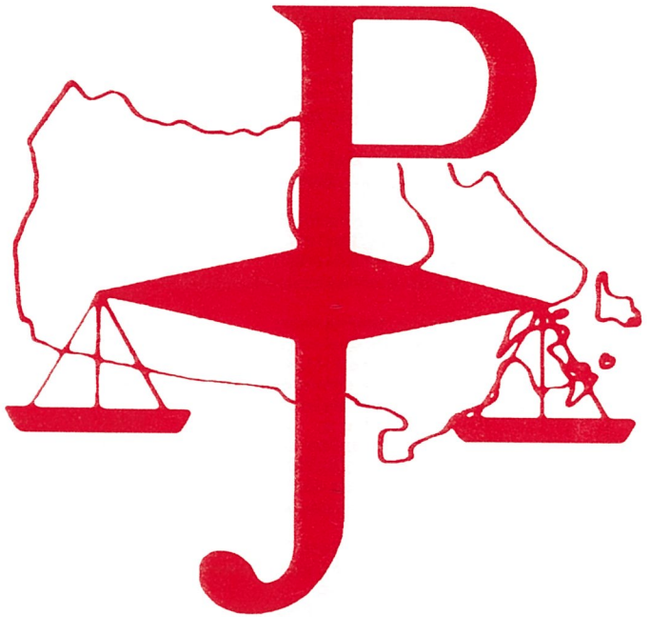

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DES JUGES PROVINCIAUX

Justice without wisdom is impossible / La justice sans la sagesse n'est pas la Justice. - **Froude.**

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Hon. Judge J. P. Wambolt
resigned August 31, 1998
appointed supernumerary
September 1, 1998

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Appointments/Nominations
Hon. Judge Brent Stewart
The Pas
effective April 15, 1998
Hon. Judge Catherine Everett
Winnipeg
effective May 20, 1998
Hon. Judge Raymond Wyant
Winnipeg
effective May 20, 1998

ONTARIO
Changes/
Hon. Judge John Evans
term as Regional Senior Judge ends
effective September 1, 1998
Hon. Judge Raymond P. Taillon
term as Regional Senior Judge begins
effective September 1, 1998
Hon. Judge Ray Walneck
term as Regional Senior Judge ends
effective September 1, 1998
Hon. Judge Peter T. Bishop
term as Regional Senior Judge begins
effective October 1, 1998

QUEBEC
Nominations/Appointments
Juge Hon. Michel L. Auger
en effet/effective July 15, 1998
Juge Hon. Monique Fradette
en effet/effective July 15, 1998

It is hard to believe that a man is telling the truth when you know that you would lie if you were in his place.

H. L. Mencken

As scarce as truth is, the supply has always been in excess of the demand.

Josh Billings

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EDITOR'S NOTEBOOK/REMARQUES DU RÉDACTEUR

Judge Judith Lanzinger is no stranger to elections. As I write this Notebook she is in the throes of her sixth campaign in thirteen years, all of which have been for her job as judge! I "met" Judge Lanzinger online. She lives in Toledo, Ohio and she, as am I, is a subscriber to a mailing list that delivers her (and many other judges') e-mail to my desktop daily. The notion of judicial elections has some allure for me but the attraction is akin to the appeal that the flame has for the moth - I do not fancy to run for the office that I hold. News from the province of Alberta over the last few years suggests, of course, that there is a "constituency" in this country which believes that judicial elections would be a good thing. A year ago I carried a piece by John Eamon of Calgary entitled **Judicial Elections in Alberta: A Dialectic**. In this article (Vol.21, No. 2, Summer, 1997), the author argued against judicial elections citing the risks that inhere in such a process for judicial independence and the thorny legal and political issues that they could engender.

If you weren't convinced by the dialectical presentation, go along with Judge Lanzinger and see how you feel after you have had a day or two or a weekend of campaigning, pressing the flesh, fund-raising and riding in open cars in parades, all to secure enough votes to become a judge. Judge Lanzinger takes us behind the

Madame la Juge Judith Lanzinger n'est pas une novice en matière d'élections. Alors que je rédige ces remarques, elle est au coeur de sa sixième campagne en treize ans, campagnes qu'elle a menées pour conserver son poste de juge! J'ai « rencontré » la Juge Lanzinger par voie électronique. Elle vit à Toledo, en Ohio et elle est, tout comme moi, abonnée à une liste de distribution qui envoie quotidiennement ses messages électroniques (ainsi que ceux de beaucoup d'autres juges) à mon ordinateur. La notion d'élections judiciaires a pour moi un certain charme mais c'est une attirance semblable à celle du papillon de nuit pour la flamme - je n'ai guère envie de me porter candidat au poste que j'occupe. Les nouvelles issues de la province de l'Alberta au cours des dernières années suggèrent, bien sûr, qu'il y a des « groupes d'intérêt » dans ce pays qui pensent que les élections judiciaires seraient une bonne chose. Il y a un an, j'ai publié un article de John Eamon, de Calgary, intitulé *Judicial Elections in Alberta: A Dialectic (Les élections judiciaires en Alberta : une dialectique)*. Dans cet article (Vol. 21, n° 2, été 1997), l'auteur argumentait contre les élections judiciaires en citant les risques inhérents à un tel processus pour l'indépendance judiciaire et les questions légales et politiques épineuses qu'elles pourraient soulever.

Si vous n'avez pas été convaincu par la présentation dialectique, accompagnez la Juge Lanzinger et voyez comment vous vous sentez après avoir fait campagne, serré des mains, collecté des fonds et paradé dans des voitures découvertes pendant une journée ou deux ou toute une fin de semaine, tout cela pour recueillir suffisamment de

permanent staff, it is inevitable that the organization constantly re-invents itself. Still, I think there are some enduring characteristics. Governments in most jurisdictions across the country will always be provincial in outlook. We need a national voice to respond to them. Those same governments will often want to restrict our independence. A national organization can bring those problems to the larger stage. Provincial judges need control over their own education so they can go beyond what local pressure is calling for at the moment. The CAPCJ can help provide a broader view. Working conditions for judges vary widely across the country. Having a national organization helps judges everywhere learn what is best.

Although I should thank many people for a fascinating year, I must single one out. For a guy who carries a full court caseload, our Executive Director, Irwin Lampert, seems remarkably like a full-time CAPCJ staffer. The best part is he does it all with a smile.

As a former president I hope to do what I can to preserve the CAPCJ's memory. I plan to attend every annual meeting while I remain a judge. I have gained a great deal from my CAPCJ experience. I want to repay as much of that as I can.

qu'elle présente certaines caractéristiques durables. Les gouvernements dans la plupart des juridictions à travers le pays garderont toujours une perspective provinciale. Nous avons besoin d'un porte-parole national pour leur répondre. Ces mêmes gouvernements voudront souvent restreindre notre indépendance. Une organisation nationale peut amener ces problèmes sur une scène plus vaste. Les juges provinciaux doivent avoir le contrôle de leur propre éducation afin de pouvoir aller au-delà de ce que les pressions locales exigent à un moment donné. L'ACJCP peut aider à offrir une perspective plus large. Les conditions de travail des juges varient considérablement à travers le pays. Le fait d'avoir une organisation nationale aide les juges où qu'ils soient à savoir ce qui est le mieux pour eux.

Bien que je devrais remercier de nombreuses personnes pour cette année passionnante, je me dois d'en choisir un en particulier. Pour quelqu'un qui assume une pleine charge professionnelle au tribunal, notre directeur exécutif, Irwin Lampert, pourrait facilement passer pour un employé à plein temps de l'ACJCP. Le plus remarquable est qu'il fait tout cela avec le sourire.

En tant qu'ancien président, j'espère faire de mon mieux pour préserver la mémoire de l'ACJCP. J'ai l'intention d'assister à chaque assemblée générale annuelle aussi longtemps que je resterai juge. J'ai tiré un énorme profit de mon expérience avec l'ACJCP. Je voudrais offrir tout ce que je peux en retour.

Just when you think that a person is just a backdrop for the rest of the universe, watch them and see that they laugh, they cry, they tell jokes ... they're just friends waiting to be made.

Jeffery Borenstein

victory in the Supreme Court of Canada last September. Instead, beginning with the Alberta government's application for a rehearing in the Supreme Court the Monday after our last annual meeting, it turned into a year of reacting to events across the country.

I had hoped to see a reduction in conflict between our courts and their governments. Although I have come to realize that tension between courts and governments is a natural result of independence, I was and am convinced that public battles between the judiciary and the executive are undesirable. The problem is they are sometimes necessary and unavoidable.

The CAPCJ tried to pour oil on the waters by helping to organize the Law Commission of Canada Round Table in March. That gathering brought together provincial and federal judges, including chief judges, provincial and federal justice officials and several academics. The object was to try to reach consensus on the implications of the Supreme Court's decision in *The Provincial Judges' Case.* Results since that day suggest that the message got through in some jurisdictions, but in others governments have continued to act much the same as they had before the Supreme Court's pronouncement.

The CAPCJ has a twenty-five year history. However, it does not have a long institutional memory. The founders of the association have almost all passed from the scene. Because there is no

de notre victoire à la Cour suprême du Canada en septembre dernier. Au lieu de cela, en commençant par la requête du gouvernement de l'Alberta en faveur d'un nouvelle audition à la Cour suprême le lundi qui a suivi notre dernière assemblée générale, cette année a été occupée à réagir à des événements survenant dans l'ensemble du pays.

J'avais espéré voir une diminution des conflits entre nos cours et leurs gouvernements. Bien que j'en sois venu à comprendre que la tension entre les cours et les gouvernements est une conséquence naturelle de l'indépendance, j'étais convaincu, et je le suis toujours, que les conflits publics entre le pouvoir judiciaire et le pouvoir exécutif sont peu souhaitables. Le problème est qu'ils sont parfois nécessaires et inévitables.

L'ACJCP a tenté de ramener le calme en aidant à organiser la table ronde de la Commission du droit du Canada en mars. Cette réunion a rassemblé des juges provinciaux et fédéraux, y compris des juges en chef, des fonctionnaires des ministères provinciaux et fédéraux de la justice et plusieurs théoriciens. L'objectif était d'essayer de parvenir à un consensus sur les répercussions de la décision de la Cour suprême dans la Cause des juges provinciaux. Les résultats depuis ce jour suggèrent que le message a été reçu dans certaines juridictions, mais que dans d'autres, les gouvernements ont continué à agir de la même manière qu'avant le jugement formel de la Cour suprême.

L'ACJCP a vingt-cinq ans d'histoire. Néanmoins, elle n'a pas une longue mémoire institutionnelle. Les fondateurs de l'association ont presque tous disparu de la scène. Du fait qu'il n'y a pas de personnel permanent, il est inévitable que l'organisation soit constamment en train de se réinventer. Pourtant, je pense

scenes on the campaign trail in **A Personal Reflection on Judicial Elections.** She is vying for the seat of appellate judge on the Sixth District Court of Appeals for Ohio, during the American primaries in November of this year. In the next edition of the Journal I will postscript this article with an update on how Judge Lanzinger fared in the voting.

In the meantime, in Canada we do not have to concern ourselves with these issues and we have more time and opportunity to become learned in the law. I will help you along that path in this issue with two instructive pieces. The authors, Judges Timothy White and Gilles Renaud, are frequent contributors to the Journal and are prolific in their writings. Judge White will assist you to become familiar with something new for provincial and territorial judges, dangerous offender proceedings, in his piece entitled **Dangerous Offenders in the Provincial Courts.** This is a detailed examination of this new legislative initiative which will bring these matters before us for the first time. I suspect that some of you have already had this experience. Judge White's article examines the changes to the Criminal Code that have made this possible and some of the practical considerations that have to be addressed during these applications.

