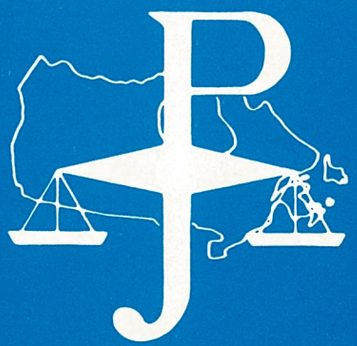

PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

VOLUME 12, No. 4 DECEMBER 1988

THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

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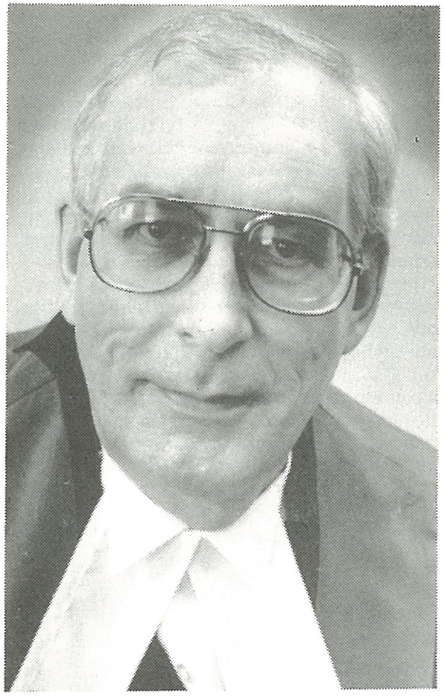
IN MEMORIAM

by Judge M. R. Reid, Editor-In-Chief



It is with the deepest regret that we record the untimely and tragic death of Judge Richard John Kucey as the result of a freak traffic accident on November 1, 1988.

Dick, as he was affectionately known to his friends and close colleagues, was a pillar of the Saskatoon legal community. He was also well known and highly respected among members of our Association having served as Editor-in-Chief of the Journal from December 1983 to March 1987. At the time of his death he was President of the Provincial Court Judges Association of Saskatchewan and Provincial Representative for Saskatchewan to the Canadian Association of Provincial Court Judges.

Dick was born in Insinger, Saskatchewan but made his home in Saskatoon since his marriage in 1962. He attended the University of Saskatchewan, obtaining his B.A. in 1963 and his LL.B. in 1965. He served with the C.O.T.C. at the University of Saskatchewan and earned the Queen's Commission and served with the North Saskatchewan Regiment from 1963 to 1966 with the rank of Captain. Dick articled with the law firm of Wedge, McKercher, McKercher and Co. in 1965-66. Following his articles he joined the Saskatoon City Solicitor's Department and was appointed Assistant City Solicitor in 1967. He left the City Solicitor's Department in 1975 to become the first Director of Continuing Legal Education of the Law Society of Saskatchewan for a period of one year. He returned to the City Solicitor's Department in 1976 as the Associate City Solicitor where he remained until his appointment to the Bench in 1978. He was also a member of the Board of Trustees of the Centennial Auditorium in Saskatoon.

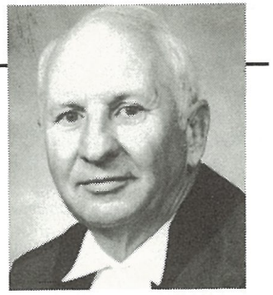
I knew Dick Kucey personally. I know he had a great sense of humour and I knew him to be kind and courteous to strangers, to be prudent in his judgments and to be sensitive, compassionate and humane in his sentencing. He was my immediate predecessor as Editor of the Journal and a friend and source of support in the transition of responsibility.

I, like everyone else who was fortunate enough to have had the opportunity to become acquainted with Dick, will miss profoundly his gracious charm and wise counsel. While I did not have the good fortune to know his family, I am sure there are no words sufficient to express the grief and pain his wife Natalie and his two daughters, Diane and Christa and his mother, Dorothy, must feel by his untimely passing.

To them goes our heartfelt sympathy. May they rest assured that his community, his profession and his friends are richer for having known him.

Judge Richard John Kucey, son, husband, father, colleague, friend — dead at age 49.

President's Page



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

It doesn't seem possible that it's time for another Journal letter from the President. Perhaps the comment "time goes quickly, when you're having fun', is applicable. The following is a collection of random thoughts and observations which may be of general interest:

PATIENCE

The sage statement was once made that in order to be a "Judge" one must be first a gentleman (or a lady) and it could be some assistance if he (she) knew a little bit about the "law".

One of the very necessary virtues of the Provincial Court Judge in Canada is that he (she) must have "Patience". As some 95% of people having first contact with the judicial system in Canada is before a Provincial Court, that Judge must be, and is, always ready to patiently deal with not only irate, belligerant, recalcitrant, confused or adamant accused, but also with competent (and sometimes incompetent), wiley, zealous or "far out" counsel.

While we daily handle these often trying, time consuming situations, we are compelled, of necessity, to deal with each matter judicially and expediently, seldom being offered the luxury of several months for briefs and lengthly considerations of the many issues, facts and law, before filing a comprehensive written decision.

With the many new twists, arguments and representations being made on an ever increasing basis, we are expected to make new laws under the Charter and break fresh ground with each new and innovative provincial and federal statute.

Patience continues to be the name of the game.

WE'VE COME A LONG WAY

Historically, when the Provincial Court was first established, the Federal Courts were seized with some 197 areas of jurisdiction. Over the years, this figure has been reduced to 7, of which the only meaningful crime is that of "murder", and even then, the Provincial Court Judge must handle the Preliminary Inquiry.

The concept of the "Police Magistrate" has now been put aside and the Provincial Court Judge is selected on the whole, upon the basis of legal training, practice and expertise in the

Impossible mais vrai: il est l'heure à nouveau d'une autre lettre (au Journal) du Président. Peut-être le commentaire "le temps passe rapidement lorsque vous vous amusez" s'applique. Fait suite donc une collection de pensées et d'observations faites au hazard qui peuvent être d'intérêt.

LA PATIENCE

Jadis on disait sagement que pour être Juge on devait d'abord être gentilhomme (ou femme distinguée) et qu'il était utile de connaître un peu de droit.

Une des vertus nécessaires pour un juge de la Cour provinciale au Canada est qu'il (ou elle) doit être patient. Puisque 95% de la population ayant son premier contact avec le système judiciaire au Canada comparaît devant une Cour provinciale, ce juge doit toujours être prêt à prendre des mesures concernant non seulement le prévenu colèreux, belligérant, récalcitrant, confus ou inflexible mais aussi lávocat compétent (et quelques fois incompétent), rusé, zèlé ou qui plaide complètement à côté de la question.

Alors que nous nous occupons quotidiennement de ces situations prenantes et souvent difficiles, nous devons le faire d'une manière expédiante et impartiale, ayant rarement eu le luxe de plusieurs mois d'une longue contemplation des dossiers, des nombreuses questions, faits et lois avant de rendre un jugement complèt par écrit.

Avec les nombreux arguments, distortions et representations faits sur une base toujours agrandissante, on nous demande d'étendre la jurisprudence actuelle sous la Chartre et de reculer les frontières avec chaque nouveau Statut innovatif de la Province ou du Fédéral.

La patience, c'est ce qui compte.

NOUS VENONS DE LOIN

Du point de vu historique, lorsque la Cour provinciale fut établie, les Cours fédérales

specialized areas of Criminal, Family, or Civil Law.

Recognition of the role of Provincial Court Judge as being the "front line troops" is steadily growing. Compensation and other benefits are now (or hopefully and properly anticipated) equated with that of federally appointed Judges. With the support of the C.B.A., inroads are being made with the various Provincial Governments, as the need for parity and independence becomes necessary as an end to the creation of a truly viable judicial system in Canada.

THE FUTURE IS OURS

One has said that the "Provincial Court is a steam roller in the Canadian Judicial System", nothing can prevent us from achieving that recognition which is justly deserved.

The aims of the Canadian Judicial Center (either in part designed or as an eventual result), tend to support the principal and concept that "a Judge is a Judge is a Judge", with little distinction except in the several areas of jurisdiction. While many have justifiable reservations, a common central education facility must be initially accepted, both in good faith and as a common denominator re Canada's Judicial System.

I understand that the Law Reform Commission is giving consideration to the concept of unified courts to the extent that the jurisdiction of the Provincial Court will again be increased so that there will be exclusive jurisdiction in the several areas of criminal, family, and civil law, subject, of course, to appeals.

Clearly, the representations, briefs, and submissions to various commissions, governments and legal groups spells out the importance of our court and the role that we will be playing within the Canadian Judicial system of the future.

CONCLUSION

As disjointed as these foregoing paragraphs might be, possibly by referring to the several headings, I will conclude by saying, "HAVE PATIENCE, WE'VE COME A LONG WAY, THE FUTURE IS OURS".

avaient quelques 197 domaines de compétence. Avec les années, ce chiffre est tombé à sept, et la seule infraction significative est celle de "meurtre"; et même là, le juge de la Cour provinciale doit présider à l'enquête préliminaire.

La conception du "tribunal de police" est maintenant écartée et le Juge de la Cour provinciale est choisi d'après sa formation en droit, son expérience et son expertise dans les domaines spécialisés du droit pénal, du droit de la famille ou du droit civil.

Le juge de la Cour provinciale est maintenant reconnu de plus en plus comme "l'infantrie de première ligne." Notre compensation et autres bénéfices sont maintenant assimilés (ou anticipés avec espoir et justification) a ceux des juges nommés par le Fédéral. Avec le soutien de l'A.B.C., des progrès sont faits auprès de plusieurs Governements Provinciaux alors que le besoin pour l'égalité et l'indépendance devient évident aux fins de créer un système judiciaire au Canada qui a de vraies chances de succès.

LE FUTURE EST NÔTRE

On a dit que la Cour provinciale est un "rouleau à vapeur" dans le système judiciaire canadien: rien ne peut empêcher cette réalisation qui est méritée.

Les buts du Centre Judiciaire Canadien (en partie à dessein, ou comme résultat éventuel) tendent à soutenir le principe et la conception "qu'un juge est un juge est un juge", sans distinction, sauf dans le domaine de la compétence. Bien que beaucoup ont certaines reservations justifiables, un service central et commun pour l'instruction doit être accepté tout d'abord, et de bonne foi et comme dénominateur commun du système judiciaire au Canada.

J'ai oui dire que la Commission sur la Réforme du Droit considère la conception de tribunaux unifiés et donc de l'élargissement de la compétence de la Cour provinciale avec, come résultat, une compétence exclusive dans les différents domaines du droit pénal, du droit de la famille, du droit civil, assujetti au droit d'appel.

Il est clair néanmoins que les représentations, dossiers et soumissions aux différents gouvernements, commissions et groupes légaux soulignent l'importance de notre Cour et le rôle que nous jouerons au sein du système judiciaire canadien à l'avenir.

CONCLUSION

Aussi décousus que ces paragraphes puissent être, me référant à leur tître, je conclurais en disant: "Prennez patience; nous venons de loin; le future est nôtre".

In Lighter Vein

A young lawyer on hearing the court give judgment against his client, exclaimed that he was surprised at such a decision. This was construed into a contempt of court and he was ordered to attend the next morning before the same court to answer the citation. Being both contrite and fearful of the consequences he consulted a senior counsel who had a very 'persuasive' manner in dealing with judges whom he regarded as perhaps a tad too haughty, who told the young man to rest easy, for he would apologize for him in such a way as to prevent any unpleasant result. When the name of the young lawyer was called, this senior counsel arose and addressed the court as follows: "I am very sorry, my Lords, that my young friend has forgotten himself to the point of treating this honorable court with disrespect; he is extremely penitent and remorseful and I implore you to kindly ascribe his unintentional insult to his ignorance. Of course, your Lordships can all see that it did originate in ignorance, for he said he was 'surprised' at the decision of your Lordships; now if he had not been very ignorant of what transpires in this court every day, had he known you only half so long as I have, he would not be surprised at anything you did!"

* * * * * *

A highly educated minister was an important witness in a trial. The minister had an extra fine sense of the distinctions and definitions of words. However, it was found that he would not testify positively to things which the lawyer knew that the witness knew. "I think so" and "I believe so" were his answers. Finally the lawyer asked: "What do you mean by the expression 'I think?" Without hesitation the witness replied: "That, Sir, is the knowledge I have of my recollection of things of which I am not positively certain." He was then asked, "What do you mean by the expression 'I believe'?" To which he just as smoothly answered, "That is the faith I have in the existence of objects of which I have a distinct recollection." The lawyer was overheard muttering: "He came out of the same hole he went in at".

* * * * * *

A witness testifying at the trial of a defendant charged with mistreating a livery-stable horse said, "When his company rides fast he rides fast, and when his company rides slow he rides slow". "But I want to know", said the lawyer for the other side, "how he rides when he is alone." "W-e-l-l," said the witness, in a slow drawl, "I - never - was - with - him - when - he - was - alone; so - I don't know."

