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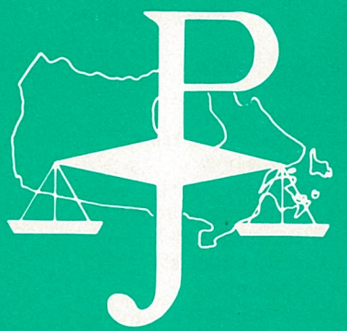

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# PROVINCIAL JUDGES Journal

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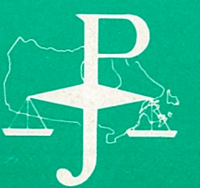
PROVINCIAL COURT JUDGES



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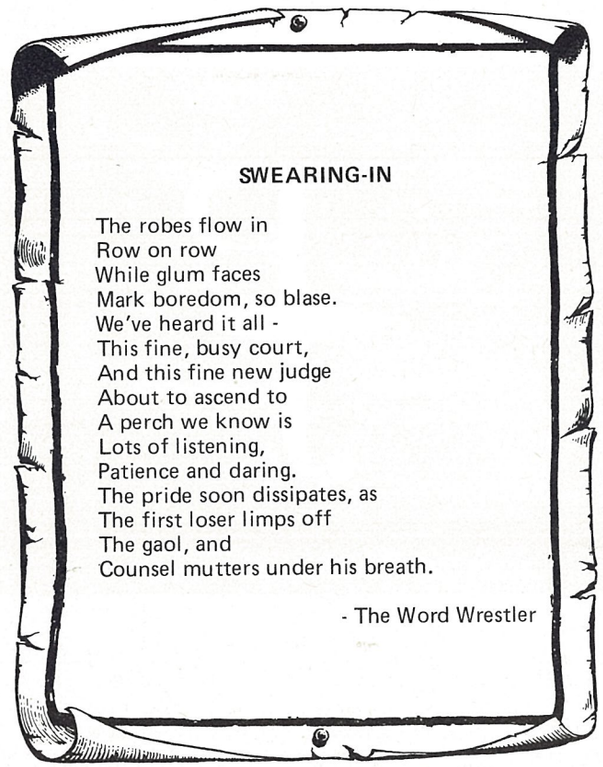


### SWEARING-IN

The robes flow in
Row on row
While glum faces
Mark boredom, so blase.
We've heard it all -
This fine, busy court,
And this fine new judge
About to ascend to
A perch we know is
Lots of listening,
Patience and daring.
The pride soon dissipates, as
The first loser limps off
The gaol, and
Counsel mutters under his breath.

- The Word Wrestler

because Mr. Batten does not pursue these questions with any of his subjects. He does not dig for the facts. He accepts the comments without challenge even when they condemn the very system lawyers work in. The result of his endeavors is an optimistic and entertaining book, although not totally accurate.

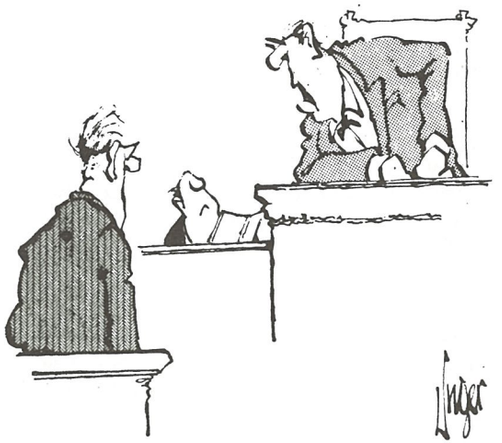
# Other Views

**(Continued from Page 30)**

of paying the legal costs for the defendants acquitted of charges or given discharges. The study recommended paying lawyer's bills and witness's expenses, as well as lost income, travel costs and accommodation expenses while at trial. If the investigation and prosecution by the Crown were improper, then additional amounts would be assessed against the Crown as punishment and deterrence, the panel recommended. Frank Muldoon, the current president of the Law Reform Commission of Canada, admits that the study was shelved, however. "The Commission will consider the problem of costs again in several years, but that will be at the end of a review that we plan to do on the entire process of criminal law," he explains.

That's scant help for the thousands of Canadians who, in the meantime, will face charges they can only beat by paying the price of justice. That burden — of having to give up much or all of what you own to defend your honor and keep your freedom — is one of the burdens of Canadian life today. There is no meaningful insurance against it and no financial cushion once the process starts. Pray it doesn't happen to you.

*- The Financial Post Magazine*



**"What does the Guinness Book of Records say about dishing out long sentences?"**

## Dates to Remember

| | | |
|---|---|---|
| June 6 - 10, 1982 | Atlantic Regional Seminar | Charlottetown, P.E.I. |
| September 14 - 17, 1982 | C.A.P.C.J. Annual Meeting | Bessborough Hotel, Saskatoon, Saskatchewan |
| Oct. 26 - Nov. 2, 1982 | New Judges' Training Program | Park Lane Hotel Ottawa, Ontario |
| July 26 - 29, 1983 | C.A.P.C.J. Annual Meeting | Explorer Hotel Yellowknife, N.W.T. |
| Sept. 24 - 28, 1984 | C.A.P.C.J. Annual Meeting | Hotel Newfoundland St. John's, Nfld. |



# President's Page

**By Senior Judge Robert B. Hutton**

My letter which appeared on the President's page in the March 1982 issue of the Journal was written on 13th January, 1982 prior to the Executive Meeting held in Ottawa on 23rd January, 1982. Your Editor has already reported on matters dealt with at that meeting in his "In Brief" report at page 3 of the March issue.

One matter that has changed is the site of the next Executive Meeting. It was hoped to have that meeting and a meeting of the Convention 1982 Committee and the Finance Committee at the Bessborough Hotel in Saskatoon being the site of the 1982 Convention but it was not possible to obtain reservations at that time. As a result with the assistance of Judge Howard Collerman the meetings of the Convention, Finance and Executive Committees will all take place at the International Inn near the Winnipeg Airport on 11th and 12th June, 1982. Due to the constitutional requirement for 90 days notice of various matters prior to the Annual Meeting, this Executive Meeting had to be scheduled before 19 June, 1982.

As your President, I have continued my travels. I attended a meeting of the Executive of the Ontario Association (as its Second Vice-President) in Mississauga, Ontario, on 19th and 20th February, 1982 and a subsequent special meeting of that Executive on 17th April, 1982 at Ramada Inn, Toronto Airport West. The special meeting was to come to grips with a problem that had developed in the operation of an Ontario Provincial Courts Committee of which we in Ontario have been so proud. We hope that the operation of the Committee will be improved by the decisions taken at that meeting.

On 28th March, 1982, I travelled to Regina where I attended the Western Regional Education Seminar until 1st April, 1982. Judges Bobowski and Kucey worked out a most informative program assisted by many people of talent in the Regina area. A program on the Constitution and Charter of Rights and Freedoms was put on with the able assistance of the Canadian Instutute for the Administration of Justice. Mr. Justice Roy Matas of Winnipeg chaired that program with a panel of academic legal and judicial talent. A similar program will be put on in Charlottetown June 6th to 10th, 1982 for the Atlantic Regional Judges.

As President of this Association I was invited to a Symposium on Race Relations and the Law put on by the Secretary of State for Multiculturalism in Vancouver which I attended from 22nd to 24th April, 1982. The overall Chairman was Chief Justice Jules Deschenes of Quebec and the program was most interesting. The opening paper made a plea to create a whole series of new criminal offenses to prevent or control racial descrimination and bigotry. Subsequent papers and addresses mellowed that position noticeably. I was glad to be there to speak of the concerns of the judiciary especially in the matter of creating new criminal offences at a time when the overall review of the Criminal Code seems to be proceeding on the principal of restraint in creating or keeping criminal offenses.

Judge Robert Conroy of Saskatoon is now the President-Elect of the CAPCJ and on his behalf I request that he be given as much advance notice as possible of any invitations he may be receiving to attend provincial meetings, conferences or seminars.

I regret that I have no improvement to report in the income tax matters I have previously discussed on the President's Page in connection with deductions for registered pension plans or RRSPs.

Again my appreciation for all the assistance I have and am receiving from all members of the Executive Committee and Chairpersons.

# In Brief

## ONTARIO COURT SECURITY STUDIED

The Attorney General for Ontario has announced the formation of a special committee to review security in court buildings.

Establishment of the committee follows consultation with the Chief Justice of Ontario, the Honourable W.G.C. Howland and the Chief Justice of the High Court, the Honourable G.T. Evans.

Mr. McMurtry said the committee will be chaired by A. Rendall Dick, Deputy Attorney General, and will include Chief Justice Howland, Chief Justice Evans, the chief judges of other levels of the courts in Ontario, Senior Judge Douglas Coo of the York County Court, representatives of the Law Society of Upper Canada including at least one lay member of the Society governing body, and representatives of the Advocates Society, the Criminal Lawyers Association, the Canadian Bar Association, the County of York Law Association and senior officials of the Ministry of the Attorney General.

Chief Justice Howland, as Chairman of the Bench and Bar Committee, has agreed to have the Bench and Bar Committee receive and consider the reports of the special security committee in order that the reports may be accompanied by any recommendations that the broader-based committee may make to the Attorney General.

The Bench and Bar Committee has a broad base of representation from the senior members of the judiciary, principal organizations of the Bar and senior representatives of the Attorney General and the federal department of justice and is well-equipped to make recommendations as to what additional security precautions are appropriate, Mr. McMurtry said.

The Attorney General expressed the hope that this special committee will be able to make at least an interim report to the Bench and Bar Committee at its next meeting in April.

The Special Committee will meet as soon as possible to undertake its review which will include the interim additional security measures which the Ministry of the Attorney General put in place immediately after the shooting in Courtroom 4 at Osgoode Hall March 18, 1982. These measures will remain in place pending reports from the police.

"Court security is an issue of direct and urgent interest to the public and those engaged in the administration of justice", Mr. McMurtry said. "I'm confident that I will receive constructive and effective recommendations for the improvement of protection in our courts and insofar as it's consistent with security matters, I'll make the public aware of these recommendations."

## "DEAR COURT OF APPEAL . . ."

*The B.C. Provincial Judges Newsletter recently published a note about reports to the Court of Appeal, as follows:*

The Court of Appeal has now designed a form to be used by Trial Judges when making reports to the Court of Appeal in criminal sentence appeals. This, I think, is a good thing. Even in recent years some reports forwarded to the Court of Appeal by Trial Judges were perhaps rather too individualistic and colourful.

I do expect, however, that it has been some years now since the Court of Appeal received a report such as the one which follows. I vouch for its authenticity.

The accused was charged with possession of a gun for a purpose dangerous to the public peace. He was not represented by counsel at his trial. Initially, the Trial Judge found him guilty, but upon learning the consequences of that verdict, he reversed himself and pronounced the accused innocent. The Crown appealed. The learned Trial Judge reported to the Court of Appeal as follows:

"When I suggested giving Mr. M. 6 months suspended sentence, I guess I was thinking out loud, because I wanted to find



# Book Review

**Lawyers, by Jack Batten**
**(Macmillan of Canada, Toronto 1980)**
**241 pages.**

by L. Fainstein

*The author is a member of the Manitoba Bar.*

This is another book about lawyers written by a lawyer. Louis Nizer, F. Lee Bailey and others have proven this to be a successful formula for a bestseller. Mr. Batten deviates from the formula only by covering the stories of several successful lawyers instead of his own.

Jack Batten begins **Lawyers** with a prologue describing his legal career. He was called to the Ontario bar in 1959. He practised general law in a medium-size Toronto firm until 1963, when he became disenchanted with the legal profession and left to become a writer. It was writing for the Toronto Star and the Globe and Mail, reviewing rock bands, that brought Mr. Batten back into contact with Law and lawyers. In 1977 he was called as a witness for Keith Richards, guitarist and founding member of the Rolling Stones rock group, who had been charged with possession of heroin for the purpose of trafficking. Mr. Batten was to demonstrate that Keith Richards was gifted and wealthy and had no need to traffic in heroin. The outcome of this trial opened a Pandora's Box of controversy over the idea of a law for the rich and a law for the poor, as Keith Richards was found guilty of the lesser offence of simple possession of heroin and sentenced to perform a benefit concert. Austin Cooper acted on behalf of Keith Richards and he impressed Mr. Batten with his excellence: his cool, resourceful and persuasive style. This stirred Mr. Batten's original feelings about the law and an admiration for people who have made successes of themselves at the bar.

The book is a series of conversations with lawyers who have been successful in different fields of law and in different ways. The one qualification the lawyers share is — they have stirred respect in the author.

This search produced a highly readable and interesting book. The narrative style makes the reader feel he is sitting with the author conversing with some of the lawyers he too may respect. The book deals with the stories of seven lawyers in depth and eight others in an anecdotal way, in short chapters titled, "Adjournments". These adjournments are interspersed with the more detailed interviews and wet the appetite for the next discussion.

Batten speaks with many lawyers from child advocate to corporate magnate who naturally hold differing viewpoints on the practise of law. Shelly Altman, a Toronto criminal lawyer, describes the practise of law as a game but seriously played. Paul Moore, of Tory, Tory, Deslauriers and Binnington, told Mr. Batten he felt socially useful and a productive member of society in arranging corporate takeovers and mergers. Jeffery Wilson a founding member of Justice for Children and author of a textbook for lawyers titled **Children and the Law** told the author, "people come here with a big alimony case and I tell them the fee you pay me will help some kid. I lose money on the children and pay the freight with the adults."

The book fulfills much of what it sets out to accomplish. But in the end, the reader may not be totally satisfied. Mr. Batten provides an entertaining read and some insight into the famous or talented in the legal profession. However, the treatment does not go far enough because it is too superficial. The reader is left feeling there ought to be more to the story, a deeper understanding of what allows this group to succeed. The lawyers in the book are represented as uniformly confident, fulfilled and happy. This does not seem to accurately portray the profession or any successful group for that matter. Batten was disenchanted himself when he left the profession yet he never attempts to delve into the negative aspects of practise.

Mr. Batten encounters comments that reflect moral and ethical dilemmas involving lawyers. Jack Majors describes the practise of law as ludicrous. He finds a settlement based on the toss of a coin to be perfectly fair. "Justice prevailed." Is this really how the law works? Does Mr. Major have any difficulty justifying contributing to a ludicrous system? We are left guessing

## AND JUSTICE FOR SOME
### by Andrew Allentuck

*The author is a Winnipeg based writer and economist. This article first appeared in the Financial Post Magazine.*

At the age of 46, Allen Spraggett, Toronto broadcaster and author of 14 books, seemed to be flourishing in the unusual career of making metaphysics pay. Host of CBC's coast-to-coast television show, "Beyond Reason," as well as of a radio program on Toronto's CFRB, he had a hefty income, a devoted family and a national reputation as an expert on the supernatural. Suddenly, his good fortune changed. On February 20, 1979, Toronto police served a warrant charging him with two counts of gross indecency with minors, after an investigation by Winnipeg police into homosexual activities in that city. Within a week, the CBC had replaced Spraggett with another host for the series. Spraggett also quit CFRB.

