PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

VOLUME 15, NO. 1 MARCH 1991

THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURTS PROVINCIALES

THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

EXECUTIVE COMMITTEE MEMBERS 1990-1991

M. le juge en chef associé Yvon Mercier, President
Judge Charles Scullion, First Vice-President
Judge E.S. Bobowski, Second Vice-President
Judge Gerald Barnable, Third Vice-President
Judge Ron Jacobson, Past President
Judge Pamela Thomson, Secretary
Judge Keith Libby, Treasurer

PROVINCIAL REPRESENTATIVES

Judge Bruce LeGrow — Newfoundland
Judge Patrick Curran — Nova Scotia
Judge Andrew Stymiest — New Brunswick
Judge Ralph Thompson — Prince Edward Island
Judge Stephen Cuddihy — Québec
Judge Stanley W. Long — Ontario
Judge Wesley H. Swail — Manitoba
Judge J.B.J. Nutting — Saskatchewan
Judge Fred Coward — Alberta
Judge Stuart Enderton — British Columbia
Judge B. Bruser — Northwest Territories
Judge John Faulkner — Yukon

COMMITTEE CHAIRPERSONS

Judge Douglas M. McDonald, Judicial Compensation
Judge M. Reginald Reid, Editor, Association Journal
Judge Pamela Thomson, Civil Courts
Judge Jean-Marie Bordeleau, Canadian Judicial College
Judge E.S. Bobowski, Judicial Independence
Judge Gerald Barnable, Committee on the Law
Judge Kent Kirkland, Family & Young Offenders Court
Judge Charles Scullion, CBA Liaison
M. le juge Louis Rémillard, Constitution
Judge H.D. Porter, Conference /91
Judge Dolores Hansen, Sentencing

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

Editorial communications are to be sent to:
The Provincial Judges Journal
Box 5144
St. John's, Newfoundland
A1C 5V5

Attention: Judge M. Reginald Reid

EDITOR-IN-CHIEF
Judge Reginald Reid

EDITORIAL BOARD
British Columbia — vacant
Alberta — Judge P.M. Caffaro
Saskatchewan — Judge G.T. Seniuk
Manitoba — Judge Linda Giesbrecht
Ontario — Judge Douglas Latimer
Quebec — M. le Juge Louis Jacques Leger
New Brunswick — Judge Frederic Arsenault
Prince Edward Island — Judge Gerald L. Fitzgerald
Nova Scotia — Judge Timothy T. Daley
Newfoundland — Vacant
North West Territories — Judge R. Michel Bourassa

EXECUTIVE COMMITTEE MEMBERS 1990-1991

President
M. le juge en chef associé Yvon Mercier
Cour du Québec
300, boul. Jean Lesage
Québec, Québec
G1K 8K6
Tel: (418) 649-3424
Fax: (418) 643-8432

1st Vice-President
Judge Charles Scullion
Ontario Court (Provincial Division)
444 Yonge Street
Toronto, Ontario
M5B 2H4
Tel: (416) 965-7420
Fax: (416) 324-4591

2nd Vice-President
Judge Ernie S. Bobowski
Provincial Court
120 Smith Street East
Yorkton, Sask.
S3N 3V3
Tel: (306) 786-1400
Fax: (306) 786-6886

3rd Vice-President
Judge Gerald Barnable
Provincial Court, P.O. Box 369
Placentia, Newfoundland, A0B 2Y0
Tel: (709) 227-2002
Fax: (709) 227-5747

Secretary/Executive Director
Judge Pamela Thomson
Judges' Chambers
16th Floor, 400 University Avenue
Toronto, Ontario, M5G 1S8
Tel: (416) 965-3715
Fax: (416) 324-4591 or
965-9721

Treasurer
Assoc. Chief Judge Keith Libby
Provincial Court, 222 Main Street
Vancouver, B.C.,V6A 2S8
Tel: (604) 660-4300
Fax: (604) 660-4322

Past President
Judge Ron Jacobson
Provincial Court, Court House
320 - 4th St. South
Lethbridge, Alberta, T1J 1Z8
Tel: (403) 381-5275
Fax: (403) 381-5772

PROVINCIAL REPRESENTATIVES

Newfoundland
Judge Bruce LeGrow
Provincial Court
35 Alabama Drive
Stephenville, NF
A2N 3K9
Tel: (709) 643-2966
Fax: (709) 643-4022

New Brunswick
Judge Andrew Stymiest
Provincial Court
599 King George Highway
Newcastle, NB
E1V 1N6
Tel: (506) 622-4780

Nova Scotia
Judge Patrick Curran
Provincial Court
5250 Spring Garden Road
Halifax, N.S.
B3J 1E7
Tel: (902) 421-1316

Prince Edward Island
Judge Ralph Thompson
Courthouse
108 Central Street
Summerside, PEI
C1N 3L4
Tel: (902) 436-4217
Fax: (902) 888-3928

Quebec
M. le juge Stephen Cuddihy
Cour du Quebec
Palais de Justice
400, rue Laviolette
Saint-Jerome, Quebec J7Y 2T6
Tel: (514) 436-7455

Ontario
Judge Stanley W. Long
Ontario Court (Provincial Division)
80 The East Mall
Toronto, Ontario
M8Z 5X6
Tel: (416) 252-7885
Fax:

Manitoba
Judge Wesley H. Swail
5th Floor, 408 York Ave.
Winnipeg, Man., R3C 0T9
Tel: (204) 945-7162

Saskatchewan
Judge J.B.J. Nutting
Provincial Court
230-20th Street East
Saskatoon, Sask.
S7K 2H6
Tel: (306) 933-6689

Alberta
Judge Dolores M.M. Hansen
Family & Youth Courts
1A Sir Winston Churchill Square
Edmonton, Alberta, T5J 0R2
Tel: (403) 427-7805
Fax: (403) 427-2077

British Columbia
Judge Stuart Enderton
Provincial Court
320 Wood Street
Nelson, BC
V1L 1S6
Tel: (604) 354-6165
Fax: (604) 354-6539

Yukon Territory
Judge John Faulkner
The Law Courts
2134 Second Avenue
Whitehorse, Yukon, Y1A 5H6
Tel: (403) 667-5438
Fax:

Northwest Territories
Judge B. Bruser
Territorial Court
Box 1965
Innuvik, NWT
X0E 0T0
Tel: (403) 979-2451

COMMITTEE CHAIRPERSONS AND SPECIAL COMMITTEES

Canadian Judicial College
Judge Jean-Marie Bordeleau
Ontario Court (Provincial Division)
The Court House
161 Elgin Street
Ottawa, Ontario, K2P 2L1
Tel: (613) 239-1339
Fax: (613) 239-1506

Association Journal
Judge M. Reginald Reid
Provincial Court
P.O. Box 5144
St. John's, Nfld., A1C 5V5
Tel: (709) 726-7181
Fax: (709) 576-2161

Civil Courts
Judge Pamela Thomson
Judges Chambers
16th Floor, 400 University Avenue
Toronto, Ontario
M5G 1S8
Tel: (416) 965-3715
Fax: (416) 324-4591 or
965-9721

Committee on the Law
Judge Gerald Barnable
Provincial Court
P.O. Box 369
Placentia, Newfoundland
A0B 2Y0
Tel: (709) 227-1001
Fax: (709) 227-5747

Judicial Independence
Judge Ernie S. Bobowski
Provincial Court
120 Smith Street East
Yorkton, Saskatchewan
S3N 3V3
Tel: (306) 786-1400
Fax: (306) 786-6886

Family & Young Offenders Court
Judge Kent Kirkland
Ontario Court (Provincial Div.)
P.O. Box 906, Suite 402
199 Front Street
Belleville, Ontario K8N 5B6
Tel: (613) 968-8583

Conference /91
Judge H.D. Porter
Ontario Court (Provincial Div.)
Judges Chambers
444 Younge Street
Toronto, Ontario, M5B 2H4
Tel: (416) 965-7420

Constitution
M. le juge Louis Rémillard
Cour du Québec
300 Boul. Jean LeSage
Québec, Québec
G1K 8K6
Tel: (418) 649-3540

Compensation
Judge Douglas M. McDonald
Provincial Court
323 - 6th Avenue S.E.
Calgary, Alberta
T2G 4V1
Tel: (403) 297-3156
Fax: (403) 297-3179

CBA Liaison
Judge Charles Scullion
Ontario Court (Provincial Division)
444 Yonge Street
Toronto, Ontario
M5B 2H4
Tel: (416) 965-7420
Fax: (416) 324-4591

Sentencing
Judge Dolores M. M. Hansen
Family & Youth Courts
1A Sir Winston Churchill Square
Edmonton, Alberta
T5J 0R2
Tel: (403) 427-7805
Fax: (403) 427-2077

CHANGES?

New Provincial Representative?

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

New Compensation Terms?

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

* * * * * *

CHANGEMENTS?

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

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

nouveaux termes de la compensation/ rémunération?

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

President's Page

by/par Judge Yvon Mercier/M. le juge Yvon Mercier

Since my election as President of our Association, I have had an opportunity to visit some provincial associations including Newfoundland and British Columbia. Although I had been invited to New Brunswick, it was not possible to coordinate my schedule so as to be able to attend that meeting. However, I plan to be back on track in time for the meeting organized by the Education Committee for the maritime provinces.

It gives me pleasure to state that in spite of real financial difficulties, our Association continues to leave no stone unturned to do things in such a way that the improvement of our members keeps them abreast of changes in the law. Indeed, each province and territory are redoubling their efforts in such a way as to ensure their judges receive continuing improvement courses enabling them to adequately keep up with changes in the law and jurisprudence. More especially, I know that Judge André Saint-Cyr is presently completing the organization of the New Judges' Programme, which course will be held as usual at Val Morin during April. Besides, Judge George Pérusse of New Brunswick is putting the final touches on the preparation of a programme for the judges of the Eastern provinces, which programme will take place in New Brunswick, in all probability, at the beginning of June.

As well, for the Western provinces and the territories, Judge Doug Campbell is organizing a study session involving 75 judges at Yellowknife between June 23 and June 29. For its part the Canadian Judicial Centre, even though imperfectly, likewise makes available to provincially appointed judges their personnel and resources with a view to providing to those who request them their services in matters of professional development. For the Centre, finances constitute a difficulty which does not permit it to accomplish all the work it wishes.

That leads me into speaking about our financial situation. We are presently entering a period in which our financial problems will likely require us to be extremely prudent. Indeed, as underlined by a letter recently received from Judge Keith Libby, our association continues to exist on a 1982 budget even though costs have continued to increase in all areas of expenditure, without counting the costs of travel and lodging when arranging meetings for both the national body and the Executive. Over and above that, it is now necessary to add the GST which uses up 7% of our meager revenue. As our Treasurer

Depuis mon élection à la présidence de notre Association, j'ai eu l'opportunité de visiter quelques Associations provinciales dont celle de Terre-Neuve et celle de Colombie-Britannique. Bien que j'aie été invité à celle du Nouveau-Brunswick, il me fut impossible de coordonner mon agenda de façon à pouvoir être présent à cette rencontre. Toutefois, j'ai bien l'intention de me reprendre au moment de la rencontre organisée par le Comité sur l'education et regroupant toutes les provinces maritimes.

Il me fait plaisir de constater qu'en dépit de difficultés financières réelles, notre Association continue de mettre tout en oeuvre pour faire en sorte que le perfectionnement de nos membres demeure à la fine pointe de l'évolution du droit. En effet, chacune des provinces et territoires multiplie les efforts pour faire en sorte que leurs juges reçoivent des cours de perfectionnement leur permettant de suivre adéquatement l'évolution du droit et de la jurisprudence. D'une façcon plus spéciale, je sais que l'honorable juge André Saint-Cyr termine présentement l'organisation des cours aux nouveaux juges, lesquels cours seront dispensés à Val Morin comme à l'habitude durant le mois d'avril. D'autre part, l'honorable juge Georges Pérusse du Nouveau-Brunswick met la dernière main à la préparation d'un programme pour les juges des provinces de l'est, programme qui se déroulera au Nouveau-Brunswick au début de juin prochain selon toute vraisemblance.

