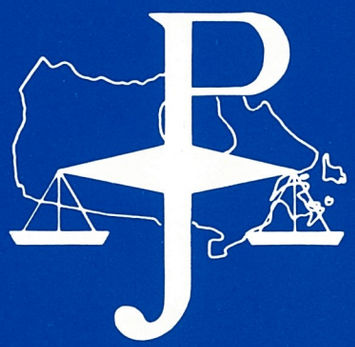

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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

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President's Page

by Judge Douglas Rice

I am pleased to report that both Joyce and I have fully recovered from the effects of an automobile accident near Bangor, Maine in mid-December. Our appreciation to all those who wrote or telephoned to wish us a speedy recovery.

For the Association, my winter has been primarily spent in three areas of concern, the Canadian Judicial Centre project, the development of a bilingualism plan and future financing.

With regard to the Canadian Judicial Centre project, there is little to report to date. A committee has been struck, consisting of Chief Justice Brian Dickson, Supreme Court of Canada, Chairman, Chief Judge Glube, Halifax, N.S. for the Canadian Judicial Council, Chief Judge Harold Gyles, for the Chief Provincial/Territorial Judges, L'honorable Andre Brassard, Cour superieure de Quebec for the Canadian Judge's Conference, and myself for the C.A.P.C.J.

Although scheduled for mid-December, the initial meeting is yet to be held. The chairman has elected to await word on funding from the Federal/Provincial Ministers of Justice before proceeding. To date, the meeting of the Ministers to discuss this, amongst other matters, has continued to be postponed. I am now advised that our first meeting is expected to be held in May.

In order for the Association to continue to receive funding for instantaneous translation and translation of documents, it must develop a bilingualism plan. A meeting has already been held with the Director of Translation Services, and a Project Officer will be meeting with the Finance Committee in Toronto before the Executive Meeting in April to complete the plan. We now subscribe to the required policies, but must formalize the matter in writing.

Future financing remains to be a problem. Last year we received a 5% reduction in financing from the Government of Canada and from one Province. Both reductions were made without prior warning. At the same time, the costs of all aspects of the Association are rising, with the increased costs of travel, hotels, meals, printing, etc. This problem must be addressed by the Association.

What the effect of the establishment of the Canadian Judicial Centre will have on financing by all levels of government is as yet unknown. The delay referred to earlier only serves to postpone the problem. It is anticipated that financing for the forthcoming fiscal year will remain reasonably stable.

I am pleased to report that some positive progress is being made in the relationship between our Association and the Canadian Bar Association, or, to be more specific, between Provincial Associations and provincial branches of the C.B.A. This relationship has developed to a greater degree in some provinces than in others. Despite the efforts of Judge Dubienski, our relationship with the C.B.A. at the national level remains unclear. The action, if any, taken at the C.B.A. Executive Meeting held in February at Whistler, B.C. has not yet been conveyed to us.

I wish to advise that I have accepted the application of Judge M. Reginald Reid as editor of the Journal, effective April 1, 1987. At my request, Judge Dick Kucey has agreed to publish this issue of the Journal, and I am most appreciative. Dick has been a strong supporter of the Association for many years and no doubt will continue to be. I have already spoken to the President-elect in this regard.

Finally, I am daily reminded of the special relationship that I have enjoyed with the members of the Association over the past twelve years. I am sincerely appreciative of the efforts of all the past Presidents, Officers, Provincial Representatives and Committee Chairpersons who have served over the years. You should be too.

In Brief

BRITISH COLUMBIA

The Executive for the Association for the year 1986-1987 is as follows:

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Judge E.D. Schmidt (Campbell River)
Judge T.C. Smith (Williams Lake)
Judge H. White (Vancouver)

Judge Ernie Anderson

It is with sadness that the unexpected death of Judge Ernie Anderson occurred on December 5, 1986. His record of service has been given in the Chief Judge's monthly letter for December. In this newsletter (March-May of 1986), his own account of his early experiences was published after his official retirement. Following that he received the ad hoc appointment, and appeared to be flourishing at the time of the annual meeting.

Judge Cyril White

The tragic death of the former Chief Judge of this Court on December 31st was reported in the Vancouver Sun on Saturday, January 3rd. He received his law degree in 1949 from U.B.C. and was appointed a magistrate in 1962 and served on the Bench in Vancouver until his appointment as Vice Chairman of the Workers' Compensation Board in 1968 and Chairman later that year. In 1970 he was appointed to be the head of the Judicial Council, and, in 1972, he was appointed as the first Chief of this Court and resigned later in the same year.

New Appointments

Judge William Kitchin, effective December 12, 1986. Judge Kitchin will sit in the Lower Mainland Family Division.

SASKATCHEWAN

Resignation

Chief Judge C.H. Toews, effective April 1, 1987, to re-enter private practice in Regina, Saskatchewan.

Appointments

Judge B.P. Carey, appointed Chief Judge, effective April 1, 1987.

Transfers

Judge G. Seniuk, from Meadow Lake to Saskatoon, effective May 1, 1987.

ONTARIO

Appointments

1. Her Honour Judge Judythe Little, Kenora, effective October 1st, 1987 to both the Criminal and Family Divisions.
2. His Honour Judge Brian W. Lennox, Ottawa, effective October 1st, 1986.
3. His Honour Judge Guy F. DeMarco, Windsor, effective March 2nd, 1987.
4. Her Honour Judge Mary L. Hogan, Toronto, effective March 2nd, 1987.
5. His Honour Judge Peter A. Grossi, Toronto, effective March 9th, 1987.
6. His Honour Judge Bruce J. Young, Toronto, effective March 9th, 1987.

Retirements

1. His Honour Senior Judge Gordon R. Stewart, Windsor, effective November 30th, 1986. Appointed on June 14th, 1965.
2. His Honour Judge Harold W. Gauthier, Timmins, effective January 17th, 1987. Appointed June 1st, 1971.
3. His Honour Judge Samuel H. Murphy,

A JUDICIAL BALLAD OF LAMENT

by Judge Michael Horrocks

Bad King John was forced to cede
All sorts of rights at Runnymede:
A trial by jury for a starter
And lots more too – in Magna Carta[1]
Since; down the years these rights have grown
By Congress, Parliament and Throne
Until by some politic barter
In '81 we got our Charter.[2]
So we would all henceforth be free
From governmental infamy.
Liberty had achieved its peak
Equality for the poor and weak
A Right to Counsel on the spot
And no unreasonable search for pot.
Freedom's acme, golden era
But has that golden age got nearer?
Our system used to spend its time
In proving "X" had *done* the crime
And those whose guilt was shown quite clear
Were rightfully consumed by fear
And stood before the Court to face
Conviction, sentencing, disgrace.
But now the battle to be fought
Concerns what can be *used* in court.
A guy can have a ton of hash
A pound of coke and lots of cash
But he will walk as free as air
If no good cause to search was there.[3]
(But to be fair and not unkind
The reason grows – the more they find).[4]
Our highways are awash in blood a hundred time a day
That alcohol contributes to – or so statistics say.
Our laws get more Draconian and people call for jail
To stop the carnage on the streets and make the guilty quail,
Provided they were "Chartered" in quite bewildering words
"Retain and instruct counsel" is (frankly) for the birds.
Demand is not detaining – is how it was before[5]
And cops could be forgiven for thinking *that* the law
But having reconsidered (though this was not admitted)
Demanding *is* Detaining and readings are permitted[6]
Only when the rights were read at once upon the spot
In any other case the cause of justice has been shot.
Now you can tell a merry tale upon the witness stand
And if you are convicted please clearly understand
Appeal your case and if you win and get another trial
Feel free to try a different tale of excuse or denial
For no one can examine you on what you said before
So now we have a "Right to Lie" included in our law,[7]
Though heaven help the witness whose every single word
Is thrown at him in question the next time that *he's* heard.
Now Rights are darned important and I happily agree
That cops have no damn business abusing you or me
But we have to have a balance and I'd like it in the books
That Rights to Safe and Happy Lives are not abused by crooks.

Footnotes:

1 1215; Reissued 1216, 1217, & 1225. Chapter 29.

2 Constitution Act 1981; Canada Act 1982 c.11 (U.K.)

3 *R.* v. *Collins* (1983) 3 C.C.C. (3d) 141 (B.C.C.A.)

4 *R.* v. *Stevens* supra @ 29.

5 *R.* v. *Chromiak* 1980 1 S.C.R. 471 @ 479.

6 *R.* v. *Therens* 1985 1 S.C.R. 613.

7 *R.* v. *Mannion* (1986) 47 A.L.R. 177 (S.C.C.); see also *Harris* v. *New York* (1971) 401 U.S. 225 per Burger C.J.

is an essential part of the judicial process, and that even if the courts had optimum financing and ran at under-capacity rather than the reverse, "we would still have negotiated resolutions of criminal proceedings." He added that in cases in which overworked Crowns have little time to prepare for prosecution, the advantage often falls to the accused, who get improved odds of acquittal.

Greenspan, as vice president of the 500-member Criminal Lawyers Association, disagrees that police are taking over prosecutions. "The Crowns consult the police, as so they should. But the police aren't running the cases. We don't hear that from our members."

The issue of plea bargaining recently caused public argument between two prominent barristers in Toronto. First, Clayton Ruby wrote to a newspaper that "friendly" defence lawyers were able to obtain lighter sentences from the Crown for their clients. In a published reply Earl Levy accused him of suggesting, without proof, that a shady conspiracy existed between judges, Crown and the defence bar. "Shame on you, Clayton Ruby, for attempting to perpetuate the myths and misconceptions of plea negotiations," Levy concluded.

Such intimate dealings are something that police officers aren't trained for, says lawyer Rebecca Shamai, and something that they shouldn't be involved in.

"The police are there to get crime off the streets. The prosecutor has a very different role. When you get the police stepping too far into the prosecutor's shoes, you interfere with the right of the accused to be tried impartially."

It was the similar reasoning by the Supreme Court of Newfoundland that led to a ruling that having police officers act as prosecutors even in minor traffic offences is unconstitutional because it denies the accused the right to a fair trial. The ruling was overturned by the Newfoundland Court of Appeal, but the case will likely find its way to the Supreme Court of Canada.

Michael Martin says he's not worried that Ontario police are too involved in prosecutions. "Sometimes the police officer might speak to a Crown and convey to the Crown the attitude of defence counsel. But the actual decision is made by the Crown. It's like a reporter telling the publisher of a rival newspaper, 'Hey, our publisher wants to sell. Do you want to buy it?' "

Counters Roach: "Over the years, Crown attorneys have lost their power to really say, 'Look, this case shouldn't proceed.' Right now, it looks like the police are calling all the shots."

Research by University of Toronto criminologist Richard Ericson tends to support Roach's perception. During fieldwork with detectives in Peel Region, to the west of Toronto, Ericson found that they sent files to the Crown with a scrawl across the front indicating the sentence they expected. Ericson also found the police officers were not averse to expressing their displeasure to uncooperative Crowns.

"The police are able to fundamentally affect the outcome of a case both in terms of what the accused is convicted on and in terms of sentencing – deciding first of all what they're going to charge a person with, what's a reasonable outcome and then getting other parties to agree. They're having a fundamental effect on the case from beginning to end."

Greater police role in prosecutions means less chance to keep an eye on their work, the criminologist says. "It means that [prosecutions] are not as subject to checks and balances as formal legal procedures would have it. In only a tiny fraction of cases does the accused actually have a trial. In the vast majority, the 'trial' is the plea bargaining session and the accused is not allowed to attend. So he is excluded from his own trial."

Peterborough, appointed March 26th, 1979, retired effective December 19th, 1986 to accept the appointment as District Court Judge for Peterborough as a retirement plan.

Deaths

1. His Honour Judge Albert E. Newall, Toronto, appointed June 19th, 1956. Retired March 12th, 1986. Honourary Life Member. Deceased June 29th, 1986.

The Association has completed four area Sentencing Seminars (Toronto, London, Kingston, Thunder Bay). The program included a discussion of sentencing cases with a panel including a Justice of the Ontario Court of Appeal; search warrants by Judge J.A. Fontana of Ottawa, author of the text on search warrants' lectures and displays by Centre of Forensic Science on blood smears, A.L.E.R.T., and breathalyzers with practical demonstrations; recent amendments to the Young Offenders Act and matters of current interest on sentencing.

The annual meeting and education program of the Association will be held in Kitchener, Ontario, the home city of the President, from May 20th to 24th, 1987.

QUEBEC

Communique

Lors de son congrès général annuel tenu à Québec, le 14 novembre 1986, la Conférence des juges du Québec s'est donnée un nouveau conseil d'administration pour l'année 1986-87.

Furent élus:

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M. le juge Jean-Marc TREMBLAY
Cour Provinciale, Québec

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Cour des Sessions de la Paix, St-Jérôme

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M. le juge André QUESNEL
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M. le juge Louis MORIN
Tribunal du Travail, Québec
Madame la juge Michèle RIVET
Tribunal de la Jeunesses, Montréal
M. le juge Marc DUFOUR
Cour des Sessions de la Paix, Québec
M. le juge Rosaire DESBIENS
Cour Municipale de Montréal, Montréal

Président sortant
de charge et conseiller:
M. le juge Yvon MERCIER
Cour Provinciale, Montmagny

La Cónference des Juges du Québec regroupe tous les juges en exercice nommés par le Québec près la Cour Provinciale, la Cour de Sessions de la Paix, le Tribunal de la Jeunesse, Le Tribunal du Travail et les Cours Municipale de la Ville de Montréal, de la Ville de Québec et de Ville de Laval.

