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trial in the inflamed climate that surrounds the affair.

In Sydney, a judge granted the request of a man charged with sexual assault for a ban on publication of his name and occupation, four days after the man's lawyer held a news conference to proclaim his innocence and state that he had passed a lie-detector test.

Customs agents routinely refuse to allow explicit gay literature to enter Canada, even when its primary purpose is to prevent the spread of AIDS. The gay rights movement protests, but isn't yet strong enough to halt this censorship.

In 1991, the Supreme Court of Canada ruled that a reporter could not view a videotaped murder confession that had been admitted into evidence at trial, and reported at the time, but found on appeal to be inadmissible. That decision provoked an eloquent dissent from Justice Peter Cory, who warned against "a priestly cult of the law whereby lawyers and judges exclusively determine those items ... which can be seen and heard by members of the public."

Some say the press deserves the publication ban in the Homolka trial because coverage of the case has been irresponsible. This suggests a new role for the courts: to adjudicate what is worthy and what is unworthy in the nation's press; and to reward the former and punish the latter.

It is a defining characteristic of a free society that the marketplace decides what books, magazines, newspapers, posters, plays and poems are worthwhile, not the government. Whether you consider it a small price or a big one, the inevitable result of having a free press is that the press will sometimes debase itself.

"A free press can of course be used for good or bad, but, most certainly, without freedom it will never be anything but bad," wrote Albert Camus. "..Freedom is nothing else but a chance to be better, whereas enslavement is a certainty of the worse."

There is no way around this. If Saturday Night magazine is to be free to enlighten us, then Frank magazine must be free to offend us. You can't have one without the other.

"Those who would lock up the press because it produces monsters ought to consider that so do the sun and the Nile," wrote James Madison, one of the authors of the U.S. Constitution. "As long as there are such things as printing and writing, there will be libels. It is an evil arising out of a much greater good."

In Lighter Vein / Sur un note plus légère

The judge in a recent case in sentencing a man for masturbating in public: "Mr. X, you're just going to have to get a grip on yourself."

The Crown (in another case): "Your Honour, the defendant damaged the victim's house by throwing potatoes at it."

Defence counsel: "The Defence sees eye to eye with the Crown on this issue, Your Honour."

From the Traffic Court: "The defendant was charged with being impaired and overweight."

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Editor's Notebook / Remarques du rédacteur

How does it feel to be in such "Honourable" company? My usual response to such things is, "What's in a name?", but I don't think I should be so skeptical of this one. The significance of this change, of course, is that it takes us one more step along the road to equality with federally appointed judges. That is no small thing.

Equality of judges could lead to Unified Courts. Despite Ian Scott's retirement from politics, court unification is not a dead issue. It appears that Ontario will have a unified family court throughout the province within a couple of years. The same could hold true for Nova Scotia. The government of New Brunswick, long a proponent of some form of unified criminal court, is still talking about a pilot project of that kind in that province. In this issue we are carrying an English translation of an insightful brief on the subject of court unification presented last year by the Quebec Judges' Conference to the Quebec government's Summit on Justice.

Not everything is moving forward for the Provincial Courts. The Attorney General of Manitoba has introduced a Bill in the Legislature of that province which, if passed, would authorize him to appoint non-lawyers as prosecutors and legal aid defence counsel in the Provincial Court.

While we are thinking about threats to our independence, we might want to pause for a few moments to think about the effect our actions and orders have on the freedom of the press and the public's right to know. In our haste to protect defendants and victims from publicity, are we building a wall of secrecy which will ultimately damage the cause of justice? We should all reflect upon Parker Barss Donham's opinion piece on this subject.

Est-il agréable de se trouver en compagnie d'"honorables" personnes?

Je réponds habituellement à ce genre de question "Ce titre vaut ce qu'il vaut", mais je ne pense pas que je devrais être aussi sceptique. Ce changement nous fait, bien sûr, avancer d'un pas sur la voie de l'égalité avec les juges nommés au niveau fédéral. Ce qui n'est pas négligeable.

L'égalité des juges pourrait conduire à l'unification des cours.Bien que Ian Scott ait quitté la politique, la question de l'unification des cours n'en est pas pour autant oubliée. Il semble que l'Ontario aura une cour familiale unifiée pour toute la province avant deux ans. Ce pourrait également être le cas pour la Nouvelle-Écosse. Le gouvernement du Nouveau-Brunswick qui est depuis longtemps partisan d'une certaine forme d'unification de la cour criminelle, parle encore d'un projet-pilote de ce genre dans cette province. Dans le présent numéro nous faisons paraître une traduction anglaise d'un mémoire intéressant sur l'unification des cours présenté l'année dernière par la Conférence des juges du Québec au Sommet sur la justice du gouvernement du Québec.

Cependant, tout ne va pas pour le mieux pour les cours provinciales.

Le procureur général du Manitoba a présenté un projet de loi devant la législature de cette province permettant, s'il est adopté, de nommer des personnes qui ne sont pas avocates, procureurs et avocats de la défense pour l'aide juridique à la cour provinciale.

Alors que nous pensons aux menaces qui pèsent sur notre indépendance, nous devrions nous arrêter quelques moments pour mesurer l'effet de notre action et de nos ordonnances sur la liberté de la presse et le droit à l'information du public. Dans notre hâte à protéger les défendeurs et les victimes contre toute publicité, ne sommes-nous pas

Priestly Cult of the Law
In Canada, official secrecy is the norm

by Parker Barss Donham

Editor's Note: *This syndicated article is reprinted with the permission of the author, a well-known Atlantic Canadian journalist and commentator.*

IN THE DEBATE over Judge Francis Kovac's decision to try Karla (Teale) Homolka in semi-secrecy, an unhealthy Canadian trait lurks, unacknowledged, just below the surface: our ingrained habit of deferring to authority.

We've grown accustomed to letting our betters decide what we can read, what we can say, and what we can safely be allowed to know. Like dutiful children, we accept our lot.

We mustn't be told whether Homolka cut a deal with the prosecution, because potential jurors at the forthcoming trial of Homolka's husband can't be trusted to put that knowledge aside and judge the case on its merits. Apparently, however, they can be trusted with the knowledge that "Homolka was not the worst offender," as Kovacs put it, or that she "did not personally inflict the deaths."

Judges can decide such things because judges are so much wiser than jurors - even those judges who, like so many, owe their position to past service as Liberal, or latterly Tory, bagmen.

Assaults on any particular exercise of free speech or open government invariably arrive swaddled in ringing endorsements of free speech and open government in general. Thus "it is clear that freedom of the press is a hallmark of a free and democratic society" - quoth Judge Kovacs in his decision to muzzle the press. It's just that rights must be balanced, or that freedoms beget responsibilities, or some such twaddle.

Defenders of Kovac's press ban like to portray it as a rare exception to Canada's otherwise unstinting devotion to free expression and open courts. Nonsense. In Canada,secrecy and suppression of free speech are the norm. Examples abound.

Residents of Ontario and Quebec have still not seen an acclaimed CBC drama about the sexual abuse of young boys by Christian Brothers in Newfoundland, because the fictionalized program might taint potential juries in a case involving a different religion sect accused of similar offences in a different province. What a low opinion of public intelligence this betrays.

Last winter, Halifax police decided to withhold the fact that a woman walking along one of the city's shopping thoroughfares had been dragged into a van and raped. Wouldn't want to alarm the public.

Last week, the Federal Court of Canada ruled that the Defence Department's inquiry into the conduct of Canadian peacekeepers in Somalia could remain behind closed doors because it was "a housekeeping affair."

Last year, the Supreme Court of Nova Scotia ruled that a reporter could not see financial records of kickbacks to the provincial Liberal Party that had been entered as evidence at the 1983 trial of a man convicted of influence-peddling, because a second defendant had subsequently been acquitted.

A judge in Saskatchewan has banned publication of evidence at the trail of the first of nine people accused of sexually assaulting children at a babysitting centre in Martensville until the other cases are completed. Only then can we examine whether the young woman defendant received a fair

fut condamné à une peine globale de 12 mois, sans probation. Tout compte fait, l'inculpé avait obtenu une peine favorable sans même devoir prétendre désirer se réformer au moyen d'une thérapie.

Conclusion

Nous croyons que c'est à juste titre que Monsieur le juge Monet déclare qu'il faut laisser les points de départ aux épreuves sportives,[56] car 'tout est cas particulier'.[57] Eriger en principe presque immuable la notion d'un seuil de sentence aurait pour résultat de priver les juges de première instance d'une part importante de leur discrétion, sans toutefois garantir une quelconque diminution de l'incidence des infractions sexuelles. Aussi nous semble-t-il manifeste que les paramètres du starting-point sentence' sont à la fois trop larges et trop étroits. Ultimement, nous croyons que ce concept fait entorse au principe de sentencing qui permet une mesure de clémence et des moyens de réinsertion sociale tels les thérapies. Cependant, en dernière analyse, sans doute est-ce l'impossibilité d'imposer un carcan intellectuel sur les épaules des juges qui exercent leur pouvoir de sentencing qui rend nul un tel concept.

56 Voir la note 56.

57 Voir la note 41.

Until I read the article by Gilles Renaud and Robert Doyle, I had no idea that the Quebec Court of Appeal, unlike its counterparts in the rest of the country, had been moving away from the judicially imposed tariff or minimum or starting point sentence for certain more serious crimes. Mr. Renaud is a keen student of the law and prolific writer who has made several fine contributions to the Journal.

Pat Curran
Editor

en train de construire un mur de silence qui, en définitive, nuira à la cause de la justice? Nous devrions tous réfléchir sur l'article de Parker Barss Donham à ce sujet.

Avant de lire l'article de Gilles Renaud et Robert Doyle, je n'avais aucune idée que la Cour d'appel du Québec, contrairement à ses consoeurs du reste du pays, s'était écartée des tarifs, minimums ou points de départ des sentences imposées judiciairement pour certains crimes plus sérieux. M. Renaud est un érudit du droit et un écrivain prolifique qui a fait plusieurs brillantes contributions au Journal.

Pat Curran
Rédacteur

President's Report / Rapport du Président

His Honour Judge Ernie S. Bobowski / L'Honourable juge Ernie S. Bobowski
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At the ourset of this Report, I want to congratulate th e Honourable Delores M.M. Hansen on hei appointment as Executive Director of the National Judicial Institute, an appointment which, I am sure I can speak on behalf of the entire judiciary is well-deserved and will be skilfully and competently attended to.

My first function as President after the Christmas break was to attend the Canadian Bar Association/Florida Bar Joint Conference, February 19-22, 1993 in Orlando, Florida. As you are aware from reading Judge Amot's CBA Liaison Committee Report in the last issue of the Journal our President now has a seat on the CBA National Council. This, in my view, gives our Association a very powerful lever in dealing with governments, as we can call upon the Bar for support. I wish to bring your attention to a very favourable Report by the CBA entitled "The Independence of the Judiciary in Canada" (August 20, 1985) which stresses that judicial independence applies to all judges including the Provincial Bench and states emphatically that "Judges cannot in any way be classified as civil servants, a point too often forgotten by governments and legislatures alike."

