

Retirement

Judge Lance Heard, retired August 31, 1988

Judge Heard had been appointed at Duncan in 1964 and spent all his judicial years in that area.

In Memoriam

Harold E. Alder
at Victoria, October 31, 1988

Harold Alder was appointed a part-time Judge of the Juvenile and Family Court in 1960 and received a full time appointment in 1965. He retired in February, 1981, having served all of his judicial life in Victoria.

He is remembered by all that knew him as a man of infinite kindness as well a person who treated all who appeared before him with courtesy and consideration, and by those who worked with him as a cheerful and helpful colleague. Not for nothing did he earn the sobriquet of "Happy Harold", bestowed by the staff at the Victoria Courthouse.

Provincial Judges' Association
Executive 1988-1989

Elected November 26, 1988

President: Judge J.B. Paradis
Vice President: Judge S.W. Enderton
Treasurer: Judge J. Auxier
Secretary: Judge T.W. Shupe
Members at Large:
South Island: Judge R.W. Metzger
North Island: Judge E.D. Schmidt
Okanagan: Judge G.H. Gilmour
North Country: Judge R.B. MacFarlane
Kootenays: Judge R. Fabbro
Vancouver: Judge R.J. Lemiski
Lower Mainland: Judge W.G. MacDonald

ON CONTEMPLATING THE DINNER FOR CHIEF JUDGE KRIS STEFANSON

by Judge Ian V. Dubienski

The thought struck me that this was the first time that there had been such a large gathering of judges in Manitoba, and that it marked a very historic occasion.

I further began to conjecture as to what would be the appropriate noun to cover such a collective event. After some research, I found that there was a great conglomeration of words that could be used if the appropriate connotation could be utilized.

In other words, what are we talking about? Such as, if geese or women, we talk of a "gaggle"; cattle — a "herd"; fish — a "school".

Generically, no doubt it is an "assemblage", but what kind?

Further, a relevant element is, what is the group doing at the time? Are they involved in work, play, sports, recreation, or otherwise?

I felt that the only way to deal with it would be to look at general groups and try to find what word best describes the judiciary after surveying the groups.

Being no relationship, it is not a "clan" and unless on particular business, it is not an "association", and although they call each other "brother", it takes the greatest stretch of imagination to consider any "brotherhood", especially now with lady judges, and with rivalries — judges are certainly no "family".

If it is a group, like grapes, they are not a "cluster", or trees — a "clump"; or dough — a "batch"; or straw — a "bale".

They are not of the forest — a "grove"; a "thicket"; or of the farm — a "stack", a "sheaf", or a "swath", so one tends to discard the connotation as a group. To consider whether or not they are an "accumulation"; I suppose after a party, they might be considered a "heap" or a "lump", a "pile", or a "mass". There is some suggestion that they might be a "conglomeration" when viewing the cross-section of appointments. It might be said that there was a "quantity" but certainly not a "concentration", and yet there might be a "congestion". If one considers the act of coming together, one of course cannot give the military meaning of "mustering". One would hestitate to say that there is a "uniting" or a "clustering". And most decidedly not a "flocking" or a "swarming" or a "herding". If they were avoiding criticism, of course, there might be a "huddling", "grouping", "hoarding", or "storing".

Discarding the above, one then comes to the usual words of grouping, but they do not seem to have the dignity required. Such a "collection", "gathering", "meeting", "congregation", "reunion", and we certainly cannot have any of the political connotations of "assemblies", "congresses", "senates", "legislatures", or of academia,, "convocation", "caucus" and "convention".

To generally look at judges as a "crowd", we are confronted with, but reject, such connotive

Justice Dickson (as he then was) speaking for the majority emphasized that s. 52 proclaims the fundamental principle that the Constitution is the supreme law of Canada and where, as here, a challenge is based on the unconstitutionality of legislation, recourse to s. 24 is unnecessary.

Counsel for Ms. Hebb submit to the court that an appropriate remedy would be to sever the offending phrase from s. 646(10) so that that section is age neutral and applies to all of persons or to make a declaration extending the benefits of s. 646(10) to the applicant personally or, alternatively, order a stay of the warrant of commitment of Ms. Hebb so long as she is not provided with the rights accorded to 16 to 22 year olds under s. 646(10).

The first consideration is whether the determination of unconstitutionality should result in a finding that the full s. 646(10) should be voided or whether the constitutionally objectionable age reference should be severed from that subsection.

"Severance" is discussed by Dale Gibson, *The Law of The Charter: General Principles* (1986) at page 188:

> Where a court finds a statutory provision to be unconstitutional for any reason, it must decide whether this invalidates the rest of the enactment, or whether the offencing provision should be excised and the rest left intact. The guiding principle for such constitutional surgery is "severability", which Professor Hogg has described as follows:
>
> > [S]everance is inappropriate when the remaining good part 'is so inextricably bound up with the part declared invalid that what remains cannot independently survive'; in that event it may be assumed that the legislative body would not have enacted the remaining part by itself. On the other hand, where the two parts can exist independently of each other, so that it is plausible to regard them as two laws with two different 'matters', then severance is appropriate because it may be assumed that the legislative body would have enacted one even if it had been advised that it could not enact the other.

By removing the phrase of s. 646(10) that relates to age, it is clear that the remaining words are not "so inextricably bound up with the part declared invalid that what remains cannot independently survive" (*A.G. Alta. v. A.G. Can., [1947] A.C. 503 (PC.)* at p. 518). To sever the age related phrase provides protection to persons of all ages who are charged with a crime in that they cannot be incarcerated for failure to pay a fine until a judicial review of their situation is held. On the other hand, by severing the complete s. 646(10), this protection is removed for all persons, including the age group which Parliament determined were worthy of that special protection.

It is important that the courts not unjustifiably invade the domain which is properly that of the legislature. In following either of the alternatives above, the court will be interfering to some extent with the efforts of the legislators of the enactment. Where the result is the removing of a protection that is constitutionally encouraged — that is judicial consideration before incarceration — as opposed to the enlarging of such a protection, it is submitted that the court should favour a result that would expand the group of persons protected rather than remove that protection completely.

It is argued by the crown that the words of the section make it clear that Parliament did not intend for this subsection to apply to all fine defaulters and to make it age neutral would be undue interference into the arena of the legislators. I do not accept that such action in these circumstances is unjustifiable or inappropriate. Since the initial proclamation of this legislation, the *Constitution Act* has been implemented and the legislative authorities have specified in it the importance of basic constitutional rights. Section 15 of the *Charter* is legislative expression of their respect for equality and for equal benefits of the law and the court is not unjustifiably interfering into the legislative domain when it applies that *Charter* in such a way as to expand the benefits of the principles enunciated in the *Charter.* It would not be "appropriate and just in the circumstances" to deprive 18 to 22 year olds of such an important safeguard as the requirement of judicial review before incarceration.

It has been submitted that even the application of s. 646 may be effected in such a way that Ms. Hebb's constitutional rights will still be infringed. For example counsel for Ms. Hebb suggest that ss. 646(10) and (11) are both constitutionally flawed in that neither provision *prohibits* the jailing of the poor if they fail to pay fines with default provisions.

It has also been argued that the usefulness of the extension of the review right to Ms. Hebb is minimal because if the review results only in an extension of time for her to pay her fine, it is ineffectual in that she will never be capable of paying the fine. Thus, it is submitted, in "default hearings" an impecunious offender faces the continual repetition of the "default hearing". It is then argued that any remedy following a default hearing short of the cancellation of the warrant can only be a stop-gap.

63 C.R. (3d) 64 (Ont. C.A.) Tarnopolsky, J.A. enunciated a three step test developed by the court in applying s. 15(1) of the *Charter*. At page 87 he stated:

> As the result of a series of cases, this court has evolved a three-step analysis for determining whether there has been a contravention of Charter s. 15(1):
>
> (1) an identification of the class of individuals who are alleged to be treated differently;
>
> (2) a consideration of whether the class purported to be treated differently from another class is similarly situated to that other class in relation to the purpose of the law; and
>
> (3) a determination as to whether the difference in treatment is 'discriminatory' in the sense of a pejorative or invidious or disadvantageous purpose or effect of the law or action impugned.

Whatever the original purpose behind s. 646(10), its continued existence creates a class of individuals — those between the ages of 16 and 22 years, who are treated differently than those who are older. Although some of this class, those under the age of 18, are presumably not similarly situated to those more than 21 years of age, it is my opinion that those in the age group of 18 to 22 are similarly situate to the older class in relation to the purpose of the law. Under all of these circumstances, the difference in treatment between these two groups is discriminatory in the sense explained by the courts.

To adopt the words of MacDonald, J.A. in *R. V. Hardiman (1987), 78 N.S.R. (2d) 55 (S.C.A.D.)* this *"...unequal and unjustified application of substantive criminal law is on its face prima facie discriminatory within the meaning of s. 15 of the* ***Charter*****"**.

In my view the creation of a special class who are to receive special benefits under the criminal law creates a *prima facie* violation of a right under s. 15(1) to equal *benefits* of the law and is clearly discriminatory.

The unequal application of the criminal law is *prima facie* a breach of s. 15 and unconstitutional unless otherwise justified as a reasonable departure.

CHARTER S. 1 CONSIDERATION

Whether a departure from the s. 15(1) benefits of the *Charter* is reasonable and justifiable or not is a matter to be determined within the context of s. 1 of the *Charter*.

Section 1 of the *Charter* reads as follows:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The burden of proving that a distinction should be upheld under s. 1 is on the crown as the party supporting the distinction (see *R. v. Oakes (1986), 24 C.C.C. (3d) 321*). Here the crown has not satisfactorily provided the court with evidence to support the imposition of a distinction between those under 22 years of age and those older. A rational basis has not been demonstrated for legislating that a 21 year old person should have a "report" or an inquiry into his or her means before incarceration for default and a person over that age should not have the benefit of such an important inquiry. Whether such distinction was justifiable in the past is not relevant to its present operation. Parliament has determined that those persons under the age of 18 years should have special protections of the law because of their age. There is absolutely no evidence to suggest that any such benefits should be extended to include those up to the age of 22.