* * * * * *

In earlier days what we now know as the Court of Appeal was commonly called the Court of Errors since litigants could bring cases there to have errors of trial courts set right.

One day a man charged with sheep-killing when asked by the trial judge, "Are you guilty or not guilty?" wouldn't answer. The judge kept at him, and at last said, "You must plead something — how do you plead?' The man replied: "I stands mute," and when pushed further, would only answer, "I stands mute." On trial the case was decided against him, but he was told he had the right to take his case higher up to the Court of Errors. To which he muttered, "If this here ain't a court of errors, I'd like to know where you kin find one!"

* * * * * *

And then there was the case of a defendant who, upon losing stood up and called the court unjust, corrupt and false. He was fined fifty dollars for contempt of court and handed the clerk a hundred dollar bill. "I can't change this", said the clerk. "Never mind about the other fifty dollars," the defendant shot back, "I'll take it out in contempt."

* * * * * *

Au tribunal de notre ville, un des magistrats est connu pour les sermons qu'il ne peut pas s'empêcher d'infliger aux accusés. Un jour, il était en train de se livrer à une de ses diatribes favorites sur un homme inculpé de cambriolage:

«Vous avez été reconnu coupable, et il est de mon devoir de vous condamner à une peine de prison de sept ans, lui dit-il. J'espère que cette sentence suffira à vous faire réfléchir sur la gravité de votre acte.»

Le condamné leva lentement les yeux, et dit:

«Oh! Monsieur le juge, je peux réfléchir bien plus vite que ça!»

Cameras in the Courtroom

Should television cameras be allowed in Canadian Courtrooms?

Here is the experience and advice of Chief Justice McDonald of Florida, one state where cameras are permitted in the United States.

It is realized the socio-political environment surrounding judicial affairs in the U.S. are somewhat different than in Canada but on this issue many similarities exist.

———

Devrions-nous permettre à l'utilisation des caméras (télévision) dans les cours canadiennes?

La suite représent l'experience et le conseil du juge en chef McDonald de Floride, un état qui permet les caméras dans les cours aux É.-U.

Il se rend compte du milieu sociologique et politique concernant les affaires judiciaire aux É.-U. ne sont pas précisément le même comme au Canada, pourtant, au sujet des caméras, il y a beaucoup de similarités.

———

My report will be very brief because "Cameras in the Courtroom" is getting, for most of the states, to be an historical event. One strong, clear recommendation is to have an understanding of what the rules and regulations are for the employment of cameras in the courtroom, and then you'll have minimal problems. What type of cameras can be used, where must they be located, when can they be used, is there any exception because of a particular witness, etc.

The real reason for having cameras in the courtroom is to let the public know what's going on in their courtrooms. The thirty-second spot doesn't do the job. You should, arrive at an agreement with the media that in addition to using cameras for the flashy-type Ted Bundy cases, the media will do an educational program utilizing things gathered from the courtroom for public information.

The actual presence of cameras in the courtroom is by grace of the courts. It's not a right! I am not aware of any particular problems except with a witness here and there we've had in our state. We haven't had any complaints from jurors. We ask the media not to show a particular witness or in-depth details of the jurors, and we haven't had any problems. I think it's primarily having an understanding of what you expect of them, and what they can expect of you, and, thus far, we've had pretty good cooperation.

In Florida, we did a one-year pilot project on cameras in the courtroom and evaluated it in a very inexpensive manner costing $1,000. Maybe it was not as good as the California program, which cost $5 million but I would recommend it to you. Before you put the program in place: let the media know it's a one-year test; give them the rules; and let them know you are going to check on a weekly basis with each county clerk to see which cases have actually had an exposure to the camera. At the end of each week, the clerk gives the names to a person whom you have designated, the names of all lawyers, witnesses, jurors and judges involved. The very next week, not a year later, but the very next week a personal letter goes out form the Chief Justice of our court, enclosing a two-page questionnaire with a self-addressed stamped return envelope. The addressee is told: "We are looking for your help. We know you've been a participant in a very important part of a pilot test. Would you please share with us your feelings." We had over an 85 percent return on that questionnaire, and it told us a lot about the system.

You want to be sure that there is neither physical obstruction from the cameras, nor the use of bright lights. We require pooling of the cameras allowing only one television camera in the courtroom.

Critics raise the point that cameras in the courtroom lead to grandstanding by the profession or by the judge, especially in an election year. We were fearful of that too, but, as a matter of fact, the studies indicate that lawyers and judges are on better behavior when they're before the cameras.

Chief Justice Parker Lee McDonald

Your comments would be appreciated.
Nous accueillerions votre remarques.

Editorial Page

It is an established fact that in Canada provincially and territorially appointed judges deal with the vast majority of criminal cases. It is also a fact that for the majority of the population their notions of justice and the judicial process are based upon their knowledge and understanding of the workings of the provincial and territorial courts. Yet a third fact that must be obvious even to a casual student, as well as any other observer of the system, is that the importance of the provincial and territorial courts within the third branch of government in this country is ever increasing.

When the framers of our constitution turned their attention to the administration of justice in the emerging country in 1867 it was decided to confer upon the provinces authority for the establishment and maintenance of courts in those jurisdictions while the federal government was given authority over appointment of judges to Superior, District and County Courts as well as setting of criminal procedure. This is a curious division of authority but was likely done with a view to achieving and ensuring as nearly as possible uniformity in the administration of criminal law across the country since authority over criminal law itself was also reserved unto the federal government.

Under the constitution the provinces were given authority to appoint magistrates (now virtually universally known as Provincial and Territorial Court Judges) for the purpose of administering local provincial laws as well as criminal laws of a minor nature — what generally are referred to as summary conviction offenses. We assume it was intended that the jurisdiction of those "inferior" courts would be fixed and never exceed that level.

In practice, however, that is not what happened. Over the years both the federal government through its criminal law powers and the provinces by virtue of their constitutional authority over property and civil rights and other residual powers have conferred an ever increasing and expanding jurisdiction upon Provincial and Territorial Court Judges to the extent that those judges have now become the busiest and perhaps the most important part of "the judiciary" or third branch of government. Those "inferior" courts have been judicialized and an illustration of the significance of the judicialization of this part of the judiciary is the fact that with the increase of jurisdiction and the high quality of justice dispensed by Provincial and Territorial Court Judges, all but three provinces have seen fit to phase out their District and County Courts entirely.

Pundits everywhere agree that the quality of justice dispensed by Provincial and Territorial Court Judges is second to none. On any given day cases of identical nature, for example sexual assualt, may be heard simultaneously by a Provincial or Territorial Court Judge, by a District Court Judge, or by a Superior Court Judge and Jury. As a matter of principle it would be repugnant to our sense of democracy to suggest that in Canada we have different levels or degrees of justice according to the court hearing those cases. Yet, even after more than 120 years of existence crowded with constant reforms courts presided over by Provincial and Territorial Court Judges are looked upon as "inferior and subordinate". That we find impossible to countenance, but what is even worse than being looked upon as inferior is being treated as such. If there is any dispute as to inferior treatment just consider the wide disparity between salary and benefits (such as pensions) and other working conditions not only between federal appointees and provincial and territorial appointees but also between provincial and territorial appointees in the various divisions all of whom do virtually the same work.

In the past several years there have been suggestions and proposals of ways to create in this country a unified criminal court. Decisions from "superior" courts, for example *McEvoy v. A.-G. N.B. and A.-G. Canada,* (1983) 1 S.C.R. 704 tell us it would be unconstitutional and thus impossible to confer upon provincially and territorially appointed judges either exclusive or concurrent full criminal jurisdiction with federal appointees. To say the least this is a startling conclusion considering what has been done under the *Young Offenders Act*, but it has generally been taken to mean that short of having a constitutional amendment there can be no unified criminal court in this country.

We do not agree. Nor should the matter end there. Indeed, it seems to us imminently viable, even in the absence of a constitutional amendment, for the federal government to achieve uniformity by bestowing upon Provincial and Territorial Court Judges a federal patent even if it means an integration of the current "Provincial and Territorial Courts" into the "Superior" Court realm. But there are other ways to achieve national uniformity in criminal courts if the will is strong enough. To be sure this would involve a major reform of the current system, but it is an

idea whose time has come. In our view such reform would rid this country's justice system of the absurdity of the appearance of multi-levels of justice and at the same time correct an equally absurd situation wherein those judges appointed and paid by the provinces and territories spend the vast majority of their working time administering federally enacted laws while those judges in the "superior" courts, appointed and paid by the federal government, spend most of their time adjudicating provincially enacted laws such as those dealing with property and civil rights matters, contract laws, and other "matters of a merely local or private nature in the provinces".

Both the ends of justice and the achievement of the objective intended by the authors of our constitution demand such reform!

M. Reginald Reid
Editor-in-Chief

Feedback

Editor-in-Chief
The Provincial Judges' Journal

Dear Sir:

I was rather shocked to note that a copy of a judgment by the Honourable Ronald C. Stevenson in the mandamus proceedings against me in the Lawrence McGann matter was printed in your September 1988 issue. I further feel that while the cartoon which followed is undoubtedly humourous in a rather macabre way; the inclusion of both was a masterpiece of dirty pool of the most odious sort.

The entire matter is now almost three years old so its publicaiton is not exactly timely as an instructional article. By the same token, you included but did not emphasize the following paragraph:

> "In cases where the Attorney General is not the applicant he is also served, **and one expects that he will take steps** to protect the jurisdiction of the lower Court..."

I immediately wrote the then Attorney General, David R. Clark and requested Counsel be appointed to argue the *jurisdictional points* I raised. He ignored my letter, and it was at a later hearing instigated by Mr. McGann and one Charters for dismissal of the charges against them that Mr. Justice Dickson made the rather ridiculous analogy which no doubt inspired your cartoonisft who (quite understandably) prefers to remain anonymous.

You apparently intentionally neglected to mention that a civil suit arose directly out of the same factual situation and judgment was delivered by the Honourable Guy Richard, Chief Justice, Court of Queen's Bench, by which he dismissed the action against me as being *frivolous* and *vexatious* and awarded costs in my favour on a *solicitor and client basis.*

It was also firmly established by Chief Justice Richard's judgment that I did not, *at any time refuse to obey any order of any Court.*

With particular reference to Mr. Justice Dickson's vituperative analogy vis-a-vis circuses, I had this to say on oath on the stand in open Court before Chief Justice Richard at my trial:

> "They (the remarks) are not worthy of a Judge, not worthy of a lawyer and not worthy of a man."

Someone in the legal hierarchy must have felt my words contained an element of truth because no proceedings were taken against me by reason thereof.

I may say that your snide little editorial "chiaroscuro" of the truth deserves an honoured spot on the same shelf with the comments of Mr. Justice Dickson.

In closing let me say that I had heretofore believed that this publication was for the educaiton and edification of provincial court judges across Canada. Apparently I was wrong as you appear to find no difficulty in stooping to vilification and obnoxious innuendo obviously intended to hurt and to ridicule.

May I suggest that you change your blue-hued cover to one tinged with yellow? Please print this!

Very sincerely yours,
James D. Harper
Judge of Provincial Court
of New Brunswick
(Criminal Division)

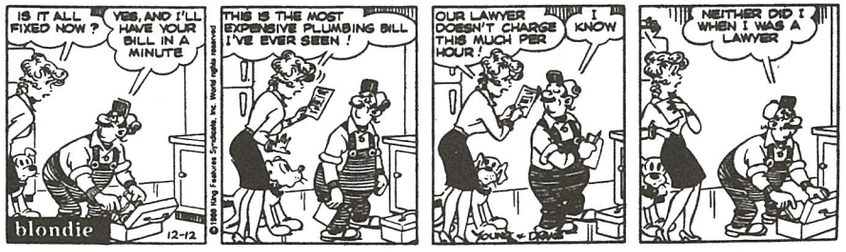
(EDITOR'S NOTE: We thought it was obvious that the McGann *decision was indeed of instructional value as it was included as part of the annual report of the Committee on Judicial Independence (pp. 14-15 or the Journal). The cartoon which happened to appear on the last page of the decision had no connection with any actual case and any appearance of such is purely coincidental. It is regrettable that the cartoon is being construed as editorializing on any actual case but the Journal is not apprised of any remarks, comments, analogies or decisions of Mr. Justice Stevenson which might have alluded to the same subject matter as the cartoon. Hence, the Journal categorically disclaims any association between the cartoon and either the* McGann *or any other decision. Any connection so drawn, and any remarks, views or opinions herein expressed by Judge Harper to that effect are not shared by the Journal).*

> them to amend in the stead; in fact, there remains little discretion to quash. Of course, if the charge is an absolute nullity, an occurrence the conditions of which the Chief Justice has set out clearly in his reasons, no cure is available as the matter goes to the very jurisdiction of the judge . . . But, if the charge is only voidable, the judge has jurisdiction to amend. Even failure to state something that is an essential ingredient of the offence (and I am referring to s. 529(3)(b)(i)) is not fatal; in fact, it is far from being fatal, as the section commands that the judge "shall" amend." (CCC pp. 309-312)

Do not be fooled. The ratio of the *Moore* decision is not merely that when an information is quashed, after plea, for failure to allege a material averment, the crown cannot later proceed upon a fresh information. That rubric will possibly interest a few legal scholars but need not greatly concern lawyers and judges toiling in the courts. The real meaning of the *Moore* decision is simple and important: trial judges must not quash criminal charges merely because they are very badly drawn up. A charge that gives the accused fair "Notice of the offence" is good enough.

