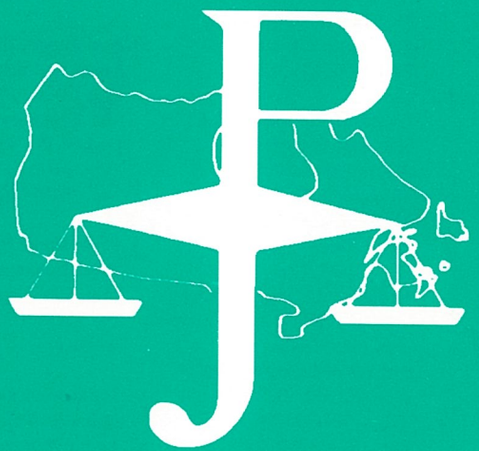

PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

Volume 19 ~ No. 1 *Spring 1995 Printemps*

THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES

The Canadian Association of Provincial Court Judges/ L'Association canadienne des juges des cours provinciales 1994-1995

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Appointments
Hon. Robert Metzger
Chief Judge of the Provincial Court,
Vancouver
effective February 1, 1995
Hon. Robert Alan Higinbotham
Duncan
effective January 31, 1995
Hon. Brian Michael Neal
Victoria
effective February 6, 1995
Retirements
Hon. Fred Green
effective January 31, 1995

ALBERTA
Appointments
Hon. Brian E. Scott
Assistant Chief Judge
Calgary
effective January 3, 1995
Hon. Jack Gordon Easton
Edmonton
effective January 3, 1995
Hon. David J. McNab
Edmonton
effective January 3, 1995
Hon. Ronald O'Neil
Calgary
effective January 3, 1995
Hon. Frank L. Maloney
Calgary
effective January 3, 1995
Retirements
Hon. William A. Troughton
effective January 12, 1995
Hon. John B. Ritchie
effective January 23, 1995

SASKATCHEWAN
Appointments
Hon. W.K. Tucker
La Ronge
effective December 22, 1994
Hon. J.E. McMurtry
Regina
effective December 22, 1994
Hon. Stephen C. Carter
Prince Albert
effective February 8, 1995
Retirements
Hon. H.D. Parker
effective September30, 1994
Hon. J.J. Flynn
effective November 15, 1994
Hon. A.C. McMurdo
effective February 28, 1995
Hon. J.R.O. Archambault
effective December 31, 1994
(appointed to the Saskatchewan Court of Queen's Bench)

MANITOBA
Appointments
Hon. Frank Aquila
Winnipeg
effective December 21, 1994
Hon. Bruce H. Miller
Winnipeg
effective December 21, 1994
(appointed Associate Chief Judge as of March 15, 1995)
Hon. Heather R. Pullan
Winnipeg
effective December 21, 1994

ONTARIO
Appointments
Hon. Hugh Campbell
New Market
effective November 7, 1994
Hon. Stephen Foster
New Market
effective November 7, 1994
Hon. Joseph R. Gilles Renaud
Cornwall
effective January 23, 1995

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l'hon. Ellen Paré
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l'hon Adette Perron
Valleyfield
l'hon Micheline Sasseville
Laval
l'hon Jean-Paul Braun
Montréal
l'hon André Renaud
Montréal
l'hon Jacques Trudel
Trois-Rivières

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Retirement
Madam Justice Gladys J. Young
effective March 6, 1995
(appointed to the Family Division of the New Brunswick Court of Queen's Bench)

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Appointments
Hon. David Orr
St. John's
effective August 15, 1994

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EDITOR'S NOTEBOOK

The scrupulous among the readership who reflect upon the masthead of this Journal may take exception to the reference to this as the "Spring 1995" edition. Indeed, where most of you are, Spring will have been sprung a long time by the time you are in receipt of your copy. Not so where I am - in Newfoundland. In this lonely outpost of the nation, Winter and Spring respectively, never end and begin. It is a fitful process and the flora and fauna, as well as humankind, pitch and roll with the early appearances of warm weather and its disappointing retreats. We will have "Spring" solidly entrenched by mid to late June, but not before.

All of this, of course, is by way of apology for the lateness of this edition of the Journal. I was appointed editor on March 13, 1995, and have been scrambling feverishly since that time to get up to speed. I extend sincere congratulations and appreciation to my predecessor in this post, the Honourable Patrick Curran. Pat is now 3rd. Vice-President of the Association, whose many new responsibilities made it impossible for him to carry on in the Editor's chair. Over the last three (3) years he has done yeoman service in keeping the Journal to you punctually and efficiently, while continuing to make it interesting and timely.

I am pleased to have received the confidence of the Executive Committee in my appointment. As early as this in my tenure I appreciate the importance of the Journal to our Association and, as well, the magnitude of the effort that is required to keep it rolling off the presses on its quarterly timetable.

I would like to welcome to the undertaking the Honourable Gilles Renaud of the Ontario Court (Provincial Division) as Associate Editor. Gilles comes to us with proven academic and editorial credentials. It is the first time the Journal has had an Associate Editor and I am truly grateful for the opportunity to work with someone of his background and skill.

The Journal you see **in futuro** will not vary radically from that which you have seen in the past. By past resolution of the Association there are strictures within which the Editor must operate, and I propose to do so. However, I have given thought to possible changes. Here are a few that may be implemented as I become more comfortable in the position and more attuned to the demands of the readership: 1. a "Letters to the Editor" section; 2. a section called "In a Literary Vein" to alternate with "In a Lighter Vein"; 3. "publication" of the Journal on QL Systems as a part of database Bench Notes (DB BN); 4. more human interest content, focusing on our judges and their personal experiences which may be of interest to all of us; 5. book reviews, particularly of those written by judges, whether of our Bench or otherwise.

These items are preliminary possibilities from my early ruminations on the subject of changes. It is, after all, your Journal and it should be tailored to your requirements. In that regard, I invite you to write, fax or telephone me to tell me what you want changed, if anything, about the Journal. As I will always continue to be, I am your humble scribe and will bid farewell until I take up this notebook again. Regards!

IN A LITERARY VEIN

He went to the clothes locker by the door and took out his black robe. He slipped into it easily, conscious as always that the mere action caused something very complex to occur within him. Now, almost instantaneously he became another man. For he had always known that here within this simple black fabric might be hidden the true sovereignty of the law. Here, slipped on like another skin, was a mere human suddenly elevated to deal with life and death and misery and joy. The "Your Honour" fitted now, if not for the ordinary man protected within then for the robe itself as the symbol of civilization.

Hickock took a final glance out the window because the sight of the real world of sky and clouds helped place his courtroom in perspective and gave him a sense of permanence; it was easier to believe the dramas of good and evil he witnessed from his perch had been performed since the earliest tribal elders sat in the shade of trees and heard the same arguments. The thieves and pimps and murderers, the harlots, the rapists, the drunkards, the wife beaters, the derelicts and the lechers, the borrowers and the lenders, the schemers, the exploiters, the rascals and the bullies -- nothing among them was new, and so in a sense nothing was changed.