Judge Renaud has a fascination with George Simenon, the Belgian novelist who created Inspector Maigret. Judge Renaud has applied himself once again to the novels of Simenon to address the issue of consent in sexual assault cases. The result is **Le consentement à l'activité sexuelle: l'enseignement de Georges Simenon.** In a recent conversation with Judge Renaud, he told me that he is as taken with the works of Shakespeare as he is with Simenon, so future

votes pour devenir juge. La Juge Lanzinger nous emmène dans les coulisses d'une campagne électorale dans son article *A Personal Reflection on Judicial Elections (Une réflexion personnelle sur les élections judiciaires).* Elle est candidate au siège de juge d'appel à la cour d'appel du sixième district de l'Ohio, dans le cadre des primaires américaines en novembre de cette année. Dans le prochain numéro du Journal, j'ajouterai un post-scriptum à cet article pour vous informer des résultats obtenus par la Juge Lanzinger lors du scrutin.

En attendant, au Canada, nous n'avons pas à nous préoccuper de ce genre de questions et nous avons davantage de temps et de possibilités pour devenir des érudits du droit. Dans ce numéro, je vous aiderai dans cette voie grâce à deux articles riches en enseignement. Les auteurs, le Juge Timothy White et le Juge Gilles Renaud, sont de fréquents collaborateurs au Journal et des auteurs très prolifiques. Le Juge White vous aidera à vous familiariser avec une nouvelle responsabilité des juges provinciaux et territoriaux, les procès contre des délinquants dangereux, dans son article intitulé *Dangerous Offenders in the Provincial Courts (Les délinquants dangereux dans les cours provinciales).* Il s'agit d'un examen détaillé de la nouvelle initiative législative qui va amener ces affaires pour la première fois devant nos tribunaux. Je soupçonne que certains d'entre vous ont déjà fait cette expérience. L'article du Juge White examine les changements au Code criminel qui ont rendu cela possible ainsi que certaines des considérations pratiques qui devront être abordées lors de ces procédures.

Le Juge Renaud a une fascination pour George Simenon, le romancier belge qui a créé l'inspecteur Maigret. Le Juge Renaud s'est emparé une fois de plus des romans de Simenon pour aborder la question du consentement dans les affaires d'agression sexuelle. Cela a donné pour résultat *Le consentement à l'activité sexuelle : l'enseignement de Georges Simenon.* Lors d'une récente conversation avec le Juge Renaud, il m'a avoué être tout aussi fasciné

editions of the Journal may contain Judge Renaud's musings on the Bard, interwoven with his reflections on the law at the end of this millennium, four hundred years later.

Judge Curran's tenure as President will end with the national conference in Calgary. He has made his Reports to the Journal a regular feature during his time in office. This edition contains his swan song. In his acute manner Judge Curran reflects on what it has been like for him during his time in that office. He was surprised at what he expected it would be like and what it turned out to be. You will be too.

And that dear Reader is all will be told
What else there is in here is for you to behold
You may have a laugh, or wet up an eye
Ken much that enthralls you or which you think dry
Be it poetry, prose, or wise words untold
As the pages before you begin to unfold.

Until the next time....

par les oeuvres de Shakespeare que par celles de Simenon, et il se peut que les prochains numéros du Journal contiennent les méditations du Juge Renaud sur le chantre d'Avon, mêlées à ces réflexions sur le droit à la fin de ce millénaire, quatre cents ans plus tard.

Le mandat du Juge Curran au poste de président se terminera lors de la conférence nationale à Calgary. Il a rédigé régulièrement ses rapports pour le Journal durant la période où il a exercé ses fonctions. Ce numéro contient son « chant du cigne ». Dans son style pointu, le Juge Curran fait le bilan de l'expérience qu'il a vécue durant son mandat de président. Il a été surpris par la différence entre ce à quoi il s'attendait et la manière dont les choses se sont passées. Vous le serez aussi.

Et voilà, Cher Lecteur, ce que j'ai à vous dire
Vous choisirez vous-même ce que vous souhaitez lire
Que cela vous invite à des rires ou des larmes
Que vous vous ennuyiez ou tombiez sous le charme
Qu'il s'agisse de poésie, de prose ou de mots sages,
Vous le découvrirez en parcourant ces pages.

À la prochaine fois...

Hold tenderly that which you cherish, for it is precious and a tight grip may crush it. Do not let the fear of dropping it cause you to hold it too tightly: the chances are, it's holding you, too.

Bob Alberti

The law isn't justice. It's a very imperfect mechanism. If you press exactly the right buttons and are also lucky, justice may show up in the answer. A mechanism is all the law was ever intended to be.

Raymond Chandler

almost no visible means of support. The organization operates on a shoestring. It has no bureaucracy and no head office, only volunteers generous with their time and ability. As a result, the members generally think of the CAPCJ as being somewhere else. It is probably best described as a state of mind.

It doesn't take a president long to discover he or she is a general without a standing army. There is no one to give orders to. A lot of the mail which arrives, particularly from government agencies, is in the name of the previous president or even the one before that. The only comfort I take from that is that my own name should survive at least a couple of years. Still, it's not as if you "don't get no respect". Nearly all judges' organizations, government officials and lawyers groups treat you as if you were a person of considerable influence or at least representing an influential body.

I went into the year with great expectations of maintaining regular contact with the other CAPCJ officers, the committee chairs, the provincial and territorial representatives and the Council of Chief Judges. I think I had the right idea, but events often got in the way. Despite my shortcomings, the highlight of the year for me was to meet so many dedicated judges from the Atlantic to the Pacific.

It is probably fortunate that I did not have a grand design in mind for the year. I thought it would be a year for taking stock and consolidating our gains after our

L'organisation fonctionne avec un budget minime. Elle n'a pas de bureaucratie ni de bureau central, seulement des volontaires généreux de leur temps et de leurs compétences. En conséquence de cela, les membres pensent généralement que l'ACJCP est située ailleurs. Elle pourrait probablement être décrite comme un état d'esprit.

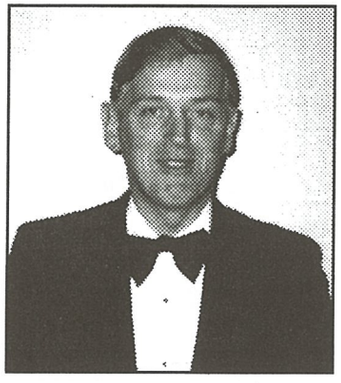
Cela ne prend pas longtemps au président avant de découvrir qu'il est un général sans armée. Il n'y a personne à qui donner des ordres. Une grande partie du courrier qui arrive, en particulier des organismes gouvernementaux, est adressé à l'ancien président ou même à celui qui l'a précédé. La seule satisfaction que je tire de cela est que mon propre nom devrait survivre au moins une couple d'années. Pourtant, ce n'est pas comme si personne ne vous respectait. Presque toutes les associations de juges, les fonctionnaires du gouvernement et les groupements d'avocats vous traitent comme si vous étiez une personne ayant une influence considérable ou au moins représentant un organisme influent.

J'ai entamé l'année avec de grands espoirs de maintenir un contact régulier avec les autres membres du bureau de l'ACJCP, les présidents de comité, les représentants provinciaux et territoriaux et le Conseil des juges en chef. Je pense que mon idée était bonne, mais les événements ont souvent entravé mes intentions. En dépit de mes insuffisances, les moments forts de cette année ont été pour moi les rencontres avec un grand nombre de juges consciencieux de l'Atlantique jusqu'au Pacifique.

Il est probablement heureux que je n'avais pas dans l'idée un grand projet pour cette année. Je pensais que ce serait une année consacrée à faire le point et à consolider nos acquis à l'issue

PRESIDENT'S REPORT / RAPPORT DU PRÉSIDENT

This will be my last Journal report as president of the CAPCJ. My reports up to now have been like travelogues, describing where I have been and what I have done on behalf of the association. This time the editor, Judge Handrigan, has asked me to write a more reflective piece, describing the role of the president of the CAPCJ and comparing my experiences with my expectations.



I had never thought about becoming an excursion fare jet-setter for a year. Then I found myself staying over Saturday nights across the country to keep costs down. Sometimes a meeting finished on Friday and so Friday night had to be filled as well. To pass the time I would first draft meeting reports for the other CAPCJ officers, probably driving them mad in the process. Then I rediscovered reading. I used to be an avid reader, but had become only an occasional one in recent years. My year as president has turned out to be one filled with books. I find airplane flights more relaxing with a book than with any newspaper or magazine. Mind you, I still need only the merest opportunity to close the book and talk with whoever is sitting next to me.

The CAPCJ could be described as having no usual place of abode and

Ceci sera mon dernier rapport pour le journal en tant que président de l'ACJCP. Mes rapports jusqu'à présent étaient comme des récits de voyage, qui décrivaient où j'étais allé et ce que j'avais fait pour le compte de l'association. Cette fois-ci, le rédacteur, Juge Handrigan, m'a demandé d'écrire plutôt un article de réflexion, en vue de décrire le rôle du président de l'ACJCP et de comparer mes expériences à mes attentes.

Je n'avais jamais pensé devenir un membre du jet-set, classe économique, pendant un an. Puis, je me suis retrouvé à passer les nuits de samedi dans divers endroits du pays pour limiter les coûts. Parfois, la réunion se terminait le vendredi et il fallait aussi remplir la soirée du vendredi. Pour passer le temps, je rédigeais tout d'abord des rapports de réunion pour les autres membres du bureau de l'ACJCP, ce qui les rendait probablement fous. Puis, j'ai redécouvert la lecture. J'étais autrefois un lecteur insatiable mais j'étais devenu un lecteur seulement occasionnel au cours des dernières années. Mon année au poste de président s'est avérée être remplie de livres. Je trouve les voyages en avion plus reposants avec un livre qu'avec n'importe quel journal ou magazine. Remarquez bien, je saisis quand même toujours la moindre occasion de fermer mon livre pour parler à la personne assise à côté de moi.

On pourrait décrire l'ACJCP comme une association sans domicile fixe ni véritables moyens de subsistance.

Le consentement à l'activité sexuelle: l'enseignement de Georges Simenon

Gilles Renaud
Juge - Cour de justice de l'Ontario (division provinciale)
le 20 août 1998

1) Introduction:

Bien que la phrase "Mais la raison n'est pas ce qui règle l'amour"[1] illustre bien la question épineuse du consentement libre et entier à l'activité sexuelle, le Code criminel cherche néanmoins à définir la portée du consentement qu'une personne puisse former. De fait, les modifications récentes apportées à cette loi ont créé une nouvelle infraction: soit le crime d'exploitation sexuelle d'une personne handicapée. L'art. 153.1 vise à réprimer le crime d'exploitation sexuelle des personnes ayant une déficience mentale ou physique. Il s'agit de proscrire l'abus d'une situation d'autorité; en d'autres mots, le législateur a cherché à protéger les personnes qui vivent une situation de dépendance.[2] Le para. (2) contient une définition du 'consentement', à savoir: "sous réserve du paragraphe (3), le consentement consiste, pour l'application du présent article, en l'accord volontaire du plaignant à l'activité sexuelle. Le paragraphe 3 traite de la restriction de la notion de consentement. Cette disposition législative calque presque parfaitement les alinéas de l'art. 273.1 du Code criminel portant sur le consentement aux activités sexuelles.