Moore does not touch upon the further requirement that a criminal charge must provide sufficient detail to identify the particular act which is charged. That requirement is found in s. 510(3) and has been considered in many cases including *Regina v. Wis Developments Corporations Ltd.* (1984), 12 CCC (3d) 129 (SCC), *Regina v. Colgan.* (1987), 38 CCC (3d) 576 (SCC), *Regina v. Donald Rea MacLean,* British Columbia Court of Appeal, November 4, 1988, CA009461, and *Attorney General of Canada v. ITT Industries of Canada Ltd. and Frank Beban Logging Ltd.* (1987), 18 BCLR (2d) 98 (BCCA). The latter decision was under appeal to the Supreme Court of Canada until the Crown stayed the charges in September 1988. While we shall therefore have to wait a while longer for the definitive reconsideration of s. 510(3), it seems reasonable to anticipate a Supreme Court of Canada ruling consistent with the *Moore* decision.

Moore is more than a sable cloud. The lady would have understood and approved.



tinued on the following two days. It developed at the start of the trial that Mr. Messner had something in mind. He said:

> ". . . . . I do have some arguments that perhaps I should make at the beginning before we get any further, as far as a plea of autrefois acquit is concerned . . . although it wouldn't dispose of all the counts, if Your Honour were to agree with my submissions, it may dispose of a number of them . . . my submission basically is that a plea of autrefois acquit could stand on those counts that His Honour Judge Smith held to be a nullity . . ."

I can state with some authority that the presiding judge — myself — listened to Mr. Messner's submissions with some considerable surprise. He had happily accepted Judge Smith's assessment of the situation back on December 15, 1981 and had then made the motion that Judge Smith invited. Now he was telling me that Judge Smith had been wrong all along, that I should say so, and that I should hold that Moore could not be tried upon the PSP charges.

Having been to various seminars where the subject of judicial comity was discussed, I did not accept Mr. Messner's submissions. It seemed to me that Mr. Messner had forgotten the wisdom that John Heywood expressed as long ago as 1546 when he recorded the proverb "Wolde you bothe eate your cake, and haue your cake?" I read the cases that counsel mentioned, commented upon them and the history of the matter, and then ruled that the charges could not be dismissed upon a special plea. I said:

> "There were never, in the counts that Judge Smith quashed back in December 1981, any allegations of criminal misconduct at all. Those counts were hopelessly bad, and being so bad . . . (Moore was) never in jeopardy."

The trial proceeded, lasting a full 3 days. I dismissed the counts of theft and convicted Moore on the charge of having knowingly been in possession of stolen automobile parts belonging to Zora Enterprises Ltd. That count, of course, was one of the counts that Judge Smith had quashed as a nullity back on December 15, 1981.

Moore appealed. In the Court of Appeal Mr. Messner argued that the evidence was not sufficient to convict Moore but that argument did not fly. Mr. Messner also resurrected his "autrefois acquit" argument. He expressed it this way in his factum:

> "In summary then, count 6 of the original information was not a nullity and could have been amended, if necessary, and therefore the appellant was truly in jeopardy. His Honour Judge Barnett should have acceded to a special plea and acquitted Moore on count 6."

The Court of Appeal bought it, 2 to 1: (1984) 9 CCC (3d) 1. Moore walked.

The Crown appealed to the Supreme Court of Canada. Moore chose to ignore Mr. Messner's requests for instructions. One suspects that he tossed envelopes bearing Mr. Messner's return address into the wastebasket thinking that they likely contained requests that he settle up his account. In due course the very learned Justices of the Supreme Court of Canada appointed Mr. Messner to argue the case at the Crown's expense.

The decision in the Supreme Court of Canada was a divided one. The Chief Justice and the two wise women who now sit upon the Supreme Court recognized Mr. Messner's arguments for the essential nonsense that they were and expressed the opinion that Moore's conviction should be restored. But the 4 other presiding justices saw matters somewhat differently and in the result the crown's appeal was dismissed.

On the merits of Moore's case, I find the decisions in the Court of Appeal and the Supreme Court of Canada more than merely difficult to accept. But if one overlooks Moore's misdeeds and the history of his case, it is clear that the *Moore* decision contains some strong statements sweeping away still more of the remaining legal cobwebs which trip up the crown in the prosecution of criminal cases.

Dickson C.J.C. said:

> ". . . it is no longer possible to say that a defective information is automatically a nullity disclosing no offence known to law. If the document gives fair notice of the offence to the accused, it is not a nullity and can be amended under the broad powers of amendment s. 529 gives to the courts. Only if a charge is so badly drawn up as to fail even to give the accused notice of the charge will it fail the minimum test required by s. 510(2)(c) . . . So long as the defect does not prejudice the accused and the Crown actually proves all the elements of the offence, a conviction will be valid. Defects in form do not defeat what is valid in substance . . . In the case at bar, the first information was clearly not a nullity. The accused knew that he faced a charge of possession of stolen goods." (CCC, pp. 297 & 298)

Lamer J said:

> "There appears to be no disagreement, either between ourselves or with the judges below, as regards the fact that, acting under s. 529 of the Code, the judge erred in quashing the information. Indeed, the information was not a nullity but only voidable and the accused was clearly in jeopardy of being convicted when the judge quashed the information. On this it is without any reservation that I agree with the reasons of the Chief Justice . . . Since the enactment of our Code in 1892 there has been, through case-law and punctual amendments to s. 529 and its predecessor sections, a gradual shift from requiring judges to quash to requiring

THE RELATIONSHIP BETWEEN THE JUDICIARY AND THE CHARTER: THEORIES OF JUDICIAL REVIEW
SPEAKING NOTES FOR THE 1987 CANADIAN AMERICAN LEGAL EXCHANGE*

by The Honourable Brian R.D. Smith, Q.C.**

1. It is obviously too late to argue against having a Charter of Rights. The genie is out of the bottle. It is not, however, inappropriate for me to lament its enactment and to argue in favour of an interpretation that will limit its effect. This first obliges me to explain why I believe that the enactment of the Charter was not a good idea. Simply put, it is my position that the Charter represents a major departure from our Canadian parliamentary traditions. The Charter also may have negative consequences both for Judges and for legislators.

2. I believe that the Charter was originally conceived by Pierre Elliot Trudeau to give constitutional protection to the francophone and anglophone minorities in Canada. I have no quarrel with that purpose as it was to have constitutionalized the bi-cultural and bi-lingual nature of our country. It should have stopped there.

3. **The Charter is unnecessary.**

We did not need a Charter to ensure that Canada would become a free and democratic country. It always has been. Nor did we need a Charter to ensure that Canadians enjoy the right of freedom of expresison, freedom of religion or freedom of assembly. These rights were respected and preserved as a matter of tradition and constitutional convention and in the rare cases where they were not respected by the government, the Court found the way to give them legal protection.

> See for example:
> *Roncarelli v. Duplessis,* (1959) S.C.R. 121;
> *Switzman v. Elbling,* (1957) S.C.R. 285;
> *Reference Re: Alberta Statutes,* (1938) S.C.R. 100

Nor was the Charter necessary to achieve egalitarian rights in Canada. Long before the enactment of the Charter every province in Canada, as well as the federal government, had human rights legislation which prohibited discrimination not only by the private sector but also by the Crown.

Similarly, the Canadian system of criminal procedure has always been regarded as fair and enlightened by Canadians and non-Canadians; it contains broad safeguards to protect the rights of accused persons. Our rules with respect to illegally obtained evidence, for example, were often cited as a sensible compromise between the English and the American approaches.

4. You might say that if Canadians had all of these rights and freedoms before the Charter, then what harm is there in simply codifying them in a constitutional document?

The answer is that we all know that such rights and freedoms never have been, and ought not to be, absolute, and that it has always been necessary to balance and accommodate the rights and freedoms of the individual with the rights and freedoms of other individuals and the interest of the public as a whole.

By entrenching these rights and freedoms they assume an absolute or near absolute value and they are certainly presumed to be paramount values in Canada. They also inevitably begin to take on a life of their own. More importantly, and regretably, what the Charter does is transfer from the legislature (and thus the people) to the Courts the power to reconcile the rights of the individuals *vis a vis* other individuals and the public.

5. The Charter runs contra the Canadian political tradition.

The Charter reflects a political ideology that at the least represents a departure from the historic values of British North America. The Charter is rooted in Lockean notions of 18th century individualism. The principle premise is that the state is a major threat to liberty and freedom. This premise moved the American colonists to take up arms; it led to the great American

***(Editor's Note) The first Canada-United States Legal Exchange was held in Ottawa-Montreal-Toronto and in Washington in the fall of 1987. Each country was represented by a team of seven lawyers and seven judges, who met together for one week in Canada and one week in the United States. The Exchange was sponsored by the American College of Trial Lawyers, Chief Justice Rehnquist and Chief Justice Dickson. Professor Ed Ratushny, Faculty of Law, University of Ottawa, served as rapporteur.**

This is the final of three articles from one of the panels on the program that the Journal has undertaken to publish. The other two articles by Chief Justice Rehnquist of the United States and Professor Katherine Swinton appeared in the September 1988 issue.

****At the time of presentation of this paper Mr. Smith was the Attorney General of British Columbia. He has since resigned from that office.**

FOOTNOTES

1. Horotwitz, G., "Conservatism, Liberalism and Socialism in Canada: An Interpretation", 32 Canadian Journal of Economics and Political Science, (1966), p. 143.

achievement in crafting a republican Constitution. Authors of the American constitution devised strong checks and balances to curb the powers of future governments. Not all the colonists in America, however, believed in these rugged individualistic republican ideals; thousands migrated to the British colonies to the north and became the Loyalist settlers of Upper Canada and the Maritimes.

The existence in Canada of the deeply rooted counter revolutionary strain has been described by Professor Horowitz in his famous analysis written 20 years ago.[1]

The mainstream Canadian ideology has been one that has recognized the power of the state to be an agent of social and economic policy; that ideology has supported the collective will of the community when it clashes with the rights of the individual.

On the other hand supporters of the Canadian Charter were characterized by Professor Donald Smiley as exhibiting

> ". . . a distrust of legislators, executives, voters and the whole democratic political process . . ."[2]

So the Constitution makes strange bedfellows. My views on the Charter probably now are shared by Roy Romanow of Saskatchewan and 1981 "kitchen" fame and although an architect of the 1981 accord, Romanow has recently expressed misgivings about the Charter!

In a compelling recent critique on the Charter, Professor Andrew Petter has sounded the skepticism of the Left over the Charter — the fear that it will become an instrument to dismantle social and economic legislation that was designed to redistribute wealth.[3] Charter individualism may now be exploited by opponents of collectivization to destroy the closed shop, or erode the "right" to strike.

Professor R. Cheffins puts it eloquently and succinctly in his recent work:

> *"(The Charter) will colour our political culture, moving us significantly in the direction of the United States. A country dedicated in the preamble of its constitution to "peace - order and good government" will give way to a Canadian society much more concerned with the American dream of "life, liberty and pursuit of happiness" . . . We will be moving from a nation based on an evolutionary, pragmatic, moderately collectivist approach to one in which the assertion of individual rights will become of paramount concern. We will move from a society in which the overwhelming majority of important decisions are made by politicians and their administrative advisors to a society in which decision-making power will be shared to a much greater extent with the judiciary"*[4] (emphasis added)

6. The Charter diminishes parliamentary accountability

As noted above, ultimate decision-making now shifts from the Legislature to the Courts composed of judges who are not elected, and not politically accountable. Because of the presence of Section 1 of the Charter, the Canadian judiciary (moreso than the American judiciary) is patently given a policy-making function. Once the Courts find that there has been violation of a right or freedom guaranteed in the Charter, the onus shifts to the Crown to justify the law under Section 1 of the Charter as a reasonable limit that can be demonstrably justified in a free and democratic society.