At trial in October, 1979, Spraggett steadfastly denied the charges. Impressed with the unwavering position he took and with the contradictions raised by the testimonies of two 15-year-old witnesses (who claimed he was with them at times when his old airplane ticket stubs showed he was not even in Winnipeg), the court acquitted Spraggett, though the presiding judge delayed releasing his decision for five months. Said Spraggett at the time of his acquittal, "I hope no other innocent person has to go through the agony that my wife and five kids have endured. I've discovered what hell is." Later, reflecting on his travails, Spraggett noted that though he was unemployed as a result of the publicity surrounding the arrest and trial, he had, in fact, been pronounced by the judge "a man of unimpeachable character." "I must be one of the very few men in Canada to have received such an imprimatur from one of Her Majesty's courts. Now, will it get me a job?"

What happened to Spraggett can happen to anyone. As Manitoba Attorney General Roland Penner admits, "Police anywhere can lay a charge without adequate investigation."After they do, says Penner, "a Crown prosecutor begins a process in which the costs to the defendant — of lawyers, of lost income during trial and perhaps time in jail awaiting proceedings, of loss of reputation, of standing in the community and perhaps even of one's job — will be devastating."

Canada's legal system currently provides for the criminal prosecution of anyone, no matter how high the price to the accused. Unlike a civil trial, in which you will probably have some of your costs paid by the losing side if you win, criminal law usually provides no financial relief for the defendant acquitted of the charges against him. It's a system of justice only the very wealthy and the very poor can afford.

For the rich, able to have the best lawyers and to pay their bills with ease, there is no financial problem. For the very poor, able to satisfy legal-aid criteria that limit the annual income of the eligible clients to sums that vary from $1,200 in Newfoundland to $9,600 in Alberta and British Columbia, it's not too costly either. But for the middle-class guy with a job and a family, the risks of wrongful prosecution are very real indeed. For him, an acquittal alone will be cold comfort. As Joel Pink, a Halifax lawyer, points out, defending a serious criminal charge such as murder can cost a client $20,000 in his bailwick.

The immense cost of defending criminal charges and the near impossibility of receiving compensation for lost income and reputation if one *is* acquitted make many defendants plead guilty, says Winnipeg trial lawyer, D'Arcy McCaffrey. McCaffrey, who co-represented Spraggett in 1979, adds that white-collar crime — prosecutions for problems arising in bankruptcies, selling methods and financing techniques, for example — is particularly expensive for police to investigate and even more expensive to defend. "A man whose company is charged with commercial crimes can face dozens of charges himself. Only the very rich can afford to defend these cases."

The new truth of criminal law is that though the police alone do not have the power to send someone to jail, they do have the power to bankrupt him. Says Ed Ratushny, professor of law at the University of Ottawa: "A Mountie once told me that he knew he could cause anybody hardship just by laying charges. 'All cops know they have that power' is what he told me. That's the frightening thing about the failure of the law to compensate the innocent for the cost of defense."

Canadian authorities are aware that the price of justice can be terribly high for the innocent defendant acquitted of the charges against him, but they are in no hurry to change the system. A Law Reform Commission of Canada panel studied the problem in 1973 and recommended a policy

**(Continued on Page 32)**



out what would happen to the revolver if such a sentence was passed, it seemed that when I mentioned the 6 month suspended sentence Constable R. jumped and took it as a fact, when he quoted the criminal code and said that revolvers would be confiscated and turned over to the Crown; with this I said I find the man not guilty.

"The reason I was thinking of a suspended sentence was that I had a strong feeling that if the R.C.M.P. did not win the case they would take it to a Higher Court and I thought Mr. M. had already had enough of court as this was his first time in Court, what with losing his wife and then the court he was I felt on the edge of a nervous breakdown.

"I may have the wrong impression of a suspended sentence, I would appreciate it if you would be so kind as to correct me; I feel that a suspended sentence should only be given when there is a reasonable amount of doubt that the Respondent did commit an offence. The next interpretation of a suspended sentence is; suppose that an honest upstanding citizen has through not knowing the law caused a crime to happen or did commit a crime but not with intent and that it would cause the family terrible hardships, then I would give a suspended sentence to make the Respondent realize that there is a law that must be abided by and this would also make him be a little more careful in the future; in this way I feel that it does not necessarily mean that the man should have a criminal record not that he did commit a crime; this way I feel that suspended sentence does more good than harm.

"As I have said, I may be wrong about the suspended sentence and I honestly would appreciate it if you would be so kind as to give me a little of your valuable time and correct me; so far I have been able to go to bed and sleep and not lose any sleep over thinking I have done someone a hardship in the courtroom; also there is only one man I have to live with and that is the fellow that I have to face in the mirror in the mornings; I have made some mistakes but I try to learn by them."

## CRIMES COMPENSATION REPORT IS SUBMITTED

Since its inception in 1971 the Criminal Injuries Compensation Board has provided a total of $3,134,372 in disbursements to victims of crime, according to the board's annual report for the year ending March 31, 1981 tabled in the Legislature by Attorney General Roland Penner of Manitoba.

The main crimes in the cases accepted for compensation were common assault (accounting for 48 per cent of all cases), robbery (13 per cent), murder (11 per cent), attempted murder (nine per cent), cause bodily harm with intent (six per cent), and dangerous use of firearms (five per cent).

As of March 31, 1981, a total of 58 pensions were being paid — 29 for permanent disabilities and 29 to dependents in fatal cases.

Of 1,416 claims received by the board since its inception, 793 qualified for benefits, 156 were withdrawn and 467 failed to meet the requirements set by the Criminal Injuries Compensation Act. The most frequent causes of non-acceptance were lack of evidence of a scheduled crime, the benefit entitlement being less than the $150 minimum requirement and refusal to report or co-operate with the police in the investigation of accidents.

Total benefits paid in the year ending March 31, 1981 increased to $448,509 — from $421,386 paid out the previous year. However, there was a sharp decline in the value of awards made between the two years — from $1,059,741 in 1979-80 to $527,984 in 1980-81. The value of awards refers not only to benefits but also to the capital value of pensions awarded.

## ONTARIO NOTES

The Ontario Provincial Judges Association (Criminal Division) announces the following appointments: Judge Gary V. Palmer, Barrie; Judge E. Gordon Hachborn, Toronto; Judge Norman Bennett, Hamilton; and Judge Charles Scullion as Senior Judge, York-College Park, Toronto.

Judge Michael J. Cloney of Toronto, who was appointed on January 19, 1961, retired from the bench in January, 1982. He was elected an Honorary Life Member of the Ontario Association in recognition of his distinguished service to the Association and the Bench.

Judge John W. P. Anjo of Barrie resigned from the bench effective April, 1982. He was elected an Honorary Life Member of the Association in recognition of his contribution to the bench.

The Association note with regret the death of Judge Anthony Falzetta of Sudbury on January 3, 1982. He is sadly missed by all who knew him as a member of

the bench, the Association and as a friend.

The Ontario Association has just completed its Annual Meeting on May 26-28 at the Meadowvale Inn in Mississauga. The educational theme of the conference was "Probation – Present and Future".

## BRITISH COLUMBIA NOTES

The Provincial Judges Association of British Columbia announces three new appointments to the provincial bench. They are Judge John Michael Hubbard (January 15, 1982), Judge Charles Ernest Bakony (January 15, 1982) and Judge Dorothy Eleanore Jaques (February 1, 1982).

Judge William L. Ostler has retired, effective January 1, 1982, and Judge George Lamperson, a former B.C. provincial representative to the C.A.P.C.J., was appointed to the County Court of Yale, effective March 22, 1982.

The B.C. Association notes with regret the deaths of Judge Lorne Pearce on February 26, 1982, and Judge Leonard J. Keffer on February 14, 1982.

## USE OF FRENCH EXTENDED

The right to use the French language in civil trials becomes effective April 1 in designated areas of Ontario, Attorney General R. Roy McMurtry announced.

The designations will take effect in the County and District Courts and the Surrogate Courts in the following areas: the District of Algoma, the District of Cochrane, the County of Essex, the Judicial District of Niagara-South, the District of Nipissing, the Judicial District of Ottawa-Carleton, the United Counties of Prescott and Russell, the United Counties of Stormont, Dundas and Glengarry, the District of Sudbury, the District of Timiskaming, the County of Renfrew and the Judicial District of York.

The right to use the French language in these areas in the Provincial Courts (Family Division) and the Provincial Offences Courts also will be extended to these areas effective April 1.

Mr. McMurtry also announced that the Supreme Court of Ontario will be designated for hearing in French in the Judicial District of Ottawa-Carleton, the United Counties of Prescott and Russell and the Judicial District of York.

The designation means it will be possible to be heard in the French language at any level of the court in Toronto, Mr. McMurtry said.

"Commencement of this service today represents an historic milestone in my Ministry's continuing effort to expand services in the French language," Mr. McMurtry said.

He added that a broad range of civil court services in the French language, from matters under the Highway Traffic Act to divorce proceedings, will be available to the vast majority of Ontario francophones in their own communities. This is in addition to the right to be heard in French in criminal trials, which has been available since December 31, 1979, to 100 per cent of the Francophone population.

## PROJECT ASSISTS CRIME VICTIMS AND WITNESSES

Attorney-General Roland Penner has announced that the Manitoba and federal governments have agreed to renew for another year a pilot project designed to provide advice and assistance to victims of crime and to witnesses called to testify in criminal proceedings.

Mr. Penner said the Government of Manitoba has allocated $42,465 towards the Victim-Witness Assistance Project (V.W.A.P.), while the Federal Government has agreed to contribute $55,026. The project is initially limited to Winnipeg, with a view to its later expansion to the remainder of the province.

The project assists victims in obtaining information about possible compensation from the Criminal Injuries Compensation Board and refers them to available social services such as the City of Winnipeg Health Department, Age and Opportunity Centres, the Rape Crisis Centre, Osborne House (for battered women) and other agencies.

The attorney-general added that a current inventory of available services would be maintained by the project co-ordinator to provide a general referral service for crime victims requiring counselling, financial aid, health care and other assistance. I would also provide information to victims about the status of the criminal investigation.

Mr. Penner said the project has resulted in the establishment of a Witness Reception Centre in the Provincial Judges Court Building, 373 Broadway, which provides all necessary services and information to witnesses. Here they receive their witness fee vouchers, redeemable at the clerk of the court's office immediately. It



its law enforcement mechanisms failed to prevent the crime. Whether one finds that point of view analytically persuasive or not, it is close to a compelling reason for judges to become better attuned to victim problems, should simple humanity not suffice.

There is no need to deal with the question of whether or our court system *causes* crime, but our heads are planted firmly in the sand if we do not recognize that we *permit* a fair amount of it. What do I mean by this? Our legal and constitutional protections make life a bit easier for the accused, and the "accused" is a group which overlaps in large measures with the "guilty."

While its common law origins may have related to reliability of evidence surely by the end of the Eighteenth Century when the Fifth Amendment was drafted, it represented a social policy decision that certain types of evidence or ways of obtaining it were not ethically appropriate. This is not meant to disparage the Fifth Amendment, but we should see it as a protection for the accused which has costs and trade-offs, just like virtually everything else of consequence in our governmental life.

Similarly, we can see the Fourth Amendments as a social policy-dictated shield, not a rationally-determined rule of evidence, and the same may be said about the exclusionary rule. All are vital to our concept of justice and we live with their occasional vicissitudes just as we demand that our enforcement officials live with them.

These are the tough parts of the Bill of Rights (quartering of troops and freedom of petition being now pretty well handled): without them, we would doubtless be safer from crime but less safe from our keepers. But we must ethically realize the consequences for those who are less protected by our freedoms than they would be by totalitarianism.

**What judges can do**

Philosophical questions aside, what can or should judges do, practically speaking, for victims? Here's a beginning list:

Make sure what your intellect tells you about each witness, especially an alleged crime victim, is put into effect. While a lawyer or doctor is *inconvenienced* by a third order to appear, a carwasher is *fired* for it. Work the hours out accordingly.

Give everyone, especially the crime victim, the dignity of explanations. A judge can explain reasons for continuances, the bane of all lay witnesses, in seconds. An apology from the bench for the inconvenience has hurt very few judges.

All available studies of witness complaints show that little things mean a lot: Do you have free parking for witnesses near the courthouse? Are your subpoenas understandable? Do your court personnel treat them politely?

Use your powers to improve physical conditions for witnesses, including victims, in both long and short-term ways. Most of the nation's courthouses require victims to wait in the same crowded hallways as bailed-out defendants; this is unconscionable. You can use the prestige of your office and relations with the media to aid physical plant improvements. In the short run, can't a waiting victim or witness be made more comfortable in an empty jury room or a neighboring courtroom than in the hall?

Acquaint appropriate victims with compensation statutes or have court personnal, the prosecutor or police do it. Be aware of witnesses who may need fee awards where they're available.

Encourage public or private creation of victim creation of victim service projects. Senior citizen, Junior League and other organizations are often seeking opportunities to help and can perform numerous tasks (e.g. information, assistance in property return) for victims.

Be tuned in to situations where witness intimidation by anyone (it may well not be the defendant) is going on in your courtroom. If you think it's happening, it is. Don't assume it's inherent, so was polio. Use your office's considerable power to compel the attention of police, prosecutors and perpetrators to intimidation in your court – and let them know it won't be tolerated.

Apparently radical techniques such as victim allocation (asking the victim's view before sentencing) aren't for every judge, but they don't seem to have brought about the end of the world where they've been tried. It is alarmist and inaccurate to equate such practices with letting laymen do the sentencing.

None of this is revolutionary, but it's a start. We judges are representatives of easily the most humane system for dealing with the accused on the planet. I merely propose beginning to treat victims equally.

*-Judicature*

# Other Views

## ARE JUDGES RESPONSIBLE FOR VICTIMS, TOO?

**by Judge Eric E. Younger**

*The author is a judge on the Municipal Court in Los Angeles and Chairman of the ABA Criminal Justice Section Victims Committee.*

It is a commonplace that, as America has become more urbanized and institutionalized, contacts between individuals and their governments have become more routinized. The crime victim has become "name" on line 2a of the police report, line 3 of the prosecutor's subpoena list and part of the unpronounceable morass of shorthand in the court reporter's machine. The standard description of this state of affairs is the "victim as evidence." Victim compensation legislation, which now exists in half the states, represents only the beginning of a recognition that crime victims have been almost as mistreated by society – by "the system" – as by the criminals.

