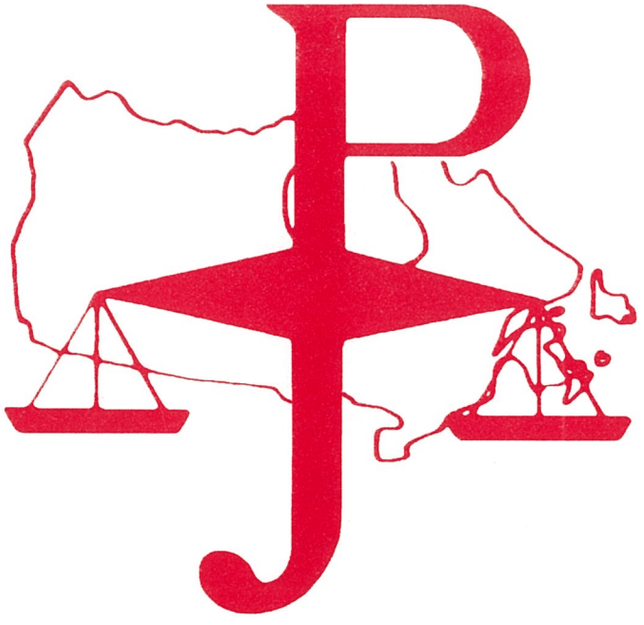


Printed by M & M Printing, Fortune, NF, Canada

PROVINCIAL JUDGES

Journal

DES JUGES PROVINCIAUX

Justice without wisdom is impossible. - **Froude.**

Volume 20 ~ No. 4 *Winter 1997 Hiver*

THE CANADIAN ASSOCIATION OF
PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES
JUGES DE COURS PROVINCIALES

The Canadian Association of Provincial Court Judges/ L'Association canadienne des juges des cours provinciales 1996-1997

Officers/Membres du bureau

President/Président
Judge Ann E. Routhwaite
14340-57th Avenue
Surrey, B.C.
V3X 1B2
Tel: (604) 572-2317
(604) 943-2612 (h)
Fax: (604) 572-2301

1st Vice-President/1er Vice-Président
Judge Patrick Curran
5250 Spring Garden Road
Halifax, NS
B3J 1E7
Tel: (902) 424-8759
(902) 424-8761
(voice mail)
(902) 454-5765 (h)
Fax: (902) 424-0603

2nd Vice-President/2ème Vice-Président
Judge Cheryl L. Daniel
323-6th Avenue S.E.
Calgary, AB
T2G 4V1
Tel: (403) 297-3156
(403) 287-2876 (h)
Fax: (403) 297-5287

3rd Vice-President/3ème Vice Président
Judge Louis A. Legault
Cour de Québec
Palais de Justice
1, rue Notre-Dame East
Room 545
Montreal, QB
H2Y 1B6
Tel: (514) 393-2581
Fax: (514) 873-4760

Past President/Président Sortant
Judge James McNamee
15 Market Square
Saint John, NB
E2L 1E8
Tel: (506) 658-2568
(506) 847-7191 (h)
Fax: (506) 658-3759

Secretary-Treasurer/ Secrétaire-Trésorier
Judge Irwin E. Lampert
P.O. Box 5001
Moncton, NB
E1C 8R3
Tel: (506) 856-2307
(506) 854-4004 (h)
Fax: (506) 856-3226
(506) 854-4004 (h)

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

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

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
Email: gahandri@nf.sympatico.ca

Committees / comités

Atlantic Education Conference/ Conférence régionale de l'Atlantique sur la formation
Judge Corrine Sparks
3880 Acadia St.
Box 8988, Station A
Halifax, NS
B3K 5M6
Tel: (902) 424-3901
Fax: (902) 424-0562

Billingualism/Bilinguisme
Judge Gilles Cadieux
1, rue Notre-Dame E.
Montreal, Quebec
H2Y 1B6
Tel: (514) 393-2245
Fax: (514) 873-4760
and
Judge Thérese Alexander
14340-57th Avenue
Surrey, BC
V3X 1B2
Tel: (604) 572-2300
Fax: (604) 572-2301

CBA Liaison/Liaison avec l'ABC
Judge Nancy Orr
Provincial Court
42 Water Street
Charlottetown, PE
C1A 1A4
Tel: (902) 368-6741
Fax: (902) 368-6743
and
Judge David Arnot
1747 Playfair Drive
Ottawa, ON
K1H 5S4
Tel: (613) 957-4717
Fax: (613) 957-4697

Canadian Judicial College/ Collège canadien de la magistrature
Judge J. Lytwyn
4450 Clarence Taylor Crescent
Delta, B.C.
V4K 3W3
Tel: (604) 940-4322
Fax: (604) 940-4364

Civil Courts/Cours civiles
Judge J. Threlfall
Unit A, 2620 Mary Hill Road
Port Coquitlam, BC
V3C 3B2
Tel: (604) 927-2100
Fax: (604) 927-2233

Committee on the Law/Comité sur le droit
Judge Owen Kennedy
4th Floor, Atlantic Place
St. John's, NF
A1C 5V5
Tel: (709) 726-7181
Fax: (709) 729-6272

Compensation/Rémunérations
Judge Douglas McDonald
323-6th Avenue S.E.
Calgary, AB
T2G 4V1
Tel: (403) 297-3156
Tel: (403) 931-2081(h)
Fax: (403) 297-5287
Fax: (403) 931-2084(h)

Conference '97/Conférence 1997
Judge Michael Sherar
Judges' Chambers
Provincial Courts Building
5250 Spring Garden Road
Halifax, NS
B3J 1E7
Tel: (902) 424-8756
Fax: (902) 424-0603

Conference '98/Conférence 1998
Judge Gary G. Cioni
Provincial Court
323-6th Avenue South East
Calgary, AB
T2G 4V1
Tel: (403) 297-3167
(403) 932-7292 (Home)
Fax: (403) 297-5287

Constitution/Constitution
Judge Bill Rodgers
200 East 23rd Street
North Vancouver, BC
V7L 4R4
Tel: (604) 983-4059
Fax: (604) 983-4034

Family and Young Offenders/ Famille et jeunes contrevenants
Judge Andre L. Guay
159 Cedar Street
2nd Floor
Sudbury, ON
P3E 6A5
Tel: (705) 670-7250
Fax: (705) 670-7254

History/Histoire
Judge Ian Dubienski
408 York Avenue, 5th Floor
Winnipeg, MB
R3C 0P9
Tel: (204) 945-2781
Fax: (204) 945-0552

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

Judicial Independence/ Indépendence des juges
Judge Kathleen E. McGowan
59 Church Street
St. Catherines, ON
L2R 7N8
Tel: (905) 988-6200
Fax: (905) 988-1533

Long-Range Planning
Judge Cheryl L. Daniel
323-6th Ave. S.E.
Calgary, AB
T2G 4V1
Tel: (403) 297-3156
Fax: (403) 297-5287

Military Judges/Juges militaires
Colonel Guy L. Brais
Chief Military Trial Judge
National Defence Headquarters
Suite 305, 66 Slater Street
Ottawa, ON
K1A 0K2
Tel: (613) 992-5201
Fax: (613) 995-5079

National Judicial Institute/ Institut National de la Magistrature
Judges James G. McNamee
15 Market Square, 3rd Floor
Saint John, NB
E2L 1E8
Tel: (506) 658-2568
(506) 847-7191 (h)
Fax: (506) 658-3759

New Judges Training Conference/ Formation des nouveaux juges
Judge Michel Babin
300, Jean Lesage Blvd.
Quebec, QB
G1K 8K6
Tel: (418) 649-3411
Fax: (418) 643-8432
-and-
Judge Jean-Paul Decoste
183 Avenue de la Cathédrale
Rimouski, QB
G5L 5J1
Tel: (418) 722-3817

Ontario Division C.J.C./ C.J.C. Division de l'Ontario
Judge Maria De Sousa
161 Elgin Street, 5th Floor
Ottawa, ON
K2P 2K1
Tel: (613) 239-1339
Fax: (613) 239-1506

Professional Responsibility/ Responsabilité professionnelle
Judge Patrick Curran
5250 Spring Garden Road
Halifax, NS
B3J 1E7
Tel: (902) 424-8759
(902) 424-8761 (voice mail)
(902) 454-5765 (h)
Fax: (902) 424-0603
-and-
Judge Linda M. Giesbrecht
Judges Chambers
Provincial Judges Court
5th Floor, 408 York Avenue
Winnipeg, MB
R3C 0P9
Tel: (204) 945-2082
Fax: (204) 945-0552

Quebec Division C.J.C./ C.J.C. Division du Québec
Judge Michel Babin
300, Jean Lesage Blvd.
Quebec, QB
G1K 8K6
Tel: (418) 649-3557
Fax: (418) 646-8417

Unification
Judge Albert A. Chrumka
5th Floor, Law Courts Bldg.
1A Sir Winston Churchill Square
Edmonton, AB
T5J 0R2
Tel: (403) 427-7817
Fax: (403) 427-0481

Western Judicial Education
Vacant

NEWS BRIEF / EN BREF (Cont'd)

Hon. Judge A. Eddy
from full-time service and became a per diem judge
effective September 1, 1996
Hon. Judge Lewis Geiger
from full-time service and became a per diem judge
effective February 28, 1997
Hon. Judge James Laing
from full-time service and became a per diem judge
effective March 31, 1997

QUEBEC

Appointments/Nominations

Hon. Judge Gérald Locas
effective July 3, 1996
Hon. Judge Eliana Marengo
effective July 3, 1996
Hon. Judge Dominique Slater
effective October 9, 1996
Hon. Carol St-Cyr
effective October 9, 1996
Hon. Judge Richard Therrien
effective October 9, 1996

Retirements/Retraite
Hon. Judge Marc Choquette
effective December 31, 1996
Hon. Judge Calude Gagnon
effective October 18, 1996
Hon. Judge Denis Gobeil
effective December 31, 1996
Hon. Judge Jean-François Gosselin
effective July 3, 1996
Hon. Judge Gaston Labrèche
effective December 30, 1996
Hon. Judge Gilles Lahaye
effective December 30,1996
Hon. Judge Denis R. Lanctôt
effective November 12,1996
Hon. Judge Albert Ouellet
effective January 14, 1997
Hon. Judge Guy Pinsonnault
effective February 13, 1997
Hon. Judge Yvon Roberge
effective January 17, 1997

Deceased/Décès
Hon. Judge Jean-Marc Tremblay
September 30, 1996

Provincial Representatives / Représentants Provinciaux

Newfoundland
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) 547-2966

Manitoba
Judge Murray Howell
Provincial Court
Judges' Chambers
5th Floor, 408 York Avenue
Winnipeg, MB
R3C 0P9
Tel: (204) 945-8005
Fax: (204) 945-0552

North West Territories
Judge Tom Davis
Courthouse
P.O. Box 550
Yellowknife, NT
Z1A 2L9
Tel: (403) 873-7604
Fax: (403) 873-0203

Nova Scotia
Judge Daryl W. Wilson
Suite 11, Provincial Building
360 Prince Street
Sydney, NS
B1P 5L1
Tel: (902) 563-2200
Tel: (902) 563-2222
Fax: (902) 563 3666

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

Quebec
Judge Michel Babin
Cour de Quebec
Palais de Justice #R-409
300, boulevard Jean-Lesage
Québec, Québec
G1K 8K6
Tel: (418) 649-3411
Fax: (418) 643-8432

Ontario
Judge Lauren Marshall
Ontario Court
1000 Finch Avenue West
Downsview, ON
M3J 2V5
Tel: (416) 314-4218
Fax: (406) 314-4235

Alberta
Judge John Maher
190 Chippewa Road
Sherwood, AB
T8A 4H5
Tel: (403) 464-0114
(403) 467-8979 (h)
Fax: (403) 449-1490

British Columbia
Judge David R. Pendleton
Provincial Court, Box 33
800 Hornby Street
Vancouver, BC
V6Z 2C5
Tel: (604) 660-8377
Fax: (604) 660-8405

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

Saskatchewan
Judge Eric C. Diehl
Provincial Court
P.O. Box 5600
Melfort, SK
S0E 1A0
Tel: (306) 752-6234
Fax: (306) 752-6126

EDITOR'S NOTEBOOK/REMARQUES DU REDACTEUR

This Journal is published quarterly and is intended to coincide with the march of the seasons. The three month intervals between Journals are periods of searching and ferreting out for me as I endeavour to collect the material which goes into making up the next edition. There are some items which appear perforce, by dint of the requirement to use this medium to communicate with you, whether this is for the purpose of informing you about some upcoming meeting, about changes in the make-up of the Bench of our court across the country, or related matters. These items are usually subsumed under the rubric of "housekeeping" matters. You will find some of such items in this edition.

Details of the national conference of the CAPCJ to be held in Nova Scotia in September are included, as are the registration forms (bilingual) for the conference, as well as the particulars of the eleventh triennial conference of the Commonwealth Magistrates' and Judges' Association (CMJA), and the particulars of all changes reported to me to the Benches of this court in the ten provinces and two territories.

But as I work toward the final stages of the preparation of the Journal, and in particular, as I sit to my keyboard to draft this Notebook, I am filled with a nervous excitement - "nervous" because publishing anything, even when most of it is not of your own doing, is a soul-baring and thereby

Le Journal est publié tous les trois mois, coïncidant en principe avec le passage de chaque saison. Je consacre les trois mois entre chaque parution à la recherche et à la découverte de renseignements qui feront partie du numéro suivant. Certaines informations reviennent forcément d'une fois à l'autre, si ce n'est qu'en raison de la nécessité d'utiliser à bon escient ce moyen de communication avec vous, qu'il s'agisse de vous informer du calendrier des réunions ou assemblées à venir, des changements au niveau de la composition de nos tribunaux ou d'autres sujets de cette nature. Ces éléments d'information sont généralement regroupés sous une même rubrique, et je vous invite à la consulter.

Dans ce numéro, vous trouverez également des précisions concernant le congrès annuel de l'association au mois de septembre en Nouvelle-Écosse, les formulaires d'inscription à cet effet, des précisions au sujet de la onzième conférence triennale de la *Commonwealth Magistrates' and Judges' Association (CMJA)*, ainsi que le relevé des changements survenus dans la composition des cours provinciales des dix provinces et deux territoires.