Il sera donc utile d'examiner de quelle façon le législateur a cherché à restreindre le consentement que ces personnes puissent donner à l'activité sexuelle. Notre objectif est de tenter de mieux comprendre les multiples facettes de la notion du consentement, tel que prévu par le texte législatif qui a été sanctionné le 12 mai 1998. Toutefois, il ne s'agit pas de revoir en enfilade la jurisprudence qui se dégage de l'interprétation de dispositions semblables portant sur les aggressions sexuelles. Bien que fort utile, cette méthode nous semble moins intéressante qu'une revue de citations tirées de romans de Simenon, autant psychologiques que policiers. Par exemple, s'il était question de la possibilité d'abus sexuel par une personne jouissant d'un ascendant qui découle de facteurs économiques et de l'âge, il serait opportun de citer La reine c. Ewanchuk (1998), 13 C.R. (5th) 324 (C.A. Alta.). Cependant, nous croyons qu'il est plus aisé de retenir en mémoire les notions de base d'une telle situation d'abus à la lecture de passages tirés de romans. Citons, en guise d'exemple, ce qui suit: "... nous savions que les femmes se donnent quand elles ont faim."[3] Ainsi, notre plan nous verra regrouper ces facettes de façon thématique conformément aux alinéas a) à e) du para. 153.1(3) afin d'illustrer des situations qui peuvent empêcher la formation d'un consentement libre ou entier. Bien sûr, il est difficile de repérer des exemples d'abus de personnes ayant une déficience mentale ou physique. Donc, la plupart des renvois illustrent des situations d'abus par des personnes en situation d'autorité.

2) Les restrictions de la notion du consentement:

a) Est nul le consentement qui est exprimé par un tiers:

L'al. 153.1(3)(a) énonce ce qui suit: Le consentement du plaignant ne se déduit pas, pour l'application du présent article, des cas où: a) l'accord est manifesté par des paroles ou par le comportement d'un tiers. Ainsi, le consentement qu'une personne qui est en situation d'autorité pourrait soulever en réponse à une accusation en vertu de l'art. 153(1) est vicié *ab initio* s'il n'est pas donné par la personne ayant une déficience mentale ou physique. Par exemple, dans La vieille,[4] il est question d'une jeune femme qui doit subir des aggressions sexuelles de la part de personnes chez qui elle doit porter une lettre, qui est écrite par son compagnon, et au moyen de laquelle il cherche à quémander de l'argent. Ainsi, les prêteurs interprêtent sa présence chez eux comme une invitation à l'activité sexuelle qui leur est faîte par le compagnon. Il serait d'autant plus répréhensible si la personne qui devait livrer la lettre était frappée d'une déficience mentale ou physique car elle serait encore moins apte à se défendre.

Et que dire de l'exemple que nous offre Simenon dans son roman La porte où le parent d'une jeune fille déclare: "Ainsi, c'est vous qui voulez m'enlever ma fille!... Elle me jure que vous avez l'intention de l'épouser devant le maire... C'est vrai, ça?... Cela ne vous suffit pas de la trousser comme les autres?"[5] S'agissant d'une personne visée à l'art. 153.1 ou pas, on peut facilement concevoir une situation d'abus sexuel découlant d'une telle "permission" ou "invitation".

Enfin, citons un passage que l'on retrouve dans L'aîné des Ferchaux: "On l'accusa ... d'avoir abusé à maintes reprises de son ascendant sur les femmes de ses employés."[6] Ainsi, si le conjoint avait "offert" son épouse au patron, et que celle-ci était visée à l'art 153.1, l'accord de celle-ci ne serait pas valable. De fait, la situation serait la même avec une personne qui n'est pas visée par ce texte mais on peut envisager qu'elle ne serait pas aussi vulnérable, de façon générale. Seule la personne qui participe à l'activité sexuelle peut donner un consentement plein et entier.

b) La situation d'une personne incapable de former tout accord

L'al. 153.1(3)(b) énonce ce qui suit: Le consentement du plaignant ne se déduit pas, pour l'application du présent article, des cas où: b) il est incapable de le former. Un premier exemple implique la personne qui est endormie. Tel que discuté dans le roman La vieille, précité, aux pages 284-5, une jeune femme se réveille et se rend compte qu'il y a trois personnes couchées avec elle dans son lit. Elle ne peut pas donné un accord à son insu, lors de son sommeil. Aussi, dans L'ours en peluche[7], on peut lire: "Quand il s'était penché pour lui toucher l'épaule, elle ne s'était pas éveillée. Elle avait seulement frémi des pieds à la tête, comme si cet attouchement venait s'insérer dans son rêve." Encore une fois, de tels gestes sont illégaux même si la personne impliquée n'ést pas visée à l'art. 153.1. Par ailleurs, Le coup de vague nous livre cet exemple d'une personne incapable de consentir par raison d'ivresse: "On l'avait soûlée. Puis, comme Jourin voulait la prendre devant les autres et qu'elle s'était débattue, on l'avait attachée sur le lit, les mains et les pieds aux quatre coins."[8] En

ENDNOTES

1 Saskatoon Star Phoenix Newspaper, Monday December 15, 1997, Pg 1-2 (Corrections Canada)

2 Bill C-55, now S.C. 1977, c. 17 proclaimed in force August 1, 1997.

3 I am indebted to the **Canadian Bar Association** for many of the ideas in this paper. The CBA was kind enough to furnish me with a copy of their learned "Submission on Bill C-55, Criminal Code Amendments (High Risk Offenders), February 1997".

4 (1987), 61 C.R. (3d)1

5 Ibid, 46-48

6 See, for example, the following cases:
R v Moore (1985), 16 C.C.C. (3d) 328
R. v Sowa (1991), 72 Man. R. (2d) 15
R. v Robideaux (1984) unreported decision of Supreme Court of B.C.
R v Ross May 30, 1997 Sk. Q.B.

7 (1983), 463 U.S. 880 (U.S.S.C.)

8 Brief Amicus Curiae for the American Psychiatric Association filed March 5, 1983 in U.S. Supreme Court Barefoot v. Estelle Ibid. Counsel of Record Joel I. Klein.

9 Supra, n.7

Everyone is kneaded out of the same dough but not baked in the same oven.
Yiddish Proverb

If you tell the truth, you don't have to remember anything.
Mark Twain

experts are regularly accepted by the courts. If they are so obviously wrong and should be discredited, there would be no insuperable problem in doing so by calling members of the Association who are of that view and who confidently assert that opinion in their amicus brief. Neither petitioner nor the Association suggests that psychiatrists are always wrong with respect to future dangerousness, only most of the time. Yet the submission is that this category of testimony should be excised entirely from all trials. We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness, particularly when the convicted felon has the opportunity to present his own side of the case.

We are unaware of and have not been cited to any case, federal or state, that has adopted the categorical views of the Association. Certainly it was presented and rejected at every stage of the present proceeding. After listening to the two schools of thought testify not only generally but also about the petitioner and his criminal record, the District Court found:

> "The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises. The accuracy of this conclusion is reaffirmed by the expert medical testimony in this case at the evidentiary hearing ....It would appear that Petitioner's complaint is not the diagnosis and prediction made by Drs. Holdbrook and Grigson at the punishment phase of his trial, but that Dr. Grigson expressed extreme certainty in his diagnosis and prediction .... In any event, the differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight [of the evidence] and not the admissibility of such testimony .... Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal"

We agree with the District Court, as well as with the Court of Appeals' judges who dealt with the merits of the issue and agreed with the District Court in this respect."

V. Conclusion

Ultimately the trier of fact will be left to sort and weigh the evidence in reaching a just determination. The process will become lengthier and more complex because of the recent amendments to the "dangerous offender" legislation. It will be the primary task of the courts to ensure that the new statutory regime is fundamentally fair and constitutionally proper. This will be complex and demanding work. It is likely that provincial court judges will have this thrust upon them in short order.

ce sens, l'adage que cite Simenon dans Les cent mille francs de p'tite madame à l'effet que "Qui ne dit mot consent" n'a pas sa place dans une société civilisée.[9]

Quant à une victime qui est handicapée, citons l'exemple tirée du roman L'écluse nº 1: "Peut-être n'a-t-il même pas eu besoin d'user de la force, car elle n'a pas conscience de ses actes."[10]

c) L'abus de confiance ou de pouvoir vicie le consentement

Tel que discuté ci-dessus, le législateur a imposé une restriction de la notion de consentement afin de nullifier tout accord s'il est, *primo*, manifesté par des paroles ou par le comportement d'un tiers et, *secundo*, si la personne impliquée dans l'activité sexuelle est incapable de le former. Le législateur a également déclaré au moyen de l'al. 153.1(3)(c) que le consentement du plaignant ne se déduit pas, pour l'application du présent article, des cas où l'accusé l'engage ou l'incite à l'activité sexuelle par abus de confiance ou de pouvoir. Il est d'intérêt de noter que la version anglaise traduit "l'engage" au moyen du vocable "counsels".

Ainsi, est coupable d'une aggression sexuelle contrairement à l'art. 153.1 une personne qui est en situation d'autorité ou de confiance vis-à-vis d'une personne ayant une déficience mentale ou physique ou à l'égard de laquelle celle-ci est en situation de dépendance et qui l'engage ou l'incite à l'activité sexuelle suite à l'abus de cet ascendant. En guise d'exemple, relevons qu'une prostituée déclare que: "... je suppose que je dois faire ça avec le fils de la patronne."[11] Non seulement peut-on prétendre à bon droit la nullité d'un tel accord dans le cas d'une personne adulte qui n'est pas protégée par la refonte du Code criminel qui est l'objet de cet article, mais à plus forte raison dans le cas d'exploitation sexuelle d'une personne handicapée. Simenon reprend souvent le thême du patron qui exploite sexuellement ces employées mineures, comme le font foi les exemples qui suivent. Notons en premier un M. Clément qui exploite sexuellement ses bonnes dans le roman Marie qui louche;[12] deuxièmement, relevons le cas de Charlotte, la domestique, qui est aggressée par son patron dans L'escalier de fer et qui s'attendait à ce qui allait arriver; un troisième exemple nous vient du roman Maigret se trompe où il est question d'un médecin qui abuse de son autorité au point ou une infirmière déclare: "Je savais, comme tout l'hôpital, que la plupart des infirmières y passaient un jour ou l'autre...".[13] Laissant de côté la question évidente à savoir si de tels gestes constituent des agressions sexuelles au sens de l'art. 271 du Code criminel s'il s'agit de personnes adultes ne souffrant pas d'handicaps, peut-on douter de la réponse dans le cas de personnes ayant une déficience mentale ou physique?

De fait, cette phrase que nous retrouvons dans le roman Les témoins résume bien cette idéologie qui justifie l'abus: "Elle avait dû être surprise qu'il ne lui demande rien et, au début, chaque fois qu'il leur arrivait d'être seuls, elle semblait attendre le geste auquel elle était tellement habituée. Dans son esprit, n'était-ce pas la timidité, ou la peur de sa femme, qui empêchait son patron d'agir comme les autres?"[14]

Le monde du romancier nous offre aussi maints exemples de pupilles de l'Aide

à l'enfance ou d'orphelinats qui sont exploitées, exemples qui pourraient aussi bien être puisés parmi les receuils de jurisprudence. Ainsi, un personnage de Simenon déclare: "J'avais douze ans quand mon oncle a commencé à me caresser en me forçant à le caresser aussi ... A treize ans et demi, il m'a prise et m'a fait très mal... Recueillie chez eux par charité, je ne pouvais pas refuser...".[15] La page 134 du roman Le suspect fait état de l'abus d'une pupille de l'assistance publique: "... quand elle avait douze ans, on avait découvert que le fermier abusait d'elle...".[16] De même, dans Le riche homme, il est question de l'abus systématique d'une jeune fille de 15 ans qui est orpheline et qui a été placée chez un fermier à titre de bonne.[17] L'idée ne lui vient pas à l'esprit de se plaindre...