I therefore find that the age specific phrase s. 646(10) of the *Criminal Code* is in contravention of s. 15(1) of the *Charter* and is not a reasonable limit on *Charter* rights justified in accordance with s. 1 of the *Charter*.

REMEDIES OPEN TO THE COURT

The court has two alternatives in dealing with s. 646(10) after determining that it is inconsistent with the *Charter* because it discriminates in providing restrictions on the benefits of the law based on age. The choices are to reject the whole subsection and thereby deny the review benefits to those in the 16 to 22 age category or to sever the constitutionally objectionable age references. If the latter choice was selected the courts would then be required to "obtain and consider a report concerning the conduct and means to pay of the accused" in every instance before a warrant commiting a person to prison could be issued.

There are three measures for enforcing the *Charter*. The first is s. 52(1) of the *Constitution Act, 1982* referred to above and the other two enforcement provisions are found in s. 24 of the *Charter*. Section 24(1) provides the right to seek an appropriate remedy from the courts and s. 24(2) allows the exclusion of evidence in court proceedings if evidence is obtained in contravention of the *Charter*.

In *R. v. Big M. Drug Mart Ltd.,* supra, Mr.

nouns as "flood", "deluge", "rabble", "mob", "host", but maybe we are a "tribe", a "gang", a "band", a "bunch" or a "round-up".

After carefully considering all of the above and others too numerous to mention and wishing to avoid any connotation that might be ascribed to the gathering that might adversely affect its independence and stature, I have come to the conclusion that a group of judges should be called a **"miscellanea"**.

This truly gives the picture of the judiciary, allowing for all its good qualities, bad qualities, knowledge or lack thereof, ability or lack thereof, and in fact, takes note of the fact that judges are merely persons, no more, no less. The best that can be said of judges of all jurisdictions is, to plagiarize the poet:

"A judge is a judge is a judge."

R. v. MONTGOMERY

PROVINCIAL COURT
(CRIMINAL DIVISION)

HER MAJESTY THE QUEEN

against

COLIN T. MONTGOMERY

*****

PROCEEDINGS
(Remand)

BEFORE HIS HONOUR
JUDGE R.T. WESELOH
on Wednesday, November 2, 1988
at Brampton, Ontario

*****

MR. SALTMARSH: Colin Montgomery, please.

MR. MACKIE: Come forward please, Mr. Montgomery. It has been indicated to me that there is little hope that we will be reached. The Crown has indicated to me the earliest dates are January of 1990. I would ask any date in January of 1990, except the 8th, which I'm booked, the 17th, which I'm booked, the 19th, that I'm booked and the 25th, that I'm booked.

THE COURT: What is the first date that is available, please, Madame Clerk?

CLERK OF THE COURT: Your Honour, any date after January the 9th and including January the 9th, 1990.

MR. MACKIE: I think that's one of the dates. That would be excellent.

THE COURT: January the 9th, 1990. Just a minute, please, Mr. Crown. You have assessed the list and it is apparent that this case will not be reached today?

MR. SALTMARSH: That's correct, Your Honour.

THE COURT: Does the Crown consent to that date?

MR. SALTMARSH: Yes, Your Honour.

THE COURT: You might as well take a seat, Mr. Mackie. Before I set that date, there are a few things that I want to say.

MR. MACKIE: Fine, Your Honour.

THE COURT: I have had the clerk assess the number of hours of estimated trial work that were assigned to this court today; here we are November the 2nd, 1988, in this courtroom number ten in the Provincial courthouse at 141 Clarence Street in Brampton, which had assigned to it 22 hours of estimated trial work for a day. I understand that some of the work came from another court; that can happen, but the total hours are, clearly, unrealistic and not possible for any courtroom to deal with within a normal working day. In fact, even given a 24 hour day, one would not expect to work 22 hours out of a day.

A court day generally runs from 10 a.m. to 4:30 p.m.; out of that come regular lunch hours, recesses morning and afternoon.

The concern this judge has is this: is, as a minimum standard, a Judge to be treated with the consideration granted, at least, to a skilled mechanic or is a Judge to be treated as an assembly line worker?

The analogy has a degree of merit. Society accepts that a trained assembly line worker is in a different category than a trained and experienced mechanic. The mechanic is respected for his skills to a considerable degree.

Society accepts for the mechanic to do his job properly, he must have the time and working environment in which to complete his task without the distraction of having other jobs pushed at him while he is working on the job initially commenced.

Generally, the assembly line worker is expected to keep up with the production line, perform-

ing repetitious tasks with minimal analysis.

The assembly line worker is expected to work faster when management speeds up the assembly line to meet the demands of production.

Now, consider that the hypothetical factory owners refuse to expand the plant to handle production requirements and consider that management puts skilled mechanics on the production line — the assembly line — and management sends down that assembly line repair jobs that require the time, skill, focused attention and analysis of the mechanics, and that management then speeds up the assembly line and shoves at the mechanics an unrelieved stream of complex repair jobs; what do you think would happen? Is it reasonable to anticipate shoddy workmanship because mechanics are working too fast? Perhaps some mechanics will suffer heart attacks resulting from the stress of trying to keep up with the production line. Or perhaps the mechanics insist on doing a proper, good and workmanlike job, in spite of the work environment whereupon the production line backs up, becomes clogged; the backlog of work builds, the waiting period on the production line grows into years.

Presently in Peel, the courts are chronically overbooked. The government (representing the plant owners in the hypothetical) has failed to provide sufficient judicial facilities to Peel to handle the criminal case load. Here the work shop — our court house — is not staffed sufficiently to handle it's caseload in a reasonable time.

One response by management in the character of the Chief Judge (Criminal Division) of this Province of Ontario, to the shortage of judicial facilities has been to require the over-booking of trial lists and, on top of over-booked lists, to have scheduled yet more cases. The parallel to the factory management speeding up a production line is quite apparent.

Trial judges are cast in the role of the suffering mechanic on the assembly line.

Outrageously, individual trial judges have been blamed for the problem.

Curiously, a society which would not expect a skilled mechanic to work under such circumstances appears to expect its judges to do so.

Theoretically, government policy reflects the general will of society. If that theory is correct, at this time in history, our society values its judges less than its mechanics. The regrettable aspect is that the public is suffering throughout this process. Today, an accused person before this Court for, apparently, a routine case of impaired driving and driving with excess alcohol in blood — the offence date was the 22nd of August, 1987 — this man has waited already over a year for his trial date of November the 2nd, 1988, and now, due to the backlog in this jurisdiction, the trial date — the first trial date that this Court can offer — is January 9th, 1990.

MR. MACKIE: Your Honour, it is the earliest date, as the Clerk as indicated.

THE COURT: Have your client stand up, please. Your trial date is now set as January the 9th, 1990 at 10 a.m. in this courthouse. Return then, sir.

MR. MACKIE: Your Honour, I indicate to the Crown that I reserve my rights of argument.

THE COURT: Yes.

THIS IS NOT ONLY A RULE OF LAW: IT IS ALSO A MATTER OF COMMON SENSE: Goodridge, J. in *A-G of Newfoundland* v. *Churchill Falls (Labrador) Corp. et al.* (1984), 49 Nfld. & P.E.I.R. 181

Could that mean the law is not sensible?!

we do not think it is appropriate to create standards for justifying departures under s. 15(1). We see nothing in the wording of s. 15(1) which would warrant such an interpretation and, indeed, to attempt the formulation of a test under s. 15(1) could only conflict with or duplicate the "reasonable classification" test in s. 1. This does not mean that the purpose and effect of the impugned legislation may not have to be examined under s. 15(1) to determine whether a classification is discriminatory. In our view the decisions of the Ontario Court of Appeal in the *Education Act Reference* case and *Re Blainey* are in accord with this interpretation. With the greatest respect we are unable to agree with the view expressed by the British Columbia Court of Appeal in *Andrews v. Law Society of British Columbia* ([1986] 4 W.W.R. 242; 27 D.L.R. (4th) 600] that a test of reasonableness is necessary under s. 15(1).

In *Re Family Benefits Act (N.S.)*, supra, the Nova Scotia Appeal Division also applied the constitutional interpretation provisions stated in *R. v. Big M Drug Mart Ltd. (1985), 1 S.C.R. 295.* There it was specified that the approach to the definition of the *Charter* was to be a purposive one, and that the meaning was to be ascertained by the analysis of the purpose of the constitutional right or guarantee and further that the interpretation should be a "generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection." (page 344)

Also in *Re Family Benefits Act (N.S.),* supra, the Appeal Division reviewed comments of the Supreme Court of Canada and of other appeal courts regarding the appropriate method of the application of s. 15 of the *Charter.* At page 347 N.S.R. they cited with apparent favour the explanation of s. 15 offered by Chief Justice Howland and Robins, J.A. in *Ontario Education Act Reference*, supra, at O.R. 553:

> Section 15(1) is a unique guarantee of equality. It covers not only 'equality before the law' and 'equal protection of the law' (clauses which have recieved interpretation in Canadian, English and American jurisprudence), but it goes further and guarantees the right of every individual to both 'equality **under** the law' and 'equal **benefit** of the law'. (emphasis in original)

It is therefore necessary to determine whether s. 646(10), which extends preferred treatment based on age, treats a class unequally and in a discriminatory manner.