Nothing in ten thousand years.

Except now perhaps, there was the hope that a man in the right place might contribute a minuscule stone to the bulwark of his society. If a man believed in the rule of law, and was fortunate enough to serve it, he could also believe that his own small role might help speed by at least a fraction the long march forward from revenge and barbarism.

No doubt about it, Hickock thought as he ascended the bench. He was a lucky man.

-excerpt from **The Magistrate** by Ernest K. Gann

Your Honour stands between the future and the past. I know the future is with me and what I stand for here. I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding that all life is worth saving, and that mercy is the highest attribute of man.

- excerpt from **Clarence Darrow, a One-Man Play** by David W. Rintels

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C.P. 5001 Moncton, NB E1C 8R3
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SPEEDIER JUSTICE IN CIVIL DISPUTES

Proactive Judges - A Toronto Experience

by **The Honourable Judge R. Bromstein**

During the last ten years judges of the Toronto limited jurisdiction court have developed a system using pretrials and Case Flow Management (CFM). It has significantly reduced time and costs for everyone. The settlement rate at or after pre-trials, reported as between 72% and 82% is, according to the judges, higher. A review of the court's approach, which involves judges proactively[1] and has been very successful, may be of interest to other provinces.

Limited jurisdiction courts are often the first, and only exposure of citizens to the court system. A positive experience there provides the best possible message. Approximately 80% of all civil cases in Ontario are filed in these courts. The Ontario courts went through major chances in the last decade. The Court, now called the Small Claims Court, has a jurisdiction of $6000.00. Its judges became directly involved in some of the court changes. Firstly, in changes to the rules of the court and, secondly, by introducing a CFM system. The new rules were designed to be useful for amounts far above its limit in expectation of major increases.[2] These rules subsequently became a model for new rules in other provinces.

Changes instituted include, for example, the direct and early involvement of the judge in the process, individual calendaring of cases where each case is assigned to one judge's case load after the initial pleadings are filed, pretrials, and simplified procedures to deal with the essential problems of civil process.

Before new rules were created and CFM instituted in our court, actions would proceed directly to trial after pleadings were filed. Pleadings were then, and are even now still, usually very sparse. There was little disclosure for the parties, whether represented by counsel or not, to assist them to know the case they had to meet at trial. There was no automatic right of discovery. Unrepresented litigants would rarely know the best procedures to follow and what evidence should be presented at trial. The judge would struggle to become aware of essential facts and issues. There were many adjournments and delays and one case might be before several different judges before final trial and judgment. There were few methods of dealing with abuses by litigants. While there were probably many good and fair decisions, the process could clearly benefit from improvement.

CURRENT PROCEDURES[3]

An action is commenced by filing the claim form provided by the court offices . Pleadings are generally concise, non-technical and stress the factual elements of the case. Where the plaintiff's claim is based on a document (such as a cheque or promissory note) a copy of the document must be attached to the claim. The court serves the claim although solicitors are also permitted to arrange service. After the defence is filed all cases over $1000.00 are reviewed by a Case Management Judge (CMJ) who becomes responsible for the file, except for pre-trials, up to and including the trial.

The action is sent by the CMJ

1) to pretrial before a judge if legal issues

are involved

2) to pretrial before a referee who is a trained lay person, if only facts are in issue; or

3) rarely, directly to trial.

The judge may also avoid delays in deciding an interlocutory dispute by sending it to a jurisdiction hearing or make an order for the parties to do something they failed to do, eg. provide particulars. Each file has an Endorsement Record which is a sheet in the front of the file containing a complete record of the action, on which all judges orders, including those from a motion or at trial, are endorsed. Resources permitting, referees have reviewed cases eg. $1000.00 and under. Although they have no power to make orders their recommendations are usually endorsed by a judge.

PRE-TRIALS

The purposes of a pretrial conference as set out in the Rules include:

- full disclosure between the parties of relevant facts and evidence

- the resolution or narrowing of the issues in an action - assisting the parties in effective preparation for trial - facilitating settlement of an action.

Judges, some retired judges, and referees hear pre-trials, usually in one half to three-quarters of an hour time slots. Attendance is compulsory and there are penalties for failure to attend, for example striking the pleadings. The court may also award costs against a person who attends a pretrial conference so inadequately prepared as to frustrate its purpose. Judges have conducted pre-trials, where necessary, by conference call. Counsel are encouraged to bring their clients to have a better appreciation of the issues and procedures and be directly involved in settlement discussions.

Pre-trials allow the parties to receive the benefit of judicial involvement. A pretrial judge can amend pleadings and deal with other interlocutory matters such as adding parties and ordering particulars without formal motions. The judge will help the parties bring out problems which particularly benefits unrepresented litigants. Agreed statements of facts and issues may be ordered to minimize trial time. The judge is not, without consent, permitted to preside at the trial and can therefore offer a reaction to the case. This helps narrow the issues and assists in settlement which is encouraged and discussed. A pretrial report, with the approval of the parties, outlining the essential issues and alleged facts, number of witnesses and estimated trial time, is prepared for the CMJ by the person presiding.

These special pretrial procedures resolve many problems normally dealt with in the higher courts by more lengthy and costly procedures such as formal motions and discoveries. When referees conduct pre-trials they provide reports to the CMJ which may contain a recommended order, such as a cost penalty for non attendance. Pre-trials help unrepresented litigants to understand what needs to be done before and at the trial. There are more settlements and fewer adjournments on the day scheduled for trial. Judges at the trial will be more informed about the key matters and are more likely to reach a decision in which the final result is fairer and better for everyone.

DISCOVERY

Discovery is available but only on a judge's order where there are special circumstances. It may be oral or by the exchange of written questions and answers.

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Provincial Court of New Brunswick
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FOR INFORMATION CALL JUDGE LAMPERT AT (506)856-2307

Such orders are rarely needed because of disclosure resulting from pre-trials. Failure to disclose evidence well before the trial may result in the court's refusal to accept it at trial.

TRIAL PROCEDURES

Trial procedures are summary and simplified. Although the monetary claims are less than higher jurisdiction courts the facts and legal issues are often similar. The judges are permitted to decide matters on the basis of equity and good conscience unless specifically bound by statute or case law, and have wide discretion particularly in procedural matters The standard rules of evidence apply but are relaxed. Hearsay evidence is allowed but discouraged and its weight is in the judge's discretion. Affidavit evidence, for example, can be used in undefended actions which avoids the need for witnesses to attend. One rule permits the service of statements with the name and address of the writer on the other side. The court will accept this type of hearsay statement at trial as the other side has the right to summons the writer as a witness for cross-examination.