Each of you will have received a joint letter from myself and the Honourable Paule Gauthier, President of the CBA regarding membership in the CBA. I urge each and everyone of you to show your support by becoming a member, so that our two Associations may cooperate in meeting their responsibilities in and for the proper administration of justice. A direct spin off of our out-reach to the CBA was the opportunity afforded me as your President to be included

Avant de commencer ce rapport, je voudrais féliciter l'honorable Delores M.M. Hansen pour sa nomination au poste de directrice générale de l'Institut judiciaire national, nomination à un poste bien mérité car elle saura le remplir avec talent et compétence, et je suis convaincu que je puis parler ici au nom de tous les juges.

Ma première tâche de président, après les vacances de Noël, a été d'assister à la conférence conjointe de l'Association du Barreau canadien/Barreau de Floride, les 19-22 février 1993 à Orlando, en Floride. Comme vous le savez après avoir lu le rapport du comité de liaison avec l'ABC du juge Arnot dans le dernier numéro du Journal, notre président a maintenant un siège au Conseil national de l'ABC. À mon avis, ceci donne à notre association un atout de taille dans nos négociations avec les gouvernements, puisque nous pouvons faire appel à l'aide du Barreau. J'aimerais attirer votre attention sur un rapport très favorable de l'ABC intitulé "The independence of the judiciary in Canada" (L'indépendance des juges au Canada) (20 août 1985) qui indique que l'indépendance des juges s'applique à tous les juges, y compris ceux des cours provinciales et il mentionne notamment que "Judges cannot in any way be classified as civil servants, a point too often forgotten by governments and legislatures alike." (Les juges ne devraient en aucun cas être considérés comme des fonctionnaires, un fait trop souvent oublié aussi bien par les gouvernements que par les législatures).

These two judgments - and there are others - demonstrate that, in the end, *each case is a cause d'espèce*, and while society must register its disapproval of acts such as these in the strongest possible terms, other factors must also be taken into consideration, and not the least among them is the fact that, as the trial judge noted, (where, unlike in *Cappellano*) we find genuine remorse and guilt, the accused can be rehabilitated, thus removing a dangerous person in a much more permanent manner than by even a lengthy period of imprisonment.[52]

Au demeurant, un jugement intéressant qui illustre de façon remarquable la clémence dont fait preuve la Cour d'appel du Québec en matière d'agressions sexuelles n'impliquant aucune thérapie est *R. c. Perron*.[53] Le prévenu avait été condamné sous cinq chefs d'accusation, soit trois d'attentat à la pudeur relativement à des gestes posés depuis octobre 1965 à décembre 1972, un d'agression sexuelle en 1984 et un dernier chef pour l'année 1989 d'abus de confiance de nature sexuelle. Il avait déposé une requête en permission d'appeler des sentences rendues par l'honorable juge Serge Boisvert, de la Cour du Québec, à Amos, soit des peines de six mois d'emprisonnement, avec confusion des peines, accompagnées d'une ordonnance de probation de deux ans.

Au soutien de sa requête pour permission d'appeler, la Couronne plaidait l'insuffisance des peines eu égard à la gravité objective des crimes proposés et surtout leur gravité subjective. En effet, elle soutenait qu'ils avaient été commis à l'intérieur d'une famille d'accueil, où Perron agissait in loco parentis. Le premier juge aurait également ignoré l'impact des actes posés sur les victimes et la nature même du comportement de l'intimé, qui aurait persisté sur une longue période de temps. Elle plaida aussi que le premier juge n'aurait pas dû prononcer la confusion des peines, du moins à l'égard du cinquième chef.[54]

La Cour d'appel observa que sauf pour le cinquième chef, les incidents survenus présentaient tous le même caractère. Perron, alors un homme âgé de 68 ans, avait agi, pendant de longues années, avec son épouse, comme famille d'accueil. Le jugement prononcé indiquait qu'il aurait fréquemment posé des actes qui, à l'époque, constituaient des attentats à la pudeur et, par suite d'une refonte législative, des formes d'agression ou d'attouchements sexuels. Ces actes étaient posés à l'égard des adolescentes qui lui étaient confiées, comme responsable d'une famille d'accueil. Ils consistaient essentiellement en des attouchements et des caresses. Il se serait également exhibé devant certaines des victimes et se serait même, à l'occasion, masturbé devant certaines d'entre elles. Il n'y aurait pas eu de violence physique, mais les adolescentes se seraient senties constamment harcelées pendant la période passée chez lui, quoi qu'elles aient reconnu avoir été toujours fort bien traitées par son épouse, qu'elles appréciaient et aimaient.

La preuve démontrait en outre aussi qu'en plus d'être troublées pendant leur adolescence, certaines d'entre elles avaient subi des difficultés dans leur développement psychologique et dans leur capacité d'entretenir des relations confiantes et saines avec les membres de l'autre sexe.[55] Toutefois, la Cour d'appel fut d'opinion que la période de probation était inutile compte tenu de l'attitude du prévenu. En conséquence, il

52 Ibid., à la p. 210, aux paras. 6-7. Parmi plusieurs exemples possibles de peines exemplaires dans des situations d'agressions sexuelles impliquant des personnes inconnues, citons R. c. Synnott (1986), 3 Q.A.C. 246 (C.A.) (six ans); R. c. Desmarest (1986), 2 Q.A.C. 151 (C.A.) (13 ans); R. c. Charest (1989), 30 Q.A.C. 227 (C.A.) (10 ans) et 10 ans dans l'affaire R. c. J. (C.R.), [1990] R.L. 633 (C.A.). Notons que cette dernière affaire impliquait des victimes adolescentes et le rapport ne précise pas un lien de parenté avec l'accusé.

53 J.E. 91-1677 (C.A.).

54 Ibid., à la p. 2.

55 Ibid., à la p. 5.

d'agression sexuelles impliquant un abus de confiance. Archambault était fondateur du Centre Aspa, dont la vocation était de venir en aide aux toxicomanes. En l'espèce, il avait abusé de deux personnes qui s'étaient adressées à lui pour vaincre leur problème de consommation de drogue.[44]

Toutefois, nous croyons que le dénominateur commun pour bon nombre des jugements de la Cour d'appel du Québec qui font entorse au concept du seuil de la sentence tient à la primauté accordée à la thérapie du contrevenant. En effet, cet aspect avait été ignoré par le juge Kerans dans *Sandercock*. L'examen de l'arrêt *Gervais*[45] sera utile en l'espèce. Le prévenu avait avoué avoir agressé sexuellement une jeune femme et lui avoir infligé des lésions corporelles, en plus d'avoir exercé des voies de fait contre un agent de la paix. Le savant juge d'appel Kaufman a observé que la victim "[suffered] psychological trauma as a result of the incident, however, and found herself afraid to go out of her house alone or to sleep alone in her house." Enfin, le rapport pré-sentenciel notait que "Les risques de récidive seront à craindre tant et aussi longtemps qu'il sera laissé seul face à lui-même."[46] Aussi pourrait-on croire que la Cour d'appel aurait saisi l'occasion d'homologuer la peine de deux ans imposée par le premier juge, sinon d'imposer une peine plus importante afin d'appuyer les motifs énoncés dans *Sandercock*. Cependant, la peine fut scindée et Gervais contraint de se conformer à une ordonnance de probation de deux ans, avec l'obligation de suivre une thérapie pour ses problèmes d'alcool
et de narcomanie. Dissidente, Madame le juge Tourigny aurait réduit la peine d'un jour, pour permettre au contrevenant de purger sa peine ailleurs que dans un pénitencier et d'y suivre les traitements et l'aide thérapeutique nécessaire.[47]

3.2 Sandercock ou le refus de la clémence

L'étude de l'affaire *R. c. Tremblay*[48] nous fournit un autre exemple d'un jugement faisant preuve de clémence allant à l'encontre de la volonté de la Cour d'appel d'Alberta en semblable matière. L'inculpé âgé de 34 ans avait abusé d'une adolescente sous sa garde pour une période de cinq ans. Toutefois, il avais entrepris une thérapie apparemment prometteuse.[49] Le premier juge imposa une peine de prison de 90 jours, a être purgée de façon discontinue. Les motifs qu'il versa au dossier sont les suivants:

> If the Court would apply only the jurisprudence of the objective gravity and the traumatism of the victim, I would have condemned the accused to a sentence of more than two years. However, due to the presentence report that suggests that the accused is also a victim and, taking in consideration that the accused followed therapy, minimizing the risks to commit the same offence, the absence of violence[50] and threats, also the fact that the victim is in clear progression, the sentence would be as pronounced.[51]

Porte-parole de ses collègues Jacques et Fish, le juge Kaufman observa que:

> This Court, as recently as January 3, 1990, in *R. c. Cappellano* (500-10-000316-891), Paré, Malouf and Rothman, JJ.A.), increased a sentence of two years imprisonment for sexual agression on a child (the accused's daughter) to one of four years. On the other hand, on September 26, 1988, a panel of this Court, with a dissent, maintained a sentence of 90 days imprisonment on a similar accusation. (*R. c. Massé*, Kaufman, Beauregard, JJ.A., McCarthy, J.A., dissenting).

44 Ibid., à la p. 3.

45 (1992), 46 Q.A.C. 236 (C.A). Les juges Rothman, LeBel et Mailhot.

46 Ibid., à la p. 238, au para. 9. Cette phrase fut soulignée par le juge Kaufman.

47 R. c. Gervais, précité, à la p. 240, au para. 19.

48 (1990), 30 Q.A.C. 209 (C.A.).

49 Ibid., à la p. 210, au para. 3.

50 Qu'en est-il de la violence verbale et psychologique? Voir R. c. Hamelin, (1991), 39 Q.A.C. 68.

51 R. c. Tremblay, précité, à la p. 210, au para. 5.

in the Canadian delegation of the CBA's Eastern and European Legal Programs Section visit to Slovakia and the Czech Republic. I met with a number of Slovakian and Czech Judges from all courts to discuss common law principles and procedures and their possible adaptability to the European system of law. A full Report has been filed with the CBA.

At the end of March, 1993 I attended the Western Judicial Education Centre seminar on The Role of the Judge in the New Canadian Reality in Victoria, BC. It goes without saying that the Honourable Judge Douglas Campbell and Shirley Campbell have again done an outstanding job of organizing a top-notch educational seminar and for that I heartily congratulate them. The programs that Judge Campbell has developed regarding racial ethnic and cultural issues are know world-wide and must be fully supported by our Association.

My next duty was attending the New Judges Training Program in Val Morin, Quebec. Once again under the able and competent leadership of the Honourable Judge Andre Saint Cyr, the training program was a complete success. This was Judge Saint Cyr's last year as a Director and I, on behalf of the CAPCJ, presented him with a painting in appreciation for his outstanding efforts over the last eight years. The Honourable Judge Michel Babin of Quebec City is the new Director.

At the end of May, I attended the Ontario Judges Association meeting in Ottawa and with our Executive Director Honourable Judge Thomson, met with numerous government officials including the Minister of Justice. The educational program was par excellence. I outlined what the CAPCJ does for its membership in accordance with the constitutional purposes of the Association and was rewarded with renewed support for and understanding of the CAPCJ. I feel that as long as the Provincial Representatives see to it that the information from the Executive reaches the membership, our support will continue to grow.