Three institutions bear the primary responsibility for victim care, or at least for victim processing – the police, the prosecutors and the courts. Of this dismally-performing threesome, the police have probably done the best since they are forced by the intimacy and immediacy of contacts with the battered child, the shattered parent or the impoverished burglary victim to occasional acts of considerable humanity.

But by saying that the police are the best leaves a distateful question: are the prosecutors or courts the worst? To be sure, prosecutors compete effectively for this dubious honor, though their performance can be at least partly explained, if not excused, by the thin resources available.

With few exceptions, urban working prosecutors are from middle class value-oriented homes. This is not to say that all are from good economic backgrounds, but even affirmative action programs have not altered the fact that law school graduates tend to represent upward-mobile and, most importantly, organized work-ethic, education-seeking families.

Thus, although prosecutors may condescend to the cops, symbiotic need and language soon smooth that over. But what about the "citizens"? (In law enforcement jargon, this term of derision). Well, the ones with nice, organized lifestyles the prosecutor can identify with may be treated reasonably well, if they don't bug him or her with too many unimportant questions (e.g., "is *he* out or in jail?"). Such nice, organized, insurance-claim-filling-out folks may comprise 15 or 20 percent of an urban prosecutor's caseload. The rest might just as well be from Mars. I mean, how much justice can someone expect if he can't even read the subpoena?

The prosecutor soon learns to keep his witnesses in manila envelopes as much as possible. He learns that the best interview, except in extraordinarily serious cases, is held in a crowded hallway during a 10-minute recess. This will permit him to fire some quick questions at his witness, and, at the same time honestly plead lack of time in response to all those inarticulate requests. Perhaps the victim gets an "I'll call you on that. Give me your number." But not many calls get made. Generally, the victim goes home after the court appearance and never hears another word about the case.

**The judicial response**

While the prosecutorial response appears defective, the bench isn't even certain if it has any responsibility to victims. Some judges equate sensitivity to victim problems with lack of fairness to the defendant; others feel that any sensitivity encroaches on the prosecutor's terrain. Both of these positions are "cop-outs": judges have substantial responsibilities to crime victims which are in no way inconsistent with their duty to provide justice for the accused.

One of the rationales advanced for victim compensation statutes is society's "failure to protect." Simply stated, this means that society's economic obligation to crime victims arises, at least in part, because also enables witnesses to be temporarily separated from an accused individual during a trial.

Both witnesses and victims are provided with brochures outlining court procedures, witness fees, restitution orders, compensation and V.W.A.P. services.

Efforts have already been made to reduce a witnesses's appearance time in court to one morning or one afternoon while doctors and busines people working in the vicinity of the court building could be placed on a 30-minute alert to add convenience and minimize time lost at work.

The advisory committee to the project is composed of Provincial Chief Judge Harold Gyles; Wayne Myshkowsky, senior crown attorney; Superintendent Herb Stephens, Winnipeg Police; Flo Arnaud, senior probation officer, as well as representatives from the federal Solicitor General's department.



## COPIES OF REPORT AVAILABLE

The Journal has been informed that the Quebec Representative to the C.A.P.C.J. has on hand a number of copies of the Report and Recommendations of the Advisory Committee on Judicial Annuities, which he is prepared to distribute to provincial associations on request.

Please write to Judge Claude Joncas, 1 Notre-Dame East, Room 5.41, Court House, Montreal, Quebec, H2Y 1B6.

## MANITOBA APPOINTMENT

The appointment has recently been announced of Jack Drapack as a provincial judge resident in Thompson, effective June 14.

Judge Drapack will sit primarily in the criminal division of the provincial court but will also hear cases in the court's family division to eliminate delays in dealing with urgent family law matters in northern Manitoba.

## THE REGINA REGIONAL

Mr. Justice Willard Z. Estey was the keynote speaker at the 1982 Western Regional Seminar held on March 28 - 31 in Regina.

Over 70 provincially-appointed judges from the four western provinces and the territories attended the meeting, held at the Sheraton Centre in Saskatchewan's capital city.

Chairman Judge Ernest Bobowski of Yorkton and his committee provided seminar participants with a full program ranging from a fresh look at evidence to an in-depth consideration of the new constitution and Charter of Rights.

Video scenarios on evidence were presented by Professor Ronald Delisle, of the Faculty of Law, Queen's University, with additional commentary by Mr. Justice Estey.

Pre-trial procedures, and amendments to the Criminal Code were covered by Eugene Ewaschuck, Director, Criminal Law Amendment Section, of the Department of Justice, followed by a panel including Mr. Justice C.F. Tallis of the Saskatchewan Court of Appeal.

A panel on Bill C-53 consisted of Mr. Justice J.H. Maher, of the Saskatchewan Court of Queen's Bench, S. Kujawa, Associate Deputy Minister, and Professor Robert Francis, of the Faculty of Law, University of Calgary.

A full day was given over to a consideration of the constitution, with discussion led by Professor Gerald Gall of the University of Alberta, Professor D.A. Schmeiser of the University of Saskatchewan, and Professor Dale Gibson of the University of Manitoba. A panel on constitutional issues followed, chaired by Mr. Justice Matas of the Manitoba Court of Appeal.

An additional feature of the program was a segment for family court judges on containment of children for the purposes of treatment, chaired by Assistant Chief Judge Walder White of Alberta. A panel on the topic included Dr. Terry Russell, Director, Child and Youth Services of the Saskatchewan Department of Health, Dr. Geoff Pawson, the Executive Director of Ranch Ehrlo Society, and Dan Perrins, Regina Regional Director, Department of Social Services and former co-ordinator of support services to the Unified Family Court in Saskatoon.

# Justice for Victims of Crime

**by the Hon. Robert Kaplan**

*The author is Solicitor-General for Canada. The article is drawn from remarks he made at the conference of the National Organization of Victim Assistance in Toronto.*

Last December, a newspaper expose brought a shortcoming of Canada's criminal justice system under public scrutiny. Even though there were many inaccuracies in the reports, the story hit a deep nerve with the Canadian people. The very considerable public reaction taught me a lesson about criminal justice and has led to a new policy approach which I want to describe tonight.

The widow of a Winnipeg police officer slain on duty was supporting herself and her two young children by driving a school bus. She had been given a report which became the headline and was very distorted as it turned out, that one of her husband's killers just released on parole had been given a $390,000 Federal government grant to open an auto wrecking yard. The Winnipeg Police Association focused on this scandal and demanded its withdrawal. As it turned out, the criminal didn't get the money. It was paid to a church group that had established a program to train ex-inmates, addicts and unskilled natives to earn a living. The ex-inmate was only one of the people working on the project. In fact, his parole has been most successful and the wrecking yard continues to operate well.

What was emphasized by the many M.P.'s who spoke and wrote to me about the admittedly exaggerated report and by the hundreds of letters that I received, was that Canadians believe that we who are responsible for the criminal justice system do too much for the offender and not enough for the offended. Let me talk about each.

So far as the offender is concerned, there are extremes of opinion of course, but most Canadians have a sense of decency and realism about criminals. Very few inmates are impossible to rehabilitate. If they show real signs that they are willing to go straight and make an honest living, they should get the chance. On the other hand, if we add extra humiliation and degradation to their incarceration, society pays the price in the end when they get back on the street. But if we are prepared to give the offender a break, what kind of break are we prepared to give his victim? That sense of imbalance between offender and victim was the reason for the public outcry, and I understand, is the point of this conference which brings Canadians and Americans together in my City of Toronto. My Ministry recognizes this real imbalance and is seeking some changes because Canadians who don't feel that the system is fair to victims and their problems will withdraw their tolerance and support of basic decency to offenders.

The criminal justice system is moving into a phase in which public support and public participation are essential components.

For example, we are asking communities to punish their offenders as much as possible without incarcerating them. Where offenders are not dangerous we want to save the expense and evil of prisons. The Young Offenders Act, which I have introduced in Parliament, gives judges wide options to punish through fines, work orders and compensation. We are even asking victims of crime to sit down with their assailants, especially youngsters, in proper cases, and teach them a lesson about the harm and suffering they have caused. I think these approaches will work better than incarceration but they depend a lot on a decent, tolerant attitude to offenders. Similar amendments are in store for the Criminal Code.

In another direction, we are asking the public to help more in the prevention of crime. Although we rely heavily on police as crook catchers, further gains in fighting crime will come less from adding additional police than from preventing crime. We want Canadians to take more precautions to protect themselves, their property and their neighbours from crime. And we are having much success. For example, the Sasnich Police Department supported a project of my Ministry to hire students to encourage residents to mark valuable property in their



24 months probation. On the criminal negligence causing death, sentences ranged from 12 months in jail down to a $300.00 fine. On the armed robbery case, sentences ranged from 13 years down to 2 years. On a theft over $200.00 ($92,000.00 from an employer), sentences ranged from 3 years in penitentiary to a suspended sentence.

His Lordship Edson Haines of the Ontario Court of Appeal in the Turner decision said the following: ". . . the law places on its judges an almost impossible task. It requires them by their sentences to protect the public by deterring those tempted to commit a similar offence. At the same time it looks to its judges to impose a sentence that will rehabilitate the accused. Thus, for the same offence society and its victims are treated to an exhibition of sentences that vary all the way from suspended sentence to a term of years for the same offence. This confuses the public who lose confidence in the object of the criminal law because it feels that, instead of consistently protecting their persons and property, the law discharges that function only occasionally. Actually, the real problem is created by the judiciary being placed in the position of serving these conflicting interests. Being required to be all things to all men, sentences vary widely and really serve no one interest adequately. Sentences bear the character of compromise and often hurt those they are intended to serve."

One can very well understand the resentment some prisoners must feel when they compare sentences in jail and find out they may be doing twice the time as a cellmate for the same crime.

There is also at the present time a growing concern amongst the public about a general lack of toughness by the courts, a concern about so-called loopholes that allow accused to be aquitted without there being a real decision on the merits of the case, a concern about lenient sentences and the return of hardened criminals to the street long before they have served their sentences.

The mood in this country, if I can guage it correctly from my readings, my in-court experiences and my social contacts, is in a swing to the right. Polls show more and more people favour a return of the death penalty, people appear to have lost faith and confidence in our judicial system. They seem to be losing patience with a system that appears at times to operate upon whimsy. Increasingly, one hears the cry "let the punishment fit the crime — not the criminal".

Out of this unlikely alliance of prisoners resentful because of sentence disparity, uncertainty of parole decisions and a hatred of the mandatory supervision provisions, together with the law and order conservatives upset by lenient sentences and early release, has come a move toward sentence reform.

Certain jurisdictions in the United States have responded by instituting sentencing guidelines — or in other words a trend has begun toward fixed and definite sentences set by legislatures and away from allowing such wide discretion to the sentencing judge. Ohio has developed guidelines, Illinois has a determinate sentencing law and Maine, California and Indiana, as well as other states, have implemented such schemes or are considering doing so.

There are of course, many opponents of fixed sentencing. Some of the arguments advanced against this scheme are — that legislature cannot be trusted to set humane sentences while others claim it will greatly increase plea bargaining, since judges and parole boards will no longer be able to exercise discretion causing the accused to be under greater pressure to plead guilty to a lessor offence. Another problem is how does one set the guidlines — are they to be data based or policy based. The main objection, of course, is that individualization of sentences would be eliminated.

Be that as it may, I can forsee in the future, determinate or fixed sentences being proposed and enacted as the latest panacea for the justice system. The foot is in the door right now with the recent addition of fixed sentences for those convicted of using weapons while committing indictable offences to our Criminal Code and the Federal Government has been at work on such a project similar to this for some time now.

Thus, if I can summarize these brief remarks: I can foresee a greater effort being made to impose sentences that will keep those who now end up serving short, and in my opinion, meaningless sentences out of jail. While those at the other end of the scale can expect to see more uniform penalties and I suspect more severe than at present, and this to come about by the use of sentencing guidelines or fixed sentences set by legislatures.

I fully realize that the fixed sentence idea is a rather simplistic solution to a complex problem and I would not like to venture a guess as to eventual success, but that is how I think we are heading in terms of the immediate future in sentencing.

relationships, keep his ties in the community and gives the offender a feeling of self-worth. A surprising number of those placed on community service have maintained contact and in a few cases have obtained employment with the organization they performed the work for.

I expect that one will see a greater use and acceptance of the Community Service Order as an alternative to jail sentences for those offenders convicted of non-violent or property offences. It will, however, require community acceptance and co-operation as well as judicial acceptance and understanding.

As a means of keeping those unable to pay fines out of jail, perhaps a fine-option program could become part of the sentencing options available.

The fine option gives the offender who cannot pay the fine or part of the fine an option of working off that part he cannot pay. A record of hours worked at a rate per hour agreed on (often the provincial minimum hourly wage) is kept and when the fine is worked off, the court records are endorsed that the fine has been paid. If the accused enters the program but fails to complete the required hours, a warrant of committal can then be issued. A fine could be settled by partial payment and the balance by work. Saskatchewan has had such a program.

A trend I expect to see develop in coming years would be that of the greater use of restitution as part of the sentence disposition. At present, it is not used as often as it should, even though there are some provisions for it in the Criminal Code. This would be a continuation of the present trend of giving more consideration to the victims of crime.

When I refer to restitution, I am referring only to those cases where someone has been convicted of an offence and a restitution order becomes part of the sentence. There is (at least in Ontario) victim compensation — wherein a victim is reimbursed to some degree by the government even if no-one has been apprehended or convicted. I am speaking only of restitution — not victim compensation.

The benefits to the victim are obvious and need not be further commented on. The accused also benefits (although the benefits may not be readily apparent to him) in that he learns that he is responsible for his acts and their consequences.

There have been a number of projects, in Kitchener, in Winnipeg and in Dauphin — called Victim-offender Reconciliation Project and varying degrees of success have been reported. Programs in the past have either been in the diversion stage (not in the Court process) or midway through a trial (where, for example, a judge may tell an accused that if restitution is made prior to sentence, that will be considered by the sentencing judge), or after sentence as part of a probation order. Thus it has been hard to measure the effectiveness of such programs.

There are also a number of drawbacks to the widespread use of restitution as part of a sentence. Many large companies (when they are the victim) do not wish to become involved, instead preferring to let their insurance cover any losses they incur. A great number of those convicted are so economically disadvantaged and without real prospects of making restitution, and from the judicial viewpoint, there may be a reluctance to become involved in assessing the amount of claims. Restitution has also been viewed as part of the civil process and criminal courts are wary of being used as a debt collection agency. This perhaps has caused judges to shy away from the widespread use of restitution orders as part of a sentence.