Le but de la Conférence des Juges du Québec est de sauvegarder la dignité, le respect, l'autorité et l'autonomie des tribunaux et du pouvoir judiciaire, de favoriser l'excellence et l'entraide des membres et de veiller à leurs interets.

Le Juge Louis-Jacques Léger, président de la Conférence des Juges du Québec.

Le Juge Louis-Jacques Léger qui siège à la Cour Municipale de la Ville de Montréal depuis 7 ans a été elu, le 14 novembre dernier, président de la Conférence des Juges du Québec pour l'année 1986-87.

Originaire de Montréal, le Juge Léger a fait ses études primaires au Jardin de l'Enfance des Soeurs de la Providence puis fréquenta le Collège de Montréal et le Séminaire de Philosophie jusqu'à l'obtention de son baccalauréat en 1957.

Il s'inscrivit à la faculté de Droit de l'Université de Montréal où il obtint sa licence en 1960.

Il fut admis au Barreau de la Province de Québec en 1961 et il a pratiqué le droit jusqu'en 1980 alors qu'il accedait à la magistrature.

Il a agi comme conseiller et vice-président de la Conférence des Juges du Québec avant d'accéder à la présidence.

August/août 19-21, 1987

CIAJ Seminar on Legislative Drafting and Interpretation.
Séminar de l'ICAJ sur la rédaction at l'interprétation des lois.
Canadian Institute for the Administration of Justice.
Institut canadien d'adminstration de la justice.
Faculté de droit, Université de Montréal, C.P. 6128, Succursale A, Montréal, (Québec) H3C 3J7 (514) 343-6157.

October/octobre 14-17, 1987

CIAJ Annual Seminar: Justice: Accountability vs Independence. Séminaire de l'ICAJ: la Justice: Responsabilite c. Indépendence. Canadian Institute for the Administration of Justice – Institut canadien d'administration de la justice, Faculté de droit, Université de Montréal, C.P. 6128 Succursale A, Montréal (Québec) H3C 3J7 (514) 343-6157.

CONSTITUTIONAL CRIMINAL PROCEDURE: CONFESSIONS IN CANADA

by Ed Ratushny, Q.C., Professor, Ottawa Law School

Background and Underlying Rationale:

The admissibility into evidence of the earlier statements of an accused has been one of the most contentious areas of Canadian case law for many decades. The concept of "voluntariness" has been re-formulated in different situations and in essentially similar situations.

For many years, the voluntariness rule was said to apply only to "inculpatory" and not to "exculpatory" statements. A great deal of judicial energy was expended, with not much success, in attempting to delineate these two categories. Finally, the Supreme Court put an end to this agony by concluding that it did not matter, the rule was applicable to all statements whether inculpatory or exculpatory.[1]

At one time, the Supreme Court had emphatically laid down the requirement that a proper caution be given to an arrested person as a pre-condition of admissibility.[2] A few years later, the same Court concluded that a caution or warning was not essential. It became only one factor to be considered in addressing the central issue of voluntariness.[3]

The caution or warning in question in these cases did not relate to the right to counsel. Rather it was a caution that the accused was under no obligation to answer. There was no requirement, whatsoever, to advise an individual of any right to consult counsel. Indeed, statements were found to be voluntary even after counsel had been requested and actively denied.[4] The most that could be said was that the denial of counsel *might* be a factor to be weighed against the Crown in assessing voluntariness.[5]

In *R. v. Howard and Trudel* the Ontario Court of Appeal clearly disapproved of police conduct in denying counsel:

> After Trudel made it clear that he wanted his lawyer to be present and had called him, Corporal McCurdy should not have continued his examination which made a mockery out of Trudel's right to counsel and his right to remain silent.[6]

Nevertheless, the voluntariness rule did not provide a basis for exclusion. Instead, the statement was rejected on the narrow basis that it fell within the residual discretion permitted by the *Wray*[7] case. In other words, the evidence was of tenuous probative value in comparison to its potential prejudice to the accused.

The underlying rationale for the voluntariness rule relates to a concern for the reliability of the evidence. The voluntariness rule, itself, does not require the weighing of probative value. Rather, it imposes a more specific test and an exclusionary consequence because of a fear of *potential* unreliability. There is an obvious implication for police behaviour but that is indirect.[8]

The basic purpose of the rule does not reflect any fundamental value other than the danger of relying upon unreliable evidence. It does prohibit threats and inducements but only in relation to the admissibility of statements. The identical police conduct, and actual violence, was considered irrelevant to the admissibility of other forms of evidence.[9]

The requirements of section 10(b) of the *Charter* rest on a different basis. This protection is an attempt to ensure that the suspect or accused has the opportunity to become fully aware of his legal rights. The same value is reflected in section 2(c) of the *Canadian Bill of Rights.* Moreover, the distinguished Ouimet Commission[10] had recommended that the right to counsel be specified in the Criminal Code together with a provision requiring that reasonable means be taken to inform the accused of his rights. The failure so to inform the accused or to provide an opportunity to consult counsel after such a request would render any subsequent statement inadmissible.

In *Clarkson v. The Queen*[11] Madam Justice Wilson articulated the nature of the right to counsel in section 10(b):

Trollope. "It doesn't come into the Crown's hands, except on days that the case is up in court for trial or if the Crown wants to request the file specifically."

Usually, however, there's no such request, especially at the provincial court level, where 90 percent of criminal charges are heard – mostly the less serious ones. The Crown first sees the file on the morning of trial, along with the dozen or more others to be prosecuted that day.

Michael Martin, Ontario's director of Crown attorneys, says this scant attention to individual cases isn't necessarily a bad thing. "Perfect justice is something one strives for at all times as a Crown attorney," he says. "But it doesn't necessarily involve agonizing attention over a protracted period of time. If someone is charged with shoplifting and there are only one or two witnesses, an experienced Crown could glance at the file for a couple of minutes and appreciate the issues."

Wein, however, doesn't accept this reasoning whole cloth. She says Crowns worry that seemingly routine cases can slip through that involve serious points of law. And she says Crowns sorely miss their lack of time to prepare members of the public before they appear as witnesses.

A former head Crown at the district court in Toronto also has his doubts. Robert McGee says the working conditions mean a Crown often has to make concessions to expediency.

"In a perfect world, he would want to interview the witnesses himself, but in fact he can't do it," says McGee. "He has to rely on what the police tell him the witnesses are going to say. Sometimes that may be faulty. Sometimes what a witness says under oath in a witness box is completely different from what he told a policeman six months before."

McGee says the Crown is also required to follow a lot of suggestions from the police about the case, especially if it's a fairly new Crown dealing with a veteran police officer – a common situation these days as experienced Crowns desert the public service to use their acquired knowledge in more lucrative defence work.

The Crown "really doesn't have time to sit down and think about his role as a quasi-judicial official," says McGee. "When you get a young Crown in there with 15 trials, it's pretty hard for him to give much thought to each one. Maybe he has 15 trials crammed into a courtroom with 50 or 60 witnesses clamouring to see him. It's hard for him to give an intelligent appraisal of each case.

"When I was a Crown, I relied a great deal on what the police advised me – what they thought and how they saw the case. The Crown isn't bound by that. It's not something that he should feel compelled to follow in every case. But it certainly has an effect. It means a lot, especially if you're young and have a lot of work on the list."

It's not only on trial day that the police exert influence on prosecutions. They also play a role in the behind-the-scenes bargaining that's part and parcel of criminal cases.

"I don't know another profession where there are so many hitches that [lawyers] could employ," says civil liberties lawyer Charles Roach. "If you worked strictly to rule, you wouldn't get anything done."

Although the two sides can hash out anything from admissibility of evidence to adjourning the trial, the bargaining often involves the accused pleading guilty in return for a lesser charge or an agreed-upon sentence.

Although it's a common activity, plea-bargaining is a controversial one, and law reform commissions, some defence lawyers and others have called for its abolition. There have been suggestions that it encourages the police to lay more serious charges than warranted by the evidence, or charges for which they have little evidence at all, in order to give them leverage in plea bargaining – thereby extracting a guilty plea without a time-consuming trial in which their case will be challenged and possibly fail.

But, says Roach, defence lawyers are willing participants. "If you don't [plea] bargain [the outcome] for the accused could be worse," he says. "So sometimes they will plead guilty to things they are not guilty of, in order to escape being found guilty of something much worse – which they may not be guilty of either. One thing people can't stand is uncertainty."

Plea-bargaining is especially repugnant, say its critics, because it not only encourages the police to be especially harsh when laying charges, but because they are integral participants in the dealing.

"The Crown attorney is so busy, his list is so long, and he's got so many things to do that he says, 'Why don't you go speak to Sergeant So-and-So,' " says Roach.

Noted criminal lawyer Brian Greenspan is one who disputes this. He says plea bargaining

THE POLICE, THE CROWNS AND THE COURTS: WHO'S RUNNING THE SHOW?

This article reprinted from the Canadian Lawyer Magazine.

by Glenn Wheeler

They hang around the hallways, smoking cigarettes and talking, waiting for 10 o'clock, like people standing around a theatre lobby.

This, however, is serious, even though the charges that have brought most of the people to Toronto's Old City Hall courtrooms are not. The diet of crime at the provincial court level is heavy on theft, drunkenness and assault. But a bad break on trial day still has serious consequences for the accused – it can mean the difference between discharge and fine, freedom and jail, unblemished character and criminal record.

On the other hand, to the Crown attorneys who prosecute the cases, they're part of a caseload to be dealt with as best they can, because, the Crowns say, their job has become less of a search for justice than a battle against the clock.

Crowns and defence lawyers agree that can be bad news for the accused, not at all a ticket to an easy time of it in court, because too often it leaves the police officers, who collected the evidence with the aim of getting a conviction, also running the show in court. In such circumstances, the Crown – who's supposed to be a check on the power of the police, and a protector of rights as well as prosecutor – is relegated to an extension of the police apparatus.

That situation was an underlying issue in the Ontario Crown attorneys' recent pay dispute, which threatened to turn into a work-to-rule campaign. The Ministry of the Attorney General staved that off by offering more money and better working conditions. But observers agree that even though the province's 314 Crowns have accepted the deal, it will do little to right the fundamental wrongs of an underfinanced court system.

The office of Crown attorney has a long history in English criminal law. Central to the office, says University of Toronto law professor John Edwards, is a concern with the wider public interest – not merely in getting convictions.

"It would be very wrong to think that the responsibility of the Crown attorney is merely to put criminals behind bars," says Edwards, an authority on such matters.

However, under increasingly frugal financing of the court system, critics argue that the protections embodied in the office of Crown attorney have become more rhetorical than real.

While the courts, like prisons and other corrections services, get 12 percent of money spent in criminal justice, the police get 70 percent. "Since the 1970s, the gap between police and other types of costs has become even more evident," according to *Selected Trends in Canadian Criminal Justice,* an annual publication of the federal Solicitor General's department.

That means that while there are plenty of police to lay charges, it's hard for the rest of the criminal justice system to deal with them. Bonnie Wein, a veteran Crown, says the physical facilities are bad (crumbling courthouses and interview rooms whose walls don't go up to the ceilings), and the Crown attorneys are overextended and underpaid.

"Having a salaried system saves the public a lot of money," she says, since overtime is a regular part of the job. But Wein says the accused gets short-changed as well. She allows that in some cases, poor Crown preparation results in people beating charges that, by rights, they should be convicted of. But she also says accused can end up languishing in jail, just waiting for their case to make it into the clogged court system.

More often, she said in a later interview, scheduling delays result in charges being dismissed without the court ever hearing the merits. And judges often react more leniently in bail hearings because of the long waiting lists for trial.

Once minor cases do make it into court, they're mostly in the hands of the police, according to some lawyers. In Toronto, for example, the Crown does not keep a file on a case unless it is a major one and the Crown is assigned immediately. A routine file "stays in the custody of the police," says lawyer Paul

> This constitutional provision is clearly unconcerned with the probative value of any evidence obtained by the police but rather, . . . the concern is for fair treatment of an accused person.[12]

and, later:

> . . . the purpose of the right, as indicated by each of the members of this Court, writing in *Therens, supra* is to ensure that the accused is treated fairly in the criminal process.[13]

Precisely how does the right to counsel relate to the accused being treated fairly in the criminal process?

One approach to this question is to examine the procedural protections which are available to an accused at trial. The accused is given: (a) a public trial; (b) after a specific accusation including particulars; (c) according to specific rules of procedure and evidence; and, (d) represented by counsel to insure that all of these protections are provided. Moreover, the accused is (e) entitled to know the evidentiary "case to meet"[14] before deciding whether or not to respond. In other words, the accused hears all of the Crown witnesses under oath and tested by cross-examination before deciding whether to respond and, if so, in what manner and to what extent.

