PROVINCIAL JUDGES

Journal

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JUGES DE COURTS PROVINCIALES

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In Lighter Vein

In the trial of a charge of fishing in the wrong fishing zone, a witness testified he flew over a dragger in a surveillance plane and spotted a number of fish on the deck of the vessel in question. In attempting to test or impugn the probity of that evidence, the defence on cross-examination put a series of questions which culminated in the following amusing exchange:

Q. Do you know how long the fish had been there?

A. No.

Q. Were the fish together or were they separated?

A. I would say spread out a little on the deck.

Q. You mean one here, one over there - that sort of thing?

A. No, just a small area - 15 fish are not going to cover a very large area.

Q. You don't know what kind they were?

A. No sir.

Q. Do you know if they had their head on?

A. No.

Q. Do you know if they were gutted or not?

A. No.

Q. Do you know where they were caught?

A. (With a puzzled but quizzical look in his eye, the witness replied) ... I guess right out of the ocean...!

* * * *

Lors du contre-interrogatoire d'un témoin, un avocat se met à hurler:

«N'est-il pas vrai que vous avez reçu 500 $ pour saboter cette affaire?»

Le témoin ne répond pas et se contente de fixer la fenêtre comme s'il n'avait rien entendu. L'avocat répète sa question, mais sans plus de succès, si bien que le juge lui-même intervient:

«Répondez à la question, je vous prie.

— Oh! pardon, monsieur le juge, répond le témoin d'un air étonné, je croyais que c'était à vous qu'elle s'adressait.»

* * * *

THE JOYS OF JUDGING (in the USA!)

When you become a judge, your life is apt to change a good deal. It becomes more monastic, more reclusive. And, although experiences vary, some incidents are almost certain to happen to every judge. The following are just a few:

- You will be riding on a bus or train and the unfriendly face grimacing at you from across the aisle is someone you either evicted or sentenced to prison.
- You will get up quickly from your seat while presiding at a trial and hear a loud ripping sound. It's your robe that was stuck under the wheel of your chair.
- You will be relaxing at home one evening when some neighbour whom you have never spoken to will ring your bell and push a jury notice into your hand, asking if you can get him excused from jury duty.
- You will gain weight.
- You will publish numerous scholarly and innovative decisions but not one of your colleagues will offer the faintest glimmer of acknowledgement, let alone praise. But, let one of your reversals be published and your well-meaning and solicitous colleagues will publicly note that fact for your benefit.
- Attorneys who rarely if ever read a case will tell you that they read every one of your decisions.

— David B. Saxe, ABA Journal, Nov. 1989

* * * *

What would you think if you encountered a situation like the following witnessed by the Justices in the Biggleswade magistrates court recently?—

COURT PROTEST

Protester Jeffry Naidoo did his own special protest sleep-in — in Biggleswade magistrates' court, right in the middle of someone else's trial. He walked into court smoking a cigarette, marched up to magistrates and handed them a letter. Then, while puzzled solicitors and ushers stared in amazement, he blew up an airbed, shook out a sleeping bag, wriggled in and snuggled down in the well of the court.

He eventually got to his feet after asking a policeman what he should do. Mr. Naidoo left the court peacefully after being warned that he could be charged in contempt if he did not.

Chairman of the bench Mrs. Doreen Rix said afterwards: 'I think it was diabolical to interrupt another person's trial. But it was very peaceful and order was kept in the court.'

Mr. Naidoo claimed he was protesting his innocence over assault charges he faces.

— per Mr. G.F. Hutchinson, JP Biggleswade

President's Page

by/par Judge Ron Jacobson/M. le juge Ron Jacobson

> "Many things about the justice system and our own courts will likely be changed. No one can predict what they will be, for much will be determined by the political forces at play in our provinces. In some cases, we as judges will find it easy to accommodate ourselves to those changes. In some cases we will find them difficult. It goes without saying however, that changes which we ourselves understand and decide upon are much easier than changes thrust upon us by outside forces. We must take charge of our own growth as best we can. It is inevitable. Accommodation to aboriginal factors at play within our courts should be regarded as nothing more than one aspect of that growth."

With those introductory words at the 1990 WJEC Workshop at Lake Louise, Assistant Chief Judge Murray Sinclair of Manitoba re-emphasized the principle that judges themselves must take action to improve the quality of the administration of justice. Such responsibility is not limited to aboriginal rights or gender bias which require growth "within our courts". Any factor which affects the administration of justice, especially judicial independence, requires our understanding and accommodation.

There is growing public interest in the process of judicial evaluation. The Manitoba Law Reform Commission made certain recommendations in its 1989 Report on Judicial Independence. New legislation in Manitoba specifically provides for evaluation of the judiciary. The Nova Scotia Barristers' society has taken a strong public position recommending such procedures. The American Bar Association has suggested criteria and some States, such as New Jersey, actually have a formal system in place.

The New Jersey Supreme Court Questionnaires, are often cited as an ideal precedent. They are:

> ...authorized by the Supreme Court's Committee on Judicial Performance as part of the Judicial Performance Program. The program seeks to evaluate judges based upon their legal ability, judicial management skills and courtroom demeanour. The use of the evaluation information, in this phase of the program, shall be limited to the improvement of performance of the individual judge.

> "Il va sans dire que plusieurs aspects de notre système judiciaire sont appelés à changer. On ne peut pas prédire en quoi comporteront ces changements mais on sait que l'ampleur sera déterminée par les pouvoirs politiques provinciaux. Certains d'entre-nous trouveront ces changements plus ou moins faciles à accepter. Pour d'autres, cela sera plus difficile. Il va sans dire qu'il est plus facile de s'adapter aux changements quand on s'y prépare au lieu d'attendre que l'on nous les impose. Il en revient à nous de vous y préparer. Nous ne pouvons y échapper. Notre adaptation des déterminents aborigènes qui se manifestent dans le système judiciaire doit être vu comme rien de plus qu'un aspect de ces changements.

Le juge en chef associé du Manitoba, Murray Sinclair, sous ces propos échangés au Lac Louise lors d'un atelier de travail commandité par le WJEC, soulignait que les juges aux-mêmes doivent participer à l'amélioration de la qualité des services judiciaires dans notre administration de la justice. Cette responsabilité ne se limite pas uniquement envers les droits des aborigènes ou envers la discrimination des sexes mais aussi envers notre propre croissance professionalle. Tous les facteurs qui affectent l'administration de la justice, particulièrement l'indépendence de la magistrature, nécessitent notre compréhension et notre adaptation entière.

Il y a un regain d'intérêt dans le processus de l'évaluation de la magistrature. La Commission de Réforme du droit du Manitoba a suggéré certains changements dans son rapport de 1989 sur **l'Indépendence de la magistrature.** Dans cette province, l'évaluation de la magistrature a été prévue par une nouvelle loi mise en vigueur. Le Barreau de la Nouvelle-Ecosse a fait connaître sa position à cot effet en recommendant une telle procédure. L'Association du Barreau américain a suggéré certains critères, et certains Etats, comme le New Jersey par exemple, possèdent déja un système bien en place.

Les questionnaires de la Cour Suprême du New Jersey sont souvent cités comme précédent. Ils sont:

> ...authorisés par le Comité de la performance de la magistrature de la Cour Suprême comme faisant partie du Programme de la performance de la magistrature. Le programme tient à évalueur les juges selon leur abilité en droit, leur habitité en qualité de gestionnaires de l'administration de la justice,

The CAPCJ itself has previously approved the concept of evaluation of judicial performance. Now, it has appointed Senior Judge Charles Scullion to chair a committee which is to consider the concept as a vital aspect of judicial independence and of judicial education to improve the quality of the administration of justice in Canada.

Although there is considerable support for the principle of improving judicial performance in search of excellence, few have considered how to implement it, how to fund it, and how to use it, without adversely affecting judicial independence.

Judges Brian Stevenson and J.J. O'Connor of Calgary have identified at least eleven questions:

1. Who should be responsible for judicial evaluation?
2. Who should actually carry out the evaluation?
3. From what source should the information be gathered?
4. How should the information be collected?
5. What should be the minimum requirements for selection of respondents?
6. On what criteria should comment be based?
7. How can the risk of the vindictiveness, overfavouritism and bias because of confidentiality and anonymity be eliminated?
8. How frequently should data be collected?
9. What uses should be made of the data collected?
10. Who should have use of the data?
11. Should there be public disclosure?

Continuing judicial education is one of the most essential elements required for judicial independence. The contributions, competence, and teaching achievements of our judges (individually and collectively) has been outstanding. They have successfully evaluated problems in the law, and with the judiciary. As a result, their excellent programs have often satisfactorily resolved the issues. The formal process of judicial evaluation must not interfere with, nor take away financial resources from continuing judicial education programs nor their sponsors.

Please raise your ideas and recommendations with your provincial/territorial association, your CAPCJ representative, your Chief Judge, or even directly with Senior Judge Scullion, well in advance of the Quebec Conference.

A bientot a Quebec!

ainsi que leur comportement sur le banc. Jusqu'à maintenant, l'usage du contenu de l'évaluation vise à améliorer la performance du juge en question.

L'ACJCP a déja approuvé le principe de l'évaluation de la performance de la magistrature. Notre association a nommé le juge Charles Scullion à la présidence d'un comité qui étudiera l'évaluation de la magistrature comme étant tout aussi important que celui qui est chargé de l'indépendance ou de la formation, dans la poursuite d'une meilleure administration de la justice au Canada.

Quoiqu'il existe déja un appui considérable du principe de l'amélioration de la performance de la magistrature, peu se sont arrêté à penser comment y arriver, comment y pourvoir les fonds nécessaires, comment l'utiliser sans nuire l'indépendence de la magistrature.

Les juges Brian Stevenson et J.J. O'Connor de Calgary ont identifié au moins onze questions:

1. Qui devrait être en charge de l'évaluation de la magistrature?
2. Qui devrait effectuer l'évaluation?
3. De quelle source devrait-on puiser l'information?
4. Comment la cueuillette de l'information devrait-elle se faire?
5. Que devrait être le minimum d'exigences pour la sélection des interviewés?
6. Sur quel critère les commentaires devraient-ils être basés?
7. Comment pourrait-on éliminer le risque de caractère vindicatif, de favoritisme ou de biasis à cause de la confidentialité ou de l'anonymat?
8. Combien souvent l'information devrait-elle être recueuillie?
9. Que devrait-on faire de l'information recueuillie?
10. A qui remonterait le droit d'utiliser l'information?
11. Devrait-on divulguer l'information?

La formation permanente est un des facteurs essentiel requis pour l'indépendence de la magistrature. La participation et la compétence des juges comme enseignants (individuellement ou collectivement) s'est fait remarquer. Ceux-ci ont réussi à reconnaître certains problèmes touchant le droit et la magistrature. Ils ont, très souvent, trouvé les solutions à ces problèmes. Le processus de l'évaluation de la magistrature ne doit pas interférer, ni diminuer les fonds attribués à la formation permanente de la magistrature, ou ses commanditaires.

N'oubliez pas de communiquer vos suggestions au représentant de votre association provinciale ou territoriale, à votre juge en chef, ou méme directement au juge Scullion, avant la conférence de Québec.

A bientôt à Québec!

ing with complaints against judges and justices of the peace and for making recommendations to the Minister of Justice respecting the "efficiency, uniformity or quality of judicial services" provided by the Territorial Court or the Justice of the Peace Court.

Owing to the far flung nature of the court's territorial jurisdiction and in order to provide for local input into the judicial system, the Yukon utilizes a number of justices of the peace located in Whitehorse and in the outlying communities. A number of the justices sit in docket court and conduct trials and prosecutions under territorial enactments in addition to the more normal functions of receiving informations and issuing court process. Responsibility for the supervision and training of the justices of the peace resides with the Chief Judge of the Territorial Court.

CHANGES?

New Provincial Representative?

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

New Compensation Terms?

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

* * * * * *

CHANGEMENTS?

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

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

nouveaux termes de la compensation/ rémunération?

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

pointment the place of residency, after which time the chief judge may, subject to the approval of the Minister of Justice, designate the place of residency.

The Lieutenant Governor appoints the judges by letters patent, but is restricted to persons of good standing of the bar of one of the provinces for at least five years immediately preceeding the day of their appointment, or who has other legal or judicial experience that is satisfactory to the judicial council. Retirement is age 65, except for those appointed under the previous legislation who may remain until age 70. Once appointed, a judge may only be removed from office by the Lieutenant Governor in Council on the recommendation of the judicial council.

The judicial council is created under The Provincial Court Act. It is composed of the Chief Justice of Saskatchewan, as chairman, the Chief Justice of the Queen's Bench and the Chief Judge of the Provincial Court, or judges delegated by them from their respective courts, the president of the Law Society of Saskatchewan, or his member so delegated, and two other persons appointed by the Lieutenant Governor in Council. The judicial council shall consider and make recommendations to the Minister of Justice regarding the proposed appointment of a judge. It also receives, investigates and may act upon complaints against a judge of the court. It may also have matters referred to it by the Minister and it shall consider and make recommendations for the improvement of the quality of the judicial services of the court.

Other than the chief judge's powers to designate a particular class of cases to a particular judge and designate court facilities for such use, there is no provision in the legislation for a separate division in the court. Every judge has criminal, family, youth and civil jurisdiction. But in practice in Saskatoon and Regina some specialization occurs in family, youth and civil matters.

