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 1991-1992

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

Le journal des juges provinciaux est une publication trimestrielle de l'Association canadienne des juges des cours provinciales. Les commentaires et opinions qu'il contient ne peuvent être considérés comme l'expression officielle de la position de l'Association canadienne, sauf indication à cet effet.

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Registration Form
C.A.P.C.J. Annual Meeting

Ramada Renaissance, Regina, Saskatchewan
September 16-20, 1992

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 ($79.) ☐ Double ($79.) ☐

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Reservations will be held until 4:00 PM CST on date of arrival. Late arrivals must be guaranteed by a credit card:

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Exp.Date ____________

Registration Fee: Judges $300. Guests $150.

Registration Deadline: August 15, 1992

Mail or Fax this form to:
Judge R. Harvie Allan
Provincial Court of Saskatchewan
Provincial Court Building
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Regina, Saskatchewan
S4P 3V7
FAX: 306-787-3933

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Fax: (403) 667-3079

Editor's Notebook / Remarques du rédacteur

This is the first issue of the Journal published in 1992 and my first issue as editor. Judge Reg Reid of Newfoundland, the editor for the past five years, resigned recently because of health problems that have kept him off the bench for several months.

Throughout his term of office Reg Reid carried on the fine work begun by his predecessors, Rod (now Mr. Justice) Mykle and the late Dick Kucey. Reg used his intelligence, mild manner and attention to detail to produce without fuss a first class publication. On behalf of everyone associated with the Journal, I wish Reg a speedy recovery and retun to the bench.

This issue had to be produced quickly. The President, Judge Scullion, appointed me on May 5. There was a backlog of information so we set a June deadline. I would have had very little to work with had not Reg Reid taken the time and trouble during his convalescence to send me his files. Judge Scullion and our Secretary-Treasurer, Judge Pamela Thomson, have also given me invaluable help.

Please send me along your comments and suggestions. The Journal is yours. It needs input. I look forward to hearing from you.

Pat Curran
Editor

Il s'agit du premier numéro du Journal en 1992 et de mon premier numéro en qualité de rédacteur. Récemment, le juge Reg Reid de Terre-Neuve, qui en fut le rédacteur au cours des cinq dernières années, a donné sa démission pour raisons de santé qui l'empêchent de siéger depuis plusieurs mois.

Au cours de son mandat, Reg Reid a continué l'excellent travail commencé par ses prédécesseurs, le juge Rod Mykle et feu Dick Kucey. Grâce à son intelligence, ses manières affables et l'attention qu'il porte au détail, Reg a réussi à produire une publication de grande qualité. Au nom de toutes les personnes associées au Journal, je présente à Reg tous mes vœux pour un prompt rétablissement et pour un retour au travail rapide.

Ce numéro a du être réalisé rapidement. Le président, le juge Scullion, m'a en effet nommé le 5 mai dernier. Compte tenu de la grande quantité d'informations en attente, la parution fut fixée pour le mois de juin. Je n'aurais pas eu beaucoup de matériel de référence sans la collaboration de Reg Reid qui, alors qu'il se trouvait en convalescence, a pris le temps de me faire parvenir ses dossiers. Le juge Scullion et notre secrétaire-trésorière, la juge Pamela Thomson, m'ont également procuré une aide fort précieuse.

Je vous invite à me faire parvenir vos commentaires et/ou vos suggestions. Le Journal vous appartenant, votre collaboration est essentielle. J'attends avec impatience le plaisir de vous lire.

Pat Curran
Rédacteur

Formule d'inscription
Assemblée annuelle de L'A.C.J.C.P.

Ramada Renaissance, Regina, Saskatchewan
16-20 septembre 1992

Nom du juge ____________________

Nom de la cour ____________________

Adresse postale ____________________

Téléphone ____________________ Fax ____________________

Nom(s) de L'(des) invité(s) ____________________

Considérations ou besoins particuliers ____________________

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Les réservations pour les arrivées tardives ne peuvent être garanties qu'avec une carte de crédit

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Date d'expiration ____________

Droits d'inscription : juges 300,00 $ Invités 150,00 $
Date limite d'inscription : 15 août 1992
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juge R. Havie Allan
Cour provinciale de Saskatchewan
Édifice de la cour Provinciale
1815 rue Smith
Regina, Sask
S4P 3V7
FAX: 306.787.3933

La confirmation de vos réservations d'hôtel vous sera envoyée par Ramada Renaissance.

In Lighter Vein / Sur un note plus légère

This bit of doggerel came to the Editor's desk in a plain brown wrapper. The following note accompanied it: "Since, somewhere, somehow, this probably offends political correctness, I refuse to claim authorship or identity!"

The Police-Person's Charter Lament
Policemen must realize
Before they can breathalize
They first must 'Mirandize'
Or, in Canada, 'Charterize'
Their slurring, staggering,
malodorous prize
Otherwise
The court might free 'em
So for Pet's sake, 10(b) 'em!

Feedback/ Réactions

Letters to the Editor are invited. They may be in either French or English. Publication is at the discretion of the Editor. Letters published are subject to editing.

Les lettres au rédacteur sont les bienvenues. Elles peuvent être en français ou en anglais. Leur publication reste à la discrétion du rédacteur. Les lettres publiées peuvent être remaniées.

January 3, 1992

Dear Sir:

On page 30 of the September issue of your journal I was pleased to see the names of the Honorary Members. Unfortunately, at this time of year, I would love to be in British Columbia, but the reality is that I am and alsways have lived in Alberta.

I also note that I am the only Honorary Member referred to by his initials.

Please call me Allan.

I enjoy reading the Journal. It not only brings back fond memories of old friends - - it also contains excellent articles and case comment.

Sincerely,
The Honourable Mr. Justice R.A. Cawsey
Court of Queen's Bench of Alberta

President's Report / Rapport du Président

His Honour Judge Charles Scullion / L'Honourable juge Charles Scullion
Ontario Court of Justice - Provincial Division- President /
Cour de justice de l'Ontario - Division Provinciale - Président
Canadian Association of Provincial Court Judges /
L'Association canadienne des juges des cours provinciales

Since taking office in September 1991, I have been very busy. Time seems to sweep swiftly and it is now the last week of May and June is almost upon us. I have travelled to the following Provincial Court Judges conferences: Alberta, Newfoundland, British Columbia, Quebec, Manitoba and Ontario. I was also present at the New Judges Training Program in Val Morin, Quebec. As each conference I met the Judges and made many new friends. I was impressed with the content of the educational programs and the presenters. The Provincial Court Bench has some very talented people who are capable of enhancing any conference.

Our esteemed editor of the Journal, His Honour Judge Reginald Reid, I am sorry to say, has had several severe heart attacks an was subject to by-pass surgery. He was therefore unable to produce The Journal and will be unable to continue as editor. I must thank Reg for all the work that he has done in the past and wish him a swift and full recovery. Judge Patrick Curran has graciously accepted this arduous job as editor of the C.A.P.C.J. Journal. I would as that if you have any material that you wish printed, that you forward it to

His Honour Judge Patrick Curran
Provincial Court
5250 Spring Garden Road
Halifax, Nova Scotia
B3J 1E7

Depuis que j'ai pris mes fonctions en septembre 1991, j'ai été très occupé. Il semble que le temps passe très vite, nous sommes déjà à la dernière semaine de mai et le mois de juin approche. J'ai été aux conférences des juges des cours provinciales suivantes: Alberta, Terre-Neuve, Colombie-Britannique, Québec, Manitoba et Ontario. J'ai également participé au Cours d'orientation initial destiné aux nouveaux juges à Val Morin, Québec. À chaque conférence, j'ai rencontré les juges et me suis fait de nombreux amis. Le contenu des programmes éducationnels et les animateurs m'ont beaucoup impressionné. La magistrature des cours provinciales compte en son sein des membres très doués qui savent rendre toute conférence intéressante.

J'ai le regret de vous annoncer que le rédacteur du Journal, Son Honneur, le juge Reginald Reid, estimé de tous, a eu plusieurs crises cardiaques et a dû subir une opération chirurgicale de pontage cardiaque. Il s'est donc trouvé dans l'incapacité de publier le Journal et ne peut plus continuer à en être le rédacteur. Je désire remercier Reg pour tout le travail qu'il a effectué dans le passé et lui souhaiter une guérison prompte et complète. Le juge Patrick Curran a gracieusement accepté la tâche difficile de rédacteur du Journal de l'A.C.J.C.P. Si vous avez des documents que vous désirez publier, je vous demanderais de les lui envoyer:

Son Honneur, le juge Patricj Curran
Cour provinciale
5250 Spring Garden Road
Halifax, Nouvelle-Écosse
B3J 1E7

Compensation

As I travelled to the various Provinces and Territories and spoke to the Judges, it is apparent that we are not being treated fairly by the Provincial Governments. The Governments are freezing the Judges' salaries and are not living up the the promises they have made. They are using the excuse of fiscal restraint and we are slowly falling behind the compensation of the Federal court judges. We must work harder and bring our compensation up to the same level.

I am happy to report that the Newfoundland Judges Association requested a brief by the Canadian Association to the Newfoundland Provincial Court Tribunal chaired by Norman J. Whelan, Q.C. A brief was prepared by His Honour Judge Douglas M. McDonald of the Provincial Court of Calgary, Alberta and was well received. This is a precedent for the future and I believe the C.A.P.C.J. is now in a position to present a position paper to any province or territory committee if requested by the Association. It is obvious that we must have a central library for material of this kind and I would request that you send a copy of any material used by our Association to Judge McDonald who is Chair of our Compensation Committee at:

His Honour Judge Douglas McDonald
Provincial Court
323-6th Avenue S.E.
Calgary, Alberta
T2G 4V1

Montreal Meeting

The Executive of the C.A.P.C.J. and representatives from each province and territory met from Friday, May 1st to Sunday, May 3rd, 1992 and discussed business of the C.A.P.C.J. Judge Pamela Thomson has sent the minutes of the meeting to your representatives and hopefully you will receive a copy. If not, perhaps you could contact your representative for any information that you may require about the Canadian Association.