However, we are in an era where the justice system is more and more considering the victim and as part of that trend I expect more and more judges will try where possible to order restitution, especially where losses are easily determinable.

Parliament has given judges very wide discretion in imposing sentences. Sentences can range from life to a suspended sentence for some offences, although to be realistic maximums are rarely, if ever, imposed these days. I cannot ever recall anyone being sentenced to life imprisonment for housebreaking or to 14 years for personation.

Recently, the Winnipeg Free Press published the results of a sentencing seminar attended by 13 Manitoba Provincial Court Judges. This article, incidentally, was substantially reprinted in the October, 1981 issue of the Ontario Criminal Lawyers Association Newsletter. In this seminar certain fact situations were presented to the attending judges and they were then asked to determine the appropriate sentence. When I refer to fact situations — judges were, in addition to the facts of the offence, given the usual pre-sentence report background material about the accused. The results disclosed the following: in the assault causing bodily harm case, sentences ranged from 2 years less one day to 4 months plus



homes for identification. That program led to significant declines in theft compared to similar neighbourhoods without the program. But, the necessary public support, even for proved and sensible initiatives like these, requires greater fairness to victims.

Restitution and compensation programs are designed to bring the offender face to face with the victim. Diversion programs often rely on the day to day involvement of ordinary citizens. These models of criminal justice are novel and exciting. But if victims and witnesses feel unjustly treated and if ordinary citizens continue to harbour distrust about the effects of our system of justice, they will not provide the cooperation which is essential to the success of these initiatives.

We who manage the system must recognize that criminal justice reform appears to be one-sided. With all that we have achieved, we have still not responded adequately to some of the very real problems of victims and witnesses. In our eagerness to deal with offenders we have neglected the offended.

Let me illustrate my point: I recently met with a group of pharmacists to discuss with them their concerns about increasing crimes against drug stores. One pharmacist told me that his pharmacy, as is increasingly common in some neighbourhoods in Toronto, has been the object of at least one robbery and a lot of petty theft. In one instance he had confronted a man in his store whom he suspected of taking non-prescription drugs from the shelves. His suspicions proved correct, the man tried to escape, a tussle occurred during which the pharmacist overpowered the thief, suffering minor injury to himself. The police were called. At this point his confidence in the criminal justice system began to waver.

After taking the suspect into custody and interviewing the pharmacist, the police indicated that they would be getting in touch with him. The following day the pharmacist encountered the suspect on the street near his pharmacy. The suspect had quite properly I might add, been released by the police but the pharmacist had not been informed of this fact.

He was called to the police station on two occasions to be interviewed first by a police officer and then by a Crown attorney. In the following months he was summoned as a witness to go to court no fewer than four times. On each occasion, he did not testfy as the trial had been remanded or otherwise delayed. He never was heard because the case was finally resolved through a guilty plea.

He was not informed as to the sentence nor was he consulted as part of any pre-sentencing report. At the point I spoke to him, his anger had very clearly been transferred from the offender to what he saw as unresponsive, unsympathetic, wasteful and ineffective criminal justice system.

Of particular annoyance to him was the lack of consideration which he felt had been given to his time. He was an independent businessman and on each occasion that he went to court or to the police station he had to make arrangements to have the store looked after at some considerable personal expense. No attempt had been made to keep him informed and no one was interested in his opinion.

Now, I know that this may not be a typical case and that in many instances the police do keep victims informed and Crown attorneys do take into account the time and concerns of victims. But there are similar instances which tell me that there is clearly much to be done for victims in their various contacts with the criminal justice system that isn't being done.

Victims are real people, people who have suffered real injuries and, frequently, indignities. They have real complaints about the lack of protection from crime which led to their victimization, and often the lack of consideration afforded them after the occurrence.

I expect this conference and its aftermath to lead to many significant, innovative approaches to improving how we deal with and treat victims in the Canadian criminal justice system.

It's hard to talk very long about victims without the discussion becoming personal. Most of us have had, either directly or vicariously through a friend or relative, some experience with the hurt and concern caused by crime, and this experience helps us to better understand some of the inadequacies of our present system. I think that it is interesting, for example, that in law we classify property crimes on the basis of the value of property, not on the impact on the victim. Statements such as "It was only theft under 200 dollars", or "It was only a minor break and entry", have a hollow ring if the object stolen was of sentimental value or when the offence leaves the victims and their friends who hear about it so traumatized as to feel unsafe and insecure in their own homes and communities. It is this personal trauma of individuals who fall prey to criminal acts that I find a most difficult and neglected area of criminal justice and is,

I understand, one of the primary matters to be dealt with in your conference.

This is not to say that the financial loss and physical harm experienced by victims are unimportant. Quite the contrary, they are very important, and, although I am sure we can improve, they are being dealt with in a variety of ways. Financial loss is often at least partially covered by insurance. In Canada, most provinces have collaborated with the federal government in setting up Crime Compensation Boards. And, where the offender is brought to justice, our courts more and more are making restitution and compensation an integral part of the sentence.

In the case of physical harm to victims, we benefit in Canada unlike in the U.S. from government established national, comprehensive medical coverage to ensure proper medical care irrespective of the source of the injury.

But where we must improve is in dealing with the less obvious and yet potentially damaging psychological and social harm resulting from crime.

As a result of an offence the victim and his friends and neighbours may adjust their lifestyles to one that is less free or less open, or simply, less comfortable. And for people like rape victims there is the stigma which can make life on our society more painful and difficult.

There is another related problem we must squarely face. Crime victims are often doubly victimized, first by the crime and second, as in the example of the pharmacist, through their contact with the legal system itself.

In focusing on the details of the offence and the offender, police may overlook the victim's need for immediate assistance and support at the time of the initial investigation. Frequently, information about the availability of legal alternatives and support services for the victim are not made known. As the witness, he or she is expected to re-live the trauma of the crime by testifying in open court, often with little understanding from court officials of the psychological stress associated with that experience. In many ways, the victim feels both ignored and abused by the process.

These perceptions are a major source of misunderstanding about our justice system. To the individual victim, even the features of our criminal process which are intended to safeguard the victim tend to be overshadowed by its sheer complexity. The common experience of victims of crime in their dealings with the criminal justice system is that individual rights and needs are subordinated by the monolithic nature of our criminal justice machinery.

There is a role for the national government to play in improving assistance to victims and ensuring that Canadians generally address this area as a legitimate matter of public policy. In fact, we have taken a number of steps both at the federal and the provincial level which reflect our commitment to the issue.

Some of these I have mentioned earlier. We have put in place a number of shared-cost criminal injury compensation schemes. We have funded useful demonstration projects all across the country to assist victims and witnesses. Just recently for example, I approved the funding of a Crisis Intervention program in Restigouche, New Brunswick, which focuses particularly on matrimonial and family violence situations through the work of specially trained police officers and social workers. Another project for which I have recently approved funding is a victim assistance service with the Calgary Police Department. The victim assistance unit will work with other units of the force, including the Race Relations, Crime Prevention, Senior Citizens, Child Safety and Sex Crime Units. The new project will consist initially of three staff persons: a police officer trained to sensitize his colleagues to the needs of victims, a social worker who will act as a counsellor to families who have suddenly lost a member through death or accident, and a researcher responsible for making a survey of existing social services and an assessment of the needs of victims which have not been addressed.

Many of my Ministry's initiatives are police-based and that is a strategy we will continue to encourage, although we fully realize that this must be done in close cooperation with other agencies to ensure that comprehensive services are provided to the victims. It is a strategy which recognizes that the initial contact between the victim and the police is of paramount importance in strengthening public confidence in the criminal justice process.

The federal government also supports about 35 transition houses and rape crises centres on a demonstration project basis. I am confident that the Honourable Judy Erola, our new Minister for the Status of Women, will continue to provide vigorous support for these initiatives. Our objective is to encourage a broad range of services both for specific groups, such as the victims of family violence, and for the wider needs of



# The Future of Sentencing Practices in Canada

**by Judge J.D. Nadelle**

*The author is a judge of the Provincial Court of Ontario in Ottawa. These remarks were first made at a Symposium on the Future of Criminal Law in Canada, in Ottawa in January.*

When Peter Shoniker asked me to speak at this symposium, he gave me two guidelines: one – that I be no longer than 15 - 30 minutes or two – that I explicitly contemplate the future of sentencing. I can certainly adhere to the first guideline, but the second one has given me some concern.

I could predict just about anything concerning the future of sentencing and time would eventually prove me accurate. Exactly when the predictions would come about I could not say, but the more I read on the subject, the more years I spend in the criminal justice field, it becomes more and more apparent that everything has been tried before and that every theory of sentencing has had its time in history and merely re-appears periodically with slight modifications to suit the times. So, I've decided to take the practical approach and limit my presentation to my views as to what we can expect to see in the immediate future in terms of sentencing.

It is well known that we in Canada send a great many people to jail – perhaps too many. Studies have shown that between 80-90% of those jailed are in provincial institutions rather than penitentiaries, and of those in provincial institutions approximately 80% are serving sentence of less than six months. The majority are in jail for non-violent offences – minor thefts, frauds, possession, breach of probation and minor drug offences and impaired driving.

Many are in jail for failure to pay fines. A study done in 1972-73 in Saskatchewan showed that 50% of all males and 80% of all females jailed in that province were in for non-payment of fines.

Other studies have shown that the rate of failure to pay fines is low. For example, a study of fines in New Brunswick, in Halifax and in Vancouver showed that over 80% of fines were paid. Despite the high percentage of payments, because of the large volume of cases disposed of by fines, that group who do not pay and end up serving the alternative or part of the alternative jail sentence comprise a substantial number of people.

Thus when we are speaking of the jail population, we are often speaking of non-violent individuals, those who have committed minor offences, those who cannot pay fines and who are usually serving less than six months.

In my view most of these people should not be in jail and the resources now used to process, house, feed and guard these people put to more effective use. There are only so many tax dollars allocated to justice and corrections and how this money is spent in the future will have to be carefully examined.

In the next few years, sentencing alternatives will have to expand and at the same time sentencing attitudes of Judges toward these types of aforementioned offenders will require careful re-examination.

Methods will have to be developed and those already in existence more fully utilized in order to keep those who pose no threat to society out of jail. A number of programs have been tried and are presently being tried in various areas of Canada – but they are applied in haphazard fashion areas of the country.

In the future, I expect we shall see an expansion in the types of sentence alternatives that would allow an accused to remain within the community. Programs such as community service orders, greater use of restitution orders and perhaps fine-option programs will be used more and more where and if available.

As a sentencing alternative, the community service order is a condition of a probation order – that is a person must have already been convicted of the offence. It is a term of probation by which the accused is directed to perform some work for the benefit of the community. As practiced in Ontario and I believe in British Columbia, these orders are designed as alternatives to jail sentences.

The community service program allows the offender to maintain employment or remain in school, maintain family

d'assitance sociale permettent d'amorcer une tendance visant à écarter du système de justice pénale ceux qui pourraient bénéficier de la déjudiciarisation;

2. L'adoption par la police d'une nouvelle attitude à l'égard des interventions, attitude non plus axée sur les solutions coercitives, pourraient avoir des ramifications éventuelles sur la façon dont les tribunaux régleront les cas qui leur seront confiés;

3. Le rôle de la police dans le respect des ordonnances émises par les tribunaux pourrait être modifié à la lumière d'une approche différente au règlement des conflits domestiques du au fait que la police donne suite aux plaintes originales.

Toute union de deux personnes qui n'est pas basée sur une disposition légale n'est pas reconnue par le Code criminel. En d'autres termes, les unions libres ne confèrent pas de droit et la protection de l'article 4 (3) de la Loi de la preuve en Canada n'existe pas pour elles.

A mon avis, le seule exception à la compétence et à la contraignabilité du témoignage d'un époux contre l'autre, se retrouve dans le cas où le conjoint n'est pas la victime et où la Couronne veut forcer un conjoint à témoigner contre l'autre pour divulguer une communication faite durant le mariage.

Les policiers doivent se soumettre librement au code d'éthique professionnelle qui s'applique à leur corps policier. Cela est d'autant plus important qu'ils sont soumis, comme tous autres citoyens, aux conséquences de leurs actes et partant à la responsabilité.

Le Code criminel trace plusieurs balises confrontant tous les citoyens, y compris les policiers.

Le policier n'est donc pas à l'abri de poursuites, s'il emploie plus que la force nécessaire dans l'exécution de son devoir ou encore s'il agit arbitrairement dans l'arrestation d'un individu.

En conséquence, il est important qu'un policier agisse avec prudence et tact et qu'il connaisse exactement les coordonnées de son mandat d'agent de la paix ou d'agent du maintien de l'ordre.

Ainsi, faut-il qu'un agent de la paix connaisse à fond l'article 450 du Code criminel relatif aux pouvoirs d'arrestation sans mandat ou avec mandat.

Messieurs, je vous ai déjà retenus trop longtemps et mes propos doivent vous avoir semblé beaucoup trop théoriques. Je ne m'en excuse pas, car vos professeurs réguliers auront tout le loisir de développer pour vous les différents thèmes que j'ai amorcés et eux le feront avec leur expérience policière, ce que je ne peux prétendre avoir.

J'espère tout simplement vous avoir convaincus que le droit n'est et ne droit être que la sauvegarde des valeurs fondamentales et qu'à ce titre, le droit est affaire de vertu, ce qui implique le tact, la modération, l'humanité, la pondération.

Rappelez-vous que vous êtes au service de la dignité de l'homme et qu'en cas de crises publiques ou domestiques votre intervention doit être empreinte de loyauté et de franchise, de tact dans l'adversité, de maîtrise de soi.

Vous entreprenez un beau métier, mais combien difficile. C'est pourquoi je me suis permis de vous parler d'une conception noble du droit dans une société civilisée.

## The Judiciary — Law Interpreters or Law-Makers?

**(Continued on Page 19)**

ends of justice in the individual case and served to advance the law. Hesitancy at outright overruling of patently bad law still prevails. But the courts in correcting past mistakes or disencumbering the law of the incoherent accretions of centuries of judicial statements, are doing the job for which they are best suited:

> Unless a judge believes that judicial action will discourage legislative reform, it is a question whether a present good should be sacrificed for the indefinite and uncertain prospect of superior parliamentary action (Jaffe, *supra*, at p.29).

I return to the questions before us, namely *The judiciary – law interpreters or law makers?* Provided the phrase "lawmakers" is understood to mean "law developers" I would answer the question by saying that the judiciary are both interpreters and, in the limited sense I have indicated, makers of law. The role of the judiciary is not political nor executive nor administrative. It is adjudicative but there is of necessity an element of law development in the work.



victims generally to help coordinate existing and emerging services. Health and Welfare is now in the process of setting up a National Clearinghouse on Family Violence for victims of family violence.

