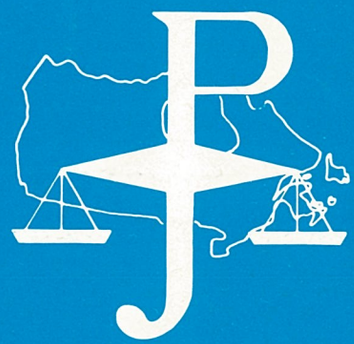
ISSN 0709-5319



PRINTED IN BRANDON BY LEECH PRINTING LTD

PROVINCIAL JUDGES Journal

VOLUME 6, No. 1 MARCH, 1982

A PUBLICATION OF
THE CANADIAN ASSOCIATION OF
PROVINCIAL COURT JUDGES

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

Editorial communications are to be sent to The Provincial Judges Journal, Box 531, Brandon, Manitoba R7A 5Z4.

EDITOR-IN-CHIEF
Judge Rodney Mykle

EDITORIAL BOARD
British Columbia, Judge C.C. Barnett
Alberta, Judge A.W. Aunger
Saskatchewan, Judge R.J. Kucey
Ontario, Judge Douglas V. Latimer
Quebec, le Judge Andre Duranleau
New Brunswick, Judge Blake Lynch
Prince Edward Island, Judge Gerald L. FitzGerald
Nova Scotia, Judge R.J. McCleave
Newfoundland, Judge Ronald L. Jenkins
North West Territories, Chief Judge James R. Slaven

The World is Unfolding

from the B.C. Provincial Judges' Newsletter

The B.C. Provincial Judges' Newsletter editor has long assumed that the high standards of our judicial education programs have succeeded in enlightening our Judges upon matters both legal and worldly. The following item, guaranteed to be factual, may require a re-assessment of judicial education programs within British Columbia and re-defining of the goals of those programs.

The scene is Maple Ridge, B.C., the date is August 20, 1981. His Honour the Judge (name withheld) is dealing with a man who has just pleaded guilty to a charge of driving a motor vehicle with no muffler:

THE COURT: I will impose a fine of thirty-five dollars.

When can you pay that?

THE ACCUSED: I'll say by two months.

THR COURT: Thirty-five in two months? How come so long?

THE ACCUSED: Me and the old lady are in a rough situation.

THE COURT: What is the problem?

THE ACCUSED: It's a long story.

THE COURT: Are you working?

THE ACCUSED: Not right now.

THE COURT: Where would you usually work?

THE ACCUSED: Broughton and Comox.

THE COURT: What sort of work do you do?

THE ACCUSED: I'm a whore.

THE COURT: Is your equipment operating all right?

THE ACCUSED: Pardon?

THE COURT: Is your equipment operating all right?

THE ACCUSED: Yes.

THE COURT: Why are you unemployed?

THE ACCUSED: I haven't been able to find any.

THE COURT: What sort of work do you do?

HE ACCUSED: I'm a hooker.

THE COURT: Well, what do you hook? What does that mean?

THE ACCUSED: I sell my body.

THE COURT: I see. Well, my friend, I would like you to have the fine paid by the 16th of September.

THE ACCUSED: Fine.

THE COURT: Thank you.

Dumb Judges — 1981

Dumb judges they called us
But dumb we were not;
Arguing and whispering
As among us we fought
About directorships
And counsel slips
And whether gowns or not.

Hints about doing our job
With firmness and dignity,
Of how to control the mob
And leave at least by three,
Kept us busy all through the day
Till faculty were hoarse and classes were done.
Then we descended upon Room 301.

Here we laughed and we drank
And argued some more,
Listening and learning
Till turfed out the door,
As Jean-Marie or Stephen
(or "Lord" Halifax even)
Said, "It's a quarter to four!"

We learned a whole lot
About the business of judging;
What is hearsay or not,
To decide with fudging,
To cite for comtempt,
To sentence folks,
And not make jokes.

Thank you C.A.P.C.J.

— The Word Wrestler

President's Page

by Senior Judge Robert B. Hutton

My last letter to the Journal was dated 20, October, 1981 and it appeared in the December, 1981 issue of the Journal. Since the date of my last letter I have accepted invitations to attend the annual meeting and educational conference of the Provincial Judges' Association of British Columbia held at Richmond, B.C. on 17th to 24th November, 1981 and the corresponding meeting of the Manitoba Association held at Winnipeg on December 2nd to 5th inclusive.

I wish to express my appreciation to both Associations for their wonderful hospitality and particularly their outgoing Presidents, Ken Page of B.C. and John Enns of Manitoba. The new President of the British Columbia Association is Judge Fred Green of Victoria and the new President of the Manitoba Association is Judge Howard Collerman of Winnipeg.

In the meantime another very successful New Judges Program was held at the Park Lane Hotel in Ottawa October 28th to November 6th, 1981. A total of 44 new Judges participated in the program, fourteen in the Family Court part and the balance of thirty in the Criminal Court part. This included Judges from all provinces of Canada and this time two Judges from the Judge Advocates department of the Canadian Armed Forces attended.

In connection with the Income Tax matters in my last letter I did meet on 9th December, 1981 with the General Director of the Taxation Policy and Legislation section of the Department of Finance. It is recognized by the Department that the $3,500.00 limit is no longer adequate in many cases but in view of the tone of the November budget it was not felt possible to include an increase of that amount. I do not think that any change will be made until either the next budget in 1982 or 1983 or at least until the completion of an "extensive interdepartmental review" which is now underway.

In the present circumstances it is my view that pensions or superannuation payments will only be taxable to the extent to which contributions are deductible and I suggest that careful records be kept so that non deductible portions may be proven in the future.

Recent history seems to be in our favour since the deduction limits in the recent past have been raised twice from $1,500.00 and $2,500.00 and then to $3,500.00.

The other problem I raised was the apparent inequality of treatment whereby some Judges are able to deduct up to $5,500.00 for RRSP in addition to $3,500.00 for pension contributions.

In some cases such as federally appointed Judges or Saskatchewan Provincial Judges, because the government does not in fact make contributions to any pension plan although it does pay the pension payments, the wording of the Income Tax Act does not limit them to an overall $3,500.00 deduction. The only cure I am aware of is to have your provincial government create a pension plan like the one in Saskatchewan where it would not make contributions but would make pension payments out of the general funds of the provincial government.

No doubt the Editor will have more to report about the activities of the CAPCJ Executive meeting of the Executive in Ottawa on 23rd January, 1981.

I am very much indebted to all members of the Executive Committee, which includes officers and provincial voting representatives, and the Committee Chairpersons for their assistance to date.

Editorial

by Judge Rodney Mykle

Community service orders have been around for a while in Canada and have met with varying degrees of success in different parts of the country. Although Ontario was one of the pioneering provinces in that regard, and continues to rely to a great extent on dispositions involving community work, British Columbia has not been far behind.

In this issue, we see the community service order from three sides. Dr. S.A. Thorvaldson, of the B.C. Attorney-General's department, talks about fitting CSO's into the traditional aims of the administration of criminal justice, and argues that sound theory behind the project is needed in order for it to fulfill its practical goals.

Criminologist Darryl Plecas, of Fraser Valley College, B.C. reports on studies he has completed involving a number of CSO participants, and comes up with some enlightening findings on the attitudes of offenders, the type of offender with the best chance of success in a CSO program, and an optimum number of hours to be awarded.

On a slightly different tack, Judge John Varcoe tells of community service orders gone wrong, and warns some of the pitfalls that may be experienced in practical terms in handing down and administring CSO orders.

The Journal hopes that this exchange of views within the pages of this issue may contribute to a better understanding of community work orders, as well as providing a reminder that such orders must be handed down with the same careful discretion as any other sentence.

* * *

In any other field of endeavour a seven-year gestation period would be a lengthy one, but that is what has been promised for the review of the Criminal Code by Dr. Edwin Tollefson of the federal Department of Justice (Journal, December, 1981). A consultation document to initiate this review was released in October, 1981, and the Committee on the Law of the Association, headed by Chief Judge Fred Hayes of Ontario, has made an initial response to it.

