PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

The Canadian Association of Provincial Court Judges / L'Association canadienne des juges des cours provinciales 1992-1993

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Formule d'inscription
Assemblée annuelle de L'A.C.J.C.P.
La Célébration de l'anniversaire 20ième

Hôtel Radisson Plaza - St. Jean, T-N

22-26 septembre 1993

Nom du juge _____

Nom de la cour _____

Adresse postale _____

Téléphone _____ Fax _____

Nom(s) de L'(des) invité(s) _____

Demandes ou besoins spéciaux _____

_____

Logement à l'hôtel nécessaire Chambre

nombre de nuits ____ simple (120 $) ☐ double (120 $) ☐

Arrivée Date _____ Heure _____ Via _____

Départ Date _____ Heure _____

"Pour dire adieu petit dejenuer - dimanche, le 26ième septembre de 8h00 à 10h00".

Les réservations seront retenues jusqu'à 19h00 (heure locale) le jour de l'arrivée. Les réservations pour les arrivées tardives ne peuvent être garanties qu'avec une carte de crédit.

Nom de la carte _____ Carte no. _____

Date d'expiration _____

Cachet d'inscription : juges 300,00 $ Invités 150,00 $

Date limite d'inscription : 10 août 1993

Envoyez cette formule par la poste ou par fax au :

juge Bruce leGrow
Cour provinciale
35 Alabama Drive
Stephenville, NF
A2N 3K9
FAX: (709) 643-4022

La confirmation de vos réservations d'hôtel vous sera envoyée par Hôtel Radisson Plaza

Registration Form
20th Anniversary Celebration C.A.P.C.J.

Radisson Plaza Hotel - St. John's, NF
September 22-26, 1993

Name of Judge _____

Name of Court _____

Mailing Address _____

Telephone _____ Fax _____

Name(s) of Guest(s) _____

Any special concerns or requests _____

_____

Hotel accommodation required

Number of nights ____ Single ($120.) ☐ Double ($120) ☐

Arrival Date _____ Time _____ Via _____

*Departure Date _____ Time _____

*Farewell Breakfast on Sunday, September 26, at 8:00 - 10:00 am
Reservations will be held until 6:00 PM on date of arrival. Late arrivals must be guaranteed by a credit card:

Name of Card: _____ Card No. _____

Exp.Date _____ Signature _____

Registration Fee: Judges $300. Guests $150.
Registration Deadline: August 10, 1993
Mail or Fax this form to: *Judge Bruce LeGrow*
Provincial Court
35 Alabama Drive
Stephenville, NF
A2N 3K9
FAX: (709) 643-4022

Confirmation of hotel accommodation will be sent to you by Radisson Plaza.

Editor's Notebook / Remarques du rédacteur

With the arrival of a new year and a new volume of the Journal, we hope to get back to the practice of publishing four issues per year. Many sharp-eyed readers noted that there was no vVolume 15, No. 4 or Volume 16, No. 1 and that there were two Volume 15, No. 1s. There were glitches in the transition from one editor to the other. With effort and a bit of luck, I hope those problems are behind us.

In addition to news from the Assocciation, this issue features articles on certificate evidence and perjury submitted by lawyers. I encourage judges to submit similar aritcles. I regret that neighter article in this issue is in French. That should be remedied next time.

Don't be afraid to pass along your comments, suggestions and criticism.

Pat Curran
Editor

Avec l'arrivée de la nouvelle année et d'un nouveau volume du Journal, nous espérons nous remettre à publier quatre numéros par an. De nombreux lecteurs très observateurs ont remarqué qu'il n'y avait pas de Volume 15, No 4 ni de Volume 16, No 1 mais qu'il y avait deux Volume 15, No 1. La transition d'un rédacteur à l'autre a entraîné quelques petits problèmes qu'avec un peu de chance nous allons nous efforcer de résoudre.

En plus des nouvelles de l'Association, le présent numéro contient des articles sur l'attestation des preuves et des parjures soumise par les avocats. J'encourage les juges à soumettre des articles semblables. Je regrette qu'aucun article de ce numéro ne soit en français. Nous y porterons remède la prochaine fois.

N'ayez pas peur de nous transmettre vos commentaires, vos suggestions et vos critiques.

Pat Curran
Rédacteur

President's Report / Rapport du Président

His Honour Judge Ernie S. Bobowski / L'Honourable juge Ernie S. Bobowski
Provincial Court of Saskatchewan
Cour Provinciale de la Saskatchewan

I would like to share with you, the membership, some of the highlights of my attendance at meetings since the commencement of my office.

Immediately after my installation in Regina in September, my wife Adelyne and I travelled to Kananaskis in Alberta where we enjoyed the Alberta western hospitality of barbecues and sleigh rides. A most interesting resolution was passed at their Annual Meeting advocating job sharing. More information regarding this resolution has been requested for the Journal. A more disconcerting suggestion of withdrawing from the CAPACJ was quickly rejected.

Efforts must be made to better communicate to each member of the Association as to what the Association does and what it stands for. Your Provincial Representatives and Executive receive regular reports and have all reports filed at our Annual Meeting.

On to Newfoundland where I was aghast to learn that the Newfoundland Provincial Court Judges, for the purpose of their Public Sector Restraint Act, were designated as public sector employees and had had their salaries frozen. This certainly appears to fly directly in the fact of R. v. Valente. This matter of designation as "public employees" is being closely monitored by the Executive. After hearing a presentation by Mr. Justice David Griffiths of the Ontario Court of Appeal, a resolution was passed to allow for adequate time for reflection and writing, such time to be worked out with the Chief Judge.

In Quebec, I was warmly hosted at the Chateau Frontenac. The highlight of this attendance was my feeble attempt to say a few words in French. Relying on my University French of some 30 years ago and

J'aimerais faire partager aux membres certains moments marquants de ma participation aux réunions depuis ma prise de fonctions.

Immédiatement après mon installation à Regina en septembre, ma femme Adelyne et moi, nous sommes rendus à Kananaskis en Alberta où nous avons goûté à l'hospitalité de l'ouest avec les barbecues et les promenades en traîneau de l'Alberta. Une résolution des plus intéressantes a été adoptée lors de leur assemblée annuelle en faveur du partage du travail. De plus amples renseignements sur cette résolution ont été demandés pour le Journal. Une suggestion regrettable de se retirer de l'ACJCP a été rapidement retirée.

Nous devons faire des efforts de communication pour mieux faire savoir à chaque membre de l'Association son action et ses objectifs. Votre exécutif et vos représentants provinciaux reçoivent des rapports réguliers et font déposer tous ces rapports à notre assemblée annuelle.

Je me suis ensuite rendu à Terre-Neuve où j'ai été atterré d'apprendre que les juges de la Cour provinciale de Terre-Neuve, dans le cadre de leur Public Sector Restraint Act (Loi sur les restrictions imposées au secteur public), ont été désignés employés du secteur public et ont eu leur salaires gelés. Cette décision contredit certainement l'arrêt R. c. Valente. L'exécutif suit de près cette désignation des juges en tant qu'"employés du secteur public". Après avoir entendu une présentation de Monsieur le juge David Griffiths de la Cour d'appel de l'Ontario, une résolution a été adoptée en vue de prendre le temps nécessaire pour réfléchir et écrire, le juge en chef décidera de la durée de ce délai.

October 15, 1992

Dear Judge Curran;

This story illustrates both the fascination of family court and the value of pretrial conferences. You may want to reproduce it in the Journal.

A recent pretrial conference, held during child-protection proceedings, revealed the following unusual fact situation.

The children's aid society took mother's two children into care because of both parents addiction to alcohol and father's abuse of mother and an older child. The parents separated and father's access to the children, who were six and eight years of age, was restricted to Saturdays at a government sponsored access program, run by a woman who held a Masters degree in social work.

The matter was set down for a lengthy trial, as well as for cross motions by both parents for custody of the children pending trial.

Happily, by the time the matter reached the pretrial conference stage, mother had successfully overcome her problems with alcohol and both the children's aid society and the children's counsel recommended that the children be returned to her.

The only opposition came from father, who sought custody of the two children himself. It seems that during the course of his visits to the Saturday access program, father and the supervisor of the program fell in love and were now living together!

As the primary caregiver, mother would normally be preferred, except for the fact that her new mate was a transsexual who was about to undergo surgery to complete his transition into womanhood!

At the pretrial conference I gave the parties the following analysis:

Mother seemed to have an unfortunate history of putting her own needs ahead of those of her children. Her need for alcohol placed them at risk and resulted in their coming into care. Now, in herneed for a relationship with her new mate, she was willing to subject them to doubts about her, their, and her partner's sexuality, as well as to certain embarrassment and ridicule at school. I indicated that it would be well if expert evidence at trial could establish just what effect mother's new relationship would have on the children.

I found father's situation no less interesting. Was the supervisor of the access program really able to reform his violent and alcoholic propensities? Did she have an unrealistic rescue fantasy? How permanent was their relationship? How committed was she to raising someone else's children?

I indicated that I could not predict the outcome at trial without the answers to the above questions, and put the matter over for the cross motions for custody.

At the next hearing counsel advised me that the matter had been settled! The parents agreed to joint custody, primary residence with mother who agreed not to cohabit with her new mate in the presence of the children. The children's aid society withdrew from the proceedings. Counsel further advised that my comments had been most helpful to the parties.

I was delighted with the result. The parents were able to resolve the matter in a way that was in their children's best interests, that was beyond my power to order and that saved days of trial time. I congratulated them. I told them that in 17 years on the bench I had seen thousands of parents in my court, but that I was really impressed with them.

As they all were filing out my courtroom door the children's aid social worker turned and rewarded me with the biggest smile.

Yours very truly,

Norris Weisman
Ontario Court of Justice

Feedback/ Réactions

September 28, 1992 Dear Judge Curran:

RE: Judicial Education - Then and Now

I was appointed to my judicial position October 1, 1973. I am a Provincial Court Judge and have resided and presided as such at Yorkton, Saskatchewan, and at surrounding towns for the entire 19 years.