Rémunération

Au cours de mes voyages dans les différentes provinces et les différents territoires et lors de mes discussions avec les juges, il m'est apparu que les gouvernements provinciaux ne nous traitaient pas de manière équitable. Les gouvernements gèlent le salaire des juges et ne tiennent pas les promesses qu'ils ont faites. Ils se servent de l'excuse des restrictions budgétaires et notre rémunération prend davantage de retard sur celle des juges des cours fédérales. Nous devons travailler davantage pour ramener notre rémunération au même niveau.

J'ai le plaisir de vous annoncer que la Newfoundland *Judges Association* (Association des juges de Terre-Neuve) a demandé la présentation d'un mémoire par l'Association canadienne au *Newfoundland provincial Court Tribunal* (Tribunal de la Cour provinciale de Terre-Neuve) présidé par Norman J. Whelan, c.r. Le mémoire a été préparé par Son Honneur, le juge Douglas M. McDonald de la Cour provinciale de Calgary, Alberta, et a été bien reçcu. Ceci constitue un précédent pour l'avenir et je crois que l'A.C.J.C.P. est maintenant en mesure de présenter une déclaration de principe au comité de toute province ou de tout territoire si l'Association lui en fait la demande. Il est clair qu'il nous faudrait avoir une bibliothèque centrale pour ce genre de document et je vous demanderais d'envoyer un exemplaire de tout document utilisé par votre Association au juge McDonald qui est président de notre Comité des rémunérations:

Son Honneur,
le juge Douglas McDonald
Cour provinciale
323-6ème Avenue S.E.
Calgary, Alberta
T2G 4V1

Réunion de Montréal

Le comité exécutif de l'A.C.J.C.P. et les représentants de chaque province et territoire se sont réunis du vendredi 1er mai au dimanche 3 mai 1992, pour discuter des

In Lighter Vein / Sur un note plus légère

Judge P. M. Caffaro of Edmonton, Alberta, who has an eye for the humorous and unusual, sent along this transcript of a recent incident in the Alberta Provincial Court. Names have been changed to initials to protect the guilty.

The Court: Mr. K., leave the Court Room and I will speak to you in my Chambers after the adjournment, which will be in about ten minutes. Just leave the Court Room right now please. I cannot - - I cannot take that any more.

Mr. K.: I'm sorry sir, I wasn't conscious of what I was doing sir. I -

The Court: Leave the Court Room. I will talk to you in a minute, Mr. K.

Mr. K.: Thank you sir. I have quite a bad cold.

The Court: That is fine, Mr. K. There are other ways as a gentleman that you can choose to overcome that disability that you are under today. Leave the Court Room until I am finished with this matter please.

Mr. K.: Thank you sir.

The Court: Thank you

(Other Matters Spoken To)

Mr. K.: Your Honour, I have been requested by the Court to put on the record an apology, and I am very happy to be given the opportunity to do so sir, for - - for the disturbing habit which I had of - - while I was sitting at the desk before the Court, of pulling phlegm up my nose by the creation of a vacuum in my lungs sir. I would just like the Court to know that I am very sick. I have been - - I am under the care of Dr. O. I am taking two different kinds of medication sir. I was in bed all week and I thought that I was strong enough this morning to come to Court, but obviously I wasn't strong enough sir, and I should be in bed right now sir, and I'm sorry I have bothered the Court sir. And I would add sir that I have never been asked to leave the Court Room before, and that really brings home the point of how - - how unpleasant my behaviour was sir, and I can assure the Court that if - - there was in no way any kind of disrespect intended whatsoever, sir, and all I can say is that my lack of sensitivity was caused by decreased awareness caused by sickness sir, and I can inform the Court that - - that if that crisis comes up for me again sir where I am required to do that, I will leave the room sir, and I will not disturb the Court, and I will also gladly take direction from the Court for example, to sit in the body of the Court Room, further back, and not - not to - - to basically sir to be a nuisance to the Court sir. And if - - if it occurs again that I am sick and I have Court dates sir, I will next time know well enough to hire an agent and not to come and - - and bother the Court sir.

The Court: Thank you.

Mr. K.: And well, just to perhaps put a little bit of human light on it sir, I just wanted to stress to the Court that I have no hard feelings and I appreciate the Court's guidance sir, and perhaps just to put a little bit of humor in it sir, I - - I have a very difficult Court of Queen's Bench application tomorrow sir, and this might very well be the excuse that I need to get out of it sir. I only mention that sir as a - - to stress that I am respectful of the Court and well sir, that I appreciate it sir.

The Court: Thank you, Mr. K.

Mr. K.: Thank you very much sir. And I am very happy to address any other comments the Court might have.

The Court: No thank you, Mr. K., the issue has been addressed. Thank you.

Mr. K.: Thank you sir.

6. **Keep** the Executive Director fully informed:
   a. of what is happening in your Province and Association
   b. of dates of Executive and Annual Meetings and of changes in your Executive
7. **Advise** Education Chair of Educational Conferences & concerns
8. **Advise** the Chair of the Compensation Committee of all developments and changes to salary and benefits when they occur. Send copies of Briefs filed
9. **File** a written report (30 copies) at each Executive Meeting (April or May and September). Send in advance, if possible, to Executive Committee
10. **Advise** the Chairs of the Judicial Independence and C.B.A. Liaison Committees of developments
11. **Indicate** to the President your interest in a Committee or issue
12. **When retiring:**
   a. give documents in No. 2 to new Representative
   b. advise Secretary **and** Journal Editor of change

B. As an Alternate:

1. **Attend** one Executive and One Annual Meeting (at expense of your Association)
2. **Study**
   a. Minutes of two previous Executive Meetings and previous Annual Meeting
   b. Reports published in the Provincial Judges Journal
   c. Prior Memos to Executive Committee
3. **Advise** Executive Director and Editor Journal when you become Representative (address, phones, fax) (home phone will not be published)

6. **Informez** complétement le directeur exécutif:
   a. de ce qui arrive dans votre province et votre association
   b. des dates des réunions du comité exécutif **et** des assemblées annuelles et des changements survenus dans votre comité exécutif
7. **Avisez** le président du comité d'enseignement de toutes conférences et de toutes préoccupations en matière d'enseignement
8. **Avisez** le président du comité sur les rémunérations des nouveaux développements et des modifications en matière de salaires et d'indemnités dès leurs survenances. Envoyez des copies des mémoires qui ont été déposés
9 **Déposez** un rapport écrit (30 copies) à chaque réunion du comité exécutif (avril ou mai et septembre). L'envoyer, si possible, à l'avance au comité exécutif
10 **Avisez** les présidents du comité sur l'indépendance des juges et du comité de liaison de l'A.B.C. des nouveaux développements
11 **Indiquez** au président votre intérêt pour un comité ou une question importante
12 **Lorsque vous vous retirez:**
   a. transmettez au nouveau représentant les documents visés au No. 2
   b. avisez le secrétaire **et** le rédacteur du Journal du changement

B. En tant que suppléant:

1. **Assistez** à une réunion du comité exécutif et à une assemblée annuelle (aux frais de votre association)
2. **Étudiez**
3. **Avisez** le directeur exécutif **et** le rédacteur du Journal que vous êtes devenu représentant : adresse, numéros de téléphone, fax (votre numéro de téléphone à la maison ne sera pas public)

Canadian Bar Association

Judge Jane Auxier is the new chair of the C.B.A. Liaison Committee of the C.A.P.C.J. and is working closely with J.J. Camp, president of C.B.A. Judge Donald Downey attended the mid-winter meeting in Whistler, B.C. and I am informed did a tremendous job advocating our position at all the functions. Judge Downey proposed a motion to amend the C.B.A. Task Force Report on Court Reform in Canada (Seaton Report) to provide for a recommendation of a unified criminal court. He was seconded by Ken Alexander, Q.C., president of the C.B.A. Ontario and joined in by the delegates from Manitoba and New Brunswick. Although the national body of the C.B.A. defeated the motion, I am informed it was well discussed by the executive and was ably defended by Judge Downey.

Through the good offices of Judge Auxier, I have been invited by the president of the C.B.A., J.J. Camp to address the C.B.A. National Council in Halifax on August 27, 1992 and of course will bring to their attention the concept of a unified criminal court, I believe this is the first time the President of C.A.P.C.J. has been invited to address the Council.

Judge Ormston and myself have been working on several committees with the C.B.A.O. dealing with Court Reform, Case Management and Judicial Independence. The draft report by the C.B.A.O. on judicial independence recommends that the Judges should run the court system and be responsible for the administration of the courts. I am sure that this report will be discussed at the C.B.A. annual conference by both the members and the Judges. Judge Ormston reports that the present executive of the C.B.A.O. has passed a By-Law granting the Provincial Division Judges two permanent seats on the C.B.A.O. Council. I understand from Judge Yvon Mercier that 3 Quebec Judges sit on the executive of the Quebec Canadian Bar Association. I would urge that the executives of the Associations urge their respective branches of the C.B.A. to also have at least two Judges sitting on their Council.

affaires de l'A.C.J.C.P. Le juge Pamela Thomson a envoyé le procès-verbal de la réunion à vos représentants et nous espérons que vous en recevrez une copie. Dans le cas contraire, vous pourriez peut-être contacter votre représentant pour obtenir les renseignements que vous désireriez avoir sur l'Association canadienne.