Abordant maintenant les dernières étapes dans la préparation du Journal et rivé à mon écran en train de composer le texte de ce carnet, je me sens à la fois nerveux et excité. «Nerveux», car le fait de publier quelque chose, même si la plupart des articles ne sont pas de votre propre cru, constitue une expérience qui interpelle votre for intérieur et qui convie à l'humilité. «Excité» devant ce potentiel énorme d'influencer l'opinion que vous procure le

NEWS BRIEF / EN BREF

BRITISH COLUMBIA

Appointments/Nominations

Hon. Judge Wendy A. Young
Chilliwack
effective November 5, 1996

Hon. Judge Robin R. Smith
Quesnel
effective November 6, 1996

Hon. Judge Suzanne K. MacGregor
Surrey
effective November 13, 1996

Hon. Judge Mark G. Takahashi
Nelson
effective November 18, 1996

Retirements/Retraites

Hon. Judge S.W. Enderton
effective November 30,1996

Hon. Judge C.C. Barnett
effective January 31, 1997

NOVA SCOTIA

Appointments/Nominations

Hon. Judge Jean Louis Batiot
Appointed Associated Chief Judge
Halifax
effective February 18, 1997

Deceased/Décès

Hon. Judge Gerald T. Casey (Retired)
February 10, 1997

NORTHWEST TERRITORIES

Retirements/Retraites

Hon. Judge Thomas B. Davis
Territorial Court, Northwest Territories
effective January 31, 1997

ONTARIO

Appointments/Nominations

Hon. Judge Rick Libman
effective November 15, 1996

Hon. Judge Richard LeDressay
effective December 1, 1996

Hon. Judge Gethin Edward
effective December 1, 1996

Hon. Judge Lucy Glenn
effective December 16, 1996

Hon. Judge Bruce Frazer
effective January 13, 1997

Hon. Judge William Wolski
effective January 20, 1997

Hon. Judge Ian Cowan
effective January 20, 1997

Retirements/Retraites

Hon. Judge John Gammell
effective October 28, 1996

Hon. Judge Jack Cannon
from full-time service and became a per diem judge
effective October 31, 1996

IN A LIGHTER VEIN (Cont'd)

Q. Speaking of the night, while you were in Spain, where did you sleep?
A. In a bed.
Q. Was there any other human being in the bed with you?
A. There were girls, chambermaids. They came around in the morning.
Q. Did you ever wake up at night and discover, look here, what is this, a woman in bed with me?
A. There may have been someone under the sheets. A hump or something.
Q. We are making progress, Mr. Edwards.
A. I'm leaving now.
Q. Where? For Spain again? By the way, what group did you go to Spain with?
A. I don't know what group I went with.
Q. And you slept in a bed in a hotel?
A. It may have been a motel.
Q. Or motel, and, on some nights, something else, another human body, was in bed with you?
A. Maybe. I don't know. I didn't lie awake in the bed all night.
Q. On how many nights?
A. Three or something.
Q. Which three nights did that happen?
A. I have no idea what three nights.
Q. How long did you stay in Spain?
A. I don't know how long I stayed there when I was there. I don't even know in what year that was.

DAVID DAY: I ask for an adjournment, My Lady, to consider where I go from here. I'll need two weeks.

THE COURT: Very well, the matter is adjourned until ...

THE RESPONDENT: Okay, I'll change my mind. I bet you're pleased with yourself, Mr. Day. The answer is yes.

FRANCIS M. VOLTAIRE. 1694-1778.

Men use thought only as authority for their injustice, and employ speech only to conceal their thoughts.

ALEXANDER POPE. 1688-1744.

The hungry judges soon the sentence sign.

humbling experience, and "excitement" because of the opportunity which the process of publication presents to influence opinion and to send forth into the heady realm of the written word another conception.

I have felt these emotions powerfully as I have prepared this Journal, but the "nervousness" has been tempered by the exhilaration which accompanied my review of the article which is the centrepiece of this edition. Authored by Josiah Wood, QC, formerly of the British Columbia Court of Appeal, who now practises law in Vancouver with the firm of Blake, Cassels & Graydon, it is entitled simply as ***Hearsay-Necessity and Reliability***. He defines his working parameters in the opening paragraph as an examination of "the traditional formulation of each of Wigmore's principles, their re-formation in the trilogy of **Khan, Smith,** and **R.v.B.(K.G.)**, and, finally, their application in a few decisions, mostly at the appellate level." He concludes the article by ominously predicting that "necessity will increasingly become a reflection of what is seen to be probative of the 'truth' or, if there is a distinction, the Crown's case" and "the question of reliability will become increasingly difficult to distinguish from a conclusion that the tendered hearsay is, or is not, the truth." Between these bookends is an illuminating analysis of the changes which have been wrought to this important rule of evidence in the last few years.

You may recall the article by The Honourable Judge Gilles Renaud in the previous edition of the Journal on the subject

domaine de l'édition, devant la possibilité d'imprimer de nouvelles conceptions dans cet univers du langage écrit.

Ces sentiments, je les ai ressenti profondément en préparant ce numéro du Journal, sauf qu'il m'a été possible de tempérer ma nervosité par cette douce ivresse dont je fus saisi à la lecture de l'article qui constitue la pièce maîtresse du présent numéro, intitulé ***Hearsay-Necessity and Reliability***. Cet article est l'oeuvre de Josiah Wood, c.r., qui siégeait jadis à la Cour d'appel de la Colombie-Britannique et pratique maintenant le droit à Vancouver au sein du cabinet Blake, Cassels & Graydon. D'entrée de jeu, l'auteur nous présente son oeuvre comme étant une analyse de la formulation traditionnelle de chacun des principes de Wigmore, de leur restructuration dans la trilogie des arrêts ***Khan, Smith,*** et ***R.c.B. (K.G.)*** et, enfin, de l'application de ces principes dans certaines décisions contemporaines, émanant principalement de tribunaux d'appel. Il termine son analyse sur ces paroles sibyllines : [Traduction] «Le critère de la nécessité deviendra de plus en plus le reflet de ce qui semble constituer une démonstration de la «vérité» sinon de la preuve présentée par la Couronne, si cette distinction s'impose, alors que le critère de la fiabilité deviendra de plus en plus difficile à distinguer d'une conclusion à l'effet que la preuve de ouï-dire ainsi présentée correspond, ou ne correspond pas, à la vérité.» L'ouvrage constitue donc une analyse éclairée de l'évolution de cette importante règle de preuve au fil des années.

Vous vous souviendrez probablement de l'article de l'honorable juge Gilles Renaud, paru dans le dernier numéro du Journal et traitant de la signification de la phrase «Vous devez comparaître devant le tribunal lorsque vous êtes requis de ce faire

of the words "appear before the court when required to do so by the court" which are directed to probationers at the time of sentencing. Judge Renaud is back again and still on the subject of sentencing. This time he examines some of the sentencing reforms which took effect in September 1996. In particular, he looks at the concept of the "conditional sentence" which is contained in section 742 *et seq.* of the Criminal Code. He welcomes the changes and suggests that they will permit the "sentencing judge to emphasize both principles that of immediate rehabilitation and of immediate punishment, without making a choice between them."

In the last edition of the Journal, The Honourable Judge Pamela Thomson, outgoing Executive Director of the CAPCJ said her "Goodbyes". In this edition, her replacement, The Honourable Judge Irwin Lampert, says his "Hellos". You will find a picture of him included and some bio. In future editions, I will provide ongoing reports from him to tell you a little of what he has been up to since taking the helm in September 1996.

As well I have a dram of levity measured up and a smattering of thoughts from the famous and the not so famous. Enjoy! Until the next time . . .

par la Cour», que l'on prononce quasi-rituellement en rendant une ordonnance de probation. Le juge Renaud nous entretient cette fois-ci d'un autre aspect du processus de détermination de la peine, celui des réformes en ce domaine qui ont pris effet en septembre 1996. Il fait notamment l'analyse du concept de la «condamnation avec sursis» dont il est question aux articles 742 et suivants du Code criminel. Il accueille favorablement ces modifications et se dit d'avis qu'elles donneront aux juges la possibilité de mettre à la fois l'accent sur les deux principes que sont la réhabilitation immédiate et le châtiment immédiat de l'individu, sans devoir choisir entre l'un ou l'autre.

Dans le dernier numéro du Journal, l'honorable juge Pamela Thomson vous faisait ses adieux alors que son mandat à titre de directrice générale de l'ACJCP tirait à sa fin. Dans le présent numéro, nous vous présentons le nouveau directeur général, l'honorable juge Irwin Lampert. Outre sa photo, vous y retrouverez quelques éléments biographiques à son sujet. Dans les prochains numéros, je vous ferai part des diverses activités dont il a eu à s'occuper depuis son entrée en fonction en septembre dernier.

Le présent numéro vous offre aussi un brin d'humour et quelques réflexions de personnes célèbres et moins célèbres. Bonne lecture et... à la prochaine!

FRANCIS BACON. 1561-1626.

Revenge is a kind of wild justice which the more man's nature runs to, the more ought law to weed it.

IN A LIGHTER VEIN (Cont'd)

Q. Did you take your three children on one or two of those visits to see her in Grand Falls?
A. My children never saw us together in bed there.
Q. So you were in bed with her, but, of course, you took the sensible precaution of not letting your children see you together there?
A. I can't remember.
Q. What was the nature of your relationship with the person named?
A. I don't ... it was a relations. We went out. We were two people who went out.
Q. Did you ever have sex with her when you went out?
A. I don't remember specific occasions. We never discussed it.
Q. When you didn't go out, did you have sex with her in any of the rooms in her place?
A. I have no idea.
Q. Last spring, did you go to Spain?
A. I would suppose.
Q. How did you get there?
A. I flew.
Q. By what airline?
A. I suppose I went in an aircraft.
Q. That's a helpful revelation, Mr. Edwards. Now, did the person named go with you?
A. I don't know. There were a lot of people on the plane.
Q. Who sat in the seat beside you on the way to Spain?
A. Which side?
Q. Either side.
A. Search me.
Q. Mr. Edwards, I'll contact the airline, obtain the manifest, and subpoena all 250 passengers and crew, if need be, and ask for costs.
A. Well, I know some people on the plane. They looked like Newfoundlanders.
Q. How perceptive. So you went to Spain?
A. Yes, I believe I went yesterday.
Q. And returned on the Concorde, I suppose, to be here today?
A. I have no idea.
Q. And when you reached Spain, did you stay in a hotel?
A. I had to stay somewhere. I just didn't wander around all night.

IN A LIGHTER VEIN

Editor's Note: If it occurs to you that you're having a "trying" day, try to imagine having to endure the manoeuvrings of a witness like the putative adulterer husband in the divorce cause in which this cross-examination occurred. Counsel for the Petitioner wife is David C. Day, Q.C. of St. John's, NF.

Q. Are these allegations which I have just read true?
A. I don't know. What's adultery?
Q. Adultery, Mr. Edwards, simply stated, is sexual intercourse between persons of opposite genders while one or both of them are married. Did you commit adultery?
A. I don't know. What's sexual intercourse?
Q. Sexual intercourse? You don't know? You want me to explain to a 38-year old man who's been married 13 years what constitutes intercourse? You want me to? Now, well, then, sexual intercourse is a physical act between a man -- you may be an example -- and a woman, such as your wife, in which the man inserts his protuberance, that is, his penis, into the woman's receptacle -- her vagina. Got the picture now, or must I demonstrate and have Her Ladyship (the judge, Madam Justice Mary E. Noonan) take a view?
A. Oh, that's what it is.
Q. Look here, Mr. Edwards. You have three children of your marriage to your wife. How did they come about?
A. I assume I am the father of the three children.
Q. What? You assume? What are you saying? What? Monstrous! This is reprehensible! So we put you down as saying your three children were fathered by another man while you lived with your wife? They are illegitimate children? They're ... they're products of bastardy?
A. I guess so. I don't know. I imagine so, I suppose so. Yes, I ... I probably am the father.
Q. Look, Mr. Edwards, very simply this, did you have sexual intercourse with the person named?
A. I can't remember.
Q. After you and your wife separated, did you go to Grand Falls and keep company with the person named?
A. Yes.
Q. Did you sleep with her on any of those occasions?
A. I can't remember if she had a separate room or not.

HEARSAY - NECESSITY AND RELIABILITY[1]

I

Since the decision of the Supreme Court of Canada in **R. v. Khan**,[2] the traditional inflexible approach of the rule against hearsay evidence has yielded to one which purports to apply the two principles underlying the rule and its exceptions; specifically, the principles which Wigmore called a "necessity for the evidence" and "a circumstantial guarantee of trustworthiness".[3] I say "purports" because in **R. v. Smith**,[4] Lamer C.J.C. noted that the criteria of necessity and reliability identified by McLachlin J. in **Khan** bear only a "close resemblance" to the principles described by Wigmore.[5]

This paper will examine the traditional formulation of each of Wigmore's principles, their re-formation in the trilogy of **Khan**, **Smith**, and **R. v. B.(K.G.)**,[6] and, finally, their application in a few decisions, mostly at the appellate level.

II

NECESSITY

The classic example of necessity is the intervening death of the declarant. At least six of the fourteen traditional exceptions to the hearsay rule recognized by Wigmore[7] owe their existence and are limited in their application to that form of necessity. But the traditional approach acknowledged other circumstances of necessity arising from either the unavailability of the declarant or the unique value of the declaration itself.[8] In his famous exposition of the principles underlying all then recognized exceptions to the rule, Jessel M.R. noted in **Sugden v. Lord St. Leonards:**[9]

> Now I take it the principle which underlies all these exceptions is the same. In the first place, the case must be one in which ***it is difficult to obtain other evidence***; for no doubt the ground for admitting the exceptions was that very difficulty.[10] (emphasis added)

If anything, Wigmore's description of the necessity criteria is more limiting:

> §1421. **First principle: Necessity.** The scope of the first principle may be briefly indicated by terming it the necessity principle. ***It implies that since we shall lose the benefit of the evidence entirely unless we accept it untested, there is thus a greater or less necessity for receiving it.*** The reason why we shall otherwise lose it may be one of two:
>
> (1) The person whose assertion is offered may now be dead, or out of the jurisdiction, or insane, or otherwise unavailable for the purpose of

testing. This is the commoner and more palpable reason. ...