In *R. v. Oakes* (1986) 1 S.C.R. 103 the Supreme Court held that two central criteria must be satisfied in order to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective of the law must relate to concerns which are pressing and substantial. And second, the means chosen must be proportionate to this objective which in turn require that the means be rationally connected to the objective, that they impair rights as little as possible, and that there be proportionality between the effects and the objective. Professor Monahan says this in relation to *Oakes:*

> ". . . while the analysis purports to offer neutral and objective standards to guide the application of Section 1, this alleged objectivity is wholly illusory. The framework of the Chief Justice necessarily requires the judiciary to question the wisdom of legislation, albeit in a disguised fashion. Thus, far from resolving the lingering doubts about the legitimacy of the judicial role under the Charter, the opinion unintentionally lends credence to such claims"[5]

7. Further Implications for the Judiciary.

The Charter will also have other consequences with respect to both the judiciary and the Legislature. It will no doubt nudge the judiciary toward a state of politicization, and the judiciary up until now has maintained a high reputation for impartiality. Professor Smiley claims that when judges merely involve themselves in labour concilation, redefining electoral districts, or royal commissions, that:

> "These kinds of activities are already putting the reputation of judicial impartiality under

2. Smiley, Donald V., "The Case Against the Canadian Charter of Human Rights", *Politics: Canada Third Edition*, Toronto, McGraw-Hill, 1970, p. 484.
3. Petter, Andrew, "Immaculate Deception: The Charter's Hidden Agenda", *Charter of Rights 1987*, Continuing Legal Education, Vancouver, B.C.
4. Cheffins, R.I., Johnson, P.A., *The Revised Canadian Constitution, Politics as Law*, Toronto, McGraw-Hill, (1986) p. 130.
5. Monahan, P.J., "Judicial Review and Democracy: A Theory of Judicial Review", University of British Columbia Law Review, Vol. 21, No. 1, 1987, pp. 87 - 144.
6. Smiley, *supra.*, p. 491.

REGINA V. MOORE: TURNING THE SILVER LINING OUTWARD, LIKE MILTON'S CLOUD.*

by Judge C.E. Barnett* *

I expect that all judges have encountered the not so silent persons who believe that the criminal justice system in Canada is a failure for many reasons including the supposed fact that judges routinely make decisions allowing criminals to escape conviction and punishment because of some silly technicality. As a judge, I do not share these beliefs which are usually expressed by persons who are ill informed as well as angry. But sometimes they do have a point.

When the Supreme Court of Canada decided, on June 30, 1988, that the conviction of Barry Moore for having knowingly been in possession of stolen auto parts could not stand, the court did decide the case on a basis that will seem to many to be exceedingly silly and technical. But, paradoxically, the court spoke in strong terms that will make it very difficult indeed for defence counsel to successfully advance technical arguments based upon poorly worded charges in future criminal cases.

Barry Moore lived near Williams Lake. He operated a business which was popularly known as "Phantom Auto Wreckers." In the course of his business he purchased totally wrecked vehicles, usually Ford pick-ups, from I.C.B.C. The crown alleged that he then acquired parts from stolen Ford pick-ups and used those parts to reconstruct his wrecked trucks which he then relicensed and sold.

Moore's activities resulted in his being charged in 6 counts. Other persons were also charged but that is no longer of any importance.

The information, sworn July 20, 1981, contained well worded charges of theft. There were corresponding PSP charges that were not so well worded. Count 6 was both representative and of particular importance. It read:

> "The informant also says that he has reasonable and probable grounds to believe and does believe that Barry Graham Moore on or about the 27th day of February, 1981 at or near the Town of Williams Lake, County of Cariboo and Province of British Columbia, did unlawfully have in his possession automobile parts, the property of Zora Enterprises Ltd. of a value exceeding $200.
>
> CONTRARY TO THE FORM OF STATUTE IN SUCH CASE MADE AND PROVIDED."

Moore elected to be tried in the provincial court and entered pleas of not guilty to all the charges on August 31, 1981. On December 15, 1981 he appeared before Judge Smith for trial. His lawyer was that renowned barrister from 100 Mile House, Peter Messner.

The crown found itself in some difficulty. The case was a complex one and had been assigned out to an ad hoc prosecutor. But he "called in sick" which meant that the crown was represented that fateful day by counsel who had no real opportunity to consider or prepare the case.

Judge Smith has sharper eyes than most counsel. The deficient wording of the PSP charges did not escape his attention. The matter proceeded in this fashion:

The Court: Crown, have you looked at the information? . . . Look at the possession charges . . . they don't allege an offence, Mr. Barbour, do they.
Mr. Messner: Oh, I see, yah, you're right, Your Honour.
Mr. Barbour: No, they certainly don't. I wouldn't think that they do, Your Honour.
The Court: Do you have an application under 529, Mr. Messner, or not?
Mr. Barbour: I would think you do.
Mr. Messner: Yah, I would say I would, Your Honour. I would submit, Your Honour, that those don't disclose an offence known in law.
The Court: No, they don't.
Mr. Barbour: I would have to agree with him. I don't think they do either, Your Honour . . .
The Court: All right. Pursuant to s. 529 there's been an application to quash counts 5, 6 and 7 . . . both counsel agree that the counts do not set out an offence known to law. Those 3 counts will be quashed.

Crown counsel then stayed the remaining charges and everybody went away with the understanding that a new information would be sworn in due course and that the trial would proceed on some future days.

A new information was sworn on February 1, 1982. The charges were identical and this time they were all well worded. Mr. Messner again represented Moore and the matter was put over for Moore to appear on April 19, 1982 with Mr. Messner to fix a trial date and "to deal with any preliminary arguments that may arise." On that date Mr. Messner advised that other well known Cariboo character, Judge Barnett, that he might have some preliminary comments, but had no motions to make. Moore then elected to be tried in the provincial court and entered pleas of not guilty to all counts.

Moore's trial upon this second information commenced on September 22, 1982 and con-

*Regina v. Moore [1988] 1 SCR 1097; [1988] 5WWR 1; 41 CCC (3d) 289. See also Milton, *Comus,* 1.221 and Dickens, *Bleak House* ch. 18.
**Provincial Court of British Columbia.

	YK	INUVIK	IQALUIT	RURAL	ALL AREAS
SUMMARY CONVICTION OFFENCES (In Numbers)	587	278	229	1455	2549
— From charge to first appearance	26.23	20.46	17.62	22.37	22.62
From first appearance to Sentence - Guilty Plea	12.25	21.35	32.70	15.14	16.70
From first appearance to Trial/Disposition - Not Guilty Plea	57.90	59.94	94.39	67.18	65.21
Average number of appearances	1.94	2.13	2.66	1.79	1.94
INDICTABLE OFFENCES (HYBRID OR INDICTABLE (In Numbers)	201	92	144	562	999
— From charge to first appearance	15.86	13.16	9.11	19.34	16.60
From first appearance to Sentence (Territorial Court election, Guilty Plea)	25.04	29.18	51.57	50.18	45.53
From first appearance to Trial/Disposition	71.27	58.12	96.32	101.11	85.28
From first appearance to Preliminary	51.95	49.17	34.28	43.69	44.23
Average number of appearances	3.05	2.87	3.31	2.86	2.96
– IN AVERAGE NUMBER OF DAYS					
	YK	RURAL	IQALUIT	INUVIK	
TOTAL NUMBER OF SWORN INFORMATIONS PROCESSED	928	2230	418	391	
Summary Conviction	587	1455	229	278	
Indictable & Hybrid	201	562	144	92	
Preliminary Inquiry	91	67	46	12	
Guilty Plea	544)	1685)	279)	284)	
	) 76.6%	) 83.45%	) 79.48%	) 72.44%	
Not Guilty Plea	165)	334)	72)	108)	
Stay of Proceedings	32	43	7	5	
Withdrawn	181	326	65	43	
Dismissals/Discharges	28	74	18	17	
Pre-Sentence Reports	16	59	11	6	
Psychiatric Examinations	1	3	24	1	
Circuits		20	18	18	
133 & 666 over 100 days old	16	64	12	10	

> strain, and the new and controversial tasks suggested for the Courts by the Charter would almost inevitably contribute to these influences."[6]

We have all heard of the boast of lawyers who now aggressively "judge shop" when engaged in Charter litigation hoping to find a judge whose values reflect those of his client or his client's cause. While judge shopping is hardly a new recreational pursuit, the Charter does provide motivation to support the practice.

8. Implications for the Legislators.

The test enunciated by the Supreme Court of Canada in *Oakes* involves certain assumptions about the law making process. Professor Hans Linde (as he then was) asserts that:

> "no court should invalidate an act of government for failure to comply with the constitutional rule unless the rule is one with which the government should have complied, or should know how to comply with in the future"[7]

Professor Linde suggests that if we were to take the formula of rational law-making seriously, we would impose on our law-makers demands which would involve an enormous requirement of time and which would bear no relationship to the reality of the law-making process.

The Charter may also cause politicians to abdicate their responsibilities or at least tempt them to allow the hard choices to be made by the judiciary rather than by themselves. This phenomenon may operate particularly where there is in existence a controversial law which has both ardent supporters and opponents. Rather than decide to repeal or change the law or even to decide not to change or repeal the law the legislators might be inclined to leave the fate of such legislation to the judiciary.

The Charter may also have an untoward "chilling effect" on the legislative process. This may or may not be due to our own inexperience and uncertainty with respect to the proper meaning and effect of the Charter. But it is not uncommon for the government to get advice from legislative counsel and crown counsel that proposed legislation is unconstitutional which often means that such proposed laws will not be enacted. Subsequent events prove that that advice was wrong or at least overly cautious. In the meantime, legislation that could have been enacted for the public good was not.

9. Theories of Judicial Review.

For all of the above reasons I obviously believe the Charter should be interpreted in a way which least intrudes into the legislative sphere. I find very attractive the thesis of Dean John Hart Ely set out in his influential text.[8] Ely believes that "in a representative democracy value determinations are to be made by our elective representatives, and if in fact most of us disapprove we can vote them out of office". He says that the Court's role under the Constitution is not to scrutinize the *outcome* of the political process but only to ensure that the political process has not malfunctioned. Dean Ely concludes that the:

> . . ."malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities or interest, and thereby denying that minority the protection afforded other groups by a representative system."[9]

Professor Monahan has argued that Ely's theory of judicial review is even more compelling in Canada with respect to the Charter than it is in the United States. Echoing Dean Ely, he says that:

> "the judiciary should not undertake the task of testing the substantive outcomes of the political process against some theory of the right or the good. . . . The central focus of judicial review should be the integrity of the political process itself. The judiciary should interpret constitutional guarantees in such a way that the opportunities for public debate and collective deliberation are enhanced. To put the matter simply, constitutional adjudication should be the name of democracy, rather than the right answers."[10]

10. It is a bit too early to be able to say what theory of judicial review will take hold in Canada. The earlier cases coming out of the Supreme Court of Canada suggested that the Courts were quite prepared to scrutinize the substantive outcomes of the political process:

> See *Reference Re: B.C. Motor Vehicle Act,* (1985) 2 SCR 486

The rhetoric of the Court suggested that "it meant business" and that it was not about to apply the Charter in a timid or deferential way as was the case with the Canadian Bill of Rights. I sense, however, in more recent judgments of the Supreme Court of Canada and certainly in lower courts in Canada, greater awareness of the importance of deference to the legislative process. If that is a shift in direction then I welcome it. For example in *R. v. Edward's Books*

7. Linde, Hans A., "Due Process of Lawmaking", 55 Nebraska Law Review, No. 2, (1976), p. 222.
8. Ely, John Hart, *Democracy and Distrust, A Theory of Judicial Review,* Cambridge, Mass., Harvard University Press, (1980) pp. 73 - 104.
9. Ely, *supra.*, p. 103
10. Monahan, *supra*, p. 89

and Art Limited et al (1986), 71 N.R. 161 (S.C.C.) (The Sunday Shopping Case) La Forest, J. stated:

> "Given that the objective (of Sunday shopping legislation) is of pressing and substantial concern, the legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plan. . . . I do not mean to suggest that this Court shouldn't, as a general rule, defer to legislative judgments when those judgments entrench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought that the Charter established the opposite regime. On the other hand, having accepted the importance of the legislative objective, *one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.*
>
> In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to maneuver to meet these conflicting pressures." (emphasis added)
> (at p. 256)

In the "Right to Strike Case" of *Alberta Union and Provincial Employees et al v. Attorney General of Alberta, et al* (1987), 74 N.R. 99 (S.C.C.), MacIntyre, J.'s comments with respect to the claim that the right to strike should be constitutionalized seem to be an appropriate response with respect to most claims that certain rights or freedoms should be constitutionalized. He states:

> "A further problem will arise from constitutionalizing the right to strike. In every case where a strike occurs and relief is sought in the Courts, the question of the application of Section 1 of the Charter may be raised to determine whether some attempt to control the right may be permitted. . . . The Section 1 inquiry involves the reconsideration by a court of the balance struck by the legislature in the development of labour policy. The Court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative arbitration is adequate compensation for the loss of the right to strike. . . . *None of these issues is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly opposite to the functions of the legislature.* However, if the right to strike is found in the Charter, it will be the Courts which time and time again will have to resolve these questions, relying only on the evidence and arguments presented by the parties, despite the social implications of each decision. This is a legislative function into which the Courts should not intrude. It has been said that the Courts, because of the Charter, will have to enter the legislative sphere. Where rights are specifically guaranteed in the Charter, this may on occasion be true. But where no specific right is found in the Charter and the only support for its constitutional guarantee is implication, the Courts should refrain from intruding into the field of legislation. That is the function of the freely-elected legislators and parliament. (emphasis added)
>
> (at p. 140)

11. With few exceptions, to date the Supreme Court of Canada has not invalidated any civil laws that fall into the realm of social and economic legislation. It would be premature however to advise legislators that it is safe to go back into the water. Judicial sharks still lurk below the surface.