Chacun de vous allez recevoir une lettre conjointe de l'honorable Paule Gauthier, présidente de l'ABC et de moi-même sur le recrutement des membres de l'ABC. Je vous encourage tous et chacun à nous appuyer et à devenir membre, de façon à ce que nos deux associations puissent coopérer et s'acquitter de leurs responsabilités pour une meilleure administration de la Justice. Comme conséquence directe de nos ouvertures à l'égard de l'ABC, j'ai eu la chance de faire partie, en tant que votre président, de la délégation canadienne lors de la visite de la Section des programmes juridiques orientaux et européens en Slovaquie et en République tchèque. J'ai rencontré un certain nombre de juges slovaques et tchèques des différentes cours pour discuter avec eux des principes et procédures de Common Law et de leur adaptation possible au système juridique européen. Un rapport complet a été déposé auprès de l'ABC.

À la fin de mars 1993, j'ai assisté au séminaire du Centre de formation judiciaire de l'ouest sur Le rôle du juge dans la nouvelle réalité canadienne à Victoria, CB. Il va sans dire que l'honorable juge Douglas Campbell et Shirley Campbell ont encore une fois accompli un travail remarquable pour organiser ce séminaire de formation de première qualité et je les en félicite de grand coeur. Les programmes que le juge Campbell a mis sur pied sur des question d'ordre racial, ethnique et culturel sont maintenant connus dans le monde entier et doivent recevoir l'appui massif de notre association.

Ma deuxième tâche a été d'assister au Programme de formation des nouveaux juges à Val Morin, Québec. Une fois encore, sous la direction compétente et éclairée de l'honorable juge Saint Cyr, le Programme de formation a été un succès complet. C'était la dernière année du juge Saint Cyr en tant que directeur et, au nom de l'ACJCP, je lui ai remis une peinture pour le remercier des efforts remarquables qu'il a faits au cours des huit dernières années. L'honorable juge Michel Babin de la ville de Québec est le nouveau directeur.

At the beginning of June, I attended my own Association's meeting and once again compliment an educational committee for an outstanding program featuring local talent. This appears to be the trend across the country, i.e. using our own Judges to lecture or report on issues. This should be continued wherever possible as it seems to generate much interest and attention in the respective Associations. It was a pleasure to attend a meeting in which there was a great deal of optimism among the Judges in that the Saskatchewan Legislature has already passed the second reading of a Bill regarding binding arbitration with respect to salaries and benefits. As of this printing, it is now law in Saskatchewan and hearings have been held.

The latter part of June was devoted to my visit to Slovakia and Czech Republic, and at the beginning of July, I was hospitably hosted by the New Brunswick Bench. Two new words, "genderistic" and "fornucopia" have been coined by the Honourable Judge Patricia Cummings and the Honourable Chief Judge Hazen Strange respectively. Please contact them for the authorized definitions. I am also pleased to report that for a 10 day period while the Premier and the Lieutenant-Governor of New Brunswick were absent from the province, the Honourable Judge Cummings was named Acting Lieutenant-Governor. I was also pleased to learn that the Minister of Justice of New Brunswick has given unification a high priority and we should see some results in the near future.

My term of office is quickly coming to an end, and I have yet to attend the CBA meeting in Quebec City in August, the Nova Scotia Annual Conference and our own Conference in Newfoundland in September. Since this is my last report for the Journal, I wish to thank everyone on the National Executive Committee and the Executive of each of the Provincial Associations for making my term a most enjoyable and pleasant experience.

À la fin du mois de mai, j'ai assisté à la réunion de l'Association des juges de l'Ontario à Ottawa et, avec notre directeur général, l'honorable juge Thomson, j'ai rencontré de nombreux dignitaires du gouvernement, y compris le ministre de la Justice. Le programme de formation était excellent. J'ai expliqué ce que l'ACJCP accomplit pour ses membres conformément aux fins constitutionnelles de l'Association et j'ai été récompensé par un appui et une compréhension renouvelés pour l'ACJCP. J'estime qu'aussi longtemps que les représentants provinciaux s'appliqueront à transmettre l'information de l'exécutif aux membres, nous obtiendrons de plus en plus d'appui de l'extérieur.

Au début du mois de juin, j'ai assisté à la réunion de ma propre association et je veux encore une fois complimenter un comité de formation pour la présentation d'un programme remarquable par des talents locaux. Ceci semble être le cas à travers le pays: l'utilisation de nos propres juges pour faire des présentations ou des rapports sur certaines questions. Il faudrait poursuivre dans cette direction à chaque fois que c'est possible car cette pratique suscite beaucoup d'intérêt et d'attention de la part des associations respectives. Ce fut pour moi un plaisir d'assister à une réunion où il y avait beaucoup d'optimisme parmi les juges en raison de l'adoption en seconde lecture par la Législature de la Saskatchewan d'un projet de loi sur l'arbitrage obligatoire en matière de salaires et d'avantages sociaux. Depuis la mise sous presse du présent rapport, ce projet est devenu une loi de la Saskatchewan et la tenue d'audiences a commencé.

La deuxième partie du mois de juin a été consacrée à ma visite en Slovaquie et en République Tchèque, et, à la fin du mois de juillet, j'ai été reçu très chaleureusement par les juges du Nouveau-Brunswick. Deux nouveaux mots "genderistic" et "fornucopia" ont été créés par l'honorable juge Patricia Cummings et l'honorable juge en chef Hazen Strange respectivement. Prière de les contacter pour obtenir les définitions autorisées. J'ai également le plaisir de vous

> réclusion sauf circonstances exceptionnelles propres aux circonstances du cas ou du condamné. Notre collègue minoritaire s'était alors, dans une opinion fort substantielle, opposé à pareil principe et le premier juge, ici, s'est en termes à peine voilés, déclaré d'accord avec cette opinion et l'a, de toute évidence, appliquée. C'est ainsi que sa sentence ne fait voir aucunes circonstances atténuantes exceptionnelles qui pourraient nous amener à déroger au principe posé par notre Cour et par ses homologues ailleurs au Canada."[37]

Cela dit, la Cour d'appel résolut à l'unanimité d'augmenter la peine à quarante-deux mois de réclusion, compte tenu de l'absence de circonstances atténuantes et de plusieurs circonstances aggravantes qui incitent à la sévérité.[38]

2.4 Le rejet de Sandercock: le Code doit être appliqué

Quelques mois plus tard, la Cour d'appel était saisie d'un autre pourvoi du ministère public à l'encontre d'une peine pour agression sexuelle: *R. c. Cyr*. Le premier juge lui avait consenti une libération conditionnelle, assortie d'une période de probation de 36 mois comportant l'obligation de poursuivre des traitements prescrits par le docteur G-F Pinard, psychiatre du Centre de Psychiatrie légale de Montréal. Il souffrait de 'trouble sévère de la personnalité avec éléments schizotypiques et schizoïdes ainsi qu'un problème de pédophilie homosexuelle.'[39] Au soutien de cette peine, le juge de première instance soulignait que les actes de grossière indécence, du nombre de trois, avaient été commis en 1982.[40] La Cour d'appel rejeta le pourvoi.

Le tribunal de révision refusait ainsi d'appliquer l'arrêt Sandercock. Il convient de signaler in extenso les notes formulées à ce sujet:

> On a prétendu dans certains arrêts (v.g., *R. c. Sandercock* ...) qu'en matière d'agression sexuelle les sentences devraient respecter un certain point de départ. Cette théorie du 'starting point' n'a pas été endossée par cette cour sans réserves. Lorsqu'on a suivi l'arrêt *Sandercock* comme on l'a fait par exemple majoritairement dans *R. c. Savard* ... et dans *R. c. Carbray* ... on l'a fait principalement parce qu'ils s'agissaient de crimes particulièrement répugnants.
>
> Lorsque la loi elle-même n'impose pas de sentence minimale la discrétion qui est laissée au tribunal ne doit pas être altérée par interprétation judiciaire. C'est un principe que rappelait la Cour d'appel de Colombie-Britannique dans l'arrêt Fallowfield... 'A discretion which is unfettered by law must not be fettered by judicial interpretation of it'".[41]

La Cour d'appel avait poursuivi en notant que "S'il fallait proscrire l'applicabilité de l'art. 736(1) dans un cas comme celui-ci, ce serait à mon avis rendre l'article stérile et vide de sens."[42]

3. L'importance de la thérapie en sentencing:

3.1 La protection de la communauté passe par l'aide aux agresseurs

En fin de compte, il nous semble que la preuve la plus convaincante du manque d'enthousiasme manifesté par la Cour d'appel du Québec se trouve parmi les nombreux jugements qui ont omis de citer l'affaire *Sandercock*, et à plus forte raison d'appliquer son enseignement. Par exemple, l'arrêt *R. c. Archambault*[43] a vu le condamné écoper de 22 mois pour deux infractions

37 Ibid., à la p. 3.
38 Ibid. Nous soulignons que l'intimé a purgé trois mois de détention préventive.
39 Ibid., à la p. 2.
40 Ibid.
41 Ibid., aux pp. 8-9.
42 Ibid., à la p. 10.
43 J.E. 91-311 (C.A.). Monsieur le juge Downs, C.S. Montréal, 500-01-004322-902, 1990-12-17. Voir aussi l'affaire R. c. Hamel (1992), 44 Q.A.C. (C.A.), où les juges Gendreau et Baudouin ont réduit de moitié une peine de 36 mois de prison pour une agression sexuelle armée, un vol qualifié et possession d'une arme dans un dessein dangereux; le juge Tyndale, dissident, n'aurait pas modifié la peine imposée par le juge de première instance.