(2) The assertion may be such that we cannot expect, again, or at this time, to get evidence of the same value from the same or other sources. ... Here we are not threatened (as in the first case) with the entire loss of a person's evidence, but merely of some valuable source of evidence. The necessity is not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.[11] (italics in text, references omitted, emphasis added)

In **Khan**, McLachlin J., for the Court, had little to say which would assist in an application of the new necessity criterion outside of sexual assault cases involving young children:

> The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.[12]

The likelihood of trauma resulting to the child from the ordeal of giving evidence is a contingency which can only be established by opinion evidence, and the suggestion that a mere possibility of such trauma would be a sufficient basis for admitting the out of court declaration postulates a very low threshold test for the necessity criterion. However, McLachlin J. later expresses the view that the necessity requirement will "probably" mean that in "most" cases children will still be called to give viva voce evidence.

While there was some early opinion to the effect that the decision in **Khan** merely created a new and narrow exception to the hearsay rule relating to the evidence of very young children,[13] the prevailing view that such was not the case was quickly confirmed by the decision of the Supreme Court of Canada in **Regina v. Smith**[14]. I suggest that the "reasonably necessary" criterion described in **Khan** represents a substantial departure from the concept of necessity described by Wigmore and common to the traditional approach to the hearsay rule. For example, there seems to be no reason in principle why the possibility of trauma per se, whether experienced by a child or an adult, would not meet the test.

In his judgment in **Smith,** Lamer C.J.C. stressed the flexible nature of the necessity requirement. After noting that the criterion refers to the necessity of the hearsay evidence to prove a fact in issue, he went on to qualify what it did not mean:

> ***The criterion of necessity, however, does not have the sense of "necessary to the prosecution's case"***. If this were the case, uncorroborated hearsay evidence which satisfied the criterion of reliability would be admissible if uncorroborated, but might no longer be

Réservation de notre billet d'avion: Le congrès a retenu officiellement les services de la compagnie Air Canada. Veuillez appeler sans frais le 1-800-361-7585 pour faire votre réservation au meilleur prix. Lorsque vous achetez votre billet, demandez à ce que le numéro de congrès **CV971025** soit inscrit sur votre billet. L'ACJCP ne touch une indemnité seulement lorsque ce numéro est inscrit.

Location automobile: Prix spéciaux pour les participants au Congrès auprès de Thrifty Car Rental. Pour rensiegnements et reservation appeler sans frais 1-800-367-2277, et demandez à ce que le numéro de congrès **CNVN**.

_____

_____

Croisère en goelette: Une croisère sur le Bluenose est planifer pour Samedi après-midi le 27 septembre. Le nimbre de places est limité. Pour faire votre réservation prière d'indiquer ci-dessous, et d'inclure 20.00 dollars par personne dans vos frais d'enregistrement au Congrès. Les réservations seront acceptés en ordre chronologique.

Prière de réserver _____ places.

_____

_____

Frais d'inscription: **Juges:** $325.00 **Invités:** $150.00

Veuillez remplir votre chèque au nom de la Nova Scotia Provincial Judges Association (N.S.P.J.A.).

Date limite des inscriptions: 14 août 1997 (Les frais sont payables à l'avance). Il n'est pas possible de garantir les réservations d'hôtel au-delà de cette date.

Veuillez envoyer ce formulaire par la post ou par télécopieur au:

Juge R. Brian Gibson - Registrar
Cour provinciale de Nouvelle - Écosse
Chambre des juges
277 rue Pleasant
Dartmouth, N.-É. B2Y 3S7

POUR DE PLUS AMPLES RENSEIGNEMENTS, VEUILLEZ APPELER LE JUGE GIBSON AU:

Téléphone : (902) 424-2390
Télécopieur: (902) 424-0677

> "necessary" to the prosecution's case if corroborated by other independent evidence. Such an interpretation of the criterion of "necessity" would thus produce the illogical result that uncorroborated hearsay evidence would be admissible, but could become inadmissible if corroborated. This is not what was intended by the court's decision in **Khan**.
>
> As indicated above, the criterion of necessity must be given a flexible definition, capable of encompassing diverse situations. What these situations will have in common is that the relevant direct evidence is not, for a variety of reasons, available. Necessity of this nature may arise in a number of situations. Wigmore, while not attempting in exhaustive enumerations, suggested at §1421 the following categories:
>
> ...
>
> Clearly the categories of necessity are not closed. In **Khan,** for instance, this court recognized the necessity of receiving hearsay evidence of a child's statements when the child was not herself a competent witness. We also suggested that such hearsay evidence might become necessary when the emotional trauma that would result to the child if forced to give viva voce testimony would be great. Whether a necessity of this kind arises, however, is a question of law for determination by the trial judge.[15] (emphasis added)

The first highlighted sentence in the above extract has been widely interpreted as implying that the fact the evidence is probative of the Crown's case will not, by itself, make the hearsay necessary.[16] However, when it is read in conjunction with the balance of the paragraph it introduces, it would seem that the statement was intended to convey the opposite, namely that necessity will not be **negated** merely because other (or corroborative) evidence to like effect is available to the Crown. The balance of the extract quoted suggests a broadly based and highly flexible approach to necessity, in which the "common thread" will be the unavailability of the relevant direct evidence. From the balance of the language used in **Smith,** this "common thread" is the only restraint on what otherwise seems to be a virtually open-ended necessity criterion.

However, the restraint was not long-lived. In the majority judgment in **Regina v. B.(K.G.)**[17], after again setting out Wigmore's two categories of necessity[18], Lamer C.J.C. notes:

> As an example of the second type of necessity, many established hearsay exceptions do not rely on the unavailability of the witness. Some examples include admissions, present sense impressions and business records. This is because there are very high circumstantial guarantees of reliability attached to such statements, offsetting the fact that only expediency or convenience militate in favour of admitting the evidence.[19]

In the balance of what he has to say about necessity, Lamer C.J.C. again stresses the need to give this criterion a flexible definition. He reiterates that the categories

of necessity are not closed:

> The precise limits of the necessity criterion remain to be established in the context of specific cases. It may be that in some circumstances, the availability of the witness will mean that hearsay evidence of that witness' prior consistent (the kind of statement at issue in **Khan**) statements will not be admissible. However, I am not prepared, at this point, to adhere to a strict interpretation that makes unavailability an indispensable condition of necessity.
>
> In the case of prior inconsistent statements, it is patent that we cannot expect to get evidence of the same value from the recanting witness or other sources: as counsel for the appellant claimed, the recanting witness holds the prior statement, and thus the relevant evidence, "hostage." The different "value" of the evidence is found in the fact that something has radically changed between the time when the statement was made and the trial and, assuming that there is a sufficient degree of reliability established under the first criterion, the trier of fact should be allowed to weigh both statements in light of the witness' explanation of the change.[20]

The first paragraph in this extract suggests that in most cases prior **consistent** statements will be admitted as "necessary." The second, as has been noted[21], results in a strained, if not a tortured analysis of the traditional necessity criterion.

The reference to **Khan** in the above quotation follows Lamer C.J.C.'s review and obvious approval of the Ontario Court of Appeal decision in **Khan v. College of Physicians and Surgeons (Ontario).**[22] The College had found Dr. Khan guilty of professional misconduct in connection with the same incident that led to his criminal conviction. The child testified before the hearing committee and the issue was whether that rendered the out-of-court statement made to her mother inadmissible. The Divisional Court quashed the finding of professional misconduct and ordered a new hearing on the ground, **inter alia,** that the hearing committee had erred in admitting the mother's evidence of the child's complaint.

On appeal from the Divisional Court, this ruling was reversed. Writing for the Court, Doherty J.A. noted:

> In my view, **Khan** holds that where a party seeks to introduce an out-of-court statement made by a child and referrable to alleged abuse of that child, the party must establish that the reception of the statement is necessary and that the statement is reliable. The fact that the child testifies will be relevant to, but not determinative of, the admissibility of the out-of-court statement.
>
> Where the child testifies, the reliability of the out-of-court statement will, in most cases, be enhanced.
>
> ...
>
> The fact that the child testifies will clearly impact on the necessity of receiving his or her out-of-court statement. Necessity cannot,

FORMULAIRE D'INSCRIPTION
CONGRÈS ANNUEL DE L'A.C.J.C.P
Hôtel Halifax
Halifax, N.-É.
24 - 28 Septembre 1997

Nom du juge: _____

Nom et siège de la cour: _____

Adresse postale: _____

Numéro de téléphone: ( ) _____

Numéro de télécopieur: ( ) _____

Nom des personnes invitées: _____

Demandes ou besions particuliers: _____

Hébergement à l'hôtel

Il est possible de faire votre réservation directement auprès de l'hôtel Halifax. L'hôtel est situé au coeur même de Halifax, 1990 rue Barrington, Halifax, N.-É. B3J 1P2. Pour faire votre réservation, veuillez appeler le 1-800-441-1414 ou directement l'hôtel au (902) 425-6700, ou télécopieur a (902) 425-6214. N'oubliez pas de signaler que vous êtes membre du congrès de l'ACJCP.

Nombre de nuits: _____

Prix de la chambre:

$126 + taxe (une personne) [ ]	$132 + taxe (deux personnes) [ ]
Avec petit déjeuner continental	Avec 2 petit déjeuner continental
Un lit [ ]	Deux lits [ ]
Fumeur [ ]	Non fumeur [ ]

Veuillez préciser si vous arrivez après 4 heures. Dans ce cas, donnez le nom et le numéro de votre carte de credit. Les prix ci-dessus sont garantis jusqu'au 14 août 1997.

Nom de la carte: _____ Numéro de la carte _____

Date d'expiration _____ Signature _____

Air Reservations: Air Canada has been appointed the official airline of the convention. Call 1-800-361-7585 toll free for the lowest fares and for reservations. When purchasing your ticket, please ask that Event Number **CV971025** be shown on your ticket. The CAPCJ only receives a benefit when you quote the above number.

Car Rental: Special conference rates have been arranged through Thrifty Car Rental. For information and reservation, call toll free at 1-800-367-2277 and ask for the **CNVN** rate.

Bluenose Cruise: A cruise on the Bluenose is planned for Saturday afternoon, September 27. Space is limited. To reserve space on this cruise please indicate below and enclose $20.00 per person with your Conference Registration Fee. Reservations will be accepted in order of receipt.

Please reserve space for _____ person(s)

Registration Fee: **Judges:** $325.00 **Guests:** $150.00

Make cheque payable to The Nova Scotia Provincial Judges Association (N.S.P.J.A.).

Registration Deadline: August 14 1997 (Fees payable in advance). Hotel reservations cannot be assured after that date.

Mail or Fax this form to:

Judge R. Brian Gibson - Registrar
Provincial Court of Nova Scotia
Judges' Chambers
277 Pleasant Street
Dartmouth, N.S. B2Y 3S7

FOR FURTHER INFORMATION CONTACT JUDGE GIBSON AT:

Telephone: (902) 424-2390
Facsimile: (902) 424-0677

> however, be equated with unavailability. In **Khan**, McLachlin J. instructs us that necessary means "reasonably necessary". ... In the context of cases involving an alleged sexual assault on a child, reasonably necessary refers to the need to have the child's version of events pertaining to the alleged assault before the tribunal charged with the responsibility of determining whether the assault occurred. In my view, if that tribunal is satisfied that despite the viva voce evidence of the child, it is still "reasonably necessary" to admit the out-of-court statement ***in order to obtain an accurate and frank rendition of the child's version of the relevant events***, then the necessity criterion set down in **Khan** is satisfied. ...[23] (emphasis added)

The discipline hearing took place more than four years after the incident and the child was unable to provide much detail of the alleged assault. After considering these and other circumstances, Doherty J.A. concluded:

> Considering T.'s age at the time of the alleged assault, the passage of time between the assault and her testimony, the nature of her testimony, and the expert evidence referable to her ability to narrate the events in Dr. Khan's office, I am satisfied that, when T. testified, she could not provide a full and candid account of the events which occurred in Dr. Khan's office. Consequently, it was reasonably necessary to admit her out-of-court statement to her mother.[24]

Holding that each case must be decided on its own facts, Doherty J.A. distinguished the decision in **R. v. Collins**,[25] in which the Court found that an out-of-court statement, made by a child in circumstances similar to those in **Khan**, could have no testimonial value because the child herself had testified at trial. He also relied on the judgment of the Quebec Court of Appeal, **R. v. P.(J.)**,[26] in which the majority concluded that a child's out-of-court statement to her mother was admissible even though the Crown did not produce the child, who was just over two years old at the time of the alleged offence, or offer any evidence suggesting that she was unable to testify or that it would be unduly traumatic. In that case Mailhot J.A. said:

> There is no need for "solid evidence based on psychological assessments that the testimony in court might be traumatic for the child or harm the child" here. In my view, it is self-evident, and in addition, the testimony could not be probative because of the time which has passed since the incident [seventeen months] and given the nature of the circumstances of the event.[27]

Doherty J.A. noted, without comment, the decision of the Ontario Court (General Division) in **R. v. F.(G.)**.[28] There Hogg J. admitted the out-of-court statements of an eight-year-old child who testified as a witness, but who, after a long silence, denied that she had been assaulted. The out-of-court statements had been made first to an expert in child abuse and then to the child's mother. In finding that necessity had

been established, Hogg J. relied on other evidence before the court to conclude that the child's recantation in court resulted from fear of her father and a possibility that she felt responsible for the family "problems" resulting from the father's arrest and loss of employment. He concluded that the child's out of court statements were required if the ends of justice were to be met.

In **R. v. Aguilar**[29] a different division of the Ontario Court of Appeal distinguished the decision in **Khan v. College of Physicians and Surgeons (Ontario).** After considering the facts in the latter case, Catzman J.A. concluded:

> In my assessment, on consideration of the circumstances I have reviewed, the Crown has not established that it was reasonably necessary to admit the complainant's out-of-court statements in the present case. I am influenced particularly by the facts that the complainant was almost eight years old at the time of the alleged event; that the trial took place within two years of the event, and that no evidence was adduced to explain the complainant's failure to testify beyond the evidence which she gave at trial.[30]

It should be noted that at Khan's new criminal trial, Moldaver J. of the Ontario Court (General Division) refused to admit the child's out-of-court statement to her mother, holding that the absence of detail in the child's evidence did not, by itself, establish the need to admit the hearsay. Doherty J.A. endorsed that approach to necessity in his judgment in **Khan v. College of Physicians and Surgeons (Ontario)**, noting that the inability to recall detail when called upon to testify is but one consideration in determining the admissibility of the out-of-court statement as an adjunct to the declarant's viva voce evidence.