There has been a long tradition of a Provincial Court Judges' Association to which almost all judges belong. The association, together with the office of the chief judge, has been active in judicial education. The association has promoted the interests of the court and judges and was actively involved in preparing the legislation creating the Provincial Court. A new pension plan was incorporated into the Act. In 1989, the difficulty experienced by the association in addressing the issue of judicial independence as reflected in the matters of compensation, benefits and residency resulted in a public confrontation between the association and the Minister of Justice. The matter was resolved when the Government agreed to establish a commission to address compensation, benefits and residency on a triennial basis.

TERRITORIAL COURT OF YUKON

by Judge John E. Faulkner

The Territorial Court of Yukon consists of three full-time judges, although one is presently on leave. These three judges are supplemented by a number of deputy judges most of whom are provincial court judges from other jurisdictions in Canada. The permanent judges of the court reside in Whitehorse — the territorial capital.

The Yukon Territory is very large, but is also very sparsely populated with a total population of only 30,000 of which some 20,000 live in Whitehorse. The remaining 10,000 are located primarily in approximately fifteen settlements ranging from 50-1600 people, widely scattered across the Territory. The provision of justice services is thus a tremendous logistical problem. The Court goes on circuit to eleven communities outside of Whitehorse generally holding court in community halls or band council offices. Judges and court staff drive to the communities closest to Whitehorse and fly to the remainder.

Administrative duties are handled by the Chief Judge of the Court who is appointed for a non-renewable five-year term. The Chief Judge is also responsible for receiving and attempting to resolve any complaints concerning the conduct of judges or justices of the peace.

The jurisdiction of the Court is similar to provincial courts elsewhere consisting of criminal court, youth court, small claims court, and family court. Because of the small size of the Court, there is no separation of the Court into divisions — judges are expected to, and do, wear all four hats. The Court has civil jurisdiction with respect to:

a. small claims up to $3,000.00

b. landlord and tenant matters including arrears of rent, distress for rent and orders for possession; and

c. family matters including child protection and maintenance.

Appointments to the court are made by the Territorial Commissioner in Council on recommendation from the Judicial Council of the Territorial Court. This Council is chaired by the Justice of the Supreme Court of the Yukon and includes as members the Chief Judge of the Territorial Court, the senior Justice of the Peace, the president of the Law Society, and a lawyer and two other persons appointed for three-year terms by the Commissioner. The judicial members and law society president may appoint nominees. In addition to recommending judicial candidates, the Council is responsible for deal-

Editorial Page

Judges in Canada might be excused those days if they feel like a besieged group. There is nothing wrong or improper with accountability of judges. Nor would we wish to convey the impression that we regard judges as omnipotent or infallible. Indeed, we feel certain that the vast majority of judges are all too aware of the limitations of human nature that render them subject to the same failures and weaknesses as other members of society. Conscientious judges everywhere are appreciative that a preview and appeal procedure exists so that those errors of judgment which are inevitably made can be rectified.

Still, there exists a fundamental characteristic of our judicial system which must be respected and fully supported. We contend that all conscientious people would agree that to perform effectively judges must be independent. It is realized that independence is an elusive concept. However, it is not unascertainable as *R.* v. *Valente* has demonstrated. We realize as well that the grant of independence to a group of men and women with immense power over the lives of others carries with it a definite need for judicious exercise of that authority.

In recent weeks and months, in this country we have seen a plethora of challenges to the manner in which judges have both discharged the duties of their office and conducted themselves personally sometimes outside the confines of their offices. Such challenges have ranged from individuals taking issue with things said or one by judges to interest groups lobbying against decisions of judges and even in some instances civil tribunals attempting to compel judges to appear before them to answer for judicial decisions.

Indeed, there is a discernable symptom of near hysteria at large to make sure that judges are held accountable for their decisions. The dangers inherent in that are easily perceivable, and in "judging the judges" we suggest that reason and common sense must prevail. While we recognize that the office of judge does not carry with it an unfettered license to do as one pleases, the demand for accountability must be balanced with the need for independence, a concept which the Supreme Court regarded in *R.* v. *Valente, Beauregard* v. *Canada* and *MacKeigan, J.A.* v. *Royal Commission (Marshall Inquiry)* as a "cardinal principle" of the judiciary.

News Briefs

ALBERTA

Retirements

— His Honour Judge James Campbell, Criminal Division, Edmonton, effective February 28, 1990. He was immediately appointed a Supernumerary Judge effective March 1, 1990 and sits throughout the province.

— His Honour Judge Arnold P. Blakey, Criminal Division, Edmonton, effective May 31, 1990.

— His Honour Judge H.B. (Ben) Casson, Red Deer, effective June 1, 1990. He will commence duties as a Supernumerary Judge at Red Deer in January 1991.

Appointments

On May 17, 1990 the following six new appointments were announced:

— Her Honour Judge Suzanne M. Bensler, Calgary Criminal Division, effective immediately.

— His Honour Judge Allan A. Fradsham, Calgary Criminal Division, effective immediately.

— Her Honour Judge Sharon L. Harper, Edmonton Criminal Division, effective immedately.

— His Honour Judge Edward R. Saddy, Edmonton Criminal Division, effective June 3, 1990.

— His Honour Judge David J. Plosz, Red Deer, effective June 1, 1990.

— His Honour Judge Jerry N. LeGrandeur, Lethbridge, effective immediately.

ONTARIO

Retirements

— His Honour Judge H. Bruce Hunter, Morrisburg, effective December 28, 1989. Judge Hunter has been elected an Honorary Life Member of the Association of Provincial Criminal Court Judges of Ontario.

Appointments

The following appointments were made effective from April 2, 1990:

— Her Honour Judge Dianne P. Baig, Fort Francis.

— Her Honour Judge Annemarie E. Bonkalo, Brampton.

— His Honour Judge Roderick J. Flaherty, Dryden.

— His Honour Judge Robert P. Main, Barrie.

— His Honour Judge Bruce E. MacPhee, Brampton.

— His Honour Judge Paul H. Reinhardt, Toronto.

— Her Honour Judge S. Rebeccah Shamai, Brampton.

— His Honour Judge Bernd E. Zabel, Hamilton.

The following appointment became effective on April 17, 1990:

— His Honour Judge G. Norman Glaude, Sault Ste. Marie.

Effective April 25, 1990 His Honour Chief Judge Sydney B. Linden, Toronto, took office. Chief Judge Linden is a graduate of the University of Toronto Law School and since being called to the bar in 1966 has held a variety of challenging positions in the public life of Ontario.

In announcing Chief Judge Linden's appointment the Attorney General indicated that upon proclamation of Bill 2, a provision to merge the Provincial Court (Criminal Division) and the Provincial Court (Family Division), Judge Linden would become Chief Judge of the newly merged Court. The Attorney General also remarked that Judge Linden's appointment as Chief Judge "Comes at a challenging point in the history of the courts... (a time when) major court reform initiatives and delay reduction projects will streamline the administration of justice in Ontario."

The following appointments have been made with effect from June 1, 1990:

— His Honour Judge James C. Crawford, Oshawa.

— Her Honour Judge Kathleen E. McGowan, St. Catherines.

— His Honour Judge David M. Stone, Oshawa.

— His Honour Judge Colin R. Westman, Kitchener.

— His Honour Judge Theo Wolder, Brampton.

Career Changes

— His Honour Chief Judge Frederick C. Hayes - Toronto, appointed to the District Court of Ontario effective April 1990 (appointed to the Provincial Court — September 18, 1961).

— His Honour Judge Kenneth A. Langdon - Brampton, appointed to the District Court of Ontario effective April 1990 (appointed to the Provincial Court - December 2, 1974).

Honorary Life Member

In recognition of his continued support, interest and friendship to the Association of Provincial Criminal Court Judges of Ontario, The Honourable William G.C. Howland, Chief Justice of Ontario, was elected an Honorary Life Member on his retirement from the Supreme Court of Ontario.

NOVA SCOTIA

Retirements

— Chief Judge Harry How — Halifax, effective April 30, 1990.

Appointments

— His Honour Judge Donald J. MacDonald, Truro, effective March 9, 1990.

— His Honour Judge Clyde F. MacDonald, Antigonish, effective March 23, 1990.

Appointment of Task Force

The Nova Scotia Government has established a Task Force to make recommendations concerning Court structure in the province. The Task Force is authorized to conduct public hearings and to make a final report not later than April 6, 1990.

Provincially appointed judges have been invited to participate and they will be making submissions on the subject of a Unified Family Court and that of a Unified Criminal Court.

The full mandate of the Task Force is:

(a) to review the present structure and procedures of the courts;

(b) in particular, to examine:

the year. Current judicial topics as well as salary and benefits are dealt with at the meetings. Under the new Act a quadrennial tribunal appointed by the Lieutenant Governor in Council recommends salary and benefits for Provincial Court Judges. The recommendations of the tribunal goes to the Legislative Assembly who are obliged to consider the report and approve or vary the recommendations within 30 days.

Our Judicial Council consists of six members. It is comprised of one Judge of the Supreme Court nominated by the Chief Justice who is the chairperson, a bencher of the Law Society nominated by the benchers, two persons nominated by the minister. The president of the Newfoundland Judges Association and ex officio the Chief Judge. One of the functions of the Judicial Council is to interview candidates for the bench. A person cannot be appointed a Judge without a recommendation from the Judicial Council. The new Act provides a minimum standard of at least ten years membership of the bar. Upon appointment the Judge holds office during good behaviour until mandatory retirement at age 65. The Judicial Council also deals with disciplinary matters as well as transfers. With respect to transfers a Judge could be transferred without his consent if the Judicial Council approved the transfer.

Our Judges look forward to the near future when society will no longer tolerate two judicial systems (i.e. an inferior court and a superior court) but will demand equal justice for all in a Unified Criminal Court.

THE PROVINCIAL COURT OF SASKATCHEWAN

by Judge Gerald T.G. Seniuk

The Provincial Court of Saskatchewan was established in 1978 by The Provincial Court Act.

This Act repealed The Magistrates' Courts Act and The Provincial Magistrates Act.

It is a court of record possessing the jurisdiction previously vested by law, statute or custom in provincial magistrates, judges of the magistrates' courts, a justice of the peace or two justices of the peace sitting and acting together.

A judge may preside over the court at any place in the province and has jurisdiction throughout Saskatchewan. The Provincial Court Judges exercise the jurisdiction conferred by the Criminal Code and are as well judges of the Youth Court of the Province of Saskatchewan pursuant to the Young Offenders Act (Canada) and judges of the Juvenile Court of the Province of Saskatchewan pursuant to The Family Services Act. Every judge is *ex officio* a coroner with all the powers as prescribed in The Coroners Act, although in practice this function is always performed by medical coroners.

Unless otherwise specifically provided for, proceedings for the imposition or punishment by fine, penalty or imprisonment for enforcing Provincial Acts or regulations are within the jurisdiction of the court by The Summary Offences Procedure Act. That Act also provides for an appeal to the Provincial Court of a conviction, sentence or dismissal of an information by a justice in connection with an offence under a municipal bylaw.

Under The Family Services Act the Provincial Court has jurisdiction to determine whether a child is in need of protection and if so, whether such child should be returned to the parents under supervision, or committed to the minister, temporarily or permanently. By separate legislation, the court also has jurisdiction to adjudge paternity of children of unmarried parents and to determine whether a deserting spouse should be ordered to pay support for the complainant spouse and children.

Under The Small Claims Act, the court has civil jurisdiction, with some limitations, to claims under $5,000.

Appeals from The Traffic Safety Court of Saskatchewan are heard by the Provincial Court by trial de novo. Surcharge appeals under The Automobile Accident Insurance Act are also to the Provincial Court.

The court has 45 judges, including a chief judge and four administrative judges. At present the court has one female judge, but in the past decade has had five. Three of the judges are fluently bilingual and capable of conducting trials in French, while others are in various French language programs.

The chief and the associate chief judges' positions are appointed by the Lieutenant Governor in Council and are limited to seven-year terms. There are at present no associate chief judges appointed. The four administrative judges are assigned their administrative duties by the chief judge pursuant to his general powers of assignment. These provisions are relatively new and to date there has been no history of rotation or fixed terms of office.

The Lieutenant Governor in Council by regulation prescribes the salary to be paid to judges, administrative judges, associate chief judges and the chief judge. Legislation implementing a commission along the federal model is expected this year to deal with compensation, benefits and residency. By present legislation, the Minister of Justice designates at the time of ap-

Court Profile*

THE PROVINCIAL COURT OF NEWFOUNDLAND

by Judge Joseph A. Woodrow

The Provincial Court of Newfoundland was constituted in 1974 out of a recommendation from the Steele Royal Commission on the Magistracy. The main recommendation was that the Magistracy was to be taken out of the civil service and made an equal partner of the Judiciary. With the advent of the Charter of Rights in 1982 Provincial Court Judges took an active role in severing the last vestiges of ministerial control from the Provincial Court Act. In order to consolidate amendments, judicial decisions and Government policy, a new Provincial Court Act will be introduced in the Spring session of the Legislative Assembly.

The main thrust of the new Act will be to place administrative matters under the control of the Government. Previously the Chief Judge or Senior Judges were the chief administrators of the courts. Under the new Act the Chief Judge's responsibilities will be limited to judicial administration. The Director of Court Services will be responsible for purely administrative matters.