In the main, the Supreme Court of Canada has decided criminal law Charter cases it has chosen to hear in favour of the accused. Some might say that this is how it ought to be; that in the area of social and economic regulation the Courts should be deferential to the legislature but in the area of criminal law the Courts should exercise their Charter muscle. I disagree. While it is true that judges and lawyers are well suited to consider matters of due process in the context of a criminal trial, nevertheless, the enactment of the criminal law and procedure, involves balancing the interests of the accused with the interests of the victim and the public at large. Like any other law, it is the legislature which is most appropriate to make those value judgments not the Courts. Indeed the criminal law, perhaps more than any other law, attempts to capture and codify our national or common morality. Whether there should be capital punishment, abortion, pornography or prostitution are issues which do not lend themselves to easy resolutions. There are no clearly correct answers. How could the Court presume to know better than parliament how these moral judgments should be made?

In the United States the judicial activism in the area of the criminal law, at least in the past, might be justifiable given that the criminal law power is vested in the state legislatures. John A. MacDonald said in the Confederation Debates that it was a matter "almost of necessity" that the criminal law be left to the General Government. He said that it is one of the "defects" in the United States system that each separate state has or may have a criminal code of its own.[11]

The Supreme Court of the United States has used the Bill of Rights to develop a national system of criminal law while this is something Cana-

11. Waite, P.B. (ed.), *The Confederation Debates in the Province of Canada/1865*, Carleton Library, No. 2.

accused is not under the supervision/control of the court, hence ought not to be included in calculating average times for charge movement. However, it does reflect the system as a whole and hence is included with distinctions as indicated.

It should be noted that summary conviction offences and indictable offences cannot stand on the same information, hence, for a number of accused persons facing a charge for an indictable offence, and for a summary conviction offence related to that indictable offence such as an offence of breach of probation (Section 666(1)), or failure to comply with an undertaking (Section 133), the practice has arisen of adjourning the summary conviction matter in Territorial Court from time to time (over a year in some cases) until the indictable matter has been dealt with in Supreme Court following a Preliminary Inquiry. These "old" Supreme Court related charges will therefore affect the averages. Their number has been identified by 'age' and thus may be removed from the averages by further manipulation.

As well, it should be noted that virtually **all** accused persons were represented by legal counsel. The Government of the Northwest Territories, through the Legal Services Board and in cooperation with the Law Society of the Northwest Territories provides one, and now, two defence counsel of all court circuits. It is rare that an accused person will decline the services of Legal Aid counsel on circuit.

Stays and withdrawals are at the sole discretion of the Crown reflecting its prosecutorial discretion, and their impact on the averages is difficult to assess, hence, they have been isolated simply for identification purposes.

With respect to the issue of delay, it appears that the most common factor in southern jurisdictions is the lack of court time and the presence of case backlog. This does not appear to be a problem in the Northwest Territories. Looking at Yellowknife, the Territorial Court is in a position to allocate two or three days for a particular trial within a matter of weeks of the request. With respect to circuit communities, two or three days for a particular matter can be allocated within the following circuit, which may be from a month to a month and a half, and requests for a longer period are usually handled by way of providing a special circuit. Special needs are assessed by the Chief Judge who then allocates special or additional circuits to deal with problems as they arise, thus maintaining flexibility and a responsiveness to the needs of the communities. In this regard the judiciary appears to be quite docket conscious.

Iqaluit and Inuvik represent two of the major regular circuit communities included in this study, hence separate figures have been provided for them. These communities are served on a regular basis of at least once per month. Yellowknife has been separated as it features the resident Judges, better availability of services — court time and counsel, and it is the largest community. The remaining rural communities have been classified as one and represent both regular circuits (e.g. Coppermine/Cambridge Bay/Rankin Inlet at approximately once every month and a half), and "on demand" circuits (e.g. Grise Fiord, Igloolik, Holman, Spence Bay, Eskimo Point, at less than five times per year).

It is acknowledged that the results produced are simple arithmetic averages unweighted to reflect various factors which may be present and impact adversely in terms of time — e.g. Pre-Sentence Reports, Psychiatric or Psychological Reports, weather delays, and other. Although the frequency of such factors may be calculated and their impact projected from further analysis of the miscellaneous totals. Too close an examination will simply distort the overall picture which this study attempts to examine.

This study is acknowledged to be a simple, straightforward one: its sole purpose is to attempt to answer the question, 'How long does it take?' The issue of delay or timeliness is always a subjective one and controversy will always be expected when we ask, 'How long *should* it take?'

I leave resolution of that issue to others, I can only say — this is how long it does take.

STUDY OF TIME FACTORS INVOLVED IN THE DISPOSITION OF CASES IN THE TERRITORIAL COURT, NORTHWEST TERRITORIES*

by/par Judge R. M. Bourassa**

There are a number of problems inherent in the delivery of justice services in any society or community, and delays always loom large. This is particularly so in the N.W.T., a jurisdiction spread over a land mass larger than the Indian subcontinent, having a population of 50,000 living in over 60 communities of various sizes from under 100 to in excess of 12,000.

In pursuing Mr. Justice Morrow's goal of bringing justice to every man's doorstep, the circuit court system has evolved to its present formulation, (1986) consisting of four Territorial Court Judges who travel from two fixed bases to the various regions and communities both on a regular and on an "as needed" basis. Three Judges, including the Chief Judge, are based in Yellowknife, one Judge is based in Hay River. A further Judge was appointed and established in Iqaluit (Frobisher Bay) in 1987. Circuits are planned and organized by the Chief Judge, exercising statutory authority, and involve trips to certain areas on a regular basis. The larger communities such as Coppermine, Cambridge Bay, Rankin Inlet, are served on a regular continuing basis, varying from once a month to once every two months; the smaller communities are served on an "as needed" basis. This system provides for both regularity and flexibility to meet and respond to particular problematic areas or times in the various centres. The Chief Judge may, in addition to the regular circuits of five days, add additional short circuits of a day or two to communities should a backlog be developing or should special needs arise.

The circuit court system is demanding, both in terms of human resources and financial resources, and represents a significant commitment by the judiciary, the Law Society, and the Government of the Northwest Territories. In 1986 the Territorial Court Judges logged in excess of 240,000 miles on circuit travel, which consisted of 56 five day circuits and 28 one or two day circuits, at a cost in excess of two million dollars.

In this context the issue of "delay" is always present, and yet to date there has been no critical examination of the issue and whether or not the circuit court system is, by defintiion, delayed justice; hence, justice denied.

It was in order to assess this question from a factual basis that this study was undertaken. No conclusions are drawn and the reader is free to conclude delay, timeliness, or haste.

STUDY PARAMETERS:

1986 was the year targeted for research for a number of reasons. First, virtually all charges laid in 1986 have been dealt with and are complete to disposition, although some only into 1987. Second, this was the last year of full coverage of the Northwest Territories by the circuit court system. Subsequent to 1986, a full-time territorial Court Judge was located in Iqaluit (Frobisher Bay) to deal with cases arising from the Baffin Region, including Sanikiluaq and Igloolik/Hall Beach, and the Chief Judge became a resident of Inuvik, N.W.T.

The study consisted of, first, a manual retrieval and compilation of data from informations sworn and brought to Territorial Court in 1986, following which the information was entered on a data processing program for further manipulation and analysis.

It is important to note that the informations studied did not include those stored at the Hay River Registry of the Territorial Court; hence do not reflect what is occurring in that circuit court region, consisting of Hay River, Fort Resolution, Pine Point, Fort Smith, Fort Providence, Fort Liard, Fort Simpson. However, it is not anticipated that the figure that would be generated by an examination of those informations would differ in any noticeable measure from the results of this study.

A total of 3,968 informations were examined. The starting point was taken as the date the information was sworn, the ending point being the date, in the case of guilty pleas, sentence was rendered, or in the case of not guilty pleas, the date upon which a decision was rendered, and if the decision was guilty, the date of sentence. In the case of Preliminary Inquiries, the termination date is the date of discharge or committal to stand trial.

Strictly speaking, the period from when the information was sworn to first appearance by the

*The conduct of this study with the attendant research it represents would have been unlikely without the work and dedication of Lisa Godenzie, on field placement from Simon Fraser University, School of Criminology, Dan Blaquiere, Program Consultant, Department of Social Services, Government of the Northwest Territories, and the cooperation and assistance of the Territorial Court staff.

**Territorial Court of Northwest Territories.

dians have had from the beginning under the *BNA Act*, 1867. Whereas the Americans have chosen the federal judiciary as the institution to control legislative action, Canadians have chosen their Parliament. It is my view, therefore, that the judicial invalidation of criminal legislation should be a very rare occurrence.

The very recent decision of the Supreme Court of Canada in *Smith v. The Queen*, (unreported, June 25, 1987) striking down the mandatory minimum sentence of 7 years for importing narcotics on the grounds that it was cruel and unusual punishment is not a judgment that I can applaud. In my respectful view the Supreme Court of Canada in that case has assumed the mantle of the Law Reform Commission. I do not believe that is their proper function. The Court advanced the curious and wholly unconvincing distinction between judicial deference to the legislative *purpose* (which they said was proper) and deference to the legislative *effects* which they said is not. Of course the effect of legislation is a function of the "legislative means" and thus the Court is suggesting that judicial deference to legislature means is not appropriate. This, it seems, puts the entire criminal code up for grabs. The dissenting opinion of MacIntyre, J. reflects my own view:

> "A large degree of latitude must, therefore, be permitted to Parliament in determining the appropriate punishment, particularly where the question is not the nature of the punishment but only its extent. . . . The formation of public policy is a function of Parliament. It must decide what the aims and objectives of social policy are to be, and it must specify the means by which they will be accomplished. It is true that the enactments of Parliament must now be measured against the Charter and where they do not come within the provisions of the Charter, they may be struck down. This step, however, must not be taken by the Courts merely because a court judge may disagree with a Parliamentary decision but only where the Charter has been violated. Parliament has the necessary resources and facilities to make a detailed inquiry into relevant considerations in forming policy. It has the capacity to make a much more extensive inquiry into matters concerning social policy than has the Court. It may test public opinion, review and debate the adequacy of its programs, and make decisions based upon wider considerations and infinitely more evidence, than can ever be available to a Court. . . . In view of the careful and extensive consideration given this matter by Parliament and the lack of evidence before this court suggesting that an adequate alternative to the minimum sentence exists which would realize the valid social aim of deterring the importation of drugs, I cannot find that the minimum sentence of 7 years goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives. . . . All that parliament has done is to conclude that the gravity of the offence alone warrants a sentence of at least 7 years imprisonment. While, again, one may question the wisdom of this conclusion, I cannot agree that this makes the sentencing process arbitrary and, therefore, cruel and unusual in violation of Section 12 of Charter." (pp. 20-26)

12. In the next several years our Courts must resolve a number of Charter challenges. They will have to say whether year round street prostitution violates freedom of expression in British Columbia, when seasonal prostitution in Nova Scotia was ruled taboo. They will have to decide whether collective agreements requiring workers to retire at 65 and make job openings for younger workers are an unjustifiable discrimination. They will have to decide a number of due process criminal cases where technical acquittals will inflame public opinion. In all these cases the Courts will be vaulted into public policy decision-making; it follows that our Courts will be more vulnerable to criticism for their policy choices — just as politicians are!

Justice like beauty lies in the eyes of its beholder. The Charter will not make Canadian society more just. But it will, or at least can, change Canadian society. As Mr. Justice La Forest noted in the "Sunday Shopping Case", in every political decision there are winners and losers. All that the Charter can do is change the score card. The losers under the Charter are more likely to be, paradoxically, the poor and disadvantaged minorities in Canada.[12]

The Charter, then, has the potential for seriously undermining the parliamentary and judicial roles that have traditionally formed part of the Canadian experience. If we do not attempt to limit its effect — if we do not strive to ensure that the Judiciary is not given a mandate it is ill-suited for — the negative consequences will far outweigh any potential benefits the Charter was intended to produce.

12. Petter, *supra*.

LIST OF CASES

1. *Roncarelli v. Duplessis*, (1959) S.C.R. 121.
2. *Switzman v. Elbing*, (1957) S.C.R. 285.
3. *Reference re: Alberta Statutes*, (1938) S.C.R. 100.
4. *R. v. Oakes*, (1986) 1 S.C.R. 103.
5. *Reference re S.94(2) of the Motor Vehicle Act, R.S.B.C. 1979*, (1985) 2 S.C.R. 486.
6. *R. v. Edwards Books and Art Limited et al* (1986), 71 N.R. 161 (S.C.C.)
7. *Alberta Union and Provincial Employees et al v. Attorney General of Alberta et al, sub nom Reference re Compulsory Arbitration, (1987), 74 N.R. 99 (S.C.C.)*
8. *Smith v. the Queen*, an unreported judgment of the Supreme Court of Canada, June 25, 1987.