In considering s. 646(10) of the *Criminal Code* it appears that its purpose is to provide a class of persons, those 16 to 22 years of age, with certain benefits based on age, a listed classification. It is clear that Parliament over the years has provided special criminal exemption and protection to the young. At the time of the implementation of s. 646(10) this special protection was afforded to those 16 years of age and younger. Since that date the *Young Offenders Act, 1980-81-82-83, c. 110,* has extended special criminal treatment to those aged 12 to 18 years. The *Young Offenders Act* creates a distinction in the type and degree of sentences available to be imposed on those under 18 when compared with sentences under the *Criminal Code* for those who are 18 years of age and older. That such protection should be afforded to the young in that age category is not disputed in this application.

Is it discriminatory to afford persons 18 to 22 years of age the protection of a review under s. 646(10) of the *Criminal Code* and not afford the same protection to someone 35 years of age? 'Equality under the law' and 'equal benefits of the law' requires that no special class of person be chosen for the imposition of special burdens nor for the receipt of special benefits. Here those over 22 are selected to be treated differently by the criminal law from those who are 21 years of age or younger.

Section 646(10) of the *Criminal Code* came into effect on July 18, 1959, being part of the amendments to the *Criminal Code* found in S.C. 1959 c. 41. The note in the margin beside *Criminal Code* s. 646(10) in the statute reads "young offenders". At that time the *Canada Elections Act R.S.C. 1952 c. 23, s. 14(1)(a)* provided that a citizen was eligible to vote "if he or she ... is of the full age of twenty-one years...". At that time in Nova Scotia most of the provincial statutes relating to drinking, voting, etc. referred to the age of 21 years as the age of eligibility for various privileges and benefits.

It would therefore appear that s. 646(10) was enacted to provide the protection of review to the young — that is, those in the age group of 16 to 22 years. Since 1959 the general federal legislative scheme for criminal enactments, voting and other general benefits appear to use the age of 18 as the "age of majority". Those over the age of 18 can vote and are considered adults in all respects and those under the age of 18 are considered "minors" who are entitled to special protections under the law through such legislation as the *Young Offenders Act.*

Other than that general information, no evidence was advanced to the court to indicate other "purposes" for the implementation of 646(10).

Speaking for the majority in *R. v. S.S. (1988),*

The Law Reform Commission of Canada in its Working Paper 6: *Fines* (October, 1974) discussed the discriminatory effect of fining and providing time in default and concluded:

> Commissions and law reform bodies both in Canada and elsewhere have recommended *that judges be prohibited form imposing a fine and simultaneously imposing a sentence of imprisonment to be served in the event that the fine is not paid.* We adhere to this recommendation. (emphasis in original)

In the Report of the Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (February, 1987) the Commission recommended a reduction in the use of imprisonment for fine default and that *"a quasi-automatic prison term not be imposed for a fine default and that offenders only be incarcerated for* ***wilful*** *breach of a community sanction"* (Recommendations 12.22 and 12.23). The Commission agreed with other sentencing reviews that incarceration for failure to pay a fine should be based on wilful default but not on inability to pay. At p. 380-381 the Report stated as follows:

> The imposition of a "semi-automatic" prison term for fine default has been the subject of relentless criticism in the sentencing literature. There is statistical evidence to support the conclusion that the imprisonment of fine defaulters without reference to their ability to pay discriminates against impoverished offenders. One highly visible example of this phenomenon is the over-representation of native persons in provincial institutions (Joint Study: Government of Canada, Government of Saskatchewan & Federation of Saskatchewan Indian Nations, 1985; 41). The breach of a sanction imposed initially because it is more appropriate than imprisonment, does not *per se* justify the imposition of a custodial sentence. As noted by the Ouimet Committee "the fact that a fine — however substantial — has been imposed rather than a sentence of imprisonment cannot be considered as anything but an implicit acknowledgement that the offender presents no problem of dangerousness" (Ouimet, 1969; 198). In the context of the Commission's proposed regime of presumptive dispositions where community dispositions have been assigned for many offences, it can only be seen as offending the principle of proportionality to impose prison terms routinely for breach of such sanctions.

Section 646(10) of the *Criminal Code*, in directing a review or consideration by the court before the issuing of a warrant (albeit only to those between 16 and 22 years of age), is a clear protection against imprisonment of persons who do not have the means to pay a fine.

CHARTER S. 15(1) CONSIDERATION IS THERE A DENIAL OF "EQUAL BENEFIT OF THE LAW"

In *Reference Re Family Benefits Act (N.S.) Section 5 (1986), 75 N.S.R. (2d) 338; 186 A.P.R. 339; 25 C.R. 336* (subnom. *re Family Benefits Act (N.S.)*) it was found that sections of the *Family Benefits Act* were inconsistent with s.15(1) of the *Charter* because they discriminated in providing certain benefits to women but not to men. After a review of the state of the law on this subject, the *per curiam* judgment of the court stated at p. 351 N.S.R.;

> As we read those decisions it is necessary to establish discrimination before one can argue that one's equality rights have been infringed. While it is true that in the *Ontario Education Act Reference* case [(1986), 13 O.A.C. 241; 53 O.R. (2d) 513] and *Re Blainey* [(1986), 14 O.A.C. 194; 54 O.R. (2d) 513] the Ontario Court of Appeal emphasized the equality of provisions of s. 15, in both cases the Court found discrimination in the statutes under review. Indeed, we quote from the decision of Howland, C.J., and Robins, J.A. at p. 554 O.R., supra, in the Education Act case:
>
> > "There is no infringement of the section unless the unequal treatment is discriminatory."

That interpretation is in accord with the wording of s. 15(1) of the *Charter.*

> It will be necessary under s. 15(1) of the *Charter* to establish that a challenged law not only treats a class unequally but also in a discriminatory manner. The burden of proof in the first instance of establishing that a law prima facie violates s. 15(1) will be on the person challenging the statute. We see no reason to distinguish in this regard between laws which fall within the listed classifications and those which discriminate on other grounds. No doubt it will be easier to establish a case under the listed classifications as laws classifying on some of those grounds will be inherently suspect. On the other hand, it may not be apparent that a law is discriminatory unless the purpose and effect of the law is carefully examined.
>
> In our view s. 1 of the *Charter* does not come into play until a prima facie violation of a right under s. 15(1) has been established. As there is a general test under s. 1 for justifying limitations on *Charter* rights,

COMMONWEALTH GATHERS IN OTTAWA*

Canada's place in the six regions which make up the Commonwealth Magistrates' Association, now burdened with the more cumbersome title of Commonwealth Magistrates' and Judges' Association, is made up of six regions for administrative purposes:

Atlantic and Meditteranean
West Africa
Indian Ocean
Caribbean
East & Central Africa
Pacific Ocean

There is a regional vice-president for each region, and Judge Sandra Oxner of Halifax Provincial Court holds that position in the North Atlantic and Meditteranean region. This may well be her due, as it was undoubtedly due to her personal efforts as much as those of anyone else, which resulted in the eighth conference being held in Ottawa, from September 17-24, 1988. The constitution of the association requires the General Assembly of the forty Commonwealth countries and associate states as members to meet not less frequently than once every four years. The venue of previous conferences is a travel agent's dream. In 1985 it was held in Nicosia, Cypress and prior to that in 1982 in Port-of-Spain, Trinidad and Tobago. The fifth conference was held in Oxford, England in September of 1979. The next conference is to be held in Sydney, Australia in September 1991.

Every Judge of the Canadian Association of Provincial Court Judges who is a member of the B.C. Association, is a member of the Commonwealth Association also. For the sum of 10 pounds sterling any Judge may be enrolled as an associate member of the Association and will receive the Commonwealth Judicial Journal as well as other publications.

OPENING CEREMONIES AND PROGRAM OF EVENTS

Both the federal government and the provincial governments have contributed generously to the program held in Ottawa. Chief Justice Dickson in particular took a prominent role and warmly greeted the participants at the colourful opening ceremony. As well he arranged tours of the Supreme Court building, and hosted a splendid reception at the Lester B. Pearson building where the participants were able to enjoy the benefits of the terrace on the seventh floor, on a warm, fall evening and look down on the lesser mortals below.

Like most well-regulated conferences, this one began with a meal and ended with a meal. The first being a lunch provided, courtesy of the Province of Ontario. Following this there was a very grand opening ceremony in the ballroom of the Château Laurier, to the accompaniment of Martial music from the band of the Governor General's Foot Guards, splendidly attired in full dress. Flags of the 36 countries and associated states who were represented, flanked the speakers who welcomed all those present to Ottawa and to Canada.

The only thing missing from the agenda was a message from Her Majesty the Queen, which was the victim of a telefax foul-up, showing that even Royalty is not immune from the frailty of modern machines. This was subsequently received and read out at a time when its effect was considerably less than would have been the case at the opening ceremony.

Chief Justice Dickson officially opened the Conference and spoke a few words.

"He referred to the rule of law as common to all those countries present. Law stands for the framework between individuals, and all restrictions on an individual must be justified. The independence of the Judiciary was a fundamental constitutional imperative."

Following this there was a brief tour of the houses of Parliament during its Sunday lull between sessions, and in the evening a buffet supper was provided at the multi-level, all-purpose courthouse on Elgin Street, which is indeed spacious enough to accommodate such a function, which is described in more detail elsewhere.

There were other receptions at Rideau Hall by the Governor General and by the Speaker, John Fraser, which he somehow or other managed to fit in on a break from his duties in the House, by the R.C.M.P. at the Musical Ride as well as a boat ride on the River for those accompanying the participants. The final banquet and dance strained both resources of the Château Laurier as well as those managing the affair to their limits. Music was provided by the Armed Forces. It was all the banquet room could do to accommodate the multitude of brightly arrayed diners, but somehow or other it managed.

FORMAT AND SOME OF THE PEOPLE

What the delegates did when they were not attending receptions or dinners or taking trips

*Excerpt from the Provincial Court Judges' Association of British Columbia Newsletter

was to listen to a lot of speeches from people from all over the world giving talks of general interest, as well as those more earnestly bent who provided discussion papers.