Then, judicial education consisted of a steady diet of on-the-job training. Now, new appointees have the benefit of "New Judges School". Even to this day, Provincial Judges in rural Saskatchewan have duties in criminal matters, Small Claims, Youth Court and Provincial Statutes such as The Highway Traffic Act, The Liquor Act, The Wildlife Act, and the like. It has been, and continues to be necessary to be knowledgeable in all these areas.

It was therefore quite an experience for me to attend a week long Educational Conference in the early 80's at London, Ontario at the invitation of the Ontario Provincial Court, Criminal Division, with Chief Judge Fred Hayes in charge. Because that court dealt only with criminal matters, each topic on the agenda was presented at a level suitable to such full-time Criminal Court Judges, and needless to say I had the opportunity to learn a lot, and did learn a lot, and did appreciate that this educational forum had been made available to me, - by the kindness and generosity of my hosts.

Now, 1992-1993, the following educational programs are in place:

1) June, 1992, Saskatoon, a week long Western Judicial Education Centre seminar in Saskatoon, Saskatchewan on racial, ethnic and cultural equity, organized by Doug Campbell.

2) September, 1992, Regina, education portion of National Conference, featuring Allan Blakeney and Supreme Court of Canada Chief Judge Antonio Lamer as speakers, and excellent sessions dealing with fact finding and credibility of witnesses.

3) March 24 to 28, 1993, a further week long seminar at Victoria, British Columbia organized by Doug Campbell.

Now, as well, we have our own Judges becoming expert presenters and innovators. Judges Deshaye, Arnot, and Seniuk from Saskatchewan have created, and continue to create video work for educational purposes, which has received high praise from the leading judicial educators in Canada.

In Regina, I mentioned to our past President Charles Scullion, that judicial education has come a long way from 1973 to date. I think that the very existence of our Association, (with the opportunity to discuss needs and exchange ideas) is the most important factor in the growth of Judicial Education.

I have never been a contributor to our Journal, but after a little chat with Charles he extracted from me a firm promise to submit an item to the Journal on this theme, which I hereby do, gladly.

Yours truly,

Judge Kash Andrychuk
Provincial Court Judge
Yorkton, Saskatchewan

superb guidance from my tutors, Madeline (my secretary), Pamela, Stephen and Yvon, I struggled through three paragraphs of French diction to the pleasant surprise of many. From all reports a lot of goodwill was garnered for the CAPCJ as a result thereof.

On to the sunny climes of British Columbia. Unfortunately the morale of the judges was not as nice as the weather. Matters of salaries and benefits have virtually been at a standstill since 1988. However, there is some movement towards their 55 retirement age package being resurrected. I was interested to note that a Retired Judges Association has been formed under the chair of Judge Larry Goulet.

The last of my attendance before Christmas took me and my wife to Manitoba where we were hosted by Judge Wes Swail and his wife, Eileen, to a scrumptious repast upon our arrival. Much of the time at the Judges' meeting was spent on compensation and the upcoming commission hearings. I might say, an issue which has taken up much discussion time in each of the provinces I have attended. One of the interesting projects that has its infancy in Manitoba is video bail hearings - any centers with a resident Correctional Centre might look at this project with great interest.

These are some of the highlights, however, I cannot conclude without indicating that in each of the provinces the educational program has been very well presented with timely and in some cases very controversial topics. Each of the Committees are to be congratulated on job well done. In addition, I thank each host province for the kind and warm hospitality extended to me and Adelyne, and for the Friendships that I have gained.

À Québec, j'ai été chaleureusement reçu au Château Frontenac. Le point marquant de ma participation a été les quelques mots que j'ai essayé de dire en français. En me servant du français que j'ai appris à l'université voilà 30 ans et avec l'aide précieuse de mes professeurs, Madeline (ma secrétaire), Pamela, Stephen et Yvon, j'ai lu avec difficulté trois paragraphes en français ce qui en a agréablement surpris beaucoup. D'après tout ce que j'ai entendu, ceci a permis de faire le plein de bonne volonté pour l'ACJCP.

Ensuite je me suis rendu en Colombie-Britannique toujours si ensoleillée. Malheureusement le moral des juges n'était pas aussi beau que le temps. Les questions de salaires et d'avantages sociaux sont pratiquement bloquées depuis 1988. Cependant, le plan de retraite à 55 ans semble être remis en marche et suscite une certaine activité. J'ai noté avec intérêt qu'une Association des juges en retraite a été formée sous la présidence du juge Larry Goulet.

Ma dernière visite avant Noël a été avec ma femme au Manitoba où le juge Wes Swail et sa femme, Eileen, nous ont invités à un délicieux repas, dès notre arrivée. La réunion des juges a porté essentiellement sur les rémunérations et les prochaines auditions de la commission. Je dois dire que cette question a occupé la plus grande partie des réunions dans toutes les provinces que j'ai visitées. Un des projets intéressants qui vient de voir le jour au Manitoba est l'enregistrement vidéo des auditions de mise en liberté sous caution - toute agglomération qui dispose d'un centre correctionnel résidentiel devrait s'intéresser à ce projet avec beaucoup d'intérêt.

Voilà donc les principaux points marquants. Cependant, je ne peux pas conclure sans indiquer que dans chaque province, le programme de formation a été très bien présenté avec des sujets actuels et quelquefois très controversés. Chaque comité doit être félicité pour son bon travail. De plus, je remercie chaque province de nous avoir reçus, Adelyne et moi, avec une hospitalité très chaleureuse, et pour tous les amis que je me suis faits.

News Brief / En Bref

ALBERTA

Appointments

His Honour Judge James L. Skitsko
Civil Division, Edmonton
effective January 7, 1993

Retirements

His Honour Judge Carl H. Rolf
retired April 6, 1992.
His Honour Judge Ralph E. Hyde
retired June 27, 1992
His Honour Judge Harry F. Wilson
retired July 12, 1992
His Honour Judge Michael F. McInerney
retired February 15, 1993

Deaths

His Honour Judge Edgar H. Gerhart
died May 25, 1992

SASKATCHEWAN

Appointments

His Honour Judge Benjamin Goldstein
Saskatoon - Effective November 17, 1992

MANITOBA

At the 1992 annual meeting of the Provincial Judges Association of Manitoba held on December 4 and 5 in Winnipeg, the following officers were elected:

President and C.A.P.C.J. Representative

Judge Marvin Garfinkel, Winnipeg

Vice-President

Judge Ron Meyers, Winnipeg

Secretary

Judge Linda Giesbrecht, Winnipeg

Treasurer

Judge Philip Ashdown, Winnipeg

ONTARIO

Appointments

His Honour Judge Paul Bentley, Toronto Region
effective June 1, 1992
His Honour Judge Jeff Casey, Toronto Region
effective December 21, 1992
His Honour Judge Ronald Richards,
Toronto Region - effective December 21, 1992
His Honour Judge Hugh Atwood, Central West Region - effective January 4, 1993
Her Honour Judge Margaret Woolcott
Central West Region
effective January 4, 1993
Her Honour Judge Jennifer Blishen
East Region
effective January 15, 1993
Her Honour Judge Geraldine Sparrow
Toronto Region - effective January 15, 1993
His Honour Judge James Blacklock
Central West Region
effective February 1, 1993

Retirements

His Honour Judge James A. Fuller
retired November 30, 1992
His Honour Judge Ross. H. Fair
His Honour Judge Jean-Pierre Beaulne
retired after 25 years

Deaths

His Honour Judge Frederick White
died December 17, 1992

CBAO Award

At a dinner held December 3, 1992 in Toronto, the Canadian Bar Association - Ontario presented an Award for Distinguished Service in 1992 to Senior Judge Charles Scullion, the Immediate Past President of the C.A.P.C.J.

QUEBEC

Nominations

L'Honourable juge Evarto Massignani
cour municipale de Montréal
L'Honorable juge Raymonde Verreault
cour du Québec - le 7 janvier 1993
L'Honorable juge Pierre Chevalier
cour du Québec - chambre criminelle de Hull

RETRAITE

L'Honorable juge Andre Daviault
le 29 novembre 1992
L'Honorable juge Robert Langeois
après 26 ans