CMJs set their own trial schedules and the trial notice is sent out 4 to 8 weeks before the trial date. Trial days are estimated at 10 to 14 hours but adjournments and settlements usually result in average trial days. Adjourned cases will still be heard by the CMJ who sets another date acceptable to the parties. The Judge can award costs to represented litigants, to witnesses unnecessarily summoned and to unrepresented litigants for inconvenience and expense.

While lengths of trials increase as the monetary jurisdiction increases, trials in these courts still take far less trial time than in the higher courts for similar issues. Trials can take 1/2 to 1/10th the trial times of higher jurisdiction courts and most cases are dealt with in less than three hours. Amounts in excess of the jurisdiction are often abandoned to obtain a decision through these courts. There are known actions where parties have agreed to proceed in these courts even though the amounts in issue were beyond the jurisdiction. Their actions were framed as if within the limit and the parties agreed to be bound by the principles of the decision.

OFFERS TO SETTLE

One rule permits a party to ask for extra costs if they have submitted an offer to settle at least seven days before the trial. Cost sanctions will apply when a plaintiff refuses a reasonable offer to settle and then obtains a trial judgment less favourable than the offer or when a defendant refuses an offer and the plaintiff obtains a judgment more favourable than the offer. The party who made the offer can present it to the trial judge after judgment has been rendered and costs, including counsel fees, have been awarded. The judge may award up to double the awarded costs to the party who made the offer. A successful plaintiff may be deprived of costs and find costs awarded to the defendant. Unrepresented litigants who use the rule successfully may be awarded compensation for inconvenience and expense which usually includes lost income and travel expenses. Where an offer is accepted and not complied with by one party, the other may move for judgment on the settlement or proceed to trial as if there was no offer.

OTHER PROCEDURES

Work procedures, as well as rules, were changed and new positions were created. The CMJs, for example, now have the assistance of Trial Scheduling Clerks, who are a combination secretary and judges's assistant. They deal with the parties after the pleadings are filed, schedule or help the

judge to schedule the trials, bring litigants problems to the attention of the judge and send out judge's orders to litigants. Computers help them deal with case flow, notices and statistics.

Various methods are used to educate court users to make the best use of the process. Judges have, for example, assisted the administration in preparing explanatory booklets and a video to be shown on television and in court offices.

Conducting pre-trials and CFM procedures requires a different approach than most judges are accustomed to. To help develop the needed skills special seminars were held and the judges met regularly to exchange experiences and develop the system.

SOME CONCLUSIONS

There are now far fewer adjournments and most cases are disposed of without a trial. Litigants and counsel are better prepared for trials. There were no records before pre-trials were instituted. Computers and staff now calculate results and although they do not yet show complete settlement calculations, they assist in an estimate for cases sent to pre-trial. The last few years show a reported settlement rate, at or after the pre-trial, of between 72 per cent and 82 per cent. The actual rate is probably higher because the figures show that less than 14 per cent of the cases sent to pre-trial are eventually tried.

A retired judge who was a highly regarded counsel and who sat in the higher court has heard pre-trials in this court for many years. He found that while the amounts are different, the facts and legal issues are similar to higher court problems, and feels strongly that the process is a marked improvement over other existing procedures.

There are two ingredients which appear to be the key to success. Firstly, more direct and early involvement of the judge in the process and secondly, the pre-trial and its early use.

Alternative dispute resolution procedures such as pre-trials, and case management procedures, don't need to be kept in separate compartments. They were brought together in the system and the parties have options not otherwise available. A pre-trial that does not result in immediate settlement can still provide many benefits as issues may be narrowed or eliminated and if complex steps, such as discovery, are necessary they can be ordered.

Jurisdictions with higher monetary limits could consider alternative approaches. One, for example, could be a two track approach where the plaintiff could choose to initiate an action either within the normal route or within a CFM route of special simplified rules. The court would have the right, on motion with appropriate criteria to be met, to transfer the action to the other route.

The litigants should, in any civil action, balance the cost of carrying the action forward against the amount in issue and the risks involved. Trained adjudicators can often assist the parties and their counsel to address these issues early in the process and to resolve speedily and effectively minor civil disputes at no or modest cost. The Toronto judges have worked, and are still working, to accomplish this objective in Ontario.

ENDNOTES

[1] Lord McClusky of the Court of Sessions, Edinburgh, Scotland in an article "The Interventionist Judge: Should the Referee Play the Ball?" raised many of the issues

REGISTRATION FORM
C.A.P.C.J. ANNUAL CONFERENCE
HOTEL BEAUSEJOUR, MONCTON, N.B.
September 13th-17th, 1995

NAME OF JUDGE: _____

COURT AND LOCATION: _____

MAILING ADDRESS: _____

_____

TELEPHONE: _____ FAX: _____

NAME(S) OF GUEST(S): _____

SPECIAL REQUESTS: _____

HOTEL ACCOMMODATION REQUIRED

Number of nights: _____

Single ($89.) ❑ Double ($89.) ❑ Business Class ($99.) ❑
Smoking ❑ Non-Smoking ❑ Guaranteed after 6:00 p.m. arrival ❑

Special requests: _____

Arrival Date: _____ Time: _____ Via _____ Flt # _____

Departure Date: _____ Time: _____ Via _____ Flt # _____

(Farewell Breakfast on Sunday, September 17th, 8:00 a.m. - Noon)

Confirmation of hotel accommodations will be sent to you by Hotel Beausejour. (Phone: 506-854-4344).

Reservations will be held until 6:00 p.m. on date of arrival. Late arrivals must be guaranteed by a credit card.

Name of Card: _____ Card # _____

Expiry Date: _____ Signature _____

are two or more candidates for any office of the Association or for the accountant, a secret ballot shall be cast by each voting representative and the candidate receiving a majority of votes shall be elected. If however, no candidate has a majority the candidate having the smallest number of votes shall be eliminated from the ballot and voting shall proceed in the same fashion until a candidate has a majority, who shall then be declared elected. If any candidates are tied for the smallest number of votes, no candidate shall be eliminated, but another ballot shall be taken voting on the same candidates.

paras 11(c) and (d) so they should read:

(c) Special Committees may be appointed at any time by the President for the purposes assigned such special Committee. All judges who are members of the Association shall be eligible for appointment as Chair, or member of any Standing or Special Committee.

(d) Meetings of any Standing or Special Committee shall be on the call of the Chair with fourteen clear days notice which may be waived.

Section 12 so that it shall read:

12 **Executive Director**

The Executive Committee may appoint an executive director who need not be a member of the Association and shall fix the salary and determine the duties of the executive director.