Pinpointing The Charter*

by/par Jim MacPherson**

Justice Benjamin Cardozo, a great American judge, once said: "The great tides and currents which engulf the rest of mankind do not turn aside in their course and pass the judges by." Professor Archibald Cox, my teacher in graduate school, has written: "The constitutional litigation of any era reflects the aspirations and divisions of the contemporary society." The truth of both these statements in a Canadian context is more than borne out by the six-year march of Charter litigation through the Canadian courts since April 17, 1982. Some of the great issues of our time — political issues (Cruise missile testing), moral issues (abortion), economic issues (wage restraint, strikes, picketing), religious issues (Sunday closing) — have come before Canadian courts in those years. Canadian judges have had to resolve them; "the tides", to use Cardozo's phrase, have not passed them by. The thousands of Charter cases that have come before Canadian courts have raised two important questions for judges: first, what is the right answer; secondly, what role do judges play, how do they relate to and interact with the legislature, the executive and, ultimately, the people?

In the rest of this speech I want to discuss two topics: first, the general principles of Charter interpretation as enunciated by the Supreme Court of Canada; secondly, the interpretation of certain key provisions of the Charter.

GENERAL PRINCIPLES OF CHARTER INTERPRETATION

It seems to me that the Supreme Court of Canada has articulated a fairly large number of principles for interpreting the charter. Let me mention nine of them:

(1) The Charter is a constitutional document. It should be interpreted in a purposive, i.e. a broad, liberal and generous fashion. Narrow phrasing of words or analogies with the principles of statutory interpretation is not helpful. In this respect, the Court's interpretation of the Charter is very different from the Privy Council's interpretation of the *BNA Act, 1867* or even the Supreme Court's interpretation of the *Canadian Bill of Rights*. See *Law Society of Upper Canada* v. *Skapinker,* [1984] 1 S.C.R. 357, and *R.* v. *Big M. Drug Mart Ltd.,* [1985] 1 S.C.R. 295.

(2) There is a broad definition of standing to initiate a Charter challenge. The leading case is *Big M Drug Mart* where an Alberta drug store was granted standing to challenge the federal *Lord's Day Act* as being a violation of s. 2(a), the freedom of religion provision of the Charter. Clearly, Big M, as a corporation, has no religion. Nevertheless, corporations could be convicted for violating the Act. In these circumstances the Court granted the corporation standing to make the Charter challenge because a conviction would have serious consequences for it. The *Big M* case is buttressed by the *Borowski* case which will be argued before the Court in October. If a male Manitoban has standing to challenge the operation in Saskatchewan of a non-existent (after *Morgentaler*) federal law, then it is difficult to imagine a situation in which standing will not be granted!

(3) The previous decisions of the Supreme Court interpreting identical or similar provisions of the *Canadian Bill of Rights* are not binding or even helpful. Indeed, it is not an exaggeration to suggest that there is almost a *de facto* presumption that the *CBR* decisions are wrong! See *Big M Drug Mart,* and *R.* v. *Therens,* [1985] 1 S.C.R. 613.

(4) It is important to interpret individual Charter provisions with an eye to other Charter provisions associated with them. For example, in *Reference Re s. 94(2) Motor Vehicle Act,* [1985] 2 S.C.R. 486, the Court clearly interpreted s.7 of the Charter in light of its association with ss. 8 - 14, all under the heading Legal Rights.

(5) The Charter does not render obsolete the common law. Many of the protections afforded by the traditions of our common law system are extremely useful when it comes to defining Charter rights. See, for example, the interpretation of unreasonable search and seizure (s.8) in *Hunter* v. *Southam Inc.,* [1984] 2 S.C.R. 145, and the interpretation of the presumption of innocence (s.11(d)) in *R.* v. *Oakes,* [1986] 1 S.C.R. 103.

(6) Decisions of the United States Supreme Court interpreting similar provisions of the U.S. Constitution should be considered.

*Summary of a speech delivered at the Canadian Association of Provincial Court Judges Conference, Halifax, September 12, 1988.
**Dean, Osgoode Hall Law School, York University, Toronto.

preuve de ce consentement soit déposée au dossier.

Dans tous les cas et malgré un consentement des parties, le magistrat s'abstiendra de commencer ou poursuivre l'audition, si il peut en résulter une apparence d'inconvenance, d'injustice ou de préjugé.

Référant à la façon de considérer la question en Angleterre, le vicomte Megarry déclare:

> «Judges are most scrupulous, too, about revealing to litigants any possible connection that they have with either party to an action, . . . and if either side objects, the case will be heard by another judge.»[64]

Le magistrat notera que selon notre jurisprudence, la partie qui sait cause de récusation contre le juge doit le déclarer sans délai, au risque, s'il s'abstient de la proposer de ne plus être admis à le faire.

Dans *Re Hanlan*[65], le Juge Orde dit ceci:

> «When bias is alleged and the party is aware of it, he must take objection to the Magistrate's jurisdiction at the outset. If he raises no objection until after the hearing, the objection is waived, and cannot be raised afterwards.»

Cette question de renonciation est aussi traitée par le Juge Norris de la Cour d'appel de la Colombie-Britannique dans *Canadian Air Line Pilots Assn et al. v. C.P. Air Lines Ltd. et al.,*[66] où il considéra qu'il y avait eu de la part de l'appelant une renonciation suffisante à l'objection de *bias*.

Enfin, au jugement unanime de la Cour suprême du Canada dans *Ghirardosi v. Minister of Highways for B.C.,*[67] le Juge Cartwright écrit à la page 372:

> «There is no doubt that, generally speaking, an award will not be set aside if the circumstances alleged to disqualify an arbitrator were known to both parties before the arbitration commenced and they proceeded without objection.»

iii) La règle ex necessitate rei:—

Il arrivera que par suite de récusations, aucune personne, aucune cour, habilités à connaître d'une affaire, ne pourront s'en saisir.

Cette situation s'est présentée dans trois cas qu'il convient de signaler.

Dans l'affaire *Dimes déjà citée,*[68] *deux arrêts étaient devant la Chambre des Lords, l'un du Lord Chancelier, déjà mentionné, et l'autre du Vice-Chancelier. Le premier, ainsi que dit ci-dessus, fut jugé annulable et fut annulé. Le second, celui du Vice-Chancelier, devait être et fut effectivement inscrit sous la signature du Chancelier. On argumenta que l'arrêt du Vice-Chancelier était ainsi devenu l'arrêt du Chancelier et était entaché d'intérêt. La Chambre des Lords requit l'opinion des juges sur ce point et le Baron Parke l'exprima en formulant en ces termes la règle ex necessitate rei:*

> «For this [l'inscription faite par le Lord Chancelier] is a case of necessity, and where that occurs the objection of interest cannot prevail.»

Les Lords acceptèrent cet avis et conclurent à la validité de l'arrêt du Vice-Chancelier.

Dans l'affaire *Boulton v. The Church Society of the Diocese of Toronto,*[69] trois juges de la Cour d'appel étaient récusés parce qu'ils étaient membres de la société défenderesse. Le quorum étant de sept juges, on ne pouvait le constituer sans inclure les juges récusés. On appliqua alors la règle *ex necessitate rei*. Incidemment, l'appel fut décidé à l'encontre de la société.

Enfin, dans *Re The Constitutional Questions Act. Re The Income Tax Act, 1932,*[70] les juges de la Saskatchewan devaient se prononcer sur la constitutionalité d'une loi d'impôt sur le revenu relativement aux traitements des juges. L'intérêt pécuniaire des juges en la matière était évident. Mais ils constituaient le seul tribunal capable de décider la question. Il s'agissait d'un renvoi du lieutenant gouverneur en conseil présenté en vertu du *Constitutional Questions Act,* R.S.S. 1930, c.60. À la question posée on répondit par l'affirmative; la décision fut confirmée.[71]

64. MEGARRY, *Lawyer and Litigant in England,* 1962, pp. 118-119.
65. (1921) 50 O.L.R. 20, 25.
66. (1966) 57 D.L.R. (2d) 417, 419.
67. Supra, p. 36.
68. Supra, p. 35.

connotations, and this has never been a disqualifying consideration.

We are all of the opinion that there is no impropriety in Mr. Justice de Grandpré taking his seat as a member of this Court in this appeal.»

Disons enfin que le magistrat aura avantage à considérer les autorités citées à l'appui du jugement unanime de la Cour dans l'affaire *Ghirardosi*.[61] L'appelant en cette cause était propriétaire de plusieurs âcres de terre expropriées par l'intimé. À défaut d'entente sur le montant de l'indemnité, on eut recours à un arbitrage. L'intimé nomma comme arbitre M. C.D. McQuarrie c.r., lequel, de concert avec M. M.E. Moran, nommé par l'appelant, choisit M. D.B. Hinds comme troisième arbitre. Après avoir reçu copie de la sentence arbitrale, l'appelant et ses procureurs apprirent que M. McQuarrie avait été retenu comme avocat du ministère dans une affaire d'expropriation et qu'il agissait en cette qualité à l'époque de la tenue et de la décision de l'arbitrage concernant la propriété de l'appelant. Ils apprirent aussi que M. Hinds avait lui-même de temps à autre agit comme avocat de la Couronne du chef de la province dans des poursuites au criminel.

Sur la base de ces faits, l'appelant demanda le rejet de la sentence arbitrale. En première instance, le Juge Collins fut d'avis qu'il y avait une crainte raisonnable que l'arbitre nommé par le ministre pouvait ne pas agir d'une façon entièrement impartiale. Le Juge ordonna le rejet de la sentence arbitrale bien qu'on n'ait nullement prétendu que M. McQuarrie, qui, de l'accord de tous était un homme intègre jouissant d'une excellent réputation dans la profession, ait effectivement été partial (biased). Le ministre en appela et l'appel fut maintenu. Le Juge Sheppard considéra qu'il n'y avait pas de preuve qu'un soupçon raisonnable de prédisposition (bias) de la part de M. McQuarrie pût exister tandis que les Juges Davey et Lord furent d'avis qu'il n'y avait pas lieu de se prononcer sur le point, la sentence arbitrale étant, à leurs yeux, celle de M. Hinds et non celle de la commission d'arbitrage. La Cour suprême infirma le jugement de la Cour d'appel et rétablit l'ordonnance de rejet. On invoqua des principes rappelés par le Juge Rand, au nom de la Cour, dans *Szilard v. Szasz*:[62]

«These authorities illustrate the nature and degree of business and personal relationships which raise such a doubt of impartiality as enables a party to an arbitration to challenge the tribunal set up. It is the probability of the reasoned suspicion of biased appraisal and judgment, unintended though it may be, that defeats the adjudication at its threshold. Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs . . .

Nor is it that we must be able to infer that the arbitrator 'would not act in an entirely impartial manner'; it is sufficient if there is the basis for a resonable apprehension of so acting.»

Relation professionelle antérieure:—

Quant au dernier motif de récusation considéré ici, soit les rapports professionnels antérieurs avec l'une des plaideurs ou avec l'affaire en litige, il suffit de rappeler les observations formulées par le Juge en chef Laskin dans *Committee for Justice and Liberty et al. v. National Energy Board et al...*[63]

«On sait que des avocats nommés juges se sont abstenus pendant une période raisonnable, d'entendre des affaires auxquelles d'anciens clients étaient parties même s'ils n'avaient rien eu à faire avec le dossier. À plus forte raison, nul ne siègerait dans une cause à laquelle il aurait pu prendre part à un stade quelconque de l'affaire. Ce serait le cas par exemple même s'il n'avait fait que participer à l'élaboration ou à la rédaction de la déclaration ou de la défense. Ily a au moins un certain parallèlisme entre le fait de recevoir des directives ou de rédiger les conclusions d'une partie et le fait de participer à l'élaboration d'une demande à faire en vertu de l'art. 44, demande qui est effectivement ensuite déposée.»

ii) Les règles de la récusation:—

Il n'entre pas dans le cadre de cet ouvrage de traiter, sauf du point du vue pratique, des règles concernant le magistrat en matière de récusation. À cet égard, il suffit de suggérer généralement la conduite la plus simple à suivre, en droit civil et en Common Law, lorsque se présente un motif de récusation.

Dans le cas où, avant le jour de l'audition d'une affaire, le magistrat constate qu'il doit se récuser, il prendra immédiatement les mesures appropriées pour qu'un autre juge le remplace.