Provincial Court Judges have jurisdiction to hear Youth Court offences, Provincial offences and with the consent of the accused over 95% of the offences in the Criminal Code, Narcotic Control Act and other Federal Statutes. Small Claims jurisdiction is presently $1,000.00 but amendment to the Act will increase the limit to $3,000.00 this year. Because the province does not have a medical coroner system, Provincial Court Judges conduct Judicial Inquiries into sudden deaths that are referred by the Attorney General. Outside the St. John's metropolitan area, Provincial Court Judges also exercise Family Court jurisdiction whereas in the St. John's area Family Court jurisdiction is exclusively reserved for the Unified Family Court presided over by a Supreme Court Judge.

Presently there is a Chief Judge and 25 Provincial Court Judges. Only one Judge is a woman. The Chief Judge has his headquarters in Corner Brook, a city of 28,000 on the west coast of Newfoundland. While the Chief Judge hears cases from time to time, the majority of his work is spent on judicial administration. Under the new Act the Chief Judge's appointment will be limited to a term of 10 years.

There are 13 Provincial Court districts and 51 circuit points in Newfoundland. Eight judges reside in St. John's, three in Corner Brook, two in Gander, Grand Falls and Stephenville and one Judge in Port Aux Basques, Springdale, Clarenville, Grand Bank, Harbour Grace, Placentia, Labrador City and Goose Bay, Labrador.

The St. John's Court has six courtrooms, consisting of four Criminal Courts, one Youth Court, and another Traffic/Small Claims Court. A scheduled expansion this Summer calls for two additional criminal courtrooms plus a new Small Claims courtroom. Although St. John's is the largest Provincial Court the accommodations are far from ideal. The court is located on the 4th floor of Atlantic Place which is an office complex. The 4th floor was previously occupied by a department store. The facility is not suitable as a courthouse. It contains many flaws including absolutely no windows for staff or Judges. Fortunately renovations during the Summer months will at least give us daylight. In general Provincial Court facilities are unsuitable throughout the province and more so while on circuit.

There are numerous Justices of the Peace in the province. Their duties however are mainly confined to receiving informations, confirming appearance notices and issuing summonses. Justices of the Peace never sit or hear cases. In an exceptional circumstance such as the Provincial Court Judge being ill a Justice of the Peace would be called up to adjourn the cases. Justices of the Peace issue search warrants, however, where practicable police officers attend upon Provincial Court Judges for search warrants. Unfortunately there is no education program upon appointment for Justices of the Peace or regular judicial seminars to ensure the proper exercise of their duties. The Government intends to correct these deficiencies with a new Justice of the Peace Act in the Spring or Fall session of the Legislative Assembly.

All Judges belong to the Newfoundland Association of Provincial Court Judges. The Association is extremely active and holds a three- to four-day educational conference each year in order to discuss the numerous legislative amendments and judicial decisions throughout

*(Editor's Note: In February of this year a project was commenced aimed at capturing in writing a profile of the Provincial/Territorial Court as it presently exists in Canada. The method adopted was to enlist the assistance of Provincial Editors with each supplying a brief article on the court in his/her jurisdiction. Due to the nature of the project it seemed appropriate to publish it serially. In this edition we include articles from three jurisdictions. They appear, not in any particular order or sequence, and others will appear in future editions.)

- merger of the Supreme and County Courts,
- a unified family court,
- procedures before the courts,
- role of Chief Justices and Chief Judges in the management and administration of courts at all levels,
- role and operation of the Judicial Councils in the Provincial Court and the Family Court,
- delivery of court services outside the major population centres of the Province,
- enforcement of court orders,
- enforcement of municipal bylaws and small claims matters,
- traffic courts,
- judicial case management,
- automation of court administration,
- the appropriate role of masters, registrars, assessors and referees,
- alternative dispute resolution and the use of referees, mediators, arbitrators and specialized tribunals,
- the jurisdiction, structure, organization, sittings, case scheduling and workload of the courts of Nova Scotia, and
- such other matters as the Attorney General may from time to time refer to the Task Force.

(c) to report and make recommendations to the Lieutenant Governor in Council in respect of matters referred to in clauses (a) and (b) that will:
- eliminate unnecessary delays and unduly technical litigation issues,
- enhance access to justice for the people of Nova Scotia through simple, efficient and expeditious dispute resolution systems.

NATIONALLY

Niagara-on-the-Lake, Ont. — June 15, 1990 — Federal provincial and territorial Ministers responsible for justice met here today, following a two-day provincial Attorneys General meeting.

The following was among the issues discussed:

Unified Trial Court

The Ministers discussed a resolution supported by most of the provincial and territorial Attorneys General to create a single trial court in each jurisdiction for criminal and family matters. The resolution supported the attempts of New Brunswick, British Columbia and Ontario to establish such a court, and urged the Attorney General of Canada to enter into discussions with those provinces and any other interested jurisdictions. The federal Minister expressed willingness to participate in discussions on these matters but stated that she wished to develop a comprehensive policy on court structural reform in light of national interests and to study more fully the implication of the provincial proposals.

Niagara-on-the-Lake, (Ontario), le 15 juin 1990 - Les ministres fédéraux, provinciaux et territoriaux responsables de la justice se sont réunis aujourd'hui, après une réunion de deux jours des procureurs généraux des provinces et des territoires.

La question suivantes étais parmi celles qui ont été abordées:

Tribunal Unifié de premiere instance

Les ministres ont discuté une résolution soutenue par la plupart des procureurs généraux des provinces et des territoires, visant à établir dans chaque ressort un tribunal unifié de première instance pour les affaires pénales et familiales. La résolution appuie les efforts dans ce domaine du Nouveau-Brunswick, de la Colombie-Britannique et de l'Ontario et prie la procureure générale du Canada d'entreprendre des discussions à cet effet avec les trois provinces susvisées et avec toute administration intéressée. Mme Campbell a déclaré qu'elle était disposée à participer à ces discussions, et qu'elle souhaitait élaborer une politique d'ensemble sur des réformes de la structure des jurisdictions à la lumière des intérêts de la nation et étudier plus avant les incidences des propositions provinciales.

Letters

101 - 540 Borland Street
Williams Lake, B.C.
V2G 1R8

Judge M. R. Reid
4th Floor, Atlantic Place
Box 5144
St. John's, Nfld.
A1C 5V5

Dear Judge Reid:

I have had a special interest in probation orders for many years and during the past couple of years I have worked at developing guidelines for use by B.C. judges, probation officers, court clerks, and others.

These guidelines are now being used by many judges. I am told that they are helpful and that they are particularly appreciated by court clerks.

The guidelines were first published in 1988. They were reproduced in 66 CR (3d) 181, along with an accompanying explanatory letter.

The guidelines were recently revised and republished. There are separate guidelines for Criminal Code and YOA probation orders.

The guidelines could be used or adapted by judges in other provinces or the territories. Some judges outside B.C. are using them already.

I enclose a set of the guidelines with this letter. (The guidelines will be found at pp. 24-27 of this edition.) I would be pleased to send additional sets to any readers of the Journal, upon request.

Yours truly,
C.C. Barnett

Judge M. R. Reid
Editor-in-Chief
Provincial Judges Journal
St. John's, Newfoundland
A1C 5V5

Dear Judge Reid:

Further to my letter dated January 31st, 1990, I have just received a brief informational article from Judge Aleene Ortiz-White of Denver, Colorado, outlining the program at the 1990 conference of the National Association of Women Judges in Denver. Hopefully, this article can be published in the next edition of the Journal.

"National Association of Women Judges 1990 Annual Conference

The 11th annual conference will be held October 4-8 and the host city is Denver, Colorado, USA. The Conference theme is **A Breath of Fresh Air** and the scheduled events will include a trip to the scenic Rocky Mountain town of Breckenridge in addition to educational sessions that will focus on innovative approaches to the legal issues of the 90's. Topical presentations will feature Mexican, Canadian, and U.S. judges participating in panels in three areas: Communications for Women Judges; Governmental Family Policy & The Courts; Environmental Litigation and Its Impact on the Courts. The Communications segment will feature a track devoted to Alternative Dispute Resolution in addition to workshops that address topics including: Communicating with Jurors; Communicating with Bankruptcy Courts; Communicating with the President;

Other highlights include Congresswoman Patricia Schroeder who will address Family Policy issues plus workshops such as: The Changing Definitions of A Family; Domestic Violence; Daycare; The Environmental workshops will explore policies and laws pertaining to: Toxic Dumping; Hazards in the Workplace; Growth vs. No Growth; and Natural Resource Depletion.

On the lighter side, the Mother Folkers will provide entertainment at the cocktail party and annual banquet. The Governor's Mansion will also host a cocktail party to honor Colorado officials and judges. For conference travel arrangements contact: Linda Rawlings of Travel Advocate at 800-873-8383."

Judge Aleene Ortiz-White
Denver, Colorado

If you have any further questions or comments please feel free to contact the writer.

Yours truly,
Linda Giesbrecht
Manitoba Provincial Editor

16. **WEAPONS** You must not have upon your person or be in possession of any weapon or any knife or any other thing capable of being used as a weapon in circumstances that give rise to a reasonable inference that the thing has been used or is or was intended to be used as a weapon.

17. **NO DRIVING** You must not drive a motor vehicle at any time and

18. You must surrender your driver's licence to the Court Clerk at _____ forthwith and for the duration of this order.

19. **AREA RESTRICTION** You must not be within _____ kilometres of _____ at any time for any reason except _____.

20. **CURFEW** You must obey a curfew between the hours of _____ p.m. and _____ a.m. Sunday to Thursday and _____ p.m. and _____ a.m. Friday and Saturday. During these hours you must be continuously in your residence unless you are elsewhere in the company and actual presence of a parent or unless you have previously been given specific written permission by your youth worker to be away from your residence.

10 BASIC RULES

1. Probation under the YOA is a separate disposition which can be combined with other dispositions. There is no provision in the YOA for the granting of conditional discharges or suspending the passing of sentence.

2. The maximum term of a YOA probation order is 2 years.

3. If a young person is committed to custody and placed on probation for a single offence, the combined duration of the dispositions cannot exceed 2 years.

4. If a young person is committed to custody and placed on probation for different offences, the combined duration of the dispositions cannot exceed 3 years [this rule is subject to a theoretical exception created by s. 20 (4.1)(c)].

5. Other dispositions under the YOA can be "delayed" but a probation order comes into force the day it is made unless the offender must first serve a custodial disposition.

6. The non-statutory conditions of a probation order must relate to the offence and also to the need to secure the future good conduct of the offender and prevent the repetition of offences. For instance, if a young man were convicted of motor vehicle thefts or of break and enters in which motor vehicles were used to remove stolen goods, it might be appropriate to order, as a condition of probation, that he not drive motor vehicles for a period of time. But such a condition would not be appropriate in the case of a young person who stole a pair of blue jeans from a department store. Further, some conditions, particularly "area restrictions" can only be used in cases which really are exceptional and present a compelling need. Other conditions, such as those requiring the offender to obey a curfew, might be thought out with particular care if they are to be meaningful and workable.

7. Judges must be careful not to create probation orders which contain too many conditions or unrealistic conditions. Such orders will only lead to series of breach charges.

8. The non-statutory conditions of a probation order must be pronounced by the court with care and precision. They must then be accurately reproduced in the order which is given to the probationer.

9. If judges use this guide for the wording of commonly used conditions, it will assist court clerks who must type the orders and get them right. When a special condition is part of a particular order, the presiding judge might think it useful and wise to write that condition out in advance, recite it precisely in court and then give it to the court clerk.

10. This guide is intended to deal only with probation orders made under the YOA. Probation orders made under the Criminal Code or the Offence Act involve significantly different considerations.

A similar guide to Criminal Code probation orders is also available. Comments and suggestions are invited. Please write to:

Judge C. Barnett
Courthouse, 540 Borland Street
Williams Lake, B.C.
V2G 1R8

The Provincial Judges' Revised Guide to the Making of Probation Orders Under The Young Offenders Act*

1. **FLEXIBLE REPORTING** You must report in person forthwith at _____ to the youth worker assigned to your case on behalf of the provincial director. Thereafter you must report as directed by the youth worker who will supervise your performance of this order.

2. **STRUCTURED REPORTING** You must report in person forthwith at _____ to the youth worker assigned to your case on behalf of the provincial director. The youth worker is to supervise your performance of this order and you must report to him or her as directed by him or her but, in any event, not less than once each _____ during the first _____ months this order is in force.

3. **CUSTODY & PROBATION** This order comes into force on the expiration of the period of custody. You must then report in person forthwith at _____ to the youth worker assigned to your case on behalf of the provincial director. (here continue the wording of condition 1 or 2).

4. **PLACE OF RESIDENCE - GENERAL** You must continuously maintain your place of residence in British Columbia and if you move you must give your new address to your youth worker within 5 days.

5. **PLACE OF RESIDENCE - WITH PARENTS** You must live at the home of your parents in _____ or at some other place specifically approved by your youth worker. You must not move without first obtaining the approval of your youth worker.

6. **ATTENDANCE PROGRAM** When your youth worker directs it, you must go to and complete the residential attendance program at _____. While you are there you must obey the rules and regulations of the program.

7. **SUBSTANCE ABUSE** You must attend as directed by your youth worker upon an alcoholism, drug, or substance abuse counsellor and, if so directed by your youth worker, at a residential treatment facility for any such probem or addiction.