In **R. v. D.(G.N.)**[31] the three year old victim of the alleged sexual assault was found by the trial judge to be incompetent to testify. While this was conceded sufficient to meet the necessity requirement with respect to her first out-of-court statement to a day care worker, the necessity of admitting two subsequent statements made within a few days and one made five months after the alleged assault was challenged. The Ontario Court of Appeal concluded that all of the earlier statements met the necessity criterion, as they were essential to a full and complete account of the event and together provided enough detail to assess the credibility of the complaint. The later statement, although it provided no further detail, was found to be necessary because it assisted the trier of fact in assessing the ultimate reliability of the earlier statements.

Age and lack of ability to remember detail were important circumstances leading to a finding of necessity in **R. v. Hanna**[32], where the British Columbia Court of Appeal upheld the admissibility of statements made by the witness at a previous trial. In that case, a six-year-old had witnessed his mother's death at the hands of the accused. He was eight at the time of the first trial. A new trial was ordered, and by the time it took place he was ten, and unable to recall significant details of the events leading to his mother's death. The trial judge accepted counsels' agreement that the Crown could put those details before the jury by reading from the child's testimony at the first trial. However, on appeal Hanna had new counsel who took the position

REGISTRATION FORM
C.A.P.C.J. ANNUAL CONFERENCE
Hotel Halifax
Halifax, N.S.
September 24 - 28 1997

Name of Judge _____

Court and Location _____

Mailing Address _____

_____

Telephone ( ) _____ Fax ( ) _____

Name(s) of Guest(s) _____

Special Requests or Needs _____

HOTEL ACCOMMODATION REQUIRED

Hotel accommodation at the Hotel Halifax should be arranged directly with the hotel. It is located in the heart of Halifax at 1990 Barrington Street, Halifax, N.S, B3J 1P2. For reservations, call 1-800-441-1414 or directly to the hotel at (902) 425-6700, facsimile (902) 425-6214. Be sure to mention that you are with the CAPCJ Conference Group.

Arrival _____ Departure _____

1 Person ($126 + tax) [ ] (Includes continental breakfast)	2 Persons ($132 + tax) [ ] (Includes 2 continental breakfasts)
ROOM TYPE: 1 Bed [ ]	2 Beds [ ]
REQUEST: Smoking [ ]	Non Smoking [ ]

Guaranteed after 4:00 pm arrival. Credit card required:

The above rates are only available until August 14, 1997.

Name of Card _____ Card No. _____

Expiry Date _____ Signature _____

Congrès National 1997 des juges des Cours Provinciales

Depuis déjà plus de deux siècles la "Citadelle" est la sentinelle silencieuse du Port de Halifax, "Gouvemeur du Nord". Cette forteresse célèbre sera mise à l'épreuve quand deux cents juges, délégués, épouses et époux, gente académique et autres disciples assortis envahissent le centre-ville historique de Halifax la semaine du 21 au 27 septembre, 1997.

L'Hôtel Halifax, choisi pour son nom mnémonique et ses connexions aisées au Casino du Sheraton Halifax, est site du Congrès National 1997 des juges des Cours Provinciales. L'Association des Juges de la Nouvelle-Écosse, en ligue avec leur gouvernement provincial, sera l'hôte d'une semaine "de chez-nous", portant le titre "le temps de juger". En plus du ronronnement régulier mais absolument essentiel des réunions d'affaires, vos hôtes vont façonner une série excitante et illuminante de sujets illustrant le travail que nous, juges, faisons. La discipline judiciaire, le stress judiciaire, la discrétion judiciaire et la prise de décision judiciaire sont certains sujets de ce Congrès, qui s'appliqueront à toutes les Chambres de nos Tribunaux. Naturellement, certaines périodes de temps seront dédiées, après des heures exténuantes de cogitation, à mesurer et considérer les problèmes éternels et vexants du divertissement, qui dire, de l'excitement, judiciaire: divertissements à la Citadel d'Halifax, croisière sur la goélette Bluenose (oui, celle sur la pièce de dix cents!), homards sur la Côte Sud, banquets et beaucoup de vrais divertissements du "Canada Est", du "Canada des Maritimes" et son pétillement.

Nos compatriotes de Terre Neuve et du Nouveau Brunswick ont consenti à tenir leur Congrès Annuel Provincial en même temps que le nôtre ici, à Halifax. Le mélange devrait être des plus grisant.

Comme la ville de Québec, Halifax, la ville historique, fut construite bien avant la déesse automobile; il est donc facile de s'y promener. Cependant, Halifax est idéal comme base d'opération pour des vacances sur la Côte Atlantique.

Le comité d'organisation se réjouit à l'avance de vous accueillir en septembre. Plus nous seront nombreux, mieux on s'amusera. Par contre, étant donné le nombre de places limité pour certains événements, je vous recommande fortement de vous inscrire le plus tôt possible. Pour toute question, veuillez contacter une des personnes suivantes: Michael Sherar/(902) 424-8756, fax (902) 424-0603, Jean-Louis Batiot/(902) 532-5137, fax (902) 532-7380 et Brian Gibson/(902) 424-2311, fax (902) 424-0677.

that he was not bound by the agreement. Applying the decision in **Khan v. College of Physicians and Surgeons (Ontario),** the Court of Appeal held that the prior testimony was necessary in the circumstances of that case.

One month before **Hanna**, in **G.(J.P.) v. British Columbia (Superintendent of Family & Child Service)**,[33] the same court refused to admit a thirteen-year-old's out-of-court statements in an application under the **Family and Child Service Act**. The child, who was not called to testify, had alleged sexual assault by the father. The court noted:

> We are not aware of any case where hearsay evidence of declarations made by a child as old as this boy have been received in evidence.
>
> ...
>
> In our view, however, the learned judge should at least have investigated the question whether this boy could give evidence before allowing such important hearsay to be given. It may be that the boy could only make an unsworn statement, and that hearsay should also have been admitted. But those questions should at least have been the subject of a voir dire, and the learned hearing judge should have satisfied himself after proper enquiry that the circumstances permitted hearsay evidence to be admitted into evidence.[34]

The foregoing applications of the necessity criterion have all involved children. It is apparent that the younger the child, the more easily the criterion will be met. But it is also apparent that other factors which are more likely to be encountered with a child witness will also favour a finding of necessity.

However, turning to cases involving adult witnesses, there is no reason to think that the necessity requirement will be any more difficult to meet. The death of the declarant obviously provides the basis for a finding of necessity. In **R. v. Finta**,[35] the Ontario Court of Appeal affirmed the trail judge's decision to admit two depositions made by a deceased witness in connection with Finta's 1947 trial, in absentia, in Hungary at which he was convicted of "crimes against the people". In that case the defence had sought to have the depositions admitted, arguing that they were relevant to refute the Crown's evidence on the role which Finta played in the Nazi chain of command at Szeged, Hungary, during a six-week period in 1944 when over 8,000 Jews were arrested, robbed of their valuables, and transported to concentration camps. After referring to the passage from Wigmore, § 1421, the majority in the Court of Appeal added:

> Properly understood, the principle of necessity means not that the hearsay evidence is necessary for a party to prove his case, but that hearsay is the only available means of putting that evidence before the court. To be admissible, the evidence must be relevant to, but not necessarily dispositive of, an issue, and for hearsay to be admissible, it must be the only way of tendering that relevant evidence.[36]

In **Smith**, of course, the declarant was dead. The same was true in **R. v. Chahley**[37] and **R. v. Jack**,[38] where declarations by murder victims made shortly before their deaths were held admissible, in **R. v. Kharsekin**[39] where statements made by the victim, in the short interval between being stabbed and dying, which identified the accused as his assailant were held admissible, and in **R. v. Narcisse**[40], where statements made by the deceased some months before her death, in which she alleged the accused had sexually assaulted her, were held admissible.

In **R. v. Lemky**,[41] Hinds J.A., for the court, suggested that the necessity criterion had been met because statements made by the deceased to her brother and a friend one week before she was killed were relevant to the issue of motive and were therefore "a necessary element in the Crown's case." The same approach was taken in **R. v. Stewart**,[42] where Wetmore J. considered the admissibility of a child's out-of-court statements in a sexual assault case and concluded that in the context of that case necessity had a twofold meaning: (1) the evidence must be "crucial" to the case, and (2) there must be an absence of other evidence. A similar approach was taken in **Regina v. Clarke**[43], where the trial judge found it necessary to admit the contradictory testimony given by a witness at the preliminary inquiry because without it "there is no case".

In **Regina v. Edwards**[44] the police intercepted telephone calls, in which the callers requested drugs, while they were searching a suspected drug trafficker's apartment. In what might be construed as **obiter dictum**, the majority concluded that if the requests were hearsay, they were nonetheless admissible as they met both the necessity and reliability criteria. In respect of the former, McKinlay J.A. stated:

> It was necessary to prove the nature of the appellant's drug activities, and could they not have been proven [sic] in this case in any other way that was available to the police. They did not know the identity of the callers, and, in any event, it is unlikely the callers would have testified if their identity had been known.[45]

In **R. v. Moore,**[46] a decision of the Ontario Court (General Division), the accused was charged with murder as a result of the death of an infant she was babysitting. She relied on the new approach to support the admissibility of statements she made while under the influence of sodium amytol. Moldaver J. found the necessity criteria established because at the time of trial the accused was not able to recall "critical evidence" regarding the incident which cased the death of the child.

The extent to which the analysis in **B.(K.G.)** has affected the application of the necessity principle may be seen in **R. v. Mallion**,[47] where the trial judge held that the necessity criterion was satisfied by the contemptuous refusal of the witness, who was an alleged accomplice and co-conspirator of the accused, to repeat the content of his out-of-court statement implicating the accused. A somewhat related, although different, problem arose in **Regina v. Hawkins and Morin**[48]. There a Crown witness both gave evidence implicating the accused and recanted that evidence, all while under oath during the preliminary inquiry, and then subsequently married the accused before trial. Without much discussion of the point, the majority concluded that the

1997 National Convention for Provincial Court Judges

For over 200 years the Citadel has stood as a silent guardian of the Port of Halifax - Warden of the North. That great fortress is about to be tested as 200 judges, delegates, academics and assorted camp followers invade historic downtown Halifax the week of September 21 - 27, 1997.

The Halifax Hotel, chosen for its easily remembered name and convenient connection to the Halifax Sheraton Casino, is the site of the 1997 National Convention for Provincial Court Judges. The Nova Scotia Judges Association in league with the Government of Nova Scotia will be hosting a downeast week entitled "A Time For Judging". In addition to the regular drone of, but absolutely essential, business meetings, your hosts have fashioned an exciting and illuminating series of topics centered around the job that we judges do. Judicial discipline, judicial stress, judicial discretion and judicial decision making are some of the subjects for the education portion of the conference which is applicable to all divisions of our courts. Of course, there will be some time dedicated after strenuous hours of cogitation to weigh and consider the eternal vexing problem of judicial entertainment and even judicial excitement. On site entertainment at the Halifax Citadel, chartered cruise of the Schooner Bluenose, (yes, the one on your dime), lobster on the South Shore, banquets and lots of real Maritime/Atlantic Canadian entertainment and effervescence.

Our fellow compatriots from Newfoundland and New Brunswick have agreed to hold their Provincial Annual Conferences in conjunction with our National Assembly here in Halifax. The mixture should be intoxicating.

Like Quebec City, historic Halifax was constructed before the almighty automobile was created so it is quite easy to walk around. However, Halifax is also a great base of operations to plan an Atlantic vacation.

The organizing committee sincerely looks forward to seeing you in September. The more the merrier; however, as some events have limited capacity I would strongly recommend that you take the opportunity to register as soon as possible. The sooner we have your application the sooner we can forward an itinerary and tourist information. If you have any questions please contact any one of the following: Michael Sherar/(902) 424-8756, fax (902) 424-0603; Jean-Louis Batiot/(902) 532-5137, fax (902) 532-7225; and Brian Gibson/ (902) 424-2311, fax (902) 424-0677.

(Ont. Prov. Ct.) in which an offender guilty of a sexual assault upon his spouse received a six month conditional sentence.

V) Conclusion:

At bottom, counsel and courts must engage in a concerted and fundamental dialogue with a view to extending the reach of this novel sentencing device, the heart of sentencing reform, and the first step must be the identification of traditional judgments wherein the lack of flexibility in the use of a suspended sentencewas deplore, to then determine whether resort to the conditional sentence of imprisonment order would permit a wiser and "fitter" blend of sentencing principles. In so doing, sight must not be lost of the signal fact that "... a conditional sentence is a jail sentence; it is not a replacement for a suspended sentence, which we still have in our sentencing law." Refer to R. v. Collingwood (1996), 32 W.C.B. (2d) 403 (Ont. Ct. (Prov. Div.)) and to M. le juge Sirois' decision in La Reine c. Senécal, No. 600-01-000750-948, November 25, 1996, in which it is held that "... il faut éviter d'imposer l'emprisonnement avec sursis dans des cas où par le passé une sentence autre que l'emprisonnement aurait pu être appropriée."

l'affaire R. c. Serkhanian, jugement rendu le 16 septembre 1996. Ce savant juge a sursis à une peine de six mois dans le cas d'un délinquant coupable d'une aggression sexuelle.

V) Conclusion:

Au demeurant, les plaideurs et les tribunaux se doivent d'initier un débat de fond portant sur le bien fondé d'étendre la portée de cet article qui semble être l'élément le plus dynamique de la loi portant refonte sur la détermination de la peine. La première étape de ce débat nous semble plutôt simple: il s'agit d'identifier les jugéments antérieurs où l'on a déploré le manque de souplesse en sentencing entre le sursis traditionnel et la peine immédiate d'emprisonnement et de les analyser à la lumière de l'art. 742. Dans cette optique, il importe de garder à l'esprit le fait que "... a conditional sentence is a jail sentence; it is not a replacement for a suspended sentence, which we still have in our sentencing law." Voir R. c. Collingwood (1996), 32 W.C.B. (2d) 403 (Cour Prov. de l'Ont.) et le jugement de M. le juge Sirois dans l'affaire La Reine c. Senécal, No. 600-01-000750-948, le 25 november 25, 1996, où il a déclaré "... il faut éviter d'imposer l'emprisonnement avec sursis dans des cas où par le passé une sentence autre que l'emprisonnement aurait pu être appropriée."