All of these protections are present in the courtroom. They are absent during interrogation at the police station. Thus, section 10(b) can be seen as an attempt to provide justice in the "gatehouses" as well as in the "mansions" of our criminal justice system.[15] How is a criminal justice system to be described if it jealously guards such protections at the trial stage while "turning a blind eye" to the pre-trial stage? Such a system certainly would be inconsistent. It might be described as lacking in integrity – and perhaps even as hypocritical!

Another approach which might be taken is to think in terms of placing the accused who is facing police interrogation in the same position as a lawyer. In other words, when faced with the serious potential consequences of the criminal process, all accused persons should be placed in an equal position in law. They should understand exactly what is involved and know the most personally advantageous manner in which to respond. The Ouimet Report recognized the "unacceptability of a system of law enforcement based upon keeping people in ignorance of their rights".[16] Once again, fairness comes down to a matter of consistency and integrity within the criminal justice system.

The Supreme Court of Canada has not yet fully explored the underlying rationale for the right to counsel protection in section 10(b). The adoption of the principle of "fairness to an accused" is a useful first step in extricating the Courts from the limitations of "probative value". However, it will be necessary to go further and explain what "fairness" entails. There are many pitfalls in attempting to do so and I will return to these in the conclusion where practical problems of law enforcement will also be considered.

Detention:

The most significant judicial decision to date in relation to the application of the *Charter* to confessions may well be *R. v. Therens.*[17] That is so in spite of Mr. Justice Lamer's qualification:

> Whether s.10(b) extends any further, so as to encompass, for example, the principle of *Miranda v. Arizona* . . . and apply to matters such as interrogation and police lineups, need not be decided in this case and I shall refrain from so doing.[18]

In *Therens,* the Court explored the meaning of "detention" under section 10(b). The issue is of crucial importance since it is the mechanism which triggers the operation of the right to counsel prior to trial. Unless there is a detention (or an arrest), there is no right to counsel. But as soon as the threshold into detention is crossed, the right to counsel and to be informed of that right become operative without delay.

The Supreme Court of Canada had the benefit of the analysis of Mr. Justice Tallis, who wrote for the majority of the Saskatchewan Court of Appeal. In his reasons, Tallis J. distinguished the earlier Supreme Court decision on the issue of detention in *Chromiak v. The Queen*[19] and elaborated upon the manner in which the *Charter* should be interpreted in this context. He also injected a healthy dose of common sense:

> When you consider the circumstances of this case and in particular the context of the demand that was made to him, it cannot be said that the respondent accused was free to depart as he pleased. To say that he was not detained is simply a fiction which overlooks the plain meaning of words from the viewpoint of an average citizen.[20]

In other words, Mr. Justice Tallis chose to apply the spirit or purpose of the right to counsel rather than merely a strict and narrow interpretation of detention.[21]

In the Supreme Court of Canada, Mr. Justice LeDain was the only judge to address the meaning of "detention" in section 10(b).[22] He stated that detention encompassed the following situations:[23]

(1) ". . . a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel . . ." or "physical constraint";

(2) ". . . when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel."

However, he went on to add a third category:

> The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.

In the same vein as the Court below, Mr. Justice LeDain elaborated that it simply was not realistic to look only to "the precise limits of police authority". It was also necessary to consider the dynamics of the relationship between the police officer and the citizen.

This approach could have the salutary effect of extending the protection of section 10(b) to aspects of police interrogation which were not affected by the voluntariness rule. Consider the following situations, for example:

(a) A suspect refuses to accompany an officer voluntarily to the police station but after further discussion perceives that he is required to do so, even though there is no express demand or direction on the part of the police officer.

(b) A suspect attends at the police station voluntarily but subsequently asked to be excused. He is not told that he *must* remain but the subject is changed and the questioning continues.

(c) A suspect attends at the police station for questioning and repeatedly asks to call his lawyer. The request is repeatedly denied but there is no attempt to leave and, therefore, no overt indication that the suspect would be prevented from leaving.

(d) A suspect agrees to accompany the police to the station but, before leaving home, tells his wife to call his lawyer to have him meet the husband at the police station. The lawyer subsequently arrives but the desk sergeant refuses the lawyer access to the interrogation room.

Suppose that in each of these situations, after a few hours of questioning, a statement is obtained. Under the voluntariness rule the courts would likely hold that there was no evidence of "fear of prejudice" or "hope of advantage". There was no evidence that the police would have prevented him from leaving at any time.

On the other hand, the implication of the Therens case might be to require a warning as to the right to counsel in each situation together with access to counsel where requested. In contrast with the voluntariness cases, some outward manifestation of coercion on the part of the police officers would not be necessary. The courts could conclude that there was a "reasonable perception of suspension of freedom of choice".

Indeed, the Charter already has been involved as the basis for an action for damages in a situation similar to the fourth example given above. In *Crossman v. The Queen*[24], Mr. Justice Walsh awarded $500 in damages against the RCMP under section 24(1) of the Charter for a breach of section 10(b).

Of course, the extension of *Charter* protections is not universally perceived as a net gain for society. As Grant Garneau has recently observed:

> Thus detention short of arrest is the point at which the legal rights of an individual being questioned come into direct conflict with the use of interrogation as a viable investigation procedure. Here the individual has the greatest need to obtain and instruct counsel without delay and enforcement officials have the strongest aversion to the intrusion of counsel.[25]

The author cites examples of police officers deliberately delaying arrest even where grounds existed in order to continue with interrogation unhindered by any need to caution the accused.

Actually I can recall only two occasions when there was real concern about my safety, and both of those arose out of my second circuit.

That second circuit occupied me for five years. It was made up of St. Albert, Morinville, Lac La Biche and Boyle. For six months, in the winter of 1976-77, Grande Prairie and Valleyview were added to it. During my time on this "expanded circuit" I was sometimes reminded of the mother of six small children who, when asked what she did in her spare time, replied that, usually she went to the bathroom.

Anyway the first occasion of concern arose when I was temporarily relieving on a far northern circuit. Three young men were charged with assaulting a Police Officer. Loyalties were divided, about equally, between support for the accused and support for the policeman, so virtually the whole population was in the court room.

The trial lasted until 1:00 p.m. I found all three guilty and I gave each of them a short jail sentence. Court was then closed for the day, and we intended to have lunch in that town, and then depart.

Crown counsel came to me, obviously alarmed, and he urged us to leave immediately and eat lunch elsewhere. He had received information that some "friends" of the accused were "unhappy", and they were looking for us.

Accordingly, my clerk and I left in my car, following by Crown Counsel in his car. Sure enough, about one block behind his car was a pick-up truck with about four men standing in the truck box. They appeared to be banging something like baseball bats on the outside of the truck box. They followed us for about two miles, and then they turned off, and were gone.

I must say that, for my part, there was a certain temptation to exceed the speed limit.

I am reminded, in this context, of the advice given to me by the Family Court Judge, whose place I was taking, temporarily, in another small town, up North. He instructed me to – "Fine them heavy – don't give any time to pay – and get out of town before sunset."

The second occasion of concern was really my own fault. I was returning home from Grande Prairie to Edmonton late one Friday night. There was much driving involved on the "expanded circuit" and the court work that week had been particularly heavy. In retrospect, I should have stayed overnight in Grande Prairie.

Anyway, on a lonely stretch of highway, near Valleyview, I went to sleep for a few moments. I awoke just in time to find the car teetering on the edge of the shoulder, on the opposite side of the road, about to go down a steep embankment. I drove to the next crossroads and pulled off on a gravel side road. I slept there for about four hours. It was cold, but much better than the alternative.

There were, of course, not only incidents, but many people, that I learned from on those years on circuit.

One particular person, who appeared before me in Jasper, I will never forget. He was a young man, charged with shoplifting. He came forward when his name was called and he was wearing a toque on his head. I was mindful of decorum, particularly since the court room was filled, so I asked him to remove his toque. He did so, somewhat reluctantly. When it was removed I understood his reluctance. He was completely bald! Without intending to do so, I had caused that young man to be humiliated, and in the presence of his peers.

The memory of that episode stays with me, and when the loneliness of a steady circuit life began to set in, for relief therefrom, I began to write occasional personal notes. One such note reads as follows:

> "The only hope for rehabilitation must come from the convicted person himself. It cannot be forced upon him. It only comes about because he wants it to.
>
> In order to want rehabilitation a person must first recognize that he is a worthwhile individual. To demean him only adds to his feelings of worthlessness. It is therefore, necessary, as much as possible, to encourage each person to appreciate his own value as the most unique creation in the whole universe. Only with that appreciation will he want to improve himself, and then rehabilitation will have begun.
>
> A good life cannot be sold like merchandise – it must be sought after, like a prize – for surely it must be the greatest prize of all."

On reading this note, some ten years later, I don't think I would change it. In some ways, perhaps, it suggests my debt to those years spent on circuit, as a valuable preparation for my present position, in Edmonton, in the criminal division.

Much of circuit life was also enjoyable and I met many good, warm and dedicated people, while so engaged. Still, on balance, for me, it is good to be home.

SOME MEMORIES OF A CIRCUIT COURT JUDGE IN ALBERTA

by Judge P.C.C. Marshall - Provincial Court of Alberta

February 2, 1974 was the day that I was appointed a Judge of the Provincial Court of Alberta. It is not yet a national holiday.

For 20 years prior to this time I had been approximately 50% of a 2-man law firm that practised on the south side of Edmonton. Ours was a general practise, with a specialty in whatever the client wanted done.

Immediately after my appointment I spent some time under the tutelage of such illustrious members of the Provincial Court Bench as His Honour Judge Allan Cawsey (now Cawsey J., of the Alberta Court of Queen's Bench), His Honour Judge Carl Rolf (now an Assistant Chief Judge of the Provincial Court), and His Honour Judge Alex Shamchuk.

Armed with this great experience, a tremendous enthusiasm, and numerous good wishes, I was set adrift upon that "vast and trackless ocean" of a judicial career. That is, I started to work.

My assignment for the first 6-1/2 years was a Circuit Court Judge in the Northern part of Alberta, charged with the responsibility of toiling in all three divisions of the Provincial court.

My first circuit was comprised of Hinton, Jasper, Edson and Grande Cache.

My beginning was not auspicious.

After reasonably successful first days at Hinton, Jasper and Edson on Monday, Tuesday and Wednesday respectively, and buoyed with an increased confidence, I was now eager for my first day at Grande Cache, on Thursday.

In those days the highway to Grande Cache was not yet paved. It was, truly, as the talking dog used to say in the television beer commercial, "ruff ruff". I mention this because perhaps the "shaking-up" on that trip had something to do with what subsequently happened.

Grande Cache was then an isolated town. There was only one channel on television and the main entertainment in town was provided by the court. There was also a brand new Judge presiding. Everybody was there.

We opened court at 10:30 a.m. Seeing such a large and captive audience, I could not resist the temptation to "say a few words". Accordingly I paid tribute to my predecessor (Judge Shamchuk), and I vowed to maintain the high standard that he had set.

Then I called the first name on the docket. Everybody leaned forward. This was the moment of truth.

The accused responded. I read the charge to him. Then, following the usual procedure, I had in my mind to say to the accused, "are you ready to enter your plea at this time?"

Unfortunately, what came out of my mouth was, "Are you ready to plead guilty at this time?"

There was an uneasy silence for a moment and then some fellow sitting in the front row, turned to his buddy, and in a loud whisper that everyone heard, he said, "Jeez this new guy is tough – he don't even give us a choice!"

Notwithstanding, I remained on that circuit for 1-1/2 years.

Grande Cache was always a special place.

I remember an occasion when I fined a man $50.00 for illegal possession of liquor. I asked him if he needed time to pay the fine. He said "yes – about 10 minutes". Then someone quietly "passed the hat" amongst the spectators in the back of the court room and the fine was paid on time.

Another, somewhat more alarming example of this sort of "expect the unexpected" atmosphere, was revealed in the case where I fined an American coal miner $150.00 for carrying a concealed weapon – a pistol in his boot. As soon as I announced the fine, the accused leaped over the wooden railing that separated the public from the bench, and he came right at me. It was just like watching a western movie. Everyone was mesmerized and nobody moved.

I thought "My God he's got another weapon and he's going to kill me!"

Just as the accused got directly in front of me, he stopped and suddenly shot out his right hand towards me. I shook hands with him and he said to me "your not a bad bastard". Then he turned and left the court room.

It was a bit unsteadying.

A number of recently reported decisions have addressed the question of when general police questioning crosses the threshhold of "detention", thereby rendering operative the protection of section 10(b) of the *Charter.*[26]

In *R. v. Esposito*[27] two police officers attended at the home of a "possible" suspect, were invited in by his mother and then questioned him in his living room. The officer who conducted the questioning testified that he had no grounds upon which to arrest the suspect until an admission was made with respect to certain invoices. At that point, the suspect was arrested and taken into custody. The Ontario Court of Appeal held that the circumstances were not sufficient to constitute a "detention" situation:

> There is no evidence on the record that the appellant actually believed that his freedom was restrained, and in my view, the circumstances would not lead him reasonably to believe that his freedom had been restrained.[28]

The accused did not testify on the *voir dire.* Nor was the police officer questioned in relation to any direct or indirect compulsion.