Canadians also benefit from a variety of programs funded by provincial governments. In our host province Ontario, for example, the Ministry of the Attorney General has established a Task Force of Family Violence. In addition, the province has developed a very useful evidence kit for sexual assault cases, as well as a number of victim-offender reconciliation projects. Funds are also provided for rape crises centers all across Ontario. Other provinces have also been actively exploring ways to better meet the needs of victims of crims:

- in 1979 the Quebec Ministry of Social Affairs organized eleven regional symposia to discuss the problem of violence against women,
- the Newfoundland government funded a conference on family violence to facilitate networking among regional service providers and has created a Family Crisis Counselling Service for victims of family violence, incest, etc.,
- Alberta is funding a project providing comprehensive police-based services to victims and witnesses in Edmonton, and a further $2 million to a family violence project,
- P.E.I. has completed an extensive report on family violence,
- the Yukon is considering the development of a program of public education on the law involving the law society,
- B.C. has developed a Community Diversion/Mediation Center in Victoria, and is funding a major victim assistance program in the Lower Mainland through the John Howard Society, and the B.C. Police Commission has prepared a "Victim Services Directory" for the province,
- Saskatchewan funds a number of mobile crisis units, and many other local and regional efforts have been undertaken or planned.

Federal and provincial governments work together in sponsoring workshops and conferences on victim services such as this one. We also collaborate on the collection and dissemination of information for victims. This spirit of co-operation and dialogue is an excellent foundation on which to build a more adequate national response to the problems of victims.

We have a long way to go in Canada. One of our first priorities has been to gather the data we need to identify the gaps in the range of victims services. I am sure we all will want to expand and improve available victim services and achieve a far wider dissemination of the information which is already available.

Encouraging a truly national effort of this sort is one of my priorities as Solicitor General of Canada. However, to be successful, anything we undertake must be done in concert and with the full co-operation of the provinces. Officials of my Ministry and the Department of Justice have already begun an informal process of consultation with their provincial counterparts. Early next month I will be raising my concerns for victims of crime with my provincial counterparts and I will be underlining the commitment of the national government in achieving these objectives. I am confident that in the relatively near future we may be able to make some formal commitments about the improvement and expansion of victim services all across Canada.

That is why I am looking forward to the results of this conference. I am particularly interested in learning more about the American experience and how we might apply some of your successful strategies in this country. I know that in the United States you have directed your attention to a number of issues, including the needs of victims of violent crimes, the needs of witnesses and jurors, and the need for prevention programs to combat citizen indifference toward crimes against public and private property. Your efforts to develop state-wide co-ordinating networks to support non-government programs and to develop joint intergovernmental initiatives would be of special interest to Canadian criminal justice policy officials at all levels. The concept of a national victim information and advocacy group, such as the NOVA organization, is also an intriguing concept for us to consider in Canada.

As I mentioned earlier, I think we all appreciate both the practical and theoretical limits to government involvement in providing assistance to victims. There is no question that we must recognize the integral

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# Justice Pour Les Victimes du Crime

par l'hon. Robert Kaplan

En décembre dernier, un journal a mis au grand jour une lacune du système de justice pénale du Canada. Même si l'article contenait de nombreuses inexactitudes, il a néanmoins provoqué un vif émoi dans la population. En effet, la réaction cinglante du public, qui m'a enseigné une leçon en matière de justice pénale, m'a amené à adopter une nouvelle approche sur le plan de la politique, approche que je veux d'ailleurs vous décrire ce soir.

La femme d'un agent de police de Winnipeg, tué dans l'exercice de ses fonctions, devait, pour subvenir à ses besoins et à ceux de ses deux enfants, conduire un autobus scolaire. On lui avait remis un rapport qui a fait la manchette et qui contenait en l'occurrence de nombreuses faussetés. En effet, elle avait appris qu'un des assassins de son mari, qui venait d'être libéré sous condition, avait reçu du gouvernement fédéral une subvention de $390 000 pour l'aider à ouvrir un cimetière d'autos. Mise au courant du scandale, l'Association des services de police de Winnipeg a exigé le retrait de la subvention. Or, il s'est trouvé qu'elle n'a pas été accordée au criminel, mais plutôt à un groupe paroissial qui avait créé un programme destiné à former des ex-détenus, des toxicomanes et des autochtones san métier afin de leur permettre de gagner leur vie. L'ex-détenu n'était qu'une personne parmi d'autres à travailler au projet. En fait, sa libération conditionnelle s'est avérée un franc succès et l'exploitation du cimetière d'autos continue d'aller bon train.

D'après les nombreux députés qui m'ont parlé ou écrit au sujet du rapport, dont il faut bien raconnaître l'exagération, et d'après les centaines de lettres que j'ai reçues, les Canadiens estiment que nous, responsables du système de justice pénale, accordons trop d'importance à l'infracteur et trop peu à la victime. Voilà deux sujets dont je voudrais vous entretenir.

La question des infracteurs donne lieu, bien sûr, à des divergences d'opinion extrêmes, mais la plupart des Canadiens font preuve de pondération et de réalisme à l'égard des criminels. La réadaptation des détenus n'est impossible que dans de trés rares cas. S'ils se montrent réellement désireux de se réadapter et de gagner leur vie honnêtement, il faudrait leur en donner la chance. Par ailleurs, si l'humiliation et la dégradation s'ajoutent à leur peine d'incarcération, c'est la société qui écopera lorsqu'ils auront recouvré leur liberté. Cependant, si nous sommes disposés à donner une chance à l'infracteur, quelle sorte de chance sommes-nous disposés à doner à sa victime? C'est cette disproportion entre le sort réservé aux détenus et celui des victimes qui a suscité l'indignation du public et qui est, d'ailleurs, le thème de cette conférence qui réunit à la fois des Canadiens et des Américains ici à Toronto, ma ville natale. Le Ministère que je dirige reconnaît d'emblée l'existence de ce déséquilibre et cherche à apporter des changements parce que les Canadiens qui estiment que le systéme n'est pas juste envers les victimes cesseront de faire preuve de tolérance et de compréhension envers les détenus.

Le système de justice pénale se dirige vers une phase dans laquelle le soutien et la participation du public seront des éléments essentiels.

Par exemple, nous demandons à la collectivité de punir ses infracteurs sans, nécessairement, les incarcérer. Lorsque les infracteurs ne sont pas dangereux, nous voulons épargner le coût de l'incarcération et l'effet néfaste des prisons. Grâce à la Loi sur les jeunes contrevenants, que j'ai présentée à la Chambre, les juges disposent maintenant d'une vaste gamme de sanctions et peuvent imposer des amendes, des ordonnances de travail et de dédommagement. Dans certains cas, nous demandons même aux victimes du crime de rencontrer leurs agresseurs, surtout des jeunes, et de leur faire comprendre le tort et les souffrances qu'ils ont causés. Je pense que ces sanctions seront d'une plus grande efficacité que l'incarcération, mais leur succès dépend largement de l'attitude des victimes à l'égard de leurs malfaiteurs. Des modifications semblables seront apportées au Code criminel.

Dans un autre ordre d'idées, nous demandons aux citoyens de participer davantage à la prévention du crime. Nous comptons beaucoup sur la police pour arrêter les infracteurs, mais le succès de la lutte contre le crime dépendra moins de l'affectation d'agents supplémentaires que de l'adoption de mesures de prévention. Nous voulons que les Canadiens prennent davantage de précautions afin de protéger leurs biens, leurs voisins et eux-mêmes contre le crime. Et les résultats sont très encourageants. Par exemple, le Service de police de Saanich a participé à un



Cette intervention est de deux ordres:

1. en fonction de son titre d'agent de la paix;
2. en fonction de son rôle de maintien de l'ordre

Différentes études psychologiques et sociologiques sur la police et le rôle du policier insistent souvent sur la différence que présentent les deux aspects de la tâche du policier, à savoir celui qui a trait aux infractions mêmes à la loi et qui amène le policier à prendre les mesures nécessaires en vue d'une arrestation ou d'une sommation à comparaître, et celui qui regarde le maintien de l'ordre, fonction plus ambigue et plus problématique qui touche à la gestion du comportement entre personnes.

Contrairement à la croyance populaire, la plus grande partie du rôle du policier comporte des fonctions qui n'ont rien à voir avec le crime, qui touchent au maintien de l'ordre ou au service social.

Bref, la tâche du policier consiste à s'occuper des situations de crises; les procédés qu'il emploie doivent être immédiats et il doit faire preuve d'autorité.

Aussi la formation du policier doit insister sur la sécurité et lui enseigner des techniques pour prendre en main les situations de violence entre des personnes, pour servir de médiateur dans les cas de conflits, et, dans la plupart des cas, doit mettre l'accent sur l'orientation des parties vers un professionnel qui peut les aider, le cas échéant.

L'ensemble des méthodes que le policier doit suivre pour rendre son intervention efficace se décompose comme suit:

a) méthods externes visant la sécurité;
b) méthodes internes visant la sécurité;
c) prise en main de la situation;
d) intervention;
e) orientation.

A la base de ce système, il m'apparaît important de noter que la réception adéquate de l'appel à l'aide est primordiale.

Ainsi, si le policier sait à l'avance la nature de son intervention, il se préparera en conséquence et interviendra en conséquence. Il y a toute la différence au monde entre un appel relatif à une tentative de meurtre à l'aide d'une arme à feu et un appel relatif à un exhibitioniste qui outrage la pudeur publique.

La classification de l'appel est une priorité et constitue un facteur externe de sécurité.

Quant à l'intervention elle-même, elle doit être marquée du signe du tact et du gros bon sens.

En effet, si le policier se trouve devant un cas où un crime a été commis ou est sur le point de se commettre, il doit prendre des mesures sévères. Par contre, s'il s'agit simplement de rétablir l'ordre, il doit user de diplomatie.

Bref, les policiers doivent savoir comment employer les mesures sécuritaires, neutraliser ou calmer les personnes violentes, communiquer, interroger, jouer le rôle de médiateur en enfin transmettre les cas aux organismes appropriés.

J'irais même jusqu'à dire que le comportement ferme mais honnête du policier est de nature à régler des conflits qui, autrement, se répéteraient.

Une enquête faite à Vancouver a révélé que les interventions contrôlées des policiers dans les crises domestiques et leur conseil à orienter les parties vers un organisme capable de les aider ont fait diminuer la fréquence de récidive et ont empêché la commission de crimes plus sérieux. De fait, en intervenant au tout début lors de voies de fait dans les familles, les policiers peuvent, à longue échéance, épargner du temps qu'ils pourront ainsi consacrer à leurs autres tâches.

Quelles sont les qualités qu'il vous faut maîtriser pour faire un travail efficace en cas d'intervention?

On peut les résumer ainsi:

a) simplicité;
b) souplesse;
c) largeur d'esprit
d) maîtrise de soi

Par quels moyens?

a) la persuasion au lieu de la coercition;
b) les paroles au lieu des armes
c) le raisonnement au lieu de la force physique
d) la connaissance en sociologie;
e) la recherche de méthodes nouvelles.

Bref, une attitude humanitaire au cours des interventions obtient de meilleurs résultats qu'une attitude autoritaire. Si l'attitude est humanitaire, on voit moins souvent des solutions où un antagoniste l'emporte sur l'autre que de cas où l'on en arrive à un compromis valable, voire même une réconciliation.

Il est évident que si on donne aux policiers une bonne formation en techniques d'intervention, ils auront une plus grand choix d'options et sauront en user selon les circonstances.

Pour un policier, déjudiciariser en conflit domestique n'est pas un manque de connaissance policière et un péché à l'éthique professionnelle.

Je conclus en affirmant que le programme d'intervention policière dans les conflits domestiques comporte, pour le système de justice pénale en général, les conséquences suivantes:

1. Des interventions sur-le-champ et le recours aux ressources d'organismes

exécutif, législatif et judiciaire. Si l'exécutif et le législatif peuvent parfois se confondre, jamais doit-il y avoir interférence entre ces deux-là et le judiciaire.

Au contraire, le parlement et le gouvernement doivent-ils tout mettre en oeuvre pour assurer l'indépendance du judiciaire.

Encore faut-il cependant que les pouvoirs législatif et exécutif respectent le pouvoir judiciare et qu'ils acceptent de celui-ci les rappels à l'ordre que le cadre constitutionnel lui donne compétence de prononcer.

Les tribunaux sont donc le dernier rempart qui protége chaque personne, physique ou morale, contre le possible arbitraire de l'Etat qui doit donner l'exemple du respect qui est dû aux tribunaux et à la légitimité qu'ils incarnent. Ce n'est certes pas payer un prix trop élevé pour la santé de notre société que de poursuivre ce nécessaire équilibre entre justice et pouvoir.

Il serait réellement trop long d'examiner les modes d'administration de la justice dans chacune des provinces du Canada. Qu'il suffise de dire que toutes les provinces, sauf le Québec, ont des régimes de common law, c'est-à-dire des régimes de droit civil basés sur les précédents. Au Québec, il existe un régime particulier en droit civil, puisqu'il s'agit d'un droit écrit colligé dans le Code civil qui tire son origine du Code Napoléon.

En matière criminelle cependant, c'est le même code qui s'applique d'un océan à l'autre.

Voyons en pratique les tribunaux de juridiction criminelle de première instance.

Au Code criminel, existent certains délits qui sont de la juridiction absolue du juge de district; par exemple le délit de fuite (hit and run) et certains autres qui sont de la juridiction d'une cour d'assises — juge et jury); par exemple le meurtre.

Par contre, certains délits qui sont poursuivables par actes criminels et qui devraient normalement être jugés par juge et jury, sont optionables au choix de l'accusé.

Les étapes de l'apparition d'un accusé devant la Cour criminelle sont les suivants:

1. la comparution — à la suite de
   a) citation à comparaître
   b) sommation de comparaître à jour fixe
   c) mandat d'arrestation
   d) arrestation sans mandat

La plainte ou la dénonciation du ministère public est alors lue à l'accusé qui doit enregistrer un plaidoyer de culpabilité ou de non culpabilité;

2. Si un accusé plaide coupable au stade de la comparution, c'est un aveu et il reçoit sentence par le magistrat;

3. Si un accusé plaide non coupable à une accusation qui est de juridiction absolue du magistrat, il est cité à procès à date fixe;

4. Si l'accusation n'est pas de juridiction absolue du magistrat, l'accusé doit d'abord subir une enquête préliminaire qui permettra au juge la présidant de déterminer s'il y a matière à procès ou non;

5. Si matière à procès: Assises — juge et jury, à moins qu'il s'agisse d'une infraction optionable et que l'accusé fasse option pour procès devant juge seul.