D'autre part, pour les provinces et les territoires de l'ouest, l'honorable juge Doug Campbell organise également une session d'étude devant regrouper 75 juges à Yellowknife entre le 23 et le 29 juin prochain. De son côté le Centre judiciaire canadien, bien que de façon imparfaite, met également à la disposition des juges de nomination provinciale tout son personnel et ses disponibilités afin de fournir à ceux qui le demandent des services en matière de perfectionnement. Les budgets constituent pour ce Centre une difficulté qui ne lui permet pas d'accomplir tout le travail qu'il voudrait.

Cela m'amène à parler de notre situation financière. Nous entrons présentement dans une période où nos problèmes d'argent nous obligeront probablement à une extrême prudence. En effet, comme nous le soulignait l'honorable juge Keith J. Libby dans une lettre qu'il m'adressait récemment, notre Association continue de vivre suivant un budget qui date de 1982 alors que les coûts augmentent sans cesse dans toutes nos sphères de dépenses, sans compter les frais

has said, nobody has yet found the miracle formula for solving those problems.

I intend to put this matter to the Honourable Kim Campbell, Federal Minister of Justice, when I, together with other members of the Executive, next meet with her. Our devoted Pamela Thomson has prepared, at my request, a short document recounting the existence and the views of our different committees, so as to adequately acquaint the Minister with the risk of seeing certain of those committees disappear because of lack of money.

It is true that we are in a time of recession and that our Country's participation in the Gulf war does not help our cause. Besides, there might be reason to envisage the possibility of reducing travel expenses and lodging by deciding to hold our annual meetings in the center of the country rather than by visiting each province and territory in turn. I mean to put this question to the Executive at our April meeting.

I don't want these remarks to seem too pessimistic but as the saying goes, money makes the world go round, and if we do not find sufficient funds to continue our work at the same level as always, there will be only one solution, that is to say cut-backs in certain expenditures and changing certain of our attitudes. I dare to hope that after our meeting with Ms. Campbell, it will be possible to bring you better news. I ask that you make every effort to assist us in getting out of this situation.

de transport et de logement lorsque nous organisons des rencontres soit au niveau national ou même au niveau de notre Exécutif. Par-dessus tout cela, il faut ajouter la T.P.S. qui vient encore prendre 7% de nos faibles revenus. Comme le dit notre trésorier, personne n'a encore trouvé la formule miracle pour résoudre ce problème.

J'ai l'intention de soumettre bien directement la question à l'honorable Kim Campbell, ministre fédérale de la Justice, lorsque je la rencontrerai prochainement avec quelques membres de l'Exécutif. Notre dévouée Pamela Thomson a préparé à ma demande un court document relatant l'existence et les vues de nos différents comités, de façon à sensibiliser adéquatement madame la ministre sur le risque de voir certains de ces comités disparaître faute d'argent.

Il est vrai que nous sommes en temps de récession et que notre participation à la guerre du Golfe ne sont pas de nature à aider notre cause. D'autre part, il y aurait peut-être lieu d'envisager la possibilité de réduire nos dépenses de voyage et de logement en décidant de tenir nos rencontres annuelles au centre du pays plutôt que de visiter chacune des provinces ou territoires à tour de rôle. J'entends soumettre cette question à l'Exécutif lors de sa réunion en avril prochain.

Je ne veux pas que ces propos soient trop pessimistes mais comme dit le proverbe, l'argent est le nerf de la guerre, et si nous ne trouvons pas les sommes suffisantes pour continuer notre exercice sur le même principe que nous l'avons toujours fait, il ne restera qu'une seule solution c'est-à-dire couper dans certaines dépenses et modifier certaines de nos attitudes. J'ose espérer qu'à la suite de notre rencontre avec madame Campbell, il me soit possible de vous apporter de meilleures nouvelles. Je vous demande de faire tous les efforts pour nous aider à sortir de cette situation.

In Lighter Vein*

Friendship:
Q. How do you get on with B.?
A. Oh, I really like her, she's helped me out a lot, and been a good friend to me. But I don't like that being bitten and strangled.
Romance:
Q. How did you meet R.?
A. Well, I was working full time at the time, shifts, and after the late shift all of us workers went to have a few beer at the Flamingo Hotel. R. was there, he was drunk, he made a real nuisance of himself, whistling at me, and carrying on to embarrass me in front of my friends. So I went over to sit at his table just to keep him quiet. And we were going to go on to the cabaret, and I wanted to shake him, and I went to the washroom, and he came in, followed me right into the ladies washroom and then after he followed me home. And that was it, that was how we started living together.
Williams Lake
Q. Do you know Miss ...?
A.: Yes; she common-lawed me for six months.
Anahim Lake
Friesen P.C.J.: "This is a defence motion to quash an information which alleges a breach of an undertaking given to a judge. The particulars indicate that the undertaking was given before His Honour Judge T.C. Smith, a Provincial Court Judge in this region, who often sits in Anahim Lake.

The argument is that Smith is not a judge because a charge properly framed under the charging section should read "Justice or Judge" or "Justice" in the case of a provincial court judge. By definition a "Judge" is, in British Columbia, a superior court judge.

That is a strict technical legal argument. It is legal jargon. It is said to have succeeded in the Provincial Court in Kamloops. Counsel could produce this judgment but I have ruled against a further adjournment of three months for that purpose. Since I do not have a copy of that judgment I am not able to deal with the reasoning, but I believe it ought to be distinguished because of the peculiar circumstances that prevail in Anahim Lake.

Provincial Court sittings here in Anahim Lake are scheduled infrequently, usually once every three months. Court is usually convened in this Community Hall. The provincial court judge, lawyers and court staff generally travel from Williams Lake. I came from Quesnel, which is about 440 kilometres away. Defence counsel is from the City of Kamloops, which must be at least 600 kilometres away. When people travel those distances court will surely be held on the tail gate of a pickup truck, if necessary.

Residents of Anahim Lake are very progressive. That became evident yesterday in a Family Court hearing. A witness said that some recommendations of the Sullivan Commission with respect to reforms in the educational system for this Province were already in effect in Anahim Lake about a year ago. The recommendations are expected to be adopted, but it will be some time yet before the rest of the Province catches up to Anahim Lake.

The jargon once used by judges and lawyers in that justice system is old history in Anahim Lake. They already use plain language. If the legal reforms recommended by the Hughes Commission are implemented, plain language in the judicial system will also find its way into the urban areas of the Province.

Residents of Anahim Lake know Smith as a judge. If you breach your undertaking to him you are absolutely sure he is a judge. I have been a judge for over twenty years. I too know that Judge Smith is a judge and a damn good one.

In Anahim Lake the residents use common sense, which they sometimes call horse sense.

There are lots of horses in Anahim Lake. Yesterday we saw more horses than usual in this settlement. It was by-election day, and our usual court room, which is this hall, was used as a polling place. Some people came by horseback, tied their horses to the front door, and voted. Some horses left piles of manure at the door step. They did not, however, bring it into the court room. Now that is horse sense!

Lawyers from Kamloops have to travel at least six hours to get to Anahim Lake. Lawyers generally have a very active mind. They have lots of time to dream up exotic legal arguments when they travel that long. However, they should pause at the front door of our court room, and look down, and contemplate those piles of manure and their arguments.

Had that been done in this case the lawyer might have been heard to say "That's horse....!" and have left his argument outside the court room too.

Now that is plain language and common sense. In any event, it's obviously amendable. R. v. Moore (1988) 41 S.C.C. (3d) 289. Motion to quash denied."
Quesnel
Overheard: "I think you had better see a lawyer or a notary republic."

From a transcript: "This hersey evidence is, of course, inadmissible."

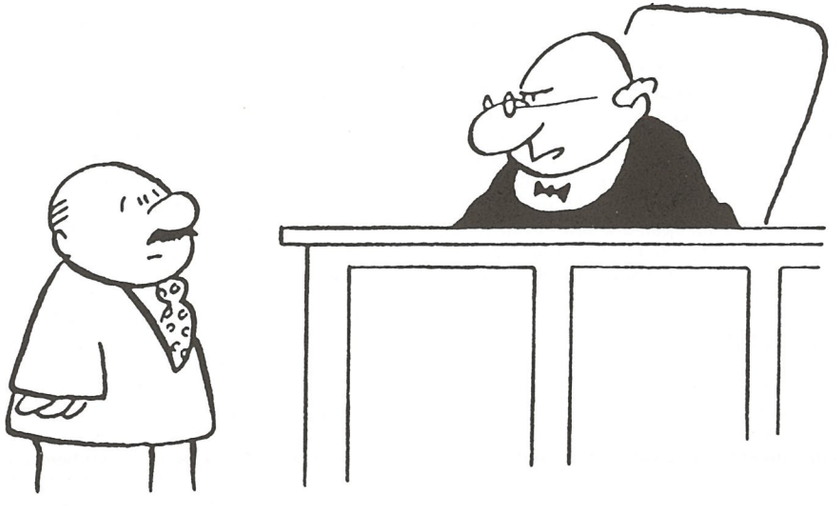
The local judge, after hearing a witness say, for the umpteenth time, that something or other was done, without identifying the actor, then falls into the same trap: "I wish the passive voice could be abolished from the English language."

*We are indebted to our colleagues in British Columbia for this contribution to "In Lighter Vein".

of Canada that the proposals for radical change that have been put forward are seriously lacking in quality, and that only a more responsible and profound analysis of the question of court structure may produce decisions that merit the support of the public.

7. Here we are in England, where just such a commission — the Beeching Commission — produced a report in 1969 on the administration of justice (H.M.S.O. Cmnd. 4153]. In regard to the criminal courts, it recommended the creation of a new Crown Court. Crown Courts have now been in existence for the better part of two decades. Each Crown Court consists of three High Court Judges (of whom one is the supervisor in the region served by the court) and a number of County Court judges. Very serious criminal cases may be tried only by the High Court judges. The least serious cases are tried by the County Court judges. The middle range of case is assigned to one level or other by the supervising judge, depending on a number of factors. Thus, without merger of the two courts, administrative coherence is achieved. The magistracy — the equivalent of the Provincial Courts — is not included, but conceivably the Beecham model could be adapted further. This might include the Provincial Courts (with all their present jurisdiction in regard to federal and provincial offences) under the same umbrella administration as the federally-appointed superior court, thus ensuring the sought-for increased administrative efficiency and elimination of any duplication of personnel and equipment. Whether that model is appropriate or not, the main point is that neither the LRC Working Paper nor the Ontario Paper considers this option — a symptom of the quality of these papers. The Canadian taxpayer deserves better.

8. The future of the structure of the courts exercising criminal and civil jurisdiction in the Canadian provinces should be studied by a federal Royal Commission that would enjoy the cooperation of the federal and provincial governments and the resources to enable it to produce a report that considers all the options comprehensively and in an informed manner.



"Court is adjourned for one hour, counselor, at the end of which time I don't want to see any more silly mustaches in this courtroom!"

Editorial Page

By any standard of evaluation, one of the more significant effects of the adoption of the *Charter of Rights and Freedoms* in 1982 is the manner in which it has influenced the work of judges. The full extent of that influence has not yet been ascertained but enough is now known to be able to say that judges are in an unprecedented position to influence the direction of society and this has made judges not only more powerful but also of higher profile.

Both the decisions made by judges and the reasons for those decisions are scrutinized to an unprecedented degree. Reporting of decisions not only by local media but also by the national media is extremely high while special interest groups make certain that decisions affecting their field of interest are analyzed, scrutinized and publicized.

This means that the integrity and credibility of the judiciary is subjected to challenges as never before. It is incumbent upon judges therefore to not only be impartial and objective in the performance of their duties, but they must also be seen to be of otherwise unimpeachable character in their daily affairs.

This is an extremely high standard to demand of a fellow human being but high standards are essential in powerful and influential offices. The standard cannot be relaxed. This, then, begs the question as to how this standard is to be achieved and maintained given that the fundamental nature of the profession requires a judge to be independent, "to do right to all manner of people . . . without fear of favour, affection or ill will".

There is no doubt that the first step in this process involves the quality of selection and appointment of judges. In appointing judges the merit principle must prevail. It is not suggested that other than the merit principle presently exists but it is not certain that popular perception agrees. It still seems that many people believe the stereotypical patronage appointment is the order of the day and this perception must be changed in order to foster continued confidence in the judiciary with its influential role in the daily lives of us all.