Dated the 30th day of April, 1995 by

(Sgd) Ronald J. Meyers
Provincial Representative -- Manitoba

(Sgd) Jerry N. LeGrandeur
Provincial Representative -- Alberta

(Sgd) Alfred H. Brien
Provincial Representative -- New Brunswick

we addressed. Notwithstanding that judges in the common law countries are generally reactive, not proactive, Lord McClusky envisages interventionist judges coming into the process early and, if necessary, often. His court is in the "big leagues". We, as he, suggest "play the ball".

[2] See section 22 to 33 from the Courts of Justice Act and the Small Claims Court Rules.

[3] The higher courts there are procedures which act like a funnel. Court rules are designed to assist the parties to properly prepare for and conduct the trial. The initial mass of facts and issues is digested and concentrated by various measures such as pleadings, motions, examinations for discovery and affidavits of documents. Motions in all Ontario courts, for example, can be used to force greater particularity of factual and legal allegations. Discoveries before special examiners with resulting written transcripts, and compulsory affidavits setting out documents in the possession of the parties, assist the litigants to know the case they have to meet and avoid trial by ambush. By the time the parties reach the trial door the issues will usually have been narrowed to the main ones and the parties will know the case they have to meet. The process is, as we all know, often costly and time consuming. Our objective was to cut this cost and time while achieving the same objectives.

News and Notes of the Commonwealth Magistrates' and Judges' Association by the Honourable Sandra E. Oxner

Big news at the CMJA London office is the move of the judicial education function to Dalhousie Law School in Canada. However, may I just note that CJEI is undertaking two projects it hopes will be of interest to Canadian judges. The first under the direction of David Armati of Australia is an ambitious study on judicial independence throughout the Commonwealth. It will begin with research on institutional checks to protect the independence of the judiciary.

Under the direction of Richard Lussick of Western Samoa, CJEI will be asking its member organizations (such as CAPCJ) to study and comment upon a proposed framework for national codes of judicial ethics. Following discussions by member associations, a concept of such a code will be discussed at the next triennial meeting to be held in 1997. I hope that Canada will take a leadership role in both these projects.

Other important news is the appointment of Ms. Vivienne Chin of Singapore to the position of Secretary General. Ms. Maria Thomas ably supports Ms. Chin in the London office.

London Club

Pam Thomson has asked me to remind you that all CAPCJ members are members of CMJA and therefore have the use of a London residential club on St. James Street in the heart of London. Even if you do not require accommodation, the club is useful for those visiting in London for its reasonably priced meals -- which in the summertime, may be enjoyed in an enchanting garden. It is also a great place to have a rest, cup of tea or a drink if you are staying outside of London and have come in for the day.

Should any Canadian provincial court

judge wish to become a personal member, he or she may do so at a specially reduced annual registration fee (60 pounds) and without a joining fee. There is also a splendid club house in Edinburgh and 57 reciprocal clubs around the world. A quarterly journal is sent free of charge to all personal members and gives details of a comprehensive summer programme which includes organized trips to Ascot, The Derby, Henley Regatta, afternoon tea on the House of Commons terrace, tickets for Wimbledon and Glyndebourne Opera (by lot), cricket matches and the Royal Box at the Albert Hall for Promenade concerts.

London Host Committee

The London host committee is pleased to make arrangements for you to visit the courts or other places of professional interest to you during a London visit. They will arrange introductions to colleagues anywhere you travel in the Commonwealth.

Pen Pal Scheme

As you know, some of us have for many years been in communication with a "pen pal" from a developing country. In addition to exchanging information about the administration of justice and our personal news, the Canadian judges have been in the practice of sending to their pals any redundant legal material they have. This has proven to be an effective scheme to forge personal and professional links between people of common interests. Should you not have a pen pal and would like one, the London office is pleased to match you with a person of similar interests in a country of your choice.

Study Tour to Florida

Under the direction of the Honourable Michael Sherar, we are planning a study tour to St. Petersburg Beach, Florida early next winter. Please contact Judge Sherar at the CJEI office for more information, indicating your month of interest.

At the Victoria Falls Triennial Meeting a declaration in support of an independent judiciary was passed and presented to the Deputy Secretary General of the Commonwealth, Sir Anthony Siaguru, with a request that it be placed on the forthcoming agenda of the Commonwealth Heads of Government meeting to be held this November in New Zealand.

Book Exchange Programme

The indefatigable Judge Pamela Thomson has undertaken to assist CMJA with a book programme to transfer to the judiciaries of developing countries redundant legal books in Canadian libraries. Please contact Judge Thomson if you would like to participate in this scheme.

Regional Seminar

The first Regional Meeting (Seminar) of the North Atlantic and Mediterranean Region will be held April 14-16, 1996, at the Law faculty of the University of Hertfordshire, St. Albans, UK. It has been timed to celebrate the opening of the Law faculty at St. Albans.

The programme is entitled "Images of Justice -- Differing Perceptions" and the discussions will include the following topics:

1. Access to Justice (Court Closure, Non publication bans, etc.)
2. Perceptions of Victim
3. Perceptions of Witnesses
4. Public Perception caused by News Media (Sentencing)

NOTICE OF MOTION

TAKE NOTICE that at the Annual General Assembly in September, 1995 at Moncton, New Brunswick, a motion will be made to amend the Constitution of the CAPCJ as follows:

Amend para 4(e) so it should read:

(e) The president shall preside at any General Assembly and all meetings of the Executive Committee. In the absence of the President the Vice-President with numerical precedence shall do so. In the absence of the President and all of the Vice-Presidents, the General Assembly or the Executive Committee, as the case may be, shall elect a temporary presiding officer who shall have all powers which the President would have had had the President been present and presiding. The President, or in the absence of the President the acting President, shall at the Annual General Assembly, make a report of the Associations' activities during the President's tenure of office.

4(f) so it should read:

(f) The President shall not vote in the first instance at a General Assembly or at any meeting of the Executive Committee but, in the event of a tie vote, shall vote to break the tie.

4(h) so it should read:

(h) The Secretary shall be the custodian of all records and archives of the Association and shall preserve and record its transactions. The Secretary shall take minutes of any General Assembly and send copies thereof to the members. The Secretary shall take minutes of all meetings of the Executive Committee and send copies to all members of the Executive Committee.

para 7(b)(iv) so it should read:

(iv) In the case of a Province or Territory in which there is only one judge, the voting representative shall be that judge if that judge is a member of the Association.

Sub-para 7(c)(vi) by changing the word "auditor" to read "accountant".

para 8(a) so it should read:

(a) On the first morning of the Annual General Assembly the President shall appoint a nominating committee. The nominating committee shall make its report on the morning of the last day of the Annual General Assembly. After the nominating committee has made its report, the President shall call for other nominations for each officer of the Association. If there

Une Bonne Action (suite en fin)
par Paul Robitaille -- juge à la retraite

NOTE: On m'a fait savoir qu'il est temps de mettre fin à ce feuilleton. N'étant pas du genre à m'accrocher, j'ai été tenté de mettre immédiatement le point final a ce pseudo-roman et, en même temps, à ma collaboration au Praetor, mais ça n'aurait pas été juste pour les lecteurs qui m'ont dit s'intéresser à cette histoire et qui veulent connaitre l'assassir du juge Dubois. A leur intention, voici en quelques linges la clé du mystère.