England and Wales provided the largest contingent numerically, covering a wide range in the judicial hierarchy. There was Lord Ackner, a Lord of Appeal in Ordinary, and there were retired justices as members in their own right as Associate Members. In between there were judges and magistrates. Among the former was Judge Tom Pigot who holds both the position of Common Serjeant in the City of London, the second permanent Judge of the Central Criminal Court (the Old Bailey), as well as that of Senior Judge of the Sovereign Base Areas in Cyprus. He was the presenter of a discussion paper on the topic of ''Sexual Abuse'', in which he paid tribute to the Supreme Court of Canada's decision to abolish the rule in Baskerville requiring mandatory jury warnings.

Lord Ackner was witty and entertaining. He mentioned that the new rule limiting counsel's oral presentation to one hour has been strongly supported by the Bar, which sounds a bit surprising. The House of Lords has had problems in the past with the prolixity of counsel for which there is no easy solution. At the conclusion of a lengthy argument, Lord Denning said to counsel, ''Thank you, Mr. Brown, you have done your best,'' only to be met with the rejoinder, ''Obviously my best hasn't been good enough for your Lordship'', and continued on for a further considerable period of time.

Lord Ackner suggested that if counsel is a person of any sensitivity he will accept any gifts that are offered by the court. If he lacks such sensitivity perhaps he shouldn't be there, or as put more bluntly by Lord Reid, 'If you can't express your point in 20 minutes, perhaps you should try some other occupation. Judges should not have to remind themselves that they are paid to be irritated.'

And the tale of the appellant who had lost every appeal. Turning to his solicitor in final frustration, he exclaimed ''There must be something more we can do?'' To which came the reply ''There is. Go away and breed, it's people like you our profession needs.'' More seriously, Lord Ackner said that Judicial Review, which is one of the growth industries in modern Britain, is there to prevent an abuse of process. Justice is not best served by remaining silent.

From the remainder of the United Kingdom there was a lone Sher[illegible] from Scotland who sits in Stirling and lives in Edinburgh, and from Northern Ireland a single representative who is from Larne but sits in Belfast, where Government is by Order in Council and where he must always be at risk.

The second largest group came from Australia. That country and New Zealand are obviously preoccupied with aboriginal rights and land claims. From the Northern Territory of Australia, a Magistrate said that he exercises criminal jurisdiction over aboriginals. He assumed that family law and civil law are matters that they look after themselves as they do not appear on the lists of his Court. Where the matter of tribal custom arise, he is quite definite that the courts should not take instructions from anthropologists, but learn on a case to case basis from those more directly involved in it.

LEGAL PLURALISM

The matter of tribal customs and tribal laws as well as divisions in religious persuasion, were very much to the fore in the discussion of Legal Pluralism. This is another growth industry to judge from the number of discussion papers that were presented, and the oral presentations which covers fields from polygamy to tribal execution. Some of the countries that go to make up the Commonwealth are obviously more concerned in these matters than others, so that Barbados was able to state that this was no problem at all, whereas in Nigeria and India there was a bewildering variety of tribal customs as well as the coexistence of Christian and Islamic law, each requiring separate consideration. A Chief Justice from Zimbabwe expressed most eloquently the problems in her country. There was a mixture of common law with Roman-Dutch law imported in early days from the Cape, as well as Rhodesian legislation. The accounts were as various as the countries from which they came.

The third and final topic for discussion was the subject of problems. Most of these dealt with the appointment process and preservation of judicial independence. The problem might be paraphrased into how not to displease the government while retaining your seat on the Bench, and how to be independent at the same time. The reality of such a conundrum was made evident by the comments with respect to the absence at the conference of any representative from Malaysia due to the internal problems that existed there between the government and the judiciary.

It might be interesting to reflect upon the extent of tribal custom and tribal law in existence at the time of independence of many of the countries that now form up the Commonwealth. It would require a considerable knowledge of Colonial history to know how extensive it was. Former colonial officers suggest that in the rush to independence, the western educated leaders of the independence movements who had seen Britain, and France and America, would have nothing less than the Westminister style of democracy. How far democracy has survived in Africa is a matter of history. How long the Eng-

ted by the Nova Scotia cases, hereafter, imprisonment for failure to pay fines occurs under federal criminal law as well. Whether or not imprisonment in default is rationalized on the ground that the imprisonment is not a punishment of the offence, but merely an enforcement device for collection of fines, until the law prohibits imprisonment as a routine alternative to payment of fines, and bars the use of imprisonment as a routine response to failure to pay, the penal law will continue to be used as an instrument of oppression against the poor.

Concern that this should not be so has moved the Advisory Committee of the American Bar Association, for example, to recommend that fines should never be levied unless the court is satisfied that the accused has the means to pay; moreover, the Committee disapproved of any provision which would permit alternative sentences of fine or imprisonment, for example, ''thirty dollars or thirty days''. Imprisonment should not be the automatic response to non-payment of fines. Instead, the Committee recommended an inquiry into failure to pay, an inquiry at which the defaulted ought to be called, and only where such a hearing disclosed no excuse for non-payment would jail be considered. Thus, imprisonment is retained as the ultimate sanction, but only for cases showing an inexcusable failure to pay.

Section 646(10) of the *Criminal Code* does provide for an inquiry prior to incarceration for default but it is limited to those in the age group of 16 to 22.

It would appear from the submissions of counsel that the major use of imprisonment in default in Nova Scotia is as a means of enforcing payment of fines and, in practice at least, the allocation of default time is not normally part of the considered penalty for the offence. As was stated by Smith, J. in *R. v. Tomlinson (1971), 2 C.C.C. (2d) 97; 14 C.R.N.S. 174 (B.C.S.C.)* at page 98 C.C.C.:

> It appears to me that the sentence, in this context, is the fine itself; any term of imprisonment in default of payment is simply fixing of one of several means open to the Crown of enforcing payment of the fine;

If the allocation of default time is not part of the considered sentence, then poor persons could be routinely fined and imprisoned in default unless there is a possibility of review. It is irrefutable that it is irrational to imprison an offender who does not have the capacity to pay on the basis that imprisonment will force him or her to pay. If the sentencing court chooses a fine as the appropriate sentence, it is obviously discarding imprisonment as being unnecessary under the particular circumstances. However, default provisions may be appropriate in circumstances where the offender may **choose** not to pay, presumably on principle, and would elect to spend time incarcerated rather than make a payment to the state. For the impecunious offenders, however, imprisonment in default of payment of a fine is not an alternative punishment — he or she does not have any real choice in the matter. At least, this is the situation until fine option programs or related programs are in place. In effect, imprisonment of the poor in default of payment of a fine becomes a punishment that wouldn't otherwise be imposed except for the economic limitations of the convicted person.

Provincial Court Judge R.E. Kimball in his comment, *On the Imposition of Imprisonment in Default of Payment of a Fine* (1976-77) 19 C.L.Q. 29, stated that ''the imposition of days in default of payment of a fine appears to be more a conditioned reflex than the result of any deliberate thought process.'' He further stated at page 32;

> The issuance of a warrant in default depriving a citizen of his liberty, should be the result of a carefully thought-out and well-considered judicial process. If it is determined that the accused is able to pay a fine but refuses to do so, then grounds may exist for his arrest. If, however, it is determined that he is not able to pay the fine and yet desires to do so arrangements should be made for payment and his arrest should not occur. There is no authority for a court, *per se*, to enforce or ensure collection of a fine by threatening an accused with jail if he fails to pay. The collection of unpaid fines is a matter for the Crown as distinguished from the court, and the decision rests with the Crown and *not* the court as to how the debt will be collected. In many cases the Crown may prefer to pursue its civil remedies pursuant to s. 652 of the *Code* rather than in prison. In any event, the option rests with the Crown and *Not* the court but in either case the process is judicial. For the most part courts do not apply the principles of sentencing when days in default are imposed at the time that a fine is assessed. The number of days in default is usually out of proportion to the offence and to the particular circumstances of the person and the protection of society either through reformation or deterrence is simply not a consideration. Under present procedures a person may serve time in jail simply because he is unable to pay the fine, with no consideration to the sentencing principles which exist, *inter alia*, as a control against arbitrary sentencing practices.

ment in default of payment of a fine imposed, which term can be for a very lengthy period depending on the nature of the offence. The maximum term of imprisonment that might have been imposed for default of Ms. Hebb's fine is two years.

Section (4) permits the sentencing court to defer payment of a fine if it is not satisfied that the convicted person has sufficient means to pay the fine immediately. It is noteworthy that the onus is on the court to make such an inquiry under this subsection. The subsection also directs the court to inquire of the convicted person whether he or she wishes time for payment or if they wish to discharge the fine by a fine option program if one has been established.

When a convicted person has been allowed time to make payment of their fine, they may return to the court pursuant to subs. (11) and apply for further time for payment. This was the situation in the present case where Ms. Hebb was twice granted extension of time to make payment of her fine.

Subsection (10) provides that people of the age of 16 to 22 years who have been allowed time for the payment of their fines will not be imprisoned for failing to pay their fine unless "the court shall ... obtain and consider a report concerning the conduct and means to pay of the accused."

In Ms. Hebb's case, she does not fall within this age group and there is no indication that the court dealing with her matter considered any report regarding her "conduct and means to pay".

Seciotn 722 authorizes the use of a fine and imprisonment in default where it is not otherwise specified in the *Criminal Code*.

THE FINE WITH IMPRISONMENT IN DEFAULT AS A SENTENCE

In this matter the Crown has argued that the true thrust of Ms. Hebb's case is that she feels she was excessively fined taking into account her means to pay. They argue that under such circumstances the proper recourse would have been to enter an appeal against the sentence contesting the amount of the fine and the designation of incarceration in the event that Ms. Hebb did not pay the fine. Ms. Hebb did not appeal the sentence and the time for appeal has now passed.