This is no small task considering that in Canada judicial appointments are routinely made by ten provincial and two territorial governments as well as by the Federal Government.

In an attempt to achieve the above goal, in the past few years judicial councils and/or other forms of screening committees have been established to advise provincial and territorial governments on their appointments. Since at least 1988 the Federal Government has also had a formal consultative procedure built into its process of appointment. To its great credit, the Federal Government has continued to monitor, review and revise its process of appointing judges so as to eliminate patronage and enhance the merit principle.

The latest revision of, and changes to, the Government's appointments policy has occurred as recently as February of this year, as reported elsewhere in this Journal. Those changes should go a long way in enhancing the integrity of the judiciary as political or other patronage is minimized in the appointments process.

This can only bode well for the country in keeping with the aims of the *Charter* to ensure to every person on trial for an offence "to a fair and public hearing by an independent and impartial tribunal".

— M. Reginald Reid
Editor-in-Chief

Feedback

February 28th, 1991

Editor, Association Journal

Dear Reg,

At page 5 of the *Journal* (September 1990), last paragraph in the right-hand column, fourth line from the bottom, several words are omitted from the sentence which reads "Words are contributions".

That statement may be true, but Keith Libby is a doer, not a talker (except when he has to be). Just for the record, my report stated:

Words are not enough to properly recognize his worth and contributions.

Don't the gremlins ever take a holiday?

Yours truly, Judge R.A. Jacobson

(Editor's Note: Sincerest apologies to both Judge Jacobson and Judge Libby. You can be sure the gremlins never rest!)

News Briefs

ALBERTA

Retirements

His Honour Judge J.S. Woods, Assistant Chief Judge of the Civil Division, effective January 2, 1991.

His Honour Judge E.P. Adolphe, Criminal Division, Calgary, effective March 1, 1991.

MANITOBA

At the annual meeting of the Association held on December 7, 1990, the following Officers of the Provincial Association of Manitoba were elected:

Past President — Judge Winston E. Norton
President — Judge Wesley H. Swail
Vice-President — Judge Marvin F. Garfinkel
Secretary — Judge Ronald J. Myers
Treasurer — Judge Frank D. Allen

The following Judges were elected as Members-at-large:

Judge Susan Devine
Judge Linda Giesbrecht
Judge Judith M. Webster
Judge Brian Giesbrecht
Judge William Martin
Judge John Guy
Judge Charles K. Newcombe

Judge Susan Devine continues as Chairman of the Education Committee for the Association.

ONTARIO

Appointments

His Honour Judge David A. Fairgrieve to Brampton, effective December 21st, 1990.

Her Honour Judge Donna G. Hackett to Toronto effective December 21st, 1990.

Her Honour Judge Elenore A Ready to Brampton effective December 21st, 1990.

Her Honour Judge Janet M. Simmons to Brampton effective December 21st, 1990.

His Honour Judge Charles H. Vaillencourt to Toronto effective December 21st, 1990.

Her Honour Judge Mary F. Dunbar to Toronto effective February 1st, 1991.

Her Honour Judge Inger Hansen to Ottawa effective February 1st, 1991.

Her Honour Judge Marion E. Lane to Toronto effective February 1st, 1991.

Retirements

His Honour Judge Peter J. Wilch, Toronto. Appointed April 1st, 1965, retired November 30th, 1990. Elected Honorary Life Member of the Association November 30th, 1990.

Resignations

Her Honour Regional Senior Judge Mary L. Hogan of Metropolitan Toronto, appointed March 2, 1987, appointed Regional Senior Judge September 1, 1991, resigned effective February 1, 1991 to become the first woman Deputy Attorney-General for Ontario.

NEWFOUNDLAND

Retirement

His Honour Associate Chief Judge E.J. Langdon, Grand Falls, effective March 31, 1991.

Judge Langdon had an extensive involvement with the Executive of the Association. He is a former President (1984-85) and former Secretary-Treasurer/Executive Director (1986-87). In 1987 he was elected Honorary Life Member of the Association.

be created? This is not the time or place to discuss that option in detail. Suffice it to point out that the LRC does not deal with this problem. The Ontario Paper, while it discusses the structure of the appeal courts in some detail, leaves the matter up in the air. Yet no decision about a single trial court can rationally be taken if this issue is left unresolved.

2. At present, the Provincial Court judges preside at trials where the accused is charged with an offence under provincial legislation. These include offences under the provincial Highway Traffic Act (such as careless driving) and the provincial Environment Protection Act (which creates offences in which very heavy penalties may be imposed). The Law Reform Commission's Working Paper simply does not discuss what court would try these cases. The Ontario "Discussion Paper" says (in one short sentence) that "municipal and traffic cases" would be heard "by justices of the peace sitting as part of the unified court". The Paper does not refer to offences under provincial legislation other than the Highway Traffic Act. Assuming that the proponents of a Unified Criminal Court contemplate that provincial offences would all be tried by a new low-level court, or at least by some kind of J.P. division of the trial court, the members of such a court would not be legally trained and would not have security of tenure and other guarantees of judicial independence. If that were to occur, we would have a new lower court created, dispensing an unquestionably lower quality of adjudication. Such a move would run quite contrary to the developments of the past three decades, which have seen lawyers rather than laymen appointed as judges of the Provincial Courts. The public would not benefit from such regression. The use of lay Justices of the Peace to carry out functions that many present Provincial Court Judges consider to be unworthy of their abilities would open the door, even wider than it already is, to the development of a level of the administration of justice that is of a vastly inferior quality.

CONCLUSIONS

1. The LRC Working Paper and the Ontario Discussion Paper base their proposals on unproven premises and ignore important aspects of what makes for good judges and quality judging.

2. These papers are selective in their methodology and superficial in their reasoning. They are sparing in details as to what is said to be wrong with the present system and what would be better if their proposals were carried out.

3. These papers have failed to establish that the radical changes they propose would benefit the public either in terms of efficiency or of the quality of justice. Equally important, these papers have failed to dispel inquietude that their proposals might in fact damage the quality of the administration of justice. The public are entitled to a more comprehensive, balanced, detailed and better-reasoned analysis before changes are undertaken at either the federal or provincial levels of legislative jurisdiction.

4. These papers have failed to mesh their recommendations with what should happen to the appellate process and provincial offences. It is like serving dessert without a fork or spoon.

5. Both the LRC and the Ontario Papers ritually invoke, as quasi-Biblical support for their proposals, the anti-hierarchical writings of some academics, whose writings are as dependent upon unproved premises as are the papers, and who are prone to rhetoric (e.g. hierarchy = elitism) that does not advance the quality of their analysis. Reliance is placed also on the writings of another academic of undoubted distinction, but his twenty-year-old criticism of the quality of justice produced by the Provincial Courts is irrelevant to the present state of affairs in my own province and most other provinces. It may be true, and if true it is regrettable, that the governments of Ontario have failed in the past 20 years to provide that level of personnel and physical resources that the governments of other provinces have provided. As to that I cannot comment, other than to say that the governments of other provinces, such as Alberta, have not been so neglectful.

6. Indeed, viewed from the perspective of the present state of affairs in Alberta (and I am confident that the same would be true of the perspective of the present state of affairs in the other western provinces), the proposals made in Ottawa and in Toronto are substantially an attempt to meet what are seen as problems in Ontario. It would not ordinarily be any of the business of an Alberta judge to comment on what may or may not be appropriate in Ontario. But if, as is the case here, there is a danger that the Ontario tail will wag the Canadian dog, judges and lawyers outside Ontario may and should feel free to criticize not only what is put forward by the Law Reform Commission of Canada but also what is put forward by a Ministry of the Government of Ontario. As far as the criminal jurisdiction of the courts is concerned, what is proposed in Ontario, if carried out, would require the cooperation of the federal government whether administrative, financial or even constitutional. Any such accommodation of the wishes of the government of the day in Ontario, effecting as it would such broad and profound changes in the administration of justice, would not be likely unless it were applied to other provinces as well. It is that danger that justifies my taking this opportunity to draw to the attention of the judges

strangely says that, once appointed *because* they have experience in the criminal law, judges of the Unified Criminal Court should be "allowed" [not encouraged] "to develop new areas of expertise by rotation into another division (subject, of course, to the approval of the chief justice)." This "flexible form of specialization" would maintain "the highly valued principle of judicial generalism" as a "vital" characteristic of the new court system and would "overcome"the "disadvantages" of "excessive compartmentalization" "including judicial burnout or jadedness and the reluctance of excellent judicial candidates to join a 'narrow' court."

(d) It is clear that the Ontario Paper contemplates that similar "expertise of specialist judges" would be a characteristic of each division. From this it is safe to infer that similar qualifications for appointment would be exacted: appointees to the civil division would have to be experienced in civil litigation, and appointees to the family division would have to be experienced in family law. The Ontario Paper specifies that they too, to avoid the disadvantages of excessive compartmentalization, would be "allowed" to rotate into another division.

(e) Gone, unsung, from the ranks of potential judicial candidates under the Ontario plan, would be those practitioners who have not specialized in any of these three areas. Gone would be the able solicitors who do not go to court or have not done so since their early days of practice. Gone would be the planning and municipal law specialists because their specialty would (according to the Ontario Paper) no longer be within the jurisdiction of the trial court. Gone would be the general civil litigation/criminal law practitioners who may be jacks of all trades but "experts" in none.

(f) So what would we have? We would experience the appointment of a narrower range of specialists and of fewer or no generalists, in the name of supposed greater "efficiency". But once the experts are appointed (says the Ontario Paper) they should be allowed to avoid becoming "jaded" (i.e. worn out) by exposure to generalism. Thus does the Ontario Paper admit that specialization wears judges out. Most trial judges I know would agree that the assignment of a judge to one kind of work month in month out, year in year out, is likely to cause him or her to become worn out (thus foregoing the "efficiency" that specialization supposedly enhances).

(g) Most trial judges would also recognize that, especially in regions or centres where a specialist judge is one of very few exercising the specialist jurisdiction, the Ontario proposal is likely to cause accused persons and civil litigants to be subjected to his or her increasing inflexibility over the years. Such a judge becomes less and less likely to find merit in principles or procedures that differ from those he or she valued in his or her formative years. This disadvantage of specialization, both in the structural organization of the courts and at the appointment stage, is not mentioned by the Ontario Paper.

(h) Nor does either the Ontario paper or the LRC Working Paper mention another point upon which most experienced trial judges would agree: that a judicial appointee who is a generalist is just as likely to be as good a judge as one who is a specialist. Furthermore, a long-serving judge who has enjoyed the benefits of a generalist court, that pitches him or her one week into the area and the next week into another, will be a *better* judge in the long run because of the variety. Such judges will not be so likely to have compartmentalized minds. For example, they will be better able to apply the principles of the criminal law and sentencing if they have a generalist's broad view of what the functions of law are. Let me give an example. Of considerable importance at the present time is the manner in which a trial judge applies the Charter of Rights in criminal cases. A generalist will be at least as able as will a specialist criminal law practitioner, when applying the Charter of Rights, to reflect the views of the community as to what is "reasonable" and to decide when the admission of evidence that has been obtained by unconstitutional means would "bring the administration of justice into disrepute".