Dr. Tollefson, in his address to the annual meeting of the Association in September, invited responses from provincial judges regarding this review. Members might wish to obtain copies of this consultation document, and the committee's reply, from their provincial representative.

This ongoing review will have an ultimate effect on the work of the provincial court, and members are urged to give the committee the direction which they feel it should take.

* * *

Mrs. Adeline Donohue, for the last six years executive director of the American Judges' Association, will be leaving her post in April as the executive headquarters of the Association moves from Holyoke, Mass. to the National Centre for State Courts in Williamsburg, Pa.

Members of the C.A.P.C.J. who attended the Calgary annual meeting will remember Mrs. Donohue, a bright and witty lady, for her enthusiasm and interest in judicial organizations, both in the United States and Canada.

In her capacity as editor of the AJA Court Review, she has given valuable assistance to our editorial board from the time of the re-introduction of the Canadian Provincial Judges' Journal, and has continued to be a valued resource person to our Journal since that time. We wish her well in her plans for the future and hope that she will continue to keep contact with her many Canadian friends.

to indicate a large percentage of adults convicted of criminal offences have learning disabilities, consequently the country's jails must have a large proportion of such handicapped person.

The question asked is even assuming the child or adult offender is treated for his disability will it make any difference? It may be that our knowlege of the proportion of disability in society generally is limited, but if a learning disability is a genuine handicap, treatment is warranted not only as a proper form of rehabilitation, but also as a humane act.

Judges may wish to impose a particular form of penalty if the offender is suspected of learning disabilities, particularly if they seem to affect his rehabilitation. The Judge will order a pre-sentence report and expect an in-depth analysis of the offender, including his school records and a psychological assessment. The Judge, with the help of specialists in the community may learn of the accused's disabilities — what next? Sadly, very little then happens. A Judge cannot feel secure in the knowledge that a large number of persons in jail can barely read and write.

I was told of one inmate who was being tutored by a generous citizen who regularly entered the jail say to his teacher, "I hope I can read before I leave, so I can read a story to my daughter." I do not know if these persons are illiterate due to mental inability, lack of education or a learning disability, but to me they seem to form a large portion of the jail population. Should not something be done about it?

At the time when society is justifiably concerned about the incidence of crime and are demanding significant penalties to those involved, Provincial Court Judges are well aware that these unlawful acts relate to the criminal person who acts in a violent and destructive way. The court realizes that penalties alone may not be sufficient when dealing with the social, economic, emotional and handicapped person who may be in need of genuine assistance and help. The learning disabled person has a real problem not only when confronted with an oral process of Justice, but also in achieving rehabilitation so that he can survive in society.

I know of heroes doing volunteer work with individuals who are sentenced to jail and who take it upon themselves to develop a one to one relationship with the prisoner and thereby help and provide assistance as may be needed. I realize many work without any sign of success but the effort must be made.

The volunteer may be the only person that can bring about success, as opposed to a structured form of training and teaching developed as part of the jail environment; it may be that not any one form or technique of providing help to handicapped prisoners is appropriate, but a flexible system of various programs to fit the needs of many different persons."

A Week in the North

(Continued from page 16)

garments, to exceedingly good local pottery and art work, all available through several outlets in the city.

If you're planning on coming all the way for a once-in-a-lifetime look at the North, you might want to consider spending a few extra days either before or after the convention for a trip to a fishing lodge or a package tour to other areas of the North.

Albert Eggenberger, a long-time resident of Yellowknife, and a man who seems to be involved in almost everything that goes on around town, explained several possibilities that might be offered to delegates, such as boat tours, fishing packages of one to several days duration, and bush plane trips, all of which might allow a little relaxation and a glimpse of a bit more of the North in the time available. More information about side trips will be available as the convention approaches.

Albert was kind enough to invite me on an evening fishing trip with a dozen others. Armed with my three dollar fishing licence, I had been guaranteed by Albert that I would catch a fish. We headed out to a secluded island on Great Slave Lake, making a short detour to see an eagle's nest, complete with eagle. Albert's promise came good; I did catch a fish. We all, in fact, caught fish, which we barbequed on the island and headed back to Yellowknife as the sun was going down.

Yellowknife is a combination of aspects . . . part big city, part small town and part, . . . well, just different. I urge members of the Association to come up and see for themselves in 1983.

can't remember". I then realized this witness is not deliberately being obnoxious, evasive, or rude, but is completely frustrated in not being able to comply with counsel's questions and state in what order the events he related took place.

The person in the witness stand obviously wasn't able to grasp and recall the various events, but he was able to recall their relationship with each other. He appeared to have a perceptual handicap. Consider my realization, that an accused person may not receive a fair trial if the Court fails to understand that the process is a verbal system depending on language, visual perception and memory. If these qualities are defective, then justice, truth and fairness to the handicapped witness or accused will suffer.

Persons with auditory and visual disabilities may have problems instructing their lawyers with the result an available defence is not considered. In a system of diversion, such persons can receive unfair interference in their lives due to these handicaps that can be viewed as aggressive and hostile behavior. The court may wonder if the written statement or confession transcribed by a police officer, which reads like well-written prose, truly reflects what the witness was trying to verbalize. This problem becomes even more obvious if the accused gives evidence and describes a series of unrelated happenings in a less than educated manner.

Judges must consider the oral evidence presented and be concerned about its credibility. Should they now be concerned about the question of disability?

I recall situations when the witness claimed lack of recall of the events even after his memory was refreshed by reading a statement given to the police at the time. Was the witness deliberately refusing to give evidence or did he have a genuine failure of recall? I recall where a witness continued to contradict the evidence of the police officer, saying "that is not what I said to him, he must have misunderstood me." Can it be said the witness had difficulty formulating what he perceived? What about the situation where it is obvious the witness was at the scene of the crime, but could not recall insignificant or immaterial aspects of the events. Was the witness deliberately evasive, or was he genuinely distracted by extraneous matters?

In my limited reading, I have become aware that it is not obvious that a learning disability will cause delinquency. There is, however, significant evidence that does support the existence of a high rate of perceptual disorders among delinquents, and consequently among adult offenders.

Obviously, in a system on justice depending on verbal and visual skills, how the Court assesses the witness or accused with a learning handicap may determine the value of the evidence and the fate of the accused. Judges must be aware of these problems as they relate to the persons who come before them so that in case of doubt, fairness is paramount.

Judges who deal with juveniles have a serious obligation to be aware of the problem and thereby urge that the necessary help and assistance is available. In the court room dealing with the adult witness or accused with learning handicaps the Judge must exercise patience, understanding and when possible, bring about different techniques or methods so that the best possible and truthful evidence is available.

For example, with a witness who appears unable to formulate what he saw, but appears to know that he wishes to say, it may be appropriate to use a sketch or diagram. The adult handicapped person has probably learned how to compensate for the disability he suffers and is in fact functioning in society. The compensation can take the form of tough behavior so as to offest academic failure or become great talkers when unable to read. They will develop their own particular assets so as to survive in society. Treatment or rehabilitation with the assistance of specialists will assist the handicapped person to develop his talents, and thereby compensate for the disabilities. The Judge who must in some super-human way, when dealing with the disabled witness, not only detect that the witness is handicapped, but also determine the persons assets and thereby elicit credible evidence.

Our oral system of justice is such that judges must be aware that learning or other forms of handicap can prevent a person from receiving a fair trial. As knowledge expands, judges are learning that the system of laws, courts procedures and traditions that have developed, do not always act fairly for all persons who enter the doors of justice. Justice in Canada is a verbal system depending on language, visual perception and memory. If those qualities are defective, justice, truth and fairness to the handicapped person can suffer unless the Judge and others concerned are aware and exercise proper concern.

It has been said that a large number of delinquents have severe learning problems and this is not news. Recent studies appear

In Brief

EXCUTIVE NOTES

The submission made by the Association's Committee on the Law to the Department of Justice respecting changes to the Criminal Code was discussed and approved at an Executive Meeting of the Association held in Ottawa in late January.