Donc, en première instance, il y a deux processus possibles du procès:

a) La Cour des sessions de la paix
b) La Cour du Banc de la Reine — juridiction criminelle — juge et jury

Les décisions de ces cours sont appelables si l'accusé a été poursuivi par voie de mise en accusation, c'est-à-dire s'il s'agit d'un acte criminel.

La Cour d'appel ne refait pas le procès avec les témoins, mais examine si le procès a respecté les règles de droit et ne décèle pas des erreurs de fait si grossières que justice ne semble pas avoir été rendue.

Le troisième palier de tribunaux est la Cour suprême du Canada qui siège à Ottawa. La Cour suprême du Canada juge en dernier ressort des questions de droit, tant en matière civile que criminelle, et aussi en matière de constitution.

Maintenant que toutes ces notions fondamentales vous sont exposées, venons-en au rôle de la police.

Auxiliaire de la justice, la police a généralement parlant deux rôles primordiaux à jouer.

Quiconque oublie trop vite que la police est une institution publique dont les pouvoirs et les limites, qu'elle tient du pouvoir politique, influent profondément sur la mise à exécution de la loi et aussi, par voie de conséquence, sur la structure fondamentale, procédurale et administrative du système de justice pénale.

En effet, une théorie complète de la justice pénale doit tenir compte de la capacité d'intervention de la police en plus de s'intéresser aux recours contre les abus de procédures d'investigation.

En définitive, il ne s'agit pas de mettre sur pied un système répressif, mais plutôt un système dont la structure soit capable d'assurer le maintient de l'ordre sans concentrer son action contre un groupe social particulier. La justice pénale de l'avenir est plus que la simple arrestation et punition des criminels. En somme, l'important est moins le nombre des effectifs de la machine assurant la mise à exécution de la loi, que son degré de capacité d'intervention.



programme du Ministère, qui consistait à embaucher des étudiants afin d'encourager les résidants à marquer les objets de valeur qu'ils avaient dans leur foyer. Grâce à ce programme, la municipalité a connu une diminution importante du nombre de vols en comparaison de celui signalé dans d'autres quartiers semblables qui ne participaient pas au programme. Toutefois, l'appui nécessaire du public, même dans le cas d'une initiative utile et intelligente comme celle-ci, exige une équité plus grande envers les victimes.

Les programmes de restitution et de dédommagement sont destinés à mettre l'infracteur en contact direct avec la victime. Les programmes de déjudiciarisation font souvent appel à la participation quotidienne de citoyens ordinaires. Ces modèles de justice pénale sont nouveaux et encourageants. Toutefois, si les victimes et les témoins estiment avoir été traités injustement et si les citoyens ordinaires continuent d'éprouver de la méfiance à l'égard des effets de notre système de justice, ils refuseront d'assurer leur collaboration, qui est essentielle au succès de ces initiatives.

En tant qu'administrateurs du système, nous devons reconnaître que la réforme dans le domaine de la justice pénale semble s'opérer en sens unique. Avec tout ce que nous avons réalisé, nous n'avons toujours pas su régler, d'une façon appropriée, certains des problèmes véritables des victimes et des témoins. Dans notre hâte de nous occuper des infracteurs, nous avons oublié les victimes.

Permettez-moi d'illustrer ce point. J'ai rencontré dernièrement un groupe de pharmaciens afin de discuter avec eux de leurs inquiétudes à l'égard de la hausse de la criminalité touchant les pharmacies. L'un d'eux m'a raconté que son établissement, comme c'est le cas de plus en plus souvent dans certains quartiers de Toronto, a été l'objet d'au moins un vol qualifié et de nombreux larcins. Dans un cas, il a confronté sur place un homme qu'il soupçonnait de vol de médicaments. Ses soupçons étaient fondés et, lorsque l'homme a essayé de s'enfuir, un combat s'est engagé au cours duquel le pharmacien, qui a subi une blessure mineure, a réussi à maîtriser le voleur. La police a été appelée sur les lieux, et c'est à partir de ce moment-là que sa confiance dans le système de justice pénale s'est mise à fléchir.

Après avoir mis le suspect sous garde et interrogé le pharmacien, les policiers ont informé ce dernier qu'ils se remettraient en rapport avec lui. Le lendemain, le pharmacien a croisé le suspect dans la rue, près de sa pharmacie. Il me faut ajouter que le suspect avait bel et bien été libéré par la police qui, toutefois, n'avait pas mis le pharmacien au courant de la situation.

A deux reprises, le pharmacien a été convoqué au poste de police pour y être interrogé, d'abord, par un agent de police et, ensuite, par le procureur de la Couronne. Au cours des mois qui ont suivi, il a été appelé, à quatre reprises, à comparaître comme témoin devant le tribunal. A chaque occasion, son témoignage n'a pas été entendu, le procès ayant été reporté. Il n'a jamais pu témoigner parce que l'affaire a finalement été réglée hors cour à la suite d'un aveu de culpabilité.

On ne l'a ni informé de la nature de la sentence, ni consulté quand a été rédigé le rapport présentenciel. Au moment où je lui ai parlé, l'objet de sa colère avait très manifestement été transféré du détenu au système de justice pénale qu'il considérait comme insensible, malveillant, inutile et inefficace.

Ce qui l'ennuyait particulièrement, c'était le manque d'égards dont, à son avis, on avait fait preuve à son endroit. Il était un commerçant, à son propre compte, et chaque fois qu'il s'était présenté au palais de Justice ou poste de police, il avait dû se faire remplacer à la pharmacie, engageant ainsi des frais considérables. Personne n'a cherché à le tenir au courant de la situation, et personne n'était intéressé à son opinion.

Je sais bien qu'il ne s'agit pas nécessairement d'un cas typique et que, souvent, les policiers ne manquent pas d'informer les victimes, et les avocats de la Couronne tiennent effectivement compte des préoccupations de temps et autres des victimes. Toutefois, il y a des cas semblables qui laissent beaucoup à désirer et où il y aurait manifestement beaucoup à faire pour aider les victimes dans leurs divers contacts avec le système de justice pénale.

Les victimes sont des personnes en chair et en os, qui ont subi des blessures réelles et, souvent, des humiliations non moins réelles. Elles ont des plaintes réelles à formuler concernant leur manque de protection contre le crime et, bien souvent, concernant le manque de considération dont elles sont l'objet après leur victimisation.

J'espère que cette conférence donnera lieu à de nombreuses approches innovatrices et importantes qui permettront au régime de justice pénale canadien d'améliorer le sort et le tatement réservés aux victimes du crime.

Il est difficile d'aborder la question de la victimisation sans que la discussion ne prenne une tournure personnelle. La

plupart d'entre nous ont, soit directement, soit par l'intermédiaire d'un ami ou d'un parent, éprouvé la douleur et les inquiétudes causées par le crime, ce qui nous aide à mieux comprendre certaines des lacunes de notre système actuel. A mon avis, il importe de noter que, par exemple, en droit nous classifions les crimes contre la propriété d'après la valeur matérielle de celle-ci et non d'après leurs conséquences pour la victime. Des phrases comme "Ce n'était qu'un vol de moins de $200" ou "Ce n'était qu'un cas mineur d'introduction par effraction" tombent à faux lorsque l'objet volé avait une valeur sentimentale ou que l'infraction cause un tel traumatisme à la victime et à ses amis qu'ils ne se sentent même pas en sécurité dans leur propre foyer et dans leur propre quartier. C'est précisément le traumatisme subi par les victimes d'actes criminels qui est l'une des questions les plus complexes et les plus négligées du système de justice pénale et qui, je crois savoir, est l'un des principaux points qui seront traités au cours de cette conférence.

Cela ne veut pas dire que les pertes matérielles et les blessures corporelles subies par les victimes sont sans importance. Bien au contraire, elles sont très importantes et, bien que nous puissions sans aucun doute améliorer la situation, diverses mesures ont été prises dans cette optique. Les pertes financières sont souvent au moins partiellement absorbées par les assurances. Au Canada, la plupart des provinces ont collaboré avec le gouvernement fédéral à l'établissement de commissions d'indemnisation des victimes du crime. En outre, dans les cas où l'infracteur est traduit en justice, les ordonnances de dédommagement et de restitution font de plus en plus partie intégrante de la sentence.

Dans le cas de blessures corporelles infligées aux victimes, nous bénéficions au Canada, contrairement aux Etats-Unis, d'un régime national d'assurance de soins médicaux complets qui couvre les soins appropriés, quelle que soit la cause de la blessure.

Toutefois, il y a un autre domaine qu'il faut améliorer, à savoir les préjudices psychologiques et sociaux résultant du crime, qui, bien que moins évidents, ne sont pas moins dommageables.

A la suite d'une infraction, la victime et ses amis et voisins peuvent se voir contraints d'adopter un nouveau mode de vie qui soit moins libre ou moins ouvert, ou tout simplement, moins confortable. Et pour les personnes comme les victimes du viol, il y a l'empreinte indélébile qui peut rendre la vie dans notre société moins agréable et moins facile.

Il y a un problème connexe auquel il nous faut absolument faire face. Les victimes du crime sont souvent doublement victimisées, d'abord par le crime lui-meme et, ensuite, comme dans l'exemple du pharmacien, en raison de la nature même de leurs rapports avec le système judiciaire.

Soucieuse de connaître les détails de l'infraction et d'obtenir des renseignements sur l'infracteur, la police peut ne pas s'apercevoir, au moment de l'enquête initiale, du besoin immédiat d'aide et de soutien de la victime. En effet, elle omet souvent de signaler les diverses possibilités de recours juridique et les services d'aide mis à la disposition de la victime. En tant que témoin, la victime est censée revivre le traumatisme du crime en déposant un témoignage dans une salle d'audience publique et souvent sans la moindre compassion des représentants du tribunal qui ne comprennent guère le stress psychologique rattaché à cette expérience. A maints égards, la victime se sent à la fois délaissée et exploitée par le processus.

Ces perceptions sont une source importante d'incompréhension à l'égard de notre système de justice. Dans la perspective de la victime, même les caractéristiques de notre procesus de justice pénale qui sont destinées à protéger la victime tendent à s'estomper devant sa complexité. En effet, d'après l'expérience commune des victimes du crime, les droits et les besoins individuels sont submergés par la nature monolithique de notre appareil de justice pénale.

Le gouvernement central a un rôle à jouer en vue d'améliorer l'aide aux victimes et de veiller à ce que les Canadiens en général considèrent ce domaine comme une question légitime de politique nationale. En fait, nous avons adopté à l'échelon tant fédéral que provincial un certain nombre de mesures qui témoignent de notre engagement à cet égard.

J'ai déjà mentionné quelques-unes de ces mesures. Nous avons notamment mis en place, dans le cadre des programmes à frais partagés, des régimes d'indemnisation des victimes d'actes criminels. Nous avons financé, dans tout le pays, un certain nombre de projects-pilotes destinés à aider les victimes et les témoins. Par exemple, je viens tout juste d'approuver le financement d'un programme d'intervention dans les querelles familiales de Restigouche (Nouveau-Brunswick), qui est axé principalement sur les situations de violence familiale et matrimoniale, le travail étant confié à des travailleurs sociaux et à des policiers ayant reçu une formation



pas tout-à-coup dépouillé des vêtements qu'il porte, de la nourriture qu'il a dans son assiette ou de l'instrument de travail qu'il tient dans ses mains.

Enfin, aucune société ne pourrait exister si elle ne respectait pas la personne d'autrui, l'ordre, si elle ne préférait pas l'ordre à l'anarchie.

Telles sont les valeurs fondamentales nécessaires à la bonne marche de toute société.

Il n'est donc pas étonnant de constater que la plupart des sociétés, évoluées ou sous-développées, se donnent des règles de droit, et en matière pénale pour étayer ces valeurs fondamentales, et en matière civile pour assurer les rapports de bon voisinage entre individus voulant vivre dans la paix, en "bons pères de famille", selon l'expression consacrée.

Ainsi, dans tout droit pénal, on s'attend à trouver des descriptions d'infractions réprimant la violence; d'infractions réprimant la malhonnêteté; d'infractions réprimant les atteintes au droit de la propriété; d'infractions réprimant les atteintes à l'ordre public.

Il ne faut absolument pas penser que le droit constitue une entrave à la liberté. Au contraire, c'est parce que le droit existe que l'homme, que l'individu est libre, plus librement libre, en autant que l'on veuille accepter une notion exacte du mot liberté.

La liberté est l'une des choses qui rend la vie en société agréable, non pas simplement parce qu'il est déplaisant d'être assujetti à la volonté des autres, mais plutôt parce qu'il existe un besoin d'être libre pour tenter des expériences, pour essayer de nouvelles choses, pour être différents. C'est cela qui nous individualise.

Mais si la liberté individuelle est désirable, elle ne doit jamais brimer le bien commun.

C'est le droit qui est la sauvegarde du bien commun.

Une caractéristique réconfortante de notre société canadienne consiste dans la reconnaissance de la dignité de l'homme. Et c'est parce que le législateur croit à cette dignité de l'homme qu'il tend à perfectionner ses lois, à les améliorer dans le sens de l'évolution, tout en tentant de respecter les valeurs fondamentales dont j'ai parlé tout à l'heure.

Le droit pénal a aussi un autre objectif, celui de nous rassurer. Il y parvient en nous démontrant d'abord que justice a été faite, ensuite il assume le rôle d'appuyer les valeurs sociales, de les étayer, de les inculquer et de les promouvoir.

Pour affirmer les valeurs auxquelles une société croit, le droit pénal utiliser la technique de dramatisation de la morale par le biais de laquelle il rassure, éduque et oppose une nécessaire réaction à la menace ou à l'atteinte aux valeurs.

Le recours au droit pénal ne doit pas être employé à tout propos. Il doit l'être s'il s'agit de manquement grave pour lequel il n'existe aucun facteur justificatif, ni excuse possible.

Mais lorsqu'il s'agit de protéger la société comme telle, il faut revenir à la conception qui fait des valeurs et de la morale communes la clef de voûte de la société. Ces valeurs sont si importantes qu'il faut les protéger.

L'effort premier de l'homme qui veut conquérir la liberté, qui veut instaurer la liberté, doit tendre à déboucher sur quelque chose qui mérite d'être conservée, utilisée et mise à profit dans l'ensemble et pour l'ensemble des individus dans une société donnée. Pour tirer le meilleur parti possible de nos libertés, nous devons nous appliquer à devenir des citoyens intelligents, cultivés et éclairés, au fait des valeurs, des privilèges et des devoirs de notre manière de vivre.