POINTS NOT CONSIDERED, OR INADEQUATELY CONSIDERED

Those who promise that a single trial court would enhance the administration of justice fail to deal at all, or deal at best inadequately, with the following important issues:

1. At present, under the Criminal Code, very many appeals are heard by a judge of the superior court from trial decisions of the Provincial Court. There are similar appeals from trial decisions of the Provincial Court under provincial legislation. If there were a single trial court, who would hear these "summary conviction appeals"? It surely should not be another judge of the same court. The LRC Working Paper does not tell us. The Ontario Discussion Paper proposes that such appeals be heard by either the Court of Appeal or a new intermediate appeal court. If the present provincial Courts of Appeal were to hear them, the workload of these courts would be stretched to the breaking point. Something would then have to be done to solve that problem. Should more judges be added to the provincial courts of appeal? There is a view, held strongly by many, that some of our provincial courts of appeal already have too many judges for the good of a cohesive appellate court. Should some new intermediate court of Appeal

Some Recent Developments in the Law of Evidence*

by Professor R.J. Delisle**

SIMILAR FACTS

In *R. v. D. (L.E.),* (1989) 71 C.R. (3d) 1 (S.C.C.), the accused was charged with two counts of sexual assault. The allegations arose out of separate incidents in July 1985. The complainant, the accused's daughter, was 17 years old at the time of the incident. The Crown sought to introduce evidence of numerous incidents of sexual fondling and intercourse from December 1978 to May 1981, and further incidents of sexual touching in December 1983 and Spring 1985. The accused had faced several charges, including incest, arising from the incidents alleged prior to May 1981, but the Crown had entered a stay of proceedings on all these charges in 1982. In that instance the daughter had refused to discuss the matter with the police. In her testimony in the present case, she explained her earlier refusal as being the result of fear, unwillingness to hurt her father and guilt at being the cause of her parents' separation. Counsel for the accused did not object to the admission of the allegations of incidents in December 1983 and Spring 1985 but did object to the admission of the evidence of incidents alleged to have occurred prior to May 1981. The trial judge ruled that the evidence of the alleged incidents prior to May 1981 should be excluded because the probative value of the evidence was outweighed by its prejudicial effect. The judge warned, however, that the excluded evidence might become admissible as a result of questions asked in cross-examination or evidence introduced by the defence. Defence counsel, during his cross-examination of the complainant's mother, posed numerous probing questions about the state of family relations both prior to and after May 1981, implying hostility as a reason for false charges being laid. An unexpected response to one of these questions referred to the previous charges of incest. Defence counsel did not move for a mistrial but cross-examined further on the events surrounding the incest charge in an attempt to minimize the damage caused. Following an adjournment defence counsel did move for a mistrial but the motion was refused on the basis that the situation was created by the defence. The judge ruled that the complainant's allegations of acts of sexual misconduct prior to May 1981 were now admissible to allow the complainant "to tell her entire story". In his charge to the jury the judge warned them that the accused was only charged with the acts alleged to have occurred in July 1985 and that the previous acts which were alleged were simply "background". The accused was convicted. His appeal was dismissed and he appealed further.

In the Supreme Court of Canada, Justice Sopinka gave the majority judgment. Justices McIntyre, Lamer and Wilson concurred. The majority decided that evidence of the sexual activities prior to May 1981 was logically connected to the present charges. However, they noted that no misconduct as serious as the earlier allegations was alleged to have occurred after May 1981. In addition, no evidence other than the complainant's testimony was adduced to prove the offences in the present charges. While saying that evidence other than that of the complainant is not essential in every case before similar acts are admissible, the court noted that in *D. (L.E.)* the similar fact evidence bore nearly the entire burden of proving the Crown's case against the accused. They decided that the probative value of the similar fact evidence was not sufficient to overcome its prejudicial effect and therefore should have been excluded.

The Court also held that the charge to the jury with respect to the similar fact evidence of December 1983 and Spring 1985 was deficient. The Court noted that the inherent prejudicial effect of similar fact evidence may be felt by a jury in three main ways. The first is that the jury, if it accepts that the accused committed the prior bad acts, may assume that the accused is a "bad person" who is likely to be guilty of the offence charged. The second effect on the jury might be a tendency for the jury to punish the accused for past misconduct by finding the accused guilty of the offence charged. The third danger is that the jury might become confused as it concentrates on resolving whether the accused actually committed the similar acts. There is a danger that the jury might substitute their verdict on that matter for their verdict on the issue which they are in fact trying. While the judge's warning that the accused was not on trial for the previous misconduct might have minimized the second prejudicial effect, it did nothing to minimize the first and third dangers. The jury should be instructed that if it accepts the evidence of the similar acts, that evidence is relevant for the limited purpose for which it was admitted. *The jury must be specifically warned that it is not to rely on the similar fact evidence as proof that the accused is the sort of person who would commit the offence charged and so infer that the accused is guilty. In the instant case the trial judge gave the jury no such warning. The jury was not warned that they were not to engage in the prohibited line of reasoning.*

* excerpt from a speech given to the Conference of the Canadian Association of Provincial Court Judges, Quebec, Sept. 1990.

** Queen's University, Kingston, Ontario

Madam Justice L'Heureux-Dubé dissented. She decided that in this case the probative force of the evidence outweighed the prejudicial effect upon the accused. For her, in determining whether a father has sexually assaulted his seventeen-year-old daughter, it is particularly relevant to know whether such behaviour is part of a long standing pattern of abuse. She decided that, given the line of questioning engaged in by counsel for the defence, it was not in the least surprising that the trial judge subsequently determined that the evidence became admissible as "background". The evidence was relevant to establish the credibility of the victim, and provided a very important context for the incidents for which the accused was charged. She reasoned that when children are sexually assaulted there are generally no witnesses. When such matters become the subject of criminal prosecution it is usually a case of the victim's word against the accused's. Under such circumstances, the credibility of the victim is of crucial importance. Following the line of questioning by the defence the evidence of prior sexual assaults by the accused on his daughter became directly relevant to the credibility of the daughter as chief witness in the case. For Justice L'Heureux-Dubé, the charge to the jury was not defective. While the jury would most certainly be shocked and undoubtedly influenced by the evidence of the past sexual conduct of the accused, such evidence was of very high probative value. The trial judge's address contained numerous warnings concerning the proper use of the evidence of prior incidents.

The majority judgment in *L.E.D.* appears to be contradictory to the common sense trend initiated by the House of Lords in *R. v. Boardman,* (1975) A.C. 421 (H.L.) and followed by our Court in *Sweitzer v. The Queen,* (1982) 1 S.C.R. 228. (For a similar "retrograde" step in England, see *R. v. Lunt,* (1987) 85 Cr. App. R. 241; criticized in [1987] Crim. L. R. 406. In *Lunt* the Court of Appeal suggests that there is a forbidden line of reasoning and that to be received, similar fact evidence must assist the jury otherwise than through "the accused's bad character or disposition to commit the sort of crime with which he is charged.") The majority in *L.E.D.* insisted that:

> The jury must be specifically warned that it is not to rely on the evidence as proof that the accused is the sort of person who would commit the offence charged and on that basis infer that the accused is, in fact, guilty of the offence charged.

The earlier decisions, which were not overruled, do not deny this mode of reasoning. They recognized that, in some cases, this reasoning is perfectly legitimate, as long as the evidence of the previous misconduct is sufficiently probative that it outweighs the competing consideration of prejudice to the accused.

In *Robertson,* Madam Justice Wilson, paraphrasing Professor Cross, wrote:

> A general statement of the exclusionary rule is that evidence of the accused's discreditable conduct on other occasions, tendered to show his *bad disposition,* is inadmissible *unless* it is so probative of an issue or issues in the case as to outweigh the prejudice caused. [emphasis added]

In *L.E.D.* the majority of the Court said that it agreed with that "concise statement of the similar facts rule". But that statement recognizes that previous conduct *can* be tendered to show bad disposition, and, presumably therefore, so acted on by the jury, as long as it is so probative that prejudice to the accused is outweighed. It's all a matter of degree.

In *L.E.D.,* the majority wrote that the similar fact evidence must have probative worth otherwise than via disposition:

> The process of reasoning therefore is to determine whether the evidence of similar acts has probative value in relation to a fact in issue, other than its tendency to lead to the conclusion that the accused is guilty because of the disposition to commit certain types of wrongful acts. If the evidence has such probative value, the court must then determine whether its probative value is sufficient to justify its admissibility, notwithstanding the prejudicial tendency of such evidence.

This two-step process of reasoning was not previously mandated by the Court. In *Robertson* and *Sweitzer* and *Green* the process of reasoning was simply the second step. In *Sweitzer,* the Court deplored cataloging purposes for which similar fact evidence could be received and Justice McIntyre described the process:

> ...admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission *whatever the purpose of its admission.* [emphasis added]

In *Green,* the Court dealt with a charge of sexual assault where the trial judge had received evidence that the accused had committed similar acts against other children and Justice McIntyre wrote, quite simply:

> This evidence was admissible to show a system adopted by the respondent, and its probative force was sufficient to outweigh any prejudicial effect upon the

fused and whether defence lawyers take advantage of the structure so as to manipulate the outcome of a case. As to both of these allegations there is no evidence offered in support as far as Ontario is concerned, and outside Ontario there is not even a whisper of any such allegations except in the LRC Working Paper, which cites no evidence in support.

8. The Ontario Paper states that "as a practical matter, delays are inevitable in a multiple court system, 'since the courts schedule their cases independently of each other.'" This statement simply is not true. The Paper gives, as an example, the time elapsed between first appearance in the Provincial court and (where the offence is a more serious one that the accused can and does choose to have tried in the superior court) the conclusion of the trial in the superior court. This is a period of time that would not necessarily be reduced in any significant degree by the creation of a single trial court; if the problem is, as alleged, that time is lost in transferring a case from one court to another, the problem can be avoided even today, when an accused is committed for trial in the Provincial Court, by a cooperative mechanism which would enable a superior court trial date to be assigned immediately. To repeat, it is *not* "inevitable" that there will be delays in a multiple court system.

9. The proponents of a single trial court offer the proposition that the elimination of the present hierarchy will reduce the cost of litigation. Thus the Ontario Paper says that "a two-level court structure of necessity has built-in administrative efficiency" because of the employment of separate personnel and equipment, "resulting in additional paperwork and duplication of efforts" which "tremendously compound the costs of the administration of justice". No evidence is offered that any savings would occur, whether "tremendous" or otherwise. No such savings are probable, because the Ontario Paper does not propose any changes in procedure that would reduce the requirements of judicial and clerical personnel, and any present duplication of computer recording can be eliminated by administrative co-operation between the present courts. It is deceptive to suggest to the public that a single court would save money. Indeed, the contrary would be the case under the Ontario proposal, for Ontario recommends that the present Provincial Court judges' salaries be increased to the level of superior court judges salaries. Across Canada, this would involve an increased cost to the Canadian taxpayer of many millions of dollars each year. Even apart from that point, no evidence has been offered that merger of trial courts will result in a decrease in support staff. Indeed, in at least one province merger of the superior and district courts necessitated a significant increase in staff support. The larger the court, the less able are the judges to exercise control over those domains that are properly theirs if the independence of the judiciary is to be preserved. For the larger the court, the larger the bureaucracy that serves it will become and the greater will be the power of the public service management that serves it and looks to the government (not to the judges) as its master.

10. The proponents of a single trial court offer the proposition that a single trial court will provide a better quality of adjudication because its judges will be assigned to specialized divisions.

(a) The Ontario Paper says that "The General Division and Provincial Division of the Ontario Court will be combined into a single, non-hierarchical court consisting of three informal divisions specializing in criminal, civil and family matters." Judicial review of government actions would be removed from the new court and assigned to a court of appeal; thus the major areas the civil division would deal with would be commercial matters, estate matters, and personal injuries actions.

(b) The Ontario Paper advocates specialization of judges: "...specialist judges potentially offer greater knowledge and efficiency in the handling of a growing caseload." The Ontario Paper goes so far as to assert that "Judges sitting in the unified criminal court should have interest and expertise in the area of criminal law." Does this include judges who gain expertise *while sitting on the Bench?* Apparently not, for the Ontario Paper discusses this requirement as a *qualification* for future appointments.

(c) The assertion that specialization will improve the quality of adjudication depends for its validity on the assumptions that specialization is a Good Thing and that generalism as a judicial qualification is a Bad Thing. Like many other trial judges, my experience tells me that these are wrongheaded assumptions. In my court many of the ablest judges in criminal cases had little or no criminal law experience before their appointment. The same is true of civil and family matters: many of the ablest and most respected judges in such cases have had little or no previous experience in civil litigation or family law. Conversely, many judges whose previous experience was in commercial litigation *or* personal injury actions *or* labour law, *or* family law, *or* even as office lawyers who never acted as counsel in court, have been good judges because by their nature they are interested in areas that are new to them and they bring their keenly developed ability *to think soundly* to bear upon their handling of areas that are new to them. To restrict appointments of judges to hear criminal cases to criminal law practitioners would be a limitation without merit and indeed would produce negative effects. The Ontario Paper

jurisdiction. In June 1990 the Attorney General of Ontario presented to the public a "Discussion Paper" of his ministry. It advocates a unified trial court for all purposes — criminal and civil. It proposes that preliminary inquiries and trials be dealt with by different judges of that court, and that the present appellate and judicial review jurisdiction of the superior court be transferred to a court of appeal. In the same month the Attorney General of Ontario told a Conference on Court Unification, held in Toronto, that the Government of Ontario had decided that the unification of the trial courts in Ontario was a government objective which was not open to discussion except as to the means by which unification will be achieved. On June 15, 1990, a meeting of provincial Attorneys General supported the creation of a single trial court for criminal and family matters in New Brunswick, British Columbia and Ontario.