A consultation document concerning the fundamental review of the Code was released by the Department of Justice in October, 1981. The Committee on the Law, headed by Ontario Chief Judge Fred Hayes, raised several issues contained in the document, including some oblique sections regarding traditional modes of trial.

The Committee's report says, in part:

"We are generally in agreement with the theme of restraint in the report of the Law Reform Commission with respect to the application of the criminal law, but we have the following observations:

(1) The suggestion that there be 'more positive community oriented approaches' is not sufficiently explained for us to assess the import of that statement. If it is intended that there be some dispute resolving mechanism outside the general justice system, the statement should be approached with caution. Justice by the operation of a committee or some other device does not necessarily give to the public the appearance of that which it expects, namely, a decision by an independent person, such as a Crown Attorney or a Judge.

(2) The report speaks of restricting the use of 'the full traditional criminal trial'. What is it intended to substitute?

The meeting was told that all provincial representatives have copies of this consultation document, and ought to circulate it among judges in their respective provinces, in order that all provincial judges might have an opportunity to consider the effect of the consultation document and advise further what the response of the committee might be.

It was also remarked that this process of consultation, in which the Canadian Association is playing a part, is a result of a committment made by Dr. Edwin Tollefson, the co-ordinator for the revision of the Code, at the September annual meeting of the Association. (see December, 1981, issue of the Journal)

CONVENTION PLANNING CONSIDERED

Planning for future conventions of the Association was considered by the Association Executive at a late January meeting in Ottawa. A report was presented by Judge Richard Kucey of Saskatoon concerning the 1982 convention (see page 24 of this issue.)

Chief Judge Jim Slaven of Yellowknife, N.W.T. informed the group that hotels had been booked in Yellowknife for 1983, including facilities for familes. He is exploring the possibility of running charter flights direct to Yellowknife, both for convenience and for, lowering transportation costs, and indicated he will be reporting later in more detail on that matter.

Judge Slaven indicated that a great deal of interest is being shown about the 1983 convention from all parts of Canada, and he explained that pre-and post-convention tours and fishing trips would be arranged for judges and their families by a local travel bureau. He said, "We are hoping for an informal convention in which visiting delegates can really get to know parts of the North."

Associate Chief Judge Edward Langdon of Newfoundland said that hotel bookings have been made for the 1984 St. John's convention, and Judge Douglas Rice received approval from the executive for tentative bookings in St. Andrews by the Sea for July, 1986.

Judge Jacques Lessard, chairman of the Education Committee, reported on a successful New Judges' Training Program, held in October in Ottawa, and pointed out that a Small Claims Program, co-sponsored by the Association and the Canadian Institute for the Administration of Justice, would be proceeding in late January in Vancouver. He also briefly reviewed plans for the Western and Atlantic Regional programs to be held in Regina and Charlottetown respectively.

Reports were also received from Judge C.E. Perkins on the Court Structure and Constitution committees, and from President Robert Hutton on the Sentencing Handbook. Judge Hutton indicated that the handbook was in the printing and translation stage. In looseleaf format for ease of updating, the handbook will be circulated to judges of the provincial bench when completed. In announcing the near completion of the project, Judge Hutton expressed satisfaction with the input which representatives of the Association have had in the preparation of this resource material.

It was agreed that the next meeting of the Executive Committee would take place in Saskatoon on Saturday, June 12, 1982.

NEW APPOINTMENTS

Several new appointments to the provincial bench have been announced, and the Provincial Judges Journal welcomes them to the membership in our Association. The appointments of which the Journal has been made aware are:

British Columbia: Judge Wayne L. Smith (May 19, 1981); Judge T. Darcy McGee (May 19, 1981); Judge Pauline Maughan (September 3, 1981); Judge Brian Bastin (August 28, 1981); Judge Ian G. Henley (September 30, 1981); Judge Dennis Schmidt (October 1, 1981); Judge David I. Smith (November 17, 1981) and Judge Harry A. White (November 17, 1981).

Alberta: Judge Lucien Maynard as supernumary judge (October 14, 1981); Judge Russell L. Dzenick (November 1, 1981); Judge James E. Enright (December 1, 1981); Judge Kenneth S. Staples (December 1, 1981).

Saskatchewan: Judge Wilfred L. Meagher (January 4, 1982).

ONTARIO NOTES

Judge Douglas Latimer, Secretary of the Ontario Provincial Judges Association (Criminal Division), reports that education and sentencing seminars are well under way in four areas of Ontario, with a member of the Ontario Court of Appeal as a guest participant, as well as other participants in the field of sentencing.

Over one hundred and forty judges are involved in the program, which commenced in Toronto on February 24 - 26, and continues in Thunder Bay on March 10 - 12, Peterborough on April 19 - 23, and concludes in London on May 5 - 7, 1982.

The Ontario Association records with regret the death of His Honor Judge P.J. McAndrew of Sudbury, of the Ontario County Bench, formerly of the Provincial Bench, on November 7, 1981. Judge McAndrew was an Honorary Life Member of the Ontario Association.

The year 1982 marks the twenty-fifth anniversary of the appointment to the bench of two members of the Ontario Association, Judge Henry (Hank) T. Howitt, of Guelph, appointed February 15, 1957, and Judge Donald F. Graham of Toronto, appointed December 21, 1957.

It has also be announced that the 1982 Annual Conference of the Ontario Provincial Judges Association (Criminal Division) will be held in the Meadowvale Inn, Mississauga, from May 26 to May 28.

THE ARMY AND THE JUDGES

Judge Thomas Meagher of Chilliwack, B.C., recently wrote the Journal about a trip to China which he had taken.

"During my visit," Judge Meagher said, "I continued to inquire about the legal system but always received unsatisfactory answers. However, I enclose a clipping from the China Daily of September 23, 1981, which did provide me with some information of the immense problem that country is finally recognizing as a result of not having a satisfactory number of trained legal persons. I also thought it interesting they should now seek that class from the armed forces."

The article to which Judge Meagher refers says, in part:

Fifty-seven thousand Chinese army officers — aged between 19 and 45 — have been transferred to civilian life and are now receiving judicial training, Li Yunchang, First Vice Minister of Justice disclosed.

Li Yunchang told the North China Lawyers Meeting currently in session here that these judicial trainees, after graduation, will be assigned to the public security departments, procuratorates and courts of various levels.

More than 200 professors, scholars and lecturers from all parts of the country have gathered in Beijing to take part in the compilation of teaching materials for law universities, law courses in middle schools and other judicial training courses, he said. Law courses are being added in some middle schools starting this autumn.

8,000 graduates

China now has 4,800 lawyers and 200,000 judicial workers. There are now in China fifteen political science and law

The Court and Learning Disabilities

by Judge John B. Varcoe

The author is a judge of the Provincial Court of British Columbia. This article appeared in the Newsletter of the B.C. Provincial Judges' Association, and is adapted from an address given by the author to The National Conference on Law and the Handicapped, held at Vanier College, York University, in 1981.

My first experience in the role of a Judge commenced in the Yukon when I had the privilege of being the Territorial Magistrate. I recall a case involving a native Indian who was charged with stealing his brother's weapon. Fortunately, it became evident that the accused's cultural background included a concept of community property with the result the required mens rea or guilty mind so necessary to establish the crime of theft was not present and I dismissed the charge. A conviction under these circumstances would have been unjust and meaningless to the accused person.

As a novice in the business of judging others, I had learned an important lesson. Cultural differences can play an important role in whether the person before the Court receives fair and just treatment. As time progressed, I became aware when involved in sentencing children and adults, that many offenders before the court suffered from a number of social, economic, emotional and psychological factors that may contribute to the unlawful behavior and in any event affected the kind of penalty to be imposed. The deterrence aspect of sentencing must include a desire to bring about a change in the offender so that he doesn't return to unlawful behavior.