8. **PSYCHOLOGICAL COUNSELLING** You must attend as directed by your youth worker for counselling by a professionally qualified psychologist.

9. **PSYCHIATRIC TREATMENT** You must commence and/or continue such psychiatric treatment as may be considered medically appropriate. This includes the taking of such medications as may be prescribed.

10. **COMMUNITY WORK SERVICE** Cannot be ordered as a condition of YOA probation. Must be ordered separately under s. 20(1)(f) or (g).

11. **RESTITUTION/COMPENSATION** Cannot be ordered as a condition of YOA probation. Must be ordered separately under s. 20(1)(c), (d) or (e).

12. **NON ASSOCIATION** You must not associate with or be found in the company of the following persons: _____, or any other person named in writing by your youth worker for good cause.

13. **STAY AWAY FROM CHILDREN** You must not be in the presence of any person under the age of _____ years unless the place where you are is a public place which is then open to all members of the public and actually being frequented by adult members of the general public.

14. **GET WORK/GO TO SCHOOL** You must make diligent efforts to find and maintain employment approved by the youth worker. If, on any occasion that you report to the youth worker as required by this order, you are not actually then employed, you must provide the youth worker with a written report concerning all efforts made to find employment since ceasing to be employed or since last reporting. This report must detail:
(a) Who was seen,
(b) What work was sought,
(c) What response was received,
Alternatively, you may attend an educational course or vocational training specifically approved by the youth worker.

15. **BREATHALYZER/URINALYSIS TESTS** You must submit to breathalyser or urinalysis testing upon the demand of your youth worker or any peace officer who has reason to believe that you have consumed alcohol or have used narcotic or other drugs not prescribed by a medical doctor.

* Users of this guide may find it worthwhile to read "Probation Orders Under the Criminal Code", 38 C.R.N.S. 165 and "Probation Order Guideline Conditions", 66 C.R. (3d) 181.

"Will Women Judges Really Make A Difference?"*

by: Madame Justice Bertha Wilson/Supreme Court of Canada

When I was appointed to the Supreme Court of Canada in the Spring of 1982 a great many women from all across the country telephoned, cabled or wrote to me rejoicing in my appointment. "Now", they said, "we are represented on Canada's highest court. This is the beginning of a new era for women." So why was I not rejoicing? Why did I not share the tremendous confidence of these women? The reasons form the theme of my lecture this evening.

First of all, of course, came the realization that no-one could live up to the expectations of my well-wishers. I had the sense of being doomed to failure, not because of any excess of humility on my part or any desire to shirk the responsibility of the office, but because I knew from hard experience that the law does not work that way. Change in the law comes slowly and incrementally; that is its nature. It responds to changes in society; it seldom initiates them. And while I was prepared — and, indeed, as a woman judge anxious — to respond to these changes, I wondered to what extent I would be constrained in my attempts to do so by the nature of judicial office itself.

In the literature which is required reading for every newly appointed judge it is repeatedly stated that judges must be both independent and impartial, that these qualities are basic to the proper administration of justice and fundamental to the legitimacy of the judical role. The judge must not approach his or her task with preconceived notions about law or policy, with personal prejudice against parties or issues, or with bias toward a particular outcome of a case. Socrates defined the essential qualities of a judge in the following manner. "Four things belong to a judge; to hear courteously; to answer wisely; to consider soberly and to decide impartially."[1]

In Winter's *Handbook for Judges*[2], there is a section devoted to the essential qualities of a judge and these are defined as integrity and independence, impartiality, flexibility, creativity, responsibility and common sense. The late Justice Frankfurter was quoted as stating:

> To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with...judicial power.[3]

In an article entitled "The Virtue of Impartiality" the late Judge Shientag of the Appellate Division of the New York Supreme Court discusses the difficulty in attaining impartiality and states that the term implies an appreciation and understanding of the differing attitudes and viewpoints of those involved in a controversy.[4] He quotes Lord MacMillan's description of the difficulty judges face in this regard:

> The judicial oath of office imposes on the judge a lofty duty of impartiality. But impartiality is not easy of attainment. For a judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by their possessor. Few minds are as neutral as a sheet of plate glass, and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done.[5]

And later Lord MacMillan issues the following warning:

> [The judge] must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments.[6]

Many have criticised as totally unreal the concept that judges are somehow super-human, neutral, above politics and unbiased, and are able to completely separate themselves from their personal opinions and pre-dispositions when exercising their judicial function. For example, Lord Justice Scrutton doubted that complete impartiality was possible. He said:

> This is rather difficult to attain in any system. I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal

* The Fourth Annual Barbara Betcherman Memorial Lecture Osgoode Hall Law School/York University, February 8, 1990. Printed by permission.

with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour. Labour says: "Where are your impartial Judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class. Even in matters outside trade-unionist cases ... it is sometimes difficult to be sure, hard as you have tried, that you have put yourself in a perfectly impartial position between the two litigants.[7]

In his text on *The politics of the Judiciary*[8], Professor Griffith caused a furor in legal and judicial circles in the United Kingdom when he questioned whether the English judiciary were capable of impartiality. He stated that for a judge to be completely impartial he or she would have to be like a political, economic and social eunuch and have no interests in the world outside the court. Because this is impossible, Griffith concludes that impartiality is an ideal incapable of realization.[9] He says of the English judiciary:

> These judges have by their education and training and the pursuit of their profession as barristers acquired a strikingly homogeneous collection of attitudes, beliefs, and principles which to them represents the public interest.[10]

The public interest, in other words, is perceived from the viewpoint of their own class. Chief Justice Nemetz has suggested that the views of Professor Griffith may have some validity in Canada too, more particularly, Professor Griffith's view that judicial attitudes towards political and social issues reflect the lack of a proper understanding of the views of labour unions, minorities and the under-privileged.[11]

Judge Rosalie Abella, Chair of the Ontario Law Reform Commission, also doubts that judicial impartiality is a realistic requirement. She emphasizes in her article "The Dynamic Nature of Equality" that "every decision-maker who walks into a court room to hear a case is armed not only with the relevant legal texts but with a set of values, experiences and assumptions that are thoroughly embedded."[12]

Judge Shientag refers to the fact that many judges believe that they have acted with the cold neutrality of an impartial judge when in fact they have completely failed to examine their prejudices and biases. He points out that the partiality and prejudice with which we are concerned is not overt, not something tangible on which the judge can put his or her finger. Yet many judges by failing to appreciate this are lulled into a false sense of security.[13] Judge Shientag emphasises that progress will only be made when judges recognise this condition as part of the weakness of human nature and then "[h]aving admitted the liability to prejudice, unconscious for the most part, subtle and nebulous at times, the next step is to determine what the judge, with his trained mind, can do to neutralize the incessant play of these obscure yet potent influences."[14] Judge Shientag concludes that "the judge who realizes, before listening to a case, that all men have a natural bias of mind and that thought is apt to be colored by predilection, is more likely to make a conscientious effort at impartiality and dispassionateness than one who believes that his elevation to the bench makes him at once the dehumanized instrument of infallible logical truth."[15]

But what, you may be asking, has all this got to do with my subject: "Will women judges really make a difference?" Well, I think it has a great deal to do with it and whether you agree with me or not will probably depend on your perception of the degree to which the existing law reflects the judicial neutrality or impartiality we have been discussing. If the existing law can be viewed as the product of judicial neutrality or impartiality, even although the judiciary has been very substantially male, then you may conclude that the advent of increased numbers of women judges should make no difference, assuming, that is, that these women judges will bring to bear the same neutrality and impartiality. However, if you conclude that the existing law, in some areas at lest, cannot be viewed as the product of judicial neutrality, then your answer may be very different.

Two law professors at New York University, Professor John Johnston and Professor Charles Knapp, have concluded, as a result of their studies of judicial attitudes reflected in the decisions of judges in the United States, that United States judges have succeeded in their conscious efforts to free themselves from habits of stereotypical thought with regard to discrimination based on colour.[16] However, they were unable to reach a similar conclusion with respect to discrimination based on sex and found that American judges had failed to bring to sex discrimination the judicial virtues of detachment, reflection and critical analysis which had served them so well with respect to other areas of discrimination. They state:

> "Sexism" — the making of unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals and social roles solely on the basis of sex

person or be in possession of any weapon or any knife or any other thing capable of being used as a weapon in circumstances that give rise to a reasonable inference that the thing has been used or is or was intended to be used as a weapon.

18. **NO DRIVING** You must not drive a motor vehicle at any time and

19. You must surrender your driver's licence to the Court Clerk at _____ forthwith and for the duration of this order.

20. **AREA RESTRICTION** You must not be within _____ kilometres of _____ at any time for any reason except _____.

21. **INTERMITTENT SENTENCE** On each occasion when a part of the intermittent sentence imposed for the present offence is to be served, you must arrive at the place where that sentence is to be served in an entirely sober condition, and not under the influence of alcohol or drugs of any description except as prescribed by a medical doctor.

10 BASIC RULES

1. If a person is serving a sentence longer than 2 years or a number of sentences which add up to more than 2 years, probation cannot be ordered.

2. A person cannot be gaoled, fined, and placed on probation for one offence (except when the probation is a statutory incident to an intermittent sentence).

3. If a conditional discharge is granted or the passing of sentence is suspended, the person must be placed on probation.

4. If an intermittent sentence is imposed, there must be an accompanying probation order but in British Columbia it cannot continue past the time when the sentence has been served.

5. The maximum term of a probation order is 3 years.

6. Except when probation is ordered to accompany a gaol sentence then being imposed, a probation order comes into force the day it is made and cannot be delayed.

7. The non-statutory conditions of a probation order must relate to the offence and also to the need to secure the future good conduct of the offender and prevent the repetition of offences. For instance, if a young man were convicted of motor vehicle thefts or of break and enters in which motor vehicles were used to remove stolen goods, it might be appropriate to order, as a condition of probation, that he not drive motor vehicles for a period of time. But such a condition would not be appropriate in the case of a person who stole a pair of blue jeans from a department store. Further, some conditions, particularly "area restrictions" can only be used in cases which really are exceptional and present a compelling need.

8. The non-statutory conditions of a probation order must be pronounced by the court with care and precision. They must then be accurately reproduced in the order which is given to the probationer.

9. If judges use this guide for the wording of commonly used conditions, it will assist court clerks who must type the orders and get them right. When a special condition is part of a particular order, the presiding judge might think it useful and wise to write that condition out in advance, recite it precisely in court, and then give it to the court clerk.

10. This guide is intended to deal only with probation orders under the Criminal Code. Probation orders made under the Young Offenders Act or the Offence Act involve important special considerations.

A similar guide to Young Offenders Act probation orders is also available.

Comments and suggestions are invited. Please write to:

Judge C. Barnett
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Williams Lake, B.C.
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The Provincial Judges' Revised Guide to the Making of Probation Orders Under The Criminal Code*

1. **FLEXIBLE REPORTING** You must report in person forthwith to a probation officer at _____ and thereafter as directed by the probation officer. Your probation officer will supervise your performance of this order.

2. **STRUCTURED REPORTING** You must report in person forthwith to a probation officer at _____ and thereafter once each _____ during the first _____ months this order is in force, and then as directed by the supervising probation officer. Your probation officer will supervise your performance of this order.

3. **JAIL AND PROBATION** This order comes into force on the expiration of your jail sentence. You must then report forthwith to a probation officer at _____ and thereafter (here continue the wording of condition 1 or 2.)

4. **PLACE OF RESIDENCE** You must continuously maintain your place of residence in British Columbia and if you move you must give your new address to your probation officer within 5 days.

5. **ALCOHOLISM COUNSELLING** You must attend for alcohol abuse counselling as directed by your probation officers.

6. **ALCOHOLISM TREATMENT** You must attend at a facility for the residential clinical treatment of alcoholism if your probation officer directs you to do so.

7. **PSYCHOLOGICAL COUNSELLING** You must attend as directed by your probation officer for counselling by a professionally qualified psychologist.

8. **PSYCHIATRIC TREATMENT** You must commence and/or continue such psychiatric treatment as may be considered medically appropriate. This includes the taking of such medications as may be prescribed.

9. **COMMUNITY WORK SERVICE** You must perform _____ hours of community service under the supervision of your probation officer or such other person as the probation officer may designate for that purpose. The place where and the time when work is to be performed is to be arranged with the probation officer or, alternatively, designated by the probation officer, and all the work is to be completed to the reasonable satisfaction of the probation officer not later than _____.

10. **RESTITUTION** You must pay restitution to _____ in the amount of $_____. Payment in full (by way of a money order or certified cheque only) is to be made at the office of the Court Clerk at _____ on or before _____.

11. **NON ASSOCIATION** You must not associate with or be found in the company of the following persons: _____, or any other person named in writing by your probation officer for good cause.

12. **NO CONTACT** You must not contact or attempt to contact _____ at any time, for any reason, and whether directly or indirectly except as may be specifically authorized in writing by your probation officer.

13. **STAY AWAY FROM CHILDREN** You must not be in the presence of any person under the age of _____ years unless the place where you are is a public place which is then open to all members of the public and actually being frequented by other adult members of the general public.