What are the arguments advanced by the proponents of a single trial court?

1. They offer simplicity of structure in place of complexity, although their allegation that complexity exists at present is exaggerted, and the simplicity that would be achieved by a single court would be more apparent than real.

2. They say that all trial judges essentially perform the same functions and that all persons involved in criminal and civil cases are entitled to have their cases adjudicated by judges of the same level, no matter how complex or difficult they may be. To these proponents of a single trial court, "a judge is a judge is a judge". Clever in its rhetoric as this claim may be, it is wrong in fact and dangerous to the preservation of high standards in the administration of justice. It would be just as pernicious to education to suggest that a primary school teacher should be in the same administration as a university professor. Yet each merits the equal respect of the public.

3. They say that the present existence of two trial courts is confusing to the lay public, but they offer no evidence that there is any such confusion, or that what confusion there is in any way impedes access to justice.

4. They allege that there is a public perception that (to quote the Ontario Paper)

> "'there is a distinction in status and respect to be accorded to different trial judges or courts because of their place in the hierarchy"

which

> "in turn causes concern that 'inferior' justice is delivered by 'inferior' courts or that one court is reserved for the rich, another for the poor".

No evidence is offered that the public accords less respect to Provincial Court judges than to superior court judges. No evidence is offered that the public is concerned that the Provincial courts deliver "inferior justice" to the poor while the superior courts deliver "superior" justice to the rich. I suggest that no such evidence could be found and that these allegations are made of straw. (It may be that the physical facilities made available to the Provincial Court in Ontario by the province's government are inferior to those in other provinces, but that deficiency, if it exists, can be remedied by increased financing of better facilities.)

5. Both the LRC and the Ontario Papers say that not only members of the public but even lawyers are confused about the powers of the different trial courts. The Ontario paper adds that "this causes some lawyers to make mistakes about the appropriate level of court for the trial of their clients". The Ontario Paper offers no evidence to support that allegation. Certainly in Alberta the experience of both the Bench and the Bar is that any such proposition would be sheer nonsense.

6. Both the LRC and the Ontario Paper say that some defence lawyers, in the words of the Ontario Paper, "seek tactical advantage by moving cases from one level to another for the purpose of delaying the trial or 'judge-shopping'." No evidence is offered that this is a problem in Ontario. At worst I understand that it may be a problem only in a few centres in Ontario. As Professor Baar has pointed out,[1] the problem is avoided in Montreal by a senior judge of each trial court (the Superior Court and the Court of Quebec) sitting together to fix trial dates; to my own knowledge that mechanism has been used in Montreal for at least 15 years. In Alberta both Bench and Bar agree that this problem does not exist. Senior judges from other provinces have made statements to the same effect. Thus, if there is a problem it is at most an Ontario problem.

7. The Ontario Paper says that "such confusion and gamemanship create public synicism and distruct of the justice system". This allegation of fact is unsupported by any evidence that the public's understanding or difficulty in understanding of the court structure affects the public's respect for or trust in the judicial system. Moreover, the proposition stands or falls on whether the public and defence lawyers are con-

1. (1988) 8 Windsor Yearbook of Access to Justice 105

> respondent . . . no error was made by the trial judge.

Is "system" anything different than disposition?

In *Boardman,* the majority of the speeches in the House of Lords reasoned that if the accused's disposition, illustrated by his previous conduct, was very probative of a fact in issue in comparison to its prejudicial effect, evidence of that disposition should be left with the jury to consider. Lord Cross used the case of *R. v. Straffen,* (1952) 2 Q.B.911, to illustrate the point. In that case the accused was charged with the murder of a young girl. It was an unusual murder for there had been no attempt to assault her sexually. Straffen was in the neighbourhood at the time of the crime. The accused had previously committed two murders of young girls and in each there had been no attempt to sexually assault. The evidence of the earlier murders was received into evidence and Straffens' conviction was upheld on appeal. Lord Cross, in *Boardman,* approved:

> . . . it would have been absurd for the law to have prevented the evidence of the other murders being put before the jury although it was simply evidence to show that Straffen was a man *likely* to commit a murder of that particular kind. [emphasis added]

> It is suggested that the Court in *L.E.D.* was led astray by the speech of Lord Hailsham in *Boardman,* which it quoted. The other law lords in *Boardman* wanted to cast off the shackles of *Makin v. A.G. N.S.W.* (1894) A.C. 57 (H.L.), the application of which had caused so much confusion during this century; indeed Lord Cross and Lord Wilberforce did not even mention *Makin* in their opinions. Lord Hailsham alone, for some unknown reason, sought to continue the force of that old decision and "explained" the *Makin* rule in the language which the Court in *L.E.D.* quotes. Professor Hoffman in his most valuable article, Similar Facts After Boardman, (1975) 91 L.Q.R. 193, at 198, points out that while this may have been an accurate paraphrase of the *Makin* rule, it is impossible to reconcile it with many of the other classic cases on similar fact evidence.

> Previous misconduct of the accused which is similar to the activity presently charged is relevant thereto but in our concern for a fair trial we erect a canon of exclusion lest the accused be prejudiced by its reception. Prejudice in this context, of course, does not mean that the evidence might increase the chances of conviction

but rather that the evidence might be *improperly* used by the trier of fact. It is one thing for evidence to operate unfortunately for an accused it is quite another matter for the evidence to operate unfairly. The trier who learns of the accused's previous misconduct may then view the accused as a bad man, one who deserves punishment regardless of his guilt of the instant offence and may be less critical of the evidence presently marshalled against him. The only true relevance of the previous activity follows a chain of reasoning through the accused's disposition and the law recognizes that frequently such chain is tenuous in its nature as people can change and dispositions can vary. The law that erects a canon of exclusion for similar fact evidence which is tenuous in nature when viewed against the possibility of prejudice. If, however, the similar fact evidence is not tenuous in nature, if it has sufficient relevance, if it has genuine probative worth when taken together with the other evidence and is not then outweighed by considerations of prejudice, the reason for the canon of exclusion disappears. The first principle of rational fact-finding, that all relevant evidence should be received, then controls and the similar fact evidence is received.

The accused is entitled to a fair trial; no less but no more. As Madam Justice L'Heureux-Dubé pointed out in dissent, most child assaults take place under circumstances which make it hard to prosecute. There are ususally no witnesses to the crime save the victim and the offender. The horrendous nature of the allegation made by a daughter against her father is inherently difficult to believe. Suggesting motives to falsify during cross-examination make the story appear to be even less credible. Evidence of the previous relationship between the parties, the context within which the assault allegedly occurred could make that story believable. Is it a fair trial when that evidence is excluded? Is it heresy to suggest that the victim also is entitled to a fair trial?

In *B.(C.R.) v. Queen,* April 12, 1990, Supreme Court of Canada, the accused was charged with sexual offences against a young child, his natural daughter. The daughter testified that the acts of sexual misconduct by the accused began in 1981 when she was eleven years old and continued for almost two years. In support of the child's testimony, the Crown sought to introduce evidence that the ac-

cused had had sexual relations in 1975 with a 15-year-old girl, the daughter of his common law wife, with whom he had enjoyed a father-daughter relationship. The trial judge admitted the evidence and convicted the accused. The majority of the Court of Appeal held that the similar fact evidence was properly admitted and upheld the conviction. The accused appealed further.

Madam Justice McLachlin wrote the majority judgment. Chief Justice Dickson and Justices Wilson, L'Heureax-Dubé, and Gonthier concurred. The reasoning was markedly different than the Court's earlier opinion in *D.(L.E.)*. The court reasoned, first, that evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Second, whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. The trial judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception. In reviewing the jurisprudence the Court noted that while the courts made a show of accepting similar fact evidence only when relevant to an issue in the case other than propensity, in reality the so-called "forbidden chain of reasoning", through disposition, was regularly employed.

Professors Andrews and Hirst, Criminal Evidence, 1987, make a very interesting observation about *Makin* as the source of the commandment that one cannot use similar fact evidence to infer guilt from disposition. Recall the facts in *Makin*. The Makins were "baby farmers". They took in unwanted children in return for money for their support. The body of a child was found buried in their garden. They were prosecuted for the murder of that child. The prosecution led evidence that the corpses of other children were found in the garden. Andrews and Hirst comment, 15.39:

> The jury must have reasoned: "The children cannot all have died of natural causes. The Makins must have murdered most of them at least; it is therefore highly probable that they murdered this child also". This of course represents the supposedly forbidden chain of reasoning in the very case which was supposed to have forbidden it.

The majority decided in *B. (C.R.)*:

> Evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

The Court recognized that admissibility of similar fact evidence is a matter which involves a certain amount of discretion and where the law accords a large degree of discretion to a trial judge, courts of appeal are reluctant to interfere with the exercise of that discretion in the absence of demonstrated error of law or jurisdiction. The majority noted the fact, that in the matter before them, in each case the accused established a father-daughter relationship with the girl before the sexual violations began and that this might be argued to go to showing, if not a system or design, a pattern of similar behaviour suggesting that the complainant's story is true. The question then was whether the probative value of the evidence outweighed its prejudicial effects and the majority decided that, while the admissibility of the evidence might be seen by them as borderline, the Court should not interfere with the conclusion of the trial judge, who was charged with the task of weighing the probative value of the evidence against its prejudicial effect in the context of the case as a whole.

Justice Sopinka, Justice Lamer concurring, disagreed. For him:

> There is no special rule with relation to similar fact evidence in sexual offences... The alleged similar acts must have relevance other than to simply show a general disposition to commit the crime charged.

For him propensity alone cannot be the basis for admissibility. If the evidence does have relevance beyond mere propensity, to be admitted, its probative value must exceed its prejudicial effect. He drew a distinction between evidence of general character and *modus operandi*. What the law seeks to forbid is a process of reasoning that would condemn the accused because of the accused's character as a thief, a fraud, a liar or a person of violent character. On the other hand, a highly individualized *modus operandi* is tantamount to evidence that the accused left his calling card. The process of reasoning which connects the accused to the crime charged is the same as in the case of other evidence of identification and is distinguishable from the prohibited line of reasoning. He noted that there were only two instances, separated by a considerable passage of time and there was a need to proceed with caution. For him the

Comments on Proposals for a Single Trial Court in the Canadian Provinces*

by the Honourable Mr. Justice D.C. McDonald**

It is of course true that the present hierarchy of trial courts in the Canadian provinces is a product of history. Just as the history of political and social institutions varies from province to province, so too there are variations from province to province in the organization of the trial courts.

The variations are not so great as to prevent useful generalizations being made, that apply to all provinces by and large. Essentially, since 1867 there has been a superior court in each province. It has the general jurisdiction, for all practical purposes unlimited, of the English High Court of Justice. Most provinces also had a county court or a district court, which had a wholly statutory jurisdiction over more minor civil and criminal matters. In all the provinces that had such courts, except Nova Scotia, they have recently been merged with the superior courts. That episode is over. The resulting merged superior court has a broad and essentially unlimited jurisdiction in criminal and civil matters. The judges of these courts are appointed by the federal government.

Then, in most provinces, there are the courts of exclusively statutory jurisdiction that historically have dealt with the initial steps in all criminal proceedings as well as the adjudication of a large volume of minor Criminal Code proceedings and proceedings where it is alleged that an offence has been committed under a provincial statute. They were once called Magistrates' Courts, but during the past two decades they have been re-named Provincial Courts (in Quebec, "la Cour du Québec"). Their judicial officers, once mostly lay people, are now almost all trained lawyers. For many decades, in the criminal field, while the gravest offences may be tried only by a judge of the superior court, many serious offences have been triable either in the Provincial Courts or the superior courts, at the choice of the accused. There is thus some overlap of jurisdiction between those two levels of trial court. No doubt, where there is concurrent jurisdiction, accused persons and their lawyers, for reasons and because of circumstances that vary from province to province, choose in a majority of cases to be tried and sentenced in the Provincial Court or at least to enter a plea of guilty and be sentenced in the Provincial Court.