La liberté de l'homme démocratique consiste en une liberté à l'intérieur de certaines limites qu'il doit accepter. En effet, l'autorité a pour source la volonté des citoyens, et c'est le privilège de l'homme de s'imposer une règle stable, commune à tous les membres de la société. Si la liberté agit autrement, elle devient anarchie.

La loi constitue donc cet ensemble de règles propres à l'épanouissement de la liberté. Comme le disait Me Léonard Brockington: "La loi ne prend jamais pour l'oppression, la violence ou la mauvaise foi. Elle est présente partout où un homme marche la tête haute et dit la vérité qu'il porte en lui. Car la loi est la voix de la liberté et des hommes libres."

Les tribunaux ont pour mission de veiller à ce que personne ne porte atteinte à la liberté et à la sécurité des résidents du pays. Ils ont donc le rôle de gardiens de la liberté, ce qui n'est pas peu dire.

Il est naturel à l'homme vraiment cultivé d'éprouver un profond respect pour les formes juridiques qui rendent possibles les contacts humains. Il sait que la recherche de lois et de valeurs morales est la recherche de la justice. Il sait également que la tolérance se fonde sur la justice.

Comme vous le voyez, j'en arrive à refermer le cercle avec la notion de justice qui est, comme l'écrivait Thomas d'Aquin: "La volonté constante et perpétuelle de rendre à chacun son droit."

Permettez-moi d'abord de vous entretenir quelques moments sur le pouvoir judiciaire.

Dans toute société démocratique, il est essentiel qu'il y ait partage des pouvoirs

# Police and the Courts

**by Judge Pierre Brassard**

*(The author is a Judge of the Sessions of the Peace of Quebec. These remarks were made at the R.C.M.P. Training School in Regina.)*

Si vous complètez votre enquête policière, vous trouverez que ma présence ici, à Regina, à l'école de la Gendarmerie royale du Canada, est due à la capacité de se souvenir du gendarme Robert Thompson.

Il faut croire que j'ai impressionné le gendarme Thompson au temps où il remplissait ses devoirs d'agent de la paix dans le district judiciaire de Beauharnois, à Valleyfield, province de Québec.

Messieurs, on m'a invité à vous parler de l'intervention policière en cas de crise. C'est un sujet vaste et des plus intéressants.

Vaste, car les états de crise se retrouvent dans toutes les sphères d'activités humaines. Que ce soit au niveau politique où des groupes manifestent leur opposition au régime, que ce soit au niveau ouvrier où des syndicats revendiquent ouvertement au cours de grèves, que ce soit au niveau individuel où des tempéraments s'entrechoquent, que ce soit au niveau familial où des différends se soulèvent, partout les forces de l'ordre sont sur la ligne de feu.

Leur intervention doit toujours être empreinte de justice, c'est-à-dire de pondération, de neutralité et d'efficacité.

Bien sûr, les policiers de première ligne ont à exécuter les orders reçus de leurs supérieurs qui, eux, sont formés à faire face aux situations théoriques qui peuvent se présenter.

Il n'en reste pas moins que les gendarmes qui répondent à un appel d'urgence sont confrontés avec la dure réalité et qu'ils doivent agir rapidement, tout en ayant égard à leur rôle primordial qui est celui d'agent de la paix.

Avant d'aborder l'aspect pratique du rôle de la police dans les situations de crise, qu'elles soient publiques ou domestiques, laissez-mois discourir en votre présence sur des concepts plus philosophiques touchant le droit, la loi, le pouvoir judiciaire, et enfin les partages en matière légale entre le fédéral et le provincial.

Cette époque de contestation que nous vivons actuellement nous amène à nous demander si nous ne devrions pas en arriver à une nouvelle définition du droit, à une conception neuve du droit, à de nouvelles limites du droit.

La tendance actuelle, avouons-le, veut que chaque individu ou chaque groupe d'individus, agisse dans les limites subjectives qui vont jusqu'à cette conception simpliste qui se traduit en ces termes: j'ai le droit de faire ce que le veux, quand je le veux, comme je le veux.

Ne voit-on pas des gens répudier des contrats signés en bonne et due forme parce que telle clause du contrat ne fait plus leur affaire?

Que nous essayions d'imaginer un monde vivant selon des normes individuelles, et nous rencontrons inévitablement un état d'anarchie.

Il n'est pas facile de sortir des sentiers battus, même en échafaudant les hypothèses qui semblent les plus évoluées. L'explication en est simple si nous partons du principe que l'homme est essentiellement un être sociable, un animal sociable comme l'a souligné Aristote.

L'homme qui vit en solitaire sur une île déserte, sans possibilité de communication, peut bien régler sa vie à sa guise. Qu'il circule à droite ou à gauche sur le seul chemin qu'il s'est tracé lui-même, cela n'a pas d'importance. Le jour où il aura un voisin, il devra convenir avec lui de normes de circulation, de voisinage, il devra penser à l'environnement.

Or, rares sont les solitaires. Il est bien plus normal de penser en terme de société.

Certaines valeurs sont essentielles à toute société. Sans elles, aucune ne peut survivre. Prenons par exemple la "non violence". Sans une quelconque acceptation de l'idée que la violence est interdite, ou du moins à éviter, une société se réduirait à un groupe d'individus apeurés et hostiles.

Considérons une autre valeur de base: la vérité. Sans une acceptation de la notion que le mensonge et la fausseté à proscrire, une société ne serait plus qu'un groupe d'entités distinctes sans aucune communication.

De plus, il doit y avoir dans toute société un certain respect du droit de propriété. Qu'elle mette tous ses biens en commun ou qu'elle se fonde sur le principe de la propriété privée, une société ne peut faire un usage satisfaisant de ses biens que si l'usager a une quelconque garantie de possession, une assurance qu'il ne se verra



spéciale. J'ai aussi approuvé dernièrement le financement d'un service d'aide aux victimes, qui relèvera du Service de police de Calgary. Les membres de l'unité d'aide aux victimes travailleront de concert avec leurs collègues chargés notamment des relations raciales, de la prévention du crime, des citoyens de l'âge d'or, de la sécurité des enfants et des crimes sexuels. Le nouveau projet sera d'abord confié à un effectif composé de trois personnes: un agent de police spécialisé, qui sensibilisera ses collègues aux besoins des victimes, un travailleur social, qui servira de conseiller aux familles dont un membre vient de mourir ou de subir un accident, et un agent de recherche chargé d'effectuer un relevé des services sociaux existants et d'évaluer les besoins des victimes, qui n'ont pas été comblés.

De nombreuses initiatives du Ministère que dirige sont confiées à la police, et c'est là une stratégie que nous continuerons à encourager, même si nous reconnaissons d'emblée que celle-ci doit travailler en étroite collaboration avec d'autres organismes afin de s'asurer que les victimes bénéficient de services complets. C'est une stratégie qui reconnaît que le contact initial entre la victime et la police est d'une importance capitale pour accroître la confiance de la population à l'égard du processus de justice pénale.

Le gouvernement finance aussi, dans le cadre de projets-pilotes, environ 35 foyers de transition et centres d'accueil des victimes de viol. Je ne doute pas que l'honourable Judy Erola, qui vient d'être nommée ministre de la condition féminine, continuera d'appuyer énergiquement ces initiatives. Notre objectif est de favoriser la prestation d'une vaste gamme de services à des groupes précis, comme les victimes de violence familiale, et aux victimes en général afin d'aider à coordonner les services existants et nouveaux. Le ministère de la Santé et du Bien-être social est en train d'établir un centre national d'échange de renseignements sur la violence familiale.

Les Canadiens bénéficient également de divers programmes financés par les gouvernements provinciaux. Par exemple, en Ontario, notre province hôte, le ministère du Procureur général a constitué un groupe de travail sur la violence familiale. En outre, la province a mis au point une trousse très utile de détection des cas d'agression sexuelle, ainsi qu'un certain nombre de projects de réconciliation de la victime et de l'infracteur. Des fonds sont aussi fournis au Centre d'accueil des victimes de viol dans toutes les régions de l'Ontario. Par ailleurs, d'autres provinces recherchent activement des moyens de mieux répondre aux besoins des victimes du crime.

— en 1979, le ministère des Affaires sociales du Québec a organisé onze colloques régionaux afin de discuter du problème de la violence contre la femme,

— le gouvernement de Terre-Neuve a financé une conférence sur la violence familiale afin de faciliter l'établissement de réseaux entre les services régionaux et a créé un service de counselling à l'intention des victimes de violence familiale, d'inceste, etc.,

— l'Alberta finance un project permettant à la police d'assurer des services complets d'aide aux victimes et aux témoins de crimes à Edmonton, et elle a versé une subvention de $2,000,000 à un projet d'aide aux victimes de violence familiale,

— l'Ile-du-Prince-Edouard vient de terminer un grand rapport sur la violence familiale,

— le Yukon envisage la possibilité d'élaborer un programme d'éducation du public sur le droit, faisant appel à l'association professionnelle des avocats,

— la Colombie-Britannique a créé, à Victoria, un centre communautaire de déjudiciarisation/médiation, et finance, dans le Lower Mainland, un important programme d'aide aux victimes par l'intermédiaire de la Société John Howard, et la Commission de police de la Colombie-Britannique a établi un "répertoire des services d'aide aux victimes" à l'intention de la province,

— la Saskatchewan finance un bon nombre d'unités mobiles d'intervention en cas de crise, et diverses autres initiatives locales et régionales ont été entreprises ou sont prévues.

Le gouvernement fédéral et les provinces parrainent ensemble des ateliers et des conférences, comme celle-ci, sur les services d'aide aux victimes. Nous collaborons également à la collecte et à la diffusion de renseignements destinés aux victimes. Cet esprit de collaboration et de dialogue constitue un excellent fondement qui permettra de mieux répondre, dans l'ensemble du pays, aux problèmes des victimes.

Il reste beaucoup à faire au Canada. L'une de nos questions prioritaires a été de rassembler les données dont nous avons besoin pour repérer les lacunes dans la gamme des services d'aide aux victimes. Je suis sûr que nous voulons tous accroître et améliorer les services actuels et assurer une bien meilleure diffusion des données déjà connues.

Un effort réellement national de cette sorte est l'une de mes priorités en tant que Solliciteur général du Canada. Toutefois,

pour y parvenir, tout ce que nous entreprendrons doit être fait de concert et avec l'entière collaboration des provinces. Des représentants de mon Ministère et du ministère de la Justice ont déjà entamé un processus de consultation officieuse avec leurs homologues provinciaux. Au début du mois prochain, je soulèverai auprès de mes homologues provinciaux des questions concernant les victimes du crime et je leur ferai part de l'engagement du gouvernement central qui cherche à réaliser ces objectifs. Je suis sûr que, dans un avenir assez proche, nous pourrons prendre certains engagements officiels en vue de l'amélioration et de l'expansion des services d'aide aux victimes dans tout le Canada.

C'est pourquoi j'entrevois avec optimisme le dénouement de cette conférence. Je souhaite vivement en savoir davantage sur l'expérience américaine et apprendre comment nous pourrons éventuellement appliquer vos stratégies heureuses dans notre pays. Je sais qu'aux Etats-Unis un certain nombre de questions ont attiré votre attention, notamment les besoins des victimes des crimes de violence, les besoins des témoins et des jurés, et la nécessité d'établir des programes de prévention afin de lutter contre l'indifférence des citoyens vis-à-vis des méfaits commis à l'égard des biens de l'Etat et de la propriété privée. Les efforts que vous faites pour établir des réseaux de coordination au niveau des Etats afin d'appuyer les programmes non gouvernementaux présentent un intérêt particulier pour les représentants, à tous les niveaux, du système de justice pénale. Le concept d'un groupe national d'aide et d'information sur les victimes, comme l'organisation NOVA, est aussi fort intéressant pour nous au Canada.

Comme je l'ai déjà mentionné, je crois que nous connaissons tous les limites tant pratiques que théoriques de la participation de l'Etat aux services d'aide aux victimes. Il ne fait aucun doute que nous devons reconnaître le rôle intégral que des individus et des organismes du secteur privé ont déjà assumé dans ce domaine. Comme nous accordons une importance accrue aux victimes, nous espérons que ces organismes élargiront encore davantage la gamme de leurs activités visant à promouvoir les programmes communautaires et à sensibiliser davantage la population aux besoins des victimes. Notre succès dépendra de l'aide et de la participation locale, à toutes les étapes.

Les citoyens tireront profit de la ligne de conduite que je préconise. Toutefois, la société en général en bénéficiera également à maints égards, si nous poursuivons ces objectifs — meilleure collaboration des victimes aux enquêtes policières, augmentation du nombre de crimes signalés, amélioration des rapports entre les citoyens et la police, amélioration de la prévention du crime, augmentation des taux de déclaration de culpabilité en raison d'une meilleure participation de témoins, et augmentation du remboursement des infracteurs aux victimes, par le recours au programme de dédommagement.

# Justice for Victims of Crime

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role that individuals and private sector agencies have already fulfilled in this area. As we place increasing emphasis on victims, we will be counting on these organizations to expand their activities even wider in the promotion of community programs and in the vital task of heightening public awareness of victim concerns. The success we achieve will depend upon local support and local involvement at all stages.

There will be benefits to individual citizens from the course I am advocating. But we can also expect many benefits for society as a whole if we pursue these objectives — improved victim support for police investigations, improved reporting of crimes, improved citizen police relations; improved crime prevention, increased conviction rates due to improved witness involvement, and increased payment by offenders to victims through restitution.


*"I've seen you here before! I never forget a face."*



423 did. Judicial law-making one step removed.

But once the legislature has acted in an area at the instigation of the judiciary, do judges suddenly lose their claim to law-making authority in the area? I am firmly of the belief that they do not, but there is a price to pay for such a belief. Judges, in general, remain sensitive to allegations of "judicial legislation", whether justified or not. Was "judicial activism" warranted in the recent case of *Pettkus v. Becker*, (1980) 2 S.C.F. 834? Some of my brethren clearly felt it was not. *The Family Reform Act, 1978* S.O. 1978, c.2 had effected an extensive reform of family law in Ontario after the stop gap measures of *The Family Reform Act, 1975*, S.O. 1975, c.41. The presumption of equal sharing of family assets which applies between married persons was not extended in the legislation to common law spouses. I found that a remedy existed (and always had existed) in equity for the division of property between unmarried individuals: the constructive trust. "Palm tree justice" and "judicial legislation" said my brother Martland. But as I took care to point out in my judgment "the court is not here creating a presumption of equal shares . . . the fact there is no statutory regime directing equal division of assets acquired by common law spouses is no bar to the availability of an equitable remedy in the present circumstances" (1980 2 S.C.R. 834 at p.851). Was I declaring the law as it has always existed or was I making law? Irrespective of the answer, my firm conviction is that I was fulfilling the duty of a judge to decide the case before him or her in a "reasoned way from principled decision and established concepts" *(Harrison v. Carswell, supra*, p.81).