As has been held in *R. v. Grady (1973), 5 N.S.R. (2d) 264 (N.S.S.C., A.D.)* the primary purpose of sentencing is to protect the public. This purpose can be affected either by rehabilitation or deterrence or a combination of the two. The fine does not normally serve to reform or rehabilitate an offender or others from criminal activity. This deterrent effect must obviously be related to the financial capacity of the offender. A court, before determining the amount of the fine, should take into consideration the ability of the offender to pay the fine. If this is not done a fine which may be insignificant to a person of great wealth can well be an impossible burden for an impecunious offender. Thus, a fine of some substance is only appropriate when a court concludes that deterrence is an appropriate method of protecting the public under the circumstances of the offence and the individual and secondly, when the offender is capable of paying the fine.

The *Criminal Code* allows an alternative to paying a fine by s. 646.1 — the section permitting fine option programs. Fine option programs have not been universally established in Nova cotia and were not available in the Halifax area during the period relevant to the matter before this court. In the absence of such a program when a person is sentenced to a fine and imprisonment in default of payment of that fine, the only options available to an impecunious person is to spend the default period in prison or to continuously apply, before the expiry date, for extentions of time to pay the fine.

The principle purpose of the imposition of a default time is to insure the offender's compliance with the sentence to pay a fine. The determination of this period of time is normally related to the amount of the fine and is usually not a considered period of time based upon the principles of sentencing as they relate to the circumstances and the offender. In making a determination to use the fine as a sentencing tool, the court is deciding that this fine is the appropriate method of effecting its sentencing purpose. Under s. 652 of the *Criminal Code* fines are recoverable by the Attorney General by the use of civil proceedings but it appears this procedure is rarely used.

Professor K.B. Jobson in his article "Fines", (1970) 16 McGill Law Journal 633, states at page 644:

> Certainly, in some magistrates' courts it is routine practice to impose a fine with "x" number of days in default. In some cases persons are imprisoned for failure to pay, but how many persons had the money and refused to pay and how many did not have the money but were imprisoned as an alternative is not known. As a working hypothesis it can be assumed, however, that persons who have the money do pay their fines; people do not go to jail out of choice. Meanwhile, imprisonment of persons who do not have the means to pay is commonplace for convictions under provincial statutes, and, undoubtedly, as indica-

lish Common Law will endure and serve any real purpose, and if it can be assimilated with native laws and customs, can only be matters for conjecture.

TWO COURT HOUSES

Between these sessions of wrestling with problems of mutual common interest, there were opportunities to see something of the modernity of Ottawa's courthouse. The Law Courts building on Elgin Street opened last year. It contains 37 courtrooms for Provincial, Family, and Civil as well as for District and Supreme Courts. It has a glass elevator as well as an escalator from the ground to the first floor. There are spacious areas for traffic outside the courtrooms. Each room that was shown had two sets of entry doors, but the courtrooms themselves leave a somewhat stark impression, perhaps due to the light oak finish, the lowered dais, and the absence of any warmth in the decor. The building then is very contemporary and may come somewhere between an airport without commercials and an expensive hotel. Very few directional signs were in evidence but security was. There are recessed counters for the staff where presumably you can get your room number and in due course your bill on checkout.

This building brought together Courts located in three separate buildings in Ottawa. Now there are second thoughts that this may be too great a concentration and may result in a very impersonal environment. The staff members on duty during the evening were well-informed about their own sphere of activity in the complex, but not too knowledgeable about what went on in other areas. One of the three former Court buildings was the Carleton County Courthouse on Daly Avenue which had been sold to the City of Ottawa in 1971 for $1.00. Last year it was turned over to the Ottawa Arts Centre Foundation. Since then the building has been repaired and renovated, bolts, jails and Judges' chambers had to be replaced by theatres, studios and display rooms. (Ottawa Citizen, Sept. 24/88).

In Montreal, in the immense Court house, well described as Palais de Justice, courtrooms have been replaced by sound stages. The parallel barristers table and Bench is changed into a square, with barristers tables at right angles to the Bench and the witness stand, and stand they do unless expressly exempted, facing the Bench. Microphone stands have given way to suspended clusters of microphones hanging from the ceiling. The accoustics of such rooms are said to be of the highest order. The walls are not panelled, according to our tour guide because panelling would be detrimental to the accoustics, but according to Chief Justice Gold it was an item over budget the Provincial Government was not prepared to accept. The seventeen storey edifice is obviously an extremely functional, high-density operation. There is only one thing that surpasses the view from the Judge's chambers on the North perimeter of the building over the city, and that is the view from the South side over the St. Lawrence and the old Expo site.

The Judge presiding in the Courtroom visited over a civil trial for damages, said that he expects to be presiding over that case for some time and would still be doing so at Christmas. These days it is hard to know whether he spoke in jest or not.

THE APPOINTMENT OF JUDGES

The appointment of judges in Canada has been the topic of wide-ranging debate for many years. Heretofore, judges at both the federal and provincial levels have been selected by the respective Attorneys General on the advice of advisers and the Canadian Bar Association. This is largely a private consultative process which has kindled and fueled the debate, and widespread public skepticism of whether the best qualified candidates are being appointed. The following series of items is aimed at the examination of how one province is proposing to virtually revolutionize the selection and appointment of judges within its jurisdiction.

On 6 February 1988 Ontario Attorney General Ian Scott delivered a speech to the Canadian Bar Association Annual Institute of Continuing Legal Education in Toronto in which he referred to a proposed pilot project aimed at greater involvement of the public in the appointment of Provincial Court Judges in Ontario.

In December 1988 the infrastructure was put into place to enable this project to get off the ground by March 1989.

While we do not have the text of Scott's speech of February we do have a statement made by him in the Legislature in December 1988 and a copy of a press release issued on the basis of that statement. Excerpts from the statement and the press release are set out below.

Following those items is an article written by Donald A. MacIntosh, a Toronto lawyer, who comments on the project initiated by Scott. Readers should bear in mind that MacIntosh composed his commentary on the basis of Scott's speech of February 1988 and not on the official announcement of December 1988. Still, his comments are relevant and timely.

Following the article by MacIntosh is a brief autobiographical sketch of the appointees to the advisory committee set up by Attorney General Scott.

We look forward with anticipation to seeing how successful this experiment proves to be and whether it can serve as a model for the rest of Canada.

Editor-in-Chief

STATEMENT TO THE LEGISLATURE
BY
THE HONOURABLE IAN SCOTT
ATTORNEY GENERAL
ON
THE ATTORNEY GENERAL'S
ADVISORY COMMITTEE ON
JUDICIAL APPOINTMENTS
DECEMBER 15, 1988

Mr. Speaker, I am pleased to announce a change in the manner in which Provincial Court Judges in Ontario are to be selected.

I intend to establish the Attorney General's Advisory Committee on Judicial Appointments, a group of qualified and highly-motivated individuals, to advise me on future appointments to the bench. They will inject essential public input into what many consider to be an informal process.

The committee will interview and select candidates before making final recommendations to the Attorney General. This model — which is the first of its kind in Canada — is a modern appointments system dedicated to seeking out candidates of merit from all branches of the legal profession.

The lay-dominated Advisory Committee will do a great deal to remove any unwarranted criticism of political bias or patronage in appointments to the judiciary, while enhancing community involvement and reinforcing public confidence in the judiciary and the justice system. Such a committee, with a broad base of representation from across the province, would ensure that the justice system reflects the needs, values and attitudes of the community.

The Judicial Appointments Advisory Committee will have the following mandate:

— to develop and recommend comprehensive, sound and useful criteria for selection of appointees to the judiciary, ensuring the best candidates are considered; and

— to interview applicants selected by it or referred to it by the Attorney General and make recommendations.

The committee will operate as a three-year pilot project and will be in a position to review candidates by March 1989. In the interim, we will continue to fill judicial vacancies when necessary. It will include nine members, led by Chairman Peter Russell, Professor of Political Science at the University of Toronto, who has had a most distinguished academic and professional career.

Joining him will be:

— Five additional non-lawyers, chosen by the

sentence. The normal practice is for the court to determine whether the convicted person has the capacity to immediately pay the fine and, if not, to give them time to make such payment. Failing their making payment within such a period of time, and on application, the court may defer payment of the fine to a future date as provided by s. 646(4), (5), (6) and (11) of the *Criminal Code*.

Sections 646 and 722 of the *Criminal Code* deal generally with the use of a fine as one of the punishments for an offence. Sections 646(10) and 646(11) are of particular relevance in this matter but a full reading of the section is helpful to understand the legislative scheme within which these subsections are applied:

646.(1) An accused who is convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any other punishment that is authorized, but an accused shall not be fined in lieu of imprisonment where the offence of which he is convicted is punishable by a minimum term of imprisonment.

(2) An accused who is convicted of an indictable offence punishable with imprisonment for more than five years may be fined in addition to, but not in lieu of, any other punishment that is authorized.

(3) Where a fine is imposed under this section, a term of imprisonment may be imposed in default of payment of the fine, but no such term shall exceed

(a) two years, where the term of imprisonment that may be imposed for the offence is less than five years, or

(b) five years, where the term of imprisonment that may be imposed for the offence is five years or more.

(4) Subject to the provisions of this section, where an accused is convicted of an indictable offence and is fined, the court that convicts the accused may direct that the fine

(a) be paid forthwith; or

(b) be paid at such time and on such terms as the court may fix.

(5) Where a court imposes a fine, the court shall not, at the time the sentence is imposed, direct that the fine be paid forthwith, unless

(a) the court is satisfied that the convicted person is possessed of sufficient means to enable him to pay the fine forthwith;

(b) on being asked by the court whether he desires time for payment, the convicted person does not request such time; or

(c) for any other special reason, the court deems it expedient that no time should be allowed.