Au sujet de l'incapacité de se plaindre de ces jeunes victimes vulnérables, voir Long cours, "Quand je suis arrivé à Paris, je suis entrée comme bonne à tout faire ... Une cuisine d'un mètre de large, sans air, sans lumière. N'empêche que le patron y accourait dès que sa femme était sortie. ... Vous devinez la suite, n'est-ce pas? Je n'ai pas osé refuser. J'étais bête."[18] Le bourgmestre de Furnes contient aussi le récit d'un employeur qui a des rapports sexuels avec domestique qui "... ne dit rien".[19] Citons aussi La veuve Couderc: "Vous vous souvenez de la pauvre Juliette?... Une gamine de quatorze ans, qui n'avait ni père ni mère... Elle avait encore l'âge de jouer à la poupée et la pauvre petite n'osait rien dire, tant elle avait peur...".[20]

Enfin, un exemple puisé dans le roman Le suspect qui implique une pupille de l'assistance publique: "... quand elle avait douze ans, on avait découvert que le fermier abusait d'elle...".[21]

d) Les cas où l'absence d'accord est communiquée à l'autre partie

L'al. 152.1(3)(d) manifeste l'intention du législateur de nullifier tout consentement possible dans les cas où le plaignant manifeste, pas ses paroles ou son comportement, l'absence d'accord à l'activité. D'emblée, il est souvent difficile d'évaluer le comportement d'une personne qui n'a pas dit un mot avant l'activité sexuelle et qui n'a pas semblé s'y opposer. Il est vrai que le monde du romancier nous offre plusieurs exemples de consentements muets, de consentements qui sont communiqués au moyen des yeux. Par exemple, le contravenant dans Lettre à mon juge relate au juge d'instruction que "Alors, des yeux, rien que des yeux, elle a eu l'air de me poser une question, de me demander pourquoi je ne venais pas m'asseoir à côté d'elle. J'ai hésité. ... Gauchement, j'ai traversé l'allée qui nous séparait." "Vous permettez?" "Un oui des yeux, toujours des yeux."[22]

Le train, à la page 50, nous livre l'exemple suivant: "Nos bouches se sont rencontrées, aussi mouillées l'une que l'autre. Je n'ai pas pensé à lui demander, comme au cours de mes expériences de jeune homme: 'Je peux?' Je pouvais, puisqu'elle ne s'inquiétait pas, puisqu'elle ne me repoussait pas, qu'elle me retenait au contraire en elle."[23] Simenon discute aussi de cette question aux pages 472-473 du roman Une vie comme neuve:[24]

"C'est lui qui vous l'a demandé?" ... "Non." "C'est vous?" "Non plus." "Alors?" "Il m'a regardée en devenant un peu rouge et a retiré ses lunettes. Puis il a toussoté et a posé ses deux mains sur mes hanches." "Comment savait-il?" "Que je voulais

Jurek v Texas, supra, rejecting a vagueness challenge to the Texas future dangerousness standard, forecloses that argument. What we do contend, however, is that the long-term prediction of future dangerousness is an essentially lay determination that should not be based on the diagnoses and opinions of medical experts, but on the basis of predictive statistical or actuarial information that is fundamentally non-medical in nature. The psychiatric gloss on such data furnished by expert medical testimony provides little, if any, additional information to the jury.

Recent research indicates that the most reliable—although by no means dispositive—predictors of long-term future behaviour are factors having nothing to do with psychiatric disorders or illnesses. Thus, for example, an individual's past history of violent criminal behaviour correlates positively with future criminal behaviour. See Shah, Dangerousness: A paradigm for Exploring Some Issues in Law and Psychology, 33 American Psychologist 224-38 (1978); J. Monahan, The Clinical Prediction of Violent Behaviour, supra, at 71. The more violent crimes a defendant has already committed, the more likely he is to engage in further criminal activity in the future. Other factors that may be predictive of future violent behaviour include age (a disproportionate amount of violent crime is committed by persons between ages fifteen and twenty); sex (nearly 90 percent of all persons arrested for violent crimes are male); and race (blacks account for 46 percent of all arrests for violent crime). Still other factors that are characteristic of criminal recidivists are a history of drug or alcohol addiction and persistent unemployment. Significantly, one factor which demonstrably fails to correlate with recurring criminal activity is mental illness. See Monahan, The Clinical Prediction of Violent Behaviour, supra, at 78.

Although there will always be difficulties in predicting future dangerousness, Jurek v. Texas, supra, 428 U.S. at 275-76, it is clear that relevant testimony concerning the above factors may be presented to a jury by persons having no credentials in the area of psychiatry. Information concerning the defendant himself—for instance, past criminal record and employment history—can obviously be presented by lay witnesses. To the extent statistical information is considered relevant and desirable, such evidence may be given by statisticians, actuaries or perhaps ideally, by corrections officers having experience in statistically-based parole decisions. This testimony could even be given by psychiatrists, but only if it is clear that they are furnishing lay evidence, not medical evidence."

Mr. Justice White writing for the majority in the United States Supreme Court expressed his opinion on these matters at pp. 899-903[9]:

"The amicus does not suggest that there are not other views held by members of the Association or of the profession generally. Indeed, as this case and others indicate, there are those doctors who are quite willing to testify at the sentencing hearing, who think, and will say, that they know what they are talking about, and who expressly disagree with the Association's point of view. Furthermore, their qualifications as

The removal of judicial discretion is especially distressing because of the rule which evolved over time that evidence about possible treatment or cure of the offender is irrelevant and therefore not admissible on the initial determination of whether the offender is a "dangerous offender". This evidence was only considered relevant to the issue of whether to sentence the offender on a determinate or indeterminate basis. Now that the discretion has been removed, *quaere* the value of this evidence. It may be of no consequence whatsoever.

The likely focus of future hearings will be the debate between experts of the issue of "dangerousness". If the American experience is any guide the implications are significant. In the leading case of Barefoot v. Estelle[7] the Supreme Court of the United States had to deal with the issue of "dangerousness" in the context of a death penalty case from Texas. The Court was confronted with a brief filed[8] by and on behalf of the American Psychiatric Association in which it was argued that the psychiatric and psychological opinions about future dangerousness should not be received in these cases because of their unreliability.

At pages 8-9 the following submission was made:

> "Psychiatrists should not be permitted to offer a prediction concerning the long-term future dangerousness of a defendant in a capital case, at least in those circumstances where the psychatrist purports to be testifying as a medical expert possessing predictive expertise in this area. Although psychiatric assessments may permit short-term predictions of violent or assaultive behaviour, medical knowledge has simply not advanced to the point where long-term predictions—the type of testimony at issue in this case—may be made with even reasonable accuracy. The large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.
>
> The forecast of future violent conduct on the part of a defendant in a capital case, at bottom, is a lay determination, not an expert psychiatric determination. To the extent such predictions have any validity, they can only be made on the basis of essentially actuarial data to which psychiatrists qua psychiatrists, can bring no special interpretative skills. On the other hand, the use of psychiatric testimony on this issue cases serious prejudice to the defendant. By dressing up the actuarial data with an "expert" opinion, the psychiatrist's testimony is likely to receive undue weight. In addition, it permits the jury to avoid the difficult actuarial questions by seeking refuge in a medical diagnosis that provides a false aura of certainty. For these reasons, psychiatric testimony on future dangerousness impermissibly distorts the fact-finding process in capital cases."

At pages 14-16 important additional submissions were made:

> "The fact that psychiatrists are unable to predict future violent behaviour does not mean that such predictions can never be made. Indeed, this Court's decision in

bien?" "Oui." "Il m'avait regardée et il avait compris." "C'est magnifique!"

Au contraire, certaines situations laissent voir sans ambages que la personne a été agressée, qu'importe les gestes ou les paroles exprimés. Parmi les exemples de ces viols ou d'aggressions sexuelles que nous livre Simenon retenons Maigret au Picratt's. Il n'y avait aucun doute que la victime avait été agressée en raison de son désarroi et des marques de violence que portaient ses vêtements.[25] Un policier consigne les commentaires qui suivent à la page 827 du roman Feux rouges: "Elle s'est défendue courageusement, comme le prouve l'état de ses vêtements et les meutrissures qu'elle a sur le corps."[26]

Et, comme de raison, la vie de tous les jours et les romans nous offrent des exemples de consentements qui sont pleins et entiers et qui sont le résultat d'une demande explicite. Dans Marie qui louche,[27] nous pouvons lire: "Simplement, sans aucune gêne, il avait demandé en tendant la main vers son corsage: On peut toucher?" La réponse: "Si vous y tenez." À ce sujet, il faut prendres des mesures raisonnables, dans les circonstances, pour s'assurer du consentement. Voir le para. 265(3) du Code criminel. De façon particulière, il faut contrôler le sens véritable des mots. Par exemple, dans Maigret et l'homme du banc, une prostituée demande à Maigret: "Vous voulez?" Il répond, "Merci." Elle questionne donc en demandant: "Merci, oui?" et Maigret répond: "Merci, non."[28]

L'al. 152.1(3)(d), à notre sens, cherche à interdire l'activité sexuelle dans les cas où le plaignant a manifesté l'absence d'accord, soit de façon verbale, soit autrement.

e) Le consentement devient nul si l'accord est rompu

Au demeurant, grâce à l'al. 153(1)(3)(e), le législateur a déclaré qu'une personne peut changer d'avis et ainsi mettre fin à l'accord intervenu entre les parties. Cette disposition prévoit que le consentement du plaignant ne se déduit pas, pour l'application du présent article, des cas où: e) après avoir consenti à l'activité, il manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci. Il importe de soulever que nous prenons pour acquis que tout geste sexuel antérieur était sous la coupe d'un consentement valable, et non pas le type de "faux" consentement décrit par Simenon dans le roman Les clients d'Avrenos: "Elle n'avait qu'à dire non! Je ne l'aurais pas prise de force!"[29]

Deux types de cas sont bien connus. Soit qu'à une étape ou l'autre de l'activité, une personne manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci. Il se peut qu'elle croyait donner son accord à un ou des gestes précis, et ne croyait pas qu'il y aurait un autre type d'activité sexuelle. Soit que la personne ait tout simplement décidée de ne pas poursuivre l'activité. Dans un cas comme dans l'autre, lorsqu'elle manifeste son choix de mettre fin à l'activité, l'accord est rompu et tout geste à caractére sexuelle qui s'ensuit serait à l'encontre du Code criminel.