Les Dubois adoptèrent donc un orphelin, ce fut leur "Bonne action". Malheureusement, en vieillissant, le garçon entretint de mauvaises relations et, entre autres, tomba dans un réseau de drogués. Il demandait de plus en plus d'argent à ses parents adoptifs; comme ce n'était jamais suffisant, il les vola, jusqu'au jour oú le juge Dubois découvrit le pot aux roses et décida de couper les vivres à son protégé.

Un après-midi, le juge était seul à la maison lorsque Peter vint lui faire une visite et lui demander de l'argent. Il était manifestement sous l'effet de la drogue; le juge lui fit de reproches, et, devant le refus du juge de lui donner de l'argent, le ton monta, une violente dispute s'ensuivit, le fils adoptif s'empara du conteau qu'il gardait dans sa poche et poignarda son bienfaiteur.

Ainsi fut récompensée cette "Bonne action" car, comme l'écrivait Musset:

"Le bien a pour tombeau l'ingratitude humaine".

FIN

5. Perceptions of Public Created by Entertainment Media.

Lord Chief Justice of England, Lord Taylor, will be the keynote speaker. His topic will be "The Media and the Judiciary".

Splendid social events will be arranged for CMJA members attending. There will also be a programme for guests of participants. If there is sufficient interest, pre and post conference tours will also be arranged.

Vice President James Tweed of The North Atlantic and Mediterranean Region invites all CMJA members to attend.

THE CMJA NEEDS YOU!!

Want to Join the Commonwealth Magistrates' and Judges' Association

WRITE TO:

Secretary General, CMJA
10 Duke Street, London
W1H 1Ld, UK
Tel: 0171-487 886
Fax: 0171-487 4386

A TRIBUTE TO THE LATE MR. JUSTICE FREDERICK HAYES WHO DIED ON OCTOBER 24TH, 1994

The Following was written by the Honourable Judge Judythe Little, P.C.J. at Kenora, Ontario after attending the Memorial Service for former Chief Judge Fred Hayes on Thursday, October 27, 1994.

In mid-December, I drove from Kenora to Red Lake. It was snowing lightly when I set out on the 280 km. trip. Later, the sun came out. The fresh snow was sparkling. I thought, as I usually do when on such a drive, how lovely the scenery was. Then, I found myself remembering how much Fred Hayes loved the north.

I first met Fred prior to my appointment to the provincial court in 1986. He was then Chief Judge of the Provincial Court (Criminal Division). Fred spoke to me enthusiastically of the various courts he had presided over in the remote north. He told me he was looking forward to having more women appointed to the provincial bench and that there would soon be a number of women with the necessary 10 years experience as a lawyer. That day we began a relationship from which I drew a lot of strength in my work as a judge. Fred was always encouraging about the unique responsibilities of judging in remote communities. He recognized the challenges inherent in presiding over courts in first nations communities, and the appropriateness of accepting the assistance of elders, or justice committees.

Soon after my appointment, I attended the June 'university' programme then offered at the University of Western Ontario in London. I was talking with Fred about something when we were joined by several other judges. In conversation, I referred to

The clerk/monitor will also be obligated to keep an accurate log of the proceedings and identify different speakers so that an accurate transcript can later be made by someone else who was not (and may never have been) inside the courtroom.

This new initiative, according to the Ministry, involves a three week training period wherein court clerks are trained to become court reporters and court reporters are trained to become court clerks. It says nothing about training typists to produce high-quality transcripts from these tapes.

In the United States the court monitor produces the finished transcript from audiotapes. She or he is not required to perform any other function but to keep the record. In a nonpartisan study conducted by an **American Research Institute**, the following finding was made:

"**The successful transcription of audiotapes is heavily dependent upon complete and accurate logs kept by monitors. This fact underscores the inappropriateness of installing an audio system without training, retraining, certifying, and retaining competent monitors through adequate salaries. Said another way, the assignment of a monitor to each recording device (in addition to the presence of a court clerk) is essential to the success of electronic recording.**[1]"

It is clear that the law, as we know

Le greffier/préposé à l'écoute sera également tenu de tenir un registre détaillé des procédures et d'identifier les différents interlocuteurs afin de permettre la rédaction d'une transcription détaillée, plus tard, par une autre personne qui n'était pas (et peut-être n'a jamais été) dans le tribunal.

Cette nouvelle initiative, selon le Ministère, comprend une période de formation de trois semaines pendant laquelle les greffiers de cour suivront une formation de sténographes judiciaires et les sténographes judiciaires une formation de greffiers de cour. Il n'est pas indiqué si les dactylographes seront formés pour produire des transcriptions de haute qualité sur la base de ces bandes enregistrées.

Aux États-Unis, les préposés à l'écoute produisent la transcription finale sur la base de bandes enregistrées. Ils ou elles ne sont tenu(e)s de remplir aucune autre fonction que celle d'effectuer l'enregistrement. Une étude non partisane menée par l'**American Research Institute** (l'Institut américain de recherche) a conclu ce qui suit:

«**La réussite de la transcription des bandes enregistrées dépend essentiellement de l'enregistrement détaillé et complet par les préposés à l'écoute. Ceci souligne assez combien il est inutile d'installer un système audiophonique sans avoir au préalable formé, formé de nouveau, agréé et embauché des préposés à l'écoute compétents en leur offrant des salaires convenables. En d'autres termes, il est essentiel d'assigner un préposé à l'écoute à chaque appareil d'enregistrement (en plus de la**

inquiry, witnesses may be recalled to repeat their testimony.[12]

It has also been held that where the absence of the transcript might lead to some unfairness to the accused in conducting the cross-examination at trial, this can be remedied by Crown counsel agreeing to supply witness statements to defence counsel in a form upon which defence counsel could cross-examine the witnesses at trial.[13]

Moreover, where the transcript from the preliminary inquiry is incomplete, the proceedings will not be quashed if the available record discloses sufficient evidence to support the committal for trial.[14]

In **R. v. Goupil**[15] the Court decided that the absence of a transcript of the preliminary inquiry is irrelevant when the committal for trial was based on the accused's consent, not on the evidence.[16]

Since all of the above cases occurred utilizing full-time monitors of the official record, one can only imagine the inefficiencies of the future when the keeper of the record is also required to perform other functions and the transcript of the proceedings is prepared by someone who was not present in court to hear the actual words spoken by the participants.