14. **GET WORK** You must make diligent efforts to find and maintain employment approved by the probation officer. If, on any occasion that you report to the probation officer as required by this order, you are not actually then employed, you must provide the probation officer with a written report concerning all efforts made to find employment since ceasing to be employed or since last reporting. This report must detail:
(a) Who was seen,
(b) What work was sought,
(c) What response was received,
Alternatively, you may attend an educational course or vocational training specifically approved by the probation officer.

15. **NO DRINKING** You must not consume alcoholic beverages at any time and

16. You must submit to a breathalyzer test upon the demand of any peace officer who has reasonable grounds to believe that there has been a failure to comply with the immediate preceding condition of this order.

17. **WEAPONS** You must not have upon your

* See also "Probation Orders Under the Criminal Code", 38 C.R.N.S. 165 and "Probation Order Guideline Conditions", 66 C.R. (3d) 181.

> differences — is as easily discernable in contemporary judicial opinions as racism ever was.[17]

Professor Norma Wikler, a sociologist at the University of California, has reviewed a number of other studies of judicial attitudes by legal researchers and social scientists and states that these confirm that male judges tend to adhere to traditional values and beliefs about the "natures" of men and women and their proper roles in society. They have found overwhelming evidence that gender-based myths, biases and stereotypes are deeply embedded in the attitudes of many male judges as well as in the law itself. They have concluded that particularly in areas of tort law, criminal law and family law, gender differences has been a significant factor in judicial decision-making. Many have concluded that sexism is the unarticulated underlying premise of many judgments in these areas and that this is not really surprising having regard to the nature of the society in which the judges themselves have been socialized.[18]

A number of strategies have been tried in the United States for the elimination of gender bias from the courts — legislative reform, enhanced legal representation of women litigants, increased numbers of women lawyers and judges. These measures have been accompanied by an intensive educational program aimed at judges right across the country. Women judges and women lawyers in the United States played a very active role in the creation of this program. They were able to persuade substantial numbers of their male peers that gender bias, like all other forms of bias they had worked so hard to eradicate, violated the core principle of judicial impartiality and neutrality and posed an increasing threat in the seventies and eighties to the maintenance of public confidence in the judiciary.

As might be anticipated, a direct frontal attack on gender bias in the courts and especially the institution of an educational program for judges on this subject, was highly controversial and would probably have died on the vine but for the support of a substantial number of the country's leading male judges and educators who recognized the profound changes that were taking place in the society including a major redefinition of the roles of men and women.

Professor Wikler has been one of the moving forces behind the United States program to sensitize judges to the problem of gender bias. She reports some modest indicators of success of the program, although she acknowledges that it is too early to assess the long term effects. She reports that requests for speakers and material generated from courses and workshops indicate a growing interest as does also the positive evaluation by judges themselves of the courses presented. Even more gratifying, attorneys practicing in States where the program has been actively promoted report a noticeable increase in judicial sensitivity to gender bias. Program materials have been cited in the courts and quoted in the judgments. Judicial Conduct Commissions are disciplining judges for gender biased behaviour such as sexist remarks to women lawyers and litigants and inappropriate comments in rape cases. Professor Wikler concludes that one very important goal has been achieved: gender bias is now a subject which judges and judicial educators think and care about.[19]

Another development in the United States has been the establishment of judicially appointed Task Forces to investigate the extent to which gender bias exists in the judiciary. The first of these Task Forces was created in New Jersey in 1982 and, as stated by Chief Justice Wilentz, was mandated to "investigate the exent to which gender bias exists in the New Jersey judicial branch, and to develop an educational program to eliminate any such bias".[20] Since 1982 over twenty other States have created Task Forces. Lynn Hecht Schafran, in her article "The Success of the American Program", reports that the Task Forces have significantly enhanced judicial education programs and have created a level of public awareness that generates its own pressures for reform.[21]

Schafran identifies four reasons why a judicially appointed Task Force is important as opposed to other groups outside the court system focussing on particular concerns. The first is that a gender bias Task Force is able to look at a broad range of issues and demonstrate a pattern of gender bias that manifests itself throughout the judicial system. The second reason is credibility. She explains this critical reason in the following manner:

> When a coalition of rape crisis counsellors asserts that rape victims are ill treated in court, or a women's bar association claims that women attorneys are denied a fair share of appointments to challenging and lucrative civil and criminal cases, these charges are heard as the claims of special interest groups. When a blue ribbon panel appointed by a state's chief justice makes these same charges, people listen. There was little in what the New Jersey and New York Task Forces reported that numerous women's rights organizations and feminist legal commentators have not been saying for years, but the task force reports twice made the front page of the New York Times.[22]

The third reason relates to the administration of the Task Force. The Chief Justice of the State is in a position to authorize funds, compel co-

operation, endorse and propose reforms and ensure their implementation, and support judicial education on the subject. A final reason in favour of the Task Force route to reform is that such a task force brings together judges, lawyers, law professors, and community activists to study an issue which many of them do not initially appreciate is an issue at all. Schafran reports that Task Force members from New Jersey and New York "who start out with no knowledge of gender bias in the courts, or even a conviction that the idea is nonsense, emerge from the data collection process convinced that the problem is real and has deeply serious implications for the administration of justice."[23].

So, where do we stand in Canada on this matter? Well, as you might expect, feminist scholars in Canada have over the past two decades produced a vast quantity of literature on the subject, some of it, in my view, very insightful, very balanced and very useful, and some of it very radical, quite provocative and probably less useful as a result. But all of it, it seems to me, is premised, at least as far as judicial decision-making is concerned, on two basic propositions, one that women view the world and what goes on in it from a different perspective from men, and two that women judges, by bringing to bear that perspective on the cases on which they sit, can play a major role in introducing judicial neutrality and impartiality into the justice system.

Let me say right away from my own experience as a judge of fourteen years' standing, working closely with my male colleagues on the bench, that in my view there are probably whole areas of the law on which there is no uniquely feminine perspective. This is not to say that the development of the law in these areas has not been influenced by the fact that the lawyers and the judges have all been men. But rather that the principles and the underlying premises are so firmly entrenched and, in my opinion, so fundamentally sound that no good would be achieved by attempting to re-invent the wheel, even if the revised version did have a few more spokes in it. I have in mind areas such as the law of contract, the law of real property and the law applicable to corporations. In some other areas of the law, however, I think that a distinctly male perspective is clearly discernable and has resulted in legal principles that are not fundamentally sound and should be revisited as and when the opportunity presents itself. Canadian feminist scholarship has, in my view, done an excellent job of identifying those areas and making suggestions for reform. Some aspects of the criminal law in particular cry out for change since they are based on presuppositions about the nature of women and women's sexuality that in this day and age are little short of ludicrous.

But how do we handle the problem that women judges, just as much as their male counterparts, are subject to the duty of impartiality? As we said at the outset, judges must not approach their task with pre-conceived notions about law and policy. They must approach it with detachment and, as Lord MacMillan said, purge their minds "not only of partiality to persons but of partiality to arguments.[24] Does this then foreclose any kind of "judicial affirmative action" to counteract the influence of the dominant male perspective of the past and establish judicial neutrality through a countervailing female perspective? Is Karen Selick, writing recently in the Lawyers Weekly, correct when she argues that offsetting male bias with female bias would only be compounding the injustice?[25] Does the nature of the judicial process itself present an insuperable hurdle so that the legislatures rather than the courts must be looked to for any significant legal change?

I think in part this may be so. Certainly, the legislature is the more effective instrument for rapid or radical change. But I see no reason why the judiciary cannot exercise some modest degree of creativity in areas where modern insights and life's experience have indicated that the law has gone awry. However, and I think this is extremely important, it will be a Pyrrhic victory for women and for the justice system as a whole if changes in the law come only through the efforts of women lawyers and women judges. The Americans were smart to realize that courses and workshops on gender bias for judges male and female are an essential follow-up to scholarly research and learned writing. In Canada we are just beginning to touch the fringes.

The first national, interdisciplinary conference on the relationship between judicial neutrality and gender equality was held in Banff, Alberta, in May of 1986. At the conference judges, academics, practicing lawyers and experts in anthropology, political science, sociology and social welfare examined judicial behaviour in equality related matters. The judicial acceptance of traditional stereotypes concerning women was noted as well as its impact in Canada on important areas of constitutional equality litigation, family law, criminal law, tort law and human rights.[26]

Mr. Justice Rothman of the Quebec Court of Appeal, one of the speakers at the conference, endorsed the approach adopted in the United States to counteract gender bias through nationwide educational programs for judges and the creation of judicial task forces. In his perception, women face the same kind of discrimination in Canada as they do in the United States and we should be working to change the old attitudes *now*. He suggested that conferences and seminars for newly appointed judges would be a good

taken from a recent publication on aboriginal self-determination. What it has to say is important to all of us for I predict that it will define the nature of our relationship as judges to the aboriginal communities and people we face and meet in the future.

> Throughout the world, aboriginal people, are taking control of their own lives. After centuries of subjugation, they are reaffirming the validity of their own cultures and redefining their identities within the context of contemporary society. Underlying this revitalization is a shift of power from external entities, including colonial administrations, to the aboriginal people themselves. Political self determination is growing, economic priorities are being reordered, and territorial bases are being reestablished.
>
> Central to this process is control over education. The key to the future of any society lies in the transmission of its culture and worldview to succeeding generations. The socialization of children, through education, shapes all aspects of identity, instilling knowledge of the group's language, history, traditions, behaviour, and spiritual beliefs. It is for this reason that aboriginal peoples have placed such a high priority on regaining control over the education of their children.[25]

[25] Supra n 20 @ 1

In several cases reference is made to the difficulties experienced by the accused as a result of change in the accused's cultural environment. In some cases the individual accused has moved from one cultural environment to another such as from the reserve to the city, and gotten into trouble there. In other cases the changes have come to the individual's own cultural environment in which he was born and raised. In both instances cases have held that what can be termed as cultural shock may be considered as a mitigating factor sufficient to attract the courts leniency in sentencing.[21]

Clearly, as well the court can take into account the differential impact of incarceration upon aboriginal people from remote areas.[22]

The Law Reform Commission of Canada has stated in the past:

> "The major role of criminal law and the criminal process is an educative one.[23]

Some of our earlier cases are resplendent with comments about the importance of bringing home to aboriginal people the purposes of the criminal process. In **British Law and Arctic Men**[24] Crown Prosecutor, C.C. McCaul who prosecuted two Inuit in 1916, for murder is quoted as saying in his opening address:

> "These remote savages, are really cannibals, the Eskimo of the Arctic have got to be taught to recognize the authority of the British born...."
>
> ...just as in the same way it was necessary to teach the Indians of the Indian Territories and of the North West Territories that they were under the law....
>
> ...this is one of the outstanding ideas of the government: and the great importance of this trial lies in this fact: yet for the first time in history these people...will be brought in contact with and will be taught what is white's man justice.

The tone of the statement speaks eloquently of a darker time in our history when racism was allowed full expression. In our current age of enlightenment and racial tolerance, one would hope that expressions such as that never find their way into the thoughts of any person not to speak of the hope and expectation that they may never be voiced.

Conclusion

From all of the cases, one can point to the following factors which courts have taken into account:

1. Courts are allowed to and do take notice of the aboriginality of the accused but the reasons for their doing so are not always clear.

2. The cultural background of an aboriginal person is a proper factor to be considered and is a factor which arises under the ordinary principles of sentencing.

3. In weighing the circumstances of aboriginal accused the courts have taken into consideration that,
   a) the shock of rapid acculturation may be a mitigating factor;
   b) incarceration may be more punitive to some individual offenders from remote communities;
   c) aboriginal people have a shorter life expectancy.

4. In some cases the courts have considered community attitudes towards the offence and or the offender. The social circumstances prevailing in the community and the community's likely reaction to the sentence.

5. The fact that the victim may have been an aboriginal person is not a legitimate consideration and has been rejected as a factor in a number of cases. Courts have however unfortunately commented upon the aboriginality of the victim without indicating why they took notice of that fact.

The sentencing process has been accepted as a means of educating aboriginal people in the values of the criminal justice system, but there remains an open question as to the degree to which such means have accomplished a purposeful end and the degree of success which has been achieved. In Manitoba if experience is any measure, the advent of aboriginal controlled child welfare agencies has had an ameliorative effect on the impact of the judicial system on aboriginal people at least insofar as child welfare matters are concerned. Whether that could hold true for greater involvement in the criminal justice system is a matter which I would dearly love to discuss with you, but perhaps at another time.

Let me leave you with the following quote,

[21]. See R.V. O'Nalik, (1980), 27 A.R., 497 and see R. v. Ikalowjuak, (1980), 27 A.R. 492, R.v. Krenjnektak (unreported), N.W.T.S.C., February 22, 1980, Case No. 2063, R.v. Aoudla, 1979 Criminal Law Quarterly at pages 270).

[22]. See R.v. Fireman supra, R.v. Capot-Balance (unreported), March 14, 1978, (B.C.C.A.), Case No. 770965, R.v. Esagoak (unreported), January 11, 1971, (N.W.T. Court), Case No. W3-433, R.v. Teemotee (unreported), December 19, 1969, (N.W.T. Court), Case No. 37-403.

[23] See Guidelines: Dispositions and Sentences in the Criminal Process, Information Canada Ottawa, 1976 at page 53.