DÉCES

L'Honorable juge Rolland Beauchemin le 26 décembre 1992

7 (1989), 51 C.C.C.(3d) 321 (Alta. C.A.), leave to appeal refused (1990), 70 Alta. L.R.(2d) liii(S.C.C.).
8v. Prihoda (1980), 54 C.C.C.(2d) 477 (Ont. C.A.). Compare Prihoda with Rex v. Brewer (1921), 34 C.C.C. 341 (Alta. C.A.) which advocates producing the entire transcript for the trier of fact.
9 R. v. Phahler, [1963] 2 C.C.C. 289, at p. 294. See also Regina v. Nichols (1975), 30 C.R.N.S. 323 (Atla. S.C.) which stands for the proposition that commissioners of oaths must ensure deponents know they are swearing an oath and that what they are swearing to is true.
10v Massot (1980), 58 C.C.C.(2d) 455 (B.C. Prov. Ct.).
11v. Deakin (1911), 19 C.C.C. 62 (B.C.C.A.).
12 (1915), 25 C.C.C. 69 at p.72.
13 Section 13 of the Canada Evidence Act specifically addresses Courts and Judges.
14 (1974), 5 O.R. (2d) 599 (Ont. C.A.).
15v. Boisjoly (1971), 5 C.C.C. (2d) 309 (S.C.C.).
16 (1977), 35 C.C.C. (2d) 407 (Ont. C.A.).
17 See also Regina v Wilson (1977), 33 C.C.C. (2d) 383 (Alta, C.A.) leave to appeal refused (1977), 33 C.C.C. (2d) 383n (S.C.C.) on, **inter alia**, the ramifications of permitting an affidavit to be used in judicial proceedings.
18v. Regnier (1955), 112 C.C.C. 79 (Ont. C.A.).
19 (1974), 17 C.C.C.(2d) 425 at pp. 429-430.
20 Calder v. The Queen (1960), 129 C.C.C.202 (S.C.C.).
21 Besner v. The Queen (1975), 33 C.R.N.S. 122 (Que.C.A.).
22v. Falkenberg (1973), 13 C.C.C.(2d) 562 (Ont.Co.Ct.)
23 See s.17 of the Criminal Code for the definition of the defence of duress.
24 (1989), 49 C.C.C.(3d) 59 at p. 64.
25 Besner v. The Queen, **supra,** footnote 21.
26 [1965] 3 C.C.C. 245 (Ont. C.A.).
27v. Falkenberg, **supra,** footnote 22 at pp. 563-564. See also s.136 of the Criminal Code.
28v. Bouchard (1981), 61 C.C.C.(2d) 242(Man. Co. Ct. reversed on other grounds (1982), 26 C.R. (3d) 178 (Man.C.A.)
29 For examples of offences which still require corroboration see Section 47(3), 292(2) and 367(2) of the Criminal Code.
30 H. Black, Black's Law Dictionary, 6th ed. (St. Paul: West, 1990) at pg. 344.
31 The policy reasons behind the need for corroboration in perjury prosecutions are canvassed in the case of Regina v. Predy (1983), 17 C.C.C. (3d) 379 (Atla. C.A.).
32 (1975), 27 C.C.C.(2d) 448 at p. 454 (Ont. C.A.).
33 Although s. 585 of the Criminal Code states that a count of perjury is not insufficient by reason only that it does not state the nature of the authority of the tribunal before which the oath or statement was made, or the subject of the inquiry, or the words used, s. 587 of the Criminal Code allows a Court to order particulars of what is relied upon to support a charge of perjury.
34 v. Pattyson (1973), 12 C.C.C. (2d) 174 (Sask. C.A.).
35 The King v. Dawn (1906), 11 C.C.C. 244 (Ont. C.A.).
36 Regina v. Pattyson, **supra,** footnote 34, at p. 179. See also Regina v. Doz (1984), 12 C.C.C. (3d) 200 (Alta. C.A.).
37 (1990), 56 C.C.C. (3d) 161 at p. 178. It should be noted that shortly after this decision was released s. 16 of the Canada Evidence Act was amended to remove the necessity for the corroboration of a child's unsworn testimony (see also s. 274 of the Criminal Code).
38 Regina v. Elliott (1972), 9 C.C.C.(2d) 207 (Atla. C.A.).
39 Section 118 of the Criminal Code.
40 **Supra,** footnote 31. See also Rex v. Brewer **supra,** footnote 8, at p. 345.
41 The Queen v. Kyling (1970), 2 C.C.C. (2d) 79 (S.C.C). See also Regina v. Fergusson and Petrie, [1968] 1 C.C.C. 352 (B.C.C.A.) on the issue of conspiracy to commit perjury where it was held that corroboration is not required.
42 Supra, footnote 28, at p. 250.
43 v. Nash (1914), 23 C.C.C. 38 (Alta. C.A.) aff. (1915), 8 W.W.R. 632 (S.C.C.).
44 Section 5(2) of the Canada Evidence Act.
45 Section 13 of the Canadian Charter of Rights and Freedoms.
46 Kenneth C. Chase "A Note on Issue Estoppel" (1980) 16 C.F. (3d) 357 at p. 358.
47 Duhamel v. [1985], 2 W.R.R. 251 (S.C.C.).
48 **Ibid,** at p. 253.
49 (1979), 50 C.C.C.(2d) 417 (S.C.C.).
50 [1975] 1 S.C.R. 729.
51 **Supra,** footnote 49, at p. 423.
52 Regina v. Gordon, [1980] 3 W.W.R. 655 (Alta.Q.B.).
53 (1985), 19 C.C.C. (3d) 289 (S.C.C.).
54 See Regina v. Boross (1984), 12 C.C.C.(3d) 480 (Alta.C.A.).

Logical as this submission may appear to be, what we have to resolve here is a question of policy based on the premise that issue estoppel cannot be founded on false evidence where the falsity is disclosed by subsequent evidence not available at the trial from which issue estoppel is alleged to arise. In my view, unless it can be said that the subsequent prosecution is an attempt by the Crown to retry the accused - and that is not the case here - the preferable policy is to exclude issue estoppel, especially when the contradictory statements on which the charge under s.124 [now s.136] is founded consist of admissions of the accused himself.[51]

[emphasis mine]

The Crown will be closely scrutinized by the Court to determine whether in fact the falsity was disclosed by evidence not available at the first trial. Evidence not available at the trial is evidence not available by the exercise of reasonable diligence.[52]

In Grdic v. The Queen[53], the accused was tried and acquitted of impaired driving and "over 80" in the British Columbia Provincial Court. The accused relied on the defence of **alibi,** that he was not driving at the time the police alleged he was, but instead was at home. Corroboration of the **alibi** was supplied by the accused's daughter.

A subsequent charge of perjury was laid against Grdic which also resulted in an acquittal based on the fresh evidence rule. Although the Crown on the original drinking and driving charges could not have anticipated the perjured testimony in its case, the Crown certainly could have applied for an adjournment when the defence rested in order to call rebuttal evidence in the form of other police officers and the breathalyser technician who could have corroborated the arresting officer's testimony. As such, the retrying of the issue on a perjury prosecution was ruled estopped by the trial Judge because the evidence on the original trial was available through reasonable diligence.

The Crown in turn appealed to the British Columbia Court of Appeal which set aside the acquittal and ordered a new trial. Following that the accused appealed to the Supreme Court of Canada which restored the accused's acquittal in a 5:4 decision.

Mr. Justice Lamer, as he then was, writing the decision for the majority, identified the two main considerations which must be addressed whenever issue estoppel is raised in a criminal proceeding.

Firstly, there must be a conclusive finding in the accused's favour on the original trial which was a prerequisite to the acquittal. Thus if the accused is acquitted, the essential issues in the prosecution are deemed to have been found conclusively in the favour of the accused. Where an accused is convicted on his original trial, the Crown would not be estopped from a perjury prosecution as all essential elements of the offence would be deemed to have been proved beyond a reasonable doubt.[54]

Secondly, issue estoppel will not benefit an accused where it is proven that the original issue was determined in his favour as a result of fraud, including perjury.

Conclusion

The entire criminal justice system is designed to protect society whereby persons accused of committing a criminal offence are brought before a Court and, after a fair trial, if found guilty, are sentenced according to law. There are many pitfalls in perjury prosecution. I hope this paper exposes those pitfalls so that perjury may be denounced

1 *v. Simon (1979), 45 C.C.C. (2nd) 510 (Ont. C.A.).*
2 *Section 131(1) Criminal Code*
3 *Section 131(2) Criminal Code*
4 *Section 131(3) Criminal Code. However see s.134 of the Criminal Code which makes it a separate offence for making a statement when not permitted, authorized or required by law, knowing it to be false. Note that the section does not apply if the statement was made in the course of a criminal investigation.*
5 *Re Wong Shue Tee and U.S.A. (1975), 24 C.C.C. (2d) 501 (Fed. C.A.) details the limitations placed on s.23 of the Canada Evidence Act*
6 (1927), 48 C.C.C. 290 (Man. C.A.)

The Duty to Challenge Certificate Evidence Pursuant to the Rule in Brown v. Dunn

by Gilles Renaud, Counsel, Crimes Against Humanity and War Crimes Section Department of Justice, Ottawa

Introduction

As a general rule, it is thought that the following proposition is correct: "The cross-examining party should put as much of his own case as concerns the witness to him. Thus, if the cross-examining party intends to adduce evidence which contradicts evidence given by the witness, he should put his version to the witness, so that the witness may have the opportunity of explaining the contradiction."[1] The authority cited in support of this proposition usually includes the seminal decision of Browne v. Dunn.[2] But what rule governs the cross-examiner in cases where the prosecution adduces evidence by other than a witness testifying viva voce? In particular, in the case of the submission of documentation evidencing the results of tests conducted by means of instruments to detect the blood-alcohol concentration of suspected drivers? This brief comment will serve to test the merits of applying the rule in Browne v. Dunn to the introduction of certificate evidence in cases of motor vehicles offences.

Discussion

It will be of assistance to begin our review by quoting from R. v. Willms,[3] wherein Dickson, J.A., later Chief Justice of Canada, had occasion to comment that

We hold that in the absence of challenge the Crown need not adduce evidence independent of the certificate to establish that the person signing the certificate is an 'analyst' as defined in the Code."[4] Many others examples could be advanced to illustrate this proposition, but suffice it to say that none refers to Browne v. Dunn or to the case law derived from this authority.[5]

The first case to be considered is from the Ontario Court of Appeal. The facts in R. v. Alatyppo[6] do not discuss a factual situation involving a certificate but the ratio appears to establish that testimony that a person employed an approved instrument is sufficient, in the absence of challenge. Hence, our review of this case will be helpful in delineating the principles that inform the appreciation by trial courts of certificate evidence. The accused was found not guilty at trial of having care and control while 'over .08', on the grounds that he did not intend to set the vehicle in motion. The Crown's appeal to the District Court was successful, based on the Ford decision.[7] Before the Court of Appeal, R.P. Lester (now a judge of the Provincial Court in Ontario) lost his argument, but won the day. Indeed, Martin, J.A., found the appellant's argument respecting the issue of care and control, 'very interesting', but rejected it.[8] However, His Lordship held that "We are all of the view that this appeal must succeed on the ground that there was no evidence that the samples of breath were received from the accused directly into an approved instrument."[9] As noted at p. 518,

The record, in our view, contains no direct evidence and, indeed, no circumstantial evidence from which it could be defined that the breathalyzer that was used in the present case was an approved instrument. The breathalyzer technician simply referred to it as a 'breathalyzer instrument'.[10]

After having remarked that testimony identifying the instrument as a Borkenstein would suffice, Mr. Justice Martin commented, "We think that it might also be proved that the instrument in question was an approved instrument if the officer had

referred to it as an approved instrument and there had been no challenge to it.[11] Such minimal evidence was absent in the circumstances.