TERENCE. 185-189. BC

Rigorous law is often rigorous injustice

FRANCIS, DUC DE LA ROCHEFOUCAULD. 1613-1680.

The love of justice is simply, in the majority of men, the fear of suffering injustice.

evidence of the witness given on the preliminary inquiry was reasonably necessary in light of the unavailability of the witness' evidence by any other means i.e. she was not compellable as a Crown witness against her husband, and her evidence was assumed for the purposes of the discussion not to be receivable under s. 715 of the **Criminal Code**.

In **R. v. Unger and Houlahan**[49], the accused were jointly charged with and tried for murder. Unger had made a number of statements to undercover police officers in which he admitted to sole responsibility for the death of the victim. He gave evidence at trial in the course of which he repudiated these statements, claiming they were false boasts designed to qualify him for membership in what he believed was a criminal organization ostensibly run by the undercover officers. Houlahan had made a formal statement to the police in which he alleged that he had participated in the killing under duress of threats by Unger. He did not testify at trial.

On appeal Houlahan argued that Unger's statement to the undercover officers should be admissible testimonially in support of his defence, as it then was, that he had nothing whatever to do with the killing. The necessity criterion was said to be met by the fact that he had been refused severance and was unable to call Unger as a witness on his own behalf.

The Court found a "complete answer" to that "interesting argument' in the fact that Unger, unlike Houlahan, had testified at trial at which time he had denied the truthfulness of the statements he had made and had been extensively cross-examined by Houlahan's counsel. Although the court does not explicitly relate these circumstances to the necessity criterion, they would seem to have been intended in that context since subsequent passages in the judgment deal specifically with the reliability criterion.

III

RELIABILITY

In **Sugden v. Lord St. Leonards**,[50] Jessel M.R. summarized what he saw as the circumstantial guarantees of trustworthiness common to the then recognized exceptions to the hearsay rule:

> In the next place the declarant must be disinterested; that is disinterested in the sense that the declaration was not made in favour of his interest. And, thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me to be one of the strongest reasons for admitting it, the declarant must have a peculiar knowledge not possessed in ordinary cases.[51]

It is worth repeating, as well, Wigmore's general comments on the traditional approach to reliability:

> §1422. **Second principle: Circumstantial probability of trustworthiness.** The second principle which, combined with the first,

satisfies us to accept the evidence untested, is in the nature of a practical substitute for the ordinary test of cross-examination. We see that under certain circumstances the probability of accuracy and trustworthiness of statements is practically sufficient, if not quite equivalent to that of statements tested in the conventional manner. This circumstantial probability of trustworthiness is found in a variety of circumstances sanctioned by judicial practice; and it is usually from one of these salient circumstances that the exception takes its name.

...

Though no judicial generalizations have been made, there is ample authority in judicial utterances for naming the following different classes of reasons underlying the exceptions.

a. Where the circumstances are such that a sincere and accurate statement would naturally be uttered, and no plan of falsification be formed;

b. Where, even though a desire to falsify might present itself, other considerations such as the danger of easy detection or the fear of punishment would probably counteract its force;

c. Where the statement was made under such conditions of publicity that an error, if it had occurred, would probably have been detected and corrected.[52]

In **Khan**, McLachlin J. gave an early indication just how far the "new" criterion of reliability would depart from the old concept of a circumstantial guarantee of trustworthiness:

> The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.[53]

In **Khan,** the out-of-court statement met the criterion of reliability because the child had no motive to falsify her story, which emerged naturally and without prompting, and she could not be expected to have knowledge of the alleged sexual act. As well, her statement was corroborated by the semen stain on her sleeve.

As noted, by discussing the new reliability criterion in the context of the evidence of young children in cases of sexual abuse, McLachlin J. prompted the view in some quarters that the new approach should be limited to such cases.[54] But Lamer C.J.C. made it clear in **Smith** that no such limitations could attach to the decision in **Khan**. In discussing reliability theoretically, he said:

continuing to behave appropriately within the community. Unfortunately, that option was not available and the selection of an individualized disposition doubtless undermined the principle of general deterrence.

The legislative scheme that is now in force permits the sentencing judge to emphasize both principles, that of immediate rehabilitation and of immediate punishment, without making a choice between them. The choice of the principle to be emphasized in any individual case will depend on the facts of the case and the situation of the offender. Thus, in R. v. Parker, [1996] N.S.J. No. 410 (S.C.), MacDonald, J., allowed an offender guilty of dangerous driving causing death and bodily harm to serve a maximum reformatory sentence within the community, having concluded that the submissions of the Crown in support of an immediate jail sentence were not sufficiently compelling. Refer to page 14, para. 37:

> ... a conditional sentence is not a suspended sentence. It is not probation. If a conditional sentence was a suspended sentence, there would be no need to pass new legislation. If a conditional sentence was probation, there would be no need to pass new legislation. There are serious sanctions for breach of conditions in a conditional sentence. A conditional sentence, properly worded, can severely limit the defendant's freedom, although he is not in physical confinement in a prison.

To the same effect is the judgment of Scanlan, J. in R. v. Frenette, [1996] N.S.J. No. 377 (S.C.), in the case of trafficking in narcotics. See also Judge Cole's judgment in R. v. S. (T.) (1996), 32 W.C.B. (2d) 364

peine qui a été retenu avait pour résultat de nuire au principe de l'exemplarité.

C'est donc pour permettre au tribunal de ménager la chèvre et le chou, c'est-à-dire les impératifs de l'exemplarité et de la réinsertion sociale des délinquants, trop longtemps envisagés comme des choix en opposition, que nous croyons que le Législateur a choisi d'introduire les condamnations à l'emprisonnement avec sursis. Dans de tels cas, l'importance du principe en jeu et la gravité de la violation du Code criminel motivent le choix du tribunal. Ainsi, dans l'affaire R. c. Parker, [1996] N.S.J. No. 410, monsieur le juge MacDonald de la Cour supérieure de la Nouvelle-Écosse a permis à un délinquant coupable de conduite dangereuse causant la mort et des blessures corporelles graves de purger une peine de deux ans moins un jour au sein de la collectivité parce que le tribunal a jugé insuffisants les moyens soulevés par la poursuite à l'appui d'une peine au sein d'un centre correctionel. A la page 14, au para. 37, le tribunal s'exprime ainsi:

> ... a conditional sentence is not a suspended sentence. It is not probation. If a conditional sentence was a suspended sentence, there would be no need to pass new legislation. If a conditional sentence was probation, there would be no need to pass new legislation. There are serious sanctions for breach of conditions in a conditional sentence. A conditional sentence, properly worded, can severely limit the defendant's freedom, although he is not in physical confinement in a prison.

Abondant dans le même sens, son collègue le juge Scanlan a imposé une peine de 14 mois avec sursis dans une affaire impliquant un délinquant coupable de traffic de stupéfiants dans l'affaire R. c. Frenette, [1996] N.S.J. No. 377. Voir aussi la décision inédite de mon collègue le juge Cole dans

hours of community work service.

IV) Reform and the suspended sentence:

In the past, faced with an inflexible device, sentencing judges elected to impose a suspended sentence even though a period of incarceration might have been appropriate, or to jail an offender though a period of immediate community supervision would not have been unwise. In either case, some element of sentencing was given inadequate weight. For example, in R. v. Lebovitch (1979), 48 C.C.C. (2d) 539 (C.A. Qué), Lamer, J.A., as he then was, remarked as follows at page 542:

> In our probation order, aside from the ordinary conditions, we have ordered the appellant to follow and complete the programme of 'Le Portage' for one year more than the regular programme normally provided for the phase of social rehabilitation. ... Of course we do not give him carte blanche . At the slightest wavering during the next three years the appellant would be brought back before the proper Court where he would then receive thesentence we could have given him. In short, we have delayed the sentence for three years. If between now and then Lebovitch does nothing to justify incarceration, society will have benefited greatly not only from the rebirth of one of its citizens but also from the example he will have given to others who, through their own fault, were placed in similar situations.

I have no doubt that the Québec Court of Appeal would have preferred to impose a jail sentence, say of two years less one day, to then suspend the effective operation of the penalty, subject to the offender

IV) Effet de la refonte sur le sursis: imposer une peine d'emprisonnement avec sursis qui est purgée au sein de la collectivité

L'approche de plusieurs juristes qui faisaient face au manque de souplesse du Code criminel était donc soit de surseoir au prononcé de la peine, soit d'imposer une peine d'emprisonnement; dans un cas comme dans l'autre, il s'agit d'un choix comportant trop peu de souplesse. Par exemple, dans l'affaire R. c. Lebovitch (1979), 48 C.C.C. (2d) 539 (C.A. Qué), le juge Lamer s'exprime ainsi, à la page 542:

> In our probation order, aside from the ordinary conditions, we have ordered the appellant to follow and complete the programme of 'Le Portage' for one year more than the regular programme normally provided for the phase of social rehabilitation. ... Of course we do not give him carte blanche . At the slightest wavering during the next three years the appellant would be brought backbefore the proper Court where he would then receive the sentence we could have given him. In short, we have delayed the sentence for three years. If between now and then Lebovitch does nothing to justify incarceration, society will have benefited greatly not only from the rebirth of one of its citizens but also from the example he will have given to others who, through their own fault, were placed in similar situations.

Il y a fort à parier que la Cour d'appel du Québec aurait plutôt choisi d'imposer une peine d'emprisonnement, disons deux ans moins un jour, pour ensuite y surseoir moyennant une période de bonne conduite au sein de la collectivité. Cependant, ce choix n'était pas disponible et le sursis de

> The criterion of "reliability" - or, in Wigmore's terminology, the circumstantial guarantee of trustworthiness - is a function of the circumstances under which the statement in question was made. If a statement sough to be adduced by way of hearsay evidence is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken, the hearsay evidence may be said to be "reliable", i.e., a circumstantial guarantee of trustworthiness is established. The evidence of the infant complainant in **Khan** was found to be reliable on this basis.[55]

After concluding that the first two telephone calls from the deceased to her mother in that case met the reliability requirement of the new approach to hearsay, Lamer C.J.C. rejected the third as unreliable:

> On the evidence, I cannot say that I am without apprehension that Ms. King may have been mistaken, or, indeed might have intended to deceive her mother on this account.[56]

He then analyzed the evidence from which an inference of either mistake or deceit could be drawn, and concluded with this:

> I wish to emphasize that I do not advance these alternative hypotheses as accurate reconstructions of what occurred on the night of Ms. King's murder. I engage in such speculation only for the purpose of showing that the circumstances under which Ms. King made the third telephone call to her mother were not such as to provide that circumstantial guarantee of trustworthiness that would justify the admission of its contents by way of hearsay evidence, without the possibility of cross-examination. Indeed, at its highest, it can only be said that hearsay evidence of the third telephone call is equally consistent with the accuracy of Ms. King's statements, and also with a number of other hypotheses. I cannot say that this evidence could not reasonably have been expected to have changed significantly had Ms. King been able to give evidence in person and subjected to cross-examination. I conclude, therefore, that the hearsay evidence of the contents of the third telephone conversation did not satisfy the criterion of reliability set out in **Khan**, and therefore were not admissible on that basis.[57]

While **B.(K.G.)** creates reliability standards which may be seen as peculiar to the testimonial use of prior inconsistent statements, Lamer C.J.C. did make the following general comment:

> What the reliability component of the principled approach to hearsay exceptions addresses is a threshold of reliability, rather than ultimate or certain reliability.
>
> The history of the common law exceptions to the hearsay rule

> suggests that for a hearsay statement to be received, there must be some other fact or circumstance which compensates for, or stands in stead of the oath, presence and cross-examination. Where the safeguards associated with non-hearsay evidence are absent, there must be some substitute factor to demonstrate sufficient reliability to make it safe to admit the evidence.[58]

Some indication of the construction Lamer C.J.C. expected to be given that theoretical statement is to be found in his conclusions on reliability in the context of prior inconsistent statements. A prior inconsistent statement will be admissible for testimonial purposes where: (1) the statement is made under oath or solemn affirmation which is accompanied by a warning as to the existence of sanctions for perjury and an explanation of the significance of the oath or affirmation; (2) the statement is videotaped and is complete; and (3) the opposing party has a full opportunity to cross-examine the declarant on the content of the previous statement. However, these are not absolute requirements, and any or all may be replaced by other indicia of reliability.

In **Stewart**,[59] Wetmore J. recognized the dilemma facing any judge who seeks to reconcile the circumstantial guarantees of trustworthiness, which governed the exceptions to the traditional hearsay rule, with the subjective evaluation of "reliability" required by the new approach. The case was again one of sexual assault and involved a three-year-old complainant. Wetmore J. noted:

> What I take from **Khan** is that the reception of this hearsay testimony must have that degree of persuasiveness that it may be found truthful when weighed with the other evidence. In making that judgment on reliability to determine whether such evidence is receivable, such considerations as capacity, opportunity, and motive to fabricate must be weighed in determining reliability - not ultimate truthfulness or accuracy as it may finally be determined by the jury or judge in arriving at findings of fact.[60]

The majority of the Ontario Court of appeal in **Finta**[61] relied heavily on Wigmore's notion of circumstantial guarantees of trustworthiness. They noted that the out-of-court statements at issue in that case were made on a solemn occasion not unlike a court proceeding, that they were made by a party adverse in interest to the party seeking their admission, that they were made by a person having a peculiar means of knowledge of the events described in the statements, that they distinguished events within the declarant's personal knowledge and events about which he had only second-hand information, and that they were officially recorded and preserved by the state. These characteristics bear a far greater resemblance to the traditional circumstantial guarantees of trustworthiness than do the subjective evaluations of "reliability" found in **Khan** and most of the other sexual assault cases dealing with the evidence of young children.