A noble thought — but this is the role the Provincial Court Judge must assume when dealing with 85-90% of accused persons, the greatest percentage of whom are not real criminals, but persons suffering from social, economic and emotional problems.

Pre-sentencing reports began to point out other problems pertaining to accused persons such as:

— "The most important datum to emerge concerning Brian is the history of hyperactivity and learning dysfunction.

— Robert, age 14, is almost totally illiterate. He reads at about Grade 1 level and reads only the most elementary words.

— Dennis struggles with concept formation.

— Robert, age 17, is a true dyslexia. He has been in special classes since Grade 1 and finally quit school at age 14."

I became aware that a number of persons who came before the Court have learning problems which are not caused by low intelligence or poor motivation.

I began to reflect on other situations that came to mind indicating that ordinary-looking persons who are not retarded may suffer from a serious handicap affecting the ability to perform verbal, quantitative and manipulative tasks. There was the case of the young offender who just couldn't obey a curfew until the term changed to read "be in when the streets lights go on".

I recall the case of a 25-year old man charged with driving without a driver's licence who was too embarrassed to apply because he couldn't read, although his school records said he had achieved Grade 9. Fortunately the motor vehicle authorities allowed him to take an oral examination.

The final impact of many experiences did not reach its full effect until I experienced problems facing the learning handicapped person when confronted with the Court process, during a trial involving assault at a time when counsel was cross-examining a young witness. As lawyers will do during cross-examination, he was trying to get the witness to clarify his evidence and determine from him the sequence of events. The more he examined, the more the witness became obnoxious to the extent I finally became angry and in effect told him to stop being evasive and answer the questions.

Finally, the witness, a 16-year old lad broke down and cried saying to the court "I am sorry if I acted rude, but I just

The Saskatoon Convention Report

by Judge Richard Kucey

Judge Kucey, a judge of the Provincial Court bench in Saskatchewan, is the Convention Chairman for the C.A.P.C.J. Annual Meeting to be held in Saskatoon from September 14 to 17.

Saskatoon is celebrating its 100th birthday this year, and that means it's a good time to visit Saskatchewan's "Second City" for members of the Canadian Association of Provincial Court Judges.

We are indeed pleased and proud that Saskatoon can be the host city for the 1982 Convention.

Planning for social events for the Convention is well under way, and I am pleased to advise that our group will be hosted by the Lieutenant Governor of Saskatchewan at a reception at the Bessborough Hotel on Wednesday evening.

This reception will be followed by an Ethnic Evening, consisting of a dinner and a group of ethnic dancers.

On Thursday evening, "Old Time Night", we will visit Western Development Museum for a tour of "Main Street", an indoor display of a typical Saskatchewan town in the early 1900's, to be followed by a buffet dinner and a dance featuring the Boom Boom Band, a popular group of senior citizens. Dress for this evening is western garb — hats, blue jeans, plaid shirts and cowboy boots.

The formal banquet and dance takes place on Friday night, the last evening of the convention. Guest speaker for that occasion will be the Hon. R.J. Romanow, Attorney General for Saskatchewan.

The Education Committee, under the able chairmanship of Judge Ernie Bobowski, has been working diligently to put together an interesting program. This committee has been heavily committed for some time in that the Western Regional Conference is being hosted in Regina at the end of March, and much effort has been expended in preparing that program.

The general theme of the convention is "The Role of the Judge in the 80's". Mr. Justice Dickson of the Supreme Court of Canada has consented to speak to us on Wednesday, and the Hon. Alan Blakeney, Premier of Saskatchewan, will give the keynote address on the morning of September 15.

Panels and other presentations at the convention will include items on hostage taking, a panel on "The Judge, The Bar, and The Press", Drug Use and Distribution, and a presentation of computer technology as it might affect the court in the future.

We look forward to an interesting and challenging week, and encourage judges from across Canada, and their spouses, to come to Saskatoon to be a part of our celebration.

Dates to Remember

March 28 - April 1, 1982	Western Regional Seminar	Sheraton Centre Regina, Saskatchewan
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.

universities and college departments with an enrollment of 5,500. More than 8,000 law students will be graduated in 1985.

China re-established its judicial ministry in 1979. A series of laws has been adopted by the National People's Congress since then, and 1,300 law advisory offices have been established throughout the country.

JUDGE FOR YOURSELF

Judge Frederick Edenharter of Reading, Penn., has solved the case of the spotted bathtub. But he won't say how.

"I'm not going to reveal the formula," the 59-year-old judge says, "I'm going to hold out for the highest bidder."

It is known that he applied some elbow grease to clean up the case, which began in 1979 when plumber Antony Spadafora filed suit against John and Margaret Fegley, charging they failed to make a final $838 payment of a glass fibre bathtub he had installed in their home.

The couple said ugly black spots marred the new tub and that no one, including specialists from the tub's manufacturer, could get them out. Edenharter decided to see the offending marks for himself. He asked the Fegleys to give him all the commercial household cleansers they'd ever used on the spots, climbed into the tub and went to work. In a few minutes, the spots were gone and the Fegleys and Spadafora worked out a settlement among themselves.

ONTARIO A-G CONCERNED

Ontario Attorney-General Roy McMurtry expressed concern over a justice system overtaken by numbers without adequate resources to handle them.

In a presentation to the Justice Committee of the Ontario Legislature during a review of budget estimates, Mr. McMurtry said, "I will admit to you that I am troubled by long-term consequences of a prolonged period of restraint.

The statistics would indicate some danger exists with the caseload we must process growing faster than the increase in the resources we have to handle it.

In fact, one can foresee a collision course in the future with some very undesirable consequences.

I stress that I do not want to raise unnecessary concern, or to be an alarmist, but I want to share with you some of the research the Ministry staff has carried out.

The crime rate increase over the last two years has been 11.5 per cent, according to the Canadian Centre for Justice Statistics. This pattern of increase has prevailed for many years. In addition to this basic statistical growth, there are a number of other factors which impact upon the system.

I will mention three: The growth in organized crime and in crimes requiring lengthy investigation and preparation as well as actual trial time, the growth in the size of the defence bar and what we see as a tendency to become more litigious; the increase in the number of cases going to the higher courts.

The resources available for the administration of justice have not matched this growth in caseload or complexity.

My officials are currently projecting an overrun of $6 million in this fiscal year.

In short, the demand and need for justice services is outracing our ability to supply them.

The consequences include every-growing court backlogs, delays, injustice and potentially the loss of respect for our system of justice, the bedrock of our democracy.

I stress again, Mr. Chairman, I do not want to raise unnecessary concern. But I do feel I would be neglecting my responsibilities to my Opposition critics, the members of the committee and to the public if I did not voice these concerns."

DISCRIMINATION AND EX-OFFENDERS

The Quebec Human Rights Commission has recommended to the Provincial Minister of Justice that discrimination on the basis of a prior criminal record be abolished. The recommendation is based on a study of various provincial statutes which institutionalize some discrimination. Three general rules are proposed: "(1) Any exclusion, distinction or preference based on a "police file" is declared discriminatory. (2) Any exclusion, distinction or preference based on the condition of a person who has received amnesty or pardon is discriminatory. (3) Any exclusion, distinction or preference based on the criminal record except if justified by the qualities or aptitudes required in good faith for the job or, in the case of permits, required for the common good and the security of the public".

The above rules were being published at the time a Superior Court decision in

the judicial district Roberval was rendered. The Court considered the matter of discrimination on the basis of a criminal record and decided that it could not be included under the general provision of the human rights legislation concerning "social condition". The Commission is appealing the decision.

I'LL SEE YOU IN COURT

In the U.S.A., inmates of a Maryland prison have succeeded in suing the authorities for damages as a result of the unsanitary and overcrowded conditions of their old institution. They demonstrated that they were often forced to sleep on floors covered with water from overflowing toilets. A federal district court ordered the authorities to pay $500 to each prisoner and $1000 to each pre-trial detainee held since July 1977. Approximately 2000 prisoners are involved and the total amount could reach nearly $2 million.