Hence, the judgment is an example of the branch of the Rule of Browne v. Dunn to the effect that one cannot rely on a supposed ambiguity in a word employed by a witness while in the box, absent challenge to make plain the existence of an alternative meaning. As stated by Mr. Justice Middleton, then of the High Court, in a case in which a witness mentioned liquor:

> *Manifestly he means intoxicating liquor. If there could be any doubt as to the meaning of the witness, it was the duty of counsel acting for the accused to clear up the situation by cross-examination. The House of Lords in Browne v. Dunn laid down the rule that there is a duty to cross-examine, drawing the attention of the witness to any particular point upon which it is intended to suggest that he is not speaking the truth, so that he may have an opportunity of making any explanation open to him unless it is perfectly clear from the surrounding circumstances that it is intended to impeach his story. A fortiori, I think, it is the duty of counsel to cross-examine where it is intended to suggest that a witness is perverting the truth by the use of a word which is capable of an ambiguous meaning, in such a way as to mislead in the administration of justice.*[12]

R. v. Alatyppo was applied in Black v. R.[13] In that case, a challenge had been addressed as to designation of the device employed by the police officer. The Crown, being on notice, had the duty to supply the required testimony to establish that fact; in default of proof of this essential issue, the conviction was set aside.

Judge Marenger reviewed the fact that defence counsel had asked for a precise description of the type of "Alert" device employed but that the Crown did not in any way attempt to adduce or show through that witness that the device was used in fact an "approved instrument". Further, "Once this issue was raised as it was, then in my view it was incumbent on the Crown to prove beyond a reasonable doubt that the device was an 'approved screening device'...".[14]

Having set out these few illustrations of the duty to challenge viva voce evidence respecting the use of breath-testing instruments, let us consider the application of Browne v. Dunn to the case of certificate evidence. In other words, is it permissible to fail to cross-examine on technical evidence, as in the case of instruments to detect and to measure blood alcohol content, to then ask the trier of fact to draw an inference adverse to the prosecution case? Possibly the most apt expression of this situation is found in R. v. Taylor.[15] Mr. Taylor provided two samples of breath into an approved instrument, and the qualified technician's certificate, attesting to the results of his analysis, contained a reference to the times at which the two samples were taken. The certificate stated "That at 1:12 a.m. on the 18th day of March, 1981 And at 1:27 a.m. on the 18th day of March, 1981, ...I did take samples...".[16] An issue was raised whether there was sufficient proof that fully 15 minutes had elapsed between the taking of the samples, as prescribed by the Criminal code, s.237(1)(c)(ii). It is important to note that the qualified technician did not testify and thus, "The proof of the time interval must be found in the information set forth in the certificate of analysis filed as an exhibit."[17] The majority of the Court rejected the submission of the Crown that it was open to conclude that the learned trial judge found as a fact that the taking of the first breath sample was completed at precisely 1:12 a.m. and that the commencement of the taking of the second sample took place at precisely 1:27 a.m. Goodman, J.A., concluded that "...the information contained in the certificate of analysis was at least equally open to a finding on the part of the trial judge that the taking of each sample commenced at the time noted or that the taking of each sample was completed at the time noted. There was no evidence to indicate which of these ... combinations of circumstances existed."[18] In the result, the Court of Appeal allowed the appeal and set aside the conviction, MacKinnon, A.C.J.O., dissenting.

to avoid the unsatisfactory situation where one person who has testified to the truth of something is exposed to a risk of conviction just because somebody else testifies that it is an untruth. However, where an accused in a statement given subsequent to his perjured testimony admits that his earlier testimony was false, that he knew that it was false when he gave it and, that he gave it with the intent to mislead the Court, a **prima facie** case is made out. Corroboration at this point would be superfluous.

Where the accused gives evidence on his own behalf in defence of a charge of perjury, material variances in his testimony from that in respect of the alleged previous perjured testimony may in themselves supply the needed statutory corroboration. In essence, an accused at his own perjury trial is at risk of convicting himself if he chooses to testify on his own behalf and his testimony is deemed corroborative of a material particular of the Crown's evidence.[43]

The Defence of Issue Estoppel

Both the Canada Evidence Act[44] and the Canadian Charter of Rights and Freedoms [45] recognize that the incriminating testimony of a witness taken in any proceedings can be used to incriminate that witness in a prosecution for perjury. However, the defence of issue estoppel stands for the proposition that the Crown cannot relitigate an issue with the same accused which has been successfully decided in the accused's favour in previous criminal proceedings.[46] Issue estoppel is founded in the doctrine of **estoppel per rem judicata** [47] or more commonly **res judicata** which in turn is based on the following policy considerations:

> *...'the general interest of the community in the termination of disputes',...'and the right of the individual to be protected from vexatious multiplication of suits and prosecutions'.*[48]

The two prominent cases dealing with issue estoppel in the context of perjury prosecutions come out of the Supreme Court of Canada. Each case is worthy of detailed consideration.

In Gushue v. The Queen [49] the accused was originally tried and acquitted of a charge of murder allegedly committed during the course of a robbery. Some four years later while being investigated on other charges Gushue confessed to the earlier murder thus contradicting his previous testimony. Consequently the accused was charged with both robbery and perjury. The accused pleaded guilty to robbery and attempted to plead guilty to perjury but the presiding Provincial Court Judge struck out the latter plea and convened a preliminary inquiry which ultimately resulted in Gushue being discharged on the perjury charge. The grounds for the discharge were that the accused had already been acquitted by a jury of murder and consequently the Crown was estopped from relitigating the issue.

The Crown preferred Indictments against Gushue on charges of perjury and giving contradictory evidence which in turn resulted in an acquittal on the former charge (based on issue estoppel and as a result of a directed verdict) but a conviction on the latter charge. On appeal to the Ontario Court of Appeal Mr. Justice Martin was required to assess both verdicts as well as the earlier guilty plea to the robbery charge. His Lordship held that issue estoppel was not a bar to the proceedings in this case, thus upholding the robbery and giving contradictory evidence convictions. However, the appeal from the acquittal on the perjury charge was dismissed as it contravened the rule against multiple convictions (vis-a-vis the conviction for giving contradictory evidence) as described in Kienapple v. Regina.[50]

The accused further appealed to the Supreme Court of Canada. Among the arguments made by the appellant was the contention that since a jury had originally acquitted Gushue of murder, a later contrary admission could not give rise to a contradiction intending to mislead the Court as the jury's initial finding was conclusive on the point. Chief Justice Laskin, in dismissing the appeal, had these comments:

In the case of Regina v. Zappia and Luppino the Ontario Court of Appeal addressed the legal and factual considerations which come to light when assessing evidence purporting to have corroborative value:

> *It is the duty of the trial Judge to determine whether or not a piece of evidence is capable of being corroborative, and in doing so he may disregard an explanation offered by the accused whether through his defence or in a statement tendered in evidence by the Crown. It is, however, for the jury to say whether or not that piece of evidence is in fact corroborative and in deciding that issue, such explanation must be considered by them.*[32]

In a perjury prosecution, it is important that the Information or Indictment reflect allegations drafted with some specificity.[33] Before it can be decided whether or not there is evidence capable of providing the required corroboration, there must be certainty as to what evidence given by the accused is the basis for the charge of perjury. It is only when there is no misunderstanding on that score that it can be determined which evidence requires corroboration.[34]

The law does not require each ingredient of the offence of perjury is corroborated. The complainant's evidence need only be corroborated in some material particular by evidence implicating the accused.[35] The material particular for which corroboration is required is not that the accused swore to a certain statement, but that the statement sworn to was false.[36] The Supreme Court of Canada, in the case of G.B. v. The Queen, focused on corroboration and material particulars in the context of child testimony. Madam Justice Wilson writing for the Court emphasized taking a common sense approach to corroboration.[37]

Section 133 of the Criminal Code requires corroboration in perjury cases. However, where two witnesses testify that the accused's evidence under oath was false, given their actual knowledge of or presence for the act that resulted in the perjured testimony, corroboration is not required. It is only when one witness gives evidence that testimony is perjured that corroboration of a material particular of his evidence becomes necessary.[38] It would appear arguable that where the Crown calls evidence, other than through witnesses[39], in a perjury prosecution, no corroboration is necessary. In the case of Regina v. Predy[40] the Crown tendered the certificate of a fingerprint expert as the only evidence to support a perjury charge where the accused was alleged to have sworn a statutory declaration that he had no criminal convictions in the last five years. The accused submitted that the trail judge erred in convicting him as there was no corroboration for the assertions found in the certificate. The Court held that perjury could be satisfactorily proven on the strength of the document alone.

Occasions will arise where an act of perjury is not completed because it is uncovered in the planning stages. Commonly this situation occurs where the accused attempts to persuade a prospective witness to bear false witness in his favour. The charge of inciting a person to commit perjury is an included offence of perjury pursuant to s. 463 of the Criminal Code (attempts, conspiracies, accessories). However, since the charge of inciting to commit perjury implies that perjury has not in fact been committed, corroboration is not required to prove the offence.

Similarly s. 21 of the Criminal Code (parties to offences) can have application to a perjury prosecution. Since the charge of subornation of perjury implies that the perjury has already been committed with the suborner as the party to the perjury, corroborative evidence will remain necessary.[41]

There is authority for the proposition that perjury can be proven on the evidence of the accused alone. In the case of Regina v. Bouchard, Mr. Justice Coleman of the Manitoba County Court came to the conclusion that the accused's own words supported a finding of guilt without the need for corroboration.[42]

It is submitted that the **ratio decidendi** in Bouchard is entirely logical. The reason for Parliament requiring corroboration was

What is of significance to the present discussion is not the particular result of this appeal, but the dynamics of advocacy when faced with a certificate. It is submitted that such evidence need not be challenged in the sense that Browne and Dunn dictates, for there is no witness to take umbrage,[19] and the Crown must accept the potential frailties of documentary evidence if it is to benefit from the statutory short-cuts in the presentation of its case. In effect, if a police officer testifies that two tests were taken at the times set out above, and no cross-examination is directed to the factual issue whether the taking of the first sample was completed at that point in time without duration represented by the time of 1:12 et cetera, the defence argument that other interpretations are possible should be dismissed. The police officer must be confronted with the matter and provided with the opportunity of establishing that that was in fact what occurred. Of course, if a certificate is filed, no obligation to challenge should arise.[20] The defence should be at liberty to argue as best it may that many varied interpretations are open to the trier of fact, and that ambiguous meanings are evident. Indeed, one may reverse the proposition stated by Anderson J., in Hardy v. Gillette, [1976] V.R. 392, "On general principles, where uncontradicted evidence, which is inherently reasonable, probable and conclusive of the matter, has been given, the court is bound to accept it." But only if it is evidence in the sense of testimony given viva voce.