Ce courant de pensée culmine avec une phrase qui d'ores et déjà est citée couramment par les plaideurs qui occupent pour des personnes accusées et qui s'évertuent à miner l'influence de l'affaire Sandercock: "Laissons les points de départ aux épreuves sportives."[30]

Il importe toutefois de noter que les juges McCarthy et Baudouin furent d'accords avec leur collègue Monet pour accueillir l'appel de la poursuite séance tenante pour faire droit à la requête de la couronne cherchant l'imposition d'une peine globale de quatre ans et demi. Rappelons que le contrevenant avait commis une agression sexuelle brutale et répugnante.[31] Par ailleurs, le ministère public fit grand cas du fait que le premier juge avait qualifié de circonstances atténuantes, dans une certaine mesure à tout le moins, le fait que l'inculpé avait inhalé de la colle et consommé de l'alcool.[32] La Cour d'appel refusa d'y voir un moyen d'atténuer la peine. Au surplus, le juge de première instance avait observé que "Facteur atténuant également, peut-être que la présence de la victime qui marchait seule ... dans un secteur peu fréquenté, la nuit à une heure tardive, après avoir été vue sortant d'un bar, où elle avait passé un certain temps, pourrait peut-être aussi être considéré comme une circonstance atténuante."[33] Sans ambages, la Cour d'appel jugea irrecevable cette opinion: "même le qualificatif 'peut-être' utilisé dans le jugement est, à mon avis, tout à fait inacceptable. De surcroît, il est inquiétant et déplorable qu'un lecteur non initié puisse avoir l'impression que les tribunaux considèrent une forme de partage de responsabilité lors de la perpétration de ces crimes dans des circonstances semblables...".[34] Enfin, la Cour d'appel s'inscrit en faux face à la conclusion du premier juge "qu'il n'y a aucune preuve que la victime d'autre part ait subi un traumatisme quelconque, qui a laissé chez elle des séquelles."[35] Pour le tribunal d'appel, "il n'est pas douteux qu'on peut raisonnablement présumer l'existence d'un traumatisme qui laisse des séquelles. Si l'intensité peut varier d'un sujet à l'autre, le trouble qui persiste est inévitable."[36]

2.3 R. c. Cabray: un rapprochement d'avec Sandercock?

Dans la cause de *R. c. Carbray*, décidée quelque 60 jours avant celle d'*Ayotte*, les juges Kaufman, Vallerand et Chevalier furent appelés à juger du bien-fondé d'une peine de deux ans moins un jour imposée pour punir des voies de faits et une agression sexuelle accomplie au moyen d'une arme. L'affaire mérite qu'on s'y arrête un instant car ce pourvoi mit en cause les principes que la Cour d'appel avait clairement exprimés dans le jugement Savard. Citons en entier l'extrait pertinent pour en bien saisir la portée:

> [Dans Savard], nous avions, à la majorité, rappelé que la jurisprudence, partout au Canada, pose qu'en principe, en pareille matière, la règle de la parité des peines fixe un seuil de trois ans de

30 Ibid., à la p. 5.

31 Ibid., à la p. 2.

32 Dans l'arrêt R. c. Sandercock, précité, à la p. 163, Monsieur le juge Kerans observa "Drunkeness generally should not be a mitigating factor. Nevertheless, the fact that an assault is totally spontaneous can offer mitigation, and sometimes drunkenness is a factor in determining whether the attack is spontaneous or whether the likely circumstances were fully appreciated."

33 Ibid., à la p. 3.

34 Ibid., à la p. 4. Voir les notes de Monsieur le juge Boilard dans l'affaire R. c. Provost, précité, où il est dit entre autres: "La tentation est forte, parfois, en certains milieux, de faire partager la responsabilité d'une agression sexuelle par la victime. On lui reproche souvent son comportement antérieur, son imprudence ou même sa naïveté. Rien n'est plus erroné. C'est comme si on la trouvait fautive de ne pas être demeurée chez elle portes et fenêtres verrouillées." Aux pp. 10-11.

35 Ibid.

36 Ibid. Citons au texte les commentaires du juge Baudouin dans une affaire analogue: R. c. Hamelin, (1991), 39 Q.A.C. 68. "Le dossier ne nous apprend rien sur le traumatisme que ces actes ont pu causer chez la victime. Je pense cependant qu'on doit prendre pour acquit que la victime, vu le jeune âge auquel elle a été soumise aux gestes de [Hamelin] et la durée de ceux-ci, a sûrement subi un traumatisme psychologique et que, même si les séquelles sont difficiles à prévoir, elle restera marquée par cette douloureuse épreuve." Aux pp. 70-71, le para. 7. [Nous avons souligné]

His Honour Judge Ernie S. Bobowski / L'Honourable juge Ernie S. Bobowski

faire savoir que, durant l'absence du Premier ministre et du Lieutenant-Gouverneur du Nouveau-Brunswick de la province, soit une période de 10 jours, l'honorable juge Cummings a été nommée Lieutenant-gouverneur par intérim. J'ai également été heureux d'apprendre que le ministre de la Justice du Nouveau-Brunswick a donné la plus grand priorité à la question de l'unification et que nous devrions très bientôt en voir les résultats.

Mon mandat arrive bientôt à son terme, et je dois encore assister à la réunion de l'ABC à Québec en août, à la conférence annuelle de la Nouvelle-Écosse et à notre propre conférence de Terre-Neuve en septembre. Puisque c'est mon dernier rapport pour le Journal, je souhaite remercier chaque membre du Comité exécutif national et de l'exécutif de chaque association provinciale d'avoir rendu mon mandat des plus agréables.

National Symposium on the Young Offenders Act / Colloque national : Loi sur les jeunes contrevenants

The Honourable Judge D.K. Kirkland
Chair - Family and Young Offenders Committee

The CAPCJ Youth and Family Court committee is preparing a national symposium on the Young Offenders Act and its interaction in the field of education. This symposium is seen as a sequel to a similar programme presented in 1988 in Montreal.

The organizing committee recognizes the connection between young people involved in the criminal justice system and those who struggle in the education system.

The symposium will be held on October 27 - 31, 1993 at Aylmer, Quebec in the Hull/Ottawa region. Invitations are extended to 150 delegates including police, educators, social service providers and provincial and federal judges. The Chief Judge of each province and territory has received information and a request for delegates from his province.

The theme of this symposium will be developed through small workshop groups led by a trained facilitator. To present the issues, a 35 minute video has been produced in French and English by the committee. The video consists of court settings as well as location scenes inside a school.

Wishing to maintain the judicial concept, the organizing committee has worked in conjunction with the Saskatchewan Provincial Court Judges Association to produce the video. The script was written and produced entirely by judges.

With the combined talents of many participants, a challenging and successful programme is anticipated.

Le comité du Tribunal de la jeunesse et de la famille (CAPCJ) prépare actuellement un symposium national sur la Loi sur les jeunes contrevenants et ses répercussions dans le domaine de l'éducation. Ce symposium est la suite d'un programme similaire présenté à Montréal an 1988.

Le comité organisateur reconnaît le lien qui existe entre les jeunes qui ont des démêlés avec la justice criminelle et ceux qui ont de la difficulté au sein du système d'éducation,

Ce symposium aura lieu du 27 au 31 octobre 1993 à Aylmer au Québec dans la région de Hull/Ottawa. Des invitations sont lancées à 150 délégués incluant des policiers, des éducateurs, des travailleurs sociaux ainsi que des juges provinciaux et fédéraux. Le juge en chef de chaque province et territoire a reçu l'information et une invitation à envoyer des délégués de sa province.

Le thème de ce symposium sera traité à l'intérieur de petits groupes en ateliers animés par un facilitateur formé dans ce domaine. Les sujets de discussion seront présentés dans un vidéo de 35 minutes produit en français et en anglais par le comité. Ce vidéo comprend des séquences qui se déroulent en cour et d'autres en milieu scolaire.

Afin de conserver le caractère judiciaire du vidéo, le comité organisateur a travaillé à cette production en collaboration avec l'Association des juges de la cour provinciale de la Saskatchewan. Le scénario a été écrit et produit entièrement par des juges.

Avec les talents combinés de tous les participants, nous nous attendons à un programme stimulant at réussi.

Pour bonne part, l'analyse des juges Kaufman et Vallerand ne se veut pas une réplique à la thèse préconisée par le juge Monet: à toutes fins pratiques, on l'ignore. Ainsi, Monsieur le juge Kaufman fit la remarque que "La preuve révèle que la victime étant fort traumatisée après ces événements...".[23] M. le juge Kaufman souleva alors que le premier juge a erré en mettant l'emphase sur l'aspect de réhabilitation: "... elle a mis l'aspect dissuasif d'une sentence de côté. La sentence imposée ne remplit pas ce but."[24] Il poursuit en citant de longs passages du jugement Sandercock, pour conclure que les traumatismes de la victime ont démontré la gravité de l'agression qu'a commis l'inculpé, et que suivant les motifs du juge Kerans, une peine de trois ans était requise.

Prenant le relais, Monsieur le juge Vallerand se range derrière son collègue le juge Kaufman non sans égards pour l'avis contraire. La grille analytique que nous livre ce savant juge a pour base le constat de fait que l'agression sexuelle fut établie hors de tout doute, nonobstant les carences du témoignage de la victime à d'autres points de vue, et que les gestes qu'elle dut subir furent répugnants. A l'instar du juge Kaufman, le juge Vallerand opine que l'arrêt Sandercock a jeté les paramètres de la sentence que la Cour d'appel du Québec se doit d'imposer, soit 3 ans de prison. Dans l'esprit du magistrat, "Il va de soi qu'en matière de 'sentencing', chaque affaire est un cas d'espèce auquel il ne convient pas d'appliquer rigoureusement un tarif. Il va en revanche tout autant de soi que les tribunaux ont établi des paramètres à l'intérieur desquels on doit statuer sauf exception."[25]

Par cette analyse, le juge Vallerand insiste sur le besoin impérieux de dissuader des hommes ordinaires sans antécédents, chefs d'entreprises et père de familles, qui agressent des femmes, tout comme l'inculpé.[26] Qui plus est, il désire souligner derechef que "[les femmes] ont le droit de se ballader sur la rue voire de demander et d'accepter des lifts tout comme les hommes le font, sans courir le risque d'être agressées et la prolifération de pareilles agressions nous impose la sévérité avant qu'il ne soit trop tard...."[27]

2.2 Le refus d'une application mécaniste du sentencing

Dans un arrêt postérieur, Monsieur le juge Monet développa davantage sa théorie sur le sujet, dans le cadre d'un jugement majoritaire.[28] Tout comme dans l'affaire Savard, l'affaire Ayotte portait sur le bien fondé d'une peine dans le cadre d'un acte d'accusation comportant des chefs de séquestration et d'agression sexuelle. Dans le présent cas, il s'agit d'une agression sexuelle ayant causé des lésions corporelles. L'inculpé fut condamné à une peine globale de deux ans. Citons en entier l'extrait pertinent du juge d'appel Monet pour en bien saisir la portée:

> Le substitut du Procureur général ... a avancé qu'une peine de quatre ans et demi de pénitencier serait juste dans les circonstances. A titre d'autorité, elle nous a référés à un arrêt de la Cour d'appel d'Alberta dans l'affaire *R. c. Sandercock* ... S'il fallait faire une application mécaniste de la théorie de cette cour d'appel, la peine de quatre ans et demi serait nettement insuffisante dans le cas présentement à l'étude. *De toute façon, il faut se métier de la systématisation des données informatisées, sous prétexte de déterminer des paramètres, pour employer un terme qui a cours depuis quelques années. L'ordinateur, même celui de demain, ne remplacera pas le juge dans la déterminaton de la peine qui, à mon avis, doit être modulée et individualisée. En régle générale, le criminel et le crime sont indissociables en la matière.*[29]

23 Ibid., à la p. 7 du jugement de Monsieur le juge Kaufman.
24 Ibid., à la p. 8.
25 Ibid., à la p. 1 des notes du juge Vallerand.
26 Ibid., à la p. 3.
27 Ibid.
28 R. c. Ayotte, précité.
29 Ibid., aux pages 4-5. Le soulignement est de nous, mais il convient de signaler que le mot 'systématisation' fut souligné par le rédacteur des notes.