SEXUAL HARASSMENT SUITS TO INCREASE

According to a Toronto lawyer, **Frederick Sagel,** cases of sexual harassment will come before courts more frequently in the future. He based his prediction on a decision by an Ontario Supreme Court master's ruling that a civil suit can include charges of sexual harassment. The lawyer is acting in a suit brought by a man against his former employer and a former supervisor. He claims he was fired because he resisted the advances from his female supervisor. The lawyer for the supervisor had argued that such charges should be heard by the Human Rights Commission and not by the court.

TAXING THE OFFENDERS

At a conference on victim assistance in Toronto, the Ontario Secretary for Justice, **Gordon Walker,** proposed that the Criminal Code be amended to require the courts to impose a special monetary penalty to be deposited in a fund for helping victims of crime. "Whenever possible, the offender – not the taxpayer – should be obliged to compensate his victim" said the minister. He suggested the amount be nominal but that all offenders be required to pay it over and above any other penalty imposed by the court. The minister's statement would be affected by the additional penalty. It would be interesting to know the impact it would have in prison populations, especially on the category of offenders serving terms in lieu of fines.

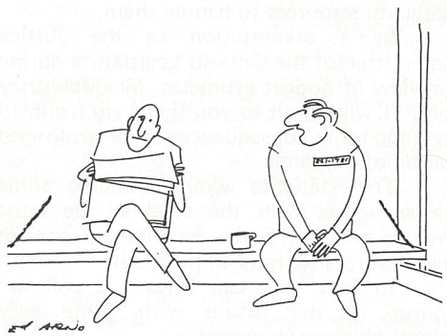
COMPUTERIZED LEGAL INFORMATION

The Department of Justice in Quebec is computerizing legal information for easier access by lawyers, notaries, judges, business corporations, unions and other interested parties. The data bank will contain all provincial laws and regulations, judicial decisions, and jurisprudence now in effect. Much of the system will be in operation by the summer of 1982. Costs of utilizing the system will be charged back to the users.

MANDATORY SUPERVISION

The Collins Bay Penitentiary Chapter of the John Howard Society has started a second campaign for the abolition of mandatory supervision. This time, it is asking people to write to members of two opposition parties in the House of Commons and to stick a one cent stamp on the envelope as a sign of their support.

Mandatory supervision, in the opinion of the Chapter, does not prevent violence, is costly to administer and deprives inmates of the time off sentence they have earned. The members of the Chapter also complain that mandatory supervision can be revoked for technical violations i.e. for acts which are not criminal. They are also requesting that funds used to administer the program be re-directed to helping offenders find employment.



"Which are you—a victim of society or a crook?"

Other Views

This editorial in the London (England) Sunday Telegraph was written in response to a decision of Judge Bertrand Richards in which he imposed a fine of 2000 pounds sterling on a man convicted of rape, citing "contributory negligence" on the part of the victim because she had been hitch-hiking alone late at night.

RAPE AND THE LAW

Almost every man convicted of rape in this country is sent to prison, often for a long period, although not many receive the maximum sentence of prison for life. The outcry over the fine imposed last week upon a man who raped a 17-year-old hitch-hiker should therefore be seen as an expression of anger at a judicial aberration, not as justifiable ire at the court's indulgence towards an appaling crime. There may be a case for reviewing the law on rape, but that is not the point here.

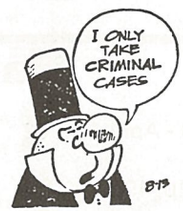
Few would dispute that the Ipswich decision *was* an aberration. It is ludicrous to suggest that a woman who asks for a lift from a motorist is thereby inviting sexual attack. The young woman in the case was apparently stranded by unforeseen circumstances and reasonably enough looked for help. It was her great misfortune that the man who offered help proved to be a cowardly wretch; and as he was subsequently convicted he should have received far sterner treatment than a mere fine.

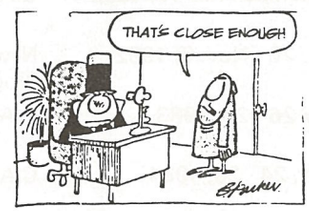
Everyone knows that a woman who hitch-hikes, especialy at night is running a risk. Most parents would go to much trouble to spare their 17-year-old daughter this particular risk, but by no means all families are in a position to do so at all times; and in any case a women is entitled to the full protection of the law even if she has not entirely avoided danger.

What has rightly incensed many people about the Ipswich case is that Judge Bertrand Richards appeared to demur on this last score; and to compound matters he seems to have got his law wrong with his inappropriate reference to "contributory negligence." That said, however, is it really helpful for MPs and others to leap into the affair with demands for this judge's removal from the Bench? Judicial independence is not something to be swept aside as a result of a sudden clamour.

Judges, like other people, must be expected to make mistakes at times. It is not really likely that potential rapists will believe that this case has in some way given the judicial licence. Those who are convicted are more likely to receive heavier sentences, not lighter ones, as a result of it and its consequences. Parents (and their daughters) are more likely to be aware of the risks which attend hitch-hiking. The law, as is well known, sometimes seems to be an ass. In this case one judge made rather an ass of himself. His example is not likely to be copied in similar circumstances in the future.

– *The Sunday Telegraph*





Mon deuxième exemple touche une peine très spéciale, qui est possible au Canada et qu'on dénomme la "libération inconditionnelle". Il concerne le lanceur de baseball canadien bien connu, Ferguson Jenkins. C'est inutile de faire un récit détaillé de l'affaire Jenkins. Comme vous le savez, il avait été arrête pour possession de stupéfiant, plus précisément, de cocaine. A cause de sa notoriété publique, l'affaire avait fait beaucoup de bruit et la peine qu'on lui avait imposée, une libération inconditionnelle, fut approuvée par bien du monde. On estimait, et à mon avis correctement, que l'embarras et l'humiliation publique causés par son arrestation et son procès suffisaient comme punition. Dans les bulletins de nouvelles, toutefois, on rapportait que, ayant obtenu une libération inconditionnelle, Jenkins n'avait pas de casier judiciaire. Ce qui était faux.

Quoique le pardon "efface" une condamnation, cela ne signifie pas que l'ex-détenu peut nier le fait de sa condamnation. Si on lui demande s'il a déjà été condamné, il doit répondre par l'affirmative.

En outre, une fois que le casier judiciaire est établi, il est extrêmement difficile de l'éliminer. Pour le moment, les casiers des détenus qui ont obtenu un pardon sont "scellés", c'est'-à-dire qu'ils sont tenus à l'écart et qu'ils ne peuvent être divulgués sans mon autorisation. Bien que la plupart des provinces et des municipalités collaborent en ne divulguant aucun renseignement sur ces personnes, il y a dans certains tribunaux et services de police — pour ne pas mentionner les archives de certains journaux — des dossiers qui sont plus ou moins accessibles. Je veux mettre sur pied un système de pardons fondé sur la collaboration totale des organismes de justice pénale au Canada, qui réduira au minimum l'accès non autorisé à ces casiers.

L'année dernière, j'ai reçu environ 8 000 demandes de pardon. A l'heure actuelle, le processus de pardon est coûteux aussi bien en termes de temps que d'argent. Il faut mettre sur pied un système qui nous permettra de faire la meilleure utilisation possible des ressources limitées dont nous disposons. Nous pourrions, je pense, tirer profit de l'expérience d'autres pays. Il faudrait notamment examiner attentivement le processus de pardon adopté au Royaume-Uni en 1974, où tout infracteur condamné à une peine non carcérale ou à une peine d'emprisonnement d'une durée maximale de trente mois, s'il respecte les délais prévus et s'il n'a pas été reconnu coupable d'un autre acte criminel dans l'intervalle, voit sa condamnation automatiquement "effacée" aux termes de la Rehabilitation of Offenders Act et devient une "personne réhabilitée". Il en résulte que toutes ses incapacités juridiques sont effacées, bien que son casier judiciaire puisse être utilisé au cours de poursuites criminelles s'il est jugé pertinent à la cause; par ailleurs, certaines occupations (par exemple, celles reliées à l'application de la loi) et professions sont exclues des dispositions. Toute infraction punissable d'une peine de plus de trente mois ne peut jamais être effacée. Certains ont avancé que l'adoption d'un système semblable pour des infractions moins graves pourrait améliorer notre processus de pardon. Bien que cette proposition mérite d'être examinée attentivement, il faut prendre les mesures qui s'imposent pour s'assurer que notre système de pardon soit en définitive adapté à nos propres besoins, c'est-à-dire, fait au Canada par des Canadiens et pour des Canadiens.