[24] In **British Law and Arctic Men** (Western Producer Prairie Books, 1979)

place to start but, in addition, courses on gender bias should be part of the continuing education programs for judges at all stages of their careers. Justice Rothman added that it is not, however, going to be enough to sensitize judges to equality issues if lawyers are not sensitized to them as well![27]

The Canadian Judicial Council and the Canadian Judicial Centre have both recognized the need for judicial education in this area and will include gender issues in their summer seminars for judges this year. I understand that the Centre hopes to subsequently present the program in a number of locations across the country and the course materials will be available to all Canadian judges. I heartily endorse this initiative. It is, in my view, a significant first step towards the achievement of true judicial neutrality. But it is only a first step and there is a long way to go.

Coming back then to the question whether the appointment of more women judges will make a difference. Because the entry of women into the judiciary is so recent, few studies have been done on the subject. Current statistics, however, show that just over nine percent of federally appointed judges are women[28] and it is reasonable to assume that more and more women will be appointed to the Bench as more and more women become licensed to practice law. Will this growing number of women judges by itself make a difference?

The expectation is that it will; that the mere presence of women on the bench will make a difference. In an article entitled "The Gender of Judges" Suzanna Sherry, an Associate Law Professor at the University of Minnesota, suggests that the mere fact that women are judges serves an educative function and helps to shatter stereotypes about the role of women in society that are held by male judges and lawyers as well as by litigants, jurors and witnesses.[29]

Judge Gladys Kessler, former President of the National Association of Women Judges in the United States, defends the search for competent women appointees to the bench. She says:

> But the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged.[30]

Justice Wald has expressed similar sentiments. She believes that women judges are indispensable to the public's confidence in the ability of the courts to respond to the legal problems of all classes of citizens.[31]

Diane Martin, a criminal lawyer writing in the Lawyers Weekly, sees another way in which the presence of women on the bench is helpful and constructive. It is easier, she says, for women lawyers to appear as counsel before a woman judge. She says the "difference is that you are "normal" — you and the judge have certain shared experiences and a shared reality that removes, to a certain extent, the need to "translate" your submissions into "man talk" or a context that a male judge will understand."[32] The woman judge does not see you as "out of place" or having "something to prove by appearing in a courtroom arguing a case before her."[33]

For women counsel, appearing in front of a woman judge also decreases the risk of sexist comments and inappropriate efforts at humour. The courtroom treatment of women litigants, witnesses and lawyers was examined by the New Jersey and New York task forces. The New York Task Force found that "[w]omen uniquely, disproportionately, and with unacceptable frequency must endure a climate of condescension, indifference, and hostility".[34] The New Jersey Task Force found strong evidence that women are often treated differently in courtrooms, in judges chambers and at professional gatherings.[35] As Justice Rothman pointed out at the Banff conference, there is no excuse for a judge allowing himself or anyone else in his courtroom to make unprofessional or inappropriate references to gender. He saw as a possible solution the appointment of more women judges and more courteous and sensitive male judges![36]

Some feminist writers are persuaded that the appointment of more women judges will have an impact on the process of judicial decision-making itself and on the development of the substantive law. As I mentioned earlier, this flows from the belief that women view the world and what goes on in it from a different perspective from men. Some define the difference in perspective solely in terms that women do not accept male perceptions and interpretations of events as the norm or as objective reality. Carol Gilligan, a Professor of Education at Harvard University, sees the difference as going much deeper than that. In her view women think differently from men, particularly in responding to moral dilemmas. They have, she says, different ways of thinking about themselves and their relationships to others.[37]

In her book, *In a Different Voice*[38], Gilligan analyses data she collected in the form of responses from male and female participants in a number of different studies. These responses, she submits, support her central thesis that women see themselves as essentially connected to others and as members of a community while men see themselves as essentially autonomous and independent of others. Gilligan makes

no claim about the origins of the differences she describes. She does, however, use the psychoanalytical work of Dr. Nancy Chodorow as a starting point.[39] Chodorow postulates that gender differences arise from the fact that women do the mothering of children. Because the gender identity of male children is not the same as their mothers, they tend to distance and separate themselves from their mothers' female characteristics in order to develop their masculinity. Female children, on the other hand, define themselves through attachment to their mothers.[40] Masculinity is therefore, according to Gilligan, defined through separation and individualism while feminity is defined through attachment and the formation of relationships. The gender identity of the male, she submits, is threatened by relationships while the gender identity of the female is threatened by separation.[41]

Gilligan's work on conceptions of mortality among adults suggests that women's ethical sense is significantly different from men's. Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations, the one to the other, because the important thing is to preserve relationships, to develop an ethic of caring. The goal, according to women's ethical sense, is not seen in terms of winning or losing but rather in terms of achieving an optimum outcome for all individuals involved in the moral dilemma.[42] It is not difficult to see how this contrast in thinking might form the basis of different perceptions of justice.

I think there is merit in Gilligan's analysis. I think it may in part explain the traditional reluctance of courts to get too deeply into the circumstances of a case, their anxiety to reduce the context of the dispute to its bare bones through a complex system of exclusionary evidentiary rules. This is, it seems to me, one of the characteristic features of the adversarial process. We are all familiar with the witness on cross-examination who wants to explain his or her answer, who feels that a simple yes or no is not an adequate response, and who is frustrated and angry at being cut off with a half truth. It is so much easier to come up with a black and white answer if you are unencumbered by a broader context which might prompt you, in Lord MacMillan's words, to temper the cold light of reason with the warmer tints of imagination and sympathy.[43]

It may explain also the hostility of some male judges to permitting intervenors in human rights cases. The main purpose of having intervenors is to broaden the context of the dispute, to show the issue in a larger perspective or as impacting on other groups not directly involved in the litigation at all. But it certainly does complicate the issues to have them presented in polycentric terms.

Professor Patricia Cain of the University of Texas in an article entitled "Good and Bad Bias: A Comment on Feminist Theory and Judging" says:

> What we want, it seems to me, are lawyers who can tell their client's story, lawyers who can help judges to see the parties as human beings, and who can help remove the separation between judge and litigant. And, then, what we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment.[44]

Obviously, this is not an easy role for the judge — to enter into the skin of the litigant and make his or her experience part of your experience and only when you have done that, to judge. But I think we have to do it; or at least make an earnest attempt to do it. Whether the criticism of the justice system comes to us through Royal Commissions, through the media or just through our own personal friends, we cannot escape the conclusion that in some respects our existing system of justice has been found wanting. And as Mr. Justice Rothman says — the time to do something about it is *now.*

One of the important conclusions emerging from the Council of Europe's Seminar on Equality between Men and Women held in Strasbourg last November is that the universalist doctrine of Human Rights must include a realistic concept of masculine and feminine humanity regarded as a whole, that human kind *is* dual and must be represented in its dual form if the trap of an asexual abstraction in which "human being" is always declined in the masculine is to be avoided.[45] If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they *will* make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.

Endnotes

1. As given in F.P.A., *Book of Quotations* (1952) at p. 466.
2. G. Winters (ed.), *Handbook for Judges,* (1975), The American Judicature Society.
3. As quoted in L. Yankwich, "The Art of Being a Judge", in Winters, *supra,* note 2, pp.3-17 at p. 4.
4. B. Shientag, "The Virtue of Impartiality", in Winters, *supra,* note 2, pp. 57-64.
5. *supra,* note 4 at p. 62.
6. *supra,* note 4 at p. 62.
7. Lord Justice Scrutton, "The Work of the Commercial Courts", (1921) 1 *Cambridge L.J.* 6 at p. 8.

In **Sentencing in Canada**[19] on the question of the importance of cultural background of the accused sentencing one writer states:

> "Clearly, such considerations are highly personal to the accused and his own background, and as native populations become more culturally integrated, particularly in large urban areas, it is to be expected that cultural differences will recede in importance in the sentencing process."

Simply put, what the point appears to be is that if the accused has no connection to his aboriginal culture, then it is no longer a factor to take into consideration.

However, some writings on the topic suggest that the appearance of a lack of connection to past cultural practices may be deceiving:

> In its broadest sense, culture is everything, material and nonmaterial, learned and shared by people as they come to terms with their environment. It includes the totality of a group's shared procedures, belief systems, worldview, values, attitudes, and perceptions of life implicit in the group's material objects. Every culture is faced with the task of coming to terms with the ecological circumstances in which it finds itself. For this reason, there exists in Canada a wide range of Indian cultures. Despite the variations however, a common thread runs through each of these cultures. That tread is a common spiritual worldview; it is an attitude towards the world and our place within it. Traditional Indian society was based on the knowledge that all things in life are related in a sacred manner and are governed by natural or cosmic laws. The land (Mother Earth) is held to be sacred, a gift from the Creator. In their relationship to the land, people accommodate themselves to it, in an attitude of respect and stewardship. To do otherwise would be to violate a fundamental law of the universe. Proper conduct is determined by natural laws which obliterate the distinction between "sacred" and "secular" or the "laws of nature" and the "rules of society". It is through the understanding of this reciprocal relationship between humans and nature that we are provided with the substance, both physical and spiritual, that we require to live. Human law is a reflection of natural law. All of the structures, customs and ways of life of an Indian community grew out of this central understanding.

Culture is a complex concept to understand. This is especially true of Indian cultures because we have been taught to understand them according to narrow and inaccurate stereotypes. When they think of Indian cultures, many people conjure up images of art, totem poles and powwow dancing, or they think in terms of material culture of canoes, tepees, moccasins and feather head dresses. Indeed, this is how Indian culture is usually taught in schools. Viewed in this way culture becomes a collection of objects and visible rituals, understood apart from their real meaning within the particular culture context. Because this view of culture emphasizes the past, it gives the impression that Indian cultures are static and traditional, rather than dynamic and contemporary. Even more damaging is the common view that the nonmaterial aspects of traditional Indian culture have disappeared.

Today's Indian cultures are not aboriginal cultures. Many earlier sources of economic existence are gone (although traditional economic pursuits such as hunting, fishing, and trapping are still viable ways of earning a living in many northern Indian communities). Much is being lost because of the assimilation pressures of government policy and the innovations of modern technology. Some Indian languages are on the verge of extinction. Many Indians have adopted Christianity and no longer practice their sacred ways. As well many institutions of larger society have replaced aboriginal institutions. In dress, housing, employment, and other external aspects of culture, Indian peoples are becoming almost indistinguishable from other Canadians.

But to conclude, as did the authors of the cultural assimilationist education policy, that Indians would eventually disappear as a distinctive cultural group would be a serious mistake. Indians have not assimilated. Their identity as separate people with a vision of reality and destiny and of themselves and their world remains an essential feature of their lives. Indians are engaged in a significant revitalization of their cultures.[20]

There is no question but that in some communities social chaos appears to prevail. In such communities it is sometimes hard to believe never mind to detect the existence of an aboriginal culture. Even that however, can be a factor to take into consideration.

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[19] **Sentencing in Canada** (R. Paul Nadin-Davis, Editor)

[20]. Indian Education In Canada Volume 2: The Challenge (1986) University of British Columbia Press Vancouver B.C., Canada, (Jean Barman, Yvonne Hébert and Don McCaskill eds.) @ 156

reasons the cultural background factor of aboriginal Canadians. In one of the earliest cases to comprehensively deal with the subject the Ontario Court of Appeal per Brooke JA stated:

> In my opinion, one can only proceed to consider the fitness of the sentence meted out to this man upon a proper appreciation of his cultural background and of his character, as it is only then that the full effect of the sentence upon him will be clear.[16]

In that case the aboriginal accused had been convicted of manslaughter and the trial judge had rejected the contention that a lesser punishment would suffice to deter the accused and the community. He imposed a term of ten years incarceration on the appellant. The Ontario Court of Appeal after consideration of the importance of the cultural background of the accused and his community decided that a much shorter period would suffice and imposed a period of incarceration of two years (per Brooke, J.A.).

> In my opinion, one can only proceed to consider the fitness of the sentence meted out to this man upon a proper appreciation of his cultural background and of his character, as it is only then that the full effect of the sentence upon him will be clear. When one considers these things, it is my opinion that even a short term of imprisonment in the penitentiary is substantial punishment to him. In the Appellant's case, despite the best efforts of those who must be responsible for his care, the effect of his removal from his environment and his imprisonment would no doubt dull every scene by which he has lived in the north.
>
> ...does his sentence of ten years take into consideration the desirability of his rehabilitation? From what I have said, in my view, it follows that it does not. ....I think it is probable that such a term will greatly reduce the chance of this man assuming a normal tolerable role on returning to his society and may result in the creation of a social cripple. ...The people of the settlement participated in and witnessed the arrest of the appellant and then they know he has been segregated from them by proceedings in a distant place. To the rest of the community the deterrent lies in the fact that this unsophisticated man of previous good character was sent to prison for his crime and surely, it is not dependent on the magnitude of the sentence for its value. I do not think it adds greatly to the deterrent value of what has taken place at such a severe sentence be imposed. What is important in these circumstances is that to the whole community justice appears to have been done and there will be respect for the law. This is best accomplished in the case of this first offender if he is returned to his society before time makes him a stranger and impairs his ability to live there with some dignity.