Dans le cas où le magistrat réalise qu'il est récusable seulement au début de l'audition (quand, v.g., il identifie une partie comme ami très intime), ou au cours de l'audition (quand, v.g., il aperçoit un témoin qui est proche parent), il se récusera, à moins qu'en regard de la loi et des circonstances, le motif de récusation soit négligeable et qu'en ayant informé les parties, il en reçoive un consentement à procéder et que

61. Supra, p. 36.
62. [1955] R.C.S. 3, 6-7.
63. [1978] 1 R.C.S. 369, 388.

They will not, however, always be followed. See *Big M Drug Mart*, and *Mills* v. *The Queen*, [1986] 1 S.C.R. 863.

(7) International conventions and decisions of international human rights bodies should be considered. See *Reference Re Public Service Employee Relations Act,* [1987] 1 S.C.R. 313.

(8) Opinion polls are not useful, particularly as an aid to determine what would bring the administration of justice into disrepute pursuant to s.24(s). See *R.* v. *Collins,* [1987] 1 S.C.R. 265, wherein Justice Lamer said: "The Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority."

(9) The most important general principle of all — a law will violate the Charter if it has *either* an improper purpose or effect. An innocent purpose but an improper effect or an improper purpose but an innocent effect lead to the same result — both violate the Charter. See *Big M Drug Mart*.

INTERPRETATION OF KEY PROVISIONS OF THE CHARTER

A. Legal Rights

As an introductory point, I believe that there is a certain chronology to the legal rights provisions, ss. 7 - 14, of the Charter. Section 7 is the umbrella provision. It protects the broadest array of rights — life, liberty and security of the person — and it signals the broad outline of how legal rights are to be protected — in accordance with the principles of fundamental justice. Sections 8 - 10 deal primarily with matters that take place *before* trial — investigation, arrest and pretrial detention. Section 11 deals with the trial process itself, and s.12 deals with *post*-trial punishment. There are exceptions to this broad chronology; for example, s.8 probably provides protection against unreasonable searches in prison after a conviction and s.12 probably covers cruel and unusual punishment in prison both before and after trial. In broad terms, however, there is a symmetry, a chronology in the Legal Rights part of the Charter.

A second introductory point is that the legal rights provisions in the Charter were not intended to upset long-standing and important Canadian criminal *procedure* traditions. See Justice McIntyre's judgment in *Mills.* On the other hand, it is clear that certain *substantive* criminal laws have been rendered unconstitutional by the Charter. Perhaps the most prominent example is the Court's decision striking down the constructive murder provision of the *Criminal Code* n *Vaillancourt* v. *The Queen,* [1987] 2 S.C.R. 636.

Section 7

Section 7 protects three substantive rights — life, liberty and security of the person. The protection is not, however, absolute. The rights can be diminished or denied ' in accordance with the principles of fundamental justice." The wording of s.7 raises two questions: first, what is the content of the three substantive rights; secondly, what are the principles of fundamental justice?

With respect to liberty, outside the criminal law area the Supreme Court has been quite deferential to laws regulating or restraining individual freedom. For example, in *Edwards Books and Art Ltd.* v. *The Queen,* [1986] 2 S.C.R. 713, Chief Justice Dickson said:

The 'liberty' protected by s.7 is not synonymous with unconstrained freedom . . . All regulatory offences impose some restriction on liberty broadly construed but it would trivialize the Charter to sweep all those offences into s.7 as violations of the right to life, liberty and security of the person even if they can be sustained under s.1. Whatever the precise contours of 'liberty', it does not extend to an unconstrained right to transact business whenever one wishes.

Within the criminal law area, however, the story is quite different. The Court has vigorously defended the liberty of the subject in a criminal context. The strongest example and the most extensive discussion of liberty in this context are found in Justice Lamer's judgment in *Reference Re s.94(2) Motor Vehicle Act* where he held that the combination of an absolute liability offence *and* a minimum term of imprisonment violated s.7.

Turning to security of the person, the Court has held that it encompasses both *physical* integrity and *phsychological* well-being. Extensive and excellent discussions of these notions are found in *Singh* v. *Minister of Employment and Immigration,* [1985] 1 S.C.R. 177, and especially in *R.* v. *Morgentaler,* [1988] 1 S.C.R. 30.

With respect to the principles of fundamental justice, the Court has held that, at a minimum, they include certain procedural protections. For example, in *Singh* Justice Wilson said:

At a minimum, the procedural scheme set up by the Act should provide the refugee claimant with an adequate opportunity to state his case and to know the case he has to meet.

However, to the surprise of many observers the Court has gone beyond mere procedural protections. In *Reference Re s. 94(2) Motor Vehicle Act* Justice Lamer said:

> The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process but also of the other components of our legal system. These principles are not limited to procedural guarantees, although many are of that nature. Whether any given principle may be said to be a principle of fundamental justice within the meaning of s.7 must rest on an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our evolving legal system. The words 'principles of fundamental justice', therefore, cannot be given any exhaustive content or simple enumerative definition but will take on concrete meaning as the courts address alleged violations of s.7.

The recent decisions of the Court in *Vaillancourt* and in *Laviolette* v. *The Queen,* [1987] 2 S.C.R. 667, confirm that s.7 has a substantive, not just a procedural, content.

Section 8

The leading case dealing with unreasonable search and seizure is *Hunter* v. *Southam Inc.* which dealt with a search provision in the federal *Combines Investigation Act.* Since that Act has been upheld for many decades under the criminal law power, the case is important for understanding what constitutes an unreasonable search and seizure in a criminal law context. Chief Justice Dickson said that s.8 guarantees a broad and general right to be secure from unreasonable searches and seizures and that warrantless searches are, therefore, *prima facie* unreasonable. He then enunciated a two-fold general test for compliance with s.8. First, normally prior authorization should be obtained before a search is conducted. This authorization must come from a neutral and impartial person. The person need not be a judge, but he or she must, at a minimum, be capable of acting judicially. Secondly, there must be reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is relevant evidence to be found at the place of the search.

The *Southam* standard is a strict one and is probably appropriate in a criminal law context. The question which is left open by *Southam* is whether the same strict standard will be applied to so-called 'administrative' searches, for example searches designed to enforce health, occupational safety and pollution laws.

Sections 9 and 10

These sections protect a number of rights once a person has been detained. Accordingly, it is crucial to know the definition of the word 'detention'. In the leading *Bill of Rights* case, *Chromiak* v. *The Queen,* [1980] 1 S.C.R. 471, the Court had defined detention in terms of actual physical restraint. This decision was clearly not followed in the leading Charter case, *R.* v. *Therens,* [1985] 1 S.C.R. 613, where Justice Le Dain defined detention in terms of the effect of the policeman's demand on the accused. In other words, there is a psychological dimension to detention. The compulsion can be physical restraint; but it can also be simply the fact that a person obeys the police because of their mantle of authority. In Justice Le Dain's words:

> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. 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.

Section 11

Section 11 protects nine specific rights for persons "charged with an offence." Thus far, the Court has had the opportunity to examine in detail only two rights — the definition of "to be tried within a reasonable time" in s. 11(b) and the definition of "presumed innocent" and "independent and impartial tribunal" in s. 11(d).

The Court has addressed s. 11(b) in three cases. In *Carter* v. *The Queen,* [1986] 1 S.C.R. 981, the Court held that pre-information delay does not violate s.11(b). The liberty and security of the person which are protected by s. 11(b) will not be placed in jeopardy prior to the commencement of judicial proceedings against an individual because, prior to a charge, a person is not subject to restraint nor does he stand accused before the community of committing a crime.

In *Mills,* Justice Lamer articulated four factors to assist in determining whether there has been an unreasonable delay:

(1) the impairment of the accused's interests, such impairment becoming increasingly pronounced with the passage of time (Comment: in some cases it can work the other

> sont capables de décider, nous n'entrerons dans aucun détail à cet égard.»

En Common Law, l'amitié intime ainsi que l'animosité personnelle du magistrat envers l'une des parties ou un témoin sont également causes de récusation.[55]

Notons enfin que l'inimitié capitale, pour pouvoir donner lieu à la récusation, doit être une inimitié de la part du juge et non de la part du justiciable.[56] Il en est de même quant à l'animosité.

Prédisposition (bias):—

La prédisposition favorable ou défavorable du juge envers l'une des parties est évidemment, tant en droit civil qu'en Common Law, motif de récusation. Le *bias,* suivant la terminologie de la Common Law, est ainsi défini dans *Black's Law Dictionary,* 4e édition:

> «[A] condition of the mind which sways [the] judgment and renders [the] judge unable to exercise his functions impartially in [a] particular case.»

Dans *Blanchette v. C.I.S. Ltd.*[57], la compagnie défenderesse, à l'appui de sa requête en récusation en première instance, avait produit des lettres montrant que le juge qui présidait avait activement présenté des réclamations contre elle au nom des membres de sa famille et avait exprimé son profond mécontentement quant à la façon dont cette compagnie traitait ses assurés. La Cour suprême du Canada jugea que c'était à tort que la requête avait été rejetée. Le Juge Pigeon, au nom de la Cour, écrit ce qui suit:

> «À mon avis, le principe est le même pour les juges que pour les arbitres. Une crainte raisonnable que le juge pourrait ne pas agir d'une façon complètement impartiale est un motif de récusation, comme il a été décidé pour un arbitre dans l'arrêt *Ghirardosi c. Minister of Highways for British Columbia.* En la présente espèce, le fait que le juge a posé avec insistance des questions sur l'identité de la compagnie défenderesse en regard de certaines modifications dans ses status, pouvait fort bien amener les représentants de la compagnie à croire qu'il n'était peut-être pas entièrement impartial. Comme il faut non seulement que justice soit faite, mais également qu'il soit manifeste que justice est faite, on ne peut rendre une décision finale à partir de conclusions sur la crédibilité formulées dans de pareilles conditions. Par conséquent, un nouveau procès est nécessaire.»

Encore faut-il, pour que la récusation ait lieu, que la crainte que justice ne soit pas rendue soit raisonnable eu égard aux circonstances de l'espèce.[58] Ainsi, on voit, dans l'affaire *In the Matter of Lewis Duncan*[59] que l'avocat Duncan comparaissant en Cour suprême du Canada pour l'appelant dans la cause *Lahay v. Brown,* avait déclaré, dès que la cause fut appelée:

> «In my opinion, the administration of Justice would not be served by Mr. Justice Locke sitting on this appeal. It is in the interest of my client and in my personal interest that Mr. Justice Locke should withdraw.»

La Cour, après s'être retirée pour examiner cette situation sans précédent, nota qu'aucune raison n'avait été donnée et qu'elle n'en connaissait aucune à l'appui d'une telle plainte; celle-ci fut rejetée. Éventuellement, Duncan fut condamné pour outrage au tribunal.

Dans l'affaire *Morgentaler v. Sa Majesté la Reine,*[60] l'avocat de l'appelant, dès que la cause fut appelée, mit en doute qu'il fût convenable qu'un certain membre de la Cour, le Juge de Grandpré siège dans l'appel. Les faits sont exposés dans le jugement prononcé oralement par le Juge en chef, le 2 octobre 1974:

> «Counsel for the appellant says that he does not attack the personal integrity of Mr. Justice de Grandpré or his objectivity, but he suggests that in view of the wide ranging debate going on in Canada on abortion, Mr. Justice de Grandpré's attention to this appeal could be influenced by reason of views expressed in a speech and comments made by him during a joint meeting in April, 1973 of the Quebec Branch of the Canadian Bar Association and of the Quebec Bar. Mr. Justice de Grandpré was then President of the Canadian Bar Association but he made it quite clear that he was expressing personal views.
>
> This Court is not concerned in this appeal with the public debate on abortion. Its sole concern is with the exercise of its jurisdiction to hear this appeal on questions of law. This is prescribed by s. 618(2) of the Criminal Code under which the appeal has been brought. Every judge of this Court has subscribed to an oath in the following terms:
>
> > 'I, ... , do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as Chief Justice (or as one of the judges) of the Supreme Court of Canada. So help me God.'
>
> All members of this Court, past and present have, to a greater or lesser degree, before appointment to the Bench and to this Court, expressed views on questions which have legal

55. SHETREET, *Judges on Trial,* p. 307.
56. Renaud v. Gugy, 6 R.J.R. 232.
57. [1973] R.C.S. 833, 842-843.
58. supra, p. 34.
59. [1958] R.C.S. 41.
60. Jugement non rapporte.

çon moderne d'envisager la question en Angleterre:

> «The crux of the problem in cases of interest in the proceeding is the ownership of shares or other personal association with a corporation (e.g., having a bank account). Unless a strict view is taken on the matter, that a judge should disqualify himself no matter how small and trivial his share-holding, the matter does not admit of an unqualified rule. The English practice does not take the strict view and allows a judge to sit when the interest is minor or minimal provided that he always discloses it. Whether or not the shareholding would be regarded as minor would depend on the number of shares, when compared with the total capital; the amount involved in the litigation; whether the company is a public or private company; whether the judge has shares in the company which is party to the proceedings or in another company which has an interest in it, and how much interest it has in it; to what extent the issue under adjudication would have any effect on his interest. These and other considerations would determine the matter. If the judge's wife is a shareholder, this is considered in the same light as if the judge himself was a shareholder, and he has to disqualify himself or disclose, as the case may be. If he knows about a near relative who is a shareholder, he would equally be expected to disqualify himself or disclose. Similar considerations will apply if a judge held shares as a trustee, if he has a bank account or was otherwise associated with a corporation.»