(6) The court, in considering whether time should be allowed for payment of a fine and, if so, for what period, shall consider any representation made by the accused but any time allowed shall be not less than fourteen clear days from the date sentence is imposed.

(7) Where time has been allowed for payment of a fine, the court shall not issue a warrant of committal in default of payment of the fine until the expiration of the time allowed for payment.

(8) Where no time has been allowed for payment of a fine and a warrant committing the accused to prison for default of payment of the fine is issued, the court shall state in the warrant the reason for immediate committal.

(9) Notwithstanding subsection (7), where, before the expiration of the time allowed for payment, the accused appears before a court and signifies in writing that he prefers to be committed immediately rather than to await the expiration of the time allowed, the court may forthwith issue a warrant committing the accused to prison.

(10) Where a person who has been allowed time for payment of a fine appears to the court to be not less than sixteen nor more than twenty-one years of age, the court shall, before issuing a warrant committing the person to prison for default of payment of the fine, obtain and consider a report concerning the conduct and means of pay of the accused.

(11) Where the time has been allowed for payment under subsection (4), the court that imposed the sentence may, on an application by or on behalf of the accused, allow further time for payment, subject to any rules made by the court under section 482.

(12) In this section, "fine" includes a pecuniary penalty or other sum of money.

Subsection (3) authorizes a term of imprison-

presently on medication to control her symptoms.

She was divorded in 1983 and has two children, ages 8 and 13 years, who reside with their father in the metropolitan Halifax area but at an address that is unknown to her. She has not had contact with these children for the past few years.

Ms. Hebb's affidavit evidence indicates that she does not drink alcohol but smokes approximately a package of cigarettes a week. She apparently was in the process of obtaining cigarettes for herself when the theft was detected.

I make the following further findings from the evidence:

1. That Judith Ann Hebb is essentially unemployable and that there is no realistic prospect of her earning an income in excess of her most basic needs.

2. That during the relevant period, that is from the date of her conviction and sentence to the time of this hearing, she did not have the financial ability to pay the fine imposed upon her and it is highly probable that she will never have the financial resources with which to pay the fine.

3. That the nature of social assistance available in this Province is such that she will not receive additional funding for the purpose of assisting her with the payment of the criminal fine.

4. Current statistics indicate that approximately 40% of people jailed in Nova Scotia provincial institutions were so committed for having defaulted on the payment of a fine. Of these admissions approximately two-thirds pay their fine and gain their release, normally the day of or the day after their committal. The other one-third serve their time in full for their default of payment of fine. The agreed statement of facts also indicates that on a review of two particular days, one in 1986 and one in 1988, 6.5% and 5.5% of all inmates in the Province were fine defaulters.

5. There is no fine option program currently in place in Nova Scotia although a pilot project is planned in the near future for the Bridgewater area.

After making these findings of fact, the essential issue for the court to determine is whether a person sentenced to a fine and a period of time in jail in default of payment of that fine should be incarcerated if they do not pay that fine by reason of being impecunious and unable to pay the fine.

There are those in our society who, for reasons of principle or merely because of a stubborn nature, will refuse to pay a fine and accept incarceration in lieu of payment of such a fine. There are those as well who would seek to test or challenge the administrators of our judicial system and who fail to pay fines and hope that the bureaucracy somehow fumbles so that they are forgotten in the process. These are situations where a person can exercise a true choice as to whether they wish to pay the fine or suffer the consequence.

But no such choice exists for those who are unable to pay their fine because of a temporary financial limitation brought on by either misfortune or bad judgment on their part. As well, no such choice exists for those, such as the applicant in this matter, who are the walking wounded of our society, those who cannot now and are unlikely ever to be in a position to pay a fine of any amount in excess of a few dollars. Judith Ann Hebb comes before this court as a person without financial resources or any prospect of having sufficient resourses to pay the fine which is assessed against her.

Parliament has accepted the concept that there should be an alternative method of sentence satisfaction for a person punished by a fine. This is the fine option program provided for in s. 646.1 of the *Criminal Code* and which has been implemented in a number of other jurisdictions in Canada but has yet to be introduced in Nova Scotia. In such a program a person works off a fine by earning credit for work performed, usually community service. It is argued by counsel for Ms. Hebb that the absence of such a program in this Province while it is available in other jurisdictions results in her being treated differently than persons in those jurisdictions. They argue that the criminal law in that respect violates Ms. Hebb's rights to equality as guaranteed by s. 15 of the *Charter*.

In general, Ms. Hebb's counsel argue that her position is analogous to that of imprisonment for debt and submit that the courts should strike down any legislative scheme which is similar to the long ago discredited system of imprisonment for debt.

Before determining if any of Ms. Hebb's constitutional rights have been violated or if any legislation restricts her constitutionally protected rights, a review of the existing provisions of the *Criminal Code* which affect this application would be appropriate.

STATUTORY BACKGROUND
CODE SECTOIN 646

Ms. Hebb's original sentence was for a fine of $500.00 and thirty days in default of payment of that fine. I have no evidence whether Ms. Hebb's financial capacity to pay such a fine was considered at the time of the imposition of this

Attorney General;

— one Provincial Court Judge chosen by, but not from, the Ontario Judicial Council;

— one lawyer chosen by the Law Society of Upper Canada; and

— one lawyer chosen by the Attorney General.

Mr. Speaker, the Judicial Appointments Advisory Committee will combine public understanding with the needed expertise of lawyers and the judiciary. It is through this balance of common sense and legal standards that government can realistically expand the public's access to justice and improve service to the community.

Thank you.

NEWS RELEASE

December 15, 1988

TORONTO — A community-based advisory committee to assist in the selection of provincial court judges has been established by Attorney General Ian Scott.

The Attorney General's Advisory Committee on Judicial Appointments will balance the expertise of lawyers and the judiciary with essential public input. The Committee will develop objective criteria for interviewing and selecting appointees before making recommendations to the Attorney General. Applicants' names already on file with the Ministry will be forwarded to Committee members who will also canvass the community for other qualified candidates. On occasion, the Committee may advertise in an area where there is a vacancy.

"The Committee will introduce a greater community involvement in the appointment of provincial court judges," said Mr. Scott. "The process will benefit from the life experiences and professional expertise of highly-qualified individuals representing diverse areas of Ontario. Their role will be to bring their collective knowledge and sensitivity for community concerns to the choosing of candidates for judicial appointments."

Currently, lawyers interested in serving on the bench submit applications to the Attorney General. When a vacancy occurs, the Attorney General's office reviews all applications and consults with members of the bar and bench before a candidate is recommended to the Ontario Judicial Council for final review. The candidate's name is then submitted to Cabinet for final approval.

The Attorney General's Advisory Committee on Judicial Appointments will include nine members, representing a variety of professional and personal backgrounds:

— six non-lawyers, including the Chairman, chosen by the Attorney General;

— one Provincial Court Judge chosen by but not from the Ontario Judicial Council;

— one lawyer chosen by the Law Society of Upper Canada; and

— one lawyer chosen by the Attorney General.

A list of the members of the committee, named by Mr. Scott, is attached. The Ontario Judicial Council and the Law Society of Upper Canada will announce their appointments.

The Attorney General's Advisory Committee on Judicial Appointments will operate as a pilot project for a period of three years. The Committee will begin reviewing applicants in March, 1989.

COMMENTS ON THE CURRENT JUDICIAL APPOINTMENTS PROCEDURE

Donald A. MacIntosh

Some members of the public believe that judicial appointments are secured through the "old boys' network". In the public's mind, judicial appointments are, more often than not, a reflection of political connections rather than legal ability.

Last year, a committee of the Canadian Association of Law Teachers called for a new system of judicial appointments. The committee released a paper stating that: "the principal defects in the existing system of judicial appointments in Canada are fundamental and systematic ... an entirely new approach is needed."

Ontario Attorney General Ian Scott has taken these words to heart and proposed a new system for appointing judges. Scott's proposals would revolutionize the judicial appointment process currently in place in Ontario.

Currently, Ontario provincial court judges are selected by the Attorney General on the advice of his advisers and the Canadian Bar Association. Attorney General Ian Scott believes that the arcane nature of the existing selection process contributes to the public perception that the best qualified candidates are not being appointed. Scott believes that the mystique surrounding judicial appointments creates this impression. Scott feels that judicial appointments are based on "privileged access" and cause the public to

perceive "that political patronage is being dispensed or an old boys' network is being perpetuated".

Scott thinks that the public would have more confidence in the judicial system if the appointment process was seen as being more open and reflective of community values. Scott has suggested that a group of "leading citizens" drawn from "varied walks of life" should assist the Attorney General in the selection of provincial court judges. The group would consist of lay members, two lawyers and a judge nominated by the Judicial Council to act as an advisory panel to the Attorney General. One of the two lawyers on the panel would be nominated by the bar and the other one would be nominated by the Attorney General. The judge, although nominated by the Judicial Council, would not be a member of council. Scott describes his proposed procedure as a "pilot project", saying that he looks forward to hearing the views of members of the profession.

Scott's suggestions for the judicial appointment process were contained in a wide-ranging speech given to the Canadian Bar Association Annual Institute of Continuing Legal Education in Toronto on 6 February 1988.

In announcing the pilot project, Scott alluded to the widespread public perception that patronage played a large role in judicial appointments. Scott was careful to distance himself from this perception, saying that he believed that the public's suspicions were unfounded. However, he stressed that it is important that the public perceive that partisan political considerations are not preventing the best qualified candidates from being appointed as judges. This is a welcome initiative in keeping with the changes being made at the federal level. It is a particularly desirable step because of the important role which provincial court judges play in society. The majority of citizens who have any experience with courts acquire it at the lower court level. Furthermore, the provincial courts have the burden and opportunity of dealing with the first offender. Having regard to the very high rate of recidivism in Canada it is vitally important that provincial court judges be knowledgeable and recognize the great responsibility of a judge in trying and sentencing a first offender. Thus, a selection of provincial court judges should be undertaken to obtain the very best possible provincial court bench.