Following that case, cultural background of the accused particularly as it relates to Canada's native peoples became an important consideration. Tallis J., of the North West Territories Supreme Court said as follows:

> "In dealing with the question of sentencing, courts in the North West Territories can not overlook the fact that society has the basic roots of ... three cultures. When the common law was transplated into Canada it proved to be very flexible but native people, whether Inuit or Indian, had their own system of laws, tribunals, penalties, and in effect their own justice system. Furthermore, such cultures did not have jails. This was a new concept introduced from the white man's world. It continues to be little understood by many of the elders in the Indian and Inuit communities. Consequently, a great deal of consideration is given to the possibility of imposing a non-custodial sentence with terms or probation or community service orders. With approximately fifty percent of the population being 18 years or younger this is particularly important. In the case of youthful first offenders, custodial sentences are generally avoided.[17]

Clearly then, even where imprisonment is mandated the term may be modified to reflect the differential impact and difficulties of incarceration for a person from a remote settlement.[18]

Probably one of the trickiest issues arises however when considering those accused for whom traditional aboriginal culture is no longer as great an influence. According to the 1986 Canada census only 25% of aboriginal people under the age of 21 reported an aboriginal language as their mother tongue (i.e. spoken primarily in the home). This is generally reflective of a decline in traditional aboriginal cultures resulting from assimilationist pressures and what some writers have termed a breakdown of societal bonds. When confronted with an aboriginal accused who has no identity with his aboriginal identity, what does one do?

[16] R.V. Fireman [1971] 3 O.R. 380 (C.A.)
[17] Sentencing in the North in Grossman, B.A. (Ed) New Directions in Sentencing (1980, Toronto: Butterworths at 305)
[18] See Fireman supra and R. v. Naukatsiak (1977), 20 Criminal Law Quarterly, 290 (N.W.T.S.C.).

8. J. Griffith, *The Politics of the Judiciary,* (1977), Manchester University Press.
9. *supra,* note 8 at pp. 209-215.
10. *supra,* note 8 at p. 213.
11. Nemetz C.J.B.C., "The Concept of an Independent Judiciary", (1986) 20 *U.B.C. Law Rev.* 286 at p. 290.
12. R. Abella, "The Dynamic Nature of Equality", in S. Martin and K. Mahoney (eds.), *Equality and Judicial Neutrality,* (1987), Carswell, pp. 3-9 at pp. 8-9.
13. *supra,* note 4 at p. 57.
14. *supra,* note 4 at p. 58.
15. *supra,* note 4 at p. 58.
16. J. Johnston and C. Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective", (1976) 46 *N.Y.U. L.Rev.* 675.
17. *supra,* note 16 at p. 676.
18. N. Wikler, "On the Judicial Agenda for the 80's: Equal Treatment for Men and Women in the Courts", (1980) 64 *Judicature* 202.
19. N. Wikler, "Identifying and Correcting Judicial Gender Bias", in Martin and Mahoney, *supra,* note 12, pp. 12-21.
20. As quoted in L. Schafran, "The Success of the American Program", in Martin and Mahoney, *supra,* note 12, pp. 412-420 at p. 412.
21. *supra,* note 20 at pp. 412-13.
22. *supra,* note 20 at pp. 413-14.
23. *supra,* note 4 at p. 62.
24. *supra,* note 4 at p. 62.
25. K. Selick, "Adding More Women Won't End Bias in Justice System", (1990) 9 *Lawyers Weekly*, No. 35, 7 at p. 7
26. Preface to Martin and Mahoney, *Equality and Judicial Neutrality, supra,* note 12 at pp. iii-iv.
27. M. Rothman, "Prospects for Change in Canada: Education for Judges and Lawyers", in Martin and Mahoney, *supra,* note 12, pp. 421-427.
28. Canadian Centre for Justice Statistics, April 1989.
29. S. Sherry, "The Gender of Judges", (1986) 4 *Law and Inequality* 159 at p. 160.
30. As quoted in J. Scott, "Women on the Illinois State Court Bench", (1986) 74 *Illinois Bar Journal* 436 at p. 438.
31. P. Wald, "Women in the Law - Despite Progress, Much Still Needs to be Done", (1988) 24 *Trial,* No. 11, 75 at p. 80.
32. D. Martin, "Have Women Judges Really Made a Difference?", (1986) 6 *The Lawyers Weekly,* No. 14, 5 at p. 5.
33. *supra,* note 32 at p. 5.
34. *supra,* note 20 at p. 419.
35. *supra,* note 20 at p. 415.
36. *supra,* note 27 at p. 427.
37. See G. Gilligan, *In a Different Voice - Psychological Theory and Women's Development,* (1982), Harvard University Press.
38. *supra,* note 37.
39. *supra,* note 37 at p. 8.
40. N. Chodorow, *The Reproduction of Mothering - Psychoanalysis and the Sociology of Gender, (1978), University of California Press, at pp. 91 and 167-170.*
41. *supra,* note 37 at p. 8.
42. *supra,* note 37, see for example, pp. 16-18, 24-32 and 163-165.
43. *supra,* note 4 and p. 62.
44. P. Cain, "Good and Bad Bias: A Comment on Feminist Theory and Judging", (1988) 61 *Southern California Law Rev.* 1945 at p. 1954.
45. Council of Europe Committee on Equality between Men and Women. Seminar on "The Democratic Principle of Equal Representation - Forty Years of Council of Europe Activity", Strasbourg, 6-7 November, 1989.

Dealing with the Aboriginal Offender*
Indians and the Criminal Law[1]

by: Associate Chief Judge Murray Sinclair**

INTRODUCTION

Events of the past few years have given rise to the question of whether the administration of justice in Canada - particularly the criminal justice and child welfare components of that system — must re-evaluate the manner in which it goes about its affairs in view of the obvious adverse impact which it has upon one segment of our society, the aboriginal peoples. The Report of the Royal Commission into the Prosecution of Donald Marshall in Nova Scotia, the Inquiry into Policing on the Blood Reserve in Alberta, the trial of the Innu people in Labrador and our own Inquiry into the Administration of Justice and Aboriginal People in Manitoba have (or should have) given us pause to consider whether the time has arrived when we as judges or the administration over which we preside should perhaps rethink some of the basic assumptions with which we have been operating.

If nothing else, at least we should be determining the extent to which we can be improving our relations with aboriginal people generally, and improving the way we handle cases concerning the significant numbers of aboriginal people who will appear before us.

Statistics are very clear. Aboriginal people are over-represented in the jails and prisons of this country to the tune of five or six times their presence. In many Provinces, particularly in Western Canada, aboriginal people represent the single largest identifiable group of accused who will appear before us. It would appear as well that with the greater growth rate among aboriginal people, there is a good chance that those numbers in our courts will increase. In Manitoba (and the statistics would appear to hold true for most other provinces) approximately 45% of the aboriginal population are under the age of 15 and over 50% are under the age of 18. The majority of the current inmate population in our jails are under the age of 30 and the majority of youth in the youth courts of Western Canada are aboriginal.

Frankly there is every possibility that the problems faced by the justice system insofar as aboriginal accused are concerned will increase in the near future rather than decrease. One of the major problems with which we will have to come face to face is the extent to which systemic discrimination plays a part in the problem of over representation and whether cultural or ethnic bias among the judiciary plays a role.

It is rather surprising to note that there has been little attention given to the role of cultural or ethnic bias in the justice system. Recently I had the privilege of hearing a presentation by Professor Norma Wikler of the University of California to the judges of our court on the question of gender bias in the court system (a presentation which I would encourage all other Provincial Courts to consider arranging). While the presentation was unfortunately far too short, it nonetheless brought home to members of our court that there exists within all of us biases and influences of which we are all unaware, and which cause us to behave and think in certain ways, sometimes to the detriment of others in society. The same point was made recently I might add, by Madame Justice Bertha Wilson in a presentation to a special session of Osgoode Hall Law School.

Gender bias we were told is bias which arises from our upbringing and develops subliminally — almost unconsciously. The predominance of men among the judiciary has fostered continued gender bias we were told and unless we make an effort to recognize it gender bias can go undetected. Both presentations concluded by saying that if we as judges do not take control of the issue of gender bias, and begin to change some of our patterns of thought and action which are not gender neutral, then change will be forced upon us.

The same is true for cultural or ethnic bias as well. We must begin to question whether we are able to deliver ourselves to the judicial process free from influences which are culturally in conflict with the aboriginal accused with whom we deal. Very little has been written in this area, but what little exists, suggests that we judges need to do more work.

My primary purpose today is to speak about "Dealing with the Aboriginal Offender". I want to talk primarily about sentencing aboriginal accused, but I also wish to touch upon the issues of presiding in aboriginal communities and some special problems which may arise during the course of trying aboriginal accused.

* Presentation to New Provincial Court Judges Far Hills Inn/Val Morin Québec Canada — April 5, 1990
**Provincial Court of Manitoba

[1] At the time this paper was presented, I was involved in the co-writing of the Report of the Public Inquiry into the Administration of Justice and Aboriginal people of Manitoba. The views expressed in this paper are mine alone and are not necessarily the views of the Inquiry.

Most aboriginal societies maintain institutions which are quite effective in rehabilitating antisocial members of society. In a leading Australian case the court imposed a sentence that required the offender to subject himself to the discipline and training of his own community.[11] Canadian cases however have generally not followed this precedent although there does not seem to be any legal bar to have such conditions imposed as part of a probation order or as a condition of a suspended sentence.

Some courts have however included as part of their sentencing, traditional aboriginal means of dealing with offenders. In a case from the North West Territories[12], a sentence of banishment from the accused's community, which was a traditional Inuit means of dealing with community troublemakers and those who had breached community customs, was upheld. Many courts have utilized community service work orders as a way to reinforce traditional aboriginal values.

Yet one must keep in mind that there are probably some limits to the utilization of aboriginal values by the criminal justice system. In a case arising in the North West Territories the North West Territories Court of Appeal refused to allow an Inuit accused convicted of sexual assault of a 14 year old girl, to serve his sentence in his remote community under the supervision of a traditional elders committee as ordered by the trial judge. Their reasoning appeared to be that the utilization of such committees should not circumvent the application of national standards insofar as the criminal law is concerned and that particularly in cases where an accused has been convicted of sexual assault upon a fourteen year old a period of incarceration requiring the removal of the offender from the community was warranted.

Courts have also generally been unwilling to take into account aboriginal customs which are in direct conflict with the Criminal Code. While there have been no cases dealing with the question of what evidence is required to establish aboriginal customs, one court has commented that while it may be generally acceptable in aboriginal communities for an aboriginal man to hit his wife, the Criminal Code must be seen to apply to all Canadians and that in such instances the Code must prevail.[13] Some courts in fact have gone so far as to say that the occurrence of customs which are repugnant to the general criminal law of Canada may be a reason to impose an even harsher sentence in order to deter others from the practice.[14]

In a case arising from the North West Territories it was argued that an order under the Criminal Code which restricts a convicted person's right to use firearms has more serious consequences for a northerner who is dependent upon living off the land, than for a person who is not part of a subsistence economy. The argument that such orders constituted cruel and unusual punishment contrary to the Charter did not succeed however. It would appear that no argument was advanced that the Constitutionally protected aboriginal right to hunt overrode the Criminal Code prohibition.[15]

In the Sailla case mentioned above the Court did hold that a term of banishment from a remote northern community reflective of community values was not contrary to the Charter of Rights. Although an express finding was made it was part of the Inuit culture no mention was made as to whether it was a right recognized and affirmed under Section 35 of the Constitution Act, 1982.

The Cultural Factor in Sentencing

In addition to looking at the cultural resources of the community for assistance in sentencing the accused appropriately, courts have used the accused's cultural background directly as a mitigating circumstance in sentencing. The interesting thing is that there are probably several hundred cases in the law reports in which judges have mentioned that the accused was an "Indian" but makes no mention thereafter of that fact and does not indicate to what extent he took it into account. Yet, the mere fact that it was mentioned suggests some importance was attributed to it, but it is almost impossible to determine what that is.

The governing rule in sentencing can probably be stated as being that each case must be judged on its own merits, taking into account the circumstances of the offence and the offender.

The principles of sentencing generally accepted by our courts are:

1) the protection of the public,
2) the punishment of the offender,
3) the deterrent effect of the punishment not only upon the offender but also upon others who may be tempted to commit such an offence,
4) the reformation and rehabilitation of the offender.

Recently courts have discussed in their

[11] Jabaltjari vs. Hammersley (1977) 15 ALR 94 (NTSC).
[12] Sailla vs. R. [1984] NWTR 176
[13] See R. vs. JSB [1984] NWTR 210 (SC)
[14] See R. vs. Baillargeon [1986] NWTR 121 (SC).
[15] R. v Tobac [1985] NWTR 201 (CA); R. v Weyallon [1985] NWTR 264, leave to appeal to the SCC refused [1985] NWTR xlii.

aboriginal and other people are not interrogated when they are disabled by illness, drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.

8. Should an aboriginal seek legal assistance, reasonable steps should be taken to obtain such assistance. If an aboriginal states he does not wish to answer further questions or any questions the interrogation should not continue.

9. When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

It may be thought by some that these guidelines are unduly paternal and therefore offensive to aboriginal people. It may be thought by others that they are unduly favourable to aboriginal people. The truth of the matter is that they are designed simply to remove or obviate some of the disadvantages from which aboriginal people suffer in their dealings with police. These guidelines are not absolute rules departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements are excluded.

The judges of this court do not consider the effectiveness of police investigation will be set back by compliance with these recommendations. It is basic that persons in custody should be treated with courtesy and patience.