Compte tenu des préoccupations que j'ai brièvement décrites et compte tenu de mes responsabilités en tant que Solliciteur général, j'ai récemment pris l'initiative d'une révision complète de nos dispositions actuelles en matière de clémence. Cette étude sera effectuée par des fonctionnaires de mon ministère en collaboration avec les représentants du ministère de la Justice. En outre, j'ai intention non seulement de demander aux provinces d'y participer au moyen de consultation, mais aussi de soliciter des idées et des suggestions de la part d'organismes de justice pénale, d'organisations du secteur privé, aussi que de citoyens intéressés. Finalement, j'espère me présenter devant le Cabinet et le Parlement avec une série de modifications à la législation actuelle, qui contribueront beaucoup à rendre plus efficaces et équitables les régimes de clémence au Canada.

"This court, featuring the unique judicial stylings of the Honorable Jay Rallwell, is now in session."

Justifying Community Service

by Dr. S.A. Thorvaldson

The author is the Director of Research of the British Columbia Attorney-General's Department. These are excerpts from a presentation delivered at a Symposium of Restitution and Community Service Sentencing in Minneapolis, Minn. in the fall of 1980.

Of all imaginable penal measures, one of the widely proclaimed virtues of Community Service (CS) from the beginning has been the fact that it has received a very 'smooth ride', that it has been almost uniquely free of controversy.

Certainly it has been implemented with astonishing speed. Virtually everyone could agree with it for one reason or another, so it was a dream come true for pragmatic reformers, planners, and administrators.

Clearly, while there is a place for pragmatism, it is the balance between thought and action that is at issue here. Obviously it helps to know where you are going and why.

As it has been said, there is nothing so practical as good theory; it is indeed possible to proceed without theoretical assumptions, acknowledged or otherwise. But without getting any deeper into such issues it is apparent that while sentences with 'multiple aims' are 'versatile' in the hands of practitioners since, by definition, they can be put to various uses or do many things at once, they also cause numerous problems for the legislator, sentencing theorist, administrator, and researcher.

What limits are to be set in the legislation such that the sentence is imposed appropriately, fairly and reasonably consistently?

How can administrators ensure that a sentence is implemented consistently and in accord with the intentions of the court?

How can researchers evaluate if they don't know what effects to look for?

Turning specifically to our experience to date with CS, from the beginning some have questioned whether this newcomer on the penal stage had any clothes. The British criminologist Roger Hood in 1974 criticized the deliberate pragmatic approach of the Wooton Committee on the grounds that it merely denies the operation of aims, values and assumptions which still determine decisions.

Somewhat similar issues have been raised in the United States by Alan Harland In a thorough analysis, Harland describes the wide inconsistencies and inadequacies of present legislation, policy, and practise in the U.S., and also points out the serious potential threat to equal justice.

He shows that CS is not necessarily rehabilitative and in the offender's interests, nor imposed only as an alternative to the more severe sentence of imprisonment. It is thus not necessarily 'benevolent', nor is it correct to assume that offenders participate voluntarily. He points specifically to the current inconsistency and potential injustice as regards several administrative issues — eligibility criteria, duration (amount) of service ordered, type of service, the legitimacy of different kinds of recipients of the service, and the usefulness of providing for CS in legislation as a sentence in its own right rather than simply as a condition of a probation order.

Turning briefly to my own experience in sentencing theory and research, it seemed readily apparent that CS was no ordinary addition to the list of sentences with unclear aims. To all intents CS seemed not merely to satisfy various points of view but to reconcile two aims which have defined the central controversy in sentencing, two aims which are logically and implacably opposed — retributive 'justice and humanitarian or scientific 'treatment'; the conflict between **blaming** offenders as responsible beings and **understanding** their behaviour as a product of forces beyond their control.

Just consider the spectable of the Wootton Committee in Britain, a group of sophisticated theorists and social planners, talking not in terms of scientific understanding and control of offenders but

in terms of an offender's 'moral values', 'sense of social responsibility' and need to 'learn consideration for others' — for all the world like a congregation of old-fashioned moralists! From a theoretical perspective, CS was irresistible.

To what extent, then, can CS be interpreted in terms of each of the common sentencing aims?

CS may, for example, have some deterrent effect, but is it a good way of deterring offenders? Can it be **justified** as a deterrent penal measure? Does it logically meet the requirements of a good deterrent?

It is one thing, in short, to say a sentence has certain welcome effects and another to say that those effects are the **intended** effects or aims of a sentence, and so significant that they **justify** setting up the sanction.

At the end of this exercise we should be in a position to consider briefly some of the implications for the legislative and administrative issues raised earlier. As indicated previously a proper analysis of the aims of CS also has profound implications for sentencing theory and for research, but we will restrict the coverage here to legislation and administrative issues.

Analysis of CS in Terms of Sentencing Aims

1. Taking the simplest aim first, is CS **incapacitating?** Does the performance of the work help to keep offenders 'out of the action', off the streets and under surveillance or control? Clearly it doesn't to any serious degree, unless one assumes that the selected offenders tend to commit their crimes mainly on Saturdays from 9 a.m. to 5 p.m., or during a few odd evenings of the week.
2. Can community service be justified as a retributive, denunciatory or deterrent sentence? While there are important differences between these aims, we need not discuss them further because they have in common fact that they all require that the offender **suffer**. They are **punitive,** i.e., they all require the deliberate intent of the sentencer to cause suffering.

The question, then, is whether, to a degree sufficient to justify CS, the courts intend that community service will cause the offender to suffer. It would seem clear that while all offenders suffer to some degree under a CS order, CS programs are not, at least at present, in fact designed or administered in such a way as/to intentionally cause offenders to suffer. In fact community service program planners and administrators typically go out of their way to avoid or reduce any of the 'negative' or 'punitive' aspects of the work, and to select work so far as possible to meet the individual offender's interests, skills and even convenience.

In short, while CS may well cause suffering, such suffering would seem usually regarded as simply an unavoidable effect. Even where it is an intended effect, it is hardly a primary or significant aim, and hardly sufficient to justify the establishment of CS as a new sentence.

3. Is community service **rehabilitative** in aim? Is it the intent of the program to change an offender's social behaviour including law-breaking, by changing his environment or teaching him the attitudes or skills necessary to cope with his social, economic or emotional problems?

It is much more difficult to analyze CS in terms of this aim than the previous incapacitative aim or the punitive aims.

For one thing it is non-custodial; it leaves the offender in the community and even here it avoids the punitive fine. That is, at least in a negative sense, CS helps to avoid adding to the offender's social and personal problems. More positively, it is claimed that an offender may pick up some work habits, some rudimentary vocational skills, some employment contacts or even become interested in continued volunteerism.

Further, the rehabilitative aim is implicit in such things as the choice of the probation service to administer CS programs, and in some of the selection criteria appearing in policy statements, for example, where CS is recommended for "purposeless", "alienated" or "withdrawn" offenders.

A close examination of the literature — at least the British literature up to 1978 — shows, however, that if CS is 'treatment', it is treatment with a difference. The Wootton Committee in Britain from the beginning recognized the fact that CS, "even though linked with supervision by a probation officer, . . . (must be regarded) as a new form of treatment standing in its own right". Indeed, the committee has some difficulty selecting the probation service as the appropriate agency to administer the program, and chose it eventually on practical rather than theoretical grounds.