The Esposito case suggests that the Therens decision need not constitute a bar to effective police questioning in reasonable circumstances. However, variations might be introduced which could be problematic. For example, suppose that the questioning had extended well beyond the point at which grounds for arrest were clear. Would an inference of compulsion be drawn more readily? The Court pointed out that the police officers only considered Esposito to be a "possible" suspect. Would the situation have been any different if he was the only suspect and, indeed, a decision had been taken to charge him but the officers were merely seeking a confession as "icing on the cake"?

In *R. v. Rodenbush*[29], the accused married couple sought to enter Canada from the United States. The couple were taken into a room to await a closer examination of their suitcases in another room. The customs inspector who had been carrying on a conversation with the couple was called aside and told by his superintendent that cocaine was found. He was instructed to question the couple and then arrest them. The appellants lied in response to questions about their suitcases, were arrested and only then were informed of their right to counsel.

The British Columbia Court of Appeal held that there was no doubt that when the couple was asked to enter the room in which the interview occurred, they were detained under section 10 of the *Charter* as interpreted by the Supreme Court in *Therens.* The manner in which the couple was asked to enter the room is not described. However, it would appear to fall within the third category of *Therens* related to "psychological compulsion".

The Court proceeded to consider whether the statements should be excluded as a result of the *Charter* contravention. It was highly critical of the customs superintendent:

> He knew or should be deemed to know that detention and questioning of a person whom he was about to arrest might garner incriminating evidence *before* the *Charter* warning was delivered. This then constituted a flagrant infringement of the appellant's constitutional rights.[30]

The Court held that the statements should be excluded pursuant to section 24(2) of the *Charter* on the basis of "all the circumstances". The instruction to delay the arrest pending interrogation was considered to be a deliberate flouting of the accuseds' *Charter* rights.

It is far from clear from the *Therens* case that section 10(b) requires that an arrest be carried out as soon as the decision to arrest has been made. The *Charter* only states that the warning and corresponding access to counsel must occur upon detention or arrest. In *Rodenbush*, there was both a detention and grounds for an arrest. The detention generated the requirement of a warning. The decision to delay the arrest while conducting an interrogation was a strong factor in applying section 24(2).

What, then, would be the situation if there were no detention yet ample grounds and an actual decision to arrest? On a strict reading of *Therens, Rodenbush* and section 10 of the Charter, it could be argued that to delay the decision to arrest is inconsequential. Since there has been no detention or actual arrest, section 10 is not operative. The delay in arrest which was criticized in *Rodenbush* was only considered there in relation to section 24(2) but first there must be a *Charter* breach before that section can come into play.

On the other hand, if *Rodenbush* is interpreted in the same broad spirit as *Therens,* the absence of a formal arrest or of any form of detention should not be conclusive as to the inapplicability of section 10. The *Rodenbush* couple were arrested for all practical purposes although not strictly so in law. The fundamental question, however, is not whether they were *legally* arrested but whether their circumstances cried out for legal counsel. Just as the

subjective perceptions of the suspect might constitute "detention" as in *Therens,* subjective perceptions of the enforcement officer (i.e. having decided to arrest) should constitute an "arrest" for the limited purpose of the applicability of section 10 of the *Charter.* If this interpretation is given to *Rodenbush,* it can be viewed not merely as an application of *Therens* but also as an important and expansive complement to it.

However, another recent decision of the Ontario Court of Appeal took a much narrower approach to the Therens decision. In *R. v. Bazinet*[31], the issue was essentially the same as that in *Esposito* although the facts were somewhat different. In both cases, the police officers came to the home of the possible suspect. However, whereas in *Esposito* the questioning occurred in the suspect's living room, in *Bazinet* the suspect volunteered to accompany the officers to the police station. This offer was entirely at the initiative of the suspect in response to a request to ask some questions. After almost two hours of questioning the accused confessed to the homicide which was under investigation.

The circumstances in *Bazinet* were certainly more coercive than those in the *Esposito* case. The questioning occurred in the police station and continued for almost two hours. Bazinet had been awakened by the police and had eaten nothing from that time until after the confession had been obtained. At the start of the interrogation blood was noticed on Bazinet's clothes and he was asked to give them up for analysis. At a certain point, the nature of the questioning changed with the police confronting the accused with some of the evidence which they had. Nevertheless, no evidence was presented by the accused as to any reasonable psychological detenion on his part. In that context, the Court might have simply concluded that it did not view the circumstances as leading to such a conclusion.

However, the Court chose to go much further by advancing a significant restriction upon the third category of "detention" described by Mr. Justice Le Dain in the *Therens* case. It held, in effect, that "psychological compulsion" could only constitute detention where it occurred in response to a "demand or direction" issued by a police officer. It is submitted that this is an unnecessarily restrictive interpretation of the judgment in question and that the passages quoted earlier are capable of standing by themselves as a separate category. The references to a demand or direction were natural in the context of *Therens*, which involved a demand for a breath sample. However, that narrow factual context should not preclude the application of the broader concept to other situations.

It is disappointed that the Court seemed to take greater comfort in the increasingly narrow formulation of "custodial interrogation" in the American Supreme Court than in the expansive approach taken by our own. Moreover, this approach fails to take into account the flexibility available in Canada through the application of section 24(2) of the *Charter.* Under this provision, even though section 10 may have been violated, the evidence need not be excluded. The great virtue of *Therens* is in recognizing the *reality* of detention even in the absence of its *formality.* Such a realistic approach is particularly needed in relation to police interrogation. Even if the police station interrogation in *Bazinet* did involve a "detention", whether at the commencement of questioning or at the point of discovering the blood-stained clothing or at the time when the interrogation became confrontational, such a *Charter* breach need not have resulted in exclusion of the subsequent confession.

Extent of the Obligation:

It now has been established that the phrase "without delay" in section 10(b) refers not only to the right to retain and instruct counsel but also to the right to be informed of that right.[32] However, the question as to what is necessary to constitute a satisfactory fulfilment of the obligation to inform and to provide access to counsel is not so easily resolved.

In *R. v. Shields*[33], Judge Borins indicated that while the accused had been *informed* of his right to counsel, inadequate information had been provided to give effect to that right:

> In the present case, the recitation of his rights to Mr. Shields became meaningless in the absence of providing him with any information as to how he could exercise his rights when it became apparent that he neither had nor knew a lawyer.

He elaborated further:

> Without attempting to establish a precise verbal formula, to give effect to the right created by s. 10(b), it should be explained, in easily understood language, to an accused that he has the right to talk to a lawyer before and during questioning, that he has a right to a lawyer's advice and presence even if he cannot afford to

euthanasia has to be left, in order to save opening the Pandora's box of the horrors of legalized euthanasia—left as an act of civil disobedience in which the courts would have to judge motivation as a mitigating factor.[10]

Says Torah: "You shall not kill." (Ex. 20:13)

Said Job in protest:

> I would rather be choked outright; I would prefer death to all my sufferings; I am in despair, I would not go on living." (7:15f)

Says Ecclesiastes:

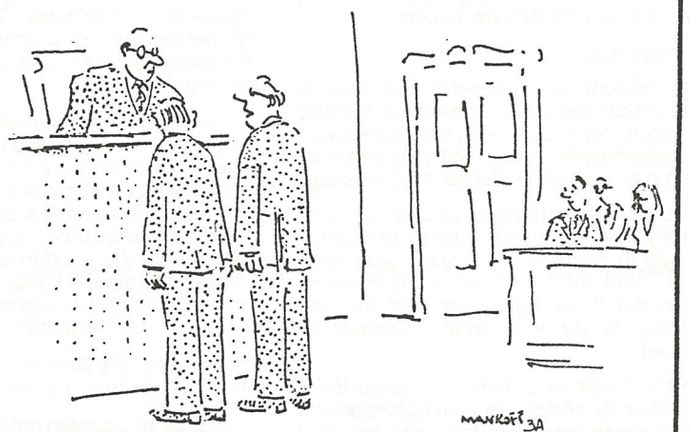
> In everything there is a season, and a time for every matter under heaven: a time to be born, and a time to die . . . a time to kill, and a time to heal." (3:1ff)

Wrote Paul in his letter to the Church at Rome: "Love does no wrong to a neighbour; therefore love is the fulfilling of the Law." (13:10) Ah, but are there situations in which euthanasia is the loving act?

NOTES

1 K. Vaux, "Beyond this Place: Moral-Spiritual Reflections on the Quinlan Case," *The Christian Century*, Vol. 93, No. 2, p. 46.
2 cf. H. Richard Niebuhr's category of "the fitting thing" in his *The Responsible Self.*
3 cf. Paul Ramsey's exceptions to the duty "to care for the dying," in his book, *The Patient as Person.*
4 Joseph Fletcher's "Euthanasia and Anti-Dysthanasia," in his *Moral Responsibility,* Ch. 9.
5 *Macleans*, Nov. 21, 1983.
6 Quoted in Daniel Maguire, *Death By Choice*, p. 57.
7 E. Keyserlingk, *Sanctity of Life or Quality of Life*, p. 20.
8 Daniel Maguire, *Op. Crt.*, p. 142.
9 Daniel Maguire, "The Freedom To Die," *New Theology,* No. 10, ed. M. Marty and D. Pierman, p. 189.
10 James Sellers, "Is Euthanasia A Form Of Civil Disobedience?", *The Christian Century*, Nov. 2, 1983, p. 980.

DOLLAR$ AND NONENE ®



"By the way, your Honor, both my client and I wholeheartedly support the pay hike for Provincial Court Judges."

On the one hand, the Hebraic-Christian ethic places very great value on the sanctity of life as God's gift. Hence the scripture, "You shall not kill." And the burden of proof has to be on anyone who goes against it. There is the right to life. On the other hand, that same ethic values highly the relief of suffering as a work of mercy. A right to death, even? This double obligation is also part of the physician's Hippocratic oath. There is the promise to prolong and protect life on the one hand, and the promise to relieve suffering on the other. Hegel's sense of the tragic comes into play precisely because two values conflict at times. When the patient is in the grips of an agonizing and fatal down-spiral, the fulfilling of the promise to relieve pain may well involve one in violating the promise to prolong life. Or more correctly, it may involve one in the refusal to prolong the dying process.

What often catches us here is what the American Episcopalian ethicist Joseph Fletcher calls "the vitalist fallacy"—the often-unexamined presupposition that life as such, the vital or biological principle itself, is the highest good. The Law-Reform Commission of Canada's study paper on *Sanctity of Life or Quality of Life* defines vitalism as the view that "wherever there is human life, any human life, whether comatose life, foetal life, deformed or suffering life, the sanctity of life principle is the final, conclusive reason against taking, ceasing to preserve, or genetically altering it."[7]

Following the vitalist fallacy through, there are people who back away from achieving "a good death"—which is the literal meaning of euthanasia—by arguing that the human must not interfere with nature, that things must be "left in God's hands." Notice carefully, though, that the presupposition here is that the will of God is to be identified with the natural processes of the body. Forgetting that all the good devices of medicine, from antibiotics to sophisticated surgical techniques, represent one vast interference with nature on the part of free, responsible human beings, opponents of death by choice fall back on "a kind of religious, biologistic determinism" when it comes to euthanasia. In the words of Daniel Maguire, a Roman Catholic ethicist at Marquette University, "What the objection implies is that God's will is identified with the process of the human's physical and biological nature. When God wants you to die, your organs will fail or disease will overcome you."[8]

But, over against the dubious enterprise of equating God's will with what natural, biochemical or organic factors determine, one should ask the questions raised in Maguire's essay on "The Freedom to Die":

> Can the will of God regarding a person's death be manifested only through the collapse of sick or wounded organs, or could it also be discovered through the sensitivities and reasonings of moral man? Could there be circumstances when it would be acutely reasonable (and therefore moral) to terminate life through either positive action or calculated benign neglect, rather than to await in awe the dispositions of organic tissue?[9]

For certain moral theologians, the answer would be in the affirmative.

VI

That brings me back to Dr. Nachum Gal, the medical resident charged with murder in the Candace Taschuk case.

Both doctors, the one who had the newborn removed from life-support, thereby allowing the inevitable, as well as Dr. Gal, who prescribed the overdose of morphine to ease and end the dying infant's painful terminal struggle—both intended her death. Dr. Gal, it can be argued, actively abetted and accelerated the process with the morphine overdose as a merciful provision. Behind Dr. Gal's intention lay the motivation of mercy.

As I understand the situation, in our Canadian system of common law, built on case precedents, only intention is important, not motive. Mr. Keyserlingk of the Law Reform Commission stated that unless the system of law changes, motive cannot be admitted as a factor in crime. As his summary statement put it, "If your intent is to end somebody's life, it's murder, even if your motive is conscience."

Ethically speaking, I question whether that's good enough. If the total moral situation is to be taken into account, then the law should be changed to allow for the consideration of motive in a case such as that of Dr. Gal.