In his speech, Scott noted that the Charter of Rights and Freedoms has increased responsibilities of judges, forcing them to strike a balance between individual rights and freedoms and collective goals of the state.

Scott said, "As the courts assume more of a public policy-making role the method by which judges are appointed in Ontario takes a more critical place on the public agenda."

Scott cited the increasing public awareness of the importance of the judiciary in determining the ambit of individual rights and freedoms as a factor which called for greater public participation in the appointment and selection of judges.

Presently, the Attorney General of Ontario receives nominations for judicial appointments on the bench from members of the legal community. Some people nominate themselves for judicial appointments. The procedure followed in Ontario has been outlined by the Canadian Bar Association's Committee Report "The Appointment of Judges in Canada." This committee was chaired by E. Neil McKelvey. The procedure for appointing provincial court judges in Ontario is summarized as follows:

> ...The names of candidates go first to the Attorney General. The chief judge of the Provincial Court interviews the candidates, reporting back to the Attorney General on the results. The Attorney General also does some screening of his own, makes a choice, and submits the name to the judicial council. The council checks the candidate's qualifications and professional standing and reports back to the Attorney General on whether they find the candidate acceptable. Although this is the current practice, in the past the council has been somewhat more active and has not confined its deliberations to names submitted by the Attorney General.

In his speech to the Canadian Bar Association, Scott did not indicate how many "leading citizens" would participate on the selection panel. Afterwards, he told reporters that the proposed Selection Committee would include seven or eight "leading citizens." Scott emphasized that the lay panel is not intended to supplant the role of the Judicial Council, but rather is intended to supplement the work of that body by looking at candidates with a view to "community standards". Scott told the Canadian Bar Association meeting that the legal qualifications of candidates for judicial appointments will still be passed upon by the Judicial Council but the Attorney General would have the final word on a candidate's appointment.

Scott's proposals for revamping the process include keeping the public informed about upcoming judicial appointments by advertising in legal periodicals and newspapers so that there will be ample opportunity for the public to nominate candidates.

Scott's proposals for increased public involve-

the right to be treated equally regardless of one's economic condition contrary to s. 15 of the *Charter*;

8. That the time in default mechanism violates the right to be treated equally despite age because 16-21 year olds are provided an opportunity to show cause for failure to pay a fine contrary to s. 15 of the *Charter*;

9. That the lack of a fine option program in Nova Scotia violates the right to equality regardless of geographic location contrary to s. 15 of the *Charter.*

In a general sense, the applicant is seeking two distinct remedies. The first is a declaration that parts of the legislative scheme contained in ss. 646 and 722(2) of the *Criminal Code* are of no force or effect. She would thus be seeking a declaration under s. 52(1) of the *Charter* that some or all of these sections are inconsistent with ss. 7, 9 and 15 of the *Charter.* Section 52(1) of the *Charter* is as follows:

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

The second thrust of the applicant is that she is seeking an order under s. 24(1) of the *Charter* to quash her warrant of committal and granting her any relief appropriate because of the non-availability in Nova Scotia of a fine option program. She submits that this personal remedy should be granted her because of the infringement of her rights under ss. 7, 9 and 15 of the *Charter.* Section 24(1) of the *Charter* states as follows:

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

This is a summary application for a chambers period normally limited to a hearing of a few hours. Because of these limitations, it was agreed at the pre-trial conference that the emphasis of oral argument would be in the area of the challenge to s. 646(10) of the *Criminal Code* and the effect on Ms. Hebb of the lack of a fine option program in Nova Scotia.

It would therefore be appropriate to deal first with those specific areas and if they provide a basis for a granting of the application it would then be unnecessary to proceed to the other issues. In *Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; 53 N.R. 169* Estey, J. stated at page 383 S.C.R.:

> The development of the *Charter*, as it takes place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new *Charter* provisions, none should be undertaken.

In the same way it is also appropriate to deal only with as many constitutional issues as are necessary to dispose of the application before the court.

FACTS

Judith Ann Hebb is a thirty-five year old divorced lady who lives in a rooming house and whose only revenue is social assistance payments. Her monthly income from the time of her conviction to the time of this hearing was approximately $450.00 to $500.00 a month. From this amount she pays about $300.00 for rent and, as the balance is normally insufficient for her other expenses, she regularly takes many of her meals at a "soup kitchen" in Halifax.

Ms. Hebb is functionally illiterate, has no marketable job training skills, and has never been able to obtain employment.

She has a history of mental illnesses that have required treatment at the three local psychiatric facilities, most recently attending for such treatment in June of 1987. A medical report submitted to the court states as follows:

> This lady has a very lengthy history of psychiatric illness, with numerous admissions both to the Nova Scotia Hospital, to the Abbie Lane Memorial Hospital, and most recently to Camp Hill Hospital. She has been diagnosed as having a Bipolar Mood Disorder, mild mental retardation, and severe disturbance of personality. Her mood disorder has led at times to periods of severe illness, in which she becomes hyperactive, sleepless and engages in bizarre acts...

and further in the same report:

> She has been more compliant than previously with her medication and her symptoms have been, for the most part, controlled. She continues to have major difficulties in the area of interpersonal relationships, and in her social circumstances. These result from problems relating to her level of intellectual functioning and the abnormalities of personality.

Ms. Hebb has continued treatment and is

R. v. HEBB

1988 S.H. No. 64419
IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

JUDITH ANN HEBB
Applicant

— and —

HER MAJESTY THE QUEEN
Respondent

IN THE MATTER OF: An application by Judith Ann Hebb for an Order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms;*

— and —

IN THE MATTER OF: A Warrant of Committal issued in default of payment of a fine pursuant to section 722(2) and section 646 of the *Criminal Code;*

— *and* —

IN THE MATTER OF: Section 7, 9, and 15 of the Canadian Charter of Rights and Freedoms;

— and —

IN THE MATTER OF: Section 646.1 of the *Criminal Code*

KELLY, J.:

In August of 1987 Judith Ann Hebb was convicted of the theft of a package of cigarettes and was fined $500.00 and costs or thirty days in default. She was ordered to pay the fine before a specific date but was unable to pay it within that time and was granted two extensions of time by the court. She failed to make any fine payment within the designated time limits. After her last failure, the Provincial Court issued a warrant of committal to the effect that Ms. Hebb was committed to thirty days imprisonment.

The warrant has not been executed and has been stayed by this court until this application to quash the warrant has been dealt with.

ISSUES

In addition to seeking an order to quash the warrant of committal pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms, The Constitution Act, 1982,* the application is seeking a declaration to the effect that:

1. Sections 722(2) and 646 of the *Criminal Code, R.S.C. 1970 c. C-34, s.1* violate the applicant's right to life, liberty and security of the person as guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms;*

2. Sections 722(3) and 646 violate the applicant's right not to be arbitrarily detained or imprisoned guaranteed by s. 9 of the *Charter;*

3. Sections 722(2) and 646 violate the applicant's right to equality as guaranteed under s. 15 of the *Charter:*

4. The failure on the part of the Lieutenant Governor in Council for the Province of Nova Scotia to authorize and establish a fine option program pursuant to s. 646.1 of the *Criminal Code* results in a violation of the applicant's right to equality as guaranteed by s. 15 of the *Charter.*

(Note: ss. 646, 646.1 and 722 are ss. 718, 718.1 and 787 in the 1985 code revision.)

The applicant's memorandum proposes that nine points are specifically in issue in this matter and they are listed as follows:

1. That the time in default for non-payment of a fine mechanism of the *Criminal Code* violates the individual's rights not to be arbitrarily detained or imprisoned contrary to s. 9 of the *Charter;*

2. That the time in default mechanism violates the right not to be imprisoned pursuant to a vague and arbitrary process contrary to s. 9 of the *Charter;*

3. That serving time in default for non-payment of a fine results in imprisonment for an arbitrary period contrary to s. 9 of the *Charter;*

4. That serving time in default for non-payment of a fine violates the individual's right to be treated fairly vis-a-vis other defaulters contrary to s. 7 of the *Charter*;

5. That serving time in default for non-payment of a fine violates the right not to be deprived of one's liberty pursuant to a *per diem* rate that violates principles of human worth and dignity contrary to s. 7 of the *Charter*;

6. That the time in default mechanism violates the right not to be incarcerated without a hearing to determine if one is at fault contrary to s. 7 of the *Charter*;

7. That the time in default mechanism violates

ment in the judicial appointment process have been endorsed by Harvey Bliss, president of the Ontario Division of the Canadian Bar Association. In an interview with *the National*, he stated that the proposal for more public participation is "a happy one we applaud". Mr. Bliss indicated that the Canadian Bar Association had some reservations about Scott's proposal to have only one representative of the profession on the proposed committee.

The Canadian Bar Association's support of increased public participation is not surprising as many of Scott's suggestions have already been put forward by the Canadian Bar Association Committee's Report released in 1985 dealing with the appointment of judges in Canada. The committee argued that public cynicism about judicial appointments could lead to an erosion of confidence in the judicial process. The committee's report states:

> The public is concerned that political patronage plays too large a part in judicial appointments. We did not conduct a public opinion poll, but comments in the media and elsewhere, particularly at the time of the appointments in the summer of 1984, clearly indicate a widespread belief that judicial appointments are a means by which the party in power rewards its defeated candidates and other party faithful. Although this belief is not fully justified by the facts, the existence of such a body of opinion is sufficient to raise the possibility that our courts may not enjoy the public confidence and respect they deserve. The perceived influence of patronage raises doubts in the minds of some about whether the courts are truly independent, particularly where the interests of the state conflict with those of the individual.