I turn now to the civil side. The superior courts deal with commercial matters and claim for damages for injuries whether the amount involved is large or small. The Provincial Courts have historically been given jurisdiction by provincial statute to adjudicate upon such matters up to a certain limit in dollars. (But in New Brunswick, the Provincial Court has not had any civil jurisdiction.) That limit, once a few hundred dollars, now varies from $3,000 to $15,000 (in Quebec). It has been raised to allow for the decline in the value of the dollar and to provide alternative public access to a less formal, and therefore (it is hoped) less costly system of adjudication where the only remedy sought is money and the amount sought is relatively low. Once again, there is evidently some degree of concurrent jurisdiction. A litigant, or his lawyer, will choose which court to go to for reasons that will vary according to the circumstances.

There are many more Provincial Court judges than there are superior court judges. Many small communities have a resident Provincial Court judge, or a Provincial Court judge who though not resident nevertheless visits the community for one or more days each week. By and large, superior court judges reside in the larger centres and sit in court in smaller centres relatively seldom because the volume of business does not justify more frequent attendances. The Provincial Court judges are thus able to deal relatively speedily with charges of provincial offences;

> — those steps in criminal proceedings that should be dealt with speedily such as applications for bail;
>
> — trials of lesser criminal offences;
>
> — trials of more serious criminal offences where the accused chooses to be tried in the Provincial Court; and
>
> — preliminary inquiries where the trial will ultimately be heard in the superior court.

There are persons in positions of considerable influence who wish to merge all the trial courts into a single trial court. For a decade the Canadian Association of Provincial Court Judges has been campaigning vigorously for such a court. The Law Reform Commission of Canada (LRC), in a Working Paper released in May 1989, proposed a Unified Criminal Court but did not comment on how its creation would affect civil

* Remarks for delivery at Judges' Day at the Canadian Bar Association Annual Meeting, London, England, Wednesday, September 26, 1990.

** Court of Queen's Bench of Alberta

of interest in a federal judicial appointment. However, these candidates will not be formally assessed by the committees. Their files will be checked by the Commissioner for completeness and their names placed directly upon the list of those available for appointment. Nor will the committees be asked to assess federally appointed judges being considered for elevation to higher judicial office. In the case of elevations, the government will rely mainly upon consultations between the Minister of Justice and the chief justice and the attorney general concerned.

Commissioner for Federal Judicial Affairs

The Commissioner for Federal Judicial Affairs will retain overall responsibility for the administration of the appointments process on behalf of the Minister of Justice.

The Commissioner for Federal Judicial Affairs will maintain the files of all candidates in a confidential data bank for the sole use of the Minister of Justice.

Assessments made under the new policy will be valid for a period of three years. Each candidate will be notified by the Commissioner three months before the three-year period expires, and will be invited to reapply if still interested in being considered for a judicial appointment. Assessments will remain valid until a new assessment can be completed.

Appointments

The Minister will continue to consult with senior members of the judiciary and the bar, and with provincial attorneys general and territorial ministers of justice, before recommending an appointment. The Minister will welcome the advice of special-interest groups and informed individuals on particular appointments, especially in the furtherance of the government's commitment to appoint more women and representatives of Canada's ethnic and cultural minorities to the bench.

comité. Le Commissaire s'assurera a que leur dossier est complet et leur nom sera placé directement sur la liste d'admissibilité. Les comités n'auront pas non plus à se pencher sur les candidatures des juges nommés par le gouvernement fédéral qui sont considérés pour une promotion. Dans ce cas, le gouvernment fondera sa décision sur les consultations menées par le ministre de la Justice auprès du juge en chef et du procureur général de la province concernée.

Commissaire à la magistrature fédérale

Le Commissaire à la magistrature fédérale continuera d'assumer l'entière responsabilité de l'administration du régime de nomination au nom du ministre de la Justice.

Le Commissaire tiendra des dossiers de tous les candidats dans une banque de données confidentielles que pourra seul utiliser le ministre de la Justice.

Les évaluations faites aux termes de la nouvelle politique seront valides pour une période de trois ans. Trois mois avant la fin de cette période, le Commissaire demandera au candidat concerné de faire une nouvelle demande de nomination s'il est toujours intéressé à accéder à la magistrature. L'évaluation restera valide jusqu'à ce qu'une nouvelle étude de la candidature puisse être faite.

Nominations

Comme par le passé, le Ministre, avant de recommander une personne à un poste de juge, consultera les principaux membres de la magistrature et du barreau, ainsi que les procureurs généraux des provinces et les ministres de la Justice des territoires. Le Ministre accueillera également les avis des groupes d'intérêt et des personnes averties quant à des nominations particulières, spécialement lorsqu'il s'agira de favoriser la nomination à la magistrature de femmes et de membres des minorités ethniques et culturelles du Canada pour respecter l'engagement pris par le gouvernment à cet égard.

father-daughter relationship in each case should not be regarded as unusual but rather as neutral. The similar fact evidence should therefore have been rejected.

In *R. v. D. (L.E.),* supra, Justice Sopinka, writing for the majority of the Court, had decided that in cases where similar fact evidence is received:

> The jury must be specifically warned that it is not to rely on the (similar fact) evidence as proof that the accused is the sort of person who would commit the offence charged and on that basis infer that the accused is in fact guilty of the offence charged.

The Court insisted that similar fact evidence could only be received if it had probative value in relation to a fact in issue other than through the accused's disposition.

In *R. v. B (C.R.)* the Court does an abrupt about-face. The majority of the Court now holds that:

> Evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.

This is a welcome retreat. After the seminal case of *Makin v. New South Wales,* supra, the courts tended to create categories of instances when similar fact evidence would be admitted. It was not until *R. v. Boardman,* supra, that this approach was rejected. Rather than create another "category of relevance" to meet the particular facts in that case the Law Lords decided on a principled approach to admissibility; assess the probative worth and compare it to the possibility of prejudice. In actual fact, in many of the leading cases on similar fact, the evidence was used solely as manifesting the accused's disposition although there was often, seemingly, a felt need to mask this fact by labelling the evidence with the name of one of the categories. However, when the court said it was receiving the similar fact evidence "to prove a system", "to prove intent", "to rebut the defence of accident", or "to prove identity", the court, in truth, was receiving the evidence to show that the accused was, as evidenced by his previous behaviour, the sort of person who would do the act charged. The court would note the possibility of prejudice to an accused and receive the evidence only when the probative worth was so great that the prejudice was outweighed; when the evidence was "strikingly similar" or when it would be "an affront to common sense to reject".

In *R. v. Morin,* (1988) 66 C.R. (3d) 1 (S.C.C.), one of the issues was the admissibility of psychiatric evidence tendered by the Crown. On this issue the Court was unanimous. Justice Sopinka decided that for such evidence to be received the crown would have to surmount the same sort of hurdle faced when tendering similar fact evidence. Taking the same approach that he later took in *D.(L.E.)* he wrote:

> Accordingly, when the prosecution tenders expert psychiatric evidence, the trial judge must determine whether it is relevant to an issue in the case, apart from its tendency to show propensity. If it is relevant to another issue (e.g. identity), it must then be determined whether its probative value on that other issue outweighs its prejudicial effect on the propensity question. In sum, if the evidence's *sole* relevance or *primary* relevance is to show disposition, then the evidence must be excluded.

Presumably the reversal in *B.(C.R.)* would apply to this position as well.

How can similar fact evidence or psychiatric evidence prove identity save through disposition or propensity? Indeed, most curiously, in justifying the decision to treat psychiatric evidence in the same way as similar fact, Justice Sopinka, himself, in *Morin*, wrote:

> It is illogical to treat evidence tending to show the accused's *propensity* to commit the crime differently because such a *propensity* is introduced by expert evidence rather than by means of past similar conduct. [emphasis added]

According to Justice Sopinka, in *Morin:*

> In order to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual *behavioural trait* with the perpetrator of the crime. The *trait* must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. [emphasis added]

Whether one calls it propensity, or behavioural trait or modus operandi the same form of reasoning is being engaged. In *B.(C.R.),* Justice Sopinka uses the phrase "modus operandi" and distinguishes the same from evidence of general character; similar fact evidence establishing the former may be received but not if it only establishes the latter. Are we not here talking differences in kind but rather only differences in degree? Similar fact evidence which only shows the accused to be a bad person is not admissible but similar fact evidence which shows him

ième effet préjudiciable, les premier et troisième dangers pesaient toujours. Dans ses directives au jury, le juge doit indiquer que la preuve de faits similaires ne s'applique qu'aux fins limitées pour lesquelles elle a été admise. *Il faut lui préciser qu'il ne doit pas considérer que cette preuve établit que l'accusé est le genre de personne qui commettrait l'infraction en question et en déduire que l'accusé est en fait coupable de cette infraction. Dans la présente instance, le juge du procès n'a pas fait une telle mise en garde au jury. Le jury n'a pas été mis en garde contre l'adoption du type de raisonnement défendu.*

Madame le juge l'Heureux-Dubé s'est inscrite en dissidence. Selon elle, en l'espèce, la valeur probante de la preuve compensait l'effet préjudiciable qui en découlait pour l'accusé. A ses yeux, s'il s'agit de déterminer si un père a commis un acte d'agression sexuelle contre sa fille de dix-sept ans, il est particulièrement pertinent de savoir si cette conduite s'inscrit dans un système d'abus existant depuis longtemps. Madame le juge L'Heureux-Dubé en a conclu que, compte tenu de l'orientation des questions de l'avocat de la défense, il n'était nullement étonnant que le juge de procès ait décidé par la suite que la preuve était devenue admissible, à titre de ''toile de fond''. La preuve était pertinent afin d'établir la crédibilité de la victime et fournissait un contexte très important aux incidents reprochés à l'accusé. Madame le juge a rappelé qu'il n'y a généralement pas de témoins lorsqu'un enfant est agressé sexuellement. Quand ces actes font l'objet de poursuites criminelles, c'est habituellement la parole de la victime contre celle de l'inculpé. Dans ces circonstances, la crédibilité de la victime est d'une importance cruciale. En raison de la série de questions posées par l'avocat de la défense, la preuve des agressions sexuelles antérieures commises par l'accusé contre sa fille est devenue directement pertinente à la crédibilité de cette dernière en tant que témoin principal. Au sens du juge L'Heureux-Dubé, l'exposé au jury n'avait pas été insuffisant. Bien que la preuve de la conduite sexuelle antérieure de l'accusé eût certainement choqué les jurés en l'espèce et les eût assurément influencés, cette preuve était d'une très grande valeur probante. L'exposé du juge du procès contenait de nombreuses mises en garde concernant la façon correcte d'utiliser la preuve d'incidents antérieurs.

Il semble que le jugement majoritaire dans l'arrêt *L.E.D.* soit contraire à la tendance amorcée par la Chambre des lords dans l'affaire *R. v. Boardman,* (1975) A.C. 421 (H.L.), tendance qui s'inscrit dans le sens commun, et qui a été suivie par la Cour suprême du Canada dans les causes *Sweitzer c. La Reine,* (1982) R.C.S. 49, *R. c. Robertson,* (1987) 1 R.C.S. 918 et *R. c. Green,* (1988) 1 R.C.S. 228. (Pour une opinion paraillement ''rétrograde'' en Angleterre, voir l'arrêt *R. c. Lunt,* (1987) 85 Cr. App. R. 241, dont on fait la critique dans [1987] Crim. L. R. 406. dans l'affaire *Lunt,* la Cour d'appel estime qu'il existe un raisonnement défendu et que la preuve de faits similaires doit informer le jury sur d'autres éléments que [TRADUCTION] ''la moralité ou les mauvaises tendances de l'accusé qui l'entraîneraient à commettre le type d'acte criminel dont on l'accuse.'') Dans l'arrêt L.E.D., la majorité a souligné ce qui suit:

> Il faut préciser [au jury] qu'il ne doit pas considérer que cette preuve établit que l'accusé est le genre de personne qui commettrait l'infraction en question et en déduire que l'accusé est en fait coupable de cette infraction.