L'Association du Barreau Canadien

Le juge Jane Auxier est le nouveau président du comité de liaison de l'A.C.J.C.P avec l'A.B.C. et travaille étroitement avec J.J Camp, président de l'A.B.C. Le juge Donald Downey a assisté à la réunion de mi-hiver à Whistler, C.-B. et j'ai appris qu'il y avait défendu nos positions de manière remarquable à toutes les activités. Le juge Downey a présenté une motion pour modifier le rapport du comité d'étude de l'A.B.C. sur la réforme judiciaire au Canada (Rapport Seaton) et recommander l'adoption d'une cour criminelle unifiée. Il a été appuyé par Ken Alexander, c.r., président de l'A.B.C. de l'Ontario, et soutenu par les délégués du Manitoba et du Nouveau-Brunswick. Bien que le bureau national de l'A.B.C. ait repoussé la motion, j'ai appris qu'elle a été bien discutée par le comité exécutif et défendue avec compétence par le juge Downey.

Grâce aux bons offices du juge Auxier, j'ai été invité par le président de l'A.B.C., J.J. Camp, à m'adresser au Conseil national de l'A.B.C. à Halifax, le 27 août 1992 et, bien sûr, je ne manquerai pas d'attirer leur attention sur le concept d'une cour criminelle unifiée. Je crois que c'est la première fois que le président de l'A.C.J.C.P. a été invité à s'adresser au Conseil.

Le juge Ormston et moi, avons travaillé dans plusieurs comités avec l'A.B.C.O. sur la réforme judiciaire, la gestion des causes et l'indépendance judiciaire. Le rapport préliminaire rédigé par l'A.B.C.O. sur l'indépendance judiciaire recommande que les juges dirigent le système judiciaire et soient responsables de l'administration des cours. Je suis sûr que ce rapport fera l'objet de discussions lors de l'assemblée annuelle de l'A.B.C. aussi bien parmi les membres

Department of Justice (Federal)

On Thursday, May 6th, Judge Pamela Thomson and I flew to Ottawa to meet with the Minister of Justice, Kim Campbell. We spent approximately 1-1/2 hours with her. We explained the structure of the Association and pointed out that we represent approximately 900 judges, that there was a representative from each of the Provinces and Territories, with numerous committees chaired by either the representative or another judge. We had previously sent the Minister a brief and the Minister complimented Pamela on the precise, succinct manner in which it was presented. We explained that one of the purposes of the C.A.P.C.J. was to provide judicial education and gave her a brief summary of the New Judges Training Program and the Regional Educational programs of the Western Judicial Education Centre and the Atlantic Regional Conference. The Minister was well aware of the W.J.E.C. program and I explained that we hoped to build the Atlantic Regional Conference into a similar excellent educational program. We explained that we liaise with the Chief Judges of the Provincial courts on a regular basis and they are firmly committed to the C.A.P.C.J. giving us all the co-operation required. We stated that we were very concerned with the independence of the Provincial judiciary and with the treatment of the provincial bench in the North West Territories. The Minister expressed her concern and stated that the independance of the judiciary was most important. She reiterated she was firmly committed to judicial education. We discussed our finances and although she was sympathetic, she stated that again, due to financial restraints, there would be no increase in the grant but that the grant would not be reduced.

We discussed the concept of the New Judges Training Program and the way in which we manage to educate 57 new judges in such an inexpensive way. I point out to her that he surroundings of Val Morin were necessary so that judges from all over Canada could meet and have lectures in both English and French. This called for instant

que parmi les juges. Le juge Ormstorm rapporte que l'actuel comité exécutif de l'A.B.C.O. a adopté un règlement administratif accordant aux juges de la Division provinciale deux sièges permanents au Conseil de l'A.B.C.O. Je sais également par le juge Yvon Mercier que 3 juges du Québec siègent au comité exécutif de l'Association du Barreau canadien du Québec. J'insisterai pour que les comités exécutifs de l'Association poussent leurs divisions respectives de l'A.B.C. à avoir également au moins deux juges membres de leurs conseils.

Ministère de la justice (fédéral)

Le jeudi 7 mai, le juge Pamela Thomson et moi, nous sommes rendus à Ottawa en avion pour rencontrer le ministre de la Justice, Kim Campbell. Nous avons passé environ 1h 1/2 avec elle. Nous lui avons expliqué l'organisation de l'Association et indiqué que nous représentions environ 900 juges, que nous avions un représentant de chaque province et de chaque territoire, et de nombreux comités présidés par un représentant ou un autre juge. Nous avions auparavant envoyé un mémoire au Ministre qui a félicité Pamela pour sa présentation précise et succincte. Nous lui avons expliqué que l'un des objectifs de l'A.C.J.C.P. était de dispenser un enseignement judiciaire et nous lui avons donné un résumé rapide du Cours d'orientation initial destiné aux nouveaux juges et des programmes d'enseignement régionaux du *Western Judicial Education Center* (Centre d'enseignement judiciaire de l'ouest) et de la Conférence régionale de l'Atlantique. Le Ministre connaissait bien le programme du *W.J.E.C.* et je lui ai expliqué que nous espérions amener la Conférence régionale de l'Atlantique au même niveau d'excellence en matière de programme d'enseignement. Nous lui avons également expliqué que nous sommes en liaison régulière avec les juges en chef des cours provinciales et qu'ils sont fermement déterminés à ce que l'A.C.J.C.P. nous fournisse toute l'aide nécessaire. Nous lui avons fait part de nos vives inquiétudes sur l'indépendance de la magistrature

Canadian Association of Provincial Court Judges
Provincial Representatives's Duties /

L'Association canadienne des juges des cours provinciales
Fonctions des représentants provinciaux May/mai 1992

A. As the Representative:

1. **Attend** Executive Meetings and Annual Meeting (or give written proxy to Alternate or to another Provincial Rep.)
2. **Obtain** from prior Representative for study:
   - *a.* Constitution
   - *b.* Policy on Judicial Independence & Study of Standards of Judicial Independence and Impartiality
   - *c.* Recent Budget and Cash Flow Statements
   - *d.* President's and Committee Reports
   - *e.* List of Names and Addresses
   - *f.* The "Job" Description
   - *g.* Minutes of 3 prior Executive and 1 prior Annual Meetings
   - *h.* Memos to Executive Committee
   - *i.* Expenses Policies
   - *j.* Dates of Future Meetings and Educational Conferences
   - *k.* Correspondence File
3. **Keep** Alternate Rep. and your Association's Executive fully in formed about the activities, concerns and policies of the C.A.P.C.J.
4. **Advise** all members of your Association about the activities, concerns and policies of the C.A.P.C.J. on a regular basis
5. **Advise** the President and Executive Director of matters concerning judicial education, administration of justice, funding, governmental actions etc. as they occur.

A. En tant que représentant:

1. **Assistez** aux réunions du comité exécutif et à l'assemblée annuelle (ou donnez une procuration écrite à votre suppléant ou à un autre représentant provincial)
2. **Obtenez** au représentant précédent pour votre information:
   - *a.* La constitution
   - *b.* La Directive sur l'indépendance des juges et l'Étude sur les normes de l'indépendance et de l'impartialité des juges
   - *c.* Les prévisions budgétaires et les états des mouvements de la trésorerie récents
   - *d.* Les rapports du président et du comité
   - *e.* La liste des noms et adresses
   - *f.* La description des "tâches"
   - *g.* Le procès-verbal de 3 réunions précédentes du comité exécutif et d'une assemblée annuelle précédente
   - *h.* Les mémoires au comité exécutif
   - *i.* Les directives en maitère de dépenses
   - *j.* Les dates des réunions et des conférences éducatives à venir
   - *k.* Le dossier sur la correspondance
3. **Informez** pleinement votre suppléant et la comité exécutif de votre association des activités, préoccupations et directives de l'A.C.J.C.P.
4. **Avisez** tous les membres de votre association des activités, préoccupations et directives de l'A.C.J.C.P. sur une base régulière
5. **Avisez** le président et le directeur exécutif des questions relatives à l'enseignement judiciaire, à l'administration de la justice, aux subventions, aux mesures gouvernementales, etc. **dès qu'elles sont soulevées**

Annoucement / Communiqué

The National Judicial Institute is pleased to announce that two new secondments have joined the Institute. ***Judge Dolores Hansen*** of the Provincial Court of Alberta has been appointed Associate Director of the Institute on a part time basis for a term of two years. Judge Hansen is presently the Chair of the Education Committee of the Canadian Association of Provincial Court Judges, and in 1990-91 was the President of the Alberta Provincial Judges' Association. Before her appointment to the Bench in 1982, she was President of the Edmonton Bar Association. Judge Hansen has considerable experience in judicial and legal education, and will make an invaluable contribution to the Institute's staff.

Mr. Guy Goulard is now the Assistant to the Executive Director at the Institute. Mr. Goulard has recently finished his term as Executive Director of the Royal Commission on Electoral Reform. Mr. John Tait QC, Deputy Minister of the federal Department of Justice kindly agreed to second Mr. Goulard to the Institute for a period of six months. Mr. Goulard was Registrar of the Supreme Court of Canada from 1985 to 1990 and was a judge of the Family Division of the Ontario Provincial Court for 15 years. He was President of the Association of Canadian Court Administrators and was active in the Canadian Association of Provincial Court Judges. He has lectured on law and been involved in judicial training. The Institute is fortunate that Mr. Goulard has agreed to share his expertise in our various projects.

April 2, 1992
National Judicial Institute

L'Institut national de la magistrature est heureux d'annoncer que deux nouveaux membres viennent de se joindre à l'Institut. ***Madame la juge Dolores Hansen*** de la Cour provinciale de l'Alberta a été nommée directrice associée de l'Institut à temps partiel pour un mandat de deux ans. Madame la juge Hansen est actuellement présidente du Comité de la formation de l'Association canadienne des juges de cours provinciales. En 1990-1991, elle a présidé l'Association des juges provinciaux de l'Alberta. Avant sa nomination à la magistrature en 1982, elle a été présidente de l'Association du Barreau d'Edmonton. Madam la juge Hansen a une expérience considérable de la formation juridique et de la formation de la magistrature. Elle apportera une précieuse contribution à l'Institut.