Plusieurs problèmes se posent à ce niveau. Nous allons tenter de les identifier brièvement, en enfilade. Premièrement,

est-ce que l'autre partie à l'activité sexuelle doit accepter cette décision de mettre fin à l'accord sur-le-champ? Peut-elle chercher à convaincre son partenaire à reprendre l'activité et même d'entreprendre d'autres activités sexuelles? Dans Les gens d'en face nous lisons: "Adil bey avait l'habitude de la guetter, au moment où elle allait partie, à la soirée. Elle répondait oui d'un signe de tête, avec toujours le même sourire, ou bien elle disait: Non Et, quand elle avait dit non, elle n'écoutait pas ses prières. C'était non!"[30]

Un deuxième problème est soulevé par la soumission. Si une personne est disposée à être impliquée à des activités sexuelles pour une raison quelconque mais sa participation est si passive qu'il semble qu'elle ne fait que subir les gestes, peut-on prétendre à bon droit qu'elle manifeste ainsi qu'elle retire son accord? Il nous semble que non. Un excellent exemple de cette situation se retrouve à la page 448 du roman Le chat: "Au début, ils avaient essayé d'avoir les mêmes rapports intimes. Cela n'avait pas marché. Intimidés tous les deux, ils avaient l'impression qu'à leur âge les gestes qu'ils faisaient maladroitement devenaient ridicules... Qui sait? Aux yeux de Marguerite, c'était peut-être un sacrilège. ... Elle était résignée. Puisqu'ils étaient mariés, son nouveau mari avait le droit de disposer de son corps."[31] Le coup de lune nous fournit un autre exemple. "Avait-elle deviné son désir? Était-elle amoureuse ou simplement docile, parce qu'il était un blanc?"[32] Peut-on invoquer la résignation, la docilité comme étant des éléments du consentement valable? Si oui, il faut aussi poursuivre l'analyse et se demander à quelle étape cette participation passive manifeste l'absence d'accord de poursuivre l'activité sexuelle.

Un dernier problème, qui s'apparente à celui de la soumission, est celui de la résignation. Il sera utile de souligner qu'il nous semble impossible, hormis de très rares exceptions, d'invoquer la résignation comme un élément permettant de prétendre qu'il y avait accord au début de l'activité. Et, de toute façon, lorsqu'il est évident qu'il y a situation de résignation, tout accord est rompu. Un exemple tiré de la page 184 du roman Le testament Donadieu illustre bien qu'il y a peu de différence entre la résignation et l'absence d'accord à l'activité sexuelle: "Il voyait que Nine, après s'être farouchement raidie, au point qu'il sentait jaillir tous ses muscles, se résignait d'un air morne et regardait de côté, pour ne pas apercevoir son visage."[33]

3) Conclusion:

Il est difficile pour un juge, pour des raisons évidentes, de livrer des conclusions qui pourraient être controversées. Notre objet étant de fournir un survol de situations de faits afin d'illustrer la complexité des notions du consentement plein et entier aux activités sexuelles, il incombe maintenant aux avocat(e)s de faire avancer la jurisprudence grâce à leurs plaidoiries...

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[1] Voir le Misanthrope de Molière (1666), à l'acte 1, scène 1, vers 248.

[2] Voici le texte du para. 153.1(1): "Est coupable soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans, soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois, toute personne qui est en situation d'autorité ou de confiance vis-à-vis d'une personne ayant une déficience mentale ou physique ou à l'égard de laquelle celle-ci est en situation de dépendance et qui, à des fins d'ordre sexuel, engage ou incite la personne handicapée à le toucher, à se toucher ou à toucher un tiers, sans son consentement,

that "at least seven days notice be given to the offender by the prosecution, following the making of the application, outlining the basis on which it is intended to found the application". Moreover, the offender has the right to attend, present evidence and cross-examine witness, in addition to a right of appeal in the broadest terms on questions of fact, law or mixed fact and law.

It seems to me that s. 7 of the Charter entitles the appellant to a fair hearing; it does not entitle him to the most favourable procedures that could possibly be imagined. I do not think it can be argued that the procedure at a Pt. XXI application is unfair insofar as it denies to an offender the right to a jury's determination of his or her dangerousness.

In other respects, however, the case law following Brusch, supra, has given a judicial gloss to Pt. XXI that might at some point merit reappraisal by this court. In light of the foregoing discussion, it might well be the logic that justified holding Pt. XXI applications to be part of the sentencing process cannot now serve to justify the whittling down of procedural rights that appears to have flowed therefrom.

Furthermore, it is clear from my earlier comments that the fairness of the process by which the deprivation of liberty is occasioned cannot, in the case of dangerous offender, be considered isolation from the process by which that deprivation of liberty is reviewed. Given the severity of the impact of such review on a dangerous offender's liberty interest, at least as opposed to those of an "ordinary" offender, it seems to be that considerations of fundamental justice might require correspondingly enhanced procedural protections at such a review. In this regard, I note that the Ouimet commission recommended that dangerous offenders be given a right to judicial review of their status every three years, with the court having the power to release the offender: Report of the Canadian Committee on Corrections (1969), at pp. 262-63. I agree that this would afford the convict greater safeguards, but I do not view it to be constitutionally required. Indeed, as was pointed out by the court in both Moore, supra, and Langevin, supra, the parole board is supposedly more expert in determining whether release is warranted, and its decisions are subject to judicial review. Including review on Charter grounds. However, the fairness of certain procedural aspects of a parole hearing may well be the subject of constitutional challenge, at least when the review is of the continued incarceration of a dangerous offender. The fairness of the review procedure, however, is not an issue in the present case."

This issue is more than a theoretical one. It has profound implications for the offender and to the survival of the legislation. There have been reported cases where "dangerous offenders" have not been sentenced to indeterminate terms of imprisonment. Questions of proportionality to the seriousness of the offence, adequacy of the parole review process and the rehabilitation of the offender have influenced courts in the past to exercise a discretion which has now been abolished.[6]

Under the law, as recently amended, when the judge finds that the respondent is a "dangerous offender" this concludes the matter of sentencing. The sentence is an indeterminate term in a penitentiary. There is no discretion. The court must impose this sanction - it is automatic, by operation of law.

Before amendment the court had the discretion to fix the term of imprisonment after declaring the offender to be a "dangerous offender". This change in the law is profound. In part this is so because the new law also delays the first review for parole eligibility to seven years. Previously , the postponement was for three years from the date of sentencing. Furthermore, the elimination of judicial discretion represents a substantive restriction upon the offender's right not to be subjected to cruel and unusual punishment. The Supreme Court will have to decide whether this is constitutionally valid. The comments of Laforest J., in Lyons, *supra*, n.4 should be examined carefully in this context. The previous statutory scheme was found to be constitutionally valid because it provided adequate safeguards, not the least of which was a judicial discretion in fixing the term of imprisonment after a finding of "dangerousness". In Lyons, *supra*, Laforest J. commented at pp. 46-48:[5]

> "It is clear that, at a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness: see, e.g., the comments to this effect of Wilson J. in Singh v. Can. (Min. of Employment & Immigration); Thandi v. Can (Min. Of Employment & Immigration); Mann v. Can. (Min of Employment & Immigration) [1985] 1 S.C.R. 177 at 212-213, 12 Admin. L.R. 137, 17 D.L.R. (4th) 422, 14 C.R.R. 13, 58 N.R. 1 [Fed.]. It is also clear that the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked. Thus certain procedural protections might be constitutionally mandated in one context but not in another. Suffice it to say, however, that a jury determination is not mandated in the present context. The offender has already been found guilty of an offence in a trial at which he had the option of invoking his right to a jury. Moreover, the procedure to which he was subjected subsequent to the finding of guilt does not impact on his liberty to the same extent as the initial determination. Indeed, this is made clear by the same considerations that led this court, in Brusch, supra, to classify the proceedings as part of the sentencing process. While the legal classification of the proceeding as part of the sentencing process does not necessarily decide the question of the scope of the procedural protection to be afforded the offender, the functional, factual considerations animating that conclusion must be taken into account.
>
> Finally, it is not insignificant that, unlike the situation in Maroney, supra, the judge at such a hearing does retain a discretion whether or not to impose the designation or indeterminate sentence, or both.

It is noteworthy, too, that Pt. XXI provides considerable procedural protection to the offender. Section 689(1)(a) requires that the consent of the Attorney General be obtained either before or after the application is made. Section 689(1)(b) requires

directement ou indirectement, avec une partie du corps ou avec un objet.

[3] Voir Les trois crimes de mes amis, Tout Simenon, Volume 21, Presses de la Cité, 1992, Paris, à la p. 56. Voir aussi La neige était sale, Tout Simenon, Volume 3, Presses de la Cité, 1988, Paris, à la p. 144: "Kromer est vicieux. Il court après les gamines, surtout les gamines pauvres parce que c'est plus facile, et il les choisit très jeunes." Le chien jaune, Tout Simenon, Volume 16, Presses de la Cité, 1991, Paris, nous fournit cet exemple, à la p. 313: "N'empêche qu'ils abusaient un peu, quand ils débauchaient toutes les gamines des usines... Il y a du chômage... Alors, avec de l'argent... toutes ces filles". Enfin, voir L'outlaw, Volume 22, Tout Simenon, Presses de la Cité, 1992, Paris, à la p. 639: "N'avait-il pas des droits, puisqu'il l'avait recueillie, quasi mourante de faim?"

[4] Tout Simenon, Volume 10, Presses de la Cité, 1990, Paris, à la p. 301.

[5] Voir Tout Simenon, Volume 11, Presses de la Cité, 1990, Paris, à la p. 227. Le soulignement est de nous.

[6] Tout Simenon, Volume 25, Presses de la Cité, 1992, Paris, à la p. 304.

[7] Tout Simenon, Volume 10, Presses de la Cité, 1990, Paris, à la p. 553.

[8] Tout Simenon, Volume 21, Presses de la Cité, 1992, Paris, à la p. 804. Voir Le petit restaurant des Ternes, Tout Simenon, Volume 5, Presses de la Cité, 1988, Paris, à la p. 221: "Elle était vautrée -- oui, vautrée -- sur la banquette cramoisie du Monaco, et il n'y avait plus besoin de lui mettre son verre en main ... Après chaque rasade, elle éclatait de rire ...".

[9] Tout Simenon, Volume 22, Presses de la Cité, 1992, Paris, à la p. 1100.

[10] Tout Simenon, Volume 18, Presses de la Cité, 1991, Paris, à la p. 530.

[11] Voir La neige était sale, précité, à la p. 187.

[12] Tout Simenon, Volume 5, Presses de la Cité, 1988, Paris, à la p. 646.

[13] Tout Simenon, Volume 7, Presses de la Cité, 1989, Paris, à la p. 39.

[14] Tout Simenon, Volume 7, Presses de la Cité, 1989, Paris, à la p. 648. Voir aussi Le grand Bob, Tout Simenon, Volume 7, Presses de la Cité, 1989, Paris, à la p. 767: "... qu'il lui arrivait d'aller retrouver l'une ou l'autre des ouvrières dans sa chambre. Adeline, la dernière venue, à peine âgée de vingt ans, était du nombre."

[15] Voir Les anneaux de Bicêtre, Tout Simenon, Volume 11, Presses de la Cité, 1990, Paris, à la p. 802.

[16] Tout Simenon, Volume 21, Presses de la Cité, 1992, Paris.

[17] Tout Simenon, Volume 15, Presses de la Cité, 1991, Paris, aux pp. 13-14 et 70-71.

[18] Tout Simenon, Volume 19, Presses de la Cité, 1992, Paris, à la p. 584

[19] Tout Simenon, Volume 22, Presses de la Cité, 1992, Paris, à la p. 60.

[20] Tout Simenon, Volume 23, Presses de la Cité, 1992, Paris, à la p. 137.

[21] Tout Simenon, Volume 21, Presses de la Cité, 1992, Paris, à la p. 134.

[22] Tout Simenon, Volume 1, Presses de la Cité, 1992, Paris, à la p. 655.