No keeper of the record will have many far-reaching consequences and the errors will reverberate faster and more widely than ever before.

d'enregistrement est découvert avant la conclusion de l'enquête préliminaire, les témoins peuvent être rappelés pour répéter leur témoignage.[12]

Il a également été considéré que l'injustice créée pour l'accusé par l'absence de transcription lors du contre-interrogatoire pendant le procès, pouvait être corrigée si le procureur de la Couronne acceptait de fournir à l'avocat de la défense les déclarations des témoins sous une forme utilisable par l'avocat de la défense pour contre-interroger les témoins lors du procès.[13]

De plus, lorsque la transcription de l'enquête préliminaire est incomplète, les procédures ne seront pas annulées si l'enregistrement disponible révèle l'existence de preuves suffisantes pour justifier la citation à procès.[14]

Dans l'arrêt **R. c. Goupil**[15], le tribunal a décidé que l'absence de transcription de l'enquête préliminaire ne devait pas être prise en considération lorsque la citation à procès se basait sur l'accord de l'accusé et non pas sur les preuves.[16]

Dans la mesure où tous les arrêts cités plus hauts se basent sur des situations où des préposés à l'écoute à plein temps effectuaient l'enregistrement officiel, on peut imaginer aisément les erreurs qui seront commises à l'avenir quand les préposés à l'enregistrement devront remplir d'autres fonctions et que la transcriptions des procédures sera préparée par une autre personne qui ne sera pas présente au tribunal pour entendre ce que les participants diront vraiment.

equipment had malfunctioned so that the evidence of only some of the witnesses could be transcribed. O'Driscoll J. refused to follow **Reiter** and instead held that such malfunction did not violate natural justice or the principle of natural justice under the Charter. He stressed that the accused were in no worse position than if the Attorney General had preferred a direct indictment.[9]

Further, the appropriate remedy will not necessarily be to quash the committal. In **R. v. Parker**[10], the Court remitted the case back to the provincial court judge to start the preliminary hearing anew since the absence of a record made it impossible to determine whether there was sufficient evidence to support the committal for trial. The Court also indicated that the system's failure to create a record was not a denial of the principle of fundamental justice under s.7 of the Charter.

In **R. v. Wright**[11], although the Court held that the failure to accurately record the testimony of certain witnesses did deprive an accused of his fundamental right to defend himself, the Court was unwilling to quash the committal on that basis. Instead, the Court remitted the matter back for examination and cross-examination of those witnesses whose testimony had been inadvertently not recorded.

Similarly, where the failure of the recording device is discovered before the conclusion of the preliminary

dispositif d'enregistrement avait si mal fonctionné que seuls certains témoignages des témoins avaient pu être transcrits. Le juge O'Driscoll a refusé de suivre l'arrêt **Reiter** et a décidé plutôt que ce genre de mauvais fonctionnement ne portait pas atteinte à la justice naturelle ni aux principes de justice naturelle contenus dans la Charte. Il a fait remarquer que l'accusé n'était pas dans une situation moins favorable que si le procureur général avait préféré une mise en accusation directe.[9]

De plus, le recours qui s'impose ne sera pas nécessairement la révocation de la citation à procès. Dans l'arrêt **R. c. Parker**[10], le tribunal a renvoyé l'affaire au juge de la Cour provinciale afin qu'il recommence l'audience préliminaire car, en l'absence d'enregistrement, il était impossible de déterminer s'il y avait assez de preuves pour justifier la citation à procès. Le tribunal a également indiqué que l'incapacité du système à effectuer un enregistrement ne constituait pas une violation du principe de justice fondamentale contenu à l'article 7 de la Charte.

Dans l'arrêt **R. c. Wright**[11], bien qu'il ait estimé que l'incapacité à enregistrer avec précision le témoignage de certains témoins avait effectivement privé l'accusé de son droit fondamental de se défendre, le tribunal a refusé d'annuler la citation à procès pour ce motif. Il a préféré renvoyer l'affaire pour un nouvel interrogatoire et contre-interrogatoire des témoins dont le témoignage n'avait pas été enregistré par inadvertance.

De la même manière, lorsque le mauvais fonctionnement de l'appareil

it today, has evolved from various precedent-making decisions. No one knows with any certainty in advance which cases will produce these legal breakthroughs but one thing is very certain: a good majority of our legal principles are premised on the official record.

As a third year law student at Osgoode Hall in Toronto, Ontario I know that very few answers to legal questions exist. There are only cases to be argued. Lawyers throughout this province quote excerpts from transcripts to promote their positions in the court room on a daily basis.

Therefore, the accuracy and integrity of the official record is and should continue to be of paramount importance to absolutely everyone involved.

The current position taken by the Ministry of the Attorney General towards court reporters in the province of Ontario pays lip service to this reality while destroying the professionalism the courts have come to expect of court reporters and the official record which they keep and produce.

NO KEEPER OF THE RECORD IS A DENIAL OF NATURAL JUSTICE:

(1) The Canadian Charter of Rights and Freedoms:

The purpose of the Charter is to uphold the rights of all Canadians. It has been put into place to underline the main principles of justice. One

présence d'un greffier judiciaire) pour assurer la réussite d'un enregistrement électronique.[1]»

Il est clair que le droit que nous connaissons aujourd'hui est le résultat d'une évolution basée sur des précédents. Personne ne sait avec certitude à l'avance quels sont les arrêts qui produiront ces changements majeurs mais une chose est certaine, une grande majorité de nos principes juridiques reposent sur l'enregistrement officiel.

En tant qu'étudiante de troisième année à l'école de droit d'*Osgood Hall* de Toronto, je sais que de nombreuses questions juridiques restent sans réponse. Il n'existe que des cas à débattre et tous les jours, les avocats de notre province citent des extraits de transcriptions pour défendre leurs positions devant les tribunaux.

De ce fait, la précision et l'intégrité de l'enregistrement officiel est et devrait continuer à être de la plus haute importance pour toutes les parties en cause.

La position actuelle du ministère du Procureur général à l'égard des sténographes judiciaires de la province de l'Ontario ne souscrit à cette réalité que du bout des lèvres, tout en détruisant le professionnalisme des sténographes judiciaires et de l'enregistrement officiel qu'ils tiennent et produisent, professionnalisme dont dépendent les tribunaux.

L'ABSENCE DE PRÉPOSÉ À L'ENREGISTREMENT CONSTITUE UN DÉNI DE JUSTICE NATURELLE

(1) La charte canadienne des droits et libertés:

such principle is that everyone in this country is **"presumed innocent until proven guilty"**. Professionals working in the administration of the justice system, no matter what their specific role, must live by these words. This is the starting point for any court proceeding throughout Canada.

Section 11(d) states:
"Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

All participants in the justice system must take these words seriously. If they are to be upheld, the accuracy and integrity of the official record is a grave responsibility which must not be compromised.