I have no idea what your responses to all of this may be, but, as I worked my way through this sermon, as one who visits Israel often and who would love to live in Jerusalem, I ended with the strong conviction that were I to live in Jerusalem, I would seek out Dr. Nachum Gal to see if he would be my physician. I will give the moral case to the person who goes by Henry David Thoreau's dictum: "If the law is of such a nature that it requires you to be an agent of injustice to another then I say, break the law." But it may be that that's where active

> hire one, that he will be told how to contact a lawyer, if he does not know how to do so and that he has a right to stop answering questions at any time until he has talked to a lawyer. To make certain that he understands his rights and to avoid equivocal and uniformed waivers, the explanation of the rights should, if possible, be written, as should any waiver of them.[34]

This appears to be the broadest formulation to date in the case-law.

In *R. v. Nelson*, Mr. Justice Scollin had also suggested that the obligation on the part of the police could extend beyond merely informing the accused of the right under section 10(b):

> Real opportunity is what is meant by [this] provision of the *Charter*, not the incantation of a potted version of the right followed immediately by conduct which pressured a waiver.

He added:

> . . . To make the right effective, particularly in the case of an unsophisticated and uneducated accused, he should obviously be asked whether he does wish to retain and instruct counsel . . . If the answer is that he does . . . a reasonable opportunity must then, without delay, be given to him.[35]

In rejecting statements which had been taken at the police station, his Lordship stressed the determining factors of the educational and social background of the accused, the apparently deliberate delay in informing the accused as to a significant change in the charge (the victim had died), the failure to make any real inquiry as to the accused's choice and the failure to ensure that a real opportunity was given to the accused to consult counsel if he so wished.

Thus, in both of these cases the accused were informed of their right to counsel but something more was required. In *Shields*, the accused responded by stating that he did not have a lawyer and did not know any lawyers. At trial, he testified that he was unaware of any referral service and had never heard of "duty counsel". In such circumstances, it seems reasonable for Judge Borins to have expected the police to go further than reading the "potted version" from their plastic card. The response of the accused to the police and at the *voir dire* indicated a practical barrier to achieving the protection provided by section 10(b). In such circumstances, the police should have elaborated beyond the bare recitation which serves as an adequate starting point and, in most cases, also as a fulfilment of the police obligation.

Similarly, in *Nelson*, there were special circumstances related to the social and educational background of the accused. Taken together with the manner in which the accused responded to the police, they created an obligation on the part of the police at least to ask whether the accused did, indeed, wish to consult counsel.

In *R. v. Anderson*[36] the Ontario Court of Appeal emphasized these special circumstances in interpreting the Shields and Nelson cases. It was also pointed out that in *Nelson* there was some defect in the manner in which the accused was informed of the right in the first place. In *Anderson* itself, no special circumstances were found to exist which would impose any greater obligation on the police than merely to inform the accused of the right to counsel. Nothing in the testimony of the accused suggested any impairment, lack of understanding or inadequacy which would inhibit the retention of counsel. On the contrary, the accused testified that he had retained counsel in the past and had been informed frequently of the right to remain silent.

The Court specifically rejected any obligation on the part of the police, as suggested by Judge Borins in *Shields*, to inform an accused *how* a lawyer might be contacted or as to the availability of legal aid. This was seen to impose too high an obligation on the police. The Anderson decision has been criticized for taking too rigid an approach to the issue of police obligation by insisting upon a prior request from the accused. Mr. Stanley Cohen observed:

> . . .[This] may leave the impression that all ancillary aspects of the right to counsel (such as private consultation, silence until counsel attends or is contacted after a request is made or even legal aid) must be specifically requested without any particular information or advice in regard thereto being supplied by the police. These aspects of the right to counsel have "to be asked for in some way". Not addressed is how one asks for what one does not know about.[37]

This concern is well taken. It would be unfortunate if the interpretation of section 10 of the *Charter* were to follow the general path of the voluntariness rule by requiring specific violations such as a "threat" or an "inducement".

The purpose of section 10(b) must be to make counsel available to the detainee or, as Mr. Justice Scollin has put it, "the essence of the provision is opportunity". If that opportunity can be provided simply by informing the detainee that it exists, that is sufficient. If the detainee is passive, reticent, inarticulate and inadequate in social skills and does not respond, it would seem reasonable to expect a police officer to go further and ask whether the person does wish to talk to a lawyer. If the detainee says he or she will not be calling a lawyer because he or she cannot afford to hire one should the Charter protection simply be abandoned? Or should the police be expected to take the further step of explaining the availability of legal aid or duty counsel?

The Ontario Court of Appeal also addressed the detainee's understanding of his Charter rights in *R. v. Baig*, where the Court stated:

> . . . in the ordinary case, after the Charter rights have been read, the suspect will acknowledge that he understands his rights in response to the officer's question.[38]

In this case, the accused made no such acknowledgement and the trial judge held that the police should have asked again whether the accused understood. However, the Court of Appeal adopted its earlier decision in *Anderson* and stressed the failure of the accused to ask for an opportunity to retain or instruct counsel:

> There is . . . no duty on the prosecution to probe into the suspect's degree of understanding or comprehension or to adduce positive evidence in the absence of special circumstances . . . or in the absence of words or conduct from which it could be reasonably inferred that the suspect did not understand his rights.[39]

The accused was sober, displayed no difficulty of hearing, appeared to be intelligent and had a good grasp of the English language. His failure to acknowledge explicitly that he understood his rights did not constitute "special circumstances".

Subsequent Questioning:

However, if a detainee does state that he wishes to retain counsel, all questioning must cease until he has been afforded the opportunity of consulting counsel. This was established in *R. v. Manninen*[40] where the accused responded emphatically that: "I ain't saying nothing until I see my lawyer. I want to see my lawyer". Nevertheless, questioning continued and the statements obtained were subsequently rejected by the Ontario Court of Appeal.

A similar issue arose in *R. v. Ferguson*[41] where the accused was arrested and informed of his rights at 10:05 a.m. At 10:41 a.m., at the police station, he asked to call his lawyer and received full co-operation from the police. He eventually called a friend to obtain a lawyer for him and informed the police that he had nothing to say until he talked to his lawyer. At 1:00 p.m. a conversation with the police took place at which little was said. However, at 2:47 p.m., a further conversation took place, without any further caution being given, in which serious admissions were made.

The Ontario Court of Appeal distinguished *Manninen* on the basis that here the accused was not denied counsel but was given every opportunity to speak to his lawyer. The trial judge found that the accused had simply made voluntary replies to routine investigation questions. In the words of the Court of Appeal:

> A suspect who has been made aware of his constitutional rights under the *Charter* is, of course, free to remain silent but is also free to talk if he thinks that it will serve his purpose to do so.[42]

The Court stated that the conduct of the police officers had not been "exemplary or beyond criticism". However, they upheld the trial judge's assessment that section 10(b) had not been infringed.

This result should be compared with the earlier Howard and Trudel case[43] in which the same Court considered further questioning following a phone call to a lawyer to constitute a mockery of the right to counsel. It must be viewed as somewhat ironical that in the earlier case the Court was able to exclude the statements without the assistance of the *Charter* and even without the assistance of the voluntariness rule. In *Ferguson*, the statement was admitted in related circumstances *in spite of* the Charter.

In *Ferguson*, the accused was questioned after he had asked for counsel and before counsel arrived at the police station. If that is the case, should there be any difference if counsel has been retained?[44] The reality of the situation is, of course, that the police officer, in the isolated setting of the police station will attempt to wear down the resistance of the prisoner by engaging him in conversation and subtly moving to questioning about the offence.

If this is permitted, we may be led back to the pre-Charter cases such as *R. v. Settee*[45]

The Canadian Medical Association's *Code of Ethics* allows that such choices are ethically responsible. The code states that "an ethical physician . . .

> — will allow death to occur with dignity and comfort when death of the body appears to be inevitable;
>
> — may support the body when clinical death of the brain has occurred, but need not prolong death by unusual or heroic means . . .

(b) Another form of indirect mercy killing is that of withholding treatment altogether. An example of this would be physicians not respirating at birth children born with gross congenital deformities.

The ethical dilemma becomes more complex with this example. What is being given priority in the decision not to respirate the badly deformed infant are the personality values of self possession and human integrity. In the conflict of values scenario, quality of life is judged to be of more import than the physical spark of mere biological existence.

We'll come back to this later.

(c) Still another form of indirect mercy killing is the pyramiding of pain killers. The doctor's Hippocratic oath commits the doctor to relieve suffering. So the doctor's order to administer morphine "as needed", so as to keep excruciating pain at bay, may in fact, by the logic of morphine, build or pyramid to fatal levels. Thus the commitment to relieve suffering may eventuate in death.

But this begins to shade over into the area of direct or active euthanasia, and leads to another case study.

IV

Maclean's magazine[5] began a cover-story on euthanasia with these words: "For 16 fitful hours after her birth, Candace Taschuk struggled for life in Edmonton's University Hospital, then died in her mother's arms on October 8, 1982." A senior pediatrician testified that the child was born "basically dead." At the urging of a doctor, her parents, suspecting she was brain-dead, tearfully agreed to have their severely disabled infant taken off life-support systems. When Candace was removed from the life-support systems, the floor nurse asked another doctor, a visiting Israeli resident physician, to help relieve the infant's pain. Dr. Nachum Gal, "to ease and speed the baby's painful death with an injection of morphine", ordered 50 times the normal dose. The Alberta Attorney General charged Dr. Gal with murder.

In that a pyramiding of morphine was not involved, but a single, massive dose, the Attorney General's office apparently judged that death as being not the side effect as it were of the physician's obligation to alleviate pain. Rather, Dr. Gal was charged with witting, active mercy killing, with murder.

Thomas Wassmer, a Jesuit moralist, asked the question pertinent and applicable to Dr. Nachum Gal's action: ". . . it can plausibly be asked just where the difference lies in accelerating the dying process by acts of commission as well as by acts of omission."[6] Was not the pediatrician who had the life-support system removed from the infant as intent upon her dying as was Dr. Gal? Was there any real difference in intention with regard to the end-result? I would judge that this is precisely why Dr. Gal, back in Israel, asked in anguish: "Am I the only one charged?" Fair question, and the right question, because both doctors—the one ordering the withdrawal of life-support systems, and the one easing and hastening the inevitable with morphine, were both intending the inevitable, the demise of the infant born "basically dead." But more important, in terms of morality, one could argue the case that Dr. Gal was not willing to give the child over to that cruel process of waiting for organ failure and biological collapse. Who was more merciful, the one who pulled the plug to wait out the struggle for that infant's last breath, or the one who eased that infant through with a morphine overdose? *The Code of Ethics* for Canadian doctors states that an ethical physician "will allow death to occur with dignity and comfort when death of the body appears to be inevitable." Somehow, Dr. Nachum Gal comes off as my hero in this.

What the Candace Taschuk case questions is the proposition of medical ethics that "letting die" is morally acceptable, but that actively abetting the process is not.

V

What these case studies of indirect and direct euthanasia place before us is what the philosopher Hegel defined as the human tragedy. To Hegel, true tragedy is located in the unavoidable conflict between two or more right principles. Hegel's description of the tragic parallels the claim of what's called "situation ethics," namely, that our choice is not usually between absolute good and absolute evil, but between the lesser and the greater evil, or the more loving action.

THEOLOGICAL REFLECTIONS OF EUTHANASIA

This sermon was delivered by Dr. Stanford R. Lucyk on January 7, 1987, on the occasion of the opening of the courts in Ontario. It is reproduced here with the permission of Dr. Lucyk.
Dr. Lucyk is the Minister of the Royal York Road United Church in Toronto.

I

A Canadian medical doctor, whose research has put him on the current cutting edge of his particular specialty, and on whose work the lives of a number of us in this room may very well depend in the future, once said to me: "Omission functions well as a method of euthanasia; commission functions in soft ways in the back pockets of some physicians."

Euthanasia—literally, the achieving of a good death; death by choice; what is sometimes called "mercy killing"—is a profund human issue. And since the issue is hedged in by many legal and theological strictures, I thought it would be fitting for us to do some theological reflecting on the question of death by choice.

II

This sanctuary is the appropriate place in which to remember that the Hebrew Scriptures have given civilization the timeless epic of Job, that archetype of all sufferers, that leading protagonist in the question of human suffering and its relation to the divine scheme. In the 7th chapter, in a bitter complaint before God, Job states:

> I would rather be choked outright; I would prefer death to all my sufferings; I am in despair, I would not go on living. (7:15f)

In his wish to die, has Job simply succumbed to hedonism, the ethic that makes pleasure, and, consequently the escape from pain, the aim of conduct?[1] Is Job's motivation that of: "If it cannot be a pleasurable life, then let me escape it"? Or is Job verbalizing the belief that, at a certain point in the human odyssey, it is quite fitting[2] to perceive death as a friend, and that, consequently, to desire death, to affirm death, to go for it, is no gross act of unfaith towards God? In this Job would be cohering with the judgment of *Ecclesiastes* that there is "a time to be born, and a time to die." (3:2) And if it's death's time, does this mean that, for the living to care for the dying in certain situations, care will demand that the living assist in hastening death?[3] Or does Job's reference to his being in despair indicate that his mind was out of joint, suggesting thereby that his, or any, request for death, is literally unreasonable? Again, does his strong reference to being "choked outright" suggest some warrant for direct mercy killing? Or is his language simply poetic, saying in effect, "Let death happen! Don't torture me like some cat playing with a bird!"? And if that's the meaning, by extension, is he saying to our present technocratic age that has so much ingenious medical hardware which prolongs the dying process, "Do the decent thing. Remove the hardware that is part of medical pyrotechnics, and let death happen"? To word the issue in still another way, is Job putting before us the morality of active and passive euthanasia—euthanasia by commission and omission?[4] Then, too, Job is able to appreciate his own situation, and, because of that, able to verbalize the wish to die. This raises the question of whether the so-called "right to die" should be limited to those able to make a rational decision. But what about choices regarding say the grossly malformed infant, the comatose?