Monsieur Guy Goulard est le nouvel adjoint au directeur général de l'Institut. Le mandat de monsieur Goulard en qualité de secrétaire général de la Commission royale d'enquête sur la réforme électorale vient de prendre fin. Me John Tait, c.r., sous-ministre de la Justice du Canada, a bien voulu prêter monsieur Goulard à l'Institut pour une période de six mois. De 1985 à 1990, monsieur Goulard était le registraire de la Cour suprême du Canada. Il a siégé pendant quinze ans comme juge de la division de la famille de la Cour provinciale de l'Ontario. Il a aussi présidé l'Association canadienne des administrateurs judiciaires et oeuvré au sein de l'Association canadienne des juges de cours provinciales. Il a enseigné le droit et participé à des activités de formation de la magistrature. L'Institut est heureux de pouvoir compter sur la vaste expérience de monsieur Goulard.

le 2 avril 1992
Institut National de la Magistrature

translation because our judges are not all bilingual. We pointed out the unifying forces brought to bear by bringing these judges together so that they could discuss problems in their areas, talk law and get together and make friends. We pointed out that the friends that they make in Val Morin will be friends they will have for the rest of their lives. We thanked the Minister for her recommendations of the W.J.E.C. programs and informed her that we hoped this program would be taken right across Canada. All the Provincial Judges in Ontario will have been through the program by the middle of November. We informed her that after the conference in Saskatoon in June, we would be bringing the program to the notice of the Canadian Judicial Council. We had a wide ranging conversation on the N.J.I., bilingualism and many other subjects and I have asked the President elect His Honour Judge Ernie Bobowski to send her a copy of the C.A.P.C.J. reports on judicial independance and impartiality. Judge Pamela Thomson and I were pleased with the meeting with the Minister and feel it was valuable.

National Judicial Institute (Federal)

On April 2, 1992 Mr. Justice Marshall, Director of the Institute, announced that Judge Dolores Hansen of the Provincial Court of Alberta has been appointed the Associate Director of the Institute on a part-time basis for a term of two years. Guy Goulard is now the Assistant to the Executive Director. Guy Goulard is an ex-provincial judge.

Judge Dolores Hansen will be taking over from Judge Bernard Grenier of the Provincial Bench of Quebec and we wish to thank Judge Grenier for his services with the N.J.I and his representations on behalf of the C.A.P.C.J.

Chief Judge Andrews of the Ontario Court of Justice (Provincial Division) will be retiring but may be available for a short while.

On January 17 and April 22, 1992, I attended the Board of Governors meeting

provinciale et du traitement de la magistrature provinciale des Territoires du Nord-Ouest. Le Ministre a indiqué qu'elle était sensible à ces problèmes et a déclaré que l'indépendance de la magistrature était très importante. Elle a répété qu'elle était fermement acquise à la cause de l'enseignement judiciaire. Nous avons discuté de nos finances et, bien qu'elle soit compréhensive à notre égard, elle a de nouveau indiqué qu'en raison des restrictions budgétaires, il n'y aurait pas d'augmentation de la subvention mais qu'il n'y en aurait pas non plus de diminution.

Nous avons discuté du concept du Cours d'orientation initial destiné aux nouveaux juges et de la manière de former 57 nouveaux juges avec des moyens financiers si réduits. Je lui ai fait remarquer que l'environnement de Val Morin était nécessaire pour que les juges de tout le Canada puissent se rencontrer et assister à des présentations en français et en anglais. Ce qui exigeait une interprétation instantanée parce que nos juges n'étaient pas tous bilingues. Nous lui avons fait remarquer l'effet unificateur de ces rassemblements de juges qui leur permettaient de discuter des problèmes de leurs régions, de parler de sujets juridiques, de se rencontrer et de se faire de nouveaux amis. Nous avons souligné que les amis qu'ils se font à Val Morin le demeureront pour le reste de leur vie. Nous avons remercié le Ministre pour les recommandations qu'elle avait faites relativement au programme du W.J.E.C. et l'avons informée que nous espérions que ce programme serait étendu à tout le Canada. Au plus tard à la mi-novembre, tous les juges provinciaux de l'Ontario auront participé au programme et nous l'avons informée qu'après la conférence de Saskatoon en juin, nous porterions le programme à l'attention du Conseil canadien de la magistrature. Nous avons également discuté de nombreux autres sujets, notamment de l'I.C.M., du bilinguisme et j'ai demandé au président nouvellement élu, Son Honneur, le juge Ernie Bobowski, de lui envoyer un exemplaire des rapports de l'A.C.J.C.P. sur l'indépendance et l'impartialité des juges. Le juge Pamela

of the N.J.I in Ottawa. Justice Frank Iacobucci chaired the meeting in place of Mr. Justice Stevenson. The meeting went extremely well and there is no doubt that the Board of Governors is concerned about the problem of delivery of services to the Provincial Court Judges and their attendance at the various N.J.I. programs.

The Canadian Judicial Council in funding the annual intensive study program for the federal court judges. Associate Chief Justice Miller from Alberta chairs a committee consisting of federal and provincial court judges studying the means by which the judges from both the federal and provincial courts could be freely integrated into the annual intensive study program. There would be 40 federal judges and 40 provincial court judges present. I am informed by Mr. Justice Marshall that the Department of Justice will provide a substantial amount of money to this program so that provincial court judges may attend. The Minister of Justice is behind this program and it appears that it will go ahead.

With the addition of Judge Dolores Hansen and Guy Goulard there seems to be a new spirit of co-operation emanating from the N.J.I. The C.A.P.C.J. and the N.J.I. are co-operating on several programs. The gender bias program was given at the Far Hills Inn by Her Honour Judge Donna Hackett of the Ontario Bench. This program was developed by Judge Hackett for the N.J.I. when she was a crown in Ottawa and the material was produced and presented freely at the New Judges Training Program in Val Morin. Similarly, the N.J.I. without any cost to us, presented a half-day educational program in the Atlantic Provincial Conference. Judge Ken Kirkland and Judge Lucien Beaulieu are working with the members of the N.J.I. on programs dealing with family violence and the Young Offenders Act. I understand that these programs will be available for Newfoundland judges in September and in Montreal, Quebec later in the year. The Institute also has given integrated seminars for the Provincial and Federal judges in Halifax in February and in St. Johns, Newfoundland in March, 1992. I understand

Thomson et moi, étions contents de la réunion avec le Ministre et pensons qu'elle a été profitable.

Institut National de la Magistrature

Le 2 avril 1992, M. le juge Marshall, directeur de l'Institut, a annoncé que le juge Dolores Hansen de la Cour provinciale de l'Alberta a été nommé directeur adjoint de l'Institut à temps partiel pour un mandat de deux ans. Guy Goulard est maintenant directeur exécutif adjoint. Guy Goulard est un ancien juge provincial.

Le juge Dolores Hansen remplacera le juge Bernard Grenier de la magistrature provinciale du Québec et nous désirons remercier le juge Grenier pour les services qu'il a rendus à l'I.N.M. et pour ses représentations au nom de l'A.C.J.C.P.

Le juge en chef Andrews de la Cour de justice de l'Ontario (Division provinciale) prendra bientôt sa retraite mais restera à notre disposition pour un certain temps.

Le 17 janvier et le 22 avril 1992, j'ai assisté à la réunion du Conseil des gouverneurs de l'I.N.M. à Ottawa. Le juge Frank Iacobucci présidait la réunion à la place de M. le juge Stevenson. La réunion s'est extrémement bien déroulée et il ne fait aucun doute que le Conseil des gouverneurs s'inquiète du problème de la fourniture des services aux juges de la Cour provinciale et de leur participation aux différents programmes de l'I.N.M.

Le Conseil canadien de la magistrature subventionne le programme d'études intensives destiné aux juges des cours fédérales. Le juge en chef adjoint Miller de l'Alberta, préside un comité formé de juges fédéraux et provinciaux qui étudient les moyens d'intégrer librement les juges des cours fédérales et provinciales au programme annuel d'études intensives. 40 juges fédéraux et 40 juges des cours provinciales y assisteraient. M. le juge Marshall m'a informé que le ministère de la Justice fournirait une somme importante pour ce programme de manière à permettre aux juges des cours provinciales d'y participer. Le ministre de la Justice soutient ce programme et il semble qu'il se réalisera.

rule while evaluating critically certain passages from the leading texts; they also illustrate the most common yet troublesome scenarios which occur daily in the trial courts and suggest certain approaches and portend future developments.

"Guide to Criminal Evidence" offers the jurists who preside over the busiest courtrooms in the land and who are faced with the same evidentiary problems that bedevil the Superior Courts (but who do not enjoy the same opportunity to reflect upon the matter) a succinct yet masterful exposition of certain fundamental issues.

monsieur le juge Boilard qui seront les plus en demande le jour où les reseignements juridiques seront disponibles sur diskettes d'ordinateurs pour consultation instantanée au moyens d'un appareil tel le Powerbook de chez Macintosh. Dans l'attente de ce 'nouveau Jérusalem' de l'informatique, il me semble que toute personne appelée à décider d'une question de preuve pénale pourra consulter avec profit le *Manuel et preuve pénale*.

nars for Superior Court Judges organized by the Canadian Judicial Council, and that it was regularly revised and renewed at the request of the Canadian Institute for the Administration of Justice. The author is of the belief that "If the work is helpful to me, sitting in Court during a trial, it might be useful to others, who have not been able to consecrate the long hours necessary to read, digest and note pertinent decisions and trends so as to be able quickly to isolate a principle and decide a given question." This resolution, to provide a useful and definitive judgement on a given question of signal interest, marks this publication with the stamp of authority.

The issues that are discussed are "Confessions", "Prior Statements", "Hearsay: General Rule and Some Exceptions", "Similar Facts", "New Rules of Evidence Regarding Sexual Offences", "Surreptitious Monitoring (Wiretapping)", "Conspiracy", "Competence of Compellability of Spouses", "Entrapment, Police Provocation, Abuse of Process", "Corroboration: **Vetrovec**", and "Truth Experts". Of note, over 95% of the Canadian cases cited are decisions of the Supreme Court of Canada or of provincial or territorial courts of appeal, ensuring that the discussion is focused on the most salient aspects of the issues being considered. The discussion is organized according to consecutively numbered paragraphs, that are concise yet exhaustive in their consideration of the subject matter.

I wish to make plain that the references to the cases are obviously selected with care, in order to illustrate fully the questions that fall to be decided. For example, at page 2-3, paragraph 2,009, reference is made to the trial decision in the **Jobidon** case, and to the fact that an onlooker had cried out spontaneously and without the possibility of fabrication that the fatal altercation was a 'fair fight!'. One rarely finds so apt an illustration of the *res gestae* rule.

The writer was impressed in particular with the treatment of the question of similar facts, at Chapter 4. The nine pages of text set out the essence of this difficult evidentiary

les tribunaux dont les calendriers sont les plus achalandés au pays. Ces 11 chapitres et l'excellente discussion de la pertinence, l'admissibilité et la force probante de la preuve qui fait guise de chapitre introductif en font un livre que l'on se doit de connaître. Où d'autre peut-on lire un exposé de la 'règle **Milgaard**' qui soit si révélateur mais autant bref ? Que dire de la pertinence et de l'utilité des commentaires relatifs à la question de la similitude des faits similaires ? Les titres de tous ces chapitres suivent:

1. Confessions
2. Déclarations antérieures
3. Oui-dire: Généralités
4. Faits similaires
5. Nouvelles règles de preuve pour les infractions sexuelles
6. Écoute clandestine
7. Conspiration: Nature, régles de preuve, application
8. Compétence et contraignabilité des époux,
9. "Entrapment", provcation policière procédures abusives"
10. "Corroboration: **Vetrovec**
11. Les experts de la véracité " (Truth experts)

Somme toute, le *Manuel de preuve pénale* se démarque des autres textes non seulement par la rigueur de son analyse, mais par sa taille réduite et par l'aise avec laquelle le lecteur ou la lectrice peut repérer la mention désirée.

De fait, lorsqu'on songe aux dimensions du Code criminel annoté Tremeears ou à celle du Martin's (sans compter la brique, le mot n'est pas trop fort, que représente le 'Counsel Edition' de ce texte qu'annote Me. E.L. Greenspan, c.r.) quel plaisir de pouvoir compter sur un texte qui soit moins gros qu'un ordinateur portatif, et qui contient plusieurs onglets descriptifs et une Table des maitères et un index que l'on peut consulter aisément.

De fait, il y a fort à parler que ce sont des études dans le genre que vient de signer

they were very successful. There is definite awareness of the needs of the Provincial court judges and a continued attempt by the N.J.I. to meet those needs.

Although the C.A.P.C.J. is in a relatively strong position, I am of the view that we are at a crossroads. The prospects for increasing our funding are poor and will remain relatively static for many years. We have been successful in obtaining funds for special projects such as the W.J.E.C. Atlantic Provinces, domestic violence and child witness etc. However, we must seriously look at our financial and personnel resources and try to improve our programs.

Your executive is working towards the future of the C.A.P.C.J. and we have telephone conference calls on a regular basis. With the swift changes in society, the continuous amendments to the Criminal Code, and the numerous decisions on the Charter of Rights, the C.A.P.C.J., as an organization must define how we see ourselves. We should be making plans for the future. For this purpose I have asked Judge Wesley H. Swail, 3rd President, to form a committee to draw up a strategic plan for both the short and long term future, identifying our objectives, growth opportunities and a basis for allocating our resources effectively. Should you have any ideas, please contact Wes so that he can incorporate them into the strategic plan.

Judge Harvie Allan assures me that the plans for the annual conference in Regina in September are in place and invites you to enjoy Western Hospitality.

In closing, I want to thank you for all your co-operation in the past months and hope you will have a warm and pleasant summer. See you in Regina.

Avec l'arrivée du juge Dolores Hansen et de Guy Goulard, un nouvel esprit de coopération semble émaner de l'I.N.M. L'A.C.J.C.P. et l'I.N.M. coopérent maintenant dans différents programmes. Le programme sur la discrimination basée sur le sexe a été présenté à l'auberge Far Hills *Inn* par Son Honneur, le juge Donna Hackett de la magistrature de l'Ontario. Le juge Hackett avait mis sur pied ce programme pour l'I.N.M., lorsqu'elle était procureur de la Couronne à Ottawa et les documents ont été préparés et librement présentés au Cours d'orientation initial destiné aux nouveaux juges de Val Morin. De la même manière, l'I.N.M. a présenté sans frais pour nous, un programme éducationnel d'une demi-journée à la Conférence provinciale de l'Atlantique. Les juges Ken Kirkland et Lucien Beaulieu travaillent avec les membres de l'I.N.M. dans des programmes relatifs à la violence au foyer et à la Loi sur les jeunes contrevenants. Je crois savoir que ces programmes seront présentés aux juges de Terre-Neuve en septembre et à Montréal, Québec, plus tard cette année. L'Institut a également donné des séminaires intégrés à l'intention des juges provinciaux et fédéraux à Halifax en février et à Saint-Jean, Terre-Neuve, en mars 1992. J'ai su qu'ils avaient été très réussis. Il y a, de la part de l'I.N.M., une incontestable prise de conscience des besoins des juges de la Cour provinciale, et des tentatives continuelles de les satisfaire.

Bien que l'A.C.J.C.P. soit relativement bien établie, j'estime que nous nous trouvons maintenant à un croisement. Les possibilités d'augmenter nos subventions sont très limitées et vont demeurer relativement inchangées pendant de nombreuses années. Nous avons réussi à obtenir des fonds pour des projets spéciaux comme le W.J.E.C., la Conférence provinciale de l'Atlantique, la violence au foyer, le témoignage des enfants, etc. Cependant nous devons sérieusement examiner nos finances et nos ressources en personnel et essayer d'améliorer nos programmes.

Votre comité exécutif travaille pour l'avenir de l'A.C.J.C.P. et nous avons des conférences téléphoniques sur une base régulière. Avec les changements rapides de notre société, les modifications continuelles du Code criminel et les nombreuses décisions relatives à la Charte canadienne des droits et libertés, l'A.C.J.C.P. en tant qu'organisation doit se redéfinir elle-même. Nous devrions établir des plans pour l'avenir. À cette fin, j'ai demandé au juge Wesley H. Swail, 3ème vice-président, de former un comité chargé d'établir un plan stratégique aussi bien à court terme qu'à long terme, identifiant nos objectifs, nos possibilités de croissance et un système efficace d'allocation de nos ressources. Si vous avez des idées à ce sujet, vous êtes priés de prendre contact avec Wes pour qu'il puisse les incorporer au plan stratégique.

Le juge Harvie Allan m'assure que les préparatifs de l'Assemblée annuelle de Regina en septembre ont commencé et vous invite à venir goûter à l'hospitalité de l'ouest.

En conclusion, j'aimerais tous vous remercier pour votre coopération au cours des derniers mois et vous souhaiter de passer un été chaud et agréable. Au plaisir de vous voir à Regina.

His Honour Judge Charles Scullion / L'Honourable juge Charles Scullion

Book Reviews / Comptes-rendus

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

Guide to Criminal Evidence
Mr. Justice Jean-Guy Boilard
Les Éditions Yvon Blais Inc.
Cowansville, Québec (1991)
$55.00 - Looseleaf

Is there need for a further text respecting Canadian criminal evidence, even one written by a very experienced and learned jurist such as the Honourable Mr. Justice Boilard of the Québec Superior Court? Indeed, his recently published book itself refers to the well known Canadian texts *"Criminal Pleadings and Practice in Canada"* by Mr. Justice Ewaschuk of the Ontario Court of Justice (General Division), to P.K. McWilliams' *"Canadian Criminal Evidence"*, and to the internationally respected publications by Cross, Archbold and Phipson. In light of these authorities, what need would there be for a further text? Of course, were it one devoted to the most significant and troublesome evidentiary issues that our Courts have to grapple with on almost a daily basis, one characterized by clarity and scholarship of exposition, and by ease of reference, such that any user could easily refer to it (and transport it), even a judge presiding over trials in the most isolated and difficult of access court facilities, its significance would appear manifest. Judged in this perspective, "Guide to Criminal Evidence", and the French language version, "Manual de preuve pénale" is a welcome and timely addition to the desk of the Canadian Judiciary.

The Preface to Mr. Justice Boilard's text sets out the genesis of the book, and emphasizes the fact that the "little manual" was developed for use at the annual semi-

de Gilles Renaud,
Conseil Section des crimes contre l'humanité et des crimes de guerre
Ministère de la Justice, Ottawa

Manuel de Preuve Pénale
L'Honorable Jean-Guy
Les Éditions Yvon Blais Inc.
Cowansville, Québec (1991)
55,00 $ - Intercalaire

Si les juges d'expression française des cours provinciales canadiennes devaient se réunir afin de dresser une liste de leurs desiderata professionnels, nulle doute que la mention d'un manuel de preuve en français serait une des plus populaires. Bien que ces juristes puissent compter sur plusiers textes portant sur la preuve en maitère pénale, notamment *Criminal Pleadings and Practice in Canada* du juge Ewaschuk de la Cour supérieure de l'Ontario et le livre de P.K. McWilliams, c.r., *Canadian Criminal Evidence*, aucun ouvrage de doctrine est paru récemment en français qui soit autre que l'étude particulière d'une question. Je pense par exemple à l'excellent texte, *Recevabilité des aveux extrajudiciaires*, de l'Honorable René J. Marin, qui sera étudié par même les juristes qui comprennent peu le français mais qui désirent solutionner une question difficile revelant du droit portant sur les confessions. Cependant, le ou la juge d'une cour provinciale qui doit trancher cette même question pourra maintenant faire appel à un manuel de preuve pénale qui discute de façon magistrale, mais avec une concision remarquable, les questions les plus fondamentales et, partant, les plus complexes, qui relèvent de la preuve pénale.

Ainsi, le text de l'Honorable Jean-Guy Boilard, de la Cour supérieure du Québec, qui vient de paraître chez Les Éditions Yvon Blais Inc., va sans doute figurer au premier plan sur les pupitres des juges qui président

13 Chief Justice Dickson and Justices Wilson, L'Heureux-Dubé, and Gonthier concurred.

14 Professors Andrews and Hirst, Criminal Evidence, 1987, an English text relied on by the majority in B.(C.R.), make a very interesting observation about Makin v. A.G. N.S.W. as the so-called source of the commandment that one cannot use similar fact evidence to infer guilt from disposition. Recall the facts in **Makin.** The Makin were "baby farmers". They took in unwanted children in return for money for their support. The body of a child was found buried in their garden. They were prosecuted for the murder of that child. The prosecution led evidence that the corpses of other children were found in the garden. Andrews and Hirst comment, 15.39:

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

15 [1894] A.C. 57.

16 Ibid at 65.

17 This list is taken from Justice McIntyre's judgement in **Sweitzer,** supra n.6, who noted that the list was not complete.

18 Supra f. n. 11.

19 Supra f. n. 5

20 (1952) 2 Q.B. 911

21 (1975) 91 L.Q.R. 193, at 198,

22 (1988) 66 C.R. (3d) 1 (S.C.C.)

23 Ibid at 26. Presumably the reversal of position in B.(C.R.) would apply to this position as well?

24 Ibid at 25.

25 Ibid at 26.

26 Supra f. n. 1 at 20.

27 (1991) 4 C.R. (4th) 1 (S.C.C.).

News Brief / En Bref

NOVA SCOTIA

Appointments

John Dower Embree was appointed a Judge of the Provincial Court effective August 30, 1991. At the time of his appointment Judge Embree was Senior Crown Attorney (Appeals) with the Public Prosecution Service of Nova Scotia. He is presiding in Antigonish and Port Hawkesbury.

Albert Bremner was appointed a Judge of the Provincial Court effective October 4, 1991. At the time of this appointment Judge Bremner was Deputy Director and a Senior Barrister of Nova Scotia Legal Aid. He was also Second Vice-President of the Nova Scotia Barristers' Society. Although he lives in Lunenburg, Judge Bremner presides mainly in Halifax.

Retirement Dinner

The Banquet held during the Atlantic Regional Education Conference at White Point, Queen's County, Nova Scotia from May 6-9 doubled as a retirement dinner for *Chief Judge William J.C. Atton and Judge H. Russell MacEwan*, both of the Provincial Court, and Judge Robert J. Butler of the Family Court. All three retired in 1991. They were presented with engraved silver trays.

QUEBEC

Nominations

Antonio Discepola a été nommé juge de la Cour Municipale de Montréal. Avant sa nomination le juge Discepola siégé depuis environ un an à titre de commissaire à la commission d'appel en matière de lésions professionnelles.

Denis LaLiberté a été nommé juge de la Cour Municipale de Montréal. Avant sa nomination le juge LaLiberté était Avocat en chef aux affaires pénales et criminelles de la Ville de Montréal.

Juges a la Retraite

L'Honorables juge Marcel Beauchemin, de la chambre criminelle et pénale du district de Montréal a pris sa retraite le 23 mars 1992.

L'Honorables juge Marc Lamarre, de la chambre criminelle et pénale, Cour du Québec, district de Montréal a pris sa retraite le 27 mars 1992.

L'Honorables juge Guy Dorion, de la Cour du Québec, Chambre de l'expropriation, a pris sa retraite le 15 avril 1992.

L'Honorables juge Roger Pigeon, de la Cour Municipale de Montréal, a pris sa retraite le 20 mai 1992.

ONTARIO

Executive Committee

At the 1991 Annual Meeting held jointly with the C.A.P.C.J. the following were elected to the Executive Committee of the Ontario Judges Association:

President
Judge Leonard T. Montgomery, Orillia

Immediate Past President
Judge Stanley W. Long, Toronto

Past Presidents
Judge J. Douglas R. Walker, London
Judge C. Russell Merredew, Pembroke

1st Vice President
Judge Jean M. Bordeleau, Ottawa (President Elect)

2nd Vice President
Judge Donald A. Ebbs, Windsor

Secretary
Judge Douglas V. Latimer, Milton

Treasurer
Judge William S. Sharpe, Milton

Appointments

His Honour Judge J. Elliott Allen Brampton (Central West Region), effective November 15, 1991.

His Honour Judge Bruno Cavion Brampton (Central West Region), effective November 15, 1991.

His Honour Judge Geraldine Waldman Brampton (Central West Region), effective November 15, 1991.

His Honour Judge Ramez Kawley Sarnia (South West Region), effective December 1, 1991.

His Honour Judge Vilbert T. Rosemary Brampton (Central West Region), effective December 1, 1991.

His Honour Judge Timothy Whetung Oshawa (Central East Region), effective December 15, 1991.

His Honour Judge Lloyd M. Budzinski Central West Region, effective April 1, 1992.

Retirements

His Honour Judge George E. Carter - Toronto - Appointed February 4, 1980, retired October 31, 1991. Commenced part time service November 1, 1991.

His Honour Judge John Cassells - Belleville Appointed January 16, 1984, retired May 4, 1992.

His Honour Judge John D. Ord - Brampton Appointed May 13, 1963, retired May 31, 1992, commencing part-time service.

His Honour Judge Sydney M. Harris - Toronto - Appointed July 23, 1976, retired June 23, 1992.

Resignation

The Honourable Janet E. Simmons - Brampton, appointed to the Ontario Court of Justice (Provincial Division) December 21, 1990. Resigned on her appointment to the Ontario Court of Justice (General Division) December 16, 1991.

Deaths

His Honour Judge Jack F. McCormick - Kitchener. - Appointed July 15, 1969, retired July 18, 1991.
Honorary Life Member.
Deceased September 15, 1991, age 65.

His Honour Judge C. E. (Cy) Perkins - Chatham. - Appointed May 2, 1967. President of the Ontario Association 1978-79.
Deceased November 5, 1991, age 69.

His Honour Judge Crawford W. Guest - Toronto. - Appointed 1958, retired 1978.
Honorary Life Member.
Deceased December 20, 1991, age 84.

His Honour Judge Ronald C. Jackson - Belleville. - Appointed February 15, 1952, retired December 25, 1983.
Honorary Life Member.
Deceased December 16, 1991.

His Honour Judge Senior Judge Johnstone L. Roberts - Niagara Falls. Appointed May 1, 1952, retired May 11, 1984. Honorary Life Member. (In his 73rd year.)

His Honour Judge Darrell Draper - Toronto. Appointed October 12, 1979.
Deceased January 24, 1992, age 69.

His Honour Judge William G. Cochrane Victoria, British Columbia, formerly of Goderich. - Appointed December 12, 1977, retired November 28, 1984.
Honorary Life Member.
Deceased March 26, 1992, age 77.

SASKATCHEWAN

Appointments

Betty Lou Huculak was sworn in as a Judge of the Provincial Court on January 18, 1992.
For several years prior to her appointment Judge Huculak had been Legal Director of Saskatoon Rural Legal Aid. She will reside in Lac LaRonge.

Diane I. Morris was sworn in as a Judge of the Provincial Court on January 30, 1992. Prior to her appointment Judge Morris was Assistant Area Director in Regina for the Saskatchewan Legal Aid Commission. She will reside in Meadow Lake.

The jurisprudence following on ***Makin*** *had proceeded on the assumption that the evidence must relate to something other than disposition; mere disposition evidence could never be admitted. In* ***Boardman*** *the majority of the court accepted that a court or jury may properly infer guilt from evidence of disposition where the high and specific relevance of the evidence warrants such an inference.*

Justice McLachlin then noted the current Canadian Jurisprudence:

The preponderant view prevailing in Canada is the view taken by the majority in **Boardman** *- evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where the evidence of prior immoral acts is presented to the jury. (p. 22).*

The majority in ***B.(C.R.)*** *recognized that the line of reasoning could be through disposition. The dissenting opinion maintained that this line of reasoning was forbidden. Sopinka, J. Wrote:*

To have probative value the evidence must be susceptible of an inference relevant to the issues in the case other than the inference that the accused committed the offence because he or she has a disposition to the type of conduct charged. (p. 7).

In **M.H.C.**, McLachlin again writes for the Court, and this time Sopinka, J., concurs. This time she writes:

Evidence as to disposition, which shows only that the accused is the type of person likely to have committed the offence in question, is generally inadmissible. ... There will be occasions, however, where the similar fact evidence will go to ***more than disposition,*** *and will be considered to have real probative value. (emphasis added)*

This language suggests an unfortunate retreat from the position earlier taken in **B.(C.R.).** The opinion in **M.H.C.** goes on:

That probative value usually arises from the fact that the acts compared are so ***strikingly similar*** *that their similarities cannot be attributed to coincidence. (emphasis added)*

Again, this language seems to be a retreat from the ideas expressed by McLachlin, J. in **B.(C.R.)**. There, after praising the rejection of the **Makin** category approach by **Boardman,** and by the Court's own earlier decisions in **Sweitzer, Robertson,** and **Green,** McLachlin wrote:

Catchwords have gone the same way as categories. Just as English courts have expressed doubts about the necessity of showing "striking similarity" (citations omitted) so in ***Robertson*** *Wilson J. rejected the validity of this phrase as a legal test.*

It is sincerely hoped that the postscript can be simply dismissed as the musings of an academic who is reading something into his recent decision that was never intended. Having cast off the shackles of the pigeon-hole, category approach in **B.(C.R.),** in favour of a principled discretionary approach, a retreat would be most regrettable.