A further comment to underscore is from the South African case of Meyer v. Kirner.[21] It was held in respect to unchallenged affidavit evidence that "...the evidence of the applicant would normally, in the absence of any contradictory evidence, be accepted as being prima facie true. It does not however follow that because evidence is uncontradicted it is true. The evidence may be so improbable in the light of all of the evidence that it cannot be accepted ... there seems to be no reason why the same principle should not apply to evidence on affidavit. Indeed, where evidence falls in the above category of improbability without the witness having even been cross-examined, the principle ought a fortiori to apply."

Conclusion

If it is correct to suggest that the rule in Browne v. Dunn has been interpreted in the context of motor vehicles offences to require challenge to testimony as to matters relative to the use of breath testing instruments, it is submitted that no such duty should arise in those instances in which the prosecution depends upon certificate evidence. In such cases, it cannot be said that the rule is triggered in the absence of a witness.

1 Richard May, Criminal Evidence (Second Edition), London, Sweet & Maxwell, 1990, at p. 410.

2 1894), 6 R. 67 (H.L.). The leading case in the field of criminal law is Rex v. Hart (1932), 23 Cr.App.Rep. (C.C.A.)

3 (1971), 22 C.R.N.S. 387 (Man. C.A.).

4 Ibid., at p. 387.

5 Consider Peters v. Perras et al., (1909), 42 S.C.R. 244, New Hamburg Mfg. Co. v. Webb (1911), 23 O.L.R. 44, Jarvis v. Hall (1912), 4 O.W.N. 232, R. v. Moke (1917), 28 C.C.C. 296, Jarvis v. Connell (1918), 44 O.L.R. 264, R. v. Nepp (1927), 48 C.C.C. 275, United Cigar Stores Ltd. v. Butler (1931), 66 O.L.R. 593, R. v. Foxton (1920), 34 Can C.C.9, R. v. Mandzuk (1945), 85 C.C.C. 158, R. V. Miller (1959), 125 C.C.C. 8, R. ex rel. Taulor v. Vanmeer (1950), 97 C.C.C. 241, R. v. Dyck, [1970] 2 C.C.C. 283, R. v. Mete, [19731 3 W.W.R. 709 R. v. Jackson and Woods (1974), 20 C.C.C. (2d) 113, Palmer v. R. (1980), 50 C.C.C. (2d) 193.

6 (1983), 4 C.C.C. (3d) 514 (Ont. C.A.).

7 (1982), 65 C.C.C. (2d) 392 (S.C.C.).

8 R. v. Alatyppo, supra, footnote 6 at p. 517.

9 Ibid.

10 Ibid., at p. 518.

11 Ibid.

12 Rex v. Foxon (1920), 34 Can. C.C.9 (H.C.J.). See also Rex el rel. Taylor v. Vanmeer, [1950] O.W.N. 539 (Co.Ct.), at p. 541, per Anderson Co. Ct. J.

13 Black v The Queen (1986), 40 M.V.R. 35 (Ont. Dist. Ct.)

14 Ibid., at p. 39. Reference may also be made to Judge Scullion insightful decision in R. v. Maguire (1983), 23 M.V.R. 279 (Ont. Prov. Ct.)

15 (1983), 7 C.C.C.(3d)293 (Ont. C.A.)

16 Ibid., at p. 296, of the judgment of Goodman, J.A., Martin, J.A., concurring.

17 Ibid., at p. 303

18 Ibid., at p. 305. It is beyond the scope of this article to comment on the narrow issue to any complementary degree, save to note that the dissenting judgment has been approved of frequently.

19 Lord Herschell's classic statement of the Rule sets out at p. 70 that "[it] is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses".

20 It is submitted that the logic of judicial economy which infuses the judgment of the Ontario Court of Appeal in R. v. Kutynek (1992), 12 C.R. (4th) 152 should not present an obstacle to the paradigm of the argument in cases of certificates set out above. Consider the passage at p. 159 of Mr. Justice Finlayson's judgment with respect to the challenge of reception of the evidence of a breathalyzer technician. [emphasis supplied]

21 1954 (4)SA, p. 413.

Remarks by His Honour Judge Ernie S. Bobowski at Mid-Winter Meeting of the Council of the Canadian Bar Association

Présentation faite par l'honorable juge Ernie S. Bobowski à la réunion de la mi-hiver du conseil de l'association du barreau canadien

February 21 Février 1993

Madame President, I wish to take this opportunity to thank you for extending the invitation to speak to his matter today.

There is a caveat that must blanket by subsequent remarks.

The Provincial judiciary completely recognizes and fully understands that there must be cooperation dialogue between the Bar and the Court. Both bodies must be impartial and unfettered by each other. Independence of the Bar is just as important as the independence of the judiciary. Both groups have to respect that the principle remains and must always remain but that does not and should not prevent information and communication flowing between both parties. Especially on the issue of the proper administration of justice where both parties have an obvious responsibility.

Madame la présidente, je désire vous remercier de m'avoir invité à parler sur ce sujet aujourd'hui.

Je dois cependant vous mettre en garde afin de justifier mes remarques suivantes.

Les juges provinciaux reconnaissent et comprennent pleinement qu'il doit y avoir coopération et dialogue entre le Barreau et le tribunal. Ces deux corps doivent être impartiaux et indépendants l'un vis à vis de l'autre. L'indépendance du barreau est tout aussi importante que celle des juges. Les deux groupes doivent respecter ce principe et accepter qu'il doit toujours demeurer intact mais cela n'empêche pas et ne devrait pas empêcher le flot d'information et de communication entre les deux parties. Particulièrement sur la question de la bonne administration de la justice où les deux parties ont une responsabilité évidente.

Although there must be some evidence of a threat of immediate death or bodily harm before the defence of duress will apply.[23] the Court must, in any event, allow an accused to make full answer and defence. In the case of Hebert v. The Queen the accused argued that he thought by testifying in a misleading fashion he would not be believed and in doing so would attract the presiding Judge's attention. He was then going to tell the Judge about the threats which had been made against him. The Supreme Court of Canada ordered a new trial for the following reasons:

> *For there to be perjury there has to be more than a deliberate false statement. The statement must also have been made with intent to mislead. While it is true that someone who lies generally does so with the intent of being believed, it is not impossible, though it may be exceptional, for a person to deliberately lie without intending to mislead. It is always open to an accused to seek to establish such an intent by his testimony or otherwise, leaving the trial judge the task of assessing its weight. The trial judge did not allow the accused to complete his evidence in this regard...*[24]

Did the Accused Know the Statement was False?

During a criminal prosecution, testing the source of evidence invariably exposes certain testimony as being based on hearsay, buttressed by speculation or generally not worthy of belief. In a perjury prosecution it is incumbent upon the prosecution to expose the impugned evidence as false and to show that the witness knew it to be false when he provided it under oath. As was discussed earlier in this paper, recklessness as to the truth or falsity of a statement does not bring with it criminal culpability on a charge of perjury.[25]

In the majority of perjury prosecutions, knowledge of falsity would have to be inferred from all the evidence rather than found in subsequent inculpatory statements. A good example of a successful perjury prosecution where knowledge of falsity was inferred from surrounding circumstances is the case of Farris v. The Queen.[26] In an investigation under the Ontario Securities Act a witness gave an answer which was literally true if understood in one sense, but false if understood in another sense. The Ontario Court of Appeal held, in dismissing the accused's appeal, that there was ample evidence to support the finding that the accused knew in which sense the question was posed and, as a consequence, he knew his answer to be false.

Where inconsistent and contrary evidence has been given at two proceedings, such as a preliminary inquiry and a trial, it would appear that one must be false.[27] However, for perjury to lie the Crown must still prove that the impugned evidence is false. Without independent evidence it would be uncertain which of the two statements was the false one.[28]

Is the Evidence of Perjury Corroborated in a Material Particular by Evidence That Implicates the Accused?

The need for corroboration in criminal prosecutions has largely been abrogated in recent times.[29] However, perjury is an offence which still requires corroboration in order to secure a finding of guilt. To corroborate or to give corroborating evidence is defined as follows:

> *To strengthen; to add weight or credibility to a thing by additional and confirming facts of evidence. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witnesses, or to comport with some facts otherwise known or established. Evidence supplementary to that already given and tending to strengthen or confirm it. Additional evidence of a different character to the same point.*[30]

The underlying rationale for requiring corroboration to prove perjury would appear to be that it would often be dangerous and always unsatisfactory to convict an accused of perjury by merely pitting the oath of one man against the oath of another's evidence.[31]

of the Supreme Court of Canada, in dismissing the accused's appeal, made the following comments:

> *I am of the opinion that if a witness allows himself to be sworn in any form without objecting to it, he is liable to be indicted for perjury, if his testimony prove false...*[12]

The person before whom the perjured statement is made must be authorized by law to permit it to be made. Among others who are vested with the legal authority to accept such statements are Justices[13], Commissioners for the taking of oaths and Notary Publics. It would appear that perjury will not lie if the impugned statement was given to a charlatan. Furthermore, a perjury prosecution will also fail if the person receiving the statement, although acting bona fide, was not acting within the parameters of his legal authority. In the case of Regina v. Edwards[14], the patent of the commissioner before whom the affidavits in question were sworn was limited to work in connection with a particular law firm. Thus, since the affidavits were taken for a non-work related matter, the commissioner acted **ultra vires** his patent and the offence was not made out.

As stated above, the person who makes the statement cannot be prosecuted for perjury if he is not specially permitted, authorized, or required by law to make the statement. Thus, only statements that are required for one purpose or another which a relevant provision of the law permits, authorizes, or requires to be so attested are of concern.[15] An example of a statement which was not authorized in law to be made can be found in the case of Regina v. Hewson.[16] In that case the Ontario Court of Appeal held that as there was no law which specifically required or authorized the use of an affidavit on a bail review hearing, until that affidavit was actually filed or used at the bail review, it had no legal significance.[17]

Did the Accused Intend to Mislead?