> I would rather be choked outright; I would prefer death to all my sufferings; I am in despair, I would not go on living."

That snippet from the Book of Job indicates that the issue of euthanasia is a biblical, theological issue.

III

Said my doctor-friend: "Omission functions well as a method of euthanasia."

(a) One form of indirect euthanasia, or euthanasia by omission, is that of ceasing treatments which, in effect, do not prolong life but rather prolong the dying process. Theologically, the conclusion would be reached, that, for the specific individual, *Ecclesiastes'* "a time to die" had come. This was the decision parishioner of mine made when they had life-support systems removed from their irreversibly brain-damaged son. And it was the decision of another parishioner, who, after six years of them, said, "No more chemotherapy treatments!" and thus went to meet death.

where over a period of seven days in custody the accused was questioned on 9 separate occasions in addition to a 4-1/2 hour car ride. He was questioned both before and after consulting counsel, although after talking to his lawyer he remained silent and questioning was not resumed for a couple of days. In spite of these facts, Chief Justice Culliton was able to say:

> As well, I am satisfied that the questioning was not to induce an admission of guilt, but rather to obtain an explanation in the light of the facts actually discovered during the course of the investigation. Conveying such information to the accused afforded him the opportunity of explaining.[46]

With great respect, it is submitted that the more realistic approach expressed by Justice Tallis and Le Dain in *Therens* is highly preferable. Decisions such as *Bazinet, Anderson* and *Ferguson* have potentially serious consequences for the future of a realistic approach to the interpretation of section 10(b).

Waiver:

Madam Justice Wilson addressed the issue of waiver of the right to counsel in *Clarkson v. The Queen*.[47] Her analysis begins with a reference to her Court's earlier condition for the waiver of statutory procedural guarantees. Such a waiver:

> . . . is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.[48]

In the context of section 10(b), she rejected the suggestion that a waiver should only be concerned with the probative value of the evidence. Other values are at stake:

> While this constitutional guarantee cannot be forced upon an unwilling accused, any voluntary waiver in order to be valid and effective must be premised on a true appreciation of the consequences of giving up the right.[49]

Thus it is not sufficient that the accused merely comprehend his or her words. In addition, the accused must appreciate the *consequences* of giving up that right.

The Clarkson case dealt with an accused's drunken assertion that there was "no point" in retaining counsel in the face of a murder charge. Madam Justice Wilson concluded simply that this:

> . . . could not possibly have been taken seriously by the police as a true waiver of her constitutional right . . . Rather, the actions of the police in interrogating the intoxicated appellant seem clearly to have been aimed at extracting a confession which they feared they might not be able to get later when she sobered up and appreciated the need for counsel.[50]

Again, the Supreme Court appears to have captured the reality of the situation rather than merely asking whether there was any specific request for counsel on the part of the accused or any specific misconduct on the part of the police.

The requirement of a "clear and unequivocal" waiver in every situation in which no request for counsel occurs, could form a powerful aspect to the protection embodied in section 10(b). It would, of course add an entirely new dimension to the obligation of police officers which was discussed earlier.

Just as the Bazinet decision interpreted *Therens* very narrowly, *Clarkson* can be interpreted as merely involving "special circumstances". In other words, the intoxicated condition of the accused extended the obligation beyond merely advising the accused of the rights embodied in section 10(b) in skeletal form. However, if the underlying foundation for the decision is emphasized, a broader mandate for the courts may be perceived. To require "a true appreciation of the consequences of giving up the right" may suggest an obligation on the police closer to cases like *Howard and Trudel, Shields* and *Therens* than to cases like and *Bazinet, Anderson* and *Ferguson.*

Fundamental Justice:

In *Reference Re Section 94(2) of Motor Vehicle Act,* Mr. Justice Lamer, delivering the majority judgment, gave a broad interpretation of section 7 of the Charter which deals with "the principles of fundamental justice". He concluded that all of the legal rights embodied in sections 8 to 14 of the Charter address specific deprivations of the principles of fundamental justice. These sections are merely examples of the manner in which "life, liberty and security of the person" might be violated unless "fundamental justice" were present:

> To put matters in a different way, ss. 7 to 14 could have been fused into one sec-

> tion, with, inserted between the words of s. 7 and the rest of those sections, the oft-utilized provision of our statutes "and, without limiting the generality of the foregoing" (s.7) the following shall be deemed to be in violation of a person's rights under this section.[51]

Thus, each of the provisions of sections 8 to 14 of the Charter, inclusive, must now be interpreted in the context of section 7.

Applying this to section 10(b), the formulation might be as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice; and, without limiting the generality of the foregoing, to retain and instruct counsel without delay.

In other words, the denial of counsel on "arrest" or "detention" is only one way in which "life", "liberty" and "security of the person" might be affected. The right to counsel might, therefore, be extended to any situation which could be brought under one of those three categories if the absence of counsel would be contrary to the principles of fundamental justice. Under section 7, there need not be an actual denial of life, liberty or security of the person. A potential denial is sufficient to render mandatory the principles of fundamental justice.[52]

Applying this approach to the facts in Therens, there would no longer be a need to establish a "detention" in order to generate the constitutional right to counsel. A person asked for a breath sample suffers a potential loss of liberty so that section 7 is applicable. If fundamental justice would require a right to counsel in such a situation, the right would be operative even without a detention.

This dimension of the decision in the *Section 94(2) Reference* has not even started to be explored. Nevertheless, prior to that decision, Judge Vannini had invoked section 7 to reject statements which had been made after the accused had been informed the section 10(b) rights and after initially declining to answer questions.[53] The potential impact of section 7 of the Charter upon all aspects the criminal and other governmental processes is massive.

Practical Considerations:

These comments have tended to support a broad application of section 10(b) of the *Charter* to the criminal process. Such an approach receives support in the Supreme Court decisions defining "detention" in *Therens,* explaining "waiver" in *Clarkson* and elaborating upon "fundamental justice" in the *Section 94(2) Reference.* However, many related issues have not be addressed. The manner in which section 24 is interpreted and applied obviously will be of central importance. Since it is being discussed by other panelists, it has not been analyzed here.

The broad interpretations offered in these Supreme Court decisions could very quickly evaporate. The definition of detention in *Therens* could be interpreted restrictively as applying only where there is a "demand" or "direction" as suggested by *Bazinet.* The extension of "detention" could be limited to the factual situation of a breathalyzer demand and given no application to detention falling short of arrest in the area of interrogation conducted in the course of general criminal investigation. The law in relation to customs encounters might be treated as another special factual situation.

Assuming the broader interpretations of *Therens* and *Rosenbush* were to prevail, how would this apply to police investigation? The situation might be summarized along the following lines:

1) The police would be free to question anyone until: (a) the person reached the point of psychological detention within the Therens definition; or (b) police suspicion focussed upon the suspect to the extent that the decision to arrest had been taken and the suspect would not be permitted to leave if he attempted to do so.
2) At either of these points, section 10(b) would become operative creating the obligation on the part of the police to inform the suspect of the rights guaranteed by that section.
3) While the point of psychological detention might appear to be problematic for the police, in order to establish a Charter violation the accused would have to demonstrate on the *voir dire* that such a situation existed. In addition, the accused would have to establish that it was a reasonable perception in the circumstances. It is this objective element which would provide guidance to the police in determining when their obligation under section 10(b) arises. If the police are occasionally tardy but not unreasonably so, the discretion in section 24(2)

(b) **Caseflow Management and Trial Coordination**

In May 1981, Professor Shetreet declared in his paper at Lisbon Conference that the practice of executive control over case assignment, court scheduling or moving judges from one court to another or from one locality to another was not acceptable. The same year towards the end of 1981 Justice Dechenes in his report *Masters in our Own House* decried this practice especially in the provincial courts. Unfortunately, the practice has continued unabated.

Case scheduling should be under the control of a judge. I believe that the problems of delays and backlogs in our courts should be managed by the judiciary and not by court administrators. A cooperative effort by the judges, the Crown, the defence bar, the police, and the legal aid under the general supervision and control of a judge is bound to reduce delays and backlogs. A judge has no axe to grind in scheduling a case and has no interest as a party whereas an administrator is closely identified with the Crown in the Attorney General's department.

(c) **Budget Control**

Justice Dechenes, in his report *Masters in Our Own House,* pointed out the petty and irksome regulations like the requirement that the Canadian Judicial Council must apply in writing for the Minister's leave to organize a simple dinner party during its annual meeting. This is true of the provincial judiciary as well.

In matters of budget, once a budget has been alotted to the Chief Judge, he should have full control over it and should be accountable only to the Auditor General. The Chief Judge should be the final authority to O.K. any expenditure. The Ombudsman and the Speaker of the House control their own budgets and are accountable only to the Auditor General. The Chief Judge should not be less independent than them.

These specific items that I have mentioned can be categorized under the rubric of "judicial administration" and are an integral part of institutional independence of the judiciary. To sum up, let me quote from the paper of Professor Shetreet presented on August 19, 1986 at the Canadian Bar Association Annual Meeting in Edmonton on The Independence of Judiciary. He said:

> "The Executive *cannot* have control over the division of labour among judges, transfer of judges from one court to another, the assignment of cases to judges, the setting of cases for hearing or the determination of sitting hours in the courts, and judge's vacation hours. The Executive *must not* have control, generally, over case-flow management and calendar control, as this is likely to interfere with the substantive and personal independence of judges and is inconsistent with the collective judicial independence."

In conclusion, I must say that the provinces must amend their *Provincial Court Acts* to reflect the concept of judicial independence as understood now after *Valente.* To, again, use the words of Marshall McLuhan, we use the past as a rear-view mirror and march backwards into the future. May I suggest that we use the past as a rear-view mirror but march forward with our eyes on the road to the present and the future.

happened recently to the structures with which provinces carry out their responsibilities under Section 92(13) of the *Constitution Act,* we could use the following terms: now, as compared with fifteen years ago, magistrates (or police magistrates) have been replaced by provincial judges; lay judges are no longer appointed; efforts have been made to limit the political overtones of appointments; efforts have been made to increase the distance, both psychological and physical, between police forces and the provincial judge; provincial courts have been courts of record, and the appeal of a provincial court decision often no longer involves trial *de novo;* the organization of provincial court has been improved by the creation of the position of Chief Judge with administrative and coordinative responsibilities; . . . the objective qualifications of new appointments have been approved; the demeaning overtones of "appointment at pleasure" have been replaced in many provinces by neutral tribunals; and the jurisdiction of provincial courts has been gradually but steadily expanded (Small Claims Court being only the most obvious example).

These developments constitute the creation of an effective court system, of growing jurisdiction and prestige, staffed by judges of increasing quality, all under provincial jurisdiction. . . . [T]he developments of the last fifteen or twenty years challenge all the assumptions that made it possible to dismiss the lowest echelon of courts so casually; to the extent that the Section 92 courts have become "real" courts staffed by "real" judges with all the professionalism and the trappings and the procedural niceties that this involves, then to that extent the Canadian court system is no longer unitary but federal. In this context, it is very significant that in at least some provinces, most of the legal and judicial community sees the court system in terms of functional, not hierarchical differentiation.

. . .

This is what "province-building" is all about: not grand constitutional confrontations or political squabbling (for all that these might play a useful ancillary role), but the building of provincial structures playing an expanding role in areas of governmental performance that are both significant and visible."

I suggest that in our federal polity the duality of courts is a reality which should neither be denied nor abrogated.

(2) **Institutional Independence**

In the area of institutional independence with respect to matters of administration bearing directly on the exercise of judicial function, I would like to refer to three specific instances, as follows:

(a) **Support Services**

Justice Dechenes, in his Report, pointed out that at the basic level, the judiciary had no active role in administering its personnel and recommended that the authority of the judiciary over the officers of the court and over the persons who, in performing their duties, are called upon to cooperate with the court or with the individual judges should be recognized by all jurisdictions. The problem, unfortunately, continues to exist. And the court services, instead of assisting the judges, at times adversely affect the smooth operation of courts. If I may put it bluntly, it becomes a case of the tail wagging the dog. Attempts are made from time to time by the Court Services to change court locations or court days because of support staff or Crown considerations. There is no provision in the legislation to prevent such attempts. It is time that the recommendations of Justice Dechene and the direction of the Supreme Court in *Valente* in this area are implemented.