[23] Tout Simenon, Volume 11, Presses de la Cité, 1990, Paris.

[24] Tout Simenon, Volume 5, Presses de la Cité, 1988, Paris.

[25] Tout Simenon, Volume 5, Presses de la Cité, 1988, Paris, à la p. 332.

[26] Tout Simenon, Volume 6, Presses de la Cité, 1988, Paris.

[27] Précité, aux pp. 719-720.

[28] Tout Simenon, Volume 6, Presses de la Cité, 1989, Paris, à la p. 419. Un exemple semblable se retrouve à la p. 456 du roman Antoine et Julie: "Du café." "Merci." "Merci, oui?" "Merci, non." Tout Simenon, Volume 6, Presses de la Cité, 1989, Paris.

[29] Tout Simenon, Volume 19, Presses de la Cité, 1992, Paris, à la p. 361.

[30] Tout Simenon, Volume 18, Presses de la Cité, 1991, Paris, à la p. 682.

[31] Tout Simenon, Volume 13, Presses de la Cité, 1990, Paris.

[32] Tout Simenon, Volume 18, Presses de la Cité, 1991, Paris, à la p. 335.

[33] Voir Tout Simenon, Volume 20, Presses de la Cité, 1992, Paris. Voir également La Marie du port, Tout Simenon, Volume 21, Presses de la Cité, 1992, Paris, à la p. 535: "... elle était déjà résignée ...".

IN A LITERARY VEIN

A Question too Far

After the lawyer asked the bespectacled
witness in the blue suit
what he did for a living, silence fell
over the courtroom. The lawyer repeated
the question.
"I'd rather not say," the witness answered.

That's when I stepped in to remind him
that this was a court of law, that witnesses
are obliged to answer all questions.
"To tell the truth, Your Honor," he said
looking me in the eye, "I'm
just putting the finishes touches on my
invention to liquidate the national debt
in two years."
"The national debt in two years?" I said.
"How do you expect to do that?"

The witness smiled at me
as though I were a child. "Now
Your Honor, I wouldn't be much of a
businessman if I tipped my hand, would I?"
"I guess not," I replied. "Mum's the word."

This is from "Silver Mercies"by Mr. Justice James Clarke of the Ontario Court of Justice, General Division. It was published by Exile Editions Limited in 1997. It is reprinted with permission of the author.

The rules pertaining to confessions and the protection against self-incrimination do not apply in these proceedings. The cases suggest that this is because the evidence is not being used to incriminate the accused. Alternatively, it has been suggested the guilt or the innocence of the accused is not in issue in these proceedings. Whatever the rationale these rules do not apply to proceedings related to the determination of sentence, which is what these proceedings are. This is the law as we have it in Canada today.

V. THE ADJUDICATIVE STAGE

The judge hearing the application must first be satisfied that the preconditions to the proceedings have been met. This usually means:

- That a predicate offence has been proven beyond a reasonable doubt.
- That the predicate offence fits within the definition of a "serious personal injury offence" under s. 752.
- That the notice requirements have been met by the Crown.

When the court is satisfied of this, the evidence on the substantive issues may be addressed. In sexual cases the court will consider the following matters on the question of" dangerousness":

- Whether the offender has shown by his conduct in sexual matters a failure to control his sexual impulses.
- Whether the offender is likely in the future to show a similar failure to control his sexual impulses.
- If so, will the offender likely cause injury, pain or other evil to any person?

The judge may base his findings on the first and third issues by an analysis of the facts surrounding the predicate offence and other previous offences committed by the offender. Psychiatric evidence will, of course, be relevant to all three issues: see R. v. Sullivan (1987), 37 CCC(3d) 143 (Ont. C.A.) and R. v. Currie (1997) 7 C.R. (5th) 74 (S.C.C.).

In cases involving crimes of violence the court will look at the following issues:

- Whether the offender has used or attempted to use violence or has conducted himself in a manner likely to endanger the life of persons or cause serious psychological harm.
- Whether the offender constitutes a threat to the life, safety or physical or mental well-being of others persons on the basis of evidence establishing either/or:
  - A pattern of repetitive violent behaviour likely to cause injury or death.
  - A pattern of persistent aggressive behaviour showing indifference to the effect on others.
  - Any behaviour associated with the predicate offence that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.

The court will also receive into evidence a previous record of the accused. This may be accompanied by a transcript detailing the circumstances of the commission of prior violent crimes or sexual assaults to enable the Crown to show repetitive, serious and harmful, injurious or evil criminal behaviour: s.753.1(2)(b).

The Crown may and will likely call evidence of other offences committed by the offender for which he was never charged or tried. The evidence is adduced through witnesses who have been victimized by the offender in the past. In sexual assault cases it is routine for people to come forward from the distant past if the case is widely publicized in the media or through "Crime Stoppers".

The court will hear expert opinion evidence that is relevant to the question of "dangerousness". This evidence may also relate to the issue of whether the offender ought to be declared a "long-term offender". With respect to the question of whether the offender is "dangerous" the evidence will focus on a consideration of whether the offender constitutes a threat to the life, safety or physical or mental well-being of persons. Pertinent to this discussion is evidence establishing past repetitive violent behaviour or repetitive sexually assaultive behaviour of such a type as to prove beyond a reasonable doubt that there is a likelihood of future injury to other persons. In the "long-term offender" application the question is more complex. It involves a determination of whether there is a substantial risk of the offender re-offending but there is a reasonable possibility of eventual control of the risk in the community. This is limited to those cases where the predicate offence is specifically a sexual assault (in a variety of statutory permutations) with a pattern of repetitive criminal sexual behaviour.

The court is permitted to hear all evidence which is relevant. This has been interpreted by appellate courts to include:

- Statements made by the offender to a court-appointed psychiatrist: Wilband v. The Queen, (1967), 2 CCC 6(SCC).
- Statements made by an accused to police officers without proof of the voluntariness of the statements: R. v. Boyd (1983), 8 CCC(3d)143(BCCA).
- Evidence of other incidents which did not result in convictions: R. v. Lewis (1984),12 CCC(3d)353(Ont. C.A.) (appeal to the SCC abandoned: 25 CCC(3d) 288).
- Evidence adduced at the trial of the predicate offence where it is the same court that hears the application: R. v. McGrath (1962), 133 CCC 57(SCC).

What is manifest is just how much latitude the judge hearing the applications has in deciding the issue of relevance. It is important to note, however, that where a judge other than the trial judge on the predicate offence hears the application it is not sufficient for the Crown to attempt to prove the facts from the previous proceedings by merely filing a transcript - evidence must be adduced in the form of sworn testimony: R. v. Canning (1966), 4 CCC 379(BCCA). This is a compelling reason for both matters be dealt with by the same judge. A victim would surely feel aggrieved if required to testify twice in such circumstances where the predicate offence is, by definition, a brutal offence of violence and/or a devastating sexual offence or combinations of the same.

A Personal Reflection on Judicial Elections

By Honorable Judith Ann Lanzinger
Judge, Lucas County Court of Common Pleas, Toledo, Ohio

My thanks to the *Provincial Judges Journal* for providing me with this forum. I am an American trial judge, thrust into the vortex of an activity which can offer the best of times, but which mostly presents the worst of times — I am running for election. My goal is a seat on the Sixth District Court of Appeals.

This is my sixth campaign in thirteen years, and I have experienced the full range of elections:

- in 1985, I ran against a newly appointed judge for an unexpired seat on the Toledo Municipal Court;
- in 1987, I ran unopposed for a full six year term to that position;
- in 1988, I ran unopposed for a new position on the general trial bench for our county;
- in 1994, I ran as an incumbent when the local newspapers endorsed my opponent - I won with 60% of the vote despite, or perhaps, because of, the bad press;
- in May 1998, I ran from cover (loss not affecting one's judicial position) in a contested primary; and,

- ❑ in November, I will run as the primary victor for an appellate spot which is vacant because of a retirement.

My experience confirms that it is ***much*** easier to run without opposition!

WHY ELECT JUDGES?

The question is raised often. Not every judge in the United States endures this periodic challenge. Whether judges are elected or appointed is governed by various constitutions and statutes. Federal judges in the United States enjoy lifetime appointments as specified by Article III of the U.S. Constitution. Thirty-four of the fifty states also provide term appointments of varying lengths – sometimes called "merit selection". When a vacancy occurs, a non-partisan commission submits specified names of the most qualified individuals to the appointing authority, usually the governor, who makes a final selection from the list. After completing a term of office, the judge may be evaluated for retention by the voters in an uncontested election. Merit selection is the process favored by a majority of the American states.

But the rest of the states, including Ohio, require that judges be elected by the will of the people. In Ohio the qualification to run for judicial office is that one must have been a lawyer who has practiced for six years. Ordinarily, either the Republican or Democratic party will endorse a single candidate in the primary and then in November, judicial races are treated as non-partisan, at least to the extent that one's party is not listed on the ballot. Of course, when it has been advertised for several months in a

The Government of Canada was warned of these potential problems by the Canadian Bar Association in a brief, "Submission on Bill C-55", in February,1997. At page 12 the authors concluded:

> "Bill C-55 creates a much larger role for the assessment than that contemplated by the Task Force. If an assessment supported a finding of dangerousness, it would be virtually impossible to challenge and the process would defer to its opinions. The assessment would occupy a position of predominance in the proceedings which an offender would not be able to dislodge, especially with limited resources. Our concern is aggravated by the current crisis in legal aid funding."

It must be noted that resources and expertise in this area are not widely available. Furthermore, the ability of professionals in the fields of psychiatry and psychology to predict future "dangerousness" is questionable. There is profound disagreement amongst experts on this very issue. More will be said about this matter later in this paper in the examination of the adjudicative phase of the hearing.

Problems of this kind, consequent on the new assessment procedure, will attract intense scrutiny and may result in constitutional challenges. The Supreme Court of Canada in R v Lyons[4] gave constitutional approval to the old provisions under Part XXI. It did so in part because the precursor to the current assessment provision guaranteed fairness and protection for the offender under the "two-psychiatrist" rule directed by the Code.

The resolution of the disagreements amongst experts on fundamental issues is crucial to the outcome of the application. Given the fallibility of predictions of dangerousness and the serious threat to the liberty of the subject, it is conceivable that constitutional problems will arise under ss. 7, 11 and 12 of the Charter. Surely, in this context, these must be a fair, balanced, adversarial process engaged if a proper adjudication is to be made. The stakes are high. The failure of the legislators to address this problem adequately will impose a severe burden on the trial judge to guarantee that justice is done and appears to be done In the statutory vacuum, judges may be compelled to make constitutionally-based judgements at the outset of the hearing to ensure that there is a fair trial.

IV. THE HEARING STAGE

Normally the Crown begins criminal proceedings by leading evidence. There is an interesting and unusual variety of admissible evidence that is permitted by law in this exceptional type of hearing. A trial has already taken place on the predicate offence and if the judge who is hearing the application conducted the trial, the evidence lead at trial is simply adopted as part of the evidence on the application. If the accused pled guilty, the court will hear evidence from the victim on the charge that constitutes the predicate offence. It is open to the offender to admit any allegations contained in the notice of application and no formal proof of those allegations will be required: s.753.1(2)(b).

➤ **the hearing stage:** this is the evidentiary and testimonial portion of the proceedings

➤ **the adjudication phase:** this is the final stage where a decision is made on whether to allow the application and in specified circumstances whether to make a finding that the offender is a long-term offender and to impose the penalty prescribed by the law. If both applications are unsuccessful then the offender is sentenced in the usual manner to a definite term of incarceration in a federal penitentiary.