Les décisions antérieures, qui n'ont pas été cassées, ne nient pas ce mode de raisonnement. Elles reconnaissent que, dans certains cas, cette logique est parfaitement fondée si la valeur probante de la preuve attestant l'inconduite antérieure du prévenu compense son effet préjudiciable.

Dans l'arrêt *Robertson,* Madame le juge Wilson écrivait ce qui suit, en commentant la pensée du professeur Cross:

> [La] règle d'exclusion porte en gros que la preuve de toute conduite indigne antérieure de l'accusé produite pour démontrer ses *mauvaises tendances* est inadmissible, *à moins* qu'elle ne soit à ce point probante relativement à une question ou à des questions en litige qu'elle l'emporte sur le préjudice causé. [Je souligne.]

Dans l'affaire *L.E.D.,* la majorité a déclaré être d'accord avec ''l''énoncé concis de la règle relative à la preuve de faits similaires''. On reconnaît donc que la preuve attestant l'inconduite antérieure *peut* être produite afin de démontrer les mauvaises tendances de l'accusé, et on peut supposer que le jury est habilité à accepter cette preuve, du moment que la valeur probante en compense l'effet préjudiciable. Il s'agit par conséquent d'une question de degré.

Dans l'affaire *L.E.D.,* la majorité a affirmé que la valeur probante de la preuve de faits similaires doit se fonder sur un critère autre que la disposition du prévenu:

> La démarche intellectuelle consiste donc à déterminer si la preuve d'actes similaires a une valeur probante à l'égard d'un fait litigieux, outre sa tendance à mener à la conclusion que l'accusé est coupable en raison de sa disposition à

nation, mais plutôt qu'elle peut être employée incorrectement et injustement. Lorsque la preuve a une valeur probante très élevée, et qu'elle démontre directement que l'inculpé a commis les actes dont on l'accuse, l'injustice, à savoir le préjudice, est annulée, et la preuve, alors pertinente, est reçue.

Si l'on rejette la méthode des catégories, l'admissibilité de la preuve de faits similaires implique un certain pouvoir discrétionnaire exercé par le juge du procès. La majorité reconnaît ce pouvoir et affirme qu'elle répugne à s'immiscer dans le jugement rendu, à moins que l'on démontre l'existence d'une erreur de droit ou de compétence. Bien qu'à son avis l'affaire constituait un ''cas limite en matière de recevabilité de la preuve'', la majorité a décidé de ne pas s'ingérer dans la décision du juge du procès, à qui il revenait de soupeser la valeur probante de la preuve et son effet préjudiciable. Pour la majorité, le fait que l'accusé avait établi des relations père-fille avec les victimes avant d'avoir avec elles des relations sexuelles peut être considéré comme un modèle de comportement similaire, ce qui laisserait croire que les propos de la deuxième jeune fille sont crédibles. En dissidence, Monsieur le juge Sopinka a déclaré que, dans chaque cas, l'existence de relations père-fille ne constitue pas un fait inhabituel, mais est neutre. Ce raisonnement ne saurait tenir. Le ministère public n'a pas produit une preuve établissant que l'accusé avait, antérieurement, agressé sexuellement une victime *quelconque.* Au contraire, la preuve présentée attestait du fait que l'inculpé avait commis nombre d'actes sexuels avec *une personne qui le considérait comme son père!* Cette preuve avait assurément une valeur probante évidente lorsqu'il s'agissait de déterminer si la plaignante avait eu des relations sexuelles avec son père; elle ne saurait être utilisée par les jurés à la seule fin de conclure que l'inculpé est une mauvaise personne. Cette preuve étaye le témoignage de la plaignante et atteste le fait que l'accusé est bien *la personne* décrite dans l'acte d'accusation; la preuve de faits similaires mérite donc d'être reçue.

Dans l'affaire *R. c. Morin,* (1988) 66 C.R. (3d) 1 (C.S.C.), l'une des questions en litige avait trait à l'admissibilité de la preuve psychiatrique produite par le ministère public. La Cour, sur cette question, était unanime. Monsieur le juge Sopinka estimait que l'admissibilité de la preuve, dans un tel cas, supposait que le ministère public surmonte les mêmes obstacles que lorsqu'il produisait une preuve de faits similaires. Adoptant l'approche suivie par la suite dans l'arrêt *D.(L.E.)*, il écrivait:

> Par conséquent, lorsque la poursuite présente une preuve psychiatrique d'expert, le juge du procès doit déterminer si elle est pertinente relativement à un point litigieux de l'affaire, indépendamment de sa tendance à indiquer la propension. Si elle est pertinente relativement à un autre point (p. ex. l'identité), il faut alors établir si sa valeur probante à cet égard l'emporte sur son effet préjudiciable sur la question de la propension. En somme, si *l'unique* pertinence ou la pertinence *principale* de la preuve est de démontrer une propension, alors il faut exclure la preuve.

On pourrait alors supposer que la révocation relative à l'arrêt *B.(C.R.)* s'appliquerait aussi à cette position.

Comment la preuve de faits similaires et la preuve psychiatrique peuvent-elles établir l'identité si ce n'est en attestant la disposition ou la propension de l'inculpé? En fait, fort curieusement, en justifiant la décision de traiter la preuve psychiatrique à l'instar de la preuve de faits similaires, Monsieur le juge Sopinka écrivait lui-même ce qui suit, dans l'arrêt *Morin*:

> Il est illogique que la preuve qui tend à démontrer la *propension* de l'accusé à commettre le crime soit traitée différemment parce qu'elle est introduite par un témoignage d'expert plutôt qu'au moyen de la conduite similaire passée. [Je souligne.]

Et Monsieur le juge Sopinka de poursuivre, toujours dans l'arrêt *Morin:*

> [P]our être pertinente relativement à la question de l'identité, la preuve doit tendre à démontrer que l'accusé partageait avec l'auteur de crime un *trait de comportement* distinctif inhabituel. Le *trait* doit être distinctif au point d'agir presque comme une étiquette ou une marque qui identifie l'auteur du crime. [Je souligne.]

Que l'on parle de propension, de trait de comportement ou de façon d'agir, il s'agit, dans chaque cas, du même mode de raisonnement. Dans l'affaire *B.(C.R.),* Monsieur le juge Sopinka emploie l'expression ''façon d'agir'', qu'il distingue de la preuve relative à la moralité en général; la preuve de faits similaires attestant la façon d'agir peut être reçue, mais elle doit être rejetée si elle n'établit que la moralité en général. S'agit-il ici de différences fondamentales ou plutôt de différences de degrés? On ne peut recevoir la preuve de faits similaires qui ne fait que démontrer le caractère foncièrement mauvais de l'accusé, mais on peut admettre cette preuve si elle établit que l'accusé est bien *la* personne qui a comis le crime. Par conséquent, l'admissibilité ne dépend que du degré de force probante, une fois cette force évaluée et comparée à l'effet préjudiciable que découle de la preuve. En fait, Monsieur le juge Sopinka n'interdit pas le raisonnement fondé sur la disposition; l'analyse qu'il fait du ''trait de comportement'' ou de la ''façon d'agir'' en revient au même.

Monsieur le juge Sopinka déclare qu'il ne peut souscrire à une théorie qui veut que l'admissibilité ne soit fondée que sur la propension de l'inculpé. Il maintient ce qui suit:

> Affirmer que la propension peut avoir une valeur probante suffisamment élevée pour être recevable est une contradiction en soi. Cela revient à dire que c'est lorsque le danger du mode de raisonnement interdit est le plus grand, que la preuve peut être admise.

Mais qu'interdit au juste le droit? Quel est son objet lorsqu'il prévoit une règle générale stipulant que le ministère public ne peut présenter une preuve du mauvais caractère de l'inculpé? De quelle façon l'accusé subit-il un préjudice? Certainement pas par l'application d'un mode de raisonnement. Voici plutôt ce qui préoccupe la justice: le juge des faits qui découvre que l'accusé est une mauvaise personne risque d'accorder trop d'importance à ce fait et d'être moins critique face à la preuve qui est produite contre l'inculpé. Il risque de réagir émotivement et d'être moins rationnel en analysant la cause du ministère public. Il voudrait peut-être punir l'accusé de son inconduite antérieure, et, pour cette raison, le reconnaître coupable de l'acte criminel imputé en l'espèce. Aux yeux de la justice, il est possible que la preuve d'inconduit antérieure embrouille le jury, lequel serait détourné de sa tâche principale. Voilà en quoi consistent les effets préjudiciables possibles; pour en résumé de ces effets, voir le jugement de Monsieur le juge Sopinka dans l'arrêt *D. (L.E.).* Le terme ''préjudice'', dans ce contexte, ne signifie pas que la preuve accroîtra les risques de condamcommettre certains types d'actes illicites. Si la preuve a une telle valeur probante, la cour doit alors décider s'il s'agit d'une valeur probante qui suffit pour justifier son admissibilité en dépit de sa tendance préjudiciable.

Auparavant, la Cour n'avait pas rendu obligatoire ce mode de raisonnement à deux volets. En effet, dans les arrêts *Robertson, Sweitzer* et *Green,* seule la seconde étape était retenue. Dans l'affaire *Sweitzer,* la Cour a dit regretter vivement l'existence de catégories aux termes desquelles la preuve de faits similaires pouvait être reçue, et Monsieur le juge McIntyre décrivait ainsi le processus:

> [L'] admissibilité (...) sera fonction de [l] à valeur probante [de la preuve d'actes similaires] par rapport au préjudice causé à l'accusé par suite de son acceptation *à quelque fin que ce soit.* [Je souligne.]

L'affaire *Green* portait sur une accusation d'agression sexuelle; en l'espèce, le juge du procès avait admis une preuve selon laquelle l'inculpé avait commis des actes similaires contre d'autres enfants. Monsieur le juge McIntyre a alors déclaré, tout simplement:

> Cette preuve était admissible pour démontrer l'existence d'un système adopté par l'intimé et sa force probante était suffisante pour l'emporter sur tout effet préjudiciable à l'égard de l'intimé. (...) [L]e juge du procès n'a pas commis d'erreur en l'acceptant.

Comment le ''système'' diffère-t-il de la disposition?

Dans l'affaire *Boardman,* la majorité des lords de la Chambre ont suivi le raisonnement suivant: si la disposition du prévenu, illustrée par sa conduite antérieure, était très probante relativement à un fait en litige, par rapport à l'effet préjudiciable qui en découlait, il revenait au jury de considérer la preuve établissant cette disposition. Lord Cross a renvoyé à l'arrêt *R. v. Straffen,* (1952) 2 Q.B. 911, pour illustrer son argument. Dans cette affaire, l'inculpé était accusé du meurtre d'une jeune fille; il s'agissait d'un cas inhabituel, car il n'y avait eu aucune tentative d'agression sexuelle. Straffen était dans la voisinage au moment du crime. Il avait déjà été reconnu coupable du meurtre de deux jeunes filles et, dans chaque cas, on n'avait relevé aucune tentative d'agression sexuelle. La preuve afférente aux meurtres antérieurs a été reçue et, en appel, la condamnation de Straffen a été confirmée. Dans l'affaire *Boardman,* Lord Cross a approuvé cette décision:

[TRADUCTION]

> Il aurait été absurde d'interdire que l'on produise devant le jury la preuve attestant les autres meurtres, même s'il s'agissait simplement de démontrer que Straffen était une personne *susceptible* de commettre un meurtre de cette espèce. [Je souligne.]

J'estime que la Cour, dans l'arrêt *L.E.D.,* s'est égarée en suivant la déclaration de Lord Hailsham dans l'affaire *Boardman,* déclaration qu'elle a citée. Dans cet arrêt, les autres lords entendaient libérer le tribunal des entraves afférentes à l'affaire *Makin v. A.G. N.S.W.* (1894) A.C. 57 (H.L.), dont l'application avait causé beaucoup de confusion, au vingtième siècle; en fait, Lord Cross et Lord Wilberforce ne mentionnaient même pas l'arrêt *Makin* dans leur opinion. Seul Lord Hailsham, pour une raison inconnue, a tenté d'appliquer une fois de plus cette décision, laquelle datait de nombreuses années, en ''expliquant'' la règle arrêtée dans cet arrêt, explication reprise par la Cour suprême du Canada, dans la cause *L.E.D.* Dans son article le plus précieux, *Similar Facts After Boardman,* (1975) 91 L.Q.R. 193, p. 198, le professeur Hoffman signale qu'il est impossible de réconcilier la déclaration de Lord Hailsham avec nombre de causes classiques ayant trait à la preuve de faits similaires, bien que ce commentaire puisse paraphraser correctement la règle *Makin*.