"...Judge Levin H. Campbell, former chief judge of the First Federal Circuit of the United States, captured the essence of the instant issues squarely when he said 'the maintenance of a record of proceedings in a trial court is absolutely essential to the work of our judiciary. There can be no meaningful right of appellate review without an accurate trial record. Our aim, therefore, must not be just to report court proceedings in the cheapest possible way, but to do so in the way best calculated to advance the administration of

Le but de la Charte est de défendre les droits de tous les Canadiens. Elle a été mise en place pour souligner les principes majeurs de la justice. L'un de ces principes est que quiconque au pays est «présumé innocent tant qu'il n'est pas déclaré coupable». Les membres des professions qui travaillent à l'administration de la Justice, quel que soit leur rôle particulier, doivent travailler selon ces principes. C'est là le point de départ de toute instance judiciaire au Canada.

L'alinéa 11d) stipule:
«**Tout inculpé a le droit d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable.**»

Tous ceux qui participent à l'administration de la Justice doivent prendre ces mots au sérieux. S'ils doivent être défendus, la précision et l'intégrité de l'enregistrement officiel constituent une sérieuse responsabilité qui ne doit pas être compromise.

...le juge Levin H. Campbell, ancien juge en chef du Premier tribunal fédéral de circuit des États-Unis, a parfaitement décrit l'essence des questions en cause lorsqu'il a dit «la tenue de l'enregistrement des procédures d'un tribunal de première instance est absolument essentielle au travail de nos juges. Il n'existe aucun droit d'appel sérieux sans un enregistrement précis du procès de première instance. Par conséquent nous ne devons pas nous contenter de rapporter les procédures

preliminary hearing, completed by a different court reporter, had been filed and both **"records"** were certified to be "**true and correct**". The two transcripts revealed significant differences. Without determining which of the two **"records"** was in fact **"the record"** for use at trial, Grotsky J. was satisfied that the deficiencies of both were such as to deny the accused an opportunity to prepare for trial, as neither would afford him the opportunity to make full answer and defence nor to permit him to test the credibility of Crown witnesses. Grotsky J. reiterated the proposition that an accused who cannot benefit from the record of the preliminary hearing proceedings and who is impeded in preparing for trial and making full answer and defence suffers a denial of natural justice.

It is important to note that not in every case, where there has been a malfunctioning of the recording equipment resulting in an incomplete transcript, will there be a finding of jurisdictional error. For example in **Re: Boylan and the Queen**[7] the Court stated that the lack of a transcript could deny the accused the right to make full answer and defence. However, the Court was unwilling to declare that a malfunctioning recording device would necessarily constitute non-compliance with s.540(1)(b)(ii); the Court indicated that such a malfunction could instead constitute imperfect compliance with the statutory provision, which could be cured.

In **Hendricks et al**[8], the recording

un nouvel enregistrement de l'audience préliminaire, effectué par un autre sténographe judiciaire, avait été déposé et les deux «**enregistrements**» avaient été certifiés comme étant «**vrais et corrects**». Les deux transcriptions ont révélé des différences importantes. Sans déterminer lequel des deux «**enregistrements**» était celui qui serait retenu au procès, le juge Grotsky a estimé que les fautes trouvées dans les deux transcriptions étaient assez sérieuses pour empêcher l'accusé de se préparer convenablement au procès, car aucune des deux ne lui permettait de répondre et de se défendre pleinement ni de vérifier la crédibilité des témoins de la Couronne. Le juge Grotsky a réaffirmé qu'un accusé qui ne peut pas utiliser la transcription des procédures de l'audience préliminaire et qui ne peut se préparer au procès ni répondre et se défendre pleinement subit un déni de justice naturelle.

Il est important de noter qu'une erreur juridictionnelle ne résulte pas toujours du mauvais fonctionnement du dispositif d'enregistrement qui entraîne une transcription incomplète. Par exemple, dans l'arrêt **Re: Boylan and the Queen**[7], le tribunal a décidé que l'absence d'une transcription retirait à l'accusé son droit de répondre et de se défendre pleinement. Cependant le tribunal n'a pas voulu déclarer qu'un dispositif d'enregistrement qui fonctionnait mal constituait nécessairement une violation du sous-alinéa 540(1)b)(ii); le tribunal a indiqué qu'un mauvais fonctionnement de cette nature constituait plutôt une exécution imparfaite de la disposition statutaire qui pouvait être corrigée.

Dans l'arrêt **Hendricks et al**[8], le

in accordance with the provincial legislation with such modifications as the circumstances require mentioned in sub-section one."

(3) Failure to Comply with Mandatory Statutory Provisions:

The statutory provisions of the Code reproduced above deal directly with the current issues of concern to court reporters throughout this province.

Although there is conflicting jurisprudence on whether this provision is mandatory or merely directory[3], and it has been held that this provision is mandatory only in respect of trials but not of preliminary hearings[4], it has now generally been accepted that s.540(1)(b)(ii) is mandatory in respect of preliminary hearings as well as trials.[5]

As indicated above, it is clear that the failure to comply with a mandatory provision constitutes jurisdictional error. It has also been held that the failure to record the evidence at the preliminary hearing represents a break of natural justice.

In the case of R. v. Reiter[6] the Court acknowledged that a poor quality transcript could deny the accused to make full answer and defence and thus constitute a break of natural justice. The court adjourned the certiorari application to accord the Crown an opportunity to cure the record. However, as reported in **Reiter**, a new record of the

adaptations de circonstance, conformément à la législation provinciale mentionnée au paragraphe (1).»

(3) Défaut de se conformer aux dispositions statutaires obligatoires:

Les dispositions statutaires du Code reproduites ci-dessus traitent directement des questions qui, actuellement, préoccupent les sténographes judiciaires de toute notre province.

Bien que la jurisprudence ne soit pas unanime sur le caractère obligatoire ou simplement directif de cette disposition[3], et il a été reconnu que cette disposition n'est obligatoire qu'à l'égard des procès et non pour les audiences préliminaires[4], il est maintenant généralement accepté que le sous-alinéa 540(1)b)(ii) est obligatoire aussi bien à l'égard des audiences préliminaires qu'à l'égard des procès.[5]

Comme il a été indiqué plus haut, il est clair que le fait de ne pas se conformer à une disposition obligatoire constitue une erreur juridictionnelle. Il a également été reconnu que le fait de ne pas enregistrer la preuve, lors de l'audience préliminaire, constitue une atteinte à la justice naturelle.

Dans l'arrêt **R. c. Reiter**[6] le tribunal a reconnu qu'une transcription de mauvaise qualité pouvait empêcher l'accusé de répondre et de se défendre pleinement et constituait donc une atteinte à la justice naturelle. Le tribunal a ajourné la demande de certiorari pour permettre à la Couronne de corriger l'enregistrement. Cependant, comme il a été rapporté dans l'arrêt **Reiter**,

justice. Electronic sound recording may eventually prove to be such a method. But if the present system of recording court proceedings were to be replaced by a markedly inferior system, the financial savings would be vastly outweighed by devaluation of our system of justice."[2]

The rights of the accused are an important consideration that need to be taken into account. A poor quality or uncertifiable transcript could very well lead to a new trial for the accused person.

Even apart from the fact that he or she may have to remain in custody as a result of inefficiency within the system, the expense of a second trial either to themselves or to the already overburdened Ontario Legal Aid Plan is enormous.

In speaking with one of the court reporters in North Bay (site of one of the pilot projects), it was brought to my attention that the criminal bar is not very supportive there of the overwhelming concerns being expressed by court reporters in relation to the proposed changes by the Ministry. Some of them have gone so far as to indicate that their clients may, in fact, benefit from poor quality transcripts in that there will then be an increased basis for an appeal. It is obvious that these lawyers have not thought through the problems and their ignorance and complacency is extremely disappointing. Thankfully most members of the bar do not share

des tribunaux de la manière la moins onéreuse possible, mais nous devons le faire de la meilleure manière possible pour assurer l'avancement de l'administration de la Justice. Il est possible que l'enregistrement sonore électronique s'avère être la meilleure méthode. Mais si le système actuel d'enregistrement des procédures judiciaires devait être remplacé par un système singulièrement inférieur, les économies financières seraient considérablement démenties par la dévaluation de notre système de justice.»[2]

Les droits de l'accusé sont une question importante qui mérite d'être prise en considération. Une transcription de mauvaise qualité ou qui ne pourrait pas être attestée pourrait très bien nécessiter la tenue d'un nouveau procès pour l'accusé.

Mis à part le fait que l'accusé pourrait devoir rester en détention à cause de l'inefficacité du système, les dépenses d'un nouveau procès, soit pour l'accusé, soit pour le Régime d'aide juridique de l'Ontario qui est déjà surchargé seront énormes.

Alors que je parlais à des sténographes judiciaires de North Bay (lieu de l'un des projets-pilotes), j'ai appris que les avocats criminalistes ne sont pas très bienveillants à l'égard des préoccupations pressantes des sténographes judiciaires en ce qui concerne les projets du Ministère. Certains vont même jusqu'à dire que leur clients pourront, en fait, profiter de la mauvaise qualité des transcriptions qui leur donnera un meilleur motif d'appel. Il est clair que

their opinions and are truly committed to the principles of justice upon which the laws in this country are based.

Section 7 of the Charter states:

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Given the Ministry's proposal to combine the clerk and monitor position into one, the accused may very well be deprived of the principles of fundamental justice.

The combination of these two very important and busy jobs will effectively take away the keeper of the record and it will be the accused who will, in most cases, pay the price.

It is possible that he or she may have to pay with loss of liberty as they await a new trial. It is entirely conceivable that the clerk/monitor may be unable to fully supervise the intake of information into the new and improved audio recording system due to the added responsibility of court clerking.

In addition the accused may have to pay the cost of another full-blown trial if the transcript is discovered to contain inconsistencies and omissions that are unacceptable. These are transcripts which [due to the Ministry's plan for the future] will be produced by word processors who were not in the courtroom at the time the words were recorded (or who may have never been in a courtroom). The end

ces avocats n'ont pas bien réfléchi au problème et leur ignorance et leur suffisance sont extrêmement décevantes. Dieu merci, la majorité des membres du Barreau ne partagent pas leur opinion et sont véritablement déterminés à défendre les principes de justice sur lesquels se fondent les lois de notre pays.

L'article 7 de la Charte stipule:

Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.»

Étant donné que le Ministère projette de combiner les fonctions de greffier et de préposé à l'écoute, l'accusé pourrait très bien être privé des principes de justice fondamentale.

La combinaison de ces deux postes importants et absorbants fera effectivement disparaître le préposé à l'enregistrement et ce sera l'accusé qui, dans la plupart des cas, en fera les frais.

Il est possible que l'accusé pâtisse en perdant sa liberté, en attendant la tenue d'un nouveau procès. Il est tout à fait possible que le greffier/préposé à l'écoute soit dans l'impossibilité de superviser totalement la prise d'information par le nouveau système amélioré d'enregistrement audiophonique en raison de ses responsabilités supplémentaires de greffier judiciaire.

De plus, l'accusé pourrait avoir à payer les dépenses d'un autre procès complet, si la transcription se révèle contenir des incohérences et des omissions inacceptables. Ces transcriptions en effet (à cause du futur projet du Ministère) seront rédigées par des dactylographes de traitement de textes qui ne seront pas

product may simply be too unreliable to form the basis of an appeal. The cost of a new trial, resulting from inaudible transcripts, is something very few litigants can or should be required to afford.

(2) The Criminal Code of Canada:

Section 540(1)(b)(ii) [formerly s.468(1)(b)(ii)] of the Code states as follows:

"(1) Where an accused is before a justice holding a preliminary inquiry, the justice shall

(b) cause a record of the evidence of each witness to be taken

(ii) in a province where a sound recording apparatus is authorized by or under provincial legislation for use in civil cases, by the type of apparatus so authorized and in accordance with the requirements of the provincial legislation."

Section 540(6) goes on to deal with the transcript of such proceedings.

"(6) Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall be dealt with and transcribed and the transcription certified and used

présents dans le tribunal lorsque l'enregistrement sera effectué (ou qui n'auront peut-être jamais été dans un tribunal). Le produit final pourrait très bien être à tel point sujet à caution qu'il ne pourra pas servir de base à un appel. Les frais d'un nouveau procès résultant de transcriptions inaudibles, est un luxe que très peu de plaideurs peuvent ou devraient avoir à s'offrir.

(2) Le Code criminel du Canada:

Le sous-alinéa 540(1)b)(ii) (anciennement sous-alinéa 468(1)b)(ii)) du Code stipule ce qui suit:

«(1) Lorsque le prévenu est devant un juge de paix qui tient une enquête préliminaire, ce juge doit:
b) d'autre part, faire consigner la déposition de chaque témoin
(ii) soit, dans une province où l'utilisation d'un appareil d'enregistrement du son est autorisée par ou selon la loi provinciale dans les causes civiles, au moyen du type d'appareil ainsi autorisé et conformément aux prescriptions de la loi provinciale.»

Le paragraphe 540(6) continue à traiter de la transcription de ces procédures.

«(6) Lorsque, en conformité avec la présente loi, on a recours à un appareil d'enregistrement du son relativement à des procédures aux termes de la présente loi, l'enregistrement ainsi fait est utilisé et transcrit, et la transcription est certifiée et employée, compte tenu des