III. THE ASSESSMENT OF THE OFFENDER

Under the former provisions of the Code, s.755 in particular, the crown and the defence were entitled to nominate one psychiatrist each to examine the offender. The old provision specifically directed the court to hear evidence from the psychiatrists and also evidence of any psychologist or criminologist called by either side. The new provision does not have these safeguards. It simply states:

> **"752.1** (1) Where an offender is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) and, before sentence is imposed on the offender, on application by the prosecution , the court is of the opinion that there are reasonable grounds to believe that the offender might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court may, by order in writing, remand the offender, for a period not exceeding sixty days, to the custody of the person that the court directs and who can perform an assessment, or can have an assessment performed by experts. The assessment is to be used as evidence in an application under section 753 and 753.1.
>
> (2) The person to whom the offender is remanded shall file a report of the assessment with the court not later than fifteen days after the end of the assessment period and make copies of it available to the prosecutor and counsel for the offender."

The new assessment regime may result in constitutional problems[3]. There are several reasons for this :

➤ The provision does not define the qualifications and the expertise of the assessor.
➤ The provision implies that a neutral and thorough assessment can be performed under the guiding hand of the prosecutor's application for the assessment and the court's endorsement by remand for assessment.
➤ The provision does not define the type of assessment required, the factors to be considered, the type of opinions that ought to be relied upon or how they should be weighed in this process.
➤ The provision presumes the existence of facilities and expertise to make balanced, neutral and unbiased assessments when there may be none or those that are available may be inadequate.

contested primary that a candidate is a Republican, for example, it takes a quantum leap of faith to believe that the electorate will expunge this representation from its collective memory when voting occurs. An independent candidate can run in a judicial election so, theoretically, there is no need to be affiliated with a party.

The fact that judges are elected, however, does not mean that the officeholder automatically faces an opponent at the end of a six year term. Some incumbents never attract opposition; others rarely avoid it. In certain parts of Ohio, numerous candidates battle over the few positions available. A serious effort to substitute a form of merit selection was mounted by the Ohio State Bar Association in 1990, but a disparate coalition of political parties and labor leaders vociferously campaigned on the theme "**Don't let them take away your right to vote for your judges**"! The issue was soundly defeated at the polls as a consequence.

PROBLEMS WITH JUDICIAL ELECTIONS

Canadian judges may wonder what it is like to run an election campaign, while attempting to preserve judicial independence and maintain the dignity of the office. It is, in a word, *difficult*. There are several areas of concern:

❑ campaign financing;
❑ an uninformed electorate;

- ❑ the impact on judicial independence; and,
- ❑ the personal toll.

Allow me to offer some of my views on these intertwined issues.

Campaign Financing

Campaigns are expensive. Television commercials, radio spots, yard signs, T-shirts for volunteers — all add up to thousands of dollars. The escalation in the cost of some judicial campaigns led our Supreme Court to adopt rules to govern campaign spending. In appellate races, during general elections, a judicial campaign committee may raise and spend no more than $125,000 - the limit is $62,500 in a contested primary.

Where does this money come from? Lawyers, traditionally motivated to contribute because of their stake in electing judges, are the primary targets for solicitation. Individual contributions of up to $500 and association contributions of up to $2,500 may be made. Candidates themselves are forbidden to solicit funds and must establish campaign committees to do so. Generally the successful campaign committee will include a number of prominent attorneys. A judge asking for the help of lawyers in raising money for a campaign is the most unpleasant part of the process. In essence, someone is paying for me to seek a job in public service. The public impression may still be that judges can be bought. When the campaign engine runs on money, how can that impression not exist?

"**752.** In this Part,

"court" means the court by which an offender in relation to whom an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;

"serious personal injury offence" means

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person, or inflicting or likely to inflict severe psychological damage upon another person, and for which the offender may be sentenced to imprisonment for ten years or more, or

(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault)."

For practical reasons, this is very important. The most likely scenario is where the offender has been convicted in the provincial court of a "serious personal injury offence", a crime of personal violence (other than murder) or a sexual offence (see s.752 definitions), and the conviction has prompted the prosecution to initiate PART XXIV proceedings. The court that heard the evidence at trial or that entertained a plea of "guilty" is best suited to judge the merits of the application. In all probability it will be easier to schedule the dangerous offender proceedings in the provincial court than in the superior court.

Where distance is a factor, as it often is in northern localities in the provinces and the territories, justice may be better served by holding the hearing at or near the home of the offender, or where he normally resides, since the offender may wish to call character evidence in response to the application made by the Crown. For offenders of aboriginal ancestry living in remote northern settlements this consideration goes to heart of the fundamental issues of fairness and justice under the Charter.

The statutory framework for proceeding under this Part of the Code contemplates four distinct phases:

➤ **the notice phase:** this involves four steps under S.754.

- an application under the circumstances set out in ss. 752 and 753;
- the Attorney-General consents in writing;
- seven days notice is to be given to the accused of the basis on which the application is being made; and,
- a copy of the application is filed with the court.

➤ **the assessment phase:** this involves an order for remand of the offender for an expert assessment under s.752.1. (I presume this means an assessment by a psychiatrist although this is not specified in the legislation. It could also include, or mean, an assessment by a psychologist or a criminologist.)

engaged in serious conduct of a sexual nature in the commission of another offence of which the offender has been convicted; and

(b) the offender

(i) has shown a pattern of repetitive behaviour, of which the offence for which he or she has been convicted forms a part, that shows a likelihood of the offender's causing death or injury to other persons or inflicting severe psychological damage on other persons, or

(ii) by conduct in any sexual manner including that involved in the commission of the offence for which the offender has been convicted, has shown a likelihood of causing injury, pain or other evil to other persons in the future through similar offences.

(3) Subject to subsections (3.1),(4) and (5), if the court finds an offender to be a long-term offender, it shall

(a) impose a sentence for the offence for which the offender has been convicted, which sentence must be a minimum punishment of imprisonment for a term of two years; and

(b) order the offender to be supervised in the community, for a period not exceeding ten years, in accordance with section 753.2 and the *Corrections and Conditional Release Act.*

(3.1) The court may impose a sentence under paragraph (3)(a) and the sentence that was imposed for the offence for which the offender was convicted stands despite the offender's being found to be a long-term offender, if the application was one that

(a) was made after the offender begins to serve the sentence in a case to which paragraphs 753(2)(a) and (b) apply ; and

(b) was treated as an application under this section further to the court deciding to do so under paragraph 753(5)(a).

(4) The court shall not make an order under paragraph (3)(b) if the offender has been sentenced to life imprisonment.

(5) If the offender commits another offence while required to be supervised by an order made under paragraph (3)(b), and is thereby found to be a long-term offender, the periods of supervision to which the offender is subject at any particular time must not total more than ten year.

(6) If the court does not find an offender to be a long-term offender, the court shall impose sentence for the offence for which the offender has been convicted."

PART XXIV of the Code sets out the jurisdiction of the courts to deal with "dangerous offender" and "long-term offender" applications. The jurisdiction is not exclusive, but dual. S. 752 reads as follows:

Judicial Independence

When an individual is successful and then hears cases involving former financial supporters, questions may arise over the matter of partiality. The new campaign rules attempt to address these concerns, but many problems remain. Because elected judges always understand that their unpopular decisions may be revived and emphasized when they seek office, the implications test the intellectual fortitude and grit of even the most upright and independent jurist. The vulnerability of elected judges must be recognized, for the smallest case can turn into a time bomb at election time if the media chooses to ignite it.

During my public appearances, most people do not understand that I cannot speak about the issues of the day: abortion, capital punishment, gun control, etc. Not surprisingly, they expect to be told exactly how that person intends to rule in these cases. I try to emphasize that it is more important that a judge be willing to set aside views and follow the law as it is given, rather than rule according to personal opinion. Intelligent dialog, unfortunately, is not always available during the campaign season.

The Electorate

It would be a mistake to assume that all voters make rational choices. After my first judicial race, a woman explained she had considered the two female candidates and voted for me because I was the blonde! This type of behavior is not isolated — when judicial candidates cannot discuss substantive matters, some voters choose, not on the basis of qualifications, but on the nicest

sounding name, the best smile, or, heaven forbid, on hair color! In my current campaign, for example, we have been trying to create opportunities to engage my opponent in debate on judicial processes without running afoul of the ethical rules relating to improper judicial speech. My opponent is an attorney who has never served as a judicial officer. He does, however, have a prominent political name and a familiar musical jingle to remind voters of its spelling. He has never run in an eight county district either, so I am hopeful that we have begun this contest on an even par. It may be difficult to spark interest in our contest, for voter apathy is real in a non-presidential year. Many who do show up to vote do not exercise their right to vote for the judges, so races are often determined on a percentage of the percentage. It is likely that less than thirty percent of the registered voters will actually vote for their appellate judge.

Personal Toll

Finally, let me address the personal toll that campaigning takes — festivals, chicken dinners, the impact on one's personal life and family. As a sitting trial judge, I feel the strain acutely, for it is difficult to leave my court during the working day. The geographical district covered by our appellate court consists of eight counties stretching from the Indiana border along the shores of Lake Erie, for about a four hour drive. A campaign is exhausting because it takes a great deal of mental energy to get into campaign mode. Each day, I must be motivated anew, positive in spirit so as not to

(3) Notwithstanding subsection 752.1(1), an application under that subsection may be made after the imposition of sentence or after an offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply.

(4) If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in a penitentiary for a indeterminate period.

(4.1) If the application was made after the offender begins to serve the sentence in a case to which paragraphs (2)(a) and (b) apply, the sentence of detention in a penitentiary for an indeterminate period referred to in subsection (4) replaces the sentence imposed for the offence for which the offender was convicted.

(5) If the court does not find an offender to be a dangerous offender,
- (a) the court may treat the application as an application to find the offender to be a long-term offender, section 753.1 applies to the application and the court may either find that the offender is a long-term offender or hold another hearing for that purpose; or
- (b) the court may impose sentence for the offence for which the offender has been convicted.

(6) Any evidence given during the hearing of an application made under subsection (1) by a victim of an offence for which the offender was convicted is deemed also to have been given during any hearing under paragraph (5)(a) held with respect to the offender."

The new legislation not only changes the law in relation to dangerous offenders but also introduces a new person for our consideration, the "long-term offender". The relevant provisions to this application are:

"**753.1** (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
- (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
- (b) there is a substantial risk that the offender will reoffend; and
- (c) there is a reasonable possibility of eventual control of the risk in the community.

(2) The court shall be satisfied that there is a substantial risk that the offender will reoffend if
- (a) the offender has been convicted of an offence under section 151 (sexual interference), 152 (invitation to sexual touching) or 153 (sexual exploitation), subsection 173(2) (exposure) or section 271 (sexual assault), 272 (sexual assault with a weapon) or 273 (aggravated sexual assault), or has

The Code provisions relative to "dangerous offenders" applications are:

"**753**. (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find the offender to bs a danger offender if it is satisfied

(a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure to restrain his or her behaviour,

(ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or

(iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or

(b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

(2) An application under subsection (1) must be made before sentence is imposed on the offender unless

(a) before the imposition of sentence, the prosecution gives notice to the offender of possible intention to make an application under section 752.1 and an application under subsection (1) not later than six months after that imposition; and

(b) at the time of the application under subsection (1) that is not later than six months after the imposition of sentence, it is shown that relevant evidence that was not reasonably available to the prosecution at the time of the imposition of sentence became available in the interim.

fail my small corps of volunteers. I must always be alert to opportunities to meet and greet voters, to shake hands, and to make small talk. Not everyone is comfortable doing this. I venture to say that most judges, who I think are inclined to introversion, probably have a more difficult time than do the candidates who are running for mayoral or other political offices.