The Anunga rules have now become almost universally applied throughout Australia in one form or the other and have become part of the training manuals for police departments in that country. Naturally, much controversy arose, particularly from police authorities when this case was pronounced, but recently, the existence of the rules was strongly endorsed by the Australian Law Reform Commission in their Report on the Recognition of Aboriginal Customary Law in 1988.

It is interesting that in Australia where the brutal treatment of aboriginal people by police authorities has been the focus of international research and comment and where the over-representation of aboriginal people in the justice system probably exceeds the state of affairs in Canada, that such an approach to the reception of statements by aboriginal accused has been judicially mandated.

Judicial Recognition of Cultural Differences in Aboriginal Communities

In many areas of the country, aboriginal people receive their judicial services from our circuit court system. In our province, our judges fly or drive out to the local community where court is held from Winnipeg or Thompson or The Pas or Brandon. Sometimes we stay overnight in the community where court is held, but more often, the court party flies out as soon as court is over. This can lead to hard feelings.

For the most part, the relationship we have with the aboriginal communities where we circuit in is a distant one, not just geographically, but emotionally as well. While emotional distance is an admirable trait in judicial behaviour for the most part, it is my belief that insofar as the circuit court system is concerned, it works to our disadvantage.

The court system is an acknowledged educational process in society. It is in our decisions that we teach others in society what is wrong and what is right. One of the principles of sentencing — general deterrence — presupposes a certain degree of community awareness and acceptance. If there is little or none, then the purpose of the sentencing process is lost. It seems logical that in our efforts to maintain an effective role in society generally, and in the communities where we sit, we should be making special efforts to cause the community to see the court system as a positive presence in their lives.[9]

One of the first things to which we might give some consideration concerns whether in our sentencing of aboriginal accused, there is not some way we could better involve the community from which the accused comes, in the sentencing process. This might take the form of some type of elders panel upon whom the court could call to indicate in open court the community's viewpoint about what an appropriate disposition could be. Our common law system has long recognized that local communities should be allowed if not invited to have some input in the judicial process, where the judge comes from a geographically or culturally foreign environment. Lay assessors have been used by the Queen's judges in parts of England and in many of the British colonies in Africa and India for centuries before local self government. There are some of our brother and sister judges here in Canada who have tried with some success to do the same.[10]

[9] One of the most important elements of the system is often the most overlooked; that is that in many communities people who do come out to watch court usually cannot hear what is going on, a problem that could be easily solved with a small sound system available in almost every community.

[10] See the various examples cited in Michael Jackson: Locking Up Natives in Canada, a Report of the Canadian Bar Association on Imprisonment and Release 1988

Much of what I have to say about sentencing you will undoubtedly hear from others this week in other sessions, so I don't want to dwell upon them. I did think however that it would be worthwhile exploring whether there are special considerations which judges need to bring to cases involving aboriginal accused

Aboriginal People and the Legal System

Who are the aboriginal people. Simply put, for our purposes, they are the Indian, Metis and Inuit people of Canada. The term "aboriginal" is of relatively recent legal vintage in Canada, having been used for the first time in a legal enactment in s. 35 of the Constitution Act 1982. Prior to that, the cases had to contend with defining Indians, Metis or Eskimo (now called Inuit).[2]

It's long been settled in Canadian jurisprudence that aboriginal people generally, and Canadian Indians specifically, are subject to the Criminal Code.[3] Although there may be a question as to whether the recognition and affirmation of the treaty and aboriginal rights of aboriginal people in Section 35 of the Constitution Act, 1982, protects aboriginal people from the application of some criminal laws, there has yet been no case to decide this question. One issue which arises for example is whether the constitutional affirmation of an Indian's treaty right to hunt renders the firearm prohibition provisions of the Criminal Code inapplicable to Indians. I suspect that we will have to await decisions from future cases before the answer to that becomes clear.

It is trite to say that aboriginal people have unique cultures and histories. Part of the unique history of aboriginal people in this country is the way in which the relationship of aboriginal people to the criminal justice system evolved. Allow me to tweak your interest by saying that Indian people in Canada were not always subject to the same criminal laws as were other Canadians. The principle enunciated in the cases mentioned earlier[4] was not always the state of affairs. There is not however sufficient room or time in this presentation to go into detail about that. It is possible however from time to time that the question of the historical application of the criminal law to Indian people may arise and it may in fact become the fruit of future litigation.

Aboriginal people in Canada are disproportionately represented on the wrong side of the justice system. In relation to the percentage of their population in Canada they are over represented in our jails and prisons in numbers totally out of proportion to their presence in society.

Interestingly, although it would appear that aboriginal people are charged and incarcerated more frequently than their numbers might warrant, their average sentence is shorter, perhaps reflecting the more minor nature of the offences with which they are convicted and/or greater leniency on the part of the judiciary. In addition, aboriginal inmates tend to have more prior convictions before their first incarceratory sentence, suggesting that judicial efforts at the outset of the accused's criminal career were aimed at keeping him or her out of jail initially. As well, while statistics for most parts of the country are deficient, it would appear that the majority of aboriginal accused appear in urban courts rather than rural ones, and even excluding indictable charges (which are dealt with in judicial centres located in larger towns and cities) the majority of aboriginal inmates are incarcerated by urban courts.

However one looks at the statistics, the numbers speak loudly that the justice system generally is failing the aboriginal community. Many reasons and theories have been advanced to attempt to explain this but again, it is beyond the scope of this paper to go very much into detail surrounding those.

It is apparent from the historical evidence that Canadian lawmakers made liberal use of criminal and quasi-criminal laws to curtail traditional aboriginal rights and customs. This is especially noticeable in the case of hunting and fishing regulations but also such a policy can be seen in many provisions of the Indian Act which, in years past had made it an offence for Indian people to practice traditional religions. The statistical evidence available (such as it is) for Stony Mountain Penitentiary in Manitoba at the turn of the century shows that most of the Indian people who were incarcerated at that time were sentenced simply for practicing their traditional religions.

More recently and more often, Indian hunters and fisherman have found themselves in conflict with the laws of the country concerning the exercise by them of what they view to be their traditional right to hunt and fish. In some jurisdictions the primary contact between aboriginal people and the justice system will be as a result of charges under the Fisheries Act, Migratory Birds Convention Act or Provincial Wildlife Legislation. One author writing about native legal issues stated:

> It is fair to say that for whole communities of native people in Canada one of their main contacts with the justice

[2] See e.g. Ref. re term "Indians" [1939] S.C.R. 104; Martin v Chapman [1983] 1 SCR 365; R. v Pritchard (1972) 9 CCC (2d) 488 (Sask. Dist. Ct.); R. v Laprise [1978] CNLB (no. 4) 118 (Sask. CA); R. v Budd; R. v Crane [1979] 6WWR 450

[3] See R. vs Beboning (1908) 17 OLR, 23 (CA); R. vs. J. S. B. [1984] NWTR 210 (SC).

[4] Supra n. 3

system has been a seemingly endless series of petty charges under the Fisheries Act or the Wildlife Acts. This pattern shows that Canadian law makers have failed to obtain consensus among native people with respect to the moral seriousness or validity of these offences. Even a generation ago the inappropriateness of this particular use of the criminal system was recognized Morrow J. said in one of his thoughtful decisions from the north:

> I regret having to find an Eskimo guilty of a game offence such as this. Apparently the game department, through no negligence on their part, have found it difficult, if not almost impossible, to give adequate education and instruction to the native people in such remote areas as Spence Bay. To me, game enforcement of this kind is a matter of education rather than policing.[5]

In some instances, aboriginal accused will persist in exercising their traditional hunting practises in the full knowledge that they will likely be prosecuted, but in the belief that their "right" should enjoy a legal status greater than the legislation.[6]

More recently, and somewhat related, is the fact that civil disobedience is seen by some aboriginal people as a justifiable means to confront governments over longstanding disputes.[7]

To a large extent, one might think that there is little which we as judges can do to alter the facts which confront us. After all, we do not arrest and charge the aboriginal accused, nor do we prosecute or defend him or her. We would appear to be at the tail end of an unfortunate process and while we may have strong influence within our sphere, our sphere is somewhat limited.

That isn't necessarily true.

The Anunga rule and aboriginal confessions

Probably one of the more perplexing issues which will arise in the course of dealing with aboriginal accused has to do with the admissibility of confessions. The rules relating to the admissibility of statements by accused persons have been developed to provide protection to an accused so that only those statements which are given freely and voluntarily and with the full knowledge and appreciation of one's legal rights including a full appreciation of the right not to give a statement are admissible.

Despite these general safeguards however aboriginal people particularly those in remote communities and those whose primary language is not English appear to have special problems in exercising their right to remain silent and to refrain from incriminating themselves. Their statements appear to be particularly open to being misunderstood both by police interrogators and when read out in court. Their vulnerability arises from the legal system's inability to break down the barriers to effective communication between aboriginal people and legal personnel, differences of language, etiquette, concepts of time and distance and so on. In an Australian case[8] Forster J., made the following statement:

> ...aboriginal people often do not understand English very well and that even if they do understand the words, they may not understand the concepts which English phrases and sentences express. Even with the use of interpreters this problem is by no means solved. Police (terminology) and legal English some times is not translatable into the aboriginal languages at all and there are no separate aboriginal words for some simply words like "in", "at", "on", "by", "with", or "over", these being suffices added to the word they qualify. Some words may translate literally into aboriginal language but mean something different. "Did you go into his house?" Means to an English speaking person "Did you go into the building?" But to an aboriginal it may also mean, "Did you go within the fence surrounding the house?". English concepts of time, number and distance are imperfectly understood, if at all, by aboriginal people, many of the more primitive of whom can not tell the time by a clock. One frequently hears the answer, "long time", which depending on the context may be minutes, hours, days, weeks or years. In case I may be misunderstood, I should also emphasize that I am not expressing the view that aboriginal people are any less intelligent than white people but simply that their concepts of certain things and the terms in which they are expressed may only be different to those of white people.
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> Another matter which needs to be understood is that most aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure such as a policeman. Indeed, their action is probably a combination of natural politeness and their attitude to someone in authority.

Some aboriginal people find a standard caution quite bewildering, even if they understand that they do not have to answer questions, because, if they do not have to answer questions, then why are the questions being asked?

Bearing in mind these preliminary observations which are based partly upon my own knowledge and observations and partly by evidence I have heard in numerous cases, I lay down the following guidelines. They apply, of course, to persons who are being questioned as suspects.

1. When an aboriginal person is being interrogated as a suspect, unless he is as fluent in English as the average white man of English descent, an interpreter able to interpret in and from the aboriginal person's language should be present, and his assistance should be utilized whenever necessary to ensure complete and mutual understanding.

2. When an aboriginal is being interrogated it is desirable where practicable that a "prisoner's friend" (who may also be the interpreter) be present. The "prisoner's friend" should be someone in whom the aboriginal has apparent confidence. He may be a mission or settlement superintendent, or a member of the staff of one of these institutions who knows and is known by the aboriginal. He may be a station owner, manager or overseer or an officer from the Department of Aboriginal Affairs. Combinations of persons in situations are variable and the categories of persons I have mentioned are not exclusive. The important thing is that the "prisoner's friend" be someone in whom the aboriginal has confidence, by whom he will feel supported.

3. Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms ..... Police officers, having explained the caution in simple terms, should ask the aboriginal to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the aboriginal has apparent understanding of his right to remain silent. Most experienced police officers in the territory already do this. The problem of the caution is a difficult one but the presence of a "prisoner's friend" or interpreter and adequate and simple questioning about the caution should go a long way towards solving it.

4. Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probating value. It should be born in mind that it is not only the wording of the question which may suggest the answer but also the manner and tone of voice which are used.

5. Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter and endeavour to obtain proof of the commission of the offence from other sources....

6. Because aboriginal people are often nervous and ill at ease at the presence of white authority figures like policemen it is particularly important that they be offered a meal, if they are being interviewed in the police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if the facilities exist for preparation of it. They should always be offered a drink of water. They should be asked if they wish to use the lavatory, if they are in the company of police or are under arrest.

7. It is particularly important that

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[5] (R. vs. Tootalik E4-321 (1970), 71WWR435 at 443, Reversed 74WWR740 (NWT Territorial Court) (quoted in Native Law, Carswell & Company, 1989, Jack Woodward, Editor)

[6] Given the recognition and affirmation of "existing aboriginal and treaty rights" of aboriginal peoples in s. 35 of the Constitution Act 1982, and the recent cases of R. v Sparrow [1987] 2WWR 577, 9BCLR (2d) 300, 32 CCC (3d) 65, 36 DLR (4th) 246 [1987] 1 CNLR 145, leave to appeal to the SCC granted [1987] 4WWR 1xvii, 12 BCLR (2d) xxxvi, 80 NR 314n; R.v Denny, Paul and Syliboy (unreported) (NSCA) and R v Flett (1987) 5 WWR 115, [1987] 3 CNLR 70 (Man Prov Ct. per Martin J, the position taken by aboriginal people appears to have some legal justification.

[7] For example, there is the case of the Innu demonstrators in Labrador fighting with the Government of Canada about low level NATO flights over what they assert to be their traditional lands. As well, there is the case of the West Coast Indians who blocked logging trucks and who were arrested and charged. Finally, in Manitoba, a Chief and several Band Councillors were charged with mischief for burning a bridge on their reserve which was admittedly dangerous to use and which the Province refused to replace.

[8] R.v. Anunga and Others (1976) 11 A.L.R., 412, (N.T.S.C.)