The control of secretarial and administrative staff of the court should be with the judiciary. The evaluation, promotion, and salary of this staff should be handled under the over-all supervision of a judge. In this area of court administration we need to have a managerial judge. It is somewhat paradoxical that a judge's secretary's work should be evaluated by some court administrator who sees her only at the time of this evaluation and who does not know what her work is. Similarly, if a lawyer is working as an in-house counsel for judges (as Law Clerk or Legal Counsel) his or her evaluation, promotion and salary should be under the exclusive control of the Chief Judge and not under the Department of the Attorney General for obvious reasons of judicial independence.

The administration of the Justices of the Peace, likewise, requires a managerial judge on the lines recommended by the Mewitt Report in Ontario.

may still save many statements from exclusion.

4) While the focussing of police suspicion might appear to be problematic for the accused, the police could be required to assert on the *voir dire* that this point had not been reached. As in relation to the perception of the accused, the police would also have to establish the reasonableness of their perception of the status of the accused as a mere suspect or as an accused.

Would such an approach result in "the paralysis of law enforcement"?[54] Would police officers soon become the perceived wrongdoers?[55] Would this be a departure from a Canadian tradition of trust in our police?[56] Emotive comments of this nature seem to appear with increasing frequency in our law reports and they are bound to continue to increase in the months and years to come.

Unfortunately, there is an inherent contradiction in the reliance upon police warnings as the vehicle for attempting to ensure the equal treatment of detainees at the pre-trial stage. Are we not putting the police in an extremely awkward position? As a good investigator, the police officer must strive to obtain a statement. However, in pursuing that goal he must draw to the attention of the accused an avenue which, if adopted, is almost certain to ensure that a statement is *not* obtained. Can we reasonably expect that warnings are likely to be given in the most effective manner?

Consider the situation from another perspective. If a suspect does obtain legal advice, what is that advice likely to be in the vast majority of cases? It will be to say absolutely nothing to police. A person who is fully conversant with the law will say absolutely nothing to the police when questioned as a possible suspect. What is the logical conclusion for law reform if the goal is to place everyone in that position? Obviously, it is to render *all* statements to police officers inadmissible. Of course, that is a totally unacceptable alternative from a practical or political point of view. However, it does illustrate the dilemma of a system which relies on confessions as an important element of proof yet purports to offer everyone complete freedom not to engage in pre-trial questioning by the police.

Conclusion:

In conclusion, there must be a better way. However, until it is found the courts will have to apply the *Charter* as best they can. In my view, the Supreme Court of Canada has been a true leader in applying the *Charter* in a way which will give life as well as practical meaning to its provisions. Nevertheless, there appear to be patterns developing of certain judges retreating to the narrowest possible reasons necessary for deciding particular cases. At this stage of *Charter* interpretation, I believe that to be unfortunate.

For example, the recent comprehensive and detailed exposition[57] by Mr. Justice Lamer in relation to section 11(b) was only joined in fully by the Chief Justice and (with only slight disagreement) Madam Justice Wilson. What is disappointing in the approach taken by the other four judges is not the conclusion which they reached but their failure to address so many of the issues on which the lower courts and legal profession are anxious for guidance.

I am looking forward very much to a comprehensive statement by that Court on the interpretation of section 10(b) in relation to pre-trial investigation.

Endnotes

1 *Piché* v. *The Queen* [1971] S.C.R. 23.
2 *Gach* v. *The King* (1943) 79 C.C.C. 221.
3 *Boudreau* v. *The King* (1949) 94 C.C.C. 1.
4 E.G., *Hogan* v. *The Queen* (1974) 18 C.C.C. (2d) 65 (.S.C.C.); *R.* v. *Ballegeer* [1969] 3 C.C.C. 353 (Man. C.A.); *R.* v. *Letendre* [1975] 6 W.W.R. 360 (Man. C.A.).
5 *R.* v. *Materi and Cherille* [1977] 2 W.W.R. 728, at p. 735 per Bull J.A. (B.C.C.A.). See also *R.* v. *Demers* (1970) 13 C.R.N.S. 338 (Qué. Sup Ct.) where improper police conduct was held to vitiate their credibility in relation to the issue of voluntariness.
6 (1983) 3 C.C.C. (3d) 399, at p. 414, per Howland, C.J. delivering the Judgment of the Ontario Court of Appeal.
7 *R.* v. *Wray* (1970) 11 C.R.N.S. 235 (S.C.C.).
8 *DeClercq* v. *The Queen* [1966] 2 C.C.C. 90, at p. 194, per Laskin J.A. (Ont.).
9 *R.* v. *Wray loc. cit.*
10 Report of the Canadian Committee on Corrections (Ouimet J. Chairman, 1969).
11 (1986) 25 C.C.C. (3d) 207. Estey, Lamer, Le Dain and La Forest JJ. concurred with Wilson J. while Chouinard, J. concurred with the narrower reasons of McIntyre J.
12 *Ibid*, at p. 218.
13 *Ibid*, at p. 219.
14 *Dubois* v. *The Queen* (1985) 22 C.C.C. (3d) 513 (S.C.C.).

15 See, generally, Y. Kamisar in *Criminal Justice in Our Time* (A. Dick Howard, ed., 1965).
16 *Loc. cit.*, at p. 144.
17 (1985) 18 C.C.C. 481 (S.C.C.).
18 *Ibid*, at p. 491.
19 (1979) 49 C.C.C. (2d) 257.
20 (1983) 5 C.C.C. (2d) 409, at p. 424.
21 See also, "The Role of the Accused in the Criminal Process", at pp. 344-5, in the *Canadian Charter of Rights and Freedoms: Commentary.* Ed. Tarnopolsky and Beaudoin, Carswell, 1982.
22 Dickson C.J., McIntyre and Lamer J.J. agreed with his reasons while Estey J. (Beetz, Chouimard and Wilson J.J. concurring) did not adopt those reasons in relation to the meaning of "detention".
23 *Supra*, footnote 17, at p. 504.
24 (1984) 12 C.C.C. (3d) 547 (Fed.Ct.Tr.D.)
25 "The Application of the Charter of Rights to the Interrogation Process" (1986) 35 U.N.B.L.J. 35, at p. 40.
26 I wish to acknowledge the assistance of Mr. Eugene O'Sullivan in the discussion which follows.
27 (1985) 24 C.C.C. (3d) 88 (Ont. C.A.).
28 *Ibid*, at p. 101.
29 (1986) 21 C.C.C. (2d) 423 (B.C.C.A.)
30 *Ibid*, at p. 427.
31 (1986) 25 C.C.C. (3d) 273.
32 *R.* v. *Kelly* (1985) 17 C.C.C. (3d) 17 (Ont. C.A.).
33 (1983) 10 W.C.B. 120 (Ont. Co. Ct.).
34 *Ibid*, quoted in *R.* v. *Anderson* (1984) 10 C.C.C. (3d) 417, at pp. 424-5.
35 (1982) 3 C.C.C. (3d) 147, at pp. 152-3 (Man. Q.B.).
36 (1984) 10 C.C.C. (3d) 417.
37 Cohen, "The Import of Charter Decisions on Police Behaviour" (1984) 39 C.R. (3d) 264, at p. 277.
38 (1985) 20 C.C.C. (2d) 515, at p. 524.
39 *Ibid*, at p. 524.
40 (1984) 8 C.C.C. (3d) 1983 (Ont. C.A.).
41 (1985) 20 C.C.C. (3d) 256 (Ont. C.A.).
42 *Ibid*, at p. 259. See also *R.* v. *Stone* (1984) 12 W.C.B. 324 (B.C.C.A.).
43 *Supra*, footnote 6.
44 The answer is No, according to R. v. *Stone, loc. cit.*
45 (1976) 32 C.R.N.S. 104 (Sask. C.A.).
46 *Ibid*, at pp. 117-8. cf. *R.* v. *McCorkell* (1964-5) 7 Cr.L.Q. 395 (Ont. C.A.).
47 (1986) 25 C.C.C. (3d) 207 (S.C.C.).
48 *Korponey* v. *A-.G. Can.* 1982 65 C.C.C. (2d) 65, at p. 74, quoted at p. 218 of Clarkson.
49 *Loc. cit.*, at p. 219.
50 *Ibid*, at pp. 220-1.
51 (1986) 48 C.R. (3d) 289, at p. 309 (S.C.C.). This approach was repeated in *Mills* v. *The Queen* (June 26, 1986). Not yet reported.
52 *Singh* v. *M.E.I.* [1985] 1 S.C.R. 177.
53 *R.* v. *Perrault and Belleau* (1984) 11 C.R.R. 331 (Ont.P.Ct.)
54 *R.* v. *Altsheimer* (1983) 1 C.C.C. (3d) 7, at p. 13, per Zuber J.A. (Ont.).
55 *R.* v. *Duguay, Murphy and Sevigny* (1985) 18 C.C.C. (2d) 289, at p. 301, again per Zuber J.A. (Ont.)
56 *R.* v. *Strachan* (1986) 24 C.C.C. 204, per Esson J.A. (B.C.).
57 *Mills* v. *The Queen, supra* footnote 51.

Manitoba in 1975, Saskatchewan and Quebec in 1978, Nova Scotia in 1980 and New Brunswick in 1985. Only Prince Edward Island stands out from this trend. (It might also be noted that the Canadian Judicial Council was created in 1971.)

The important functions of judicial councils include passing upon the qualifications of candidates for appointment as provincial court judges and considering complaints of judicial misconduct or misbehaviour lodged against members of the provincial bench.

The composition of the Judicial Councils is rather diverse. All provincial Judicial Councils contain, as members, at least one judge, at least one lawyer, and all, except Nova Scotia, contain at least two lay persons. Beyond this rather simple statement, generalizations break down. (By contrast, the Canadian Judicial Council created in 1971 includes only the Chief Justices and Chief Judges of all section 96 and section 100 courts in the country and has no lawyers or lay persons as members.)

Dr. Peter McCormick of the Political Science Department of the University of Lethbridge, Alberta conducted an empirical study on the "Judicial Councils for Provincial Judges in Canada" in 1985 and found that all nine judicial councils play a role in the process of judicial discipline. Either explicitly or by direct inference from the legislation, no provincial judge in those provinces may be removed from office except after a formal procedure that includes the consideration of complaints against him by the council. However, in different provinces the judicial council plays quite different roles in the discipline procedure. Indeed, no two provinces employ the same procedure for the consideration of complaints against judges, although Alberta and British Columbia differ only to the extent that in Alberta the inquiry is closed and in B.C. it is public.

The disciplinary procedure has three stages: (1) the complaint; (2) the investigation, and (3) the inquiry. Typically, however, the power of the inquiry is limited to the two extremes of recommending either that the judge in question be removed from the bench or that the complaint be dismissed. Dr. McCormick quotes one member of a judicial council as saying

> "We have the choice of shooting the guy or letting him go, nothing in between."

In Manitoba, Quebec, Newfoundland, and New Brunswick there is the added option of reprimanding a judge. It is interesting in this regard that during the investigation of Mr. Justice Berger, the suggestion surfaced several times that the power to recommend dismissal implied the power to administer minor disciplinary measures such as a reprimand, although in its final report the Committee rather gingerly concluded that it "did not have to deal with" this question. The late Chief Justice Laskin asserted the implicit power even more unambiguously in his subsequent address to the Canadian Bar Association titled "The Meaning and Scope of Judicial Independence" [published in *Law Politics and the Judicial Process in Canada* (editor F.L. Morton)].

It is my view that the Judicial Councils is a positive step towards the promotion of judicial independence. It protects the provincial judges from arbitrary or ruthless acts of the executive or legislative branches as well as from the unjust or unfair criticism of the public or the profession. At the same time, it provides a mechanism for investigating any complaints against the judges. It preserves the time-honoured addage that a man should be judged by his peers. There should be more provincial court judges on the Council. Quebec and B.C. go to the extreme by not having any superior court judge on their Councils. Abolition of Judicial Council will land the disciplining of judges in the hands of those who are not our peers. It is time to refine the institution of Judicial Councils not to abolish it.

I also want to share with you the perception of a political scientist in this area. Dr. McCormick explains the creation of provincial Judicial Councils in terms of "province building" in our federal polity. Here is his slightly lengthy, but most insightful, observation:

> "This concept [Province Building] initially introduced by Black and Cairns and subsequently adumbrated by others, suggests that Canadian politics especially since World War II can be understood in the light of the growth of provincial governments and provincialism, a process that is similar to (and in some sense competitive with) the growth of national government and nationalism in Canada. . . . If at one time we could speak of the province as "junior" levels of government with small-scale operations and lower standards and levels of service than those provided by federal government, recent decades have seen the growth of increasingly sophisticated, complex and efficient provincial bureaucracies and organizations. . . .
>
> . . . If we were to describe what has

reform-oriented lawyers. The spokesperson for this Law Union said that his interest in such a guidance was sparked by an article in the magazine *The American Lawyer*, rating the best and worst U.S. federal judges. The impetus, he said, for the guide is the increasingly political role judges are playing under the *Charter.* He added, "there's a little too much mythology in this country about judges being superhuman and neutral, and above politics and unbiased, and it's simply wrong in my experience". And finally, the spokesperson added that judges are now facing new forms of accountability and he thought that all intelligent public discussion of the performance of public officials was of benefit, even though some of that discussion may be critical of some aspects of the judiciary.