Running a campaign is entirely different from the discipline of ruling on cases, of course. The organization and responsibility of the entire enterprise is under the control of the candidate. Public appearances, fund-raises, event scheduling to avoid conflicts, media advertising, volunteers, yard signs, T-shirts, endorsements, reporting requirements — are all part of the campaign shuffle. Neither law school, the bar exam, nor years in the practice of law, or on the bench, are adequate preparation for the experience. A robust constitution and heaps of stamina are absolute necessities.

A Bright Spot

I should not paint a completely bleak picture of the election process. If approached with the right spirit and an open mind, a campaign can be invigorating – particularly if family members or friends are involved. (Fortunately, my husband of thirty-one years is my greatest supporter.) A campaign allows me to become acquainted with people in the northwest region of my state. I have begun to appreciate the differing viewpoints of urban and rural citizens while still appreciating that they have much in common. It is amazing to learn that many people are thrilled to shake a judge's

hand. But it is a humbling experience too when they turn to me as their representation of justice. I go back to my chambers after a weekend of campaigning at the festivals with a renewed attitude that I am truly in the public service. It is difficult to be arrogant or haughty for long while judging pig contests at the county fair.

Winning an election provides the comfort of knowing that at least the majority was persuaded, for whatever reason, to vote for you and it also brings the satisfaction of knowing that the position is secure for another six years. Despite the misgivings that I have expressed above, however, on November 3, 1998, I am entrusting myself to the voters, seeking promotion to the appellate bench.

Whenever a separation is made between liberty and justice, neither, in my opinion, is safe.

Edmund Burke

Laughter is nothing else but a sudden glory arising from some sudden conception of some eminency in ourselves, by comparison with the infirmity of others, or with our own formerly.

Thomas Hobbes

Men show their character in nothing more clearly than by what they find laughable.

Anon

Dangerous Offenders in the Provincial Courts*

I. INTRODUCTION

Until recently, there was no practical reason why provincial court judges should take an interest in dangerous offenders. They were in the exclusive bailiwick of the superior courts and provincial court judges were not required to deal with them. However, that is about to change. There are several reasons why provincial courts can expect to see "dangerous offender" applications coming before them.

➤ In Canada, there is a growing public pressure to remove dangerous criminals from society on a long-term basis. An indeterminate sentence of incarceration meets this demand. The public is at once afraid of these criminals and at the same time frustrated with the criminal justice system, especially as to how it handles repeat offenders who have a history of conviction for violent and/or sexual offences.

➤ The provincial court is now the primary criminal trial and sentencing court in Canada. *Ergo* the expertise in criminal law matters resides in this court. The superior courts of criminal jurisdiction in the provinces commonly handled the most serious cases - this is no longer true.

➤ Proceedings in the provincial court are scheduled more easily and tried more expeditiously.

➤ There are more such proceedings occurring now than ever was contemplated in the past: between 1977 and 1992 an average of eight people were sent to prison each year as dangerous offenders. From July 1996 to July 1997 in Canada 39 people were declared "dangerous offenders"[1].

Let me review the basic features of dangerous offender proceedings.

II. THE LEGISLATIVE FRAMEWORK: PART XXIV OF THE CRIMINAL CODE

The Criminal Code of Canada has been amended recently in relation to "dangerous offenders". Bill C-55 was enacted by Parliament and proclaimed in force on August 1, 1997[2]. This legislation changed the law significantly and in ways that will likely engender controversy. The changes resulting are procedural and substantive. They have profound legal and constitutional implications. Considerable litigation can be expected to arise until the matters of principle and practise consequent on this legislation are ultimately resolved by the Supreme Court of Canada.

* by Judge Timothy, Provincial court of Saskatchewan

A.: Down to the wharf in the Harbor the boys would be smoking it and they called it "weed" and "marihuana"

Q.: Why do you accuse that your wife disabled you?

A.: To bring in the grocery boy to go in the bathroom and do d'is and d'at.

Q.: This and that of a sexual nature?

A.: That's what I said.

Q.: Have you any evidence of what your wife used to discharge marihuana into your buttock or any evidence of the missiles, the darts, as you described them?

A.: Neither. But I have evidence.

Q.: Where?

A.: My rear?

Q.: Your rear?

A.: My rear.

Q.: There?

A.: Here. Look here. I'll flick my dungarees and long johns and you'll see the red marks from the marihuana darts.

Q.: Spare the court. Spare me. If you say you have a tattoo of red marks about your buttocks I accept that without taking a view.

A.: Fine.

Q.: But I take it . . .

A.: Your not taking them.

Q.: I mean to say, the buttock marks, there is nothing in the nature or quality of these marks on your backfield that spell marihuana darts.

A.: I doubt there'd be any spelling down there.

Q.: You admit you brought lunch cooked by your wife to a village common, interfered with your wife's bathroom privacy, and falsely accused her of using marihuana?

A.: That and more. Everyone knows in the Harbor. I've asked people what they think. Anyhows, its time to go. If she'll lay off my skiff and gear and my bank account, she can have the house, the furniture, the divorce and, yes, her grocery boy.

Q.: That's it.

A.: And bring my lunch to me where I'll go to live.

Q.: Thank you.

This is an excerpt from the cross-examination of the Repondent in a divorce cause. It was provided by and is used with the consent of counsel for the Petitioner, who is referred to at places throughout the transcript. The name of the Repondent has been omitted out of respect for his identity. If a reader has questions about the meaning of any of the terms, e.g. "tom cod", "skiff", and "pokey", that appear in the text the Editor will be happy to interpret. **Ed. Note.**

IN A LIGHTER VEIN

David C. Day, Q.C., xx'd.

We will, Mr. C., be dealing with the ground for divorce first. Do you understand? Today I'll only ask you about the divorce.

A.: I reckon I'm here to tell the truth, the whole truth, whatever you ask.

Q.: Face Her Ladyship, Mr. C., and answer the questions I put to you.

A.: Face the lady? Well now, I'll face my Lord.

Q.: No, the Judge, being a woman, is addressed in the Court as "My Lady".

A.: I know she is a lady. I don't need no grade 2 to figure that. But I mean. I'm going to talk to the Lord, my Saviour. The only salvation for me is there.

Q.: Then talk to Her Ladyship and to your Lord at the same time.

A.: That, I will. And my Lady, let me ask you this. I've got to take my skiff out to check my [cod] traps by 2:00 o'clock. Can you put a rush on Mr. Day to be done by noon so I can get back to Petty Harbor to my traps.

Per curium: Counsel, we'll dispense with the mid-morning recess, if necessary, to dispose of this witness this morning.

[Counsel agrees.]

Mr. C.: Dispose of me? I thought I'm only hear to tell what I knows. I know she'd like to dispose of me.

Per curium: By dispose, I mean, complete your evidence.

Day, Q.C.: Mr. C.. Your wife asked for a divorce on the ground of mental cruelty. You deny the events she has stated in the, in her evidence, as her reasons for claiming mental cruelty. Were you present for and hear, did you sit in this room and hear all her evidence?

A.: Yes. I've an ear for what she said. I'll pray for her.

Q.: I pray you answer my questions. The first question involves your wife's complaint about your treatment of meals she prepared for you.

A.: The meals?

Q.: Your wife stated you took food from the dinner table, which she prepared for you, and treated a woman on the wharf.

A.: How would you want me to treat her? She was a widow and alone in the harbor. No pension. Little pokey [state social assistance] and as rexic as a tom cod.

Q.: Rexic?

A.: Pale as ground fog at noon.

Q.: You mean anorexic.

A.: That's what I said.

Q.: Did you get your wife's approval?

A.: No. She served me my lunch. The lunch belonged to me. I could have heaved she in the cellar.

Q.: I beg your pardon – "heave your wife in the cellar"?

A.: No, Mr. David, heave she, the meal, in the cellar.

Q.: I had not considered who owns a meal in a family home once put before the consumer.

A.: No, and you probably never set traps.

Q.: And you will never reach your traps, unless you answer, if you can, what is being asked.

A.: Come to think of it, a proper lunch bucket she was.

Q.: Who?

A.: My wharf friend.

Q.: She collected lunch from several people?

A.: No. I bought her lunch down to her, shared my lunch with her, but then I hears that some of the boys were oral with her in the back of […]'s grocery van.

Q.: I trust you shared only the home cooked variety of lunch with her.

A.: You said it.

Q.: So you admit you brought lunch cooked by your wife, without her knowledge or consent, to the docks in Petty Harbor where you openly shared the lunch with another woman who was known to provide men from the harbor with a buffet that was the talk of the shore?

A.: You said it.

Q.: Next you testified your wife was unfaithful in the bathroom of the family home.

A.: That she was.

Q.: You testified, I summarize: When you would go out on the [fishing] grounds, the […] supermarket delivery boy, about 16 years, came by bicycle - a two wheeler I assume - to the family home, where he took or was taken by your wife to the bathroom where acts contrary to marriage vows took place?

A.: Yes.

Q.: And to investigate, you went to Zeller's, purchased a tape recorder and tape, got in under the family home, cut a hole up into the bathroom floor, and inserted the battery-operated recorder in the hole to record these alleged acts?

A.: The tape was cheap, on special. Got balled up. I only got a few gurgling sounds.

Q.: Did you see the delivery boy enter the family home before you got underneath the house?

A.: Now there's a question. I was under the house two nights and a day before I heard anything up there.

Q.: Did you hear the boy's voice in the bathroom?

A.: Not that I can say.

Q.: Your answer is "no"?

A.: Yes. My answer is no.

Q.: Did you hear male-sounding groans or grunts or growls or gratefuls in the washroom.

A.: Not that I can say. Just some gurgling.

Q.: Perhaps your stomach was rumbling from lack of lunch for two days?

A.: True, true, but I had a bottle. London Dock.

Q.: You should have been familiar with an empty stomach by now, what with dispensing your lunch to wharf widows.

A.: I was also familiar with the bottle.

Q.: And you drank from that bottle before you thought you heard gurgling.

A.: And I drank, yes, some of the rum

Q.: And you drank enough that you got drunk before you thought you heard gurgling?

A.: I had on a buzz, yes.

Q.: You don't know what you heard? Could have been the London Dock rum falling through your plumbing.

A.: Gurgling. I played the tape.

Q.: Mr. C.. We all heard the tape. It reminded me of the Rolling Stones on a good night.

A.: Like someone licking their chops.

Q.: You saw nothing, did you?

A.: No, and it wasn't easy to remember.

Q.: Because you were drunk.

A.: Because she shoot marihuana darts into me.

Q.: Marihuana darts?

A.: Yes, sirree. After tea, I'd be sot in my chair watching All In The Family and Three In The Company. And she'd, secret like, shoot darts in me and bring in the boy from the grocery.

Q.: Darts?

A.: In my behind

Q.: How did your wife manage that? What? Were you doggy style in the chair? Or, did she come at you through the cushions?

A.: I'd be walking - this wasn't under the house - this was other time. We would have supper.

Q.: I suppose we'll next learn you shared supper with someone.

A.: I'd have my supper ate and I'd go for the chair to watch T.V. and, sudden like, I'd feel pain to me rear and I'd remember nothing for hours. Then I'd wake and there would be the smell of marihuana.

Q.: How did you know the smell of marihuana.