Rappelons-nous que l'affaire Savard portait sur des accusations de séquestration, de menaces et d'agression sexuelle pour lesquelles l'inculpé avait été condamné à un an de prison. Savard aurait accosté et emmenée de force la victime dans sa camionnette où il l'aurait ligotée avant de l'obliger à une fellation complète sous la menace. Toutefois, "le substitut du procureur général [reconnut] qu'une partie importante de la version de [la victime] est pure fabulation: il s'agit d'un récit romanesque voulant que l'accusé, quelque 12 ans plus jeune qu'elle, l'ait guettée depuis quelque temps ... pour mieux épier ses mouvements en vue de l'enlever éventuellement."[15] Plus embêtant encore, le jugement minoritaire signale que le premier juge a commenté le témoignage de la victime ainsi: "Ça relève plus du cinéma que de la réalité.... Je pense que ce scénario provient peut-être du fait que devant ses pairs, devant ses enfants, madame était gênée d'admettre qu'elle auraitaccepté d'embarquer avec un inconnu."[16]
Ce constat donnait ouverture à l'acquittement du prévenu sous les chefs d'enlévement et d'extorsion.

Par conséquent, Monsieur le juge Monet a formulé deux propositions de principe. Primo, "[L]a sévérité de même que la clémence de la peine - et cela pour les mêmes raisons - se plaident en première instance. Le caractère approprié, la justesse, seulement, se plaident en appel. Notre Cour n'entérine pas forcément les peines imposées en première instance lorsqu'elle rejette un pourvoi en la matière."[17] Et, secundo, en réplique à la plaidoirie du substitut fondée sur l'affaire Sandercock:

> Présentement, dans notre système de détermination de la peine, le législateur fixe parfois des minima; ne pas les respecter est illégal. En revanche, il n'appartient pas aux juges de légiférer en la matière et de déterminer, statistiquement ou autrement, des minima. Au contraire, j'estime que l'on doit tendre à l'individualisation de la peine qui doit être modulée selon les circonstances. Le juge doit chercher à protéger la personne en même temps qu'assurer la défense sociale.[18]

La philosophie du sentencing de ce savant magistrat se résume ainsi: "Tout est cas particulier."[19]

Laissant de côté l'aspect théorique de l'imposition des peines, le juge Monet a rédigé des notes fouillées où il cherche en vain à convaincre ses collègues Kaufman et Vallerand que l'inculpé mérite une mesure de clémence, notamment en raison des circonstances donnant lieu aux infractions. Il qualifie les risques de rechute comme étant 'inexistants'[20] et soulève que Savard n'est pas criminalisé. Par contre, "le condamner, dans l'état actuel de son évolution, au pénitencier risque d'avoir l'effet contraire de celui qu'on semble rechercher."[21] Au demeurant, le jugement dissident rend compte de l'importance du châtiment exemplaire mais souligne qu'il ne suffit pas qu'un juge le déclare exemplaire pour qu'il le devienne. "L'avertissement qu'il recèle doit être entendu par le plus grand nombre possible.... Le châtiment exemplaire prononcé par une Cour d'appel ne doit pas être banalisé. La prudence comme la jurisprudence demandent de ne prononcer de cette façon que dans un cas approprié. Selon moi, l'affaire à l'étude n'entre pas dans ce cadre"[22]

15 Ibid., à la p. 2. Dans l'affaire R. c. M. (T.). J.E. 92-553, la Cour d'appel rejeta le pourvoi de la Couronne à l'encontre d'une peine de six mois en dépit du fait que l'accusé ait abusé de deux de ses filles pour une période de temps importante, en raison du fait que "la preuve a été fortement contradictoire en ce qui concerne le nombre et la fréquence des infractions...". A la p. 4.

16 Ibid., à la p. 3.

17 Ibid., aux pp. 3-4. Voir le jugement de première instance dans l'affaire R. c. Aumond J.E. 87-451 (C.S.P.), M. le juge Labelle.

18 Ibid., aux pp. 4-5.

19 Ibid., à la p. 5.

20 Ibid., à la p. 10.

21 Ibid.

22 Ibid., à la p. 11.

A BRIEF PRESENTED TO THE SUMMIT ON JUSTICE

Better Access to Justice by Unification of the Courts, A Necessary Solution

Quebec, February 1992

Editor's Note: *This is a translation from French of large portions of the brief presented by the Quebec Judges Conference to the summit on justice convoked by Quebec's Minister of Justice in February, 1992. The translation was prepared by the Quebec Judges conference and was distributed at the C.A.P.C.J Executive Meeting held in Montreal in May, 1993.*

CONTENTS

QUEBEC JUDGES' CONFERENCE

1. PREAMBLE

At the time of his appointment as minister of Justice, Mr. Gil Rémillard expressed his intention to "facilitate access to justice for average citizens".

In the same vein, at the opening of the courts last September, he stated that "the Summit on Justice would take place in order to make, in common, concrete decisions for the well-being of people before the courts in Québec".

In this desire to facilitate greater access to justice, he made it clear that the system and the courts are not the exclusive domain of judges and lawyers.

The courts exist for the citizens and belong to them. As a result, they must be understood by the citizens, and must be well run.

It has long been known that simplicity is often the basis for efficiency.

This principle has been recognized in Québec by the creation of the Court of Québec. The Youth Court, the Court of the Sessions of the Peace and the Provincial Court were unified to give judges full jurisdiction in all areas that formerly belonged to three (3) different court levels. At the same time a single and thus more efficient administration was established.

The chief justice of the Court of Québec, the honourable Albert Gobeil, stated publicly on October 13, 1988 that the purpose of creating the Court of Québec was "to offer citizens a better-quality, more accessible and more efficient legal system". He continued, "the unification of the courts will make possible unity of legal thought and unity of organization".

Other provinces have also opted for simplicity by unifying certain of their courts of first instance, such as Superior or Supreme Courts or High Court and County or District Courts.

In Ontario, in 1990, where there were three (3) levels of courts of first instance, the first step was the unification of Superior and District Courts. After this step had been taken, preparations were under way to bring together federally and provincially

appointed judges in a single court, when a change in government occurred and delayed the plan.

In British Columbia in the same year, County Courts and the Supreme Court of the province were unified.

Before 1990, other provinces had also unified their County Courts and their Superior Courts. This movement to unify two (2) courts of first instance into one began in 1975 with Prince Edward Island, and continued thereafter. In 1979 Alberta and New Brunswick followed. In 1981, 1984 and 1986, the provinces of Saskatchewan, Manitoba and Newfoundland took the same route. Only in Nova Scotia are there now judges of County Court and of Superior Court, that is, two different courts of first instance. In March 1991, however, a document entitled "Report of the Nova Scotia Court Structure Task Force" confirmed, on page 139, the principle of a "Unified Criminal Court" which would begin operation after the establishment of at least one pilot project.

It is interesting to note the considerations on which the authors of this Nova Scotia report based their conclusions. We will quote just a few of these, from pages 12 and 13 of the report:

We have based our study of court reform on the followed values and considerations. Courts of justice should:

...

(c) be as simple and flexible as possible;

...

(f) be accessible to all members of society;

...

(i) provide a high degree of efficiency;

...

(k) avoid giving the impression that there are different classes of justice because of different levels of courts.

[Retranslation of what is called a "free translation" from English]

All over the country the results obtained by simplification seem to be satisfactory. There is now a movement towards more complete simplification, to dispel the mysteries of the courts and to allow easy access to citizens dealing with them.

Thus, in various provinces, unified Family Court pilot projects have been created.

In the Hamilton-Wentworth region, a pilot project has been in place since 1977. Provincial judges exercise complete jurisdiction in family matters.

On November 15 of last year, the Attorney General of Ontario, Mr. Howard Hampton, expressed satisfaction with the results of the experiment and stated his intention to create such courts throughout the province. He had previously explained to a journalist from *Lawyers Weekly* that he had come to this conclusion because "the current split jurisdiction between federal and provincial courts is inconvenient, expensive and confusing to the public".

The Québec Judges' Conference, like the Minister of Justice, Mr. Gil Rémillard, is concerned that the citizens of Québec should have full access to their courts. It believes that the structure of our courts should be considered during the deliberations of the Summit on Justice.

Considering that in holding the Summit on Justice the Québec Minister of Justice sincerely desires a thorough examination of the needs of Québécois concerning the legal system, the Conference in its general meeting unanimously adopted the following resolution, which is in accordance with the move to simplicity and unification mentioned above:

"That the subject of unification of Québec courts be included in the submissions made to the Summit on Justice in the name of the Québec Judges' Conference."

In keeping with the above, the Conference presents the following proposal:

"That the Minister of Justice examine the means of establishing in Québec a single Civil and Criminal Court of first instance, including a division of family law."

Le tribunal poursuit en soulignant que les directives du tribunal d'appel ne doivent pas être trop peu souples. "A fixed guideline, or tariff (or, indeed, even an 'approved range'), fails to take into account the immense variety of circumstances which can be found in different cases involving a conviction for the same offence."[5]

Le juge Kerans conclut cette partie de son analyse en résumant ses notes:

> *The sentencing process now adopted by this court is to state typical categories with precision, and to acknowledge at the same time that each actual case presents differences from the archetypical case. These differences might mitigate or aggravate.* Nevertheless, the idea of a typical case affords a starting-point for sentencing because one can state a precise sentence for that precise category. An actual sentence in a real case will vary upwards or downwards from that, depending upon the balance of the factors present in the actual case.[6]

Le tribunal d'appel albertain procéda alors sur l'infraction visée à l'article 246.1 du Code criminel, savoir l'agression sexuelle. D'entrée de jeu, on nota que "The crime of sexual assault covers the huge spectrum of cases from a stolen kiss[7] to the worst forms of human degradation...".[8] Monsieur le juge Kerans énuméra les éléments constitutifs d'un 'major sexual assault':

> ...where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs. The injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two. This category, which we would describe as major sexual assault, includes not only what we suspect will continue to be called rape, but obviously also many cases of attempted rape, fellatio, cunnilingus, and buggery, where the foreseeable major harm which we later describe more fully is present.[9]

En somme, poursuit le juge Kerans, "The key ... to a major sexual assault is the evident blameworthiness of the offender ... [a] 'contemptuous disregard for the feelings and personal integrity of the victim'".[10]

2. L'enseignement de la Cour d'appel du Québec:

2.1 'Tout est cas particulier'

Comme on aura pu le constater à la lecture des pages qui précèdent, l'école de pensée albertaine défendrait la thèse suivant laquelle le législateur exige des peines exemplaires en pareilles matières nonobstant l'omission de prévoir expressément un tel résultat. Qu'en est-il des tribunaux québecois? Quel enseignement nous fournit la Cour d'appel du Québec? La réponse à ces questions s'amorce par l'examen en enfilade de quatre jugements du palier judiciaire le plus élevé du Québec, soit: R. c. Savard,[11] R. c. Ayotte,[12] R. c. Carbray,[13] et R. c. Cyr.[14]

Toute réflexion utile sur la notion du seuil des sentences doit prendre en considération le raisonnement articulé par Monsieur le juge Kaufman pour la majorité de la Cour d'appel du Québec dans l'affaire Savard. Cependant, pour bien saisir la portée de cet arrêt partagé, mieux vaut examiner les motifs de l'opinion dissidente de l'honorable juge Monet en premier lieu.