The committee concluded that: "The present system of selection and appointments at the federal level is, in several respects, overly dominated by political considerations." However, the provinces bore the brunt of the committee's criticism. The report concluded: "In most provinces politics plays too important a part in selecting candidates for the bench — in some provinces to the point of abusing the concept of partisanship."

There can be no doubt that the present system of appointment, whatever may be the quality of the appointees, leads to the criticism that our judges are largely political appointees selected in part for political services.

The McKelvey Committee was established in 1984 with a broad mandate to determine whether the existing procedures for appointing federal and provincial court judges insured that the best qualified people were appointed to the bench.

The committee was instructed to study alternate methods of selecting judges and make recommendations to the Canadian Bar Association. The committee surveyed appointment procedures in England, the United States, Australia, New Zealand, France, Denmark and Israel, as well as the method of selecting federal and provincial court judges in Canada. The committee's findings about existing appointment practices are very relevant because there is no doubt that the committee's view will fuel the fires of those advocating substantive reform of the existing appointment procedures. Its views will probably influence the course of the Ontario proposal which is still in very general terms. The committee recommended a system which would require the Attorney General to nominate from a list prepared by an advisory body and if not satisfied would be required to ask for further nominations. Mr. Scott's proposal would not bind the Attorney General's discretion in this respect and this failure will undoubtedly lead to criticism.

Ian Scott's proposals will provoke discussion and debate among members of the profession. Unfortunately, the Attorney General has not spelled out what he means when he states that a group of leading citizens should provide a "direct link to community values." Scott's choice of words is unfortunate. The phrase is an open-ended one which is capable of several interpretations. Does Scott mean that the leading persons appointed to the committee will represent, among others, groups who traditionally have not had much input into the judicial appointment process, or will the so-called "leading citizens" simply represent people who are pillars of the establishment?

If Scott takes the committee seriously, and there is every reason to believe that he will do so, the committee will have substantial input into provincial court appointments. Qualified candidates may not wish to offer their names for appointment until they know what criteria Scott's proposed committee will use for recommending judges. As the object of the exercise is to increase public confidence in the judiciary, it is also important that the criteria be carefully developed and made known. With the growing importance of the Charter of Rights and Freedoms, the public will wish to be assured that judicial appointments are not made with a view to gaining support for the state's view about the desirable ambit of its own rights.

The Attorney General is not proposing that judges go through American-style confirmation hearings before being appointed. Scott has stated that his proposed selection committee does not take the place of the Judicial Council, say-

ing that the Judicial Council will still determine whether a candidate is legally qualified to serve as a judge. Accordingly, Scott's proposed selection committee will look at judicial candidates with a view to determining whether the candidate reflects "community standards" and presumably will do this in private. Such a determination could lead to qualified persons being rejected if such persons do not pass a vague test of "community values" established privately by a group of leading citizens drawn from "varied walks of life". What is meant by the term "community values"? Is it really desirable that a judge reflect the committee's notion of what constitutes "community values"? Judges are supposed to be chosen for their legal ability, judgment and integrity. Traditionally, judicial appointments have not been openly made on the basis of a candidate's ideology. Presumably Mr. Scott is not advocating that judges be appointed on the basis of their adherence to any particular ideology.

A system which ensures that a judge represents "community values" will have to be carefully designed so that the judiciary does not become the voice of the majority or committed to a particular ideology. If a community value is a clear recognition of the danger of the tyranny of the majority, then the respect for the rights of citizens may be increased by ensuring that a judge endorses that value. But if the community is, at the moment of appointment, very prejudiced towards a particular minority, it may be very dangerous to appoint someone who represents that particular committee value. There have been occasions in our history when the fairness of a trial could only be ensured if a judge was prepared to disregard community values. Clearly, it is important that judges be aware of the cherished values of a community so that their decisions may be respected by the people. Mr. Scott is undoubtedly seeking to enhance such respect. If that objective is to be attained, it is important that the community values to be considered by the advisory committee be carefully developed and publicly enunciated. It is desirable that the judiciary be sympathetic to the best hopes and ideals of the community, while recognizing that it should not be guided by community values or objectives when such values and objectives fall short of our best.

If the rights of citizens are to be secured, we must have a judiciary which is vigilant in the recognition of the importance of individual rights. The point was clearly made by Mr. Justice Lamer in *R. v. Collins* (1987), 56 C.R. (3d) 193 at p. 208. In discussing the reliance which judges should place upon community views in determining their judgements, Mr. Justice Lamer dealt with whether the exclusion of evidence would bring the administration of justice into disrepute and said:

> The concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the view of the community at large. This does not mean that evidence of the public's perception of the repute of the administration of justice, which Prof. Gibson suggested could be presented in the form of public opinion polls ... will be determinative of the issue ... The position is different with respect to obscenity, for example, where the court must assess the level of tolerance of the community, whether or not it is reasonable and may consider public opinion polls. ... It would be unwise, in my respectful view, to adopt a similar attitude with respect to the Charter. Members of the public generally become conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system, either personally or through the experience of friends or family. Prof. Gibson recognized the danger of leaving the exclusion of evidence to uninformed members of the public when he stated a p. 246: "The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion". The Charter is designed to protect the accused from the majority so the enforcement of the Charter must not be left to that majority.

Thus, it is vitally important that the judiciary not become simply a voice for the particular prejudices of a community.

Canada has always prided itself upon the independence of the judiciary. Such independence has been fostered by having judges appointed, rather than elected to office. The Canadian system produces judges who take pride in their judicial independence. Scott's proposal should give a high place to the maintenance of such independence. As noted earlier, this consideration has become even more important when the rights of the citizens vis-a-vis the state are being developed by Charter litigation. At such a time, it is vital that the judiciary not only be independent of the executive, but be perceived to be independent. Such real and perceived independence would be increased if the Attorney General was required to select names from a panel developed by the Judicial Council and the advisory committee. As Mr. Scott's initiative is experimental in its nature, it would be worthwhile to experiment with such a system. The Attorney General could still suggest names to the advisory committee and the Judicial Council, but could not appoint someone whose name was not recommended by them. The Attorney General would still have the final say, but it would be apparent that the appointees were persons of merit and independence.

Mr. Scott's initiative is a welcome one but before it is implemented more work needs to be done to ensure that the result will both enhance respect for the judiciary and ensure that it is a bulwark for freedom.

Donald A. MacIntosh is a lawyer with the Toronto firm of Heather & Eaton, practising in the area of criminal law.

THE JUDICIAL APPOINTMENTS ADVISORY COMMITTEE
December, 1988

CHAIRMAN

Peter Russell, Toronto

Mr. Russell is a Professor of Political Science and Director of Graduate Studies for the Department of Political Science at the University of Toronto. A Rhodes Scholar and Officer of the Order of Canada with a distinguished list of academic and professional credits, Professor Russell served on the Legal Aid Committee of Ontario and as a Research Advisor for the Canadian Bar Association Committee on the Appointment of Judges. He has authored numerous reviews and articles in various legal and political science publications including: The Judiciary in Canada — The Third Branch of Government; The Supreme Court in the Eighties; and, How Judges Decide.

MEMBERS

Valerie Kasurak, Windsor

Ms. Kasurak has a distinguished career of public service as a former citizenship judge, and a past member of the Ontario Human Rights Commission, the Advisory Committee on the Canada Pension Plan, University of Windsor Board of Governors and Ontario Press Council. Ms. Kasurak is currently a member of the Institute of Chartered Accountants Discipline Committee.

Denise Korpan, London

Called to the Ontario Bar in 1981, Ms. Korpan practices family, civil, administrative and criminal litigation with the firm of Siskin and Cromarty. She is also an instructor at the Bar Admissions Course for the Law Society of Upper Canada. She was selected as the Attorney General's lawyer-representative on the Committee.

Michele Landsberg, Toronto

Award-winning author and newspaper columnist, speaker and broadcaster, Michele Landsberg has written on a variety of legal and related social issues. Marriage, law reform, sexual assault, spousal and child abuse, judicial bias against women victims of crime, and equality legislation have been probed by Ms. Landsberg's insightful and compassionate works. Her books include "Michele Landsberg's Guilde to Children's Books", published in both the United States and England as well as Canada, and "Women and Children First". She is also the recipient of two newspaper awards for columns and feature writing.

Bob Muir, Kenora

Mr. Muir is Executive Director of the Lake-of-the-Woods District General Hospital, and past Executive Director of the Kenora-Rainy River District Health Council. He has worked tirelessly on behalf of the health-care system in Canada, applying his administrative skills as a member of the Manitoba Delegation on the Federal/Provincial Negotiating Committee for Health Cost Sharing, Special Assistant to the Minister of Health and Social Development in Manitoba, and Chairman of the Children's Dental Programme, also in Manitoba.

Bob Sennik, North York

Born in Nairobi, Kenya, and educated in the United Kingdom, Mr. Sennik moved to Canada in 1975 and established corporate headquarters for the family business. Desbro Investments operates 30 manufacturing, distribution and investment companies around the world, with interests in real estate, ladies' fashions, banking and industrial chemicals and engineering products. Mr. Sennik devotes much of his spare time to performing community and social work. He is president of the Toronto Organization for the Promotion of Indian Culture.

Reverend David McCord, Ottawa

A former penitentiary chaplain, Rev. David McCord founded the Church Council on Justice and Corrections in 1974 and served as its Executive Director for 10 years. He has developed extensive experience within the justice system and, under his direction, the CCJC has developed into a highly credible and respected ecumenical organization identifying and dealing with the needs of both victims and offenders. CCJC members are regularly called upon by Federal Government Officials for input into the development of new legislation, programmes and policy initiatives.