Similarly, in **Chahley**,[62] the British Columbia Court of Appeal applied the three guarantees of trustworthiness found in **Sugden v. Lord St. Leonards**, noted that

interference with logging activities on Lyell Island. They were sentenced by McEachern, C.J.S.C., to five months' imprisonment but the sentence was suspended for six months on condition that they not return to Lyell Island. One defendant admitted his wrongdoing in the breach of the injunction and undertook not to return to Lyell Island. He was sentenced to a fine of $750.

In Fletcher Challenge Canada Ltd. v. Hucalak et al., C915008, Vancouver Registry, October 30, 1991 (B.C.S.C.), Hutchison, J., found Hucalak and several others guilty of criminal contempt of court of breaches of an injunction order restraining interference with logging activities carried on by the plaintiff. Several of the defendants received sentences of one month imprisonment which were suspended on conditions. The conditions included the performance of community work service ranging from 50 up to 100 hours, depending upon the seriousness of the breaches committed by the various defendants. Two of them, who were less involved in the breaches, received fines of $500 each.

In Fletcher Challenge Canada Ltd. v. Miller et al., C915008, Vancouver Registry, November 26, 1991 (B.C.S.C.) ... the defendant Weston was found guilty of civil contempt of court for breach of an injunction order prohibiting interference with the plaintiff's logging operations in the Walbran area of Vancouver Island. Hutchinson, J., sentenced her to one month's imprisonment which was suspended for 12 months on conditions, one of which was that she perform 125 hours of community work service.

In Fletcher Challenge Canada Ltd. v. Hucalak et al., C915008, Vancouver Registry, October 30, 1991 (B.C.S.C.), Hutchison, J., found Hucalak and several others guilty of criminal contempt of court of breaches of an injunction order restraining interference with logging activities carried on by the plaintiff. Several of the defendants received sentences of one month imprisonment which were suspended on conditions. The conditions included the performance of community work service ranging from 50 up to 100 hours, depending upon the seriousness of the breaches committed by the various defendants. Two of them, who were less involved in the breaches, received fines of $500 each.

In Fletcher Challenge Canada Ltd. v. Miller et al., C915008, Vancouver Registry, November 26, 1991 (B.C.S.C.) ... the defendant Weston was found guilty of civil contempt of court for breach of an injunction order prohibiting interference with the plaintiff's logging operations in the Walbran area of Vancouver Island. Hutchinson, J., sentenced her to one month's imprisonment which was suspended for 12 months on conditions, one of which was that she perform 125 hours of community work service.

III) "Conditional jail sentences" and contempt of court:

For present purposes, it may be a useful introduction to the issue of "conditional jail sentences" to consider the granting of a penalty akin to this device in contempt of court cases. Of interest, a number of courts have upheld the right of a court to impose a "known suspended sentence", in instances not prosecuted pursuant to the Criminal Code, to sanction breaches of a court order, chiefly as an enforcement mechanism. In one sense, it may be said that the objective pursued is to denounce the breach of the order without "jailing" the wrongdoer while issuing a warning, in appropriate cases

The general tendency in such cases is illustrated in MacMillan Bloedel Ltd. v. Simpson (1993), 32 B.C.A.C. 244, 53 W.A.C. 244 (C.A.). Accordingly, it will be of assistance to refer extensively to the passages in question as they presage the conditional sentence scheme that has been adopted under s. 742.1 of the Criminal Code.

> Thereupon the learned trial judge convicted Ms. Simpson of criminal contempt of court and sentenced her to six months' imprisonment. The suspension of the fine of $1,500 imposed on condition of her good behaviour was terminated. The fine has been paid. The oral reasons of the trial judge were brief. [MacMillan Bloedel Ltd. v. Simpson (1993), 32 B.C.A.C. 244, 53 W.A.C. 244 (C.A. C.-B.)
>
> [In] Western Forest Products v. Collison et al., C854987, Vancouver Registry, December 20, 1985 (B.C.S.C.),nine defendants were found guilty of criminal contempt of court for breach of an injunction forbidding

en matière à la récente réforme du sentencing. En effet, plusieurs jugements de common law ont reconnu le droit d'un tribunal d'imposer une peine d'emprisonnement et de surseoir à son exécution aux conditions qu'il détermine. Quoique le language employé varie parfois, le message véhiculé est essentiellement identique: lorsque le Code criminel ne s'applique pas, un tribunal peut imposer une peine d'emprisonnement pour remédier à la violation d'une ordonnance et surseoir à celle-ci dans le cadre d'un mécanisme administratif d'exécution forcée qui est prévu. L'objectif visé étant de redresser la situation sans toutefois réellement pénaliser puisqu'il est jugé opportun en cette situation de d'abord donner une mise en garde.

La tendance qui se dégage des extraits cités ci-bas, tirés de l'affaire Simpson qui suit, illustre bien la notion de la condamnation à l'emprisonnement avec sursis que le a adopté dans le cadre de l'art. 742 du Code criminel.

> Thereupon the learned trial judge convicted Ms. Simpson of criminal contempt of court and sentenced her to six months' imprisonment. The suspension of the fine of $1,500 imposed on condition of her good behaviour was terminated. The fine has been paid. The oral reasons of the trial judge were brief. [MacMillan Bloedel Ltd. v. Simpson (1993), 32 B.C.A.C. 244, 53 W.A.C. 244 (C.A. C.-B.)
>
> [In] Western Forest Products v. Collison et al., C854987, Vancouver Registry, December 20, 1985 (B.C.S.C.),nine defendants were found guilty of criminal contempt of court for breach of an injunction forbidding interference with logging activities on Lyell Island. They were sentenced by McEachern, C.J.S.C., to five months' imprisonment

such guarantees have the great advantage of being immune to the court's subjective evaluation of reliability, and thus acknowledged the line that separates the legal issue of admissibility from the factual issue of weight. The same court also took a conservative approach to the issue of reliability in **Hanna**.[63] There the court found that because the prior statements of the witness were made on solemn affirmation (equivalent to an oath by virtue of s. 14(2) of the **Evidence Act**) and were subject to cross-examination at the time they were made, the requirement of reliability had been met.

An illustration of how far the trial judge's subjective evaluation of reliability as an issue of admissibility has invaded the realm of the trier of fact, at least in sexual assault cases involving young children, is to be found in the trial judge's decision in **F.(G.)**.[64] After concluding that the prior statements of the child witness were necessary in order that the ends of justice be met, he turned to the question of reliability:

> First of all, I am satisfied that a sexual assault took place and in a sense, the initial denial of the child that such took place, strengthens the reliability because of the circumstances and because of the nature of the statements sought to be admitted.
>
> The child was severely injured by penetration in her vaginal area. She initially told her mother that this injury was caused by a fall from a tree. This is patently and obviously untrue. There is, in my opinion, not the slightest possibility that the injuries described by the doctors could have occurred in this fashion.
>
> Therefore the question arises, why did the child tell this story and was she attempting to protect somebody and if so, who.
>
> There is evidence to corroborate in a material particular the statements of the child concerning her father. At a later stage it will be my duty as the trial judge to decide what weight and what inferences to draw. There are his unusual actions, behaviour and demeanour after the event occurred. There is the very nature of the injury. There is evidence of opportunity. Of course, that is not corroboration.
>
> There is evidence of the brother, albeit there is a recantation at the preliminary inquiry. And there is the evidence of Anne-Marie Wickstead with whom I have stated I am impressed and whose evidence I accept having regard to her experience and her competence and to put it plainly, what she says is common sense.
>
> One can think of many hypothetical situations where hearsay evidence would be the most reliable and truthful evidence available. One can well understand why there would be a denial, clumsy as it may be, in view of the circumstances of a case.
>
> There are, of course, dangers in the accepting of hearsay evidence, but my task as the trial judge will be to recognize that and to consider all the circumstances of the case and in due course after hearing all the evidence that is presented, to determine whether or not the Crown has proven the charge beyond a reasonable doubt.
>
> That surely is the bottom line.[65]

Recent cases suggest this broad fact finding approach to reliability is not limited to sexual assault cases. In **R. v. Kharsekin**[66], the Newfoundland Court of Appeal considered the circumstances relevant to a consideration of the reliability of the deceased's statements, made in the hour between the time he was stabbed and his death, which implicated "the second electrical mechanic" (who was the accused) on a Russian trawler as the person who attacked him:

> The factors relevant to reliability will vary from case to case. The fact that some cases have continued to analyze cases under the traditional exceptions to the hearsay rule before turning to a **Khan** approach does not limit the application of **Khan** (see **Chahley**, supra, p. 209), nor would I conclude that the admissibility of the evidence here would require the criteria of "hopeless expectation of death" and "spontaneity".
>
> In this case the deceased had a peculiar means of knowledge. Indeed, only he and the person who wounded him had that knowledge. Pedyura's wound and rapid loss of blood when he arrived at the medical centre indicate that the initial statement was made shortly after the wounding and the confirming statements within an hour of the first. There was little time to plan falsification and the medical evidence supports the position that the deceased knew what he was saying. The first statement was in response to a question but it was not a leading question.
>
> There is physical evidence to indicate that there were blood stains on the respondent's pants consistent with that taken from the body of the deceased.
>
> There is nothing in the circumstances to suggest a reason to be untruthful. The tests enunciated in **Khan** and **Smith** were met. There was, in the words of Wigmore, circumstantial probability of trustworthiness and the statements were admissible.[67]

In **R. v. Narcisse**[68], the deceased had reported a sexual assault by the accused some three months prior to her death by suffocation. The evidence established that she had also been sexually assaulted just prior to her death. The issue facing the trial judge was the admissibility of her complaint, made in connection with the earlier assault, in which she had identified the accused as the person who attacked her. The trial judge, having concluded that there were similarities between the two attacks, was also satisfied that the reliability requirement established in **Khan, Smith** and **B.(K.G.)** was met:

> In my view, the reliability of what Ms. Dominick told her band chief is compelling and, on a balance of probabilities, the requisite guarantee of trustworthiness is established. I say that primarily because of the extent to which her identifying the accused as her assailant was, unknown to her, capable of corroboration. Clearly, her home was broken into: the window was broken with a rock and the door knob was dislodged. She was hurt: her wrist was swollen. But additionally, when

the sentence itself."

See also R. v. Paquette (1981), 58 C.C.C. (2d) 413 (Qué. C.A.), Qué.). What might be termed a trite passage is found at page 417:

> The purpose of suspending the passing of sentence and imposing a probation order is to enable the Court to see how the convicted person behaves during the period of probation. If the person behaves well and shows definitesigns of rehabilitation for the duration of the probation order, no sentence will be passed. If on the other hand, he behaves badly and commits other offences while on probation, he will probably receive a heavy sentence on the termination of the period of probation.

Noteworthy as well is this passage from Mr. Justice Chevalier's judgment in Procureur général c. Savenco (1988), 26 Q.A.C. 291, at page 295, para. 21:

> A la condition que l'appareil judiciaire effectue un suivi vigilant du dossier et qu'il n'hésite pas à ramener devant le tribunal, pour recevoir sa sentence, celui qui ne respecte pas l'ordonnance de probation, la décision de surseoir, dans les cas où elle est appropriée, présente des avantages manifestes. Elle installe une épée de Damocles sur la tête de l'accusé en ce qu'elle contient implicitement la promesse d'un châtiment futur. En ce sens, le sursis remplit sa fonction dissuasive. Il a également comme résultat de protéger la société pour toujours si l'accusé ne récidive jamais et au moins pour la durée de son emprisonnement futur s'il récidive.

passing of sentence and imposing a probation order is to enable the Court to see how the convicted person behaves during the period of probation. If the person behaves well and shows definite signs of rehabilitation for the duration of the probation order, no sentence will be passed. If on the other hand,he behaves badly and commits other offences while on probation, he will probably receive a heavy sentence on the termination of the period of probation.

Enfin, notons au passage les commentaires du juge Chevalier dans l'affaire Procureur général c. Savenco (1988), 26 Q.A.C. 291, à la page 295, le para. 21:

A la condition que l'appareil judiciaire effectue un suivi vigilant du dossier et qu'il n'hésite pas à ramener devant le tribunal, pour recevoir sa sentence, celui qui ne respecte pas l'ordonnance de probation, la décision de surseoir, dans les cas où elle est appropriée, présente des avantages manifestes. Elle installe une épée de Damocles sur la tête de l'accusé en ce qu'elle contient implicitement la promesse d'un châtiment futur. En ce sens, le sursis remplit sa fonction dissuasive. Il a également comme résultat de protéger la société pour toujours si l'accusé ne récidive jamais et au moins pour la durée de son emprisonnement futur s'il récidive.

III) Les sursis pour les questions d'outrage au tribunal

Pour nos fins, il sera utile de regarder quelque peu la question des sursis en matière d'outrage au tribunal car elle sert d'entrée

offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

Hence, though Parliament has retained the traditional device of the suspended sentence, it has also found merit in a scheme that departs radically from this tradition. It is thought that the conditional sentence scheme was adopted in order to introduce an element of flexibility; stated otherwise, the time-honoured scheme was unduly rigid.

In this respect, it will be of assistance to note firstly that Professor R.P. Nadin-Davis has observed: "... in Canada, what is suspended is sentencing, not the execution of a sentence already pronounced." In support of this thesis, reference is made to R. v. Sangster (1973), 21 C.R.N.S. 339 (C.A. Qué.) and to R. v. Tuckey (1977), 34 C.C.C. (2d) 572 (C.A. Ont.). Note as well the concurring views of C.C. Ruby: "Therefore a court cannot set a fixed term and thereafter suspend it, as the English statute and practice permits." A simple example: a court could not impose a 30 day jail sentence, to then suspend the operation of the sentence subject to good behaviour. Abundant authority for the proposition that this device was unwieldy may be found, including Judge Porter's judgment in R. v. Joachim et McDonald (1988), 92 A.R. 36 (Prov. Ct.), at page 40, para. 15: "Section [737(1)] allows the court to suspend the passing of sentence. These are words which seem to be confused in a number of jurisdictions. Clearly in some places a court can sentence but thereafter suspend the sentence, thus releasing the accused on suspended sentence. In other jurisdictions it is the passing of sentence that is suspended, not

de l'observation des conditions qui lui sont imposées en application de l'article 742.3.