L'inconduite antérieure de l'inculpé est pertinente si elle est similaire aux actes dont on accuse le prévenu en l'espèce. Toutefois, dans le but d'assurer l'équité du procès, les tribunaux ont prévu un critère d'exclusion: aux termes de ce critère, l'admission de la preuve d'inconduite ne doit pas être préjudiciable au prévenu. Dans ce contexte, on aura compris que le terme ''préjudice'' ne signifie pas que la preuve peut accroître les risques de condamnation, mais, plutôt, que cette preuve peut être utilisée *incorrectement* par le juge des faits. Les résultats malheureux, du point de vue de l'accusé, qui découlent de l'admission de la preuve, sont une chose; l'application injuste de cette preuve en est une autre. Le juge qui est mis au fait de l'inconduite antérieure du prévenu peut considérer qu'il a devant lui un individu foncièrement mauvais, qui mérite d'être puni, indépendamment de l'infraction dont on l'accuse; ce juge peut être moins critique face à la preuve rassemblée contre l'accusé. La pertinence véritable de la preuve d'actes antérieurs découle d'un raisonnement fondé sur la disposition du prévenu et la loi reconnaît que ce type de longique est souvent fautif, puisque la nature humaine est variable et que la disposition d'une personne peut changer. La loi prévoit alors un critère d'exclusion lorsque la preuve de faits similaires est faible par rap-

port au préjudice possible. Cependant, si cette preuve s'avère solide, si elle est suffisamment pertinente et si, à la lumière d'éléments de preuve additionnels, elle a une valeur probante authentique eu égard au préjudice possible, la critère d'exclusion n'est plus valable. C'est alors le premier principe régissant l'appréciation des faits qui s'applique, à savoir qu'il faut admettre toute preuve pertinente, et la preuve de faits similaires est reçue.

L'accusé a droit à un procès équitable, ni plus ni moins. Comme Madame le juge l'Heureux-Dubé l'a indiqué en dissidence, la plupart des agressions commises contre des enfants se déroulent dans des circonstances peu propices à une poursuite. En effet, règle générale, seuls la victime et l'auteur de l'infraction sont témoins du crime. De par sa nature monstrueuse, il est difficile de croire à l'allégation d'agression sexuelle portée par une fille contre son propre père. En insinuant des mobiles de falsification en contre-interrogatoire, on mine encore plus la crédibilité du témoignage. Par contre, la preuve attestant la relation entre les parties, à savoir le contexte dans lequel l'agression serait survenue, pourrait rendre l'allégation crédible. Le procès est-il juste lorsque cette preuve est exclue? Commet-on hérésie lorsqu'on estime que la victime a droit, elle aussi, à un procès équitable?

Dans l'affaire *B. (C.R.) c. La Reine,* le 12 avril 1990, cour suprême du Canada, l'inculpé était accusé d'infractions d'ordre sexuel contre une très jeune fille, en l'occurrence, sa fille naturelle. Celle-ci a témoigné que les actes d'inconduite sexuelle avaient commencé en 1981, lorsqu'elle était âgée de 11 ans, et qu'ils s'étaient poursuivis pendant près de deux ans. A l'appui de ce témoignage, le ministère public a tenté de produire la preuve qu'en 1975 l'accusé avait eu des relations sexuelles avec une jeune fille de 15 ans, la fille de sa conjointe de fait, avec qui il avait une relation père-fille. Le juge du procès a reçu la preuve et condamné l'accusé. En appel, la majorité a jugé que la preuve de faits similaires avait été admise correctement, et elle a confirmé la décision. L'accusé a adressé un pourvoi à la Cour suprême du Canada.

Madame le juge McLachlin a rendu le jugement majoritaire. Le juge en chef Dickson ainsi que les juges Wilson, L'Heureux-Dubé et Gonthier se sont ralliés à cette opinion. Le raisonnement, dans ce cas, différait sensiblement de l'opinion de la Cour dans l'affaire *D.(L.E.).* tout d'abord, la Cour a déclaré que la preuve qui est produite dans le seul but de démontrer que l'inculpé est le genre de personne susceptible d'avoir commis l'infraction est, en principe, irrecevable. En deuxième lieu, pour déterminer si, en l'espèce, la preuve constitue une exception à cette règle générale, il faut répondre à la question suivante: la valeur probante de cette preuve l'emporte-t-elle sur l'effet préjudiciable qui en découle? Le juge du procès doit considérer des facteurs comme la distinction entre les faits similaires et les infractions imputées à l'inculpé, ainsi que le lien, s'il en est, entre la preuve et des questions autres que la propension pour déterminer si, compte tenu des circonstances de l'espèce, la valeur probante de la preuve l'emporte sur son préjudice potentiel et justifie son admission. En examinant la jurisprudence, la Cour a noté que bien que les tribunaux aient fait grand état de n'admettre la preuve de faits similaires que lorsqu'elle atteste un élément autre que la propension de l'accusé, ils avaient, en fait, régulièrement recours au soidisant ''mode de raisonnement interdit'', fondé sur la disposition.

Les professeurs Andrews et Hirst, dans leur ouvrage *Criminal Evidence* (1987), font part d'une observation fort intéressante au sujet de l'arrêt *Makin*: cet arrêt serait à l'origine de la directive qui interdit, à partir de la preuve de faits similaires, de conclure à la culpabilité du prévenu pour cause de disposition. Rappelons les faits pertinents à l'affaire *Makin.* Les Makin accueillaient chez eux des enfants dont personne ne voulait et en assuraient le soutien, contre rémunération. Le corps d'un enfant avait été trouvé enterré dans leur jardin et les Makin avaient été poursuivis pour meurtre. La poursuite a présenté une preuve attestant que l'on avait trouvé le cadavre d'autres enfants dans le jardin des inculpés. Les auteurs apportent le commentaire suivant (par. 15.39):

> [TRADUCTION]
>
> Le jury a dû raisonner ainsi: ''Il ne peut s'agir, dans chaque cas, de mort naturelle. Les Makin ont dû assassiner au moins la plupart des enfants dont on a trouvé la cadavre; par conséquent, il est fort probable qu'ils aient aussi assassiné l'enfant dont il est question en l'espèce''. Violà, bien sûr, le prétendu mode de raisonnement interdit, dans l'arrêt même qui était sensé avoir condamné ce type de logique.

Dans l'arrêt *B.(C.R.),* la majorité a déclaré ce qui suit:

> [L]a preuve de la propension, bien que généralement irrecevable, peut exceptionnellement être admise lorsque la valeur probante de la preuve relative à une question soulevée est tellement grande qu'elle l'emporte sur le préjudice grave que subira inévitablement l'accusé si la preuve d'actes immoraux ou illégaux antérieurs est présentée au jury.

La Cour a reconnu que l'admissibilité de la preuve de faits similaires comporte un élément discrétionnaire et que, lorsque le droit reconnaît au juge de procès un important pouvoir discrétionnaire, les cours d'appel hésitent à s'immiscer dans l'exercice de ce pouvoir, à moins qu'il y ait erreur de droit ou de compétence. La majorité a signalé que, dans chaque cas, l'accusé avait établi une relation père-fille avec la victime avant le début des infractions d'ordre sexuel et que l'on pourrait soutenir qu'il s'agit alors, sinon d'un système ou d'un plan, du moins d'un modèle de comportement similaire permettant de croire que le récit de la plaignante est véridique. La question est donc de savoir si la valeur probante de la preuve l'emporte sur son effet préjudiciable. La majorité a déclaré que, bien que la preuve produite puisse lui sembler un cas limite en matière d'admissibilité, elle n'était pas disposée à modifier la décision du juge du procês dont la tâche était de soupeser la valeur probante de la preuve et son effet préjudiciable en fonction de l'ensemble de l'affaire.

Les juges Sopinka et Lamer se sont inscrits en dissidence. Selon Monsieur le juge Sopinka:

> Il n'existe pas de règle particulière relative à la preuve de faits similaires en matière d'infractions d'ordre sexuel. (...) [L]a preuve des actes que l'on prétend être similaires doit avoir une autre pertinence que celle d'établir simplement une disposition générale à commettre le crime reproché.

A ses yeux, la propension ne peut, à elle seule, servir de fondement à l'admissibilité de la preuve. Si la preuve s'avère pertinente au-delà de la simple propension de l'accusé, il faut, pour qu'elle soit admise, que sa valeur probante l'emporte sur son effet préjudiciable. Monsieur le juge Sopinka a distingué entre la preuve relative à la moralité en général et la façon de faire. Ce que le droit veut interdire est un raisonnement aux termes duquel l'accusé serait condamné en raison de sa réputation de voleur, de fraudeur, de menteur ou de personne violente. Par ailleurs, une façon de faire très individualisée équivaut à une preuve que l'accusé au crime reproché est indentique à celui qui est suivi dans le cas d'autres preuves d'identification et se différencie du raisonnement interdit. Monsieur le juge a signalé qu'il ne s'agissait que de deux cas, séparés par un laps de temps considérable, et qu'il était indiqué de procéder avec prudence. A ses yeux, il ne fallait pas, dans chaque cas, considérer comme inhabituelle la relation père-fille, mais l'interpréter plutôt comme neutre. Par conséquent, la preuve de faits similaires aurait dû être rejetée.

Dans l'affaire *R. c. D.(L.E.),* ci-dessus, Monsieur le juge Sopinka, rendant le jugement de la majorité, avait déclaré ce qui suit relativement aux cas où la preuve de faits similaires est reçue:

> Il faut préciser [au jury] qu'il ne doit pas considérer que cette preuve [la preuve de faits similaires] établit que l'accusé est le genre de personne qui commettrait l'infraction en question et en déduire que l'accusé est en fait coupable de cette infraction.

La Cour a insisté que la preuve de faits similaires ne pouvait être reçue que si elle avait une valeur probante relativement à un fait en litige, indépendamment de la disposition du prévenu.

Dans l'arrêt *R. c. B. (C.R.),* la Court fait brusquement volte-face. En effet, en l'espèce, la Cour soutient ce qui suit:

> [L]a preuve de la propension, bien que généralement irrecevable, peut exceptionnellement être admise lorsque la valeur probante de la preuve relative à une question soulevée est tellement grande qu'elle l'emporte sur le préjudice grave que subira inévitablement l'accusé si la preuve d'actes immoraux ou illégaux antérieurs est présentée au jury.

Voilà un repli apprécié. Après l'arrêt *Makin v. New South Wales,* ci-dessus, lequel a fait école, les tribunaux ont eu tendance à créer des catégories de cas où la preuve de faits similaires serait admise. Ce n'est qu'avec l'arrêt *R. v. Boardman,* ci-dessus, que cette approche a été rejetée. Plutôt que de créer une autre ''catégorie de pertinence'' afin de satisfaire aux faits en l'espèce, les lords ont arrêté une approche fondée sur des principes précis et servant à déterminer l'admissibilité d'une preuve: évaluer la valeur probante de cette preuve par rapport à son effet préjudiciable. En réalité, dans nombre de causes majeures relatives aux faits similaires, la preuve n'avait servi qu'à démontrer la disposition de l'accusé même si, semble-t-il, on s'efforçait souvent de masquer cette démarche en invoquant l'une des catégories prévues. Toutefois, lorsque la Cour disait recevoir la preuve de faits similaires [TRADUCTION] ''dans le but de démontrer l'existence d'un système'', ''afin de prouver l'intention', ''pour réfuter la défense d'accident'' ou encore ''afin de prouver l'identité'', elle admettait la preuve dans le but de démontrer que l'accusé était le type de personne qui aurait commis l'acte criminel en question, comme l'attestait sa conduite antérieure. La Cour prendrait notre du préjudice possible et ne recevrait la preuve que lorsque la valeur probante en était si considérable qu'elle l'emportait sur le préjudice subi, en cas de ''similarité frappante'' ou, encore, lorsque ce serait [TRADUCTION] ''faire affront au sens commun que de la rejeter''.