Footnotes

1 (1989) 71 C.R.(3d) 1 (S.C.C.)

2 Justice McIntyre, Lamer and Wilson concurred.

3 Ibid, at 21.

4 Ibid, at 15.

5 (1975) A.C. 421 (H.L.), discussed infra.

6 (1982) 68 C.C.C. (2d) 193.

7 (1987) 1 S.C.R. 918.

8 (1988) 62 C.R. (3d) 399. For a similar "retrograde" step in England, see **R. v. Lunt,** (1987) 85 Cr. App. R. 241; criticized in (1987) Crim. L. Rev. 406. In **Lunt** the Court of Appeal suggested that there was a forbidden line of reasoning and that to be received, similar fact evidence must assist the jury otherwise than through "the accused's bad character or disposition to commit the sort of crime with which he is charged."

9 Supra f.n.7 at 941.

10 Supra f.n.6 at 196

11 Supra f.n. 8 at 399

12 (1990) 76 C.R. (3d) 1 (S.C.C.)

According to Justice Sopinka, in Morin:

In order to be relevant on the issue of identity the evidence must tend to show that the accused shared a distinctive unusual ***behavioural trait*** *with the perpetrator of the crime. The* ***trait*** *must be sufficiently distinctive that it operates virtually as a badge or mark identifying the perpetrator. [emphasis added]*[25]

Whether one calls it "propensity", or "behavioural trait" or modus operandi", as he called it in **B.(C.R.),** surely the same form of reasoning is being engaged. In **B.(C.R.)**, Justice Sopinka used the phrase "modus operandi" and distinguished the same from evidence of general character; similar fact evidence establishing the former could be received but not if it only establishes the latter. Are we here talking differences in kind or only differences in degree? Similar fact evidence which only shows the accused to be a bad person is not admissible but similar fact evidence which shows him to be **the** person responsible is admissible. Receivability then depends solely on the degree or probative force when assessed and compared to prejudicial impact. Reasoning through disposition is, in fact, not forbidden by Justice Sopinka; his "behavioural trait" or "modus operandi" analysis amounts to the same thing.

Reception of similar fact evidence should be exceptional. The test is, however, as a result of **B.(C.R.)**, simpler than Justice Sopinka would maintain. But make no mistake, while the test is simple to articulate, probative worth versus prejudice, the judgment call on when such evidence should be received remains as difficult as it ever was

Meaning of Prejudice

Justice Sopinka wrote in **B.(C.R.)** that he chould not subscribe to a theory that propensity alone could be the basis for admissibility. He maintained:

To say that propensity may have probative value in a sufficiently high degree to be admissible is a contradiction in terms. It is tantamount to saying that when the danger of the application of the forbidden line of reasoning is the strongest, the evidence can go in.

But what exactly does the law forbid? What is it that the law is concerned about when it formulates a general rule that the Crown cannot lead evidence of an accused's bad character? How may the accused be prejudiced? It is not only by a line of reasoning. The law is concerned that if the trier of fact finds out that the accused is a bad person they may give that fact more weight than it deserves and may be less critical of the evidence led against him by the prosecution. An emotional reaction to the person's character may cause them to be less rational in analyzing the Crown's case than they might otherwise be. The law is concerned that the trier might want to punish the accused of his past misconduct and for that reason convict him of the crime charged. The law is concerned that evidence of previous misconduct will confuse the jury and they may be deflected from their main task. These are the possible prejudicial effects; for a good summary of them see Justice Sopinka's own judgement in **D.(L.E.)**.[26] "Prejudice in this context does not mean that the evidence will increase chances of conviction but rather that the evidence might be improperly and unfairly used. When the evidence has a very high probative value, directly persuading that the accused did do the act alleged, the unfairness, the prejudice, disappears and the evidence, being relevant, is received.

A Postscript

There is some disturbing dicta in the most recent Supreme Court of Canada case dealing with similar fact evidence. **C.(M.H) v. R.**[27] In **B.(C.R.)**, the Court was quite clear its rejection of the old category approach to similar facts associated with Makin. The court embraced the wisdom of the modern, principled approach set out in **Boardman,** McLachlin, J. noted the difference:

Retirements

Judge William B. Tennant.
Appointed November 1, 1976,
retired October 31, 1991.

Judge Alistair J. Muir.
Appointed November 1, 1972,
retired November 30, 1991.

Judge Wilfred L. Meagher.
Appointed January 1, 1982,
retired December 31, 1991.

Deaths

Judge Paul G. Trudelle, Regina
passed away in March 1992.

ALBERTA

Appointments

Harry D. Gaede was appointed a Provincial Court Judge effective January 10, 1992. He presides in Camrose.

Donald E. Demetrick was appointed a Provincial Court Judge effective January 10, 1992. Judge Demetrick will preside in St. Paul.

Three Recent Decisions of the Supreme Court of Canada Affecting the Law of Similar Fact Evidence

by *J.R. Delisle*

Faculty of Law - Queen's University - Kingston, Ontario

This paper was delivered by Professor Delisle at the Atlantic Regional Education Conference held at White Point, Nova Scotia on May 7 and 8, 1992. He has graciously permitted us to reproduce it here.

In **R.V.D.(L.E.)**, [1] the accused was charged with two counts of sexual assault. The allegations arose out of separate incidents in July 1985. The complainant, the accused's daughter was 17 years old at the time of the incident. The Crown sought to introduce evidence of numerous incidents of sexual fondling and intercourse from December 1978 to May 1981, and further incidents of sexual touching in December 1983 and Spring 1985. The accused had faced several charges, including incest, arising from the incidents alleged prior to May 1981, but the Crown had entered a stay of proceedings on all these charges in 1982. In that instance the daughter had refused to discuss the matter with the police. In her testimony in the present case, she explained her earlier refusal a being the result of fear, unwillingness to hurt her father and guilt at being the cause of her parents' separation.

Counsel for the accused did not object to the admission of the allegations of incidents in December 1983 and Spring 1985 but did object to the admission of the evidence of incidents alleged to have occurred prior to May 1981. The trial judge ruled that the evidence of the alleged incidents prior to May 1981 should be excluded because the probative value of the evidence was outweighed by its prejudicial effect. The judge warned, however, that the excluded evidence might become admissible as a result of questions asked in cross-examination or evidence introduced by the defence.

Defence counsel, during his cross-examination of the complaint's mother, posed numerous probing questions about the state of the family relations both prior to and after May 1981, implying hostility as a reason for false charges being laid. An unexpected response to one of these questions referred to the previous charges of incest. Defence counsel did not move for a mistrial but cross-examined further on the events surrounding the incest charge in an attempt to minimize the damage caused. Following an adjournment defence counsel moved for a mistrial but the motion was refused on the basis that the situation was created by the defence. The judge ruled that the complainant's allegations of acts of sexual misconduct prior to May 1981 were now admissible to allow the complainant "to tell her entire story". In his charge to the jury the judge warned them that the accused was only charged with the acts alleged to have occurred in July 1985 and that the previous acts alleged were simply "background". The accused was convicted. His appeal was dismissed and he appealed further.

In the Supreme Court of Canada, Justice Sopinka gave the majority judgement.[2] The majority decided that evidence of the sexual activities prior to May 1981 was logically connected to the present charges. However, they noted that no misconduct as serious as the earlier allegations was alleged to have occurred after May, 1981. In addition, no evidence other than the complainant's testimony was adduced to prove the offences in the present charges. While saying that evidence other than that of the complainant is not essential in every case before similar acts are admissible, the

tified concerning the particulars committed on each, and the trial judge ruled that the evidence of each could be taken as corroborative of the other as the acts were similar. The Court of Appeal dismissed the accused's appeal but certified a point of law of general public importance:

Whether, on a charge involving an allegation of homosexual conduct there is evidence that the accused is a man whose homosexual proclivities take a particular form, that evidence is thereby admissible although it tends to show that the accused has been guilt of criminal acts other than those charged.

The Lords were unanimous in declining to create, or recognize, a "category of relevance" giving "automatic admissibility to evidence where proclivities take a particular form". Rather the approach in future was to be based on principle. In **Boardman,** the majority of the speeches in the House of Lords reasoned that if the accused's disposition, illustrated by his previous conduct, was very probative of a fact in issue in comparison to its prejudicial effect, evidence of that disposition should be left with the jury to consider. Lord Cross used the case of **R. v. Straffen**, 20, to illustrate the point. In that case the accused was charged with the murder of a young girl. It was an unusual murder for there had been no attempt to assault her sexually. Straffen was in the neighbourhood at the time of the crime. The accused had previously committed two murders of young girls and in each there had been no attempt to sexually assault. The evidence of the earlier murders was received into evidence and Straffen's conviction was upheld on appeal. Lord Cross, in Boardman, approved:

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

It is suggested that Justice Sopinka in **L.E.D.** was led astray by the single speech of Lord Hailsham in **Boardman**, which it quoted, that reasoning through disposition was forbidden. The other law lords in Boardman wanted to cast off the shackles of **Makin**, the application of which had caused so much confusion during this century; indeed Lord Cross and Lord Wilberforce did not even mention **Makin** in their opinions. Lord Hailsham alone, for some unknown reason, sought to continue the force of that old decision and "explained" the **Makin** rule in the language which the Court in **L.E.D.** quoted. Professor Hoffman in his most valuable article, Similar Facts After Boardman, [21] points out that while this may have been an accurate paraphrase of the so-called **Makin** rule, it is impossible to reconcile it with many of the other classic cases on similar fact evidence.