It is evident from this news item that some members of the legal profession also believe that with the proclamation of the *Charter of Rights* the courts have assumed a new role – a political role as they call it, simply because the courts have the final say now as to the legality of a piece of legislation. What has happened is that the separation of powers which already existed in our Constitution has been reinforced by checks and balances as an essential by-product of the *Charter.* It will be idle to label the Supreme Court of Canada as a super-legislature. In our federal polity the three branches of government – legislative, executive and judicial are equals: only the Constitution is supreme. The *Charter* has merely provided a further safeguard for individuals and minorities by allowing an action before the Courts to test the violation of any right guaranteed by the Constitution. In common man's language, something has been added to the job description of the judges. Hence, there is a clamour to find what kind of persons do this job and if that job is being done in the earnest or not. Or, as the Law Union put it, the desire to have accountability.

The creation of judicial councils has heralded a new era in judicial accountability. The idea has come from south of the border and a little bit of history is not out of place here. In the U.S., the field of judicial discipline entered a new stage in 1960. Until that time, judicial misconduct in the United States was dealt with almost exclusively through the traditional procedures of *impeachment, address,* or *recall.* [Impeachment is a legislative procedure in which judges are removed from office by the lower house acting as a grand jury and the upper house acting as trial court. Address is a formal request from the legislature to the governor asking for the removal of a judge. Recall is a procedure in which the electorate votes to remove a judge from office.] These procedures proved to be cumbersome, time-consuming, and often uncertain in result. Moreover, they provided for only one sanction – the harsh penalty of removal which was not appropriate in all or even most cases of judicial misbehaviour. Because of these deficiencies and a reluctance to compromise judicial independence, the three procedures were rarely used, and many cases of judicial misconduct were left unattended.

In the past 26 years, this situation has changed dramatically. In 1960 California established the first permanent state judicial disciplinary commission and in 1965 other states began to follow suit. By 1981 all 50 states as well as the District of Columbia and the federal government had established organizations with the authority to regulate judicial conduct. Moreover, in 1972 the American Bar Association promulgated the Code of Judicial Conduct, which has since been adopted by 46 jurisdictions. Illinois, Maryland, Montana, Rhode Island, and Wisconsin have not adopted the Code. Thus, with the adoption of new Codes of Judicial Conduct and the creation of judicial conduct organizations, the modern era of judicial discipline was inaugerated in the U.S.

The burning current issue in the U.S. in this area now is the confidentiality in the judicial disciplinary process. Rules of confidentiality, which exist in every jurisdiction in the U.S., have played a significant role in the judicial disciplinary process. It is, however, under attack in the U.S. As the U.S. Supreme Court has said in *Landmark Communications* v. *Virginia* 435 U.S. 829, at 842 using confidentiality to bolster public confidence in the courts as an institution or to protect the reputation of individual judges is not only self-defeating, but is contrary to the openness in government required by the first amendment. With the continuing evolution of the judicial disciplinary process, it is becoming increasingly apparent that the value of confidentiality is less than was originally believed and that the need for confidentiality may be outweighed by countervailing policies calling for dissemination of information concerning government officials.

In our country, nine provinces now have judicial councils. Prior to 1968 there were none. Following recommendations of the McRuer Commission, the Government of Ontario amended its *Provincial Court Act* in November of 1968 and created its first judicial council for its Provincial Court Judges. Other provinces followed suit in subsequent years: British Columbia in 1972, Alberta, Newfoundland and

THE INDEPENDENCE OF THE JUDICIARY

by His Honour C.A. Kosowan, Chief Judge, The Provincial Court of Alberta

Ed. Note: This paper was delivered by Chief Judge Kosowan at the Annual Conference of the Canadian Association of Provincial Court Judges held in Saint John, New Brunswick in September, 1986.

Let me begin by making the following statements: Judicial independence is the soul of democracy. The higher judiciary in Canada has its judicial independence entrenched in the Constitution. The Supreme Court of Canada has held that the provincially appointed judiciary is in fact independent. However, its judicial independence is not guaranteed by the Constitution. It is guaranteed more by public opinion and tradition than by provincial statutes many of which will not pass the test of judicial independence laid down by the Supreme Court of Canada in *Valente.* And, most importantly, entrenching the guarantees in the Constitution is only one of the many ways of ensuring judicial independence.

More than 119 years have gone by since the *B.N.A. Act* incorporated sections 96 to 101 on Judicature entrenching judicial independence. Since then, if I may quote the eminent Canadian thinker, the late Marshall McLuhan,

> "Electric circuitry has overthrown the regime of "time" and "space" and pours upon us instantly and continuously the concerns of all other men.
> . . .
> Ours is a brand new world of allatoneness. "Time" has ceased, "space" has vanished. We now live in a global village . . . a simultaneous happening . . . We have had to shift our stress of attention from action to reaction. We must now know in advance the consequences of any policy or action, since the results are experienced without delay. Because of electric speed, we can no longer wait and see. George Washington once remarked, "We haven't heard from Benj Franklin in Paris this year. We should write him a letter."
>
> At the high speeds of electric communication, purely visual means of apprehending the world are no longer possible; they are just too slow to be relevant or effective.
>
> Unhappily we confront this new situation with an enormous backlog of outdated mental and psychological responses. We have been left dangling. Our most impressive words and thoughts betray us – they refer us only to the past, not to the present."

Television, computers and word processors have made remarkable impact on the administration of justice. One can now speak to the list of the Supreme Court of Canada in Ottawa from Vancouver – the abridgement of time and space. Warrants in certain cases can be issued on telephone. (Telewarrants). Case-scheduling has been facilitated by computerized informations. And any incident affecting the image of courts can be, and is, in fact, flashed across the country almost instantaneously thus involving public opinion.

In this context, I will now briefly discuss judicial independence.

Starting with the publication of Professor Shetreet's work Judges on Trial in 1981, we have witnessed four other landmarks on the road of judicial independence. These are:

(1) The Minimum Standards of Judicial Independence adopted by the International Bar Association's meeting in New Delhi in 1982.

(2) Mr. Justice Dechenes' work "Masters in Our Own House".

(3) The "Universal Declaration on the Independence of Justice" adopted by the World Conference on the Independence of Justice in 1983 at Montreal.

(4) And finally, the unanimous decision of the Supreme Court of Canada in *Valente and The Queen* rendered on December 19th of last year.

Six years ago the International Bar Association established a Committee with Judge Norman Mackie of our Provincial Court of Alberta as the Chairman to develop *"Minimum Standards of Judicial Independence".* Professor Shetreet was the General Rapporteur of this Committee and Mr. Justice King, Chief Justice of the Supreme Court of South Australia was

the general coordinator of this project. This Committee presented its report at the 9th Biennual Conference of the I.B.A. at New Delhi in 1982. These standards have been delineated by Chief Justice King in 58 Australian Law Journal. These standards do not purport to be a set of ideal conditions for the independence of the judiciary. They do not represent the ideal towards which we strive, but the irreducible minimum which must be attained if judicial independence is to be said to exist. The World Conference on the Independence of Justice on the 4th of August, 1983 at Montreal, under the stewardship of Mr. Justice Dechenes adopted a *"Universal Declaration on the Independence of Justice"* which contains 33 articles on chapter 2 on National Judges.

This universal declaration does not draw any distinctions between the different levels of judiciary. And, I submit, rightly so. For as Justice Dechenes points out in his *Masters in Our Own House* at page 102:

> "All judges should recognize that they are members of the great judicial family and that the origin of their respective appointments neither holds nor confers any particular virtue.
>
> The political authorities should acknowledge this fact and refrain from any discriminatory practices with regard to judiciary."

Lord Denning, in his book *The Changing Law* published in 1953 wrote at page 4:

> "The keystone of the rule of law in England has been the independence of judges . . . the judges for the last 250 years have been absolutely independent. And when I speak of judges, I include not only the High Court judges, *but also all the magistrates and others who exercise judicial functions.* No member of the government, no member of Parliament and no official of any government department, has any right whatever to direct or to influence or to interfere with the decision of any of the judges. It is the sure knowledge of this that gives the people their confidence in the judges . . ."

This is what is referred to as "substantive independence" in the International Bar Association's Delhi Standards. Substantive independence means that "in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience". However, the collective or institutional independence of the judiciary is equally important and along with substantive independence, is an integral part of judicial independence. In *Valente* v. *The Queen*, (1985) 23 C.C.C. (3d) 193, the Supreme Court of Canada in an unanimous decision referred to these two components of judicial independence and held that the provincial court (of Ontario) was an independent and impartial tribunal within the meaning of section 11(d) of the *Charter.*

The common theme that runs through all the literature on judicial independence is that judicial independence is the keystone of the rule of law and we cannot draw distinctions between different levels of judiciary vis-a-vis judicial independence. A judge is a judge is a judge and he/she must be independent. In the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience. This is what Howland C.J.O. called "adjudicative independence" and the International Bar Association calls "substantive independence". However, the collective or institutional independence of the judiciary is equally important and along with substantive independence it is an integral part of judicial independence.

In *Valente* the Supreme Court of Canada reviewed the literature on this subject in some detail and summed up the essentials of judicial independence as

(1) security of tensure,

(2) financial security, and

(3) institutional independence with respect to matters of administration bearing directly on the exercise of judicial function.

It is noteworthy that even though the Supreme Court of Canada narrowed down the context in which it rendered its decision to adjudicative independence, it nevertheless enumerated the minimum essential ingredients of *institutional independence* at pages 220 and 222 (23 C.C.C. (3d)) as follows:

> "Judicial control over the matters referred to by Howland C.J.O. – assignment of judges, sittings of the court and court lists – as well as the related matters of allocation of courtrooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence."

And at page 222, Le Dain J. for the Court said:

> "The essentials of institutional independence which may be reasonably perceived as sufficient for purposes of s. 11(d) [of the *Charter*] must, I think, be those referred to by Howland C.J.O. They may be summed up as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."

The Supreme Court also said at page 207 that "it is the essence of the security afforded by the essential conditions of judicial independence that is appropriate for application under s. 11(d) and not any particular legislative or constitutional formula by which it may be provided or guaranteed".

In other words, what is imperative is that the conditions or components of judicial independence, both substantive as well as institutional, must exist; whether they are formulated as part of the Constitution or statute is not crucial.

As Professor Hogg has pointed out in his *Constitutional Law of Canada* (1977 edition):

> "The independence of the judiciary is a value which is now deeply rooted in Canada and elsewhere in the common law world. It requires as a minimum that the judiciary be free from the influence of the other branches of government. In England the Stuart Kings badly impaired the independence of the judiciary by the practice of dismissing judges who rendered decisions unfavourable to them. Accordingly, as part of the revolution settlement on the accession of William and Mary, the English Parliament enacted the *Act of Settlement, 1701*, which guaranteed the tenure of the judges "during good behaviour", and which provided for their removal "upon the address of both houses of Parliament". Section 99 of the *B.N.A. Act* is closely modelled on the *Act of Settlement.*
>
> The independence of the judiciary has since become such a powerful tradition in the United Kingdom and Canada that there may be little point in a fine analysis of the language of the provisions by which it is formally guaranteed . . .
>
> . . .
>
> Section 99 applies only to superior courts. There is no formal constitutional guarantee of tenure during good behaviour for the judges of county and district courts, even though they are also federally-appointed. And, obviously, there is no formal constitutional guarantee of tenure for the judges of the inferior courts who are provincially-appointed. *Of course, the powerful tradition of judicial independence would in practice protect them from arbitrary removal, and for most judges this tradition is reinforced by statutory guarantees of tenure.* In the case of the federally-appointed county and district court judges the federal *Judges Act* guarantees tenure "during good behaviour". In the case of most provincially-appointed inferior court judges similar guarantees are contained in provincial statutes."
>
> (emphasis supplied)

My view is that the essential components of judicial independence be incorporated in each provincial statute dealing with the provincial judiciary. It will not entail any change in our Constitution. At the same time, the provisions of the *Charter*, and an ever vigilant higher judiciary and media will ensure that the executive or legislative branches do not make any inroads into judicial independence. The bottom line is that all the provinces must revise their *Provincial Court Acts* to bring them in line with the requirements mentioned earlier.

The Supreme Court of Canada did not accept the argument that there be a uniform *Provincial Court Act* governing the judicial independence of provincial judiciary. I respectfully agree. I recognize the diversity in unity of our federal Constitution. Each province has its own legal, social and economic mileau and identity. Provincial Courts are parts of that identity. The duality of courts is a constitutional and factual reality. Our objective of ensuring judicial independence can be achieved by each province amending its own *Provincial Court Act* to bring it in line with *Valente.*

I have some comments on some of the specific problems relating to judicial independence.

(1) Security of Tensure, Competence of Judges and the Judicial Council

The June 20, 1986 issue of *The Lawyers Weekly* carried the following headline:

> Ontario Law Union will rate judges on performance, biases.

The story underneath suggested that the proposed practice-type manual designed to help lawyers judge the judges and tailor their courtroom strategies and conduct accordingly, was a project of the Law Union, a group of 200