It became plain that although CS is widely seen as 'reformative', it represented not only a change of **method** but a change of

purgent actuellement une peine d'emprisonnement à vie, de telle sorte que la Division de la clémence de la Commission nationale des libérations conditionnelles serait littéralement submergée. Par conséquent, il nous faut trouver une réponse satisfaisante qui permettra d'adopter les mesures appropriées dans les circonstances exceptionnelles où l'exercice de la clémence est justifiée, sans toutefois "mettre en doute" les décisions du système de justice pénale ou aller à l'encontre de la volonté du Parlement.

En fait, la formulation d'une politique globale de clémence est une question urgente. Etant donné la nature "exceptionnelle" de la Prérogative royale de clémence, il est impossible de soumettre son exercice à des critères rigoureux. Néanmoins, il faut certaines lignes directrices générales et celles-ci doivent être aussi claires que possible. Cette tâche est d'une importance vitale parce que les formes de clémence que je viens de décrire sont, en réalité, les dernières possibilités dont nous disposons, en tant que citoyens, pour rectifier les torts que l'Etat peut avoir causés par inadvertance.

Il y a aussi une autre forme de clémence dont je désire parler avec plus de détails. La grande majorité des pardons accordés au Canada le sont en vertu de la Loi sur le casier judiciaire. Il s'agit d'une reconnaissance officielle du fait que le détenu a purgé sa peine et qu'il a ensuite prouvé qu'il est un citoyen conscient de ses obligations.

On a souvent fait valoir — et je suis sûr que de nombreuses personnes ici présentes en conviendront — que l'expiration de la peine marque le début de la punition "réelle" du détenu. En effet, l'ex-détenu est obligé de traîner un casier judiciaire avec les incapacités qui en découlent. Le pardon accordé en vertu de la Loi sur le casier judiciare cherche à mettre fin à cette deuxième peine, à un moment précis et déterminable, en effaçant le stigmate qui souvent crée des difficultés sociales, économiques et phychologiques à la personne reconnue coupable.

Cette loi, qui a reçu la sanction royale en 1970, a suscité beaucoup de critiques tant du public que des spécialistes du système de justice pénale. Contrairement à la croyance populaire, le pardon ne replace pas l'individu dans la situation où il se trouverait s'il n'avait jamais été condamné. En réalité, son effet est beaucoup plus limité. Permettez-moi d'en illustrer certaines limitations par deux exemples qui ont été portés à mon attention.

Mon premier exemple concerne un candidat au poste de gérant de banque qui, dans sa jeunesse, avait été comdamné pour vol à l'étalage, soit pour un vol de moins de $200 d'après le Code criminel. Là encore, il s'agit d'une infraction très commune, surtout chez les adolescents. Depuis lors ce candidat avait bien travaillé à l'école, était devenu gérant adjoint dans l'une de nos grandes banques et on envisageait sa promotion au poste de gérant.

Lorsqu'il s'était joint à la banque il avait eu à remplir une formule dans laquelle on lui demandait: "Avez-vous déjà été condamné pour une infraction criminelle?". Il avait répondu "non", soit parce qu'il avait oublié son imprudence antérieure, soit parce que, à ce moment-là, il ne considérait vraiment pas que son acte passé était "réellement" criminel. Selon lui, ce n'était qu'un simple péché de jeunesse. Maintenant qu'il était un peu plus âgé, cependant, il était conscient que la bêtise qu'il avait commise dans sa jeunesse était une infraction criminelle et qu'elle pourrait peut-être nuire à sa carrière. Il a donc consulté un avocat qui l'a aidé à présenter une demander de pardon, laquelle a été soumise à la Commission nationale des libérations conditionnelles pour enquête et recommandation.

Avant d'accorder le pardon, l'une des mesures prises par la Commission nationale des libérations conditionnelles avait été de faire mener une enquête par la GRC. Cette enquête fut raisonnablement rapide, mais dans ce cas il a fallu que l'agent enquêteur téléphone à l'employeur — le gérant de la banque — pour lui signaler que son employé avait présenté une requête de pardon et lui demander son appréciation de ce dernier. Lorsque le gérant a interrogé l'enquêteur afin de connaître la nature de l'infraction, celui-ci lui a répondu que c'était une information qu'il ne pouvait divulguer. Ainsi, parce que le candidat au poste avait demandé un pardon, il lui est arrivé précisément ce qu'il essayait d'éviter.

Il obtint le pardon, mais pas la promotion.

Et il n'a pas obtenu ce qu'il espérait. Il s'attendait à ce qu'on lui accorde un "pardon" qui équivaudrait à passer l'éponge sur son passé, soit effacer son écart de conduite antérieur. En réalité, il avait obtenu seulement le droit de répondre à la question:
"Avez-vous déjà été condamné pour une infraction criminelle?"
"Oui, mais j'ai obtenu un pardon."

Ce qu'il voulait et ce qu'il aurait dû obtenir, c'était un pardon plus complet pour son imprudence antérieure afin qu'il puisse mettre tout cela de côté, une fois pour toutes. C'est ce à quoi je me serais attendu et, à mon avis, c'est ce que la loi devrait refléter.

Réforme des Mesures du Clémence

par l'Honorable Bob Kaplan, P.C.

Bien que la clémence soit l'un des aspects les moins apparents du processus de justice pénale, elle n'en demeure pas moins un élément essentiel.

La notion de clémence émane d'un de nos principes de droit les plus fondamentaux, à savoir que la justice doit être tempérée par l'indulgence, et elle constitue une source de préoccupation très réelle pour des milliers de Canadiens qui ont payé leur dette envers la société qui veulent avoir la chance de repartir à zéro.

Bien que des expressions comme "excusez-moi" ou "pardonnez-moi" soient utilisées quotidiennement, elles le sont généralement d'une manière plutôt superficielle. Toutefois, en tant que Solliciteur Général, je reçois chaque année des demandes de milliers de personnes qui disent ni plus ni moins "pardonnez-moi" et chacune doit être examinée très attentivement. Il est donc essentiel, à mon avis, que la notion de clémence et les questions qui l'entourent soient bien situées dans le contexte de la justice pénale. Par ailleurs, j'espère que mes observations vous inciteront à songer sérieusement aux dispositions de pardon au Canada et, plus particulièrement, aux améliorations qu'il y a lieu d'apporter aux mécanismes déjà en place.

Permettez-mois d'abord de vous exposer un peu plus en détail les dispositions actuelles en matière de clémence. La clémence vient de l'ancienne prérogative des rois et des reines de faire preuve d'indulgence dans les cas qui le méritent ou lors d'occasions spéciales. Au Canada, des pouvoirs semblables ont été conférés au gouverneur général qui, en tant que représentant de la Reine, peut exercer la Prérogative royale de clémence. Ces pouvoirs sont aussi conférés au gouverneur en conseil, c'est-à-dire au Cabinet fédéral, qui peut exercer la clémence en vertu des articles 683 et 685 du Code criminel et de la Loi sur le casier judiciaire.

La Prérogative royale de clémence et les dispositions du Code criminel sont en grande partie des pouvoirs discrétionnaires absolus qui permettent d'appliquer des correctifs exceptionnels dans des circonstances spéciales. La gamme de ces correctifs va du pardon absolu, dans le cas d'un condamné qui, en réalité, est innocent, jusqu'à diverses autres options comme le pardon conditionnel, la remise de peine, la remise d'amende ou de biens confisqués, et le sursis. Ces options sont envisagées lorsqu'une peine ou une condamnation a causeé un "préjudice" on une "injustice" en raison de circonstances qui étaient inconnues du tribunal au moment du prononcé de la sentence ou encore qui sont apparues après la condamnation, par exemple une maladie terminale.

Bien que je ne reçoive, chaque année, que quelque 70 demandes de pardon de ce genre, chaque cas est unique. Bon nombre de demandes sont, évidemment, plutôt directes, par exemple une demande d'annulation d'amende à cause d'un préjudice financier. D'autres sont beaucoup plus complexes.