Ainsi, bien que le Législateur a retenu la formule du sursis traditionnel, il a aussi adopté une formule qui se démarque de cette tradition et la thèse que nous soutenons est à l'effet que cette décision a été motivée par le manque de souplesse du sursis de peine que nous avons toujours connu.

A ce sujet, notons au départ les commentaires du professor R.P. Nadin-Davis: "... in Canada, what is suspended is sentencing, not the execution of a sentence already pronounced." A l'appui de cet énoncé, ce savant juriste cite les affaires R. c. Sangster (1973), 21 C.R.N.S. 339 (C.A. Qué.) et R. c. Tuckey (1977), 34 C.C.C. (2d) 572 (C.A. Ont.). Par ailleurs, Me C.C. Ruby adopte une position similaire: "Therefore a court cannot set a fixed term and thereafter suspend it, as the English statute and practice permits." Le tribunal ne pouvait donc pas imposer une peine de 30 jours, par exemple, pour ensuite libérer le délinquant moyennant un engagement que celui-ci allait être de bonne conduite. Bon nombre de jugements ont fait valoir que cette règle était inutilement complexe, dont M. le juge Porter dans R. c. Joachim et McDonald (1988), 92 A.R. 36 (Cour prov.), à la page 40, le para. 15: "Section [737(1)] allows the court to suspend the passing of sentence. These are words which seem to be confused in a number of jurisdictions. Clearly in some places a court can sentence but thereafter suspend the sentence, thus releasing the accused on suspended sentence. In other jurisdictions it is the passing of sentence that is suspended, not the sentence itself."

L'affaire R. c. Paquette (1981), 58 C.C.C. (2d) 413 (C.A. Qué.) exprime un truisme à cet effet, à la page 417:

The purpose of suspending the

the accused was arrested, three days later, his shoulder was found to have been recently cut and the DNA type profile of the blood on his shirt matches that of the blood found on Ms. Dominick's bedding.

I recognize that because Ms. Dominick was not disinterested in what she said to Ms. Williams one significant indicator of reliability is not present. Disinterest is a particularly strong indicator because it can serve to dispel any suggestion of a motive to falsify. But it is evident from the decisions of the Supreme Court of Canada it is not a prerequisite to admissibility.[69]

In **D.(G.N.)**,[70] the Ontario Court of Appeal rejected an argument that the circumstantial guarantees of trustworthiness described in **Sugden v. Lord St. Leonards** ought to govern in sexual assault cases involving young children. The specific point taken by the appellant in that case was that the child's statements to the police were made after there existed a "dispute", with the result that she spoke in response to questions asked with a view to pressing criminal "litigation". The Court dismissed this argument:

> The requirement of this authority that the statement be made prior to litigation or a dispute is not a strict requirement and may have only limited relevance to the declarations of children. While this criterion may be a factor to consider with respect to the reliability of the evidence given by an adult, it is more significant to reliability to consider that the child's original report arose in the context of explaining an injury, that the child was able to articulate to P.C. Morrison the circumstances of how she said it occurred, and that there was no perceived dislike of her father at the time.[71]

In the same case the Court also stated that necessity and reliability are "part of the same continuum" and are "not compartmentalized".[72] On this view, greater necessity may justify admission where there is less reliability, and vice versa.

For very young children reliability, like necessity, seems to be virtually presumed. In **P.(J.)**, [73] the majority of the Quebec Court of Appeal made the following comment:

> With respect to the reliability of the statement, it is also established. As the child was only two years and three and a half months old when she described to her mother how her father licked her vagina, she had no reason to invent the story told, in addition to the fact that one cannot expect a child of this age to know the nature of the sexual act in issue.
>
> In addition, there is in the record corroborating material evidence: the medical examination carried out at the hospital and the detailed written reports produced.... in addition to the testimony of the mother in respect of the kiss given before her by the father to the daughter....[74]

In **Moore,**[75] statements made by the accused while under the influence of sodium amytol were found to meet the reliability criteria. In that case Moldaver J. stated:

I am further satisfied that the evidence is reliable for several reasons;

(1) I am confident of Dr. Hucker's expertise, and I am also confident that the test was properly administered.
(2) I accept Dr. Hucker's evidence that, in his opinion, Mrs. Moore was an appropriate candidate for such testing.
(3) I further accept the indicia of reliability put forward by Dr. Hucker, and especially the fact that Mrs. Moore's version goes to incriminate her in a very serious criminal offence.[76]

A unique approach to reliability is to be found in the decision of the British Columbia Court of Appeal in **Lemky**[77]. There counsel at trial had signed an admission of fact under s. 655 of the **Criminal Code**, in which the following paragraph appeared:

> That in the week prior to her death Michelle Cummins was considering and discussing with others the possibility of leaving the accused Randy Lemky due to problems in their relationship resulting in part from the use of intoxicants by the deceased.

No issue was taken at trial with evidence led from the brother of the deceased and a friend in which details of her statements were given. However, on appeal the admissibility of both the s. 655 admission and the conversations were challenged. The Court held that the deceased's declarations met the test of reliability because they were incorporated in the admission of fact.

Two distinct approaches to the indicia of reliability discussed in **B.(K.G.)** are exemplified by the following cases. In **Mallion**[78] the accused's accomplice confessed and implicated the accused in a statement to police. He repeated the statement, but not completely, before a video camera. At trial the accomplice did not contradict the out-of-court statement, but he refused to repeat it. The Crown sought to adduce the videotaped statement in evidence for testimonial purposes.

The trial judge found the oath requirement satisfied by the fact that the accomplice acknowledged the truth of his statement, that he had pleaded guilty to the crimes acknowledged in it and was serving his time with "resignation", that he made no complainant about the police conduct which had led to the statement being made, and finally that he steadfastly refused to repeat it in court, in face of the prospect of a harsh sentence for contempt of court. The trial judge also concluded that the accomplice's reluctance to implicate Mallion was such that if his prior statement was untrue he would surely have chosen to recant rather than face punishment for contempt. However, the trial judge concluded that because the videotaped record of the prior statement was incomplete, and no reliable record of the balance could be adduced, the requirement for contemporaneous cross-examination, or a satisfactory substitute therefore, could not be met. The prior statement was thus ruled inadmissible as it failed to meet the reliability criterion mandated by **B.(K.G.)**. This approach would seem to acknowledge a strict adherence to the need to find satisfactory substitutes for the oath, presence and cross-examination requirements essential to the reliability criterion described by the majority decision in **K.(B.G.)**.

to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,

a) in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend the passing of sentence and direct that the accused be released on the conditions prescribed in a probation order.

The new legislative text, s. 731(1)(a) reads as follows:

Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,

(a) if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order.

No real changes are evident. What is noteworthy is the introduction of a conditional sentencing regime at s. 742.1.

Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court,

(a) imposes a sentence of imprisonment of less than two years, and
(b) is satisfied that serving the sentence in the community would not endanger the safety of the community, the court may, for the purpose of supervising the

l'infraction a été commise:

a) dans le cas d'une infraction autre qu'une infraction pour laquelle une peine minimale est prescrite par la loi, surseoir au prononcé de la sentence et ordonner qu'il soit libéré selon les conditions prescrites dans une ordonnance de probation

L'article qui le remplace, au numéro 731(1)a), dispose ainsi:

Lorsqu'une personne est déclarée coupable d'une infraction, le tribunal peut, vu l'âge et la réputation du délinquant, la nature de l'infraction et les circonstances dans lesquelles elle a été commise:

a) dans le cas d'une infraction autre qu'une infraction pour laquelle une peine minimale est prescrite par la loi, surseoir au prononcé de la sentence et ordonner que ledélinquant soit libéré selon les conditions prévues dans une ordonnance de probation

Somme toute, aucun changement. Toutefois, l'art. 742.1 dispose que:

Lorsqu'une personne est déclarée coupable d'une infraction - autre qu'une infraction pour laquelle une peine minimale d'emprisonnement est prévue - et condamnée à un emprisonnement de moins de deux ans, le tribunal peut, s'il est convaincu que le fait de purger la peine au sein de la collectivité ne met pas en danger la sécurité de celle-ci, ordonner au délinquant de purger sa peine dans la collectivité afin d'y surveiller le comportement de celui-ci, sous réserve

SENTENCING REFORM AND THE SUSPENDED SENTENCE/ LA RÉFORME DU CODE CRIMINEL EN MATIÈRE DE DÉTERMINATION DE LA PEINE ET SON EFFET SUR LE SURSIS

Judge Gilles Renaud/M. le juge Gilles Renaud
February 28, 1997/le 28 février 1996

I) Introduction:

It appears undoubted that the recent sentencing reforms to the Criminal Code will result in the cutting down of a great many trees, notably with respect to the conditional sentence of imprisonment scheme. Indeed, the legislation found at s. 742 et seq. of the Code permits an offender to serve a custodial period within the community upon the observance of certain conditions. Obviously, it is suggested, a device that enables an offender to serve a term of imprisonment outside of a correctional facility must be intended to advance the individual's reinsertion within his or her community.

This brief article has two parts. In the first section, attention is drawn to the case-law interpreting former s. 737(1)(a) respecting the suspension of sentence. In the second part, the question to be discussed surrounds the potential interpretation to be given to the recent legislative innovations. The objective pursued is to provide some guidance on this thorny issue in the light of recent decisions.

II) The traditional suspended sentence: sentencing is suspended

S. 737(1)(a), in force up to September 3, 1996, provided that:

> Where an accused is convicted of an offence, the court may, having regard

I) Introduction:

De toute évidence, la Loi modifiant le Code criminel en matière de détermination de la peine, va faire couler beaucoup d'encre, notamment en ce qui à trait au nouveau régime de sanction dénommé condamnation avec sursis. Ces dispositions législatives, prévues aux articles 742 et suivants, permettent au tribunal d'imposer une peine d'emprisonnement et de surseoir à son exécution aux conditions qu'il détermine. Il nous semble que l'objectif du sursis d'exécution des peines est la réinsertion du contrevenant dans la collectivité, sous surveillance.

La première partie de ce bref article traite de l'ampleur et l'impact de la jurisprudence portant sur l'ancien art. 737(1)a). La deuxième partie traite de l'interprétation possible des nouveaux textes législatifs. Notre objet est de jeter un éclairage utile sur cette question d'actualité et d'orienter les plaideurs appelés à discuter de la portée de cette refonte suivant certains points de repère que nous offre la jurisprudence.

II) Le sursis de peine traditionnel: surseoir au prononcé et non à la peine

L'art. 737(1)a), en vigueur jusqu'au 3 septembre courant, disposait que

> Lorsqu'un accusé est déclaré coupable d'une infraction, le tribunal peut, vu l'âge et la réputation de l'accusé, la nature de l'infraction et les circonstances dans lesquelles

However, those strict standards were regarded as peculiar to the circumstances of **K.(B.G.)** when the British Columbia Court of Appeal considered the use which could be made of the prior inconsistent statement of an adverse crown witness in **R. v. Letourneau and Tremblay**[79]. In that case the accused were charged jointly with the murder of one Paquette, who died in a gangland execution style shooting as he and a friend by the name of St. Jacques were working at a construction site in Richmond, B.C. St. Jacques was wounded in the same incident, but managed to make his way to a downtown Vancouver hotel where he had a few drinks before taking a taxi to hospital. When interviewed by police several hours later, he made a tentative identification of Letourneau in a photo line-up as the man who shot him. In a statement given at the same time, he described both assailants as small, slightly built men, a description which generally fit both accused. However, at the preliminary inquiry, St. Jacques described the man who shot at him as 6'5" tall and weighing roughly 260 lbs. He also repudiated his photo line-up identification. There was evidence from a fellow prisoner that Letourneau said he had arranged to have a "friend" speak to St. Jacques before the preliminary inquiry.

At trial St. Jacques was declared adverse and cross-examined extensively by the Crown counsel on his written 10 page statement made shortly after the shooting. The trial judge instructed the jury that they could have reference to the content of the statement in order to determine whether he had in fact picked Letourneau out in the photo line-up.

In response to the argument that this instruction constituted reversible error, the British Columbia Court of Appeal concluded that St. Jacques' out-of-court statement was admissible for all purposes. Finding "ample grounds" to satisfy the requirement for reliability, Cumming J.A. for the Court noted:

> Unlike the statements given in K.G.B., St. Jacques's original statement was made very soon after the incident, before he had an opportunity to speak with his and Paquette's friends and before the assailants or their friends could contact him. In addition, there was no reason to give St. Jacques any warning. As already mentioned, there was evidence that between the time St. Jacques gave his statement and the preliminary inquiry, something caused him to change his mind about what happened.
>
> In these circumstances there are a number of factors that, taken together, support the view that the requirement of reliability was satisfied with respect to this evidence.
>
> St. Jacques himself was wounded in the incident. He did not know either of the appellants and they did not know him. His statement to police was made very soon after the event. There was little time for him or others to consider what his story "should be". The statement was made to a police officer. St. Jacques read the statement, initialled each page, and signed it. He also made a physical identification from a photo line-up that was consistent with his written statement. St. Jacques testified at trial. The trial judge declared him an adverse witness and he was vigorously cross-examined by both defence counsel and Crown counsel.