Au Canada, dans l'affaire *Ghirardosi v. Minister of Highways for British Columbia,*[48] le Juge Cartwright a cité la décision rendue dans *Dimes* (supra) comme l'a fait le Juge Smith dans la cause *O'Krane v. Alcyon Shipping Co. Ltd.*[49] Dans ni l'un ni l'autre cas la *ratio decidendi* de l'affaire *Dimes* a-t-elle servi de base au jugement rendu. Aussi bien, on ne peut affirmer que la règle de récusation énoncée dans l'affaire *Dimes* a été appliquée au Canada.

Relation de parenté:—

En droit civil, il n'y a guère d'observations à formuler en ce qui a trait à la parenté ou l'alliance. Le premier alinéa de l'article 234 en précise le degré, ce qui ne permet pas, semble-t-il, d'étendre ou de restreindre la portée de la loi à cet égard seulement. Il en est de même quant au neuvième alinéa.

En Common Law, on semble s'en rapporter au principe général qui régit la récusation. C'est ainsi que, d'une part, on met en doute, et à bon droit, le bien-fondé de la décision rendue dans *ex parte Jones,*[50] où un juge de paix a été récusé parce que son grand-père était l'arrière-grand-père du défendeur et que, d'autre part, dans *The King v. Biggar et al: ex. parte McEwen*[51] la Cour d'appel du Nouveau-Brunswick déclare que le critère dans toutes ces causes est de savoir si la parenté et la connaissance du juge sont de nature à créer raisonnablement des préjugés en son esprit.

Amitié et inimitié:—

L'amitié ou l'inimitié du magistrat pour l'une des parties ou même l'un des témoins peuvent, en droit civil et en Common Law, justifier, selon les circonstances, sa récusation.

L'article 234 ne parle pas de l'amitié comme motif de récusation. Cependant, la liste des motifs n'est pas limitative et à la lumière du principe général formulé par Lord Hewart, il semble qu'on ne saurait exclure définitivement l'amitié comme motif de récustion sans tenir compte des circonstances. On peut penser ici à l'amitié intime et agissante, fondée sur une association de caractère émotionnel, tel, par exemple, celle que le magistrat peut avoir envers le médecin qui a récemment sauvé la vie d'un être qui lui est cher.

Dans *Kirk v. Colwyn,*[52] Lord Evershed connaissait l'appelant qui était son dentiste et lui prodiguait l'anesthésie selon que requis. Le savant juriste se récusa parce que le procureur de Kirk devait, aux fins de l'appel, miser sur l'honnêteté de son client.

Le cinquième alinéa de l'article 234 prévoit l'inimitié capitale comme motif de récusation. À la question de savoir ce qu'il faut entendre par inimitié capitale, Rodier répond:

> «. . . il faut que l'inimitié soit décidée, connue, manifestée, occasionnée par l'homicide de quelqu'un de nos proches, par des querelles, par des affaires d'honneur ou d'un gros intérêt, dont le ressentiment porterait à saisir les occasions d'attenter à la vie, à l'honneur, aux avantages temporels de son ennemi.»[53]

En somme, écrit-on dans *La Procédure civile du Châtelet de Paris:*[54]

> «Les cas d'inimitié capitale son infinis; d'ailleurs, comme il est facile d'apprécier ceux de récusation, qu'il ne s'agit point là de droit, mais de choses sur lesquelles tous les hommes

48. (1966) R.C.S. 367, 373.
49. (1960) 32 W.W.R. 178, 181.
50. (1888) 27 N.B.R. 552.
51. (1906) 37 N.B.R. 372.
52. The Times, 13 mars 1958.
53. CARRÉ et CHAUVEAU, *Loi de la procédure civile et commerciale,* 5e éd., 1880, t.3, p. 349.
54. PIGEAU, *La Procédure civile du Châtelet de Paris,* 1787, p. 366.

way — delay is often the best thing that can happen to an accused!);

(2) waiver of time periods — e.g. defence requests for, or consents to, adjournments;

(3) time requirements inherent in the nature of the case;

(4) limitations on institutional resources — e.g. police, prosecutors, attorneys, courts.

Finally, mention should be made of the Court's decision in *Rahey* v. *The Queen,* [1987] 1 S.C.R. 588, wherein the Court held that s. 11(b) applies to judicial delay as well as delay by police or prosecutors.

Several cases have addressed s.11(d). For discussion of the presumption of innocence see *R.* v. *Oakes,* [1986] 1 S.C.R. 103, and *R.* v. *Holmes,* [1988] 1 S.C.R. 914. For discussion of what constitutes an "independent and impartial tribunal" see *R.* v. *Valente,* [1985] 2 S.C.R. 673.

Section 12

For discussion of what constitutes cruel and unusual punishment see *R.* v. *Smith,* [1987] 1 S.C.R. 1045, wherein the Court struck down a seven-year minimum sentence for the importation of drugs.

Section 13

There are two important decisions dealing with s.13. In *Dubois* v. *The Queen,* [1985] 2 S.C.R. 350, the accused had voluntarily testified at his first trial. Subsequently, a new trial was ordered and the accused did not testify. The Crown led as part of its evidence-in-chief the accused's testimony from the first trial. The Supreme Court held that this violated s.13. This decision was followed in *R.* v. *Mannion,* [1986] 2 S.C.R. 272, where the Court held that the Crown could not at a second trial cross-examine an accused about statements inconsistent with evidence he gave at the first trial.

Section 15 — Equality

Section 15 will almost certainly be the most important provision of the Charter. Its wording is very broad — intentionally so in an attempt to signal to the courts that their very narrow interpretation of equality under the *Canadian Bill of Rights* is not appropriate for the Charter. The breadth of s.15 is manifest in three ways: first, the right has four components — equality before the law, equality under the law, equal protection of the law and equal benefit of the law; secondly, there is a fairly extensive list of prohibited grounds of discrimination (race, national or ethnic origin, colour, religion, sex, age, mental or physical disability); thirdly, and probably most importantly, the list of prohibited grounds of discrimination is not closed; it will be possible for the courts to read into s.15 other protected categories. My own guess is that early candidates for judicial inclusion in the s.15 list will be marital status, sexual orientation, criminal record (in some circumstances), pregnancy, size, residence and social or economic status. In making additions to the s.15 list the important question for the courts will be: should there be a presumption that *all* legislative distinctions or classifications violate s.15 (thus forcing governments to resort to s.1 to justify them) or should new protected categories be added only if they are similar in kind to those already enumerated in s.15? I would speculate that the courts would adopt the latter, narrower, standard.

It is too early to tell what will be the ultimate definition of equality. Several major decisions have been handed down by the courts in almost every province, but until the Supreme Court delivers its judgment in *Andrews* v. *Law Society of B.C.* we will not know whether the dreams of those who hope for a meaningful definition of equality have been realized.

Section 1

Section 1 will be in issue in almost every case. (The only situation I can think of where it might not be in issue would be a s.12 case. It is difficult to imagine a government lawyer arguing that although a punishment is cruel and unusual it is nonetheless reasonable!) The leading case — and it is very, very important — is *Oakes.* In that case the Court articulated a two-step process of analysis: first, a court should decide whether a Charter right has been violated; then, if the answer is affirmative, the Court should proceed to the s.1 analysis. *Oakes* also indicates that the s.1 hurdle is a very high one for governments. It consists of two components — first, the government must demonstrate that it has a very important reason or objective for limiting the right; secondly, the limitation must be "proportionate" — it must be designed with care to meet the legislative objective, it must limit the right as little as possible, and there must be a proportionality between the effects of the measures and the objective which has been identified as of sufficient importance to limit the right.

Another issue with respect to s.1 is the meaning of the phrase 'prescribed by law'. In *Therens,* Justice Le Dain said:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s.1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a sta-

tute or regulation or from its operating requirements. The limit may also result from the application of a common law rule.

It is also clear that the onus under s.1 rests on the government: see *Southam* and *Oakes*.

Finally, the government should ordinarily lead evidence to support its s.1 argument (*Oakes*), although this will not be necessary in every case (*Jones* v. *The Queen,* [1986] 2 S.C.R. 284).

Do you have any comment on any article appearing in a past issue of the Journal; or do you have an opinion or viewpoint on any legal matter you would like to share with your colleagues? The Journal would welcome your comments, in writing, for inclusion in the FEEDBACK section.

Avez-vous des remarques à faire concernant un article, n'importe lequel, qui a paru dans une édition passé du Journal; ou avez-vous une opinion, ou peut-être un point de vue, concernant un sujet légal que vous voudriez partager avec votre collègues? Si oui, nous vous invitons d'en soumettre, par écrit, pour faire inclure au FEEDBACK.

Quelques mots de la sagesse pour les juges*

La récusation:—

La confiance du justiciable et la foi du public en l'administration de la justice reposent sur l'intégrité et l'impartialité du magistrat.

En ce qui concerne la récusation, le précepte énoncé par Lord Hewart est d'une importance primordiale.[42]

Ce précepte, le Juge Rivard de la Cour d'appel, le formule ainsi dans la cause *Barthe v. The Queen and Attorney-General of Quebec:*[43]

> «Il est de l'intérêt non seulement des parties, mais également de l'administration de la justice que non seulement les tribunaux soient impartiaux, mais qu'ils écartent tout soupçon raisonnable qu'on pourait entretenir à ce sujet.»

Il ne s'agit pas de n'importe quel soupçon. Comme le dit Lord Denning dans *Regina v. London Rent Assessment Panel Committee, ex parte Metropolitan Properties Company (F.G.C.) Ltd.*[44]

> «There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other.»
>
> Il ajoute:
>
> «The court will not enquire whether he did, in fact, favour one side unfairly.»

Il ne s'agit pas non plus du soupçon que n'importe quelle personne de la rue peut avoir mais bien du soupçon qui peut naître chez le *«reasonable man»* soit, pour le civiliste, chez le «bon père de famille».

Comme la raison de la récusation réside dans le facteur humain, ses motifs et ses règles sont, en substance, les mêmes en droit civil et en Common Law. La différence qu'on croît déceler dans la jurisprudence n'est, la plupart du temps sinon dans chaque cas, qu'apparente et ne tient qu'aux circonstances particulières de l'espèce.

i) Les motifs de récusation: —

On ne saurait dresser une liste limitative de motifs de récusation sans risquer d'exclure de l'application du précepte des cas où peuvent se présenter les circonstances en raison desquelles il a été établi.[45]

En droit civil, les articles 234 et 235 du *Code de procédure civile* qui spécifient les motifs de récusation, sont ici reproduits à l'Annexe E.

En Common Law les motifs les plus habituels sont indiqués dans les traités de doctrine et comprennent: l'intérêt pécuniaire dans le litige mu devant le tribunal, la relation de parenté ou d'alliance avec l'une des parties, le caractère intime de l'amitié ou le caractère capital de l'inimitié du magistrat envers l'une des parties ou d'un témoin, la prédisposition (bias) en faveur d'une des parties, la relation professionnelle antérieure avec un des plaideurs ou l'affaire en litige.

Intérêt pécuniaire: —

De tous les motifs de récusation, l'intérêt pécuniaire semble bien être celui qui, le plus souvent, crée un problème délicat, surtout lorsque cet intérêt réside dans la détention d'actions dans une société.

En Angleterre, il a été jugé, dans l'affaire *Dimes v. Grand Junction Canal,*[46] qu'un décret rendu par le Lord Chancelier, Lord Cottenham, alors qu'il était actionnaire de la compagnie du Canal, était annulable et devait être cassé. À la Chambre des Lords, Lord Campbell déclara:

> «No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interests that he had in this concern».

Lord Campbell fut néanmoins d'avis qu'il y avait lieu d'annuler le décret.

C'est souvent une question discutée que celle de savoir quand la propriété d'actions dans une société en procès, constitue un intérêt financier, capable de nécessiter la récusation du magistrat.

Dans *Judges on Trial*[47] l'auteur, sans citer d'autorité, formule ainsi son opinion sur la fa-

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*Un extrait du livre intitulé *Le livre du magistrat* par le très honourable Gérald Fauteux, C.P., C.C., LL.L., LL.D., C.R., l'ancien juge en chef du Canada, écrit en 1980 à la requête du Conseil canadien de la magistrature. Si on a le temps et l'inclination, le texte entier vaut bien la peine de lire quand même c'est un ouvrage preparé surtout pour les juges nommés par le pouvoir fédéral.

44. [1919] 1 Q.B. 577, 599.
45. Considérer la décision du Juge Bruneau dans *Bourdon v. La Cité de Montréal* (1918) 54 C.S. 193.
46. (1852) 3 H.L. Cas 759, 792.
47. SHETREET, *Judges on Trial,* 1976, p. 309.