The intention to mislead is an essential element of the offence of perjury. It is not necessary that the false statement did, in fact, mislead the Court. It is sufficient that the statement is known to the witness to be false and is intended by the witness to mislead the Court.[18]

Notwithstanding that evidence is such that a Court cannot draw any inference or conclusion from it in all the circumstances, such evidence can still be intended to mislead. Chief Justice Laskin of the Supreme Court of Canada dealt with "negative evidence" in the case of Wolf v. The Queen where an accused was charged with perjury as a result of his alleged memory lapse:

> *It may be that drawing an inferance of an intent to mislead is more difficult where "can't remember" evidence is given or "I forgot" evidence is given than where a witness lies about a fact about which he gave an out-of-court statement or alters the narrative previously given by positive falsification or variation. This does not, however, go to a different legal measure on the question of culpability. The law of perjury, a necessary sanction in the administration of justice, would become toothless if a calculated lapse of memory was enough to defeat it. The quest for truth, so far as a Court can discern it from evidence, can be as easily frustrated by false negative evidence as by false positive evidence. In this sense the falsity has positive consequences in either event.*[19]

Evidence may be given in error, but error alone affords no basis for the inference of the intent and knowledge necessary to support a charge of perjury.[20] Likewise, the fact that the witness acted recklessly is not sufficient to constitute the mens rea for perjury. Recklessness does not satisfy the requirement that an accused acted intentionally.[21]

The defence of duress has found little success in perjury prosecution.[22] Typically, the argument is that the witness felt compelled to lie under oath due to extraneous threats which were relayed to him. The problem with this defence is that the Court, in theory, has the immediate power to protect the witness from harm. The excuse of duress is, generally, merely a reason for the exercise of clemency on sentence.

An independent judiciary has a natural ally in an independent Bar on certain issues, particularly, judicial independence. The Canadian Association of Provincial Court Judges would like to establish a closer working relationship with the Canadian Bar Association. Your mission statement to improve the administration of justice fits in very well with our own constitutional purposes, one of which is to create uniformity as well may be done in the procedure in the administration of justice.

We feel that the resolution before the Canadian Bar Association at the mid-winter meeting is the cornerstone in the foundation in the bridge building process between our two associations. We recognize there will be a corresponding expectation to promote increased membership and increased participation in the Canadian Bar Association, Provincial Branches, and the Canadian Bar Association National. We feel we are prepared as an association to meet that challenge.

For many reasons, the traditional role of the Attorney General as a spokesperson or protector of the Provincial Court Judiciary is evaporating. Most provinces have commissions established to deal with matters of Judicial Independence, including salary and compensation issues. In some provinces, it is clearly demonstrated that the Attorney General is an advocate opposing the Provincial Court. We feel it behooves the members of the Canadian Association of Provincial Court Judges to look to other constituencies, particularly the Canadian Bar Association, for support. We feel an independent Bar is a natural ally for an independent court.

The Canadian Association of Provincial Court Judges has always appreciated the role and the position taken by the Canadian Bar Association Provincial Branches before their respective compensation commissions. We realize that the Canadian Bar Association would appreciate a method of demonstrating our support. We are certainly enthusiastic and encouraged by the response to our outreach by the Canadian Bar Association.

L'indépendance des juges trouve un allié naturel auprès d'un barreau indépendant sur certaines questions, particulièrement l'indépendance même des juges. L'Association canadienne des juges des cours provinciales voudrait établir des relations de travail plus étroites avec l'Association du Barreau canadien. Votre objectif d'améliorer l'administration de la justice coïncide très bien avec nos propres objectifs constitutionnels dont l'un est de créer autant que possible l'uniformité dans les procédures de l'administration de la Justice.

Nous pensons que la résolution proposée à l'Association du Barreau canadien à la présente réunion de la mi-hiver est la pierre d'angle du pont à bâtir entre nos deux associations. Nous reconnaissons qu'on peut s'attendre en conséquence à promouvoir un recrutement accru de membres et une participation plus active à l'Association du Barreau canadien, aussi bien au niveau provincial que national. Nous pensons, en tant qu'association, que nous sommes prêts à relever ce défi.

Pour de nombreuses raisons, le rôle traditionnel de porte-parole ou de protecteur des juges des cours provinciales assuré par le procureur général est en train de disparaître. La plupart des provinces ont en effet établi des commissions pour traiter des questions touchant à l'indépendance des juges, notamment les questions de salaires et de rémunération. Dans certaines provinces, le procureur général s'oppose à l'évidence à la Cour provinciale. Nous estimons qu'il est du devoir des membres de l'Association canadienne des juges des cours provinciales de chercher de l'aide auprès d'autres organisations, particulièrement l'Association du Barreau canadien. Nous estimons qu'un barreau indépendant est un allié naturel d'un tribunal indépendant.

L'Association canadienne des juges des cours provinciales a toujours apprécié le rôle joué et les positions prises par les sections provinciales de l'Association du Barreau canadien devant leurs commissions respectives sur les rémunérations. Nous comprenons que l'Association du Barreau

To encourage that outreach our C.B.A. liaison, Judge Arnot and I met with your incoming President, Cecelia Johnstone and Treasurer Dennis Maher in Saskatoon on January 30 as an embryonic meeting to chart our courses.

At our meeting a target goal of becoming a conference of your organization was discussed. It was also discussed and subject to approval from my Executive Committee and yours we will be looking to join in a joint meeting in Vancouver in 1996.

Further, I was discussed with your President, circulating a joint letter signed by her and myself requesting participation and membership in the C.B.A.

Once again, I thank you for your invitation to be here today and solicit your support for this Resolution.

Thank you.

canadien aimerait nous voir démontrer notre soutien. Nous sommes certainement encouragés et enthousiasmés par la réponse de l'Association du Barreau canadien à nos ouvertures.

Pour encourager ces ouvertures, notre comité de liaison avec l'A.B.C., le juge Arnot et moi-même, avons rencontré votre nouvelle présidente, Cecelia Johnstone, et votre trésorier, Dennis Maher, à Saskatoon, le 30 janvier, pour planifier, au cours de cette première prise de contact, nos relations futures.

Lors de notre réunion, nous avons discuté de notre objectif de devenir une conférence de votre organisation. Nous avons également discuté, sous réserve de l'approbation de mon comité exécutif et du vôtre, de la possibilité de nous joindre à vous, lors d'une réunion commune à Vancouver en 1996.

De plus, j'ai discuté avec votre présidente de la possibilité de faire circuler une lettre conjointe signée par elle et moi demandant à participer à l'A.B.C. et à en devenir membre.

Encore une fois, je désire vous remercier de m'avoir invité ici aujourd'hui et vous demande votre soutien pour la résolution.

Merci.

s.136 Giving Contradictory Evidence;
s.137 Fabricating Evidence;
s.138 Affidavit Offences;
s.139 Attempting to Obstruct Justice;
s.140 Public Mischief; and,
s.141 Compounding an Indictable Offence

* The comments found herein are solely those of the author. The author would like to thank Rick Bennett B.A., LL.B. and Renee Puskas B.A., M.A., LL.B. for their helpful comments on earlier drafts of this paper and Domenic Basile B.A., LL.B., for updating the caselaw referred to herein.

*Editor's Note: A longer version of this article may be obtained from the author.

Was a statement Made Under Oath or Solemn Affirmation, by Affidavit, Solemn Declaration or Deposition to a PersonAuthorized by Law to Permit it to be Made Before Him?

In a perjury prosecution it must be proved that the accused made a statement orally or in writing while under oath or solemn affirmation. Written statements are defined as affidavits, solemn declarations and depositions. [2] It matters not whether the statement was made in a judicial proceeding. [3] A person does not commit perjury by giving a statement when he is not specially permitted, authorized or required by law to make that statement. [4]

The fact that a witness was under oath or affirmation can be proved by introducing documentary evidence alone, documentary evidence in combination with **viva voce** testimony or, oral testimony alone. A transcript of the testimony can be introduced via the court reporter who was present to transcribe the evidence. Section 23 of the Canada Evidence Act may be utilized to introduce evidence of judicial proceedings and, as such, dispense with the necessity of calling the maker of the document. [5] As long as the document has the seal of the Court or the signature of the Justice or Coroner affixed thereto, it shall be received into evidence without the need for further proof. In addition, the cases of Rex v. Kobold [6] and Regina v. Tatomir [7] stand for the proposition that documentation introduced in evidence under s. 23 of the Canada Evidence Act does not require previous notice of its production.

When transcripts are being relied upon by the prosecution, especially where the accused is being tried by a judge sitting with a jury, only that portion of the transcript that is subject to the perjury allegation and any part necessarily connected therewith is admissible. [8] Therefore, the presiding justice should direct an editing of the transcript so that only relevant evidence will be considered.

It is sufficient, in proving that an accused was under oath when he made a statement, to call witnesses who were present at the earlier proceedings who say and heard the accused duly sworn [9].

Where a person practices a certain religion it is only reasonable that he should be allowed to swear according to his own notion of an oath. It would be absurd to have a witness swear according to an oath based on a religion to which he does not adhere. The witness' conscience would not be evoked and, as such, a subsequent perjury prosecution would be doomed to fail. Similarly, where a person wishes to be sworn, it is no alternative to simply have him affirm that his evidence will be true. [10] Section 14 of the Canada Evidence Act allows a witness to give evidence by way of solemn affirmation, but before testimony can be given in that fashion, the witness must establish that his desire is based on grounds of conscientious scruples and not on mere fancy. [11]

In the case of Shajoo Ram v. The King a Hindu witness in a criminal case was administered the oath through an interpreter. The ceremony was performed in such a way that it did not conform with the witness' religion in that certain words were not uttered by the Court in connection with the witness' promise to tell the truth. The Court received no objections at trial regarding the form of the oath. Mr. Justice Brodeur

Family Court - Sydney, Nova Scotia

February 12, 1993

Mr. Justice Lucien Beaulieu
Dear Lou:

Congratulations on your appointment to the Federal Bench. I couldn't be happier if it were myself. I lie.

I well remember the enjoyable evening we spent at the Montreal Forum. In that regard the President of the American Hockey League has contacted me requesting you permit an interview for their next player's newsletter.

As you are aware there are players (many from small prairie towns) of excellent caliber who spend their entire careers in the "minors". They ride buses, sleep in cheap motels, perform in questionable venues, giving their all for a meager wage. Meanwhile their "big league" counterparts (many of whom possess no greater skill) fly first class, stay in luxurious hotels while performing similar functions in majestic surroundings. This is a stressful situation, especially for the ~~older~~ seasoned player who, after a few years in the minors" tends to be overlooked by the "big club". This, in spite of honing his (or her if you happen to be a goaltender) skills to an exceptional level. These players, I am sure you will agree, are the backbone of the league, maybe even the sport itself.