5 Ibid., aux pp. 157-158.

6 Ibid., à la p. 158. [Le soulignesment est de nous.]

7 Voir l'affaire R. c. Cook (1985), 20 C.C.C. (3d) 18, et de façon précise, les observations de Monsieur le juge Lambert à la p. 38.

8 R. c. Sandercock, précité, à la p. 159. Monsieur le juge Kerans observa à la même page que "It is not, however, the purpose of these reasons to deal with minor sexual assaults."

9 Ibid., à la p. 159.

10 Ibid., à la p. 160.

11 J.E. 89-795 (C.A.).

12 J.E. 90-695 (C.A.).

13 J.E. 90-268 (C.A.).

14 J.E. 91-1 204 (C.A.).

La sentence de base au Québec et les infractions sexuelles : un survol

Gilles Renaud, Conseil Section des crimes contre l'humanité et des crimes de guerre
Ministère de la Justice, Ottawa
et
Monsieur Robert Doyle, Barreau de L'Ontario

Les opinions déclarées ci-dessous sont celles des auteurs. Elles ne sont pas celles du Ministère de la Justice

Introduction:

Récemment, M. le juge Boilard nous enseignait que la Cour d'appel du Québec désavouait le concept du seuil de la sentence.[1] Aussi nous semble-t-il utile de référer à quelques affaires mues devant la Cour d'appel du Québec afin de tenter de juger du bien-fondé de cette affirmation, du moins en ce qui a trait aux infractions sexuelles. Notre plan est d'étudier brièvement l'arrêt de principe R. c. Sandercock,[2] pour discuter ensuite de certains arrêts québécois qui ont interprété cette affaire. Nous espérons, ce faisant, illustrer l'importance d'une question de principe qui sous-tend le refus de la Cour d'appel du Québec d'entériner le 'starting point sentence', soit le besoin impérieux de permettre aux contrevenants qui répondent favorablement à une thérapie d'éviter la détention au sein d'un pénitencier.

1. L'affaire Sandercock et le 'starting point sentence':

Dans l'affaire R. c. Sandercock monsieur le juge Kerans a rédigé des motifs fouillés qu'il convient de reproduire iin extenso:

> ... [the starting-point approach] does not arbitrarily confine the discretion of the sentencing court. Rather, it offers a rational structure for its exercise, and a structure which is just because it guards against both disparity and inflexibility.... At the risk of stressing the obvious, we will consider these twin difficulties (disparity and inflexibility) in detail. On the one hand, appellate guidance offered cannot be so vague as to permit unjustified disparity of sentences.[3] The discretion of sentencing judges is wide, but is not unfettered. Each sentence must, in the words of the Criminal Code, be 'fit', and a significantly disparate sentence is not a fit sentence unless there is a reason for the disparity. Justice requires that two offenders in identical life circumstances who commit identical crimes should receive identical sentences. Such a twinning is rare, but the sentence process must be such that the reason for any apparent disparity is clear.[4]

1 Voir R. c. Provost, J.E. 92-1 5 70, à la p. 10. Ce concept est mieux connu sous le vocable anglais "the starting point sentence".

2 (1985), 48 C.R. (3d) 154, 22 C.C.C. (3d) 79 (C.A. Alta.). [Tous les renvois seront aux Criminal Reports]

3 A cet effet, citons Monsieur le juge Tarasofsky: "A reading of the Criminal Code never fails to underscore how few are the sections that deal with the sentence.... As striking as is the paucity of legislative text relating to the sentence so too, one can find nowhere in the Code either the goal of the sentence as determined by the legislator, nor any of the considerations to be taken into account by the sentencing Judge prior to fixing a sentence." Voir "The Sentence at Present", Droit pénal - Orientations nouvelles (Cowansville, Les Editions Yvon Blais Inc., 1987, aux pp. 235-55, à la p. 235.

4 R. c. Sandercock, précité, à la p. 157.

2 - THE PRESENT SITUATION

a) In criminal matters

It is an undeniable fact that Québec has led the way in Canada in creating the Court of Québec. The Québec model, particularly in criminal law, is cited favourably by the Law Reform Commission of Canada:

[Section not translated, p. 9.]

Even though the creation of the Court of Québec provides definite advantages for the citizens of Québec, there remain certain lacunae, as the Law Reform Commission of Canada says.

Despite the far-reaching authority that the Court of Québec has in criminal matters, the process is still cumbersome for the citizen, who tends to become confused. For a case of burglary for example, he may face three categories of judges: a Provincial Court judge, a judge without jury and a judge with jury. The two (2) first are judges of the Court of Québec. If the case is tried before a court composed of a judge and jury, a judge of the Superior Court will preside.

With simplification of the system, a defendant could be judged by a judge of a single court, whether with or without jury. Nothing should prevent this. Defendants would certainly be better off with unification of criminal courts.

When we speak of access to the legal system, we often think of those who are denied access because of the high cost of such access or because of failure to understand the system. We should consider also that access can become difficult or almost impossible for certain defendants because of geographic distances.

The members of the Court of Québec go even in the most remote regions of the province. In fact, they judge more than 90% of criminal cases. On the other hand, Superior Court judges traditionally go only to larger centres and do not go to very remote areas.

[Section not translated, p. 11 - 14]

In 1979 the Canadian Association of Provincial Court Judges stated in a report to the Canadian Minister of Justice :

> **"Fundamental changes must be made in criminal jurisdictions in Canada to allow them to serve Canadians in a more efficient and cost-effective way. The present hierarchy of criminal courts is essentially based on tradition. It is an awkward, archaic and unnecessarily expensive structure, characterized by inherently slow action and waste of human resources, both on the judicial and on the administrative level."**
>
> *[Re-translation]*

The Association concluded that the creation of a unified Criminal Court was the only way to reduce delays, costs and complications.

The judges of the Provincial Court of Ontario expressed an identical point of view in 1987.

In *The Judiciary in Canada: The Third Branch of Government*, Professor Russel wrote:

> **"The basic goal of the proposition concerning the establishment of a unified court is to avoid a hierarchical system of courts. When the primary task of the courts is to determine the guilt or innocence of defendants and to apply the appropriate penalty when necessary, there should be no higher or lower form of justice."**

The McEVOY case shows the desire of New Brunswick to simplify the penal legal system by creating a single court. The text of the law proposed by the Attorney General reads as follows:

> **"...that the legislature establish a unified penal system which would have full authority in criminal matters, particularly regarding all offenses under the Criminal Code, as well as all other federal and provincial offenses."**
>
> *[Re-translation]*

It should be noted that the federal government did not oppose the creation of a unified court in New Brunswick. Article 96 of the Constitution is the only obstacle to carrying out this project.

The province of New Brunswick is now working on the creation of a unified court of criminal law. Thus there will be in New Brunswick only one court of first instance, since the Court of Queen's Bench of the province already deals with all civil and family matters. It appears that the judges appointed by the province, who with the judges of the Court of Queen's Bench will make up the unified criminal court, would also be appointed by the federal government according to Article 96.

Manitobans observe that their double system of judges of first instance, which as in Québec is composed of provincially and federally appointed judges, has many disadvantages and deprives defendants of legal services that they should be able to obtain.

In November 1991 the Associate Chief Justice of the Court of Queen's Bench, Mr. A.C. Hamilton, and the Associate Chief Justice of the Provincial Court, Mr. C.M. Sinclair, made a joint report entitled *Report of the Aboriginal Justice Inquiry of Manitoba*. They concluded that it was necessary to amalgamate the Court of Queen's Bench and the Provincial Court, to provide greater access to citizens.

> **"The Commission has come to the conclusion that the only way to offer satisfactory service in civil, criminal and family law to the citizens of the province, including Natives, is to give each judge the authority necessary to deal with all cases pending before the court. The best way to do so would be to unify the Court of Queen's Bench and the Provincial Court to create a new court called the Manitoba Court of First Instance. This court would have the jurisdiction of the two courts. This unification would allow trials by jury in the localities where the offense is presumed tohave been committed."**

[See translator's note 2]

b) In civil matters:

The difficulties encountered by citizens in criminal matters are found equally in civil matters.

It is not easy for citizens to understand the logic of two (2) courts of first instance in civil matters. The two (2) courts of first instance are at the same level but are separated by the amount of money at issue.

The Court of Québec deals with cases below fifteen thousand dollars ($15,000), and the Superior Court with larger amounts. The constitutional and thus historical context is at the basis of this separation of jurisdiction. Basically, the sum of fifteen thousand dollars ($15,000) represents in present-day dollars the ceiling that was set for the lower court in 1867.

It is not always easy to explain this situation to the average citizen, who at first sight may think that there is a different legal system for the rich and for the poor.

On the other hand Provincial Court judges exercise jurisdiction in specific areas with no monetary limit.

The Court of Québec deals with appeals in fiscal matters, decisions of the Real Estate Assessment Review Office and the Expropriation Tribunal, and it is not unusual for the amount contested in these areas to be several million dollars. Thus the competence of the judge is not in question. As explained above, it [the $15,000 limit] is based on the situation in 1867, that is about a hundred and twenty-five years ago, when not all judges had legal training.

This situation applied today just causes inconvenience for the person before the courts. A few examples will suffice.

By virtue of Article 32 of the Code of Civil Procedure, the Court of Québec ceases to have jurisdiction in any matter which can affect the parties' future rights when the value of these rights exceeds the upper limit set for the Court of Québec. But the notion of future rights is not always clear.

[Section not translated, p. 21 - 22]

Here is another example of the difficulties suffered by an individual because of the two courts of first instance. In virtue of Article 273 of the Code of Civil Procedure, when the Superior Court and the Court of Québec are dealing with actions which have

> *the Provincial Court Judges. The best way to bring this about is to create a new court by the amalgamation of the Provincial Court and the Court of Queen's Bench.*

(Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1, The Justice System and Aboriginal People. Chapter 8, Court Reform, p. 342)

3. The original sentence is not very clear, and my consultant, a bilingual lawyer, was not sure what it meant either.

L'unification permettrait aussi une meilleure cohérence, au niveau du contentieux administratif, des règles de pratique, de procédure, voire de preuve.

News Briefs / En Bref

ALBERTA

Appointments

The Honourable Leo J. Wenden
Edmonton Criminal Division
Effective July 5, 1993

Retirements

His Honour Judge Bernard N. Laven
Calgary Criminal Division
Effective March 13, 1993

His Honour Judge Dean Saks
Edmonton Criminal Division
Effective April 2, 1993

His Honour Judge Edward Stack
Edmonton Criminal Division
Effective May 12, 1993

SASKATCHEWAN

Appointments

The Honourable Jeremy A. Nightingale
Meadow Lake
Effective July 5, 1993

MANITOBA

Appointments

The Honourable Kristjan Stefanson
formerly Chief Judge of the
Manitoba Provincial Court
to the Manitoba Court of Queen's Bench
(Family Division)
Effective May 31, 1993

QUEBEC

Nomination

L'Honorable juge Yves Morier
chambre criminelle pénale à
St-Hyacinthe

Retraites

L'Honorable juge Bernard Pinard
chambre civile de Quebec
le 24 mars 1993

L'Honorable juge Roger Lagarde
chambre criminelle pénale de Montréal
le 12 avril 1993

Deces

L'Honorable juge Paul Emile Fortin
juge à la retraite
le 8 mars 1993

L'Honorable juge Michel J.P. Cuddihy
chambre civile de Montréal
(frère du juge Stephen Cuddihy)
le 6 mai 1993

NOVA SCOTIA

Appointments

The Honourable Robert F. Ferguson
Associate Chief Judge of the Family Court
Effective July 1993

The Honourable Joseph P. Kennedy
Associate Chief Judge of the Provincial Court
Effective July 1993

Deaths

His Honour Judge J. Elliott Hudson
Retired Judge of the Family Court
Died August 11, 1993

"The situation is different today. Judges of the Court of Québec, like those of the Superior Court, are accomplished jurists.