It is also I think important, in a discussion such as this, to have in mind the very important change effected in the jurisdiction of the Supreme Court of Canada with the enactment of section 41(1) of the *Supreme Court Act* in 1975. I will read it:

> 41(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgement of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgement is accordingly granted by the Supreme Court.

Implicit in this is recognition of the role of the court as developer of the law. The emphasis is on legal development rather than the resolution of disputes between litigants or the correction of error in the lower courts. Leave is to be granted or not granted depending upon whether the issue raised is one of public importance, not merely of importance to the litigants. In the resolution of the legal problem presented the court may well have to give meaning to the words of a statute or adapt the law to meet changing social conditions and, in that limited sense, perform a law-making function.

**Conclusion**

Judges do make law but, unlike the legislature in a system which recognizes the doctrine of parliamentary sovereignty, their law making power is a limited one.

> A judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knighterrant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles (Cardozo, *The Nature of the Judicial Process)* (1921), at p.141).

Paul Weiler in his study of the Supreme Court of Canada *In the Last Resort* (1974) says that judges should make law but not too much. Professor Jaffe advises that they do it surreptitiously:

> The fact is that a judiciary, whether reactionary or radical, can do much more to work its will by *ad hoc* manipulation. Such activity is difficult to detect and eludes the criticism and confrontation made possible by overt law-making (*supra*, at p.15).

*Ad hoc* manipulation was perhaps necessary during the reign of *stare decisis* and the domination of the doctrine of binding precedent. "This case is distinguishable on its facts" or "this case must be confined to its facts" achieved the

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some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this house as normally binding, to depart from a previous decision when it appears right to do so.

In this connexion they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.

The announcement is not intended to affect the use of precedent elsewhere than in this house (1966) 3 All E.R. 77 *per* Lord Gardiner).

A year later in *Binus v. The Queen*, (1967) S.C.R. 594, Cartwright J. confirmed the power of the Supreme Court of Canada to depart from a previous decision:

> I do not doubt the power of this court to depart from a previous judgment of its own but, where the earlier decision has not been made *per incuriam*, and especially in cases in which parliament or the legislature is free to alter the law on the point decided, I think that such a departure should be made only for compelling reasons (at p.601).

The principle of *stare decisis* still applies vertically of course; decisions of the Supreme Court of Canada are still "binding" on the courts below. I would hope however that the precedents are not applied as blindly as they have been in the past. A version of the doctrine of *stare decisis* is of course found everywhere, in practice if not in theory, even in the civil law jurisdictions which adamantly maintain that there is no doctrine of precedent applicable to decisions of their judiciary. A judge of first instance, in say, Montpellier, who perversely refuses to follow a recent ruling of the Cour de Cassation will merely find himself consistently and invariably overruled. So the doctrine of precedent is with us still and for good reason.

Lord Devlin for his part denies that he has ever felt the "tyranny of precedent":

> It is a tie, certainly, but so is the rope that mountaineers use so that each gives strength and support to the others. The proper handling of precedent is part of judicial craftsmanship; the judge must learn how to use it and in particular how to identify the rare occasions when it is necessary to say that what judges have put together they can also put asunder (*The Judge*, *supra*, at p.201).

Lord Devlin and I might differ on the rarity of the occasions.

A simplistic view of the theory of the division of powers has obscured the fact that the judiciary and the legislature are partners in the law-making process. The distinction between the judge and the legislator has been over-defined. Judges do, and must, posit rules of general applicability, the supposed preserve of the legislature. On the other hand, legislatures do pass legislation determining the rights and status of an individual, supposedly a function of the judiciary. The judiciary and the legislature both make law – but it is not the same kind of law nor is it made for the same purposes. The primary function of the judge is to decide the case before him, to "trancher le litige" – cut through the issue. He deals with a concrete issue and has the benefit of seeing the practical implications and repercussions of a rule of law on individual members of society. The legislature, on the other hand, is dealing with issues at a certain level of abstraction, and, cannot exhaustively provide for every mutation possible. There are some areas of the law where legislative action is infinitely superior to judicial action, for example in corporate and commercial law. Those directly affected by the legislation are in close and constant communication with the legislator. They form a powerful lobby group. The law is continually being amended and updated. In Ontario, for example, there have been two major revisions of *The Business Corporation Act*, in ten years. But the legislative process can be a slow and cumbersome one and many areas of the law which badly need reform may simply be low priority, not politically profitable. The legislative process should not be idealized out of all proportion. It is certainly not the solution to every troubled area of the law.

On the contrary, judicial law making, may be a spur to a lazy or indifferent legislature. The judiciary and the legislature do not exist in splendid isolation one from the other. They interact. Mrs. Murcoch, on her own, did not have sufficient clout to bring about a major reform in Alberta family law. *Murdoch v. Murdoch*, (1975) S.C.R.



# The Judiciary — Law Interpreters or Law-Makers?

**by Mr. Justice Brian Dickson**

*Mr. Justice Dickson is a judge of the Supreme Court of Canada. These remarks were made at the mid-winter meeting of the Manitoba Bar Association.*

> "What is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both". (Denning L.J. in *Packer v. Packer*, (1954) P.15 at p. 22)

It should not be hard to guess the speaker of these words: Lord Denning, Master of the Rolls, without a doubt the most controversial member of the judiciary this century. His position in the great debate "Do Judges Make the Law or Do They Merely Declare It" is unambiguous. He is the most unabashed advocate of "Judicial Creativity" – otherwise known as "Naked Usurpation of the Legislative Function" *(Magor and St. Mellons Rural District Council v. Newport Corporation*, (1951) 2 All E.R. 839 *per* Lord Simonds).

The debate is an old one and, in England at least, shows no signs of diminishing in vigour or pertinence. Lord Denning flies his colours proudly; he used the above quotation at the preface to his recent book *The Discipline of Law* (London, 1979). The same year Lord Devlin published *The Judge* (Oxford, 1979) as an antidote one might surmise at Lord Denning:

> In recent years a number of pens have been put to paper to criticize the English judiciary for its torpidity. What is needed today, it is said, is a dynamic, or at least an activist judiciary, ready and willing to develop the law to fit the changing times

Lord Devlin makes it "plain" that he "is firmly opposed to judicial creativity or dynamism" as he defines it. "Social justice guides the law-maker: the law guides the judge. Judges are not concerned with social justice, or rather they need not be more concerned with it than a good citizen should be; they are not professionally concerned. It might be dangerous if they were. They might not administer the law fairly if they were constantly questioning its justice of agitating their minds about its improvement" (ibid., at p.8). Lord Denning, in ringing language, has characterized the debate as one between the "timorous souls" and the "bold spirits" *(Candler v. Crain, Christmas & Co.*, (1951) 2 K.B. 164). He can perhaps be forgiven the note of triumph with which he cites this decision; vindication is the reward which longevity provides to one who is ahead of his time. His dissent in *Candler v. Crane, Christmas & Co.* of course became the *Headley Byrne v. Heller* principle.

For many reasons, the lines of the debate are more distinctly drawn in England than in Canada and the United States. The real issue in Canada is not whether judges do or should make law. It is, as I pointed out in *Harrison v. Carswell*, (1976) 2 S.C.R. 200 defining the limits of judicial law-making:

> The duty of the court, as I envisage it, is to proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts. I do not for a moment doubt the power of the court to act creatively – it has done so on countless occasions: but manifestly one must ask – what are the limits of the judicial function? (at p. 218).

It is a complex and difficult question and one which is of particular concern to members of the Supreme Court of Canada. Since the doctrine of *Stare Decisis* has fallen into desuetude at the level of final appeal, the question has become more pressing. As Chief Justice Laskin commented several years ago:

> A final court which is prepared to overrule its own precedents puts itself, institutionally, into a partnership albeit a junior one, with the legislature (*The Institutional Character of the Judge* (1972) 7 Israel L.R. 329 at p. 341).

And yet, as judges, we are all sensitive to

accusations of "judicial legislation". I still react with a guilty start, although I am convinced that in many instances such allegations are based on what I consider a basic misapprehension of the function of the judiciary.

Part of the difficulty lies in the term itself: "judicial legislation". Our political system is based upon the concept of the division of powers between the judiciary, executive and the legislature. The judiciary adjudicates and the legislature legislates. There is no quarrel with this. But the existence of judge-made law is not necessarily a prohibited incursion into the exlusive domain of the legislature. The "law" which judges make should not be confused with the "laws" which issue from parliament. The civilian jurists with their genius for systemization, correctly in my view, speak in terms of "sources" of law. Statute law is a "source" of law; custom may be a "source" of law; and in our legal system, judicial decisions are a "source" of law. Some sources are more important or more authoritative then others, so that custom, for example, is of relatively little significance.

There have been historical examples of true "judicial legislation". In pre-revolutionary France the courts of appeal, the "parlements" were given the power to enact regulations. This was a straight delegation of the legislative power of the king to the courts, a power which was used by the parlements to challenge the authority of the king himself. For their excesses and abuse of power the parlements incurred the wrath of the population and were almost immediatly dissolved at the time of the French revolution. The courts which took their place under the revolutionary government were totally subjugated to the legislature. Not only were they denied all power to make regulations, even the interpretation of laws were placed beyond them. An address by the court to the legislature was required in order to interpret a law (*see* Dawson, *The Oracles of the Law* (1968), at p.375 ff). A vestige of the revolutionaries' distrust of the judiciary remains to this day in Article 5 of the *French Civil Code:*

> Judges are forbidden to pronounce by way of a general and rule-making disposition on the cases submitted to them.

Some eminent common law judges would adopt the very same position.

The civilian hostility to judge-made law is readily explained by history. The origins and nature of the common law, however, do not offer such an easy explanation for the existence of this same hostility.

The common law is, by definition, judge-made law. "The common law . . . is inarticulate until it is expressed in a judgment . . . where the common law governs, the judge in what is now the forgotten past, decided the case in accordance with morality and custom and later judges followed his decision" (Devlin, *The Judge, supra,* at p.177). Before the conquest, as in other Germanic tribal societies, custom was the main source of law. It was transformed by the king's courts into the common law. There was, as such, no legislation as we know it today. Inspired by little other than healthy regard for the king's peace and his royal purse, common law courts initially ventured jurisdiction over a limited range of legal matters. That original jurisdiction was enhanced by measure. The juridicial system expanded its province to accommodate new demands for remedies at law. The courts expressed creativity by first advancing, then consolidating, new concepts of law. Thus, the strands of the common law were woven case by case in the courts of the day. In time that body of law supported a full complement of legal principles, given shape and cohesion by the application of like principles in alike circumstances, by an observance of precedent. Lord Wright chose an apt analogy in speaking of the evolution of our law:

> (The judge proceeded) . . . from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea . . . (Lord Wright, *The Study of Law* (1938) 54 L.Q.R. 185 at p.186).

Though perhaps the courts took small and carefully measured steps the distance covered by principles of law was not insignificant. The strength of the common law, then as now, resides in its resilience, its undoubted capacity for robust growth. Throughout history, principles were devised and concepts forged anew to meet the host of ongoing demands advanced by litigants who pursued remedies not yet recognized and challenged the inadequacies of rule and procedure.

If historically judges did make law how did they, according to many eminent judges and commentators, lose this ability? L. Jaffe in a provocative study published in 1969 "Is The Great Judge Obsolete?" quotes Lord Upjohn as saying that "as a judge he felt that certainty in the law was of paramount importance and he saw his duty to be to declare the law as it it; he deprecated judicial legislation" (at p.28). "Judicial legislation" as I have attempted to point out above, is a misnomer for judge-made law. The irony is that those who deprecate judge-made law revere the great judges of the past who made it: Coke, Bacon, Holt, Mansfield, Blackburn, Willes. As Lord Devlin points out, the ancient powers of the judge to make law have never formally been abrogated: "We could if we would but we think we better not" says Lord Devlin *(The Judge supra,* at p.6).

Why should judges think it better not? As in any other field of human endeavour there is a pendulum of innovation and consolidation, action and reaction.

> "There are two principles", says Whitehead, "inherent in the very nature of things, recurring in some particular embodiments whatever field we explore – the spirit of change, and the spirit of conservation. There can be nothing real without both. Mere change without conservation is a passage from nothing to nothing. Its final integration yields mere transient non-entity. Mere conservation without change cannot conserve. For after all, there is a flux of circumstance, and the freshness of being evaporates under mere repetition". If life feels the tug of these opposing tendencies, so also must the law which is to prescribe the rule of life. We are told at times that change must be the work of statute, and that the function of the judicial process is one of conservation merely. But this is historically untrue, and were it true, would be unfortunate. Violent breaks with the past must come, indeed, from legislation, but manifold are the occasions when advance or retrogression is within the competence of judges as their competence has been determined by practice and tradition (Cardozo, *The Paradoxes of Legal Science* (1928) at p.7-8).

The emergence of a strict doctrine of *stare decisis* towards the end of the nineteenth century marks the onset of the pre-eminence of the view that a judge's function is merely a declaratory one. It found expression in the 1898 case *London Street Tramways Co. Ltd. v. London County Council,* (1898) A.C. 375: once a principle of law had been declared in a decision it was immutable. Those who had made it (or "found it" as they would prefer to term the process) could not change it. The judges forged their own shackles. Some, like Lord Campbell, sought the justification of the rule in a principle verging on that of papal infallibility! The law existed, and always had existed, in some platonic ideal world and, upon his appointment to the bench, the scales fell from a judge's eyes enabling him to see and declare the "law". Lord Halsbury much more pragmatically based the rule on public policy, the interest of society in the finality of litigation.

There are many good arguments which may be advanced in favour of the principle of *stare decisis:* it promotes "certainty, predictability, reliability, equality, uniformity, convenience" (Hahlo, *The South African Legal System* (1968), at p.215).

The principle, however, has two major flaws. "Law must be stable and yet it cannot stand still" Roscoe Pound, *Interpretations of Legal History* (1923), at p.1) Give a moment's thought to the changes in our world since 1898: automobiles to airplanes to space ships. Technology has radically altered the context within which the law operates. Can copyright law remain the same after the invention of the photocopy machine?

Secondly, judges are not infallible and the doctrine of *stare decisis* can serve to perpetuate a bad rule.

> It allows the law to become a petrified forest of erroneous notions. Jonathan Swift in an oft-quoted passage in *Gulliver's Travels* has Gulliver splenetically say: "It is a maxim among . . . lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of *precedents,* they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly" (Hahlo, *supra,* at p.215).

In 1966 the vices of the rule overcame its virtues and the House of Lords issued its famous practice statement. Six short sentences:

> Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least