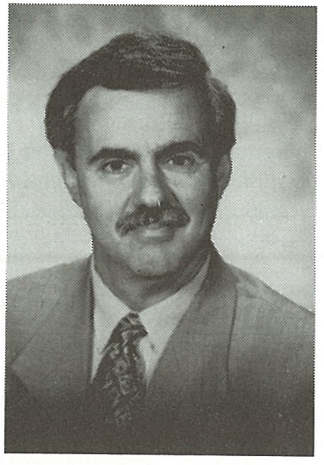
> When compared to his testimony at the preliminary inquiry and at trial, St. Jacques's original statement appears much more reliable. There was ample time between the date of the incident and the date of the preliminary inquiry for him to realize, or be made aware, that it may be in his best interest not to identify or accurately describe the assailants. Something caused him to increase the dimensions of his assailants substantially. Viewed objectively, I have no doubt his prior inconsistent statements meet the requirement of reliability.[80]

In **R. v. Letourneau and Tremblay**, the out-of-court statement of the recanting witness was accepted as reliable, notwithstanding its repudiation by the witness while under oath. By contrast, in **R. v. Unger and Houlahan**[81], the Court concluded that the fact the witness repudiated his out-of-court statements while under oath rendered them unreliable:

> Furthermore, dealing with the admissibility of Unger's confessions, there is simply no circumstantial guarantee of reliability; indeed Unger testified at trial that the statement Houlahan wished to rely on was false! Unger's confessions to the R.C.M.P. undercover team are inconsistent with Houlahan's last statement. Houlahan indicated that Unger killed the deceased in his presence and that he assisted under duress, Unger told the undercover officers that he acted alone. Houlahan cannot in those circumstances rely on the statement of a co-accused as being trustworthy when it is at odds with his own version of the events. In essence Houlahan seeks to rely on an out-of-court statement by Unger, repudiated by him at trial, and at variance with his own confessions.[82]

The recanting witness has offered unique opportunities for the development of the new reliability criterion under the auspices of **B.(K.G.)**. In **R. v. Clarke**[83] the Crown's case on drug trafficking charges rested solely on the evidence of the accused's girl friend who was arrested with him and charged with simple possession. At the time of her arrest she indicated that the drugs in her possession had been given to her by the accused. She gave the same evidence at the preliminary inquiry. At trial she recanted, and testified that she had lied at the preliminary inquiry. In ruling that the transcript of her evidence at the preliminary inquiry was admissible for all purposes, the trial judge noted the following about reliability:

> In order that a prior inconsistent statement be admissible into evidence for substantive use, the onus is on the Crown to establish, upon a balance of probabilities, the two tests of reliability and necessity. The indicium of reliability can be met if the prior statement was given under oath, was taken by videotape and was accompanied by cross-examination. Here, the first requirement, that of the oath, is obviously met. The second requirement, that of presence, as found in the use of a videotape, is not fully satisfied. However, the court indicated that a videotape would not always be available. It stressed that a videotape



THE HONOURABLE JUDGE IRWIN E. LAMPERT

EXECUTIVE DIRECTOR

The new Executive Director of the CAPCJ is the Honourable Irwin E. Lampert. He was appointed to this position at the time of the retirement of the Honourable Pamela Thomson in September 1996. He had previously served as Assistant Executive Director for one year prior to his appointment. Judge Lampert's term is for a period of five years. He is a member of the Provincial Court of New Brunswick, and was sworn in as a judge on October 14, 1988. Before that he practiced general law in the City of Moncton, NB from 1970 to 1988 with the firm of Roy, Losier, Lampert & Gaudet (as a partner since 1973) with emphasis on criminal and family law, as well as civil litigation. From November 1981 to July 1985 he acted as an Independent Chairperson, Correctional Service of Canada, at Dorchester Penitentiary and Springhill Institution. From the early 1970's to 1984 he acted as a Standing Agent for the Minister of Justice, Ottawa, and carried out prosecutions under various Federal statutes. He graduated from the University of New Brunswick Law School in 1970 with his LLB, and had previously completed a BSC at Dalhousie University with a major in Biology in 1967. His first language is English, but he describes himself as "functionally literate" in French as well, and he is constantly working at improving his ability in his second language. To round out his language abilities he notes that he also speaks Yiddish and reads Hebrew. Judge Lampert has presently and has had much past involvement in his community. His hobbies include golf, reading and walking. He is married to Audrey and they have three teenaged children.

[11] Supra, note 3, p. 253.
[12] Supra, note 2, p. 546.
[13] See for example: **Regina v. Jack** (1992), 70 **C.C.C.** (3d) 67 (Man. C.A.), per O'Sullivan J.A. at p. 113.
[14] Supra, note 4.
[15] Ibid., pp. 933-34.
[16] See for example: Justice David Doherty, "The Hearsay Rule in Canada: Recent Developments and Emerging Problems", (1995), National Judicial Institute, Appellate Court Seminar, p. 36.
[17] Supra, note 6.
[18] Infra, pp. 2-3.
[19] Supra, note 6, p. 797.
[20] Ibid., pp. 798-99, emphasis in text.
[21] See, for example, Marc Rosenberg's article referred to in note 8, at p. 473.
[22] (1992), 76 **C.C.C.** (3d) 10.
[23] Ibid., p. 24.
[24] Ibid., p. 28.
[25] (1991), 9 **C.R.** (4th) 377 (Ont. C.A.).
[26] (1992), 74 **C.C.C.** (3d) 276, aff'd [1993] 1 **S.C.R.** 469.
[27] Ibid., p. 281.
[28] (1992), 10 **C.R.** (4th) 93.
[29] (1992), 77 **C.C.C.** (3d) 462.
[30] Ibid., p. 427.
[31] (1993), 81 **C.C.C.** (3d) 65 (Ont. C.A.).
[32] (1993), 80 **C.C.C.** (3d) 289 (B.C.C.A.).
[33] (1993), 77 **B.C.L.R.** (2d) 204.
[34] Ibid., pp. 209-10.
[35] (1992), 14 **C.R.** (4th) 1, aff'd [1994] 1 **S.C.R.** 701.
[36] Ibid., p. 87.
[37] (1992), 72 **C.C.C.** (3d) 193 (B.C.C.A.).
[38] Supra, note 13, aff'd. [1994] 2 **S.C.R.** 310.
[39] (1994), 30 **C.C.** (4th) 252 (Nfld. C.A.).
[40] June 20, 1994, unreported, Vernon Registry No. 26269.
[41] (1992) 17 **B.C.A.C.** 71 (B.C.C.A.).
[42] (1991), 4 **C.R.** (4th) 37 (B.C.S.C.).
[43] (1993), 82 **C.C.C.** (3d) 377 (Ont. Ct. Gen. Div.).
[44] (1994), 34 **C.R.** (4th) 113 (Ont. C.A.).
[45] Ibid., p. 123.
[46] (1990), 63 **C.C.C.** (3d) 85 (Ont. Ct. Gen. Div.).
[47] (15 December 1993), Brampton CRIM NJ (P) 3531/93 (Ont. Ct. Gen. Div.).
[48] Not yet reported, (March 3, 1995, C15751) (Ont. C.A.).
[49] (1993), 83 **C.C.C.** 228 (Man. C.A.).
[50] Supra, note 9.
[51] Ibid., p. 240.
[52] Supra, note 3, pp. 253-54.
[53] Supra, note 2, p. 547.
[54] Supra, note 13.
[55] Supra, note 4, p. 933.
[56] Ibid., p. 935.
[57] Ibid., pp. 936-37.
[58] Supra, note 6, p. 787.
[59] Supra, note 42.
[60] Ibid., p. 40.
[61] Supra, note 35.
[62] Supra, note 37.
[63] Supra, note 32.
[64] Supra, note 28.
[65] Ibid., p. 98-99.
[66] Supra, note 39.
[67] Ibid., p. 259.
[68] Supra, note 40.
[69] Ibid., p. 12.
[70] Supra, note 31.
[71] Ibid., p. 81.
[72] Ibid., p. 78.
[73] Supra, note 26.
[74] Ibid., p. 281.
[75] Supra, note 46.
[76] Ibid., p. 90.
[77] Supra, note 41.
[78] Supra, note 47.
[79] (1994), 87 **C.C.C.** (3d) 481.
[80] Ibid., pp. 528-9.
[81] Supra, note 49.
[82] Ibid., p. 259.
[83] Supra, note 43.
[84] Ibid., pp. 379-80.
[85] Supra, note 48.
[86] Ibid., pp. 19-20.
[87] Ibid., p. 25.
[88] Ibid., pp. 27-8.

would have actions and motions of the witness that are lost in a transcript, but it also noted the importance of the reproduction of an accurate statement. Finally, the court indicated that this requirement might be met by the testimony of an independent third party, such as a justice of the peace, or counsel. As I understand the witness, T.M., who was a young offender and had been charged with possession, had her counsel present during the course of the trial and, obviously, a judge presided at the preliminary hearing. Neither counsel nor judge were called as witnesses on the voir dire.

Nowhere does the decision of the Supreme Court refer to a prior inconsistent statement given during the course of preliminary hearing. The closest it came to doing so was when it dealt with the third party requirement, namely, when it stated that the final hearsay danger is the lack of contemporaneous cross-examination when the statement is made. It described this danger as being the most important of all, and being impossible to address outside of judicial or quasi-judicial process. Here, examination-in-chief was some 13 pages and the cross-examination 38 pages, in open court. This court concludes that the second and third requirements are met and that, in fact, the Supreme Court may not have directed their minds to the possibility of an application being resorted to in regards to a prior inconsistent statement comprised of the testimony at a preliminary hearing, or alternatively, it may not have considered that the same principles would apply without expressly so stating. Be that as it may, the court did find that other tests may suffice if circumstances provide adequate assurance of reliability in place of those which the hearsay rule traditionally requires. I find that the test of reliability has been met. Indeed, it is difficult to believe that there can be more reliable circumstances than those arising out of a preliminary hearing.[84]

In **R. v. Hawkins and Morin**[85], the trial judge refused to admit the evidence of the principal Crown witness given at the preliminary inquiry, where she first implicated the accused, one of whom was her boy friend, in the crimes charged and then recanted her earlier evidence, all while still under oath:

> However, because of the events leading up to the giving of the two versions, the involvement of the police, the involvement of Mr. Hawkins, and the many threats made against Ms. Graham [the witness], the beatings to which she was subjected and the promises apparently held out to her by the police, as well as the apparent influence the police had on her in obtaining the statements, and then the subsequent testimony in September which was given while she was under the witness protection programme, then the subsequent January recantation after having spent some time back with her husband, I cannot find the necessary ingredient of reliability necessary to allow her prior evidence to be read into this trial.[86]

In setting aside the acquittal which resulted from the foregoing ruling, and ordering a new trial, Arbour J.A. for the majority dealt first with the admissibility of the witness' prior evidence under s. 715 of the **Criminal Code.** As an alternative consideration she canvassed its admissibility under the new principled approach. Having concluded that the prior evidence of the witness was hearsay only in the technical sense, she noted:

> It is indisputable that since the evidence given by Cherie Graham at the preliminary inquiry is contradictory, it cannot be accepted as true in its entirety. It does not follow, in my respectful view, that her evidence must be held to be unreliable so as to, preclude its admissibility. Graham testified under oath, in the presence of the respondents, and was fully cross-examined by their counsel, both when she gave evidence as a Crown witness and when she recanted. All the evidence that she gave was recorded by a court reporter. Apart from not having the benefit of observing Cherie Graham give her evidence, the jury in this case would be in the same position as any other jury would be when required to assess her evidence.[87]

After noting that a witness' presence is not a constitutional requirement when s. 715 of the **Criminal Code** applies, and reviewing some of the crucial passages from the majority judgment in **B.(K.G.)**, Arbour J.A. concluded with the following:

> In the present case, the trier of fact is not required to choose between the versions of events given by the witness under oath in court, where demeanour may be observed, and an unsworn, out-of-court version, available only in the form of a transcript. Here, all the witness has to say comes from the out-of-court statement. As I indicated earlier, I do not believe that it would be impossible for a jury to make a finding of fact simply because the jurors did not see the witness give contradictory versions of events. The jury's task may be much more difficult, and the Crown may ultimately fail in discharging its burden if the task is insurmountable. All may depend, as is often the case, on the inherent plausibility of one version over the other, when assessed in the context of the evidence as a whole.
>
> The evidence which the appellant sought to have admitted in this case was an accurately recorded sworn statement which was full cross-examined in the presence of the respondents by their counsel. I do not wish to overstate the importance of actual cross-examination. A mere opportunity to cross-examine may suffice to render the statement admissible, as is the case under s. 715 of the **Code.** In this case, a full cross-examination did take place. Thus, the only possible hearsay danger that would stand in the way of admissibility is what was referred to in **K.G.B.** as "presence". Considering the circumstantial guarantees of trustworthiness offered by the oath and cross-examination, that single factor is insufficient, in my opinion, to prove a principled basis upon which to bar the admissibility of Cherie Graham's evidence. Had she died, become ill, left the country, or had she stated in court that she refused to testify, the Crown would have been entitled to introduce her evidence given at the preliminary inquiry without having to show that it was "reliable". I can find nothing in the principles upon which the hearsay rule is based which commands a different result in this case. I would therefore hold that the evidence of Cherie Graham should have been admitted in evidence as an exception to the hearsay rule.[88]

IV

Time and space do not permit a detailed comparative analysis of these cases. Were both available, it would be an interesting exercise to determine in how many of the cases reviewed, including those of **Khan**, **Smith** and **B.(K.G.)**, the result would have been the same if the traditional approach to the criteria of necessity and trustworthiness had been adhered to. I suggest that these cases cumulatively lead to the conclusion that under the new or so-called principled approach to the hearsay rule the concepts of both necessity and "reliability" differ markedly from those which shaped the rule and its exceptions for over three and one half centuries.

As for the future, in the criminal law context, to the extent that it is any longer a significant consideration, I suggest that necessity will increasingly become a reflection of what is seen to be probative of the "truth" or, if there is a distinction, the Crown's case. As the search for reliability standards produces an ever widening range of subjectively designed tests, I suggest that the finding on the question of reliability will become increasingly difficult to distinguish from a conclusion that the tendered hearsay is, or is not, the truth.

---

1 A preliminary draft of this paper was prepared for the 1994 National Criminal Law Program, held at U.B.C. in July of that year and was jointly authored by Josiah Wood, of the British Columbia Court of Appeal and Derek R.S. Jonson, Articled Clerk. It has been revised and updated with the valuable assistance of Dennise Kolaitis, Articled Clerk to Wood J.A. for the 1994-95 term.

2 [1990] 2 **S.C.R.** 531.

3 J.H. Chadbourn, ed., **Wigmore on Evidence**, 3d ed., rev., vol. 5 (Boston: Little, Brown, 1974) at §1420.

4 [1992] 2 **S.C.R.** 915.

5 Ibid, p. 932.

6 [1993] 1 **S.C.R.** 740.

7 Supra, note 3, §1427.

8 I agree with and adopt the suggestion by Mr. Marc Rosenberg, found in "Developments in the Law of Evidence: The 1992-93 Term. Applying the Rules", 5 Supreme Court Law Review, 421, at p. 473, that Wigmore's reference to necessity arising from the inability to get evidence of the same value was intended to apply to those circumstances where the proximity of the declaration to its related event gave it a high degree of reliability.

9 (1876), 1 **P.D.** 154.

10 Ibid., p. 240.