It is difficult in 1991 to imagine situations that could not be corrected by an appeal.

In any case, if there were only one court of first instance in Québec, the problem of prerogative writs would not arise for that court. The Court of Appeal of our province will always be ready to correct or confirm decisions of the court of first instance.

Another point is that the Superior Court has jurisdiction in appeals for offenses mentioned in part XXVII of the Criminal Code and in matters of bail. Logically, this jurisdiction should belong to a court that has no jurisdiction in the first instance.

There could conceivably be within the Court of Appeal a division which would operate according to flexible rules and which would be assigned to review these cases. It would even be possible for members of this division to go to the different regions so as to be more accessible to citizens.

Let us be clear: the Québec Judges' Conference is not against the hierarchy of courts. A court of appeal is as necessary in a well-organized society as a court of first instance. The Conference wants a study to be made of how, given the constitutional context, we can operate with only one court of first instance so that citizens can have rapid and less costly access to the courts.

6 - CONCLUSION

The Québec Judges' Conference suggests that studies on the modalities of unification of the courts be assigned to a committee composed of the Bench, the Bar, representatives of the Ministry of Justice and representatives of the public.

Such a committee might well solicit the views of responsible organizations such as the recently formed Institute for Law Reform. It is also certain that distinguished people from universities would study such an interesting question.

This subject has been discussed for many years, as can be seen by the quotations given above. It would appear that a complete study might at last come to a final conclusion. Citizens stand to gain if we succeed in unifying courts and it seems imperative to examine all ways that can provide them with complete access to the legal system.

It would be interesting to see whether the government of Québec would make substantial savings by unifying the courts of first instance. Cost studies could be undertaken to determine this point.

The Québec Judges' Conference is aware that the Canadian Law Reform Commission is now studying the question of prerogative writs in the context of a unified court. A working paper on the subject will be published soon.

The Conference offers its full collaboration in any steps that the Minister of Justice may take to examine the ways and means of establishing in Québec a single Civil and Criminal Court of first instance, including a Division of Family Law.

Translator's notes

1. The English names of Québec courts are those found in G.L. Gall, *The Canadian Legal System*, and in the *Canadian Law List*

2. The passage we have given in the text is a translation of the quotation in French, which is said to be a "free translation" from English. It is partly a summary of what is said is different parts of the original text. The main part of the original is as follows:

> *We have come to the conclusion that the only way in which a full range of civil, criminal and family services can be delivered to all residents of the province in an efficient manner is to have every judge able to deal with any kind of case.*
>
> *One way to enable judges to deliver a full range of judicial service throughout the province would be to extend to the existing Provincial Court judges all the jurisdiction the judges of the Queen's Bench now have, and to extend to the existing Queen's Bench judges that now held exclusively by*

the same basis in law or raise the same points of law and of fact, the Court of Québec must suspend proceedings in the action brought before it. There can be no more concrete example of difficulties suffered by a citizen. In such a case, access to the Court of Québec is denied to this person until the Superior Court has reached a decision.

[Section not translated, p. 22 - 23]

Judges should have a wider, thus more complete jurisdiction in order to fully satisfy the needs of citizens.

c) <u>In family matters</u>

The establishment of a Family Court in Québec has been called for by legal, paralegal and social third-party interveners for more than twenty-five years. The government itself has been very interested in the subject. We cite the following examples:

1. THE PREVOST REPORT, 1970

Towards the end of the 1960s, the government of Québec set up the Commission of Inquiry on the Administration of Criminal and Penal Justice. Number I of Volume 4 of the report of this commission, *La Société face au crime* (Society and crime) said, on page 191:

> **"It is recognized that questions related to filiation, guardianship and especially judicial separation are under the authority of the Superior Court. On the other hand, laws on adoption, on juvenile delinquency and particularly on the protection of children are applied by the Social Welfare Court.**
>
> **This overlapping of jurisdiction leads to ambiguous situations. Take for example the common example of a person who is separated from his/her spouse by a decision of the Superior Court, and who applies to the Social Welfare Court for custody of his/her children. Suppose that the Superior Court has granted custody of the children to the other spouse and that this person informs us that the children are in physical or moral danger. When the Social Welfare Court takes these children under its protection and moves them to a different home, it creates a tangle which could be straightened out only by the joining of these authorities in one: Family Court. We recommend that such a court be established."**

2 - THE CIVIL CODE COMMITTEE ON FAMILY COURT - 1975

The Committee on Family Court, which was set up by the Committee for Revision of the Civil Code of Québec and chaired by Madame Claire l'Heureux-Dubé, at that time a Superior Court judge, submitted to the chair, Mr. Paul-André Crépeau, its report on Family Court. After an extensive study of the division of authority on family matters among the five courts of that time: Superior Court, Court of the Sessions of the Peace, Provincial Court, Social Welfare Court and Municipal Court, the following remarks were made on page 25:

> **"This division of jurisdiction on family matters leads to numerous difficulties for citizens, particularly: uncertainly, waste of time and of**
>
> **money, multiple procedures and the possibility of contradictory judgements. All these cause trouble and frustration. For the judge hearing a case, it is difficult if not impossible to consider the family problem as a whole and to find an overall solution."**

The Committee based its work in large part on the effects of a decision made by the Supreme Court in the case THE ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC AND THE SOCIAL WELFARE COURT FOR THE DISTRICT OF MONTREAL VS KREDL AND KELLER. In this case, the Supreme Court recognized the possibility that the Social Welfare Court, acting under the Youth Protection Law, could contradict a decision of the Superior Court on the grounds that the lower court exercised an authority which was legally assigned to it in the area of child protection, and in doing so applied criteria and principles corresponding to different litigation

situations from those which apply on questions of strict legal custody.

This recognition of parallel jurisdictions, which still exist today, amply demonstrates difficulties which may result from the overlap of jurisdictions in family matters. The Committee therefore suggested that an overall approach by legal institutions be made possible by the establishment of a single court devoted to family matters.

3 - THE TASK FORCE SET UP BY THE MINISTRY OF JUSTICE ON THE ESTABLISHMENT AND ORGANIZATION OF A FAMILY COURT IN QUEBEC - 1981

In 1981, a task force was set up by the Ministry of Justice under the responsibility of Mr. Benoit Morin for the purpose of studying the various aspects of a possible Family Court. The report was submitted to Mr. Daniel Jacoby, Deputy Minister of Justice, on October 19 of that year. Once again the task force analyzed the division of jurisdictions and its disadvantages, and, in accordance with its terms of reference, dealt especially with the practical implications of the establishment of a Family Court. The study even included estimates of costs, depending on the solutions proposed; these solutions depended on possible constitutional accords related to Article 96 of the Canadian Constitution. Such a report ordered by the Minister of Justice himself was ample proof of his interest in a Family Court and of a possible wish to set one up.

4 - THE REPORT ENTITLED: YOUTH PROTECTION, MORE THAN A LAW - 1992

Recently, a task force chaired by the honourable Michel Jasmin, Associate Chief Justice for the Youth Division, was appointed by the Minister of Justice and the Minister of Health and Social Services to assess the application of the Youth Protection Law after twelve years of operation.

The last recommendation of its report in the chapter on better adapting legal intervention to child protection, refers specifically to the establishment of a Family Court. It reads as follows:

> **"THAT THE MINISTER OF JUSTICE SET UP A UNIFIED FAMILY COURT IN QUEBEC."**

The remarks preceding this recommendation resume so to speak the main points of the concerns already discussed in the many earlier reports and documents on this subject:

> **"However, certain difficulties arise in relation to the overlapping of jurisdiction between the two courts, emergency situations, the confidentiality of information, and the intervention of the director of child protection. In our view, a major difficulty comes from the fact that more than one court handles family problems such as separation, custody of children, children in need of protection, offenses against the Criminal Code in family matters, etc. These situations are handled incompletely, which leads to complicated procedures involving several courts with different authorities in family matters.**
>
> **The creation of a unified court, exercising authority in all family matters, would make it possible to solve problems of overlapping. This idea is not new. Much has been written in the past, here and elsewhere, about the establishment of a Family Court."**

5 - TODAYTHE SAME REASONS ARE STILL VALID

All the reasons widely and extensively identified in these numerous studies are still entirely valid today. There are still contradictory legal decisions, dispersion of legal and psychosocial resources, difficulties for citizens in finding their way around, wasted time for them as well as for government, and lack of rationalization of human and material resources. The need to develop an

the authority of a single chief justice who would adopt uniform methods of management and administration.

The fact that the two (2) courts have independent structures and thus have no unified management makes it difficult to coordinate and plan human, equipment and financial resources.

At the level of administrative litigation, unification would make possible more coherence in rules of practice and procedure and even of evidence. [See translator's note 3]

In an editorial in *La Presse* on September 13, 1983, the journalist Jean-Guy Dubuc said of the possible establishment of the Court of Québec:

> **"This the first step towards a more complete reorganization of a system which has not been touched since 1867 and which has not been adapted to great social and political changes."**

The Québec Judges' Conference believes that the courts should be unified to be in harmony with citizens who live "today", in 1992. Citizens should have a "present-day" justice system, even if it means setting aside centuries-old traditions. The needs of citizens in matters of justice belong to this century and they will be completely met with a justice system that changes with society, thus with the citizen.

5 - SOLUBLE PROBLEMS

It is clear that the process of unifying of the Court of Québec and the Superior Court to create a single court may cause difficulties. However, these difficulties are not insurmountable. For each problem there is a solution.

It is not the intention of the Conference at this point to offer answers to constitutional, jurisdictional and procedural objections that may be raised. The purpose of this brief is to request that the problems and possible solutions be examined.

The Law Reform Commission of Canada, in its working paper 59, pages 49 ss. gives some indications for solutions. They may certainly be debatable, but they should be examined.

The ideal solution would be to amend Article 96 of the Constitution of 1867, and thus some articles of the Criminal Code. It is certainly not easy to reach consensus on constitutional amendments, and the McEVOY case stipulates that the federal government alone cannot agree to give up its area of jurisdiction.

Another possible solution would be for judges appointed by Québec to be appointed by the federal government as well, in accordance with Article 96. They would thus enjoy the immunities and powers guaranteed by the Constitution.

This solution is not out of the question since in the Hamilton-Wentworth area Family Court judges, who were provincial judges, have been appointed in this way. This is a precedent that has existed for fifteen (15) years.