Accordingly, the news that an ~~older~~ seasoned performer is recognized and "called to the show" (a phrase used by all players and a few federal appointees) would be uplifting and inspirational to the entire league.

Such news may well keep an individual "alive" in his or her vocation. It may keep the entire league "alive". Hell, it may keep the entire profession "alive".

Keep an ~~old~~ recent file photo handy.

Since St. John's has become one of the great American League cities, Judy and I don't anticipate seeing you and Joan at the National Meeting in September. Joan will be missed.

As of this date there is no movement afoot to retire your number. Curran can be bought.

Yours truly,
Robert F. Ferguson, J.F.C.

The Offence of Perjury: A Prosecutor's Perceptive*

by Brian Mararin, Assistant Crown Attorney, Toronto, Ontario*

Introduction

One of the most vexing problems for all who participate in the criminal justice system is the task of assessing the credibility of a witness. There are occasions where the testimony of a witness will transcend mere incredibility to the point where the truth is absolutely perverted. The question remains whether such testimony constitutes the offence of perjury. At the outset it should be mentioned that although this article will focus on the offence of perjury, there are several related provisions in the Criminal Code which should be considered before laying any specific charge [1], including:

- s.127 Disobeying a Court Order;
- s.128 Misconduct of Officers Executing Process;
- s.129 Obstructing a Peace Officer;
- s.134Making a Statement When not Permitted, Authorized or Required by Law;

Reply by his Honour Judge Ernie S. Bobowski at C.B.A. President's Dinner

Résponse de l'honorable juge Ernie S. Bobowski au dîner de la présidente de l'A.B.C.

Thank you Madame Gauthier for the introduction. I would like to thank you and the C.B.A. on behalf of myself and my wife, Adelyne, for your kind invitation and gratuitous hospitality extended to us. It's indeed a pleasure to bring greetings to this meeting on behalf of the Canadian Association of Provincial Court Judges. Judge Charles Scullion, Past President of our Association, was primarily responsible for fostering an attitude of cooperation and need between our two organizations. He is here in our audience tonight and I would ask that he rise and be recognized. As a result of his efforts, he was recently presented with the C.B.A.O Award for Distinguished Service. I feel very honoured to follow Judge Scullion as President of our Association and to attempt to carry on in his footsteps in reaching a workable relationship in and with the Canadian Bar Association. There may be issues that may require our non-involvement or abstention, but, on the whole I am of the view that there are many areas in which we can work together towards our common interests.

This is the first ever C.B.A. mid-winter meeting where two members of our executive are present and I only hope and resolve that it will be the last

Thank you

Merci Madame Gauthier de m'avoir présenté. J'aimerais, en mon nom et en celui de ma femme Adelyne, vous remercier vous et l'A.B.C. pour votre charmante invitation et votre chaleureuse hospitalité. C'est en effet avec plaisir que je salue cette assemblée au nom de l'Association canadienne des juges des cours provinciales. Le juge Charles Scullion, ancien président de notre association, a été le premier à développer une attitude de coopération et de satisfaction des besoins mutuels entre nos deux organisations. Il est avec nous ce soir et je voudrais lui demander de se lever pour que nous le saluions. En raison des efforts qu'il a déployés, il a récemment reçu la distinction de l'A.B.C.O. pour services distingués. C'est un très grand honneur pour moi de succéder au juge Scullion en tant que président de notre association et de continuer son action dans l'établissement d'une relation pratique avec l'Association du Barreau canadien. Il y a des questions qui peuvent exiger notre non-intervention ou notre abstention, mais, dans l'ensemble je suis persuadé qu'il y a de nombreux secteurs dans lesquels nous pouvons travailler ensemble à l'avancement de nos intérêts communs.

C'est la première réunion de la mi-hiver de l'A.B.C. à laquelle participent deux membres de notre exécutif et j'espère que ce ne sera pas la dernière, je m'engage à y travailler.
Merci.

Resolution 93-13-M - Compostion of Council Representation of the Judiciary

Résolution 93-13-M - Compostion du conseil Représentation des juges

The following resolution was passed unanimously at the Mid-Winter Meeting of the Council of the Canadian Bar Association on February 21, 1993 at Orlando, Florida.

WHEREAS the Canadian Provincial Court Judges Association and the Canadian Judges Conference has reported to Council of The Canadian Bar Association on an informal basis for a number of years.

WHEREAS strong communication between the Canadian Bar Association and associations representing members of the judiciary should be encouraged;

BE IT SOLVED THAT Section 32 of the By-Law which sets out the designated members of Council be amended by adding thereto the following:

(q) a representative of the Canadian Provincial Court Judges Association;
(r) a representative of the Canadian Judges Conference. (93-13-M)

La résolution suivant a été adoptée à l'unanimité à la réunion de la mi-hiver du Conseil de l'Association du Barreau canadien, le 21 février 1993, à Orlando en Floride.

ATTENDU que l'Association canadienne des juges des cours provinciales et que la Conférence Canadienne des Juges s'est conformée au Conseil de l'Association du Barreau canadien sur une base informelle pour un certain nombre d'années.

ATTENDU qu'une communication étroite entre l'Association du Barreau canadien et les associations représentant les juges devraient être encouragée;

IL EST RÉSOLU QUE l'article 32 du règlement administratif qui désigne les membres du Conseil soit modifié par l'adjonction de ce qui suit:

(q) un représentant de l'Association canadienne des juges des cours provinciales;
(r) un représentant de la Conférence Canadienne des Juges. (93-13-M)

Recent Federal Judicial Appointment Récentes nominations judiciaires fédérales

In the past few months several provincial court judges from across the country have received federal judicial appointments. They include:

Madam Justice Margaret Stewart, formerly of the Family Court of Nova Scotia; appointed to the Nova Scotia Supreme Court, Trial Division, effective November 25, 1992. At the time of her appointment, Madam Justice Stewart chaired the CAPCJ's Atlantic Provinces Education Seminar Committee.

Madam Justice Anne Russell, formerly of the Family and Youth Division of the Alberta Provincial Court, appointed to the Court of Queen's Bench of Alberta, Edmonton, effective November 25, 1992.

Mr. Justice J.S. Moore, formerly of the Civil Division of the Alberta Provincial Court, appointed to the Court of Queen's Bench of Alberta, Calgary, effective November 25, 1992.

Madam Justice Eileen M. Nash, formerly of the Alberta Provincial Court, appointed to the Court of Queen's Bench of Alberta, Edmonton, effective January 29, 1993.

Mr. Justice Lucien A. Beaulieu, formerly of the Ontario Court, Provincial Division, appointed to the Ontario Court, General Division, Toronto, effective February 1, 1993. At the time of his appointment, Mr. Justice Beaulieu was a member of the C.A.P.C.J. Family and Young Offenders Committee.

The following letter, printed with thepermission of both the sender and receiver, seems to capture the feelings of former provincial court colleagues when news of a federal appointment is received.

Au cours des derniers mois, plusieurs juges des cours provinciales du pays ont reçu des nominations judiciaires fédérales. Notamment:

Madame le juge Margareth Stewart, anciennement de la Cour de la famille de la Nouvelle-Écosse; nommée à la Cour suprême de la Nouvelle-Écosse, division de première instance, à compter du 25 novembre 1992. Au moment de sa nomination, Madame

le juge Stewart présidait le comité sur le séminaire de formation de l'ACJCP des provinces de l'Atlantique.

Madame le juge Anne Russel, anciennement de la division de la famille et de la jeunesse de la Cour provinciale de l'Alberta, nommée à la Cour du Banc de la Reine de l'Alberta, à Edmonton, à compter du 25 novembre 1992.

Monsieur le juge J.S. Moore, anciennement de la division civile de la Cour provinciale de l'Alberta, nommé à la Cour du Banc de la Reine de l'Alberta, à Calgary, à compter du 25 novembre 1992.

Madame le juge Eileen M. Nash, anciennement de la Cour provinciale de l'Alberta, nommée à la Cour du Banc de la Reine de l'Alberta, à Edmonton, à compter du 29 janvier 1993.

Monsieur le juge Lucien A. Beaulieu, anciennement de la Cour de l'Ontario, division provinciale, nommé à la Cour de l'Ontario, division générale, à Toronto, à compter du 1er février 1993. Au moment de sa nomination, Monsieur le juge Beaulieu était membre du comité sur la famille et les jeunes délinquants de l'ACJCP.

La lettre qui suit, publiée avec la permission de son auteur et de son destinataire, semble bien exprimer les sentiments d'anciens collègues de la Cour provinciale lorsqu'ils reçoivent leur nomination fédérale.

2. An offence under any of the following provisions of the Food and Drug Act:

a) section 39 (trafficking in controlled drug); b) section 44.2 (possession of property obtained by trafficking in controlled drug); c) section 44.3 (laundering proceeds of trafficking in controlled drug); d) section 48 (trafficking in restricted drug); e) section 50.2 (possession of property obtained by trafficking in restricted drug); and f) section 50.3 (laundering proceeds of trafficking in restricted drug).

3. Une infraction prévue par l'une des dispositions suivantes du Code criminel, chapitre C-34 des Statuts revisés du Canada de 1970, dans leur version antérieure au 4 janvier 1983:

a) article 144 (viol); b) article 145 (tentative de viol); c) article 149 (attentat à la pudeur d'une personne du sexe féminin); d) article 156 (attentat à la pudeur d'une personne du sexe masculin); e) article 245 (voies de fait ou attaque); f) article 246 (voie de fait avec intention).

ANNEXE II

(Paragraphes 107(1) et 125(1) et articles 129, 130 et 132)

1. Une infraction prévue par l'une des dispositions suivantes de la Loi sur les stupéfiants:

a) article 4 (trafic de stupéfiant); b) article 5 (importation et exportation); c) article 6 (culture); d) article 19.1 (possession de biens obtenus par la perpétration d'une infraction); e) article 19.2 (recyclage des produits de la criminalité).

2. Une infraction prévue par l'une des dispositions suivantes de la Loi sur les aliments et drogues :

a) article 39 (trafic des drogues contrôlées); b) article 44.2 (possession de biens obtenus par la perpétration d'une infraction); c) article 44.3 (recyclage des produits de la criminalité); d) article 48 (trafic des drogues d'usage restreint); e) article 50.2 (possession de biens obtenus par la perpétration d'une infraction); f) article 50.3 (recyclage des produits de la criminalité).

Parole Eligibility: a new Judicial role

L'Admissibilité la libération conditionelle: un nouveau rôle pour les juges

by Anne MacKenzie,
Legal Services, National Parole Board

On November 1, 1993, the Corrections and Conditional Release Act, R.S.C. 1992, Chap. 20, came into force bringing with it consequential amendments to the Criminal Code. Section 203 of the Corrections and Conditional Release Act amended the Criminal Code by adding section 741.2, headed "Eligibility for Parole". This section enables the Court to order that:

> *"... the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence of ten year, whichever is less."*

However, it is critical to note that this order may only be made in those cases where the offender is sentenced to a term of two years or more on conviction for one or more offences set out in Schedule I and II of the Corrections and Conditional Release Act. For instance, it is not possible to impose such an order when the conviction is one of break and enter or possession of a narcotic; these offences are not set out in Schedule I or II of the Act.

Principles to be considered by the Court will be familiar to the judiciary: they are the traditional principles of sentencing, although with express recognition of the principle of denunciation. The Court may have regard to the circumstances of the offence, the character and circumstances of the offence and also whether the expression of society's denunciation of the offence or the objectives of specific or general deterrence may require such an order.

par Anne MacKenzie,
Services juridiques, Commission nationale des libérations conditionnelles

Le 1er novembre 1992, la Loi sur le système correctionnel et la mise en liberté sous condition, L.R.C. de 1992, ch. 20, est entrée en vigueur, apportant avec elle des modifications corrélatives au Code criminel. L'article 203 de la Loi sur le système correctionnel et la mise en liberté sous condition a modifié le Code criminel en ajoutant l'article 741.2, intitulé "Admissibilité à la libération conditionnelle". Cet article autorise le tribunal à ordonner que:

> *"...le délinquant...purge, avant d'être admissible à la libération conditionnelle totale, le moindre de la moitié de sa peine ou dix ans."*

Cependant, il est important de noter que cette ordonnance ne peut être prise que dans les cas où le délinquant est condamné à une peine d'emprisonnement d'au moins deux ans pour une infraction mentionnée aux Annexes I et II de la Loi sur le système correctionnel et la mise en liberté sous condition. Par exemple, il n'est pas possible d'imposer une telle ordonnance lorsque la condamnation est pour une introduction par effraction ou pour la possession de stupéfiant; ces infractions ne sont pas mentionnées aux Annexes I ou II de la Loi.

Les principes que le tribunal doit prendre en considération ne sont pas nouveaux pour les juges: ce sont les principes traditionnels de l'imposition de la peine, mais avec la reconnaissance expresse du principe de la réprobation de la société. Le tribunal peut avoir égard aux circonstances de l'infraction, au caractère et aux circonstances de l'infraction, à la réprobation de la société à l'égard de l'infraction commise ou à l'effet dissuasif que l'ordonnance peut exiger.

For ease of reference the Schedules to the Corrections and Conditional Release Act are reproduced at the end of this article.

Another point of interest is the determination of the parole eligibility date for an offender who is under a number of sentences, some of which have an order of full parole eligibility at one half of sentence and some of which do not. There is a statutory provision in the Corrections and Conditional Release Act that deals expressly with this situation. Subsection 120(4) is somewhat difficult and has not yet been the subject of judicial interpretation. Conceptually it is intended to ensure that the effect of a judicial order of parole at one half of sentence is preeminent and not subsumed by the general rule of full parole eligibility at one third of sentence. This confusion could arise if two or more sentences overlapped and merged together, one with parole eligibility at one half of sentence and one with parole eligibility at one third of sentence for the same period of time. Specific rules were needed to address the issue. Subsection 120(4) deals with both concurrent and consecutive sentences.

SCHEDULE I

(Subsections 107(1), 125(1) and 126(1) and sections 129 and 130)

1. An offence under any of the following provisions of the Criminal Code:

a) paragraph 81(2)a) (causing injury with intent); b) section 85 (use of firearm during commissions of offence); c) paragraph 86(1) (pointing of firearm); d) section 144 (prison breach); e) section 151 (sexual interference); f) section 152 (invitation to sexual touching); g) section 153 (sexual exploitation); h) section 155 (incest); i) section 159 (anal intercourse); j) section 160 (bestiality, compelling, in presence of or by child); k) section 170 (parent or guardian procuring sexual activity by child); l) section 171 (householder permitting sexual services of a child); m) section 172 (corrupting children); n) subsection 212(2) (living off the avails of prostitution by a child); o) subsection 212(4) (obtaining sexual services of a child); p) section

Pour faciliter les renvois, les annexes de la Loi sur le système correctionnel et la mise en liberté sous condition sont reproduites à la fin du présent article.

Un autre point intéressant est la détermination de la date d'admissibilité à la libération conditionnelle pour un délinquant qui est condamné à plusieurs peines d'emprisonnement, certaines sont assujetties à une ordonnance de libération conditionnelle totale à la moitié de la peine et d'autres ne le sont pas. Il y a une disposition législative de la Loi sur le système correctionnel et la mise en liberté sous condition qui traite expressément de cette situation. Le paragraphe 120(4) est assez difficile et n'a pas encore fait l'objet d'interprétation judiciaire. Théoriquement, le but de cette disposition est d'assurer que les effets d'une ordonnance judiciaire de libération conditionnelle à la moitié de la peine d'emprisonnement prédominent et ne soient pas soumis à la règle générale de l'admissibilité à la libération conditionnelle totale au tiers de la peine d'emprisonnement. Ce problème pourrait surgir si deux ou plusieurs peines d'emprisonnement se chevauchaient et étaient fusionnées, l'une avec l'admissibilité à la libération conditionnelle à la moitié de la peine et l'autre avec l'admissibilité à la libération conditionnelle au tiers de la peine pour une même période. Des règles spécifiques étaient nécessaires pour résoudre ce problème. Le paragraphe 120(4) traite à la fois des peines d'emprisonnement concurrentes et consécutives.

ANNEXE I

(Paragraphes 107(1), 125(1) et 126(1) et articles 129 et 130)

1. Une infraction prévue par l'une des dispositions suivantes du Code criminel:

a) alinéa 81(2)a) (causer intentionnellement des blessures); b) article 85 (usage d'une arme à feu lors de la perpétration d'une infraction); c) paragraphe 86(1) (braquer une arme à feu); d) article 144 (bris de prison); e) article 151 (contacts sexuels); f) article 152 (incitation à des contacts sexuels); g) article 153

236 (manslaughter); q) section 239 (attempts to commit murder); r) section 244 (causing bodily harm with intent); s) section 246 (overcoming resistance to commission of offence); t) section 266 (assault); u) section 267 (assault with a weapon or causing bodily harm); v) section 268 (aggravated assault); w) section 269 (unlawfully causing bodily harm); x) section 270 (assaulting a peace officer); y) section 271 (sexual assault); z) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm); z.1) section 273 (aggravated sexual assault); z.2) section 279 (kidnapping); z.3) section 344 (robbery); z.4) section 433 (arson - disregard for human life); z.5) section 434.1 (arson - own property); z.6) section 436 (arson by negligence); and z.7) paragraph 465(1)a) (conspiracy to commit murder).

2. An offence under any of the following provisions of the Criminal Code, as they read immediately before July 1, 1990:
a) section 433 (arson);

b) section 434 (setting fire to other substance); and c) section 436 (setting fire by negligence).

3. An offence under any of the following provisions of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as they read immediately before January 4, 1993:

a) section 144 (rape); b) section 145 (attempt to commit rape); c) section 149 (indecent assault on female); d) section 156 (indecent assault on male); e) section 245 (common assault); and f) section 246 (assault with intent

SCHEDULE II

(Subsections 107(1) et 125(1) and sections 129, 130 and 132)

1. An offence under any of the following provisions of the Narcotic Control Act:

a) section 4 (trafficking); b) section 5 (importing and exporting); c) section 6 (cultivation); d) section 19.1 (possession of property obtained by certain offences); and e) section 19.2 (laundering proceeds of certain offences).

(personne en situation d'autorité); h) article 155 (inceste); i) article 159 (relations sexuelles anales); j) article 160 (bestialité, usage de la force, en présence d'un enfant ou incitation de ceux-ci); k) article 170 (père, mère ou tuteur qui sert d'entremetteur); l) article 171 (maître de maison qui permet, à des enfants ou en leur présence, des actes sexuels interdits); m) article 172 (corruption d'enfants); n) paragraphe 212(2) (vivre des produits de la prostitution d'un enfant); o) paragraphe 212(4) (obtenir des services sexuels d'un enfant); p) article 236 (homicide involontaire coupable); q) article 239 (tentative de meurtre); r) article 244 (fait de causer intentionnellement des lésions corporelles); s) article 246 (fait de vaincre la résistance à la perpétration d'une infraction); t) article 266 (voies de fait); u) article 267 (agression armée ou infliction de lésions corporelles); v) article 268 (voies de fait graves); w) article 269 (infliction illégale de lésions corporelles); x) article 270 (voies de fait contre un agent de la paix); y) article 271 (agression sexuelle); z) article 272 (agression sexuelle armée, menaces à une tierce personne ou infliction de lésion corporelles); z.1) article 273 (agression sexuelle grave); z.2) article 279 (enlèvement, séquestration); z.3) article 344 (vol qualifié); z.4) article 433 (incendie criminel: danger pour la vie humaine); z.5) article 434.1 (incendie criminel: biens propres); z.6) article 436 (incendie criminel par négligence); z.7) alinéa 465(1)a) (complot en vue de commettre un meurtre).

2. Une infraction prévue par l'une des dispositions suivantes du Code criminel, dans leur version antérieure au 1er juillet 1990:

a) article 433 (incendie criminel); b) article 434 (incendie: dommages matériels); c) article 436 (incendie par négligence).