Another example of and I say this with respect, Justice Sopinka's old-fashioned category approach, occurred in **R. v. Morin.**[22] One of the issues was the admissibility of psychiatric evidence tendered by the Crown. On this issue the Court was unanimous. Justice Sopinka decided that for such evidence to be received the Crown would have to surmount the same sort of hurdle it faced when tendering similar fact evidence. Taking the same approach that he later took in **D. (L.E.)** he wrote:

*Accordingly, when the prosecution tenders expert psychiatric evidence, the trial judge must determine whether it is relevant to an issue in the case, apart from its tendency to show propensity. If it is relevant to another issue (e.g. identity), it must then be determined whether its probative value on that other issue outweighs its prejudicial effect on the propensity question. In sum, if the evidence's **sole** relevance or **primary** relevance is to show disposition, then the evidence must be excluded.*[23]

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

*It is illogical to treat evidence tending o show the accused's **propensity** to commit the crime differently because such a propensity is introduced by expert evidence rather than by means of past similar conduct. [emphasis added]*[24]

For Justice Sopinka propensity could not be the basis for admissibility. For him the evidence must have relevance beyond mere propensity. And then its probative value must exceed its prejudicial effect. He drew a distinction between evidence of general character and **modus operandi.** For Justice Sopinka, what the law seeks to forbid is a process of reasoning that would condemn the accused because of the accused's character as a thief, a fraud, a liar or a person violent character. On the other hand, a highly individualized **modus operandi** was tantamount to evidence that the accused left his calling card. The process of reasoning which connected the accused to the crime charged was the same as in the other case of other evidence of identification and was therefore distinguishable from the prohibited line of reasoning. He noted that in **B. (C.R.)** there was only two instances, separated by a considerable passage of time and there was a need to proceed with caution. For him the father-daughter relationship in each case should not be regarded as unusual but rather as neutral. The similar fact evidence should therefore have been rejected.

The Source of Justice Sopinka's Reasoning

After the seminal case of **Makin**[15] the courts tended to create categories of instances when similar fact evidence would be admitted. Lord Herschell had written in **Makin** that it was:

not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of (other) criminal acts for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.

His Lordship went on, however, to say that the prosecution could lead such evidence:

if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[16]

Unfortunately the juxtaposition of these two sentences led later courts to approach similar fact evidence by first repeating a general rule of inadmissibility which would foreclose any evidence which would indicate that the accused was likely to have committed the charged offence and then determining whether there was some exception through which the evidence could be received. This rule-pigeon-hole approach led to the creation over the years of a long list of exceptions. However, when these courts said they were receiving the similar fact evidence "to prove a system", "to prove intent", "to prove a plan", "to show malice", "to rebut the defence of accident or mistake", "to prove identity", or "to rebut the defence of innocent association",[17] the courts, in courts, in truth, were receiving the evidence to show that the accused was, as evidenced by his previous behaviour, the sort of person who would do the act charged. The court would note the possibility of prejudice to an accused and receive the evidence only when the probative worth was so great that the prejudice was outweighed; when it would be an affront to common sense to exclude the evidence. Justice McIntyre recognized this in **Sweitzer** when he wrote that a category approach, while useful, created a:

a tendency to overlook the true basis upon which evidence of similar facts is admissible. The general principle described by Lord Herschell may and should be applied in all cases where similar fact evidence is tendered and its admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission. ... The categories, while sometimes useful, remain only as illustrations of the application of that general rule.[18]

Boardman

The breakthrough to a principled approach was led by the House of Lord in **Boardman.**[19] In Boardman the accused was charged and convicted of buggery. The victims, pupils at the accused's school, tes-

Court noted that in **D. (L.E.)** the similar fact evidence bore nearly the entire burden of proving the Crown's case against the accused. They decided that the probative value of the similar fact evidence was not sufficient to overcome its prejudicial effect and therefore should have been excluded.

The court also held that the charge to the jury were respect to the similar fact evidence of December 1983 and Spring 1985 was deficient. The court said that he jury should have been instructed that if it accepted the evidence of the similar acts, that evidence was relevant for a limited purpose. According to **D. (L.E.)**:

The jury must be specifically warned that it is not to rely on the evidence as proof that the accused is the sort of person who would commit the offence charged and on that basis infer that the accused is guilty of the offence charged. In the instant case the trial judge gave the jury no such warning. The jury members were not warned that they were not to engage in the prohibited line of reasoning". [3]

According to the majority:

The evidence of similar acts (must) have probative value in relation to a fact in issue, other than its tendency to lead to the conclusion that the accused is guilty because of the disposition to commit certain types of wrongful acts." [4]

To reason through disposition
is forbidden.

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

The majority judgement in **D. (L.E.)** appears to be contradictory to the common sense trend initiated by the House of Lords in **R. v. Boardman,**[5] and followed by our Court in **Sweitzer v. The Queen,**[6], **R. v. Robertson**, [7] and **R. v. Green**, [8]. The majority in L.E.D. insisted that the jury needed to be specifically warned that it was not to rely on the similar fact evidence as proof that the accused was the sort of person who would commit that offence charged. The earlier Supreme Court of Canada decisions, which was not overruled in **D. (L.E.)**, did not deny this mode of reasoning. They recognized that, in some cases, this reasoning was perfectly legitimate, as long as the evidence of the previous misconduct was sufficiently probative that it outweighed the competing consideration of prejudice to the accused.

For example, in **Robertson**, Madam Justice Wilson, paraphrasing Professor Cross, wrote:

A general statement of the exclusionary rule is that evidence of the accused's discreditable conduct on other occasions, tendered to show his ***bad disposition****, is inadmissible* ***unless*** *it is so probative of an issue or issues in the case as to outweigh the prejudice caused. [emphasis added]* [9]

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

In **D. (L.E.)**, the majority wrote the the similar fact evidence must have probative worth otherwise than via disposition. If it had relevance other than through disposition then the court was to determine whether its probative value was sufficient to outweigh prejudice. This two-step process of reasoning was not previously mandated by the Court. In **Robertson**, **Sweitzer** and **Green** the process of reasoning was simply the second step. In **Sweitzer**, for example, Justice McIntyre for the Court, having deplored cataloguing purposes for which similar fact evidence could be received, described the process:

... admissibility will depend upon the probative effect of the evidence balanced against the prejudice caused to the accused by its admission ***whatever the purpose of its admission.*** *[emphasis added]*[10]

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

The only issue argued before us concerned the admission at trial similar fact evidence, which came from children other that the complainant, concerning the accused's behaviour with them. This evidence was admissible to show a system adopted by the respondent, and its probative force was sufficient to outweigh any prejudicial effect upon the respondent... no error was made by the trial judge. [11]

Is "system" different than disposition?

Why Do We Exclude Similar Fact Evidence? - What Are The Principles?

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

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

A Thorough Examination of the Principles by the Court

In **B.(C.R.) v. The Queen,** [12] only months after **D.(L.E.)** was decided, the accused was charged with sexual offences against a young child, his natural daughter. The daughter testified that the acts of sexual misconduct by the accused began in 1981 when she was eleven years old and continued for almost two years. In support of the child's testimony, the Crown sought to introduce evidence that the accused had had sexual relations in 1975 with a 15-year-old girl, the daughter of his common law wife, with whom he had enjoyed a father-daughter relationship. The trial judge admitted the evidence and convicted the accused. The majority of the Court of Appeal held that the similar fact evidence was properly admitted and upheld the conviction. The accused appealed further.

Madam Justice McLachlin wrote the majority judgment.[13] The reasoning was markedly different than the majority opinion in **D.(L.E.)** delivered only a few months before. The majority in **B.(C.R.)** reasoned, first, that evidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Second, whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect. The trial judge must consider such factors as the degree of distinctiveness or uniqueness between the similar fact evidence and the offences alleged against the accused, as well as the connection, if any, of the evidence to issues other than propensity, to the end of determining whether, in the context of the case before him, the probative value of the evidence outweighs its potential prejudice and justifies its reception. In reviewing the jurisprudence the court noted that while the courts had made a show of accepting similar fact evidence only when relevant to an issue in the case other than propensity, in reality the so-called "forbidden chain of reasoning", through disposition, was regularly employed.[14]

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

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

Reasoning through disposition is permitted!

The Court recognized that admissibility of similar fact evidence is a matter which involves a certain amount of discretion and where the law accords a degree of discretion to a trial judge, courts of appeal are reluctant to interfere with the exercise of that discretion in the absence of demonstrated error of law or jurisdiction. The majority noted the fact, that in the matter before them, in each case the accused established a father-daughter relationship with the girl before the sexual violations began and that this might be argued as going to show a pattern of similar behaviour suggesting that the incident had occurred as the complainant has testified. The question then was whether the probative value of the evidence outweighed its prejudicial effects and the majority decided that, while the admissibility of the evidence might be seen by them as borderline, the Court should not interfere with the conclusion of the trial judge, who was charged with the task of weighing the probative value of the evidence against its prejudicial effect in the context of the case as a whole. The evidence showed, in effect, that the accused was the sort of person who would violate one with whom he enjoyed a father daughter relationship. He was disposed to that sort of activity. He had a propensity toward that sort of activity. It would be fair for the trier of fact to learn of this.

Justice Sopinka disagreed. He began by noting that: *There is no special rule with relation to similar fact evidence in sexual offences... The alleged similar acts must have relevance other than to simply show a general disposition to commit the crime charged.*