In criminal law, judges of the Court of Québec have a wider jurisdiction than any other provincial judges in Canada. Superior Court judges, in criminal law, have a rather limited jurisdiction in the first instance. They hold jury trials. If a single court were

established, jury trials would necessarily be held by members of the new court; from a procedural point of view, this does not create any difficulty.

When the question of unifying the courts is raised, opponents of unification conclude that it is impossible because of the powers of supervision granted to the Superior Court by virtue of Article 96. These powers of supervision have a historical basis in a time when persons without legal training dispensed justice.

It was obviously necessary at that time for a court to correct errors or abuses that might be committed by "referees". This is the origin of the supervisory power of the permanent court whose members had legal training.

"CHANGE THE CONSTITUTION

For Chief Justice Gold, the situation is quite different; he observes that the problem of court organization is still unsolved and that he is forced to return to the question. 'Why', he asks, 'should one leave the jurisdiction of Provincial Court in so-called ordinary matters involving the sum of $3,000?

Even worse, why let our statutory jurisdiction in municipal and school law be taken away little by little when we have been exercising it for a quarter of a century, and incidentally, doing it very well?

Why not give judges of the Sessions of the Peace and of Provincial Court the right to preside at jury trials in penal matters?

Why not transform the Social Welfare Court into a real Family Court?'

And Justice Gold concluded: 'Why? you will say the Constitution, always the Constitution! Then let's change the Constitution. Heaven knows that everyone is talking about it these days; let's stop talking, and act'."

4 - ADVANTAGES OF UNIFICATION

Unlike other provinces, Québec does not have to deal with the difficulties inherent in having three (3) courts of first instance, as is still the case in Nova Scotia and as it was in the other provinces until recently. In these other provinces, federally and provincially appointed judges were so separated that they worked in different buildings. This is not the case in Québec. Thus on this point, unification of the courts is "monetarily" easier than in other provinces.

On the face of it, it appears that the government of Québec, which pays for the administration of justice, will necessarily save money and resources by unification. The best example is the creation of the Court of Québec. Its members have all powers that belong to the Court. It can easily be seen that a judge of the Court of Québec hearing a criminal matter, in a remote region or even one outside large cities, can, if urgent cases arise concerning youth or even civil matters, sit in these areas.

The situation would have been impossible before, since the judge did not have jurisdiction. To settle the urgent civil or youth problem, it would have been necessary to send a second judge with the authority appropriate to the case. Since the judge now has complete jurisdiction in all pertinent matters, the government of Québec has necessarily saved money and human resources, while at the same time providing easier access to the courts.

The same economies can be gained if there is unification. The judge could hear civil cases without monetary limit and decide on all cases brought forward. Citizens would then have access to the services of a judge at all times, since the judge would have full authority. Thus the single court would really serve citizens, which would simplify procedures for them.

Common sense and a more rational use of resources suggest that unification could bring about substantial savings; studies could prove that this is true.

In districts outside of large centres, it is very common for two (2) judges, one from Superior Court and the other from the Court of Québec, in civil matters for example, to be in the same courthouse, coming from the same city. It might be possible to have only one judge who would decide on everything.

Rational administration of resources would no doubt give maximal services to citizens at minimal cost.

Each Court has its office equipment for administration. Duplications exist at different levels. Each court has its own library and its own research staff.

It would certainly be possible to make savings in staffing and equipment by unifying the different instances.

If courts of first instance were unified, all courts would of course be placed under

overall and consistent concept of legal intervention in family matters is still being discussed.

Today as in the past, citizens who have difficulties of this nature may find themselves before several courts of law, with all the consequences that one can imagine. Thus, spouses in conflict may have to address the Superior Court for matrimonial matters at the same time as they deal with the Court of Québec because their children are in need of protection as a result of their conflict. At the same time, it may be that one of the spouses is facing criminal charges as a result of violence within the family. These situations are so common that judges of the Youth Division meet them almost every day.

Incidentally, it is worth noting that in an increasing number of cases, the case before the Superior Court regarding legal custody is suspended to allow the Youth Division to pronounce first on the need for protection. Thus, with all respect for the exercise of jurisdiction by the higher court, its decision is dependent on the decision of the lower court.

This situation illustrates the fact that the Youth Division possesses expertise and well-developed resources which allow it, in a climate suitable to this very emotionally-charged type of litigation, to make the best decision possible in the interests of the children concerned. It is also universally recognized that the very nature of these cases requires an approach, a tone and a climate that facilitate an emotionally painful debate which, if not carried out with the necessary care and attention, runs the risk of increasing trauma for the child.

6 - NEW REASONS HAVE BEEN ADDED

To these reasons, well known and described by all those who are closely involved in the exercise of justice in family matters, more contemporary reasons of great importance also apply:

a) <u>Experience with new laws in the area</u>

When it took effect on January 15, 1979, the Youth Protection Law established one of the most advanced systems in the world for protecting children. It set up a process of social intervention backed up by legal intervention when necessary, by which there was a remarkable complementarity between the social support system for people in difficulty and the legal system in the form of the Court of Québec, Youth Division. The result was that judges and social workers developed a remarkably consistent philosophy, approach and sensitivity to present-day family problems. It is now specified in the law that everyone, whether judges or social workers, will work for the best interests of the child and will respect the child's rights.

In the same way the Superior Court, in order to exercise better its authority in matrimonial matters, set up an office of consultation and conciliation. The Court sometimes even has the Director of Youth Protection intervene in certain cases.

Thanks to the success of this complementarity, all those who are concerned with family problems are even more eager for a Family Court to be established.

b) <u>The modern family is more complex</u>

A new definition of the modern family, more complex because of its variability and rapidly-changing nature, is another element in favour of a Family Court.

The family is no longer identified only with the triangular schema of father-mother-child. Broken families are numerous, and they are transformed into single-parent or reconstituted families by new unions which depend on the most diverse circumstances.

Children are constantly confronted by new situations to which they must adapt, or else risk losing their parents. The result of this changeability in the family is a great complexity which calls for expertise and specialization. Conflicts are often insoluble and choices are exceedingly difficult. To deal with them, the courts can no longer

administer family justice with the simplicity of years past, nor can it do without the aid of the social sciences.

In short, legal authority, when applied in the area of the family, must develop an understanding of the law which is enriched by deep human feeling and supported by appropriate knowledge and philosophy. This legal authority has a much better chance of being exercised for the greater good of citizens in a real Family Court, possessing the means and powers to decide on all cases with implications for families.

c) <u>The conciliatory aspect</u>

Because in family litigation a mother, a father and sometimes even their child are adversaries in a contradictory debate, its hearing brings a considerable risk of trauma. Intimate and emotionally charged facts are revealed openly in often painful testimony. But whatever the outcome of the case, the participants will still be attached by a common past and the emotional effects that always result from it.

It thus seems important that this judicial debate take place with all possible civility, calm and sensitivity in order not to exacerbate painful conflicts. But even more important, it is essential that the court also be a place where conciliation is possible at all stages in an atmosphere and following a process that the judge can control. This conciliatory aspect is already an important part of our laws, and it is important to facilitate its application.

In this way, a Family Court, duly constituted and provided with the proper authority, will adequately serve the citizens of Québec.

3 - TWO SYSTEMS OF JUSTICE?

All third-party interveners agree that the present system of two (2) courts of first instance leads to confusion. There is absolutely no reason to declare that the judges of one court are more competent than others. Make no mistake: competence is not at issue here.

However, the very name of one court, in relation to the other, gives people the impression that the members of one court are superior to those of another court. As a result they may conclude that there are two qualities of justice. Such a perception is harmful to the entire legal system.

Certain kinds of behavior on the part of legal officials, sometimes unconscious, may lead people to conclude that there are in fact two levels of justice.

For example, in many courthouses there is still a difference between the offices assigned to itinerant Superior Court judges and those assigned to judges of the Court of Québec.

Legal officials in many places designate and reserve for judges of Superior Courts larger and more spacious courtrooms, while judges of the Court of Québec must made do with smaller rooms, even if the number of persons before the courts on certain days makes it impossible for people to find a place in the room and forces them to wait in the corridors.

It is true that this situation is gradually disappearing, but there are some remaining traces of apparent disparity in the quality of justice, precisely because of such situations.

In our society, status often depends on salary. Generally the person who receives a lower salary than another is considered inferior.

The Vanek report, a study of criminal justice in Ontario, came to this conclusion on the subject:

> **"The fact that the annual income, pension and other benefits of Provincial and District Court Judges are determined by different governments is of little consequence or importance to the accused or to the general public. What is important is the public's perception of the judges of each court. The differences in remuneration and benefits are now so vast that the conclusion the public must reach is inescapable. It is that there are two classes of judges, one decidedly inferior or incompetent in relation to the other yet, in respect of the criminal law, each judge performs essentially the same task."**

[Original text of the Vanek report, p. 53]

This public perception is a cause for concern by provincially appointed judges. In 1979 the Canadian Association of Provincial Court Judges presented to the federal Minister of Justice a brief on the hierarchy of courts and declared:

> **"The existence of a hierarchy of courts dealing with the same kinds of cases suggests that the higher level courts do a better job than the lower ones. If we accept the supposition that a County Court judge is in some way superior to a Provincial Court judge, but the High Court Judge is better than either of the two, we must also admit that justice is dispensed in different levels of quality. A hierarchy of courts exercising parallel powers gives the impression that the value of a judicial decision varies according to the court that rendered it."**

[Re-translation]

The problem of disparity and of perception of the courts appears regularly. The report on the courts of justice in Nova Scotia quotes the Canadian Law Reform Commission:

> **"The existence of multiple levels of penal jurisdiction reinforces the image of a qualitative hierarchy of courts, where the Provincial Court occupies the lowest level, the County Court the middle, and the Superior Court the highest. Since the majority of criminal cases are treated in the Provincial Court, the perception of inferiority attached to this court gives an unhealthy image of our penal system."**

In the article "Magistrate's Courts, Functioning and Facilities", Professor Friedman states:

> **"A fundamental change in the position of the magistrate in the judicial hierarchy is necessary. He now suffers from an inferiority complex because the Criminal code puts him in an inferior position by treating him as a third class judge - below the Supreme and County Court judge."**

In a report in favour of the establishment of a pilot project for a unified Criminal Court in New Brunswick, Mr. Basil D. Stapleton, Q.C., director of the Law Reform Branch, said:

> **"The fact that the courts within a multi-level system are referred to and perceived as 'superior' and 'inferior' is a further source of difficulty. Although those descriptive terms may not be intended to have a qualitative significance consistent with their vernacular applications, it seems inevitable that they will be associated in many minds with the quality of the justice administered in the respective courts. It is clearly inappropriate that the public should perceive the criminal justice system as providing a service of lower quality to those charged with lesser offences. Perceptions become realities even if they have no basis in fact. And such perceptions can cause a lack of respect for the whole criminal justice system."**

In Québec, the elimination of this difference between the two (2) courts of first instance has long been called for. As early as 1976, at the Journée du barreau the present Chief Justice of Superior Court, the honourable Alan B. Gold criticized the situation and observed that the entire problem of the organization of courts remains unsolved. The *Journal du Barreau* commented as follows: