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PROVINCIAL JUDGES Journal DES JUGES PROVINCIAUX

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THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

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The Canadian Association of Provincial Court Judges/ L'Association canadienne des juges des cours provinciales 1995-1996

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PRESIDENT/PRESIDENT
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Saint John, NB
E2L 1E8
Tel: (506) 658-2568
(506) 847-7191 (h)
Fax: (506) 658-3759

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Delta, BC
V4K 3W3
Tel: (604) 940-4350
(604) 943-2612 (h)
Fax: (604) 940-4364

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5250 Spring Garden Road
Halifax, NS
B3J 1E7
Tel: (902) 424-8759
(902) 454-5765 (h)
Fax: (902) 424-0603

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323-6th Ave. S.E.
Calgary, AB
T2G 4V1
Tel: (403) 297-3174
(403) 287-2876 (h)
Fax: (403) 297-5287

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408 York Ave., 5th Floor
Winnipeg, MB
R3C 0P9
Tel: (204) 945-7162
(204) 269-6718 (h)
Fax: (204) 945-0552

SECRETARY-TREASURER/ SECRETAIRE/TRESORIER
Judge Pamela Thomson
444 Yonge Street
Room 207
Toronto, ON
M5B 2H4
Tel: (416) 325-8922 (#58920)
(416) 923-3100 (h)
Fax: (416) 325-8944

ASSISTANT EXECUTIVE DIRECTOR/DIRECTEUR GENERAL ADJOINT
Judge Irwin Lampert, P.O. Box 5001, Moncton, NB E1C 8R3
Tel: (506) 856-2307, Tel: (506) 854-4004 (h), Fax: (506) 856-3226

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Editorial Communications are to be sent to:
Les editoriaux doivent être envoyés à:

Judge Garrett A. Handrigan
Provincial Judges Journal
P.O. Box 339
Grand Bank, NF
A0E 1W0
Tel: (709) 832-1450
(709) 279-3280(h)
Fax: (709) 832-1758

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Box 8988, Station A
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Tel: (902) 424-3901
Fax: (902) 424-0562

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Judge D. Kent Kirkland
Box 906, Suite 402
199 Front Street
Belleville, ON
K8N 5B6
Tel: (613) 968-8583
Fax: (613) 966-4390
and
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CBA Liaison/Liaison avec l'ABC
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1747 Playfair Drive
Ottawa, ON
K1H 5S4
Tel: (613) 957-4717
Fax: (613) 957-4697
and
Judge Susan Devine
408 York Avenue
Winnipeg, MB
R3C 0P9
Tel: (204) 945-2647
Fax: (204) 945-0552

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14340-57th Avenue
Surrey, B.C.
V3X 1B2
Tel: (604) 572-2000
Fax: (604) 572-2301

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3 Wildwood Dr.
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K2P 2K1
Tel: (613) 239-1339
Fax: (613) 239-1506

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Fax: (204) 945-0552

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Assistant Chief Judge of the Provincial Court of Alberta
effective May 1, 1996

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Appointments/Nominations
Hon. Judge Rose Raven
Surrey
effective May 13, 1996
Hon. Judge Balwinder W. Sundhu
Kamloops
effective May 15, 1996
Hon. Judge Anne Winter MacKenzie
Vancouver
Supreme Court of British Columbia
effective June 20, 1996
Retirements/Retraites
Judge P.D'A. Collings
effective May 31, 1996

NOVA SCOTIA

Appointments/Nominations
Hon. Judge Joe Kennedy
appointed Chief Judge
Retirements/Retraites
Chief Judge E.J. MacDonald
effective March 31, 1996
Resignation/Démission
Hon. Judge Sandra Oxner

ONTARIO

Appointments/Nominations
Hon. Salvatore Merenda
effective February 21, 1996
Retirements/Retraites
Hon. Judge D.F. Graham
effective January 31, 1996
Hon. Judge G.A. Phillips
effective February 29, 1996
Hon. Judge R.T. Bennett
effective March 31, 1996
Hon. Judge F.W. Olmstead
effective April 30, 1996
Hon. Judge J.D. Bark
effective April 30, 1996
Hon. Judge C.R. Ball
effective May 31, 1996

PRINCE EDWARD ISLAND

Retirements/Retraites
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effective April 15, 1996

QUEBEC

Appointments/Nominations
Hon. Judge Nicole Mallette
effective 6 mars 96
Hon. Judge Lise Gaboury
effective 6 mars 96
Hon. Judge Normand Bonin
effective 5 juin 96
Hon. Judge Micheline Paradis
effective 5 juin 96
Hon. Judge Claude Mélançon
effective 12 juin 96
Hon. Jean Larue
effective 12 juin 96
Retirements/Retraites
Hon. Judge Claude Lamoureux
effective 4 mars 96
Hon. Judge Robert Auclair
effective 15 mars 96
Hon. Judge Gilles Bélanger
effective 11 avril 96
Alexandre Lesage
effective 11 mai 96

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Saskatoon
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effective June 20, 1996

Provincial Representatives / Représentants Provinciaux

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Judge David Peddle
Provincial Court
P.O. Box 2222
Gander, NF
A1V 2N9
Tel: (709) 256-1100
Fax: (709) 256-1097

New Brunswick
Judge Frederic Arsenault
Provincial Court
P.O. Box 5001
Bathurst, NB
E2A 3Z9
Tel: (506) 547-2155
Fax: (506) 547-0552

Manitoba
Judge Ronald J. Meyers
Provincial Court
Judges' Chambers
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Winnipeg, MB
R3C 0P9
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Fax: (204) 945-0552

Saskatchewan
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Provincial Court
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Melfort, SK
S0E 1A0
Tel: (306) 752-6230
Fax: (306) 752-6126

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Court House
Box 550
Yellowknife, NT
X1A 2L9
Tel: (819) 873-7604
Fax: (819) 873-0203

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Provincial Court
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Fax: (902) 755-7181

Quebec
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Cour de Quebec
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Montreal, QB
H2Y 1B6
Tel: (514) 393-2581
FAx: (514) 873-4760

Ontario
Judge Lauren Marshall
Ontario Court (Prov. Div.)
105-1000 Finch Avenue West
Downsview, ON
M3J 2V5
Tel: (416) 314-4218
Fax: (416) 314-4235

Alberta
Judge Jerry N. LeGrandeur
Provincial Court
320-4th Street South
Lethbridge, AB
T1J 1Z8
Tel: (403) 381-5275
Fax: (403) 381-5772

British Columbia
Judge James Gordon
Provincial Court
45 Columbia St.
Kamloops, BC
V2C 6K4
Tel: (604) 828-4344
Fax: (604) 828-4368

Yukon
Judge Heino Lilles
Territorial Court
Judges' Chambers (J3E)
Box 2703, 2134 Second Avenue
Whitehorse, YT
Y1A 2C6
Tel: (403) 667-5438
Fax: (403) 667-3079

Prince Edward Island
Judge Nancy Orr
Provincial Court
42 Water Street
Charlottetown, PE
C1A 1A4
Tel: (902) 368-6741
Fax: (902) 368-6743

EDITOR'S NOTEBOOK/REMARQUES DU REDACTEUR

I have a fascination with language. There is a magical quality to words and their ability to convey ideas and meaning to those familiar with the language. I do not know the cerebral processes involved in speaking and writing a language and am not particularly interested in understanding them. I am content to luxuriate in the mystery and magic of it all.

One of my favorite English words is, not surprisingly, of French origin - "potpourri." It literally means "rotten pot" and is an obvious combination of the French words "pot" ("pot") and "pourri" ("rotten"). "Potpourri" has a sweet, musical quality to it and rolls easily off the tongue. Its most endearing quality, however, is its ability to unify an otherwise disparate group of things. In this edition of the Journal I have such a miscellany. I offer you a "potpourri," a miscellaneous collection of articles which I trust you will find worthy of this publication and your attention.

Most of this edition is taken up with an article by Mr. Justice W. J.Vancise of the Saskatchewan Court of Appeal. Appropriately entitled "Home Alone - But Not Forgotten," this piece deals with the recent developments on the subject of electronic monitoring. The learned justice surveys the jurisprudence on the topic and candidly expresses his views as to the propriety and efficacy of the remedy.

You will appreciate the article ali the more when you realize the Justice Vancise comes to his subject with personal experience - he actually wore the bracelet and agreed to "house arrest" for a weekend

Les langues m'ont toujours fasciné. Les mots exercent un pouvoir quasi magique, tant ils sont porteurs d'idées et de signification pour ceux qui en connaissent les rudiments. J'ignore les processus cérébraux permettant de communiquer verbalement et par écrit dans une langue, et je ne suis d'ailleurs pas nécessairement intéressé à les apprivoiser. Je suis bien content de me vautrer dans le mystère et la magie qu'elle m'inspire.

Il n'est donc pas étonnant que l'un de mes mots préférés de la langue anglaise soit le mot «potpourri», un mot d'origine française, il va sans dire. L'étymologie de ce mot procède de la juxtaposition des mots «pot» et «pourri», si besoin était de le préciser. Douceur et musicalité, voilà les qualités que l'on retrouve dans ce mot qui roule doucement sur nos papilles. Sa qualité la plus attachante, si je puis dire, c'est sa capacité de rassembler un ramassis d'éléments par ailleurs disparates. Voici donc ce que vous retrouverez dans ce numéro du Journal. Je vous offre ainsi un «pot-pourri», soit des textes variés que vous trouverez, je l'espère, dignes de publication dans ce périodique et qui sauront susciter votre intérêt.

Une large partie de ce numéro est consacrée à un article signé par monsieur le juge W.J. Vancise de la Cour d'appel de la Saskatchewan. Ce texte au titre évocateur, *Home Alone - But Not Forgotten*, aborde les développements récents en matière de surveillance électronique. Le savant juge nous offre un survol de la jurisprudence en la matière, tout en nous livrant ses commentaires sur l'opportunité et l'efficacité de cette mesure.

Vous apprécierez encore davantage son article lorsque vous réaliserez que le juge Vancise parle de ce sujet en connaissance de cause, ayant lui-même porté le bracelet électronique et consenti à une «assignation

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while wearing it! Let me quickly point out that there was nothing untoward about his conduct which led to this being imposed on him by a court. If you know Justice Vancise you realize that he prefers to know of what he speaks before he does, and there is no better way to know your subject than to "walk the walk."

There is a learned piece as well from the Honourable Judge Gilles Cadieux, President of the Quebec Judges' Association. Enlightening in its analysis of the Quebec Judges' Association, it is useful reading for all judges who wish to have an appreciation of their position in respect of Chief Judges, other judges, the court, government and society. Judge Cadieux has a visionary's perspective on the role of the judges' association which is amenable to any of the associations functioning in the country. It is timely in respect of its analysis of judicial independence issues.

The Executive of the CAPCJ, provincial reps, and committee chairs met in Montreal inApril of this year for the midterm meetings. Each of the reps gave a report on issues of concern to the judges' association in hislher province. It would be too lengthy to reproduce all of these reports. I went through each of them and synthesized what I felt was of most interest and have prepared a section entitled "From the Provinces." I am afraid there is little good news to be found in this section, from any of the provinces or either of the territories. I commend it to your reading nonetheless.

I want you to get a flavour of what is happening to our judges across and up and down the country. I invite you to write to me reporting on matters of which you are aware in your area which you regard as having a negative impact on judicial

à domicile» pour une fin de semaine avec ce bracelet au poignet! Je dois m'empresser de vous souligner que ce n'est pas un écart de conduite de sa part qui lui a valu ce traitement au nom de la loi. En effet, qui connaît le juge Vancise sait qu'il préfère bien maîtriser l'objet de son propos avant d'en parler et comment mieux y parvenir que par une expérience de première main.

L'on y retrouve également un article de fond sous la plume de l'honorable juge Gilles Cadieux, président de la Conférence des juges du Québec. Tout en nous livrant une analyse éclairée de la Conférence des juges du Québec, il nous offre un texte que tous les juges trouveront utile et qui leur permettra de mieux apprécier leur position respective par rapport à celle des juges en chef, des autres juges, de la cour, du gouvernement et de la société en général. Le juge Cadieux nous présente sa perspective visionnaire sur le rôle de la Conférence des juges, un rôle qui conviendrait tout à fait à quelque autre association de juges existant au pays. Aussi, son analyse des questions relatives à l'indépendance judiciaire tombe tout à fait à propos.

D'autre part, l'exécutif de l'ACJCP, ainsi que les représentants provinciaux et les présidents des comités de l'association se sont rencontrés à Montréal au cours du mois d'avril afin d'y tenir les réunions mi-sessionnelles. Les représentants y ont fait rapport sur l'état des divers dossiers intéressant l'association des juges dans leur province respective. L'espace ne suffirait pas ici pour y reproduire tous et chacun de ces rapports. Je les ai lus et j'ai fait une synthèse des éléments qui me semblaient présenter un vif intérêt pour l'association et je vous livre le fruit de mon travail dans la section intitulée «From the Provinces». Les nouvelles ne sont malheureusement pas trop bonnes à ce chapitre, qu'elles proviennent des provinces ou encore des territoires. Malgré tout, je vous en recommande la lecture.

Il serait bon que chacun puisse avoir un aperçu du sort de nos juges partout au pays. Je vous invite donc à m'écrire afin de m'informer des situations dont vous avez

independence. I think you will agree with me that much of what is contained in this section can be readily classified as of this character.

In consultation with committee chairs, executive officers and provincial reps we believe we should have a column in the Journal dedicated to reporting on incidents which tend to compromise judicial independence. Tentatively called "Independence Watch" we believe, that it will serve to shine the cold, hard light of day on matters that sometimes are endured in silence and without recourse by individual judges.

This is such a large country and travel and communication can be so difficult, even in the era of the "global village" and instant communication. If something happens to a judge in St. John's, NF or in Victoria, BC that tends to lessen the independence of that judge, it can and should be known by all others throughout the country. It is only notoriety that will put an end to such practices. I invite you to use this medium for this purpose.

Aside from these matters you will also find between these covers the usual columns and matters of a housekeeping nature. Until the next time . . .

eu connaissance dans votre région et que vous estimez avoir un effet négatif sur l'indépendance judiciaire. Je crois que vous conviendrez avec moi que l'essentiel de ce qui est relaté dans la section mentionnée ci-dessus peut certes être répertorié parmi les situations de ce type.

Aussi, à la suite d'une consultation menée auprès des présidents des comités, des membres de l'exécutif et des représentants provinciaux, nous croyons que le Journal devrait consacrer une rubrique décrivant les diverses situations qui risquent de compromettre l'indépendance judiciaire. Sous le titre possible de «L'indépendance sous observation», cette rubrique jetterait un éclairage cru sur les diverses situations que certains juges peuvent parfois être appelés à vivre en silence et sans pouvoir y réagir.

Ce pays est tellement grand, si bien que les déplacements et les communications peuvent également être difficiles même en cette ère du «village global» et des communications instantanées. Si un juge de St-Jean, à Terre-Neuve, ou de Victoria, en Colombie-Britannique, vit une expérience qui tend à amoindrir l'indépendance de ce juge, cette situation pourrait et même devrait être connue de tous les autres juges ailleurs au pays. Ce n'est que la notoriété qui pourra mettre fin à de telles pratiques. Je vous invite donc à utiliser ce médium à cette fin.

Outre ces articles, vous trouverez dans ce numéro les rubriques habituelles et celles traitant des affaires courantes. À la prochaine ...

INDEPENDENCE WATCH

I have been approached by a number of judges to establish a column in the Journal under the heading given above. It is the perception of these judges that there are many things happening to judges each day throughout the country which affect their ability to functionally independently. These occurrences would be reported on in this column. It is the belief of these judges that publicizing these matters will have the salutary effect of reducing the number of such occurrences or of eliminating them altogether. If you have matters which you believe relate to this subject please send them to me for consideration at the address given in the front.

THE EDITOR

years. There's hardly a man, woman, child, or horse there who does not know who Moxley is.

It seemed a shame to turn that town over to my successor. My encounter with the old man meant that I had arrived. I had reached the point where I was their judge, just as they would have had their hairdresser or their psychiatrist, had La Loche had such people. But of course, it did not, which made having its own judge all the more important. The La Lochians, and the people of those many other communities in northern Saskatchewan whom I had been visiting for those 19 years, had at last taken me in as one of their own. I had come to be seen as being not on the side of the police, or other outsiders, but as being on the side of the people. They could confide in me their innermost secrets.

Armed with the warm and fuzzy feeling my acceptance by the people of the north as a true Northerner gave me, I turned south, away from the land of forests and lakes. I headed toward the great open plains of southern Saskatchewan, and that capital city with the slough in the middle, there to begin a new life, and a renewed search for court comics, and tragedy and comedy in court.

Excerpted from:
"Court Comics: Tragedy and Comedy in Court."

Hon. Ross Moxley,
Provincial Court of Saskatchewan

The House of Commons starts its proceedings with a prayer. The chaplain looks at the assembled members with their varied intelligence and then prays for the country.

Lord Denning (b. 1899), British judge. **Daily Telegraph** (London, 12 Oct. 1989).

IN A LITERARY VEIN

"On Surrendering La Loche ...."

Never a day goes by that the courtroom does not provide a moment of amusement. There have always been, and always will be, those who slip on the banana peels of life, and for a lot of people, that slip will cause them to find themselves in court looking at some judge whose job it is to shake the finger of guilt at them, and, who sometimes is, quietly I hope, chuckling behind the other hand. Those poor folk as often as not have the ability to laugh at themselves, and those who do are the blessed. For without that quality those who have made a mistake in the choice of their parents or their community, will find that slippery path mighty hard, and the getting up from the pratfalls ever harder. As for me, I thank them all. Without them, my own life in court would have been a sorry one. As it is, they have made my life there a joyful one, and they have left me with a vast store of wonderful stories to tell my grandchildren. They have become part of my family folklore, and they have made my own banana peels a lot more fun to slip on.

But I must end somewhere, and what better place than La Loche. That community, for which I developed a fondness out of all proportion to the trouble and work it generated for me, is composed of citizens who, if they have mastered little else, have mastered the art of laughing at themselves.

One day as I was leaving the La Loche courtroom I was vigorously signalled by an elderly but somewhat dishevelled gentleman, leaning precariously against a post. "Hey, Moxley!" he hollered, beckoning me over. Having great respect for elders, since I'm fast approaching the day when I'll be one myself, I hastened over to where he leaned. It was apparent as I approached that the post was vitally necessary. "Shsh," he whispered when I got to his side. "I'm drunk. But don't tell the police." He winked, and grinned a toothless grin.

That was shortly before I left La Loche for the last time. The residents knew me from my dress even if they had never seen me before. But they had seen me before. I'd been strolling the streets of La Loche for nineteen

HOME ALONE - BUT NOT FORGOTTEN

Is Electronically Monitored House Arrest an Effective Alternative to Imprisonment?*

The Hon. Mr. Justice W.J. Vancise**

INTRODUCTION

The futility of sentencing people to prison for non-violent crimes, particularly where protection of the public is not required, has long been recognized. Imprisonment is not an effective deterrent to crime. Until the development of technology to electronically monitor an offender confined to a residence, there had not been effective alternative sanctions to imprisonment in the array of sentencing options acceptable to the public. In this context "effective" means sufficiently intrusive, demeaning, and punitive in the public perception. Electronically monitored house arrest is a sanction with sufficient punitive elements (restrictive of liberty and autonomy) to be an acceptable alternative for imprisonment. It is not a panacea, and must not be regarded as a sanction which will empty the jails, but it can be an effective alternative to the sentencing options available to the courts. It may also be the catalyst which will force the courts to examine, or re-examine, the effectiveness of the traditional custodial sentence as punishment for non-violent crimes.

The term "alternative or intermediate sanction" connotes an alternative to imprisonment, which is presumed to be the norm against which all other sanctions are measured. There is a presumption that incarceration is the appropriate penalty for the commission of most, if not all, serious crimes. Anything less than incarceration is regarded as an exceptional penalty and lenient. The courts have become fixated with sending offenders to prison[1], in the belief that imprisonment and longer sentences will deter the offender and others from committing the crime. This is contrary to empirical evidence which indicates that longer custodial sentences do not deter crime. If one accepts that imprisonment as a penalty for non-violent crimes has been a dismal failure, it is necessary to find acceptable replacement community based sanctions, such as community service, intensive probation supervision and electronically monitored house arrest.

Electronic monitoring is the most intrusive non-custodial sanction. The offender is confined to his or her residence, is supervised by personal telephone contact with probation personnel and the offender's whereabouts are monitored electronically 24 hours a day. Intensive probation supervision, coupled with electronic monitoring, permits the offender less opportunity to re-offend.

During the period of house arrest the electronic monitoring is done by means of a transmitter attached to the ankle of the offender which sends a signal 24 hours a day to a mini computer in the residence

*_Electronic Monitoring and Corrections: The Policy, The Operation, The Research_ (Vancouver: Simon Fraser University, 1995) 27.

**Saskatchewan Court of Appeal.

which in turn transmits it to a central computer. House arrest can be used as a stand alone penalty or as part of an intensive probation supervision program.

The fundamental question to courts in their analysis of whether to impose electronic monitoring is whether intensive probation supervision — which employs electronic monitoring to assist with the supervision — is an effective alternative to imprisonment. Electronic monitoring with intensive probation supervision is a sanction at the upper end of intermediate sanctions; it is more intrusive than other community based sanctions such as community service or regular probation. It is a punishment which combines elements of imprisonment (restriction of liberty and autonomy), by confining the offender to his or her residence with community based (as opposed to institutionally based) programming and services. Electronic monitoring is the sanction which provides the greatest restriction of liberty and autonomy and the highest level of supervision for offenders who are not imprisoned, and hence the greatest degree of protection for the public.

The imposition of the alternative sanction of electronically monitored intensive supervision, which in Saskatchewan is called Intensive Probation Supervision/Electronic Monitoring (IPS/EM), is permitted by ss. 737(1) and 738 of the ***Criminal Code***.[2] It is beyond the scope of this paper to consider the constitutionality of the Saskatchewan program or programs in other provinces. I start therefore with the assumption that the program is constitutional and is statutorily permitted by the ***Code*** and the **Corrections Act**[3]. I also assume that conditions imposed on offenders under the program guidelines do not offend the **Charter of Rights and Freedoms**[4]. There are a number of interesting issues which could arise from such an analysis. For example, issues as whether electronic monitoring violates the offender's mobility rights, the offender's right to privacy, contravenes the principles of fundamental justice or forces the offender to criminate himself or herself may arise. Most of those issues can be finessed by having the offender consent to the terms of the intensive probation order and authorize the probation officer to enter the house to visually check on the offender. In any event, analysis of these Charter issues is beyond the scope of this paper and are best left for future consideration.

The fundamental issue to be addressed by this paper is whether or not electronically monitored intensive supervision is an appropriate and effective penalty. Whether it conforms to accepted sentencing principles and whether its imposition will maintain confidence in and respect for the administration of justice are questions I propose to address. If the answers to the above questions are "yes", one must determine what factors should be taken into account to permit a particular offender to purge his or her sentence through the use of a program of intensive probation supervision. The analysis is undertaken by reference to the Saskatchewan IPS/EM program.

Any consideration of these issues must take place within the context of generally accepted principles of sentencing as enunciated in the seminal case of ***R. v. Morrissette***[5]. This analysis will inevitably lead to an examination of such matters as punishment, deterrence (both specific and general), protection of the public, reformation and rehabilitation and the suitability of community based sanctions as an appropriate alternative to imprisonment within the sentencing framework.

The Canadian Association of Provincial Court Judges Executive Officers

Photo by Hon. Eric Diehl

(L-R) **Hon. Patrick Curran,** 2nd Vice-President, **Hon. Cheryl L. Daniel,** 3rd Vice-President, **Hon. Wesley H. Swail,** Past President, **Hon. Ann E. Rounthwaite,** 1st Vice-President, **Hon. James G. McNamee,** President, **Hon. Pamela Thomson,** Secretary-Treasurer.

CMJA STUDY TOUR TO SINGAPORE AND MALAYSIA - NOVEMBER 1996

The 10 day study tour begins in Singapore on the 15th November and ends in Kuala Lampur (Malaysia) on the 24th, with 2 days' stopover in Malacca the oldest fortress town and former Portuguese settlement on the west coast of Malaysia. Programme includes visits to courts, probation and penal institutions and opportunities to meet judicial officers and court administrators. Programme also includes exciting sightseeing tours and shopping. Fully comprehensive flight/hotel package from London or package excluding airfare available. Only limited places available. For more information, contact Commonwealth Magistrates' & Judges' Association, 10 Duke street, London WIM 5AA. Tel: 0171487 Fax: 0171487 4386.

Judges don't age. Time decorates them.

Enid Bagnold (1889-1981), British novelist, playwright. Judge, in **The Chalk Garden**, act 2.

IN A LIGHTER VEIN

Res Ipsa Loquitur

During my years on the bench, I have taken pride in my punctuality and, when necessary, have reminded counsel that the same was expected of them, regardless of habits imported from elsewhere.

Recently, after lunch, Crown Attorney, Paul Adams, was not to be found. A great effort was made to locate him, even to considering there might have been an extended stay at the washroom.

Eventually he appeared, some 20 minutes late. He apologized for his lateness, explaining that he had been trapped behind a slow moving parade whilst returning from his well-deserved lunch. I noted the novelty of his explanation, but couldn't resist putting my punctuality narrative on the record. The trial proceeded.

The proceedings were interrupted 20 minutes later by vehicles, sirens, loud hailers and horns passing the Court House. My curiosity piqued, I invited a response by asking, "What's happening?"

Without batting an eye or betraying even a hint of a smile, Mr. Adams responded, "That's my corroboration, Your Honour." As you might expect, it took a few moments, in an otherwise serious matter, to control the chuckles and to remark upon the ingenuity of the Crown's use of all manner of evidence to his advantage.

Submitted by the Honourable James K. Kean, Provincial Court Judge, Harbour Grace, Newfoundland

THE SASKATCHEWAN PROGRAM

The Saskatchewan IPS/EM program was designed as an alternative sanction to imprisonment where certain offenders, who would normally receive a custodial sentence, are released into the community under a high degree of supervision. It is a "front end" alternative to imprisonment where the offender is placed on intensive probation by the sentencing judge and is ordered to be confined to his or her residence and participate in the electronic monitoring program. A sentence involves the suspending of the passing of sentence for a period of 1 or 2 years on condition that there be electronic monitoring for the first number of months (it is rare that that exceeds 6 months). The electronic monitoring portion of the sentence is not free standing; it is tied to intensive probation supervision. Electronic monitoring is not a penal sanction in the ordinary sense of the term except for the social stigma attached to it. Rather, it is the mechanism used to enforce the supervision of the confinement to a residence imposed by the terms of the intensive probation supervision order.

The persons eligible for such program fall into three target groups: women, natives and persons who, by either the nature of the crime committed or their personal circumstances (i.e. previous record), would otherwise be incarcerated with probation to follow.

The policy considerations developed by the Corrections Branch relating to the selection of the three targeted groups differ. Women are targeted because there are inadequate facilities and a narrow range of programs available to female offenders in correctional institutions in the province. Natives form part of the target group because they comprise a disproportionate percentage of the prison population (approximately 65%). Offenders who commit crimes which would normally require incarceration with probation to follow are included because the risk to the community was judged to be low enough in the particular case to permit release into the community to serve supervised and monitored sentences. The use of the program will result in the saving of bed space in the correctional institutions. The Corrections Branch's policy is not to "widen the net" but to permit offenders who come within established guidelines to serve their sentences at home in the community under supervision and in conditions where the public is protected and the cost to enforce punishment can be reduced.

IPS/EM Guidelines

What, then, are the guidelines? The program is not *generally* available to, or normally recommended for, persons who have committed the following crimes: homicide, prison breach, sexual assault with a weapon and aggravated sexual assault, abduction, assault with a weapon and aggravated assault. The IPS/EM program is also generally unavailable where an offender has been convicted under s. 348(1) of breaking and entering with intent to commit an indictable offence and the indictable offence is one of the offences listed above. Although these are the general guidelines, the IPS/EM program has been used by the courts as an alternative penalty for sexual assault on at least three occasions. Those cases are regarded as exceptional. In one case, the trial judge initiated the assessment of the suitability of placing the offender on supervised electronic monitoring, and ordered that the offender serve 6 months of monitored house arrest *after* serving one year in prison. The same approach was used in a second sexual assault case as a means of ensuring that the offender followed the treatment programs

on an Indian Reserve upon his release.

In contrast, the program is available for offenders who have committed non-violent crimes. To be eligible to be referred to the program the offender must be evaluated in the context of a pre-sentence report against an Offender Classification Profile. That profile contains 14 factors on which the offender is measured. It is at this point that the probation officer assesses the needs and the risks and determines the suitability of intensive probation with electronic monitoring as an alternative sanction. An offender who is rated as a high risk requiring incarceration primarily because of the nature of the crime committed, but who is otherwise suited for the program (as more particularly described below), is recommended as a candidate for intensive supervision (with or without electronic monitoring) to the sentencing judge. The offender must either rate high on the Offender Classification Profile or a probation officer, after consultation with the supervisor or the Project Co-ordinator, must override the indicated profile and recommend that while in the circumstances of the case imprisonment is normally warranted, IPS/EM is the preferable penalty. In addition to the seriousness of the offences, the motivation of the offender is an important factor in determining whether the offender is a suitable candidate. Of paramount importance in that assessment is the protection of the public. If the risk of danger to the public is high, the offender is not an acceptable candidate and IPS/EM will not be recommended.

IPS/EM differs from ordinary probation in that IPS/EM contains specific time related goals and requirements. It is a time specific program and one which provides an increased level of face to face supervision and contact between the offender and the probation officer or counsellors that may be involved. The offender has contact with Corrections Branch staff, program staff, support staff, or volunteers (i.e. an AA sponsor) on an almost daily basis. The Corrections Branch staff is in phone contact with the offender three or four times a week, and the offender has a weekly face to face appointment with the probation officer. The offender is referred to service agencies in the community for counselling. There are regular but randomly scheduled home visits to check that the offender is respecting the curfew, as well as regular random drug and alcohol testing.

The intensive nature of the supervision of the offender is exercised in one of two ways: by Corrections Branch personnel (probation officers); or, by probation officers and electronic monitoring. The latter provides for a more intensive level of supervision.

The offender must agree to being placed on electronic monitoring and accept the terms of the probation order made by the presiding judge. The offender's movements are continuously monitored by use of a transmitter which is attached to his or her ankle. It sends a signal of the offender's whereabouts to a transmitter located in the offender's residence. This transmitter, in turn, sends signals via the telephone lines to a central computer. If the offender leaves the designated residence it is immediately detected. Similarly, any attempt to tamper with the ankle device or the transmitter is detected. The breach of a curfew (by leaving the house) is known to the central monitoring authorities within minutes and verification of the offender's

goal of eventually bringing them up to 90% of the salary paid to Federally-appointed judges. With practically no notice to the judges, government voted to reject the recommendations, with vague rationale that the recommendations did not accord with government policy.

In November, 1995, the B.C.Provincial Judges' Association voted to seek a judicial review of this decision. Proceedings were commenced and the matter was set for argument before the Supreme Court of British Columbia on May 27 and 28, 1996.

Judges' Assistance Program. A committee of the Association recommended a structure for a program to be operated by the Association. The report of the committee has been tabled pending the outcome of discussions about the National Judicial Counselling Program.

THE TERRITORIES:

Salaries and Benefits. In the Northwest Territories, a 3.25% increase in salary has been negotiated "subject to cutbacks". A formula is being considered which will be linked to the salaries of Federally-appointed judges.

Court Unification. A committee has been struck in the Northwest Territories to consider the unification of the Supreme and Territorial courts.

Judicial Immunity. A recent decision in the Yukon has confirmed that provincial judges have the same immunity from legal action as Federally-appointed judges.

WANTED - PENPALS

I am interested in finding two penpals, one in Canada and the other in a Commonwealth country who would be agreeable to providing copies of their letters to me for publication in the Journal on an ongoing basis. I envision a serial format to the publication, with the letters out and the replies to same published simultaneously in the same edition of the Journal, or in succeeding editions as the situation might dictate. If you have a penpal, are not timorous about having your epistles appear in print, and are agreeable to participating in this enterprise, contact me at the address given in the front.

THE EDITOR

Crown directed a stay of proceedings on the charge, thereby pre-empting the court from deciding the issue raised by the accused.

National Judicial Counselling Program. This was enthusiastically endorsed by the Chief Judge and funding has already been put in place for it.

Civil Courts. The Saskatchewan Bar Association presented a proposal to the government to extend the jurisdiction of the small claims court. The judges agree with this if sufficient additional resources, support staff and extra judges are provided to handle the extra work.

Meeting With the Chief Judge. A welcome spirit of co-operation and openness pervades the relationship between the Chief Judge and the Judges' Association. A recent meeting occurred between the two and it is seen by the judges as instructive of how the court operates. As an example of the cooperation, and in an unprecedented move for the Chief Judge's Office, the Executive of the Judges' Association was shown the entire budget for the operation of the Provincial Court.

ALBERTA:

Litigation. Recently, the government of Alberta succeeded in obtaining a stay of proceedings in an action taken by the judges against the government. This stay was granted because of the proceedings in **R. v. Campbell, et al**, which is before the Supreme Court of Canada and which is regarded as dealing with the same issues which were raised by the judges in their action. Nonetheless, the judges are disappointed, since they lose carriage of the proceedings which deal with these important issues.

The Alberta Judges' Association has filed application to intervene in all matters before the Supreme Court of Canada involving the issues of judicial independence. These, of course, are from Manitoba and Prince Edward Island.

Term Appointments-Chief and Associate Chief Judges. The Executive of the Alberta Judges' Association has struck a committee to investigate and provide a position paper on the issue of limited term appointments for the Chief and Associate Chief Judges.

Judicial Elections Act-Bill 218. A private member's bill, entitled the **Judicial Elections Act**, was introduced in the Fall, 1995 sittings of the Alberta legislature. This was sponsored by a Mr. Hlady, a Conservative member, and would provide for the election of judges. It died on the Order paper. However, it has been re-introduced as Bill 218 in the Spring session. In a clear case of putting the cart in front of the horse, its sponsor has also introduced a Notice of Motion calling upon the government to investigate the feasibility of electing judges.

BRITISH COLUMBIA:

Salaries and Benefits. In the spring of 1995 the Judicial Compensation Committee had filed a report recommending substantial increases in the salaries of judges, with the

absence is commenced immediately: first by telephone; and, secondly, by visual verification in cooperation with the local police.

Terms of Intensive Probation and Electronic Monitoring

The probation officer who prepares the pre-sentence report recommends to the trial judge the terms to be included in the IPS/EM order. Those terms are designed to ensure that the public is protected and not in danger, while at the same time permitting the convicted offender to serve the sentence in the community. The probation officer designs the conditions to meet the particular rehabilitative and program needs of the offender. Typical terms and conditions include the following:

i) participation in electronic monitoring;
ii) confinement to a designated residence for a specified period of time;
iii) continuation of employment;
iv) education or employment requirements;
v) abstinence from drug and alcohol use;
vi) submission to drug and/or alcohol testing as required; and,
vii) submission to such counselling as determined necessary.

Standard terms and conditions of intensive probation supervision (IPS) are similar with the exception of the requirement to participate in the electronic monitoring program.

It will be noted that if the offender does not require the high degree of supervision or surveillance permitted by electronic monitoring, or for some other reason cannot participate in the electronic program (i.e. does not have a telephone), the recommended conditions can be modified to provide for confinement to the residence with curfews being personally monitored by a probation officer and by telephone, if available.

Once the offender is placed on electronic monitoring, the probation officer issues an instruction order which specifies the times that the offender can be absent from the residence. That order is reviewed every 7 to 10 days to ensure that the designated times continue to meet the offenders program and employment needs. The failure to comply with the curfew or terms of the confinement to the residence can result in the offender being charged under s. 740 of the ***Code.***

IS ELECTRONIC MONITORING AN ACCEPTABLE ALTERNATIVE TO IMPRISONMENT?

Whether electronic monitoring is an acceptable alternative penalty to imprisonment requires a consideration of accepted sentencing principles. It is generally accepted that the use of incarceration as an effective penalty has failed and should be used with restraint. As long ago as 1969, the Ouimet Report[6] proposed the following sentencing policy:

> **... segregate the dangerous, deter and retrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition, the possibility of rehabilitation should be taken into account.**[7]

Sentencing Principles

Sentencing takes place within a principled framework where the courts seek to impose a fit sentence having regard to the offence and the offender. Significantly, one of the major reasons given by trial judges for refusing to implement the recommendation of the probation officer that the offender be placed under electronically monitored house arrest is that this penalty is not seen as satisfying the traditional sentencing requirement that the offender be incarcerated. The penalty is not regarded as severe enough, perhaps because there exists a judicial misconception as to the severity of the penalty of electronically monitored house arrest.

Traditionally, punishment, general and specific deterrence, the need for protection of the public, reformation and rehabilitation have been considered when imposing a fit sentence. That traditional analysis does not or should not, however, prevent the courts from seeking acceptable alternatives on the basis of those broad principles. Culliton C.J.S., on behalf of the Saskatchewan Court of Appeal, articulated a dynamic approach to sentencing:

> **There is as well, as there should be, a constant changing of approach to the problem of sentencing. This changing attitude, in my opinion, was properly expressed by Ernest A. Coté, Q.C., who, in an address to the John Howard Society of Alberta, said:**
>
> > **"Perhaps the principal difference between criminal justice in the past and today is that the concepts of retribution, deterrence, and denunciation of evil are slowly being abandoned and gradually being replaced by what are considered to be realistic, social science concepts."**
>
> **Such a changing attitude requires, from time to time, a review and reappraisal of both the elements underlying an appropriate sentence and the emphasis to be placed thereon.**[8] (emphasis added).

As long ago as 1975, the Alberta Court of Appeal in ***R. v. Wood***[9] noted that "the offences which require a prison sentence...grow fewer and fewer as more humane approaches are developed". The Saskatchewan Court of Appeal in ***R. v. Ulrich***[10] stated that it is wrong to consider the imposition of a sentence of something less than imprisonment as necessarily a lenient sentence. Speaking for the majority (Bayda C.J.S. and myself), I stated that non-violent offences should not attract custodial sentences and the courts should strive to find other more appropriate sanctions. I returned to that theme in ***R. v. McGinn,***[11] albeit in dissent, and most recently restated much of what I said in ***McGinn in R. v. McLeod***[12].

In examining the appropriateness of intensive probation coupled with electronic monitoring as an appropriate sanction one must understand the following:

1. The offender's liberty is severely restricted. The offender is confined to his or her residence, able to leave only to go to work or attend rehabilitative programs or treatment. The offender is subject to supervision 24 hours a day.

2. The intensive probation supervision which is electronically monitored (IPS/EM) is at the upper end of the middle range of sanctions, more severe than probation, community service or any other form of non-custodial sanction, but less severe than imprisonment served in a prison.

to the Fund. The money collected will be used to pay for the initial consultation with counsel if a complaint is made which brings the judge before the Judicial Council.

MANITOBA:

Salaries and Benefits. The report of the second Judicial Compensation Committee, covering the years 1992-93 has now been presented to the Minister of Justice. The recommendations of the majority of the three person tribunal are:

- that the salaries of the judges be increased to $96,180 (2.3%) effective September 1, 1993 and to $97,022 (0.9%) effective September 1, 1994, and that the additional benefit received by the Chief and Associate Chief Judges be $7000 and $2000, respectively.

- that the supplementary pension benefit for provincial court judges be extended to cover service prior to July 1, 1992 for those judges who continue to be active participants in the pension plan as of the date of the report.

- that other benefits remain unchanged.

The Judges' Association representative on the tribunal concurred in the majority report, but would have recommended differently in two areas, pensions for active members, and other benefits.

There are ongoing talks between the Government of Manitoba and the judges on how to structure the compensation process. Despite the apparent willingness to find some common ground, it is evident that any final solution is still a distant thing. The Judges' Association will soon have to decide whether it will demand the early convening of the two outstanding tribunals which will address these issues for the years 1994-95 and 1995-96.

SASKATCHEWAN:

Litigation. The action commenced against the provincial government commenced by the Judges' Association continues to be mired in procedural difficulties. There have been Demands for Particulars, applications to strike parties, delays with respect to Examinations for Discovery and sundry Notices of Motion. At the moment, Judge G.T.G. Seniuk has been partially examined for discovery and there are applications to define the number of judges who may be examined. In addition, there is an effort being made to have a date, time and place designated for the discovery of the Minister of Justice.

In a related matter, an accused asked a judge to excuse himself on the trial of failing the breathalyser charge, by reason of apprehension of bias emerging from the civil action. The Saskatchewan Queen's Bench ruled that the provincial court judges have a public and legal duty to exercise their jurisdiction pending the outcome of their civil action. This was appealed by the accused to the Court of Appeal, in a hearing which took place in September, 1995. On February 21, 1996, while a decision was still pending from the Court of Appeal, the

In this case, the Chief Judge proceeded directly with the Justice Minister without consultation or public process.

The Quebec government refuses to consider changing the judges' compensation and intends to replace the current process of Triennial Committees by a process of salary indexation offered to civil servants of higher rank.

Administrative Appeals. The Quebec Court is composed of the Civil, Youth and Criminal and Penal Divisions. For nearly 40 years, the Quebec Court has exercised wide powers in the area of administrative law. In particular, it operates as an Appeal Court in administrative justice matters. The Quebec government intends to create a separate appeal tribunal and to remove this jurisdiction from the Quebec Court.

Interventions Before the Supreme Court of Canada. The Quebec Judges' Conference has decided to ask for leave from the Supreme Court of Canada in the cases before it regarding judicial independence, from the provinces of Alberta, Manitoba and Prince Edward Island.

At its annual meeting, the Conference also authorized the Executive to contribute a sum of money, not to exceed $10,000, to the Alberta Provincial Judges' Association, to assist with the cost of their legal action.

ONTARIO:

Salaries and Benefits. Representatives were supposed to have been appointed to the Provincial Judges' Remuneration Commission by the end of June, 1995, and the Commission was to have completed its work and reported by December 31, 1995. This did not occur.

The Ontario judges were finally able to persuade the government to make its appointments to the Commission in January and February of this year. In essence, the judges have had to agree to a deferral of the conclusion of the process for a period of one year, until December 31, 1996.

Judicial Council. A new Judicial Council has been appointed. The Chief Justice of Ontario, the Honourable Mr. Justice Roy McMurtry, is the head of the Council. Five of the twelve members come from the provincial court, there is one federally-appointed judge and the remaining six members represent the legal profession or the general public.

Provincial Court History Project. A historian has been hired to interview 29 older provincial court judges. It is intended that the materials gathered be the genesis of an archive which will become a formal history of the court.

Compensation Fund. In May, 1995, the Ontario Judges' Association and the Ontario Family Law Judges' Association voted to implement a self-funded insurance scheme which would help pay for the costs associated with complaints to the Judicial Council. In March, 1996, the judges voted to make this program effective on April 1, 1996. From that date each judge is expected to pay an additional amount of $100.00 on the annual fee as a contribution

3. There is no earned remission. The offender's liberty is restricted not only for the period of house arrest, but may also be restricted, although not to the same extent, for the full term of probation.

4. There is an illusion of liberty but, in reality, the sanction (a form of house arrest) is partially custodial.

5. The authorities recommend that a maximum of six months electronic monitoring be assessed. Any period longer than six months dramatically increases the likelihood of a breach of the condition because of the intrusive nature of the monitoring mechanism and difficulty of completing such a term. (Recent research would tend to dispute this, but to date the author has not seen the published studies).

6. The need for the protection of the public has been carefully considered and the offender, although requiring monitoring, is not considered a high risk to serve an electronically supervised sentence in the community.

7. The offender's emotional stability has been assessed and he or she has demonstrated a sincere desire to change and a willingness to participate in the program.

8. The offender has consented to electronically monitored house arrest and electronic monitoring and to random drug and alcohol testing (if required).

9. The offence for which IPS/EM is imposed is generally a non-violent crime, a crime which although high risk, meets the other program requirements, and not one which puts in question the integrity of the administration of justice.

In addition, the court must determine what constitutes a fit sentence having regard to available sentencing options.

Public Confidence in the Administration of Justice

Before reviewing case law dealing with IPS/EM as an alternative sanction, it is necessary to consider the issue of sentencing in the context of public confidence in and respect for the administration of justice. While the question may be formulated in a number of different ways, basically it may be posed as: Can the courts impose alternative sanctions to imprisonment in circumstances where a custodial sentence would normally be imposed, and still maintain confidence in the administration of justice? I believe that not only are the courts able to, but that the non-custodial alternative sentences can be rationalized and justified and that confidence in the administration of justice will not only be maintained, but enhanced. The intermediate sentence of electronically monitoring the offender's confinement to a residence is perfectly suited to replace incarceration as an appropriate sentence for non-violent crimes, in combination, where necessary, with intensive supervision and other appropriate non-carceral penalties such as community service orders.

A compelling argument can be made that there is a loss of public confidence in and respect for the administration of justice where the offender is sentenced to a 3 or 4 year prison term, (i.e. for fraud or breach of trust, a typical white collar crime) and the offender is released by the parole authorities

a matter of a few months or sometimes a few weeks later. Under IPS/EM the term of house arrest is fixed and the conditions of probation set out. The electronically monitored offender is confined to his or her residence subject to conditions which permit that person to be absent from the residence only to continue employment or take treatment where otherwise permitted by the probation officer.

Judicial Consideration of Suitability of Electronic Monitoring as an Alternative Penalty

The suitability of electronically monitoring the house arrest of an offender has recently been considered by the Saskatchewan Court of Appeal in three cases.

The issue was considered for the first time in ***R. v. Pearman***[13]. The accused was convicted of dangerous driving causing bodily harm and the circumstances were aggravated by reason that the victim had been seriously injured. The sentence was suspended for 18 months and the accused was placed on the IPS/EM on condition that he be confined to his residence for the first 6 months of the probation. He was permitted to leave his residence only to continue his employment. The Court stated:

> **We note at the outset that the respondent was charged with dangerous driving causing bodily harm, a serious offence which resulted in serious injury and damage to the victim. In our opinion, a suspended sentence and imposition of terms under the Intensive Probation Supervision/Electronic Monitoring Program was inappropriate in the circumstances of the case. The sentence failed to take into account the factor of deterrence and public confidence in the administration of justice**[14]. (Emphasis added).

The Court was of the opinion that, in the circumstances of that case, a denunciatory sentence was required and that it was necessary to impose a custodial sentence. The Court stated that normally a minimum custodial sentence of 6 months imprisonment would be imposed for such offence. The intensive probation supervision order was set aside and a sentence of 90 days to be served intermittently was substituted. The offender was given credit for the four months spent on electronic monitoring, although the amount of credit was not identified.

The Court, in underlining the denunciatory nature of the sentence and the reliance on specific and general deterrence reiterated the statement in ***R. v. Powell***:[15]

> **[I]n a crime of this nature the factor of deterrence must be given adequate consideration. If the sentence adequately emphasizes community disapproval of such conduct by branding it as reprehensible, one can hope that it will have a moral and educative effect on the attitude of the public. Not only will the offender refrain from repeating such conduct but perhaps other members of the public will appreciate the seriousness of such conduct.**[16]

The second case to consider the appropriateness of IPS/EM, ***R. v. Erdmann***[17], arose in the context of a conviction following a guilty plea for two counts of trafficking in cannabis resin, and one count of possession for the purpose of trafficking in cannabis resin. The accused, who was 22 years of age and had one child,

NEW BRUNSWICK:

Unified Criminal Court. The initiative to create a Unified Criminal Court in New Brunswick has sputtered and is considered to be dying. In February, 1996, the Minister of Justice for the province announced that the project had been moved "to the back burner". He cited three criteria stipulated by the Federal Minister of Justice as his reasons for the decision, describing them as impossible to meet.

Amendments to the Provincial Court Act. A recent change was made to the legislation to grant to provincial court judges "the same protection and privileges as are conferred upon Judges of the Court of Queen's Bench, for any act done or omitted in the execution of his or her duty". This was a response to a civil action (dismissed as frivolous!) against a provincial court judge because of action taken in the course of judicial proceedings.

In another amendment to the legislation, the New Brunswick government passed a provision which eliminated supernumerary status for provincial court judges. Formerly a judge who had reached age 60 and had served a minimum of 25 years, could elect this status and, instead of taking pension benefits, could continue to draw full salary as long as the judge was available to work the equivalent of 40% of the year. The change was strenuously opposed by the New Brunswick Judges' Association, but passed regardless.

Two judges were directly affected: one elected to return to full-time duties, despite failing health. He is contemplating legal action to test the validity of the legislation. The other has commenced legal action and avers in his pleadings, amongst other things, that it seriously impinges on his judicial independence.

QUEBEC:

Salaries and Benefits. In February, 1996, the Quebec Justice Minister advised the Quebec Judges' Conference that the 1993 Triennial Committee's recommendations would not be ratified. At the same time as the Triennial Committee's recommendations were disallowed, changes in compensation for Chief Judges were authorized. The Chief Judge's requests that were met were preceded by structural changes in the Court's organization:

- Assistant Administrative Judges are now appointed to assist administrative judges in larger districts for the Criminal, Youth or Civil Division. The Senior Judges will have responsibility for all divisions.
- There will now be only one Associate Chief Judge who will be responsible for the entire province of Quebec.
- Assistant Chief Judges will now exercise the authority delegated by the Chief Judge in their respective divisions for the whole of the province of Quebec.

In the past, the Triennial Committees received public representations on the compensation of Chief Judges by both the Chief Judges and the Quebec Judges' Conference.

they were supposed to be served by the tribunal process. During the same period, the salary of the Deputy Minister of Justice increased from $91,760 to $106,033.

Recently, the Executive of the Provincial Judges' Association and the Association's lawyers met with the new Minister of Justice, Mr. Chris Decker. It appears that he is going to take a different approach than his predecessor: he committed himself to the tribunal process and has undertaken to appoint a new tribunal soon.

PRINCE EDWARD ISLAND:

Salaries and Benefits. A 7.5% salary rollback remains in effect. It is expected that judges appointed before April 1, 1994, will receive a 3% increase, retroactively, a further 3% effective April 1, 1996, and that these salaries will revert to the national average as of April 1, 1997. For those appointed after April 1, 1994, they are paid at the average of the Atlantic provinces, rather than at the national average. Using 1995 salaries, this results in a differential of $3000 at present but will approximate $11000 if the rollback is phased out.

Amendments to the Provincial Court Act. An amendment to the **Provincial Court Act** is proposed which will enable a French-speaking provincial court judge from New Brunswick to be appointed to hear cases in French in Prince Edward Island. There are presently four or five matters to be heard in French, pending the passing of the legislation.

The same amendment package will provide for the establishment of a Judicial Council. Negotiations are ongoing with the other three Atlantic provinces to establish an Atlantic Judicial Council to serve all four provinces.

Litigation. Litigation regarding judicial independence continues to wind its way through the courts. There are appeals to the Prince Edward Island Court of Appeal and the Supreme Court of Canada and applications for leave to appeal and for intervenor status afoot.

NOVA SCOTIA:

Salaries and Benefits. The judges are in the last year of a three year salary rollback. The legislation governing judges provided for a tribunal to deal with salaries and benefits. For the third successive year, the government has refused to constitute the tribunal, observing that the rollback legislation suspended the tribunal process.

Efforts at reconstituting the tribunal to provide for a neutral chairperson have been equally frustrating. The government has indicated that it will replace the provision in the legislation providing for binding effect of the tribunal's recommendations if the legislation is opened up to deal with the constitution of the tribunal.

New Chief Judge. The judges are awaiting the appointment of a new Chief Judge following the retirement of Chief Judge Elmer MacDonald. The judges would like some input into the appointment of the new Chief Judge, but are not optimistic that any will be permitted.

admitted to being a "user", and to trafficking in cannabis resin over a period of time. She was accused of and admitted to having sold one-half pound of cannabis resin and attempted to mitigate the culpability of her conduct on the basis that she sold only to her friends.

The trial judge noted that on the basis of authorities emanating from the Saskatchewan Court of Appeal, notably ***R. v. McGinn***[18], a sentence of 9 months was justified. He declined to impose such a penalty but rather suspended the passing of sentence for one year and ordered intensive probation supervision for one year. The accused was ordered confined to her residence for the first 6 months of the probation on such conditions as may be imposed by the probation officer together with electronic monitoring.

On appeal, the Court again stated that IPS/EM was not an acceptable or suitable penalty in the circumstances of that case. Wakeling J.A., writing for the Court, noted that it had received an explanation of the IPS/EM program during argument and indeed quoted from a portion of the program summary provided by the IPS/EM Program Co-ordinator. The Court, in arriving at the conclusion that IPS/EM was not an appropriate penalty in that case, made a number of observations:

i) the Court should proceed cautiously in developing guidelines for when IPS/EM would be suitable;

ii) it was "impossible to say how effective that [electronic monitoring] may become and the extent of its application";

iii) no special circumstances had been shown to justify overriding the presumption of incarceration by the use of IPS/EM in the circumstances of that case;

iv) only a small percentage of offenders are "offered the opportunity of participating in this program";

v) there was no evidence before the Court other than the "temperamental suitability of the [offender] to justify a departure from the norm"; and,

vi) the transaction or transactions admitted to by the accused were of a commercial nature.

That panel reasserted its belief in the importance of general deterrence and the necessity to send a message to the general public that traffickers in drugs will be dealt with harshly. Wakeling J.A. stated:

> **This court has shown its concern about the harmful social consequences of the drug trade and the need to have special concern for the concept of general deterrence in order that everyone may be aware there is no easy way to experiment with the profits available from the sale of drugs. It is not sufficiently clear that the use of this program, in circumstances such as exist here, will adequately continue that message. This concern is consistent with that expressed in *R. v. Pearman.*[19]**

What is significant about the analysis in *Erdmann* is that IPS/EM was not *rejected* as an alternative sanction. Indeed, the Court was careful to say that the sanction should be approached with caution because the Court did not have enough information to

make a fully informed judgment. It was also careful to point out that no good reason had been demonstrated to the trial judge or to the Court — other than the psychological suitability of the offender — to depart from the range of sentences developed by the Court and which, in the circumstances of that case, required that a custodial sentence be imposed. The offender had simply failed to demonstrate that the presumption of incarceration should be overridden.

The final important component of that case is the opinion expressed that only a small percentage of the convicted offenders "*will be offered the opportunity* of participating in [the] program". This statement underscores the pervasiveness of the presumption of incarceration. Anything less than incarceration is viewed as lenient. There is a judicial perception that electronically monitored house arrest is a "soft" and not a punitive or intrusive punishment. As illustrated earlier, this represents a fundamental misconception about the intrusive and punitive nature of intensive supervised probation and the mechanisms used to enforce the supervision.

In my opinion, terms like "home confinement" and "electronic monitoring" obscure the nature of the penalty imposed and make it difficult for judges and the general public to accept that the liberty of the offender is significantly affected by such a penalty.

The most recent decision of the Saskatchewan Court of Appeal dealing with the appropriateness of the alternative sanction of electronic monitoring is ***R. v. McLeod***.[20] That case dealt with the alternative sanction of IPS/EM for a conviction of trafficking in a schedule F drug, contrary to the provisions of the ***Narcotic Control Act***. That offence is one of the least serious offences of trafficking and not one which would ordinarily carry a presumption of imprisonment.

In ***McLeod***, an RCMP informer, who had sold drugs to McLeod in the past and had been in prison with him, called McLeod to find out if he could purchase some prescription drugs. McLeod was under a doctor's care and had a quantity of Xanax which had been prescribed for him to control depression. At that time McLeod was broke, had little or no food in his apartment, had run out of cigarettes and was still using drugs. He was, in a word, vulnerable. Though McLeod was initially reluctant, after some persistence on the part of the RCMP informer he finally agreed to sell and did in fact sell, 50 tablets of Xanax for $30.00. McLeod eventually entered a plea of guilty to trafficking and violating the probation order some 13 months after his arrest.

A number of positive things happened to McLeod between the commission of the offence and the eventual guilty plea some thirteen months later. The change had really begun some six months prior to committing this offence. In January, 1991 he pled guilty to a series of break-ins which he committed to repay an outstanding drug debt. The passing of sentence was suspended, but, he violated his probation by breaching his curfew and continuing to use drugs, he pled guilty and was sent to jail for five months. It was at about this time that he realized that he had to change. He was 30 years old and had essentially wasted his life to that point by using and abusing drugs.

McLeod went back to school and took grades 11 and 12 upgrading at the Saskatchewan Institute of Applied Science and Technology (SIAST) from August of 1991 until June of 1992. He completed that

FROM THE PROVINCES

NEWFOUNDLAND:

Leave Without Pay. In the 1994-95 budget the government announced that all who are paid from the public purse would be required to take 1.5 days without pay during the fiscal year. An amount equal to the salary for 1.5 days was deducted from Judges' salaries.

Salaries and Benefits. The Provincial Court Act was proclaimed October 16, 1991. Section 28 of the **Act** provided for an independent tribunal to make recommendations to Government on salaries and benefits. A first tribunal was established. It reported to Government on April 14, 1992. The report was favourable to judges, recommending an immediate increase in salary from $90,129 to $101,00 and a further increase to $112,000 on April 1, 1994. On May 1, 1992, Government decreed that consideration of the report be deferred until expiration of the restraint period provided for in **The Public Restraint Act**, 1992. In December, 1992, an **Act** to amend **The Public Restraint Act** was passed lifting the restraint on all public sector employees, but excluded judges, for whom the restraint was extended to March 31, 1994. On May 16, 1994, the matter was again raised in the House of Assembly and the tribunal report was again varied by resolution. The recommendations of the tribunal were nullified and Treasury Board was asked to consider whether the position of judge should be "re-classified". An independent consultant was retained for this purpose. The resolution provided for consideration of any recommendation for reclassification by the legislature before implementation.

James Blewett, General Manager of the Hay Group, was retained to do the re-classification. He submitted his report in March, 1995. He recommended an increase from the current salary of $90,129 to $97,430, retroactive to April 1, 1994. Government refused to release the report until it was considered by Cabinet. Commitments as to when it would be dealt with by Cabinet were not honoured. The judges were ultimately advised by memo from the Chief Judge's office that the report had been considered by Cabinet on December 14, 1995 and its recommendations were rejected. The judges were not officially notified of Cabinet's position.

Under Section 28 of **The Provincial Court Act**, Government was required to appoint a new tribunal on December 1, 1995. They have ignored their own legislation in failing to do so.

During a November, 1995 meeting, then Justice Minister, Mr. Roberts, made it clear that he intended to recommend to Cabinet that the Act be amended to eliminate the tribunal process "because it is clearly not working".

The last salary increase was 2% to $90,129 in April, 1990. Judges have not received the step increases all other senior public servants have been receiving since 1990, because

McConnell and we look forward to the final draft.

The Committee on the Law, chaired by Judge Owen Kennedy, has recently participated in a consultation relating to **Criminal Code** amendments. The work and the worth of this committee is evident: proof of this is present in that the federal government sought their input and was willing to spend a significant amount of money to fund the attendance of committee members.

In Moncton, there was no appointment made to the Chair of the Family and Young Offenders Committee or the Constitution Committee. Those vacancies have been filled by the appointment of Judge Andre Guay of Ontario to the former and Judge Gilles Cadieux of Quebec to the latter. On behalf of the association, I extend to them our gratitude in agreeing to fill these positions. As well, I thank all chairpersons and committee members who give so freely of their time.

To date, the year has been relatively quiet as we await resolution of the various court cases which are ongoing.

The contribution of Judge Gerald Senuik must also be recognized, both for his efforts in setting up the media workshop and for his work with the C.B.A. He was instrumental in arranging for the publication of a short article on the need for a process in setting judicial salaries and benefits. This is likely to appear in the C.B.A.'s May publication.

Judge Patrick Curran attended as our representative at the Chief Judges' meeting in Ottawa in February. A number of issues were discussed, including the Chief Judge's wishes to be afforded the opportunity to make representations before the Schmeiser report is finalized.

I believe it is extremely important that the relationship between the Association and the Chief Judges be maintained so that they are kept fully informed. Their support and co-operation is critical to the interests and operation of this Association.

I express my thanks to the other officers for their help to this point and, in particular, Judge Thomson for her tireless efforts on our behalf. Judge Irwin Lampert can attest to the amount of work that Judge Thomson has done and continues to do. Coupling his talents with her experience, Judge Lampert is quickly demonstrating that he will be a very capable successor.

Hon. J. G. McNamee
April, 1996 - Montreal, Quebec

When the judge calls the criminal's name out he stands up, they are immediately linked by a strange biology that makes them both opposite and complementary. The one cannot exist without the other. Which is the sun and which is the shadow? It's well known some criminals have been great men.

Jean Genet (1910-86), French playwright, novelist. **Prisoner of Love**, pt. 1 (1986) tr. 1989).

course with honours. He was accepted into a two year Biological Science Technology Course at SIAST. There were 84 applicants and he was among the 23 accepted. In addition, he performed much volunteer work at SIAST and participated in weekly Bible studies at his church and he regularly attended AA meetings. In June of 1992, he registered in an evening class in microbiology so that he would have a head start on the academic year at SIAST. He was one of seven people of the original group selected for the Biological Science Technology Course still taking the course at the end of the first year.

McLeod was on bail for some thirteen months prior to his sentencing and was subject to certain restrictions on his liberty during that period of time. He had an 11:00 p.m. to 7:00 a.m. curfew and reported once a week to his parole officer for the first six months of his bail.

The trial judge accepted the recommendation of the probation officer, suspended the passing of sentence for two years and ordered that McLeod be placed on intensive probation, a condition of which was that he be confined to his residence for the first 6 months of probation with electronic monitoring.

What is interesting about this case, is that the trial judge accepted the recommendation that the offender be placed on IPS/EM notwithstanding that the convicted offender had previously broken the conditions of an order of intensive probation supervision electronic monitoring. The trial judge was satisfied that the accused was not attempting to manipulate the sentencing process, was sincere in his desire to change, had indeed become rehabilitated and should be given the chance to finish his education.

The federal Crown applied for and received leave to appeal. The Court of Appeal unanimously upheld the decision of the trial judge and concluded that IPS/EM may be an appropriate alternative sanction for trafficking in small quantities of "soft" drugs, and by implication, for non-violent crimes. It is a logical extension for traditional custodial penalties. The Court recognized that this alternative sanction was an intermediate penalty, one in which the offender is subject to a high degree of supervision — second only to imprisonment — and that supervision will continue (albeit at a lesser rate) after the period of electronically monitored house arrest is over. It is a hybrid sanction, not completely custodial and not entirely supervised liberty, but one which is intrusive and punitive.

The Court analyzed the Saskatchewan IPS/EM program at length and measured that program against traditional sentencing factors. The Court considered whether the trial judge was justified in imposing a sanction other than imprisonment and whether there were factors in existence which would override a non-custodial sentence. The Court stated:

> **One must weigh the positive and negative factors in answering that question [the presumption of non-incarceration]. There are a number of positive factors. Are the offender's personal circumstances, and prospects for rehabilitation sufficiently compelling to outweigh what the Crown submits must be the predominant factor, general deterrence? In my opinion, they are. I say that for a number of reasons. First, general deterrence is not the predominant factor in sentencing for this type of offence. It is but one of the factors that must be considered**

in imposing a fit sentence. This is not an offence which carries a presumption of incarceration. Second, even though this is a serious offence having a maximum penalty of three years, there is no statutorily mandated minimum penalty. Third, the offender's conduct did not cause or threaten serious harm to others. Here, the transaction occurred when the accused was in a very vulnerable state and the police agent arranged a $30.00 buy of prescription drugs. There is no evidence that the accused sold Xanax to teenagers or, indeed, that he had sold the prescription drug to anyone else although the Crown tried to create the impression that he had sold the drug to others. There was no evidence to support that contention and, in fact, the counsel for the accused specifically denied the allegation made by Crown counsel. Fourth, in considering the conduct of the victim, I note that the police undercover officer or his agent, clearly set up and facilitated the offence.

Fifth, and more importantly, the overwhelming evidence is that the offender has become rehabilitated. He had remained "clean" and sober for approximately 17 months (at the date of the hearing of the appeal). He has succeeded against great odds in passing his high school equivalency exams with honours and his exams at SIAST and appears to be on his way to obtaining his Biological Sciences Technicians Certificate. I cannot emphasize enough how the accused has succeeded despite a number of factors working against him. These are factors which this Court can consider in assessing the fitness of the sentence. See *R. v. Matthon*.[21]

Sixth, while it is never easy to predict these matters, it would appear that the likelihood of McLeod re-offending is remote. I say that with some hesitation given his record, but, in these circumstances, he appears to have become rehabilitated and dedicated himself to succeeding in his studies and changing his lifestyle.[22]

The Court considered its earlier decisions in ***Pearman*** and ***Erdmann*** and stated:

In addition, Crown counsel contends that electronic monitoring is not an appropriate alternate sanction for drug offences. He contends this Court in *R. v. Erdmann* stated that electronic monitoring is not an appropriate sanction in trafficking cases. I do not agree that that was the ratio of that case. In *Erdmann*, Wakeling J.A., speaking for the Court, pointed out that it was appropriate that the Court be cautious in the approach to be taken with respect to the implementation of electronic monitoring. He went on to say "this is particularly so when...no special circumstances have been shown to exist for the application of the program in this case... ."[23] It is true that he went on to speak about deterrence in trafficking cases, but the Court was dealing with trafficking in half a pound of marihuana where the opportunity for profit was great. There is a commercial element to the crime and it would carry a presumption of incarceration. In that

represent us and I thank him for doing so.

In February I attended the Canadian Bar Association's mid-winter meeting in Yellowknife, where our C.B.A. Liaison Co-Chair Judge David Arnot and I participated in a membership workshop. We were joined by Mr. Justice Guy Kroft, who is President of the Canadian Judicial Conference. The participants in the workshop explored the issue of how the C.B.A. could better serve the interests of the judiciary. This should serve to increase the number of judges in the C.B.A.

Judge Arnot and I met with Justices Kroft and Jennings concerning the resolution creating the Judges Forum within the C.B.A.

Most of the discussion dealt with the membership fee. Mr. Justice Jennings urged that a reduced fee was appropriate. Mr. Justice Kroft did not share that view. Our association decided that we would not seek a fee reduction. In the end, a decision was left to the annual meeting of the C.B.A. in August.

As president of the C.A.P.C.J. I was invited to address the Council. In my remarks, I spoke of the erosion of judicial independence and of accountability, as well as the Schmeiser Report.

There was considerable interest in the existing litigation and the C.B.A. will seek to intervene in the cases before the Supreme Court of Canada.

I recently received an invitation to attend the C.B.A. annual meeting in August.

I subscribe to the view expressed by Past President Swail that our attendance at C.B.A. meetings is important. Lines of communication must be kept open to encourage joint participation in areas of mutual concern.

I look forward to the opportunity to attend the meetings of the associations in the remaining provinces and the annual general meeting in Vancouver.

While in Yellowknife, I also met with Chief Judge Halifax and Judges Browne and Davies.

Judge Arnot and I both spent an evening at the home of Judge Michel Bourassa as part of the "at home dinner" program.

I have the impression that the Territories is the place where a decent relationship exists between the bench and the executive branch of government. It seems a certainty that the unification of the Courts will occur there in the foreseeable future. It clearly will not occur any time soon in New Brunswick.

Judge Robert Fowler of Newfoundland resigned his position as Chair of the Education Committee. At the same time he gave his assurance of his willingness to assist the Association and remain involved.

I express to Judge Fowler our sincere thanks for the effort he has made and wish him well in his future endeavours.

Judge Jean Lytwyn of British Columbia has agreed to accept the position as Education Chair. She has extensive experience in judicial education, having been responsible for same in British Columbia.

A new director will have to be found for the Western Judicial Education Centre as the present director, Judge Linton Smith, has resigned. Judge Smith has expressed his willingness to see through present projects and has been asked to do so. On behalf of the Executive, I thank him for the effort he has made and the Association wishes him success in pursuing his interest in aboriginal issues.

The Judicial Independence Committee, chaired by Judge Kathleen McGowan, has been diligently working on the report being prepared by Professors Schmeiser and

REPORT OF THE PRESIDENT TO EXECUTIVE MEETING OF THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES MONTREAL – APRIL, 1996

At the annual general meeting in Moncton, a resolution was passed inviting the federal Minister of Justice to take a leadership role in designing and implementing an effective, uniform, fair and binding process to resolve matters of judicial independence.

As a result of the above resolution, I wrote to the Honourable Allan Rock seeking to meet with him to discuss the current situation and the need to avoid further confrontation and litigation.

The Minister replied, indicating his support for the principle of judicial independence. He also indicated that it would not be useful for him to try and persuade his provincial counterparts of the need to collectively address the issue, given the many aspects of judicial independence that are before the Supreme Court of Canada. He concluded by saying that he is carefully monitoring the situation but as yet he has not determined what, if anything, he will do by way of intervention. This stance is not surprising given that Judges Thomson and Lampert met with Deputy Minister of Justice George Thomson and came away with the impression that the Minister was not likely to become involved.

Efforts to meet with Mr. Rock continue.

Since becoming President, I have attended meetings of the Newfoundland, Quebec and British Columbia Associations. I was warmly received by all and thoroughly enjoyed their hospitality. I am particularly grateful to Judges Gerald Barnable of Newfoundland, Jim Gordon of British Columbia, and, Louis Legault of Quebec, all of whom went out of their way acting as tour guides and chauffeurs.

In those jurisdictions, despite good humour, there was little good news.

While not involved in or anticipating litigation, the relationship between the Newfoundland judges and their government is a sorry state of affairs. However, the new executive seemed hopeful that things would improve.

At the Quebec meeting in St. Sauveur I was joined by Judges Rounthwaite and Daniel where each of us addressed the attendees in French.

My brief presentation identified the attack on judicial independence as the common problem facing our bench and invited a greater participation of their members in the C.A.P.C.J.

In British Columbia Judges Daniel of Albert and Gosselin of Saskatchewan were present representing their provincial associations.

At that meeting, we attended the session at which the decision was made to commence litigation arising from the rejection of the salary commission's report.

The debate which preceded the vote was characterized by passionate, but reasoned presentations. I was left with the impression that this might have had a divisive effect, but such was not the case. In my remarks I addressed the benefits of belonging to the C.A.P.C.J.

I was invited to attend the meeting of the Provincial Court Judges of Manitoba, but due to illness I was unable to do so. Past president, Wes Swail, was kind enough to

case, no circumstances were demonstrated which would override the presumption of incarceration. He also indicated a need to have full and complete information concerning the Intensive Probation Supervision/ Electronic Monitoring program provided to the Court to enable it to develop meaningful guidelines. That information was available here in the form of two pre-sentence reports. In addition, I examined extensive material concerning the development and utilization of electronic monitoring as an alternative sanction in Saskatchewan and elsewhere.

The Crown also relies on *R. v. Pearman* in support of its argument that electronic monitoring is not an appropriate alternate sanction. That case is of no assistance to the Crown here. It dealt with a conviction for dangerous driving which was committed while the accused was impaired and where the victim was severally [sic] injured. It was a denunciatory sentence emphasising both general and specific deterrence.[24]

Thus, even though one could seriously argue that the breaches of probation committed by the offender were sufficient to overrule the presumption of non-incarceration, the positive factors outweighed the negative factors thus maintaining the presumption of non-incarceration. The sanction chosen by the Provincial Court judge was appropriate. It was judged not to be a completely non-carceral sanction. While a community service order or a suspended sentence without intensive probation may not have been justifiable here, the choice of suspended sentence of two years with intensive probation for two years and six months of electronically monitored house arrest, was an appropriate sentence.

FACTORS TO BE CONSIDERED WHEN DECIDING TO IMPOSE IPS/EM

In my opinion, intensive probation requiring electronic monitoring is clearly an appropriate alternate sentence for non-violent crimes which ought not carry the presumption of incarceration[25]. It may also be an appropriate sentence for some inherently violent crimes, such as sexual assault, where circumstances of the offence and the offender permit. It is not a "lenient" sentence. It severely restricts the accused's liberty but at the same time permits the offender to function in society and advances the rehabilitation of that offender.

The determination of the factors to be considered in deciding whether IPS/EM should be imposed is tied directly to the issue of whether incarceration is required to punish offenders who commit a particular crime. Even though IPS/EM is an acceptable alternative sanction for the commission of non-violent crimes, there still exists a presumption in favour of incarceration for most crimes, including non-violent crimes. Incarceration is considered the norm; a disposition which does not conform to the norm is regarded as the exception, and therefore a lenient sentence. In other words, the public interest demands that the offender be sent to jail.

In my opinion that approach is counter productive. The public would be better served if no presumption of incarceration for non violent crimes existed. Sentencing judges could then consider a wider array of options including community service and electronically monitored house arrest.

There are certain categories of offences which, *prima facie,* require incarceration, (for eg. trafficking in heroin or cocaine). The presumption of incarceration should remain when dealing with hard drugs where the social costs and the potential for enormous profit in the retailing and wholesaling of the drug exists. Offences such as possession, possession for the purpose of trafficking and even trafficking in small amounts of drugs ought not to attract the presumption of incarceration. Trafficking in and possession of commercial quantities as retailer, wholesaler, importer or courier should carry the presumption of incarceration. This is but a partial list.

In my opinion, there is a need for the development of guidelines for the use of alternative sanctions when sentencing an offender who has committed a non-violent crime. This is a logical progression in the determination of acceptable penalties. Guidelines should be developed for the use of alternative sanctions, notwithstanding the presumption that presently seems to exist that incarceration is the norm and that non-carceral sentences are exceptions to that norm. The custodial presumption has been expressed in a number of ways but it is usually expressed under the guise of a public interest requirement for imprisonment for certain offences.

Professor A. Young, in his research entitled: *The Role of an Appellate Court in Developing Sentencing Guidelines* (prepared for the Canadian Sentencing Commission (1984)) noted that an examination of the list of offences caught by the custodial presumption reveals that it encompasses almost every offence except obscenity, gambling and some property offences that are neither repetitive nor involve a breach of trust. Those offences caught by the presumption include theft by a person in a position of trust, drug trafficking, perjury and related offences against the administration of justice, repetitive break and enters, extortion, sophisticated commercial crime as well as crimes of violence. An offender has a difficult task in displacing the presumption of incarceration and, in most cases, the presumption is displaced by factors peculiar to the accused and not by an overriding principle.

The development of guidelines will become necessary as more and more courts of first instance respond to and accept submissions that incarceration for non-violent crimes is not an effective sanction, that it is more costly than acceptable alternatives, that it rarely accomplishes rehabilitation or has a deterrent effect and that there is indeed no presumption of incarceration.

The fundamental question is whether incarceration is a necessary and appropriate sanction for non-violent crimes. In deciding that question the courts must determine whether the offender and offence require that the public be protected by removing the offender from the community in order to ensure that protection or whether incarceration is necessary to ensure continued respect for the administration of justice. These are the primary considerations. Of secondary importance is whether the offender will benefit from a non-custodial sentence. In my opinion, the following factors should be taken into account when determining whether the presumption of incarceration should be overridden and a non-custodial sentence be imposed in a particular case:

(a) whether the crime is a non-violent crime not involving a disregard of the administration of justice, and

perspective. The strength of the Court, because of its cohesion and its collegiality, could then truly guarantee the operation of the judiciary as independent from the executive branch, a principle which is also essential to maintain the separation of legislative, executive and judicial powers.

It is therefore imperative that the Conférence confirms its role as a representative of judges, not only before the Chief Justice but also when dealing with the executive and legislative levels on matters relating to their interests as well as to the interests of the court.

Its credibility will also be enhanced as it receives the full support of the 290 judges of the Cour du Québec and the clear backing of the Chief Justice.

alors garantir un fonctionnement indépendant du pouvoir exé cutif, par ailleurs essential au maintien de la séparation des pouvoirs législatif, exécutif et judiciaire.

Dans ce contexte, il devient impératif que la Conférence confirme son rôle de porte-parole de tous les juges non seulement auprès des pouvoirs exécutif et législatif pour tout ce qui concerne leurs intérêts et ceux de la cour.

Sa crrédibilité sera d'autant plus forte qu'elle recevra l'appui des 290 juges de la Cour du Québec et le france soutien du juge en chef.

CORRECTION

RE: REGISTRATION FOR CAPCJ CONFERENCE VANCOUVER, B.C. - SEPTEMBER 18-21, 1996

- **The dates for the conference are September 18-21, rather than September 17-21, 1996.**
- **The Event Number which should be quoted to Canadian Airlines when you book your ticket to get the special fare is STAR*M20196, rather than 20/96.**

A criminal trial is like a Russian novel: it starts with exasperating slowness as the characters are introduced to a jury, then there are complications in the form of minor witnesses, the protagonist finally appears and contradictions arise to produce drama, and finally as both jury and spectators grow weary and confused the pace quickens, reaching its climax in passionate final argument.

Clifford Irving (b. 1930), U.S. author, notorious hoaxer. **Sunday Times** (London, 14 Aug 1988).

of Judicial Conduct designed for an independent judiciary." ***(C.M.*-8-94-17)**

For these reasons, the same holds true when it comes to establishing Court policy. While it is up to the Chief Justice to ensure compliance with the policies of the Court, their establishment is not exclusively the Chief Justice's prerogative, as such policies are, by definition, those of the Court, hence those of the Court's 290 judges.

The Chief Justice's role is also recognized by law in the area of judicial education (section 96 C.J.A.). In order to underscore the administrative autonomy of the judiciary, budgets ear-marked for judicial education courses should be transferred from the Judicial Council to the office of the Chief Justice. However desirable this objective may be, the process holds certain pitfalls that must be avoided:

> **"... if courses are used as a reward or sanction, ... certain judges will be left out of this system as sanction and will have no opportunity for that particular training program" (*Judge David Marshall, Judicial Conduct and Accountability*)**

The role of the Conférence des juges should also be recognized in this area.

Therefore, except as to the powers that are exclusively reserved for the Chief Justice and that the Conférence has recognized as such, the horizontal concept of our judicial organization, which must not be construed as a form of co-management, entails a necessary measure of collegiality within a framework of transparency, communication and consultation. The *Conférence des juges* must be part of this process. Such an approach would help us see the prospect of administrative autonomy in a more positive

code de déontologie pour une magistrature indépendante." ***(C.M.*-8-94-17)**

Pour ces raisons, il en va de même des politiques de la cour. Si le juge en chef doit les faire respecter, il ne lui appartient pas en exclusivité d'établir ces politiques, celles-ci étant par définition celles de la cour, donc de ses 290 juges.

Enfin, en matière de formation, le juge en chef a un rôle reconnu à la Loi (article 96). Dans une perspective d'autonomie administrative, le transfert des budgets de perfectionnement du Conseil de la Magistrature au bureau du juge en chef devra s'effectuer. Si louable soit-il, il comporte certains écueils qu'il faut éviter:

> **"...if courses are used as a reward or sanction, ... certains judges will be left out of this system as sanction and will have no opportunity for that particular training program" (*Judge David Marshall, Judicial Conduct and Accountability.*)**

Ici, aussi, le rôle de la Conférence des juges devrait être pleinement reconnu.

Ainsi, à l'exception des pouvoirs qui sont exclusifs au juge en chef et que la Conférence lui reconnâit, une conception horizontale de l'organisation judiciaire appelle, dans un cadre qui n'est d'aucune façon celui de la co-gestion, à une nécessaire collégialité dans un contexte de transparence, de communication et de consulation. La Conférence des juges doit en être partie.

Cette approche nous permettrait d'envisager l'autonomie administrative de façon plus positive. La force de la Cour, par sa cohésion et sa collégialité, pourrait

whether the accused's conduct caused or threatened serious harm to another person or his or her property;

(b) whether the act was planned or the resultant harm or damage was planned;

(c) the conduct of the offender in the commission of the offence;

(d) whether the victim's conduct facilitated the commission of the offence, (i.e. entrapment);

(e) the likelihood of the offender re-offending;

(f) the possibility of the offender responding positively to probationary treatment;

(g) the conduct of the offender, including whether there was a violation of an order of the court such as an order prohibiting driving, probation order or order for interim judicial release;

(h) whether the offender's conduct was directed at diminishing or lessening respect for the administration of justice by committing acts of perjury or contempt of court; and,

(i) the record of the offender.

Particulars of the offender's record can provide valuable information concerning the potential for rehabilitation. The duration of the record is an important factor to aid the court in determining whether there are reasons for the anti-social behaviour. Similarly, the kinds of offences committed and the sanctions imposed indicate the seriousness of the crimes and the danger that the offender is to the community. A series of petty offences, while long in number, need not be an aggravating factor.

The susceptibility of the offender to rehabilitation is an important factor, second only to the protection of the public. If the offender is one who has committed an offence out of character and therefore not a person in need of specific deterrence, or has demonstrated a willingness to follow recommendations made by the probation officer designed to improve his or her behaviour, that could affect whether a trial judge would order IPS/EM.

This list of factors is not exhaustive but contains a number of factors which I believe should be considered in deciding whether the recommendation of the probation officer should be accepted and a non-custodial sentence should be imposed as an alternative to imprisonment.

CONCLUSION

Electronically monitored house arrest is an appropriate and effective alternative sanction for non-violent crimes. It is a sanction which contains sufficient elements of punishment (it is both demeaning and intrusive) to be accepted by the public as an alternative to imprisonment. The empirical evidence would tend to demonstrate that it is more effective in delivering rehabilitative programming and in reducing recidivism than traditional custodial sentences.

Prominent among the factors considered by the courts in imposing the alternative sanction are protection of the public, public confidence in and respect for the administration of justice, the conduct of

the offender including his or her motivation to change, the availability of treatment for the offender, the possibility of rehabilitation and the seriousness of the offence.

ENDNOTES:

1. In Canada the rate of imprisonment is the second highest of the Western democracies, second only to the U.S. In 1986 that rate was .08 per 100,000 inhabitants: See Correctional Services of Canada, **Basic Facts About Corrections in Canada** (Ottawa: Supply & Services, 1986). In 1991 that rate was 112.7, still amount one-quarter that of the U.S. at 426.0: see Correctional Services Canada, 1991.
2. R.S.C. 1985, c. C-46.
3. R.S.S. 1978, c. C-40.
4. **Canada Act**, 1982 (UK) C-11.
5. (1970), 1 **C.C.C.** (2d) 307; (1970), 12 **C.R.N.S.** 392; (1970), 75 **W.W.R.** 644 (Sask. C.A.).
6. Canadian Committee on Corrections, **Towards Unity: Criminal Justice and Corrections** (Ottawa: Queen's Printer, 1969).
7. **Ibid**. See also: Standing Committee on Justice and the Solicitor General, **Taking Responsibility** (Ottawa: Queen's Printer).
8. Supra, Note 5 at p. 309.
9. (1975), 26 **C.C.C.** (2d) 100.
10. (1989). 75 **Sask. R.** 26.
11. (1989), 75 **Sask. R.** 161.
12. (1993), 81 **C.C.C.** (3d) 83 (Sask. C.A.); (1993), 109 **Sask. R.** 8.
13. (1990), 89 (Sask. R.) 156.
14. **Ibid.** at p. 157.
15. (1989), 52 **C.C.C.** (3d) 403; (1989), 81 **Sask. R.** 301; (1989), 19 **M.V.R.** (2d) 36.
16. **Ibid.** at p. 409 of **C.C.C.**
17. (1991), 92 (Sask. R.) 65 (Sask. C.A.).
18. Supra, Note 11.
19. Supra, Note 17 at p. 67.
20. Supra, Note 12.
21. June 30, 1988; (unreported judgment of Sask. C.A.).
22. Supra, Note 12 at p. 37.
23. Supra, Note 17 at p. 67.
24. Supra, Note 15 at p. 39.
25. See list of non-violent crimes referred to by Prof. A. Young in **The Role of an Appellate Court in Developing Sentencing Guidelines** (Prepared for Canadian Sentencing Commission (1984) infra at p. 28.

Notice of Venue and Date for Eleventh CMJA Triennial Conference

Cape Town, South Africa
From 25th October to 1st November 1997
Official Conference Venue: Karos Arthur's Seat Hotel, Sea Point, Cape Town

justification. Together and united, their voice becomes stronger and has a better chance of being heard.

The Conférence therefore asks to participate, through dialogue and consultations, in all decisions where the interests of its members are at stake. Such participation should first and foremost be with our Chief Justice. The law provides that the power to assign cases rests exclusively with the Chief Justice. It further provides that this power shall be exercised in cooperation with the coordinator judges (section 96 C.J.A.). The Chief Justice also coordinates, distributes the workload and monitors the work assigned to the judges. If he deems it is appropriate to seek the participation of puisne judges through consulting coordinator judges in the process, he may do so at will.

In other areas where the law has bestowed powers upon the Chief Justice, judicial independence and the interests of judges are at stake and therefore, the Conférence should be consulted on these matters. Its mandate, its representativeness, the absence of any risk of conflict of interest it provides, and the elective functions held by its representatives make it the most independent vehicle to hold consultations with judges.

On judicial conduct and ethics, the Chief Justice is empowered to oversee compliance of the judiciary. However, as the Quebec Judicial Council noted in a decision dated December 21, 1995, citing with approval professor Glenn:

> **"[TRANSLATION] The Quebec Code of Judicial Conduct simply articulates the notion of what is a judge. It is up to the judge and to the judges to decide what he [or she] must do. The Quebec code is a Code**

défendre l'indépendance de la magistrature, la mission de la Confeérence trouve toute sa justification. Ensemble, unis, leur voix sera plus forte et aura plus de chance d'être entendue.

La Conférence demande de participer par le biais de la consultation et de la concertation à toutes les décisions où les intérêts de ses membres sont en jeu. Cette participation doit se faire d'abord avec notre juge en chef.

Législativement, le pouvoir d'assignation est dévolu exclusivement au juge en chef. Il est prévu qu'il exerce ce pouvoir en collaboration avec les juges coordonnateurs. (article 96 **L.T.J.**) Il coordonne, répartit et surveille les travail des juges. Si le juge en chef choisit de faire participer les juges puînés par le liais d'une consultation des juges coordonnateurs, il en a tout le loisir.

Dans les autres domaines où la Loi reconnaît des pouvoirs au juge en chef, l'indépendance judiciaire et les intérêts des juges sont en jeu et la Conférence doit pouvoir être consultée. Son mandat, sa représentativité, l'absence de risque de conflit d'intéré dans lequel elle se trouve, et la fonction élective de ses représentants en font en effet le véhicule le plus indépendant de consultation des juges.

Ainsi, en matière déontologique, si le juge en chef veille au respect de la déontologie judiciaire, le Conseil de la Magistrature, dans une décision du 21 décembre 1995, en citant le professeur Glenn, nous rappelle que:

> **"Le code québécois articule plus simplement une notion de ce qu'est le juge. C'est au juge et à ses juges qu'il revient de décider ce qu'il devrait faire. Celui du Québec est un**

are involved in the decisions are probably the more effective and productive courts." (M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, page 258).

3) Role of the Conférence within the judicial structure

The Conférence des juges groups together the judges appointed by the Lieutenant-Governor in Council to the Cour du Québec and to the municipal courts of Montreal, Laval and Quebec City.

The purpose of the Conférence des juges du Québec is to ensure the dignity, respect, authority and autonomy of the courts and of the judiciary, to further the achievement of excellence and cooperation between its members, and to attend to their interests.

Thus, its mandate is not that of a unionized organization whose purpose would be the exclusive defense of its members' financial working conditions. Its role is legitimized by its constitution, by the support of its membership and by the recognition of its status in the Courts of Justice Act ***(section 258 C.J.A. pertaining to judicial education programs).***

To the extent that the judicial organization remains horizontal, the Conférence shall and will continue to represent the Cour du Québec and its 290 members. It is in this respect that it speaks for each and every judge it represents, individually and collectively, on all subjects and in every forum where their interests are at stake.

Since every judge, including the Chief Justice, has the responsibility to uphold and defend the independence of the judiciary, the Conférence's mission finds even further

cours au sein desquelles les juges puînés sont au fait de ce qui se passe et ont le sentiment que leurs collègues et eux-mêmes participent aux décisions sont probablement les plus efficaces et les plus productives." (M.L. Friedland, *Une place à part: l'indépendance et la responsabilité de la magistrature au Canada*, p 258.)

3) Rôle de la Conférence dans la structure judiciaire

La Conférence des juges regroupe les juges nommés par le lieutenant-gouverneur en Conseil à la Cour du Québec et aux cours municipales de Montréal, Laval et Québec.

La Conférence des Juges du Québec a comme objectif de sauvegarder la dignité, le respect, l'autorité et l'autonomie des tribunaux et du pouvoir judiciaire, de favoriser l'excellence et l'entraide des membres, et de veiller à leurs intérêts.

Son mandat n'est donc pas celui d'une organisation syndicale vouée à la défense exclusive des conditions financières de travail des ses membres. Elle trouve sa légitimité dans sa constitution, dans l'appui de ses membres et dans la reconnaissance qui lui est faite dans la Loi sur les tribunaux judiciaires (**article 258 de la Loi sur les tribunanux judiciaires relatif aux programmes de perfectionnement**).

Dans la mesure où l'organisation judiciaire demeure horizontale, la Conférence doit continuer de représenter la Cour du Québec et ses 290 membres. C'est dans cette mesure qu'elle devient le porte-parole de chacun d'eux et collectivement sur tous les sujets et devant toutes les instances où leurs intérêts sont en jeu.

Chaque juge, y compris le juge en chef, ayant la responsabilité de préserver et

New Directions for the Conférence des juges du Québec/ Orientations de la Conférence

The Council of the Conférence des juges du Québec/
Le Conseil de la Conférence des juges du Québec
by Gilles Cadieux, Chairman / par Gilles Cadieux, président

As seems to be the case with all our social institutions today, Quebec's judiciary is under great scrutiny. Any measure of accountability society expects from the judiciary can only be met through a unified court system, structural changes within our Courts, an eventual administrative autonomy and a possible reform of the Québec Judicial Council.

At the same time, as we ponder these issues within the present social and economic context, the *Conférence des juges du Québec* is also going through a harrowing period, some may say a crisis. Its members are losing their motivation as results seem scarce. Its representatives, although they have done what they could, have come to a dead end.

Thus, we must redefine our role as judges and together decide what principles should guide our future steps. Hence, we must manage the changes Government has asked us to undertake while preserving the underlying fabric our society relies on to keep on functioning adequately on the basis of humanist and democratic values.

As our actions should follow the principles we seek to uphold, the focus of the Conférence must be set according to our understanding of the role of individual judges as well as that of the judiciary as a whole.

Comme toutes les institutions sociales, la magistrature québécoise est actuellement soumise à un examen minutieux. La responsabilisation réclamée par la société passe par l'unification des tribunaux, la modification aux structures de la Cour, une éventuelle autonomie administrative, et une possible réforme du Conseil de la Magistrature.

Dans cette période de remise en question et compte tenu du contexte socio-économique, la Conférence des juges du Québec vit également un malaise, sinon une crise. Ses membres se démotivent devant l'absence de résultat. Ses représentants, qui ont fait ce qu'ils pouvaient faire, font face à une impasse.

Il devient donc nécessaire de nous redéfinir et de décider ensemble des principes qui doivent orienter notre action. Il nous appartient en effet de gérer le changement que l'État nous demande tout en préservant les acquis indispensables au bon fonctionnement de notre société, fondée sur des valeurs humanistes et démocratiques.

Nos actions étant tributaires des principes que nous voulons défendre, les orientations de la Conférence seront fonction de notre conception du rôle du juge individuellement et de celui de la Magistrature dans son ensemble.

1) Underlying Principles of Judicial Authority

a) The Judge

Basically, the rationale behind the institution of the judge is that conflict resolution between parties that are fundamentally opposed requires the intervention of an institutionally distinct third party, free from any ties to the parties involved. It is recognized that the judicial function, one of the requirements of which is that judges must render their decisions free from any external intervention or influence, requires judges to be independent. (Patrick Glenn, **Judicial Independence and Ethics).**

The judiciary is a function of the State and of the power held by the State. The foundations of democracy itself command respect for the rule of law and individual rights, for «when justice has vanished, nothing else can instill any worth to human life». **(Kant)**

Therefore, the judiciary delivers a service to the people and upholds their right to seek justice, while it serves as a function of the State, of the power of the State.

As Chief Justice Albert Gobeil always insisted, all judges individually embody the whole realm of judicial authority. The presiding judge holds and disposes of all the Court's jurisdiction regarding the matter under consideration. When a judge presides, judicial authority as a whole is at the forefront.

b) The Court

Judges are thus entrusted, both individually and as a group, with the responsibility of giving credibility to the judicial function and also of ensuring its

1) Principes du pouvoir judiciare

a) Le juge

L'institution du juge vient de l'idée que la résolution de différends entre des parties fondamentalement opposées demande l'intervention d'une tierce personne institutionnellement distincte, libre des parties en cause. Il est admis que la fonction judiciaire, qui comporte l'obligation pour les juges de rendre des décisions libres de toute intervention ou influence de l'extérieur, exige l'indépendance des juges. (Patrick Glenn, **Indépendance et déontologie judiciaire**.)

La magistrature est l'une des fonctions de l'État et du pouvoir de l'État. Le fondemaent de la démocratie commande le respect de l'état de droit et des droits de la personne, "quand la justice disparaît, il n'y a plus rien qui puisse donner une valeur à la vie des homes." **(Kant)**

Qui dit magistrature dit service aux justiciables, au droit à la justice et qui dit magistrature dit fonction de l'État et pouvoir de l'État.

Le juge en chef Albert Gobeil nous répétait que le juge incarne individuellement tout le pouvoir judiciaire. Le juge qui siège assume et épuise toute la juridiction de la Cour à l'égard de l'affaire dont il est saisi. Quand il siège, c'est tout le pouvoir judiciaire qui est en jeu.

b) La Cour

Les juges, individuellement et dans leur ensemble, portent donc cette responsabilité de rendre crédible le pouvoir judiciaire et d'en assurer l'indépendance. A cet égard, le pouvoir judiciaire est un et indivisible.

demonstrating its will to bureaucratize our functions. For instance, the unfortunate dispute on parking, its total disregard of the recommendations of the Triennal Committee, its recent unilateral decision to readjust judges assuming managerial functions without consulting the Triennal Committee, the immediate adverse reaction of ministers when a judge falls out of step, the eventual removal of jurisdiction from the Civil Division through the pretext of reforming our administrative tribunals, increasingly resorting to the jurisdiction of a justice of the peace in criminal and statutory matters, etc. ...

"One method of interfering with the judiciary is to remove matters from its jurisdiction to other tribunals." *(Friedland, page 37.*)

One of the main objectives of the structural changes implemented in 1995 was to enhance the judges' active role in the management and operation of the Court. Therefore, we must now take the immediate steps towards focusing the organization of the Courts, beyond the wording of the enactment whereby we hold the ability to do so, by reinforcing the independence of our judicial authority in a collegial context that is familiar to us, rather than by diluting it through a process involving hierarchy, promotion, and eventually, conflict.

In line with professor Friedland's recommendations, we wish to achieve a formula stressing a management style based more on collegiality and consultation, while the final decision on administrative issues should rest with the Chief Justice.

"In talking to judges across the country, I reached the not surprising conclusion that courts in which the puisne judges know what is going on and feel that they and their colleagues

Le pouvoir executif nous a donné cec dernière années maints exemples de sa volonté de fonctionnarisation de nos fonctions. Le malheureux exemple du stationnement, son ignorance complète des recommandations du comité triennal, sa décision unilatérale récente de réajuster les juges gestionnaires sans avis du comité triennal, les levées de boucliers des ministres quand un juge dérape, l'éventuel détournement de compétence de la Chambre civile sous prétexte de la réforme des tribunaux administratifs, le recours de plus en plus répandu à la juridiction de juges de paix en matière criminelle et pénale...

"L'un des moyens de faire obstacle à la magistrature consiste à soustraire de sa compétence certaines matières pour les confier à d'autres organismes." *(Friedland,* page 42.)

La contribution plus active des juges à la gestion et au fonctionnement de la cour était un des objectifs importants des modifications structurelles de 1995. Il nous appartient donc dès maintenant, au delà du text législatif qui nous en donne toute la latitude, d'orienter l'organisation judiciaire, en renforcant l'indépendance du pouvoir judiciaire dans le contexte collégial que nous avons toujours connu, plutôt qu'en le diluant dans une ligne hièrrachisée, promotionnelle et éventeullement conflictuelle.

A l'instar du professeur Friedland, nous souhaitons une formule qui favorise un style d'administration faisant davantage place à la collégialité et à la consultation, tout en nous en remettant au juge en chef pour les décisions finales en maitère d'administration.

"Après avoir discué avec des juges de tous le pays, nous arrivons à la conclusion guère surprenante que les

judge. Courts under federal jurisdiction have retained this type of organization.

This horizontal and collegial concept of our judicial organization will survive to the extent that the role of regional coordinators will be one of team leaders whose function is to help judges to work together and communicate with each other and with the Chief Justice, and not only to act as a transmission belt for directives and administrative decisions handed down from the Chief Justice.

But if coordinator judges are considered as a new category of judges, as managers trained at the National School of Public Administration and in a position of authority, we will be much closer to the French concept of court management, with a vertical and hierarchical approach that will in turn generate a sense of autocracy, promotion and syndication.

> **"We have gone from a situation of pure, undiluted judicial independence to a very controlled, hierarchical judiciary. A manager has to get people to obey him. There has to be a system of rewards and punishments in any managerial situation. As soon as you introduce these, you no longer have judicial independence. (*David Marshall, Judicial Conduct and Accountability, Carswell, 1995.*)**

Such a trend towards creating hierarchic levels within our organization, coupled with the "bureaucratic" approach taken towards the judicial function, may well cause strain not only on our judicial independence but also on the institution to which we belong: the Court of Québec.

Over the last few years, the executive branch has given us a number of examples

d'un associé ou d'un adjoint. Les cours de juridiction fédéale ont maintenu ce type d'organisation.

Cette conception horizontale et collégiale de l'organisation judiciaire pourra survivre, dans la mesure où la fonction des coordonnateurs régionaux sera celle de chefs d'équipe appelés à établir la concertation entre les juges et à faciliter la communication entre eux et le juge en chef, et non seulement comme la courroie de transmission de directives et de décisions administratives émanant du juge en chef.

Si par contre, les judges coordonnateurs sont consideérés comme une nouvelle catégorie de juges, gestionnaires formées à l'"E.n.a.p., en position d'autorité, nous nous rapprocherons de plus en plus de la conception franç, verticale, hierarchique de l'organisation judiciaire, où les notions d'autocratie, depromotionet de syndicalisation pourront prendre leur place.

> **"We have gone from a situation of pure, undiluted judicial independence to a very controlled, hierarchical judiciary. A manager has to get people to obey him. There has to be a system of rewards and punishments in any magagerial situation. As soon as you introduce these, you no longer have judicial independence. (David Marshall, *Judicial Conduct and Accountability,* Carswell, 1995.)"**

Cette tendance à la hiérachisation de notre organisation, cumulée avec l'approche "fonctionnarisante" de la fonction judiciaire, risque de saper non seulement l'indépendance judiciaire, mais également l'institution que nous sommes: la Cour du Québec.

independence. In this regard, the judicial function remains one and indivisible.

Over the last few years, the public attention given to the individual and collective actions of the judiciary has clearly demonstrated that the credibility of the judicial function is in the hands of each and every one of us, underscoring the true meaning of the word collegiality. In the media, we are "the judges, those dear little judges" (*letter published in Le Devoir, on Thursday March 21, 1996*), whatever our jurisdiction may be - federal, provincial or municipal.

c) The Chief Justice

The administration of the Courts rests with the Chief Justices. The scope of the individual power they wield and their relations with puisne judges may vary and depend on the applicable law and on one's personal conceptions on management. (M.L. Friedland, **A Place Apart: Judicial Independence and Accountability in Canada**, chapter 10, at pages 251 and foll.)

> **"Members of the court must enjoy judicial independence and be able to exercise their judgment free from pressure or influence from the Chief Justice." *Lippé, (1991) 2 S.C.R. 114*)**

The Chief Justice of the Cour du Québec assumes the management of the Court **(section 96 of the C.J.A.)**. The Chief Justice's authority is very clear.

> **"The Chief Judge's authority under the CJA is essentially administrative and his moral authority, which is naturally associated with his status and functions, is not restrictive and is part of the context in which all judges perform their duties." (*Ruffo, Supreme Court of Canada, December 14, 1995*)**

Ces dernières années, la publicité entourant les actions individuelles ou collectives de la magistrature nous a bien démontré que la crédibilité du pouvoir judiciaire est l'affaire de chacun d'entre nous et qu'à cet égard la collégialité prend tout son sens. Pour les médias, nous sommes "les juges", "les chers petits juges", **(lettre au Devoir, jeudi le 21 mars 1996)** quelle que soit notre juridiction, fédérale, provinciale ou municipale.

c) Le juge en chef

L'administration des cours est dévolue aux juges en chef. L'ampleur des pouvoirs de chacun d'eux et ses relations avec les juges puînés varient selon la Loi et selon ses conceptions en regard de la gestion. (M.L. Friedland, **Une place à part: l'indépendance et la responsabilité de la Magistrature au Canada**, chapitre 10, p. 251s.s.)

> **"Les membres de la Cour doivent jouir de l'indépendance judiciaire et être en mesure d'exercer leur jugement sans faire l'objet de pressions ou d'influences de la part du juge en chef." (arrêt Lippé, (1991) 2 R.C.S. 114)**

Le juge en chef de la Cour du Québec est chargé de la direction de la Court. **(article 96, Loi sur les Tribunaux Judiciaires.)**. Son autorité administrative ne fait aucun doute.

> **"L'autorié du juge en chef au sens de la Loi sur les tribunaux judiciaire est essentiellement administrative et son autorité morale, associée naturellement à son statut et à ses fonctions, n'est pas contraignante et fait partie du cadre dans lequel tout juge exerce ses fonctions." (arrêt Ruffo, Cour Suprême du Canada, 14 décembre 1995).**

Whenever Chief Justices take a stand, either individually or with other Chief Justices, their moral authority and their prestige can definitely influence even governmental decisions, as was recently the case with the initiative taken by the three Chief Justices of Ontario against budgetary cuts in that province **(Journal du Barreau, vol. 28, nº 6, April 1, 1996.)**

We therefore need a Chief Justice who will fully exercise his or her administrative functions and whose prestige and moral authority will permeate the entire Court. To a large extent, this is how the Court's image will be able to assert itself, both within and beyond the judicial system.

The strength and the credibility of the judicial authority depend upon the strength and the credibility of each and every judge of the Court as a whole, relying also on the moral authority of the Chief Justice. These three precepts are compatible with both the law and legal precedents.

2) Structure of the Court of Québec

In 1932, Senator Arthur Meighen stated before the Senate that "a judge is in no sense under the direction of the Government... The judge is in a place apart." **(Senate Debates, May 24, 1932, at pages 462 and 463).**

It follows that the organization of the judiciary, a *sui generis* institution, must not copy its administrative model on that of other institutions. It must be original, creative, and strive to preserve judicial independence.

The legislature has provided us with the necessary leeway, by enacting that "the Court of Québec is composed of 290 judges, including the chief judge, a senior associate chief judge and three associate chief judges." (section 85, **Courts of Justice Act).**

Lorsque le ou les juges en chef prennent position, leur autorité morale et leur prestige peuvent de façon certaine influer les décisions même de l'État, comme nous l'a démontré l'initiative récente des trois juges en chef de l'Ontario contre les compressions budgétaires (**Journal du Barreau, vol 28, no 6, 01 avril 1996**).

Nous souhaitons donc un juge en chef qui exerce pleinement ses fonctions administratives et done le prestige et l'autorité morale s'exercera sur l'ensemble de la Cour. C'est dans cette mesure que l'image de la Cour pourra s'affirmer à l'intérieur du système judiciaire.

La force et la crédibilité du pouvoir judiciaire dépend donc de celles de chaque juge, de celle de l'ensemble de la Cour et s'appuie sur l'autorité morale du juge en chef. Ces trois préceptes sont compatibles avec la Loi et la jurisprudence.

2) La structure de la Cour du Québec

En 1932, le Sénateur Arthur Meighen déclarait devant le Sénat que "les juges ne sont à aucun point de vue (sous la direction du gouvernement) ... Le juge occupe une place à part". **(Débats du Sénat, 24 mai 1932, pp 462, 463)**

De la même façon, l'organisation judiciaire, institution "sui generis", ne peut copier son modèle administratif sur aucun autre. Elle doit faire preuve d'originalité, de création et s'assurer de préserver l'indépendance judiciaire.

Le législateur nous en laisse toute la latitude en établissant que: "La Cour du Québec est composée de 290 juges dont le juge en chef, le juge en chef associé et trois juges en chef adjoints." (article 85, **Loi sur les tribunaux judiciaires**.)

The unification of the Court of Québec in 1988 and changes to its management structure in 1995 have brought prestige, cohesion and efficiency to our judicial structures but have not changed, in the process, the principles stated above.

In effect, the rationalization and the simplification of these structures through the changes implemented in 1995 have concentrated the authority in the hands of the Chief Justice and his Associate Chief Justice. Their powers are the same as those described in the law, since 1988, before the Supreme Court decision in ***Ruffo***, on December 14, 1995.

The functions of the Chief Justice, namely to ensure adherence to Court policy on judicial matters, to coordinate, divide the judges' workload and monitor their performance, who in turn must comply with said orders or directives, and to see to the adherence to judicial ethics, all remain "administrative" functions, as stated by the Supreme Court of Canada. Since 1995, the Chief Justice is also responsible for judicial education programs, and may delegate to coordinator judges his responsibility of assigning judges to cases.

The structural conception of the Court depends and shall continue to depend on our regional coordinator judges and on the way they intend to carry out their mandate. Indeed, they are the transmission belt between the judge, the Court and the Chief Justice. They are the cornerstone of the Court's structure and their role is to ensure open communications, free of any conflict of interest.

Historically, the framework of our courts was based on a British concept, a straightforward structure with a presiding Chief Justice "primus inter pares", sometimes assisted by an associate chief

L'unification de la Court du Québec en 1988 et les modifications à la structure de gestion de 1995, si elles ont apporté prestige, cohésion et efficacité à la structure judiciaire, n'ont pas modifié les principes que nous venons d'énoncer.

La rationalisation et la simplification de la structure découlant des amendemtns de septembre 1995 ont en effet concentré l'authorité sur les personnes du juge en chef et de son associé. Leurs pouvoirs, tels que prévus à la Loi, sont décrits de la même façon depuis 1988 avant l'arrê de la Cour Suprême. (arrêt **Ruffo**, 14 décembre 1995)

Les fonctions du juge en chef de voir au respect en matière judiciaire des politiques de la Cour, de coordonner, de répartir et de surveiller le travail des juges qui, à cet égard, doivent se soumettre à ses ordres et à ses directives, et de veiller au respect de la décontologie judiciaires restent comme le dit la cour Suprême: administratives. Depuis septembre 1995, 13 juge en chef doit voir également à la formation complémentaire des juges et il peut déléguer ses pouvoirs d'assignation aux juges coordonnateurs.

La conception structurelle de la Cour dépend et dépendra du rôle dévolu aux juges coordonnateurs régionaux et de la façon dont ils entendent concrétiser leur mandat. Ils sont en effet la courroie de transmission entre le juge, la Cour et le juge en chef. Par leur nombre, ils constituent la pierre angulaire de la structure de la Cour. Ils doivent assurer une communication ouverte, dans un contexte absent de tout conflit d'intérêt.

Jusqu'ici, l'organisation des tribunaux répondait à une conception britannique, avec une structure simple, coiffée d'un juge en chef "primus inter pares", assisté parfois