Ainsi, j'ai commencé dernièrement à recevoir des demandes de personnes reconnues coupables de meurtre et condamnées à des peines d'emprisonnement à perpétuité. Ces cas sont particulièrement troublants.

Comme vous le savez, la législation qui a aboli la peine capitale a modifié considérablement les peines imposées aux personnes reconnues coupables de meurtre, de même que leur période d'admissibilité à la libération conditionnelle. En effet, les personnes reconnues coupables de meurtre au premier degré doivent purger une peine d'emprisonnement à vie et elles ne sont admissibles à la libération conditionnelle qu'après vingt-cinq ans d'emprisonnement. Dans le cas de meurtre au deuxième degré et où le juge a imposé une peine d'emprisonnement à perpétuité, la période d'inadmissibilité fixée par le juge peut varier de dix à vingt-cinq ans. Bien que les deux catégories de meurtriers puissent, après avoir purgé quinze ans de leur peine, demander une révision judiciare de la période d'inadmissibilité, il existe en fait très peu de mécanismes permettant à ces détenus de faire modifier leur peine. Bref, la clémence est, à toutes fins pratiques, le seul moyen. C'est précisément pour cette raison que je m'attends de recevoir un nombre croissant de demandes de la part de condamnés à perpétuité.

La décision de faire preuve de clémence dans un tel cas pourrait facilement être interprétée comme un acte délibéré pour tourner la loi en vigueur ou la violer. En outre, une décision de ce genre pourrait provoquer une véritable "avalanche" de demandes de la part des 535 personnes qui

goals.

As for methods, the emphasis was clearly not so much on the offender's lack of sufficient guidance, economic opportunities or social skills but on his strengths; not on his 'dependency needs' or lack of insight into his own motivations, but on his capacity for responsibility; not on his vulnerability to social or psychological forces but on his capacity to choose. Hardly anyone was seriously suggesting that the duration of CS orders be determined in accord with the offender's 'needs' for therapy, which the rehabilitative aim would require. The offender was not to be responsible merely for **himself** but responsible for the effect of his behaviour on **others**.

The object of it all was to be nothing more modest than fostering an awareness of the needs of others, an awareness "that the members of society are interdependent". The object, in short, was to change the offender's basic moral attitudes toward his society. Ultimately, it becomes apparent that the 'treatment' CS represents bears little resemblance to traditional rehabilitative methods or aims.

Thus none of the conventional sentencing aims is satisfactory as a justification for making offenders work on public or charitable tasks as a consequence of crime. Unlike the chain gangs of former times, CS lacks sufficient punitive intent to make it a good retributive, denunciatory or deterrent sentence. There are much more satisfactory sentences available for expressing these aims. Nor is CS incapacitating to any serious degree, nor rehabilitative in the traditional and legitimate sense of that term.

Community service sentences are, however, intended to have a 'reformative' effect on offenders, to change offender' attitudes. But these attitudes are **moral** attitudes.

It represents a desire not simply to 'fix up' the offence or simply repair the material loss, but to express a principle — the principle, crashingly obvious, of justice or reciprocity in social relations, the principle which constitutes the fundamental basis of social behaviour. Nor is the message restricted to offenders — when an erstwhile 'hardened' offender is seen to perform manifestly altruistic social tasks, the powerful symbolism is missed by none.

CS was, then, a reparative sentence — the offender in fact gave something of value back to society as a consequence of violating the law — but the question was: What is the purpose of reparation as a criminal sanction?

I would define community service predominantly as reparative in aim, defining that aim as *requiring offenders to repay the victim(s) of their offences (including the community at large) in order to foster an awareness of the concept of justice in the offenders concerned or in the public.*

Such an analysis does not necessarily indicate that CS, or reparative sentences in general, will in fact foster moral attitudes in offenders or in the public. That is an empirical question and a matter for research.

Nor does it demonstrate that moral attitudes, specifically a more acute awareness of the notion of equitable justice, reciprocity or cooperation in society, are in fact connected to moral **behaviour,** specifically law-abiding behaviour.

These questions go beyond our scope here, which is simply to provide at least a plausible and coherent primary goal for CS. It is not necessarily an uncontroversial view, but given that the proposed aim is at least clear, and assuming that as it is said, if you know the principles you can invent the truth, we may get on with an attempt briefly to apply it as a guiding principle to the legislative and administrative problems mentioned earlier.

Selected Legislative and Administrative Issues

1) Selection (or eligibility) criteria.

Clearly all convicted offenders, having 'harmed' the community by violating the law, violating the social ideal of cooperative or just social behaviour which the law expresses, are liable in principle to repayment in some form. Selection of CS for the offender depends, however on several considerations.

The question is a practical one, depending mainly on the assessment of the offender's capacity and willingness to cooperate, his financial resources, the availability of facilities, etc. It also depends on whether the court considers the case appropriate for some other sentencing aim or at least to what extent it does so. Even if it shares the idea of using the case to express and convey moral values it may choose punishment according to deserts (denunciation), regarding this perhaps as a more dramatic and effective way of transmitting the message.

Or the court may reject CS because it considers some other sentencing aim more appropriate on theoretical or practical grounds — incapacitation, deterrence, rehabilitation, even retribution. In principle,

the reparativist, as I have defined him, would like to see all offenders repay in some material way and to some extent.

CS is attractive not only because of its concreteness and powerful symbolism -- by their works shall ye know them — but because time on earth is one of the great equalizers. It is also often not inconsistent with deterrence, rehabilitation, or incapacitation.

In the reparativist's view, the restriction of CS to specific offenders on rehabilitative grounds, or reserving it for offenders who would otherwise be sent to prison vastly under-appreciates its sugnificance for criminal justice.

2) Duration of Community Service Order.

As you know, Britain limited CS to between 40 and 240 hours. Canada seems about to repeat that error, but I notice in Alan Harland's survey that most of the States here do not specify a limit (or tie the limit to the amount of a fine, but that is a special application of CS).

If CS is to 'do justice', it follows that the severity or amount of the order should have, in principle, a reasonable relationship with the 'seriousness' or 'harmfulness' of the offence to the community. This implies some sort of CS tariff, subject to aggravating or mitigating factors, and subject, as in the case of other sentences such as the fine or probation, to the offender's capacity and willingness to cooperate, availability of appropriate facilities, and the like.

I think, incidentally, that we should avoid using the conventional range of prison sentence as a guide, as Kenneth Pease, in Britain, has argued. Punitive tariffs based on imprisonment or even the fine are poor guides for reparative ones which take place in the community.

3) Legislating for Community Service as a separate sanction.

The interpretation of the reparative aim given here, which distinguishes it from other aims, clearly implies that CS be provided for in legislation in its own right, probably in tandem with other reparative orders such as monetary restitution, restoration of goods, and service to the individual victim.

To provide for it only as a condition of probation implies that it is rehabilitative in aim, and thus beclouds its function and sharply jeopardizes its potential, not to mention its effect on probation. This is not to say that CS, or other reparative orders, should not be imposed in conjunction with rehabilitative or even punitive measures.

4) Administrative authority.

Certainly CS may be administered by probation services but this is a matter of convenience at the present time, and not principle. Probation is, however, rehabilitative and to some extent incapacitative in aim, and has great integrity and tradition as such.

Mixing in reparative orders tends to confuse two fundamentally different principles, both essential. If probation officers continue to administer CS and other reparative orders, the probation order may well continue, but the service should soon change its name.

5) Service recipient.

The essential characteristc of the work is that it be of benefit to the community. The offender can work on a public park but not on a private garden, no matter how convenient the 'private' work might be, or appropriate for his rehabilitation. Private work or 'victim service' as reparation to the individual victim of the offence may of course be appropriate, but that is a different kind of reparative order. Nor is this to minimize the problems, on occasion, of distinquishing 'private' from 'public', but the principle is clear.

6) Service type.

The question seems to be whether the work can be onerous, difficult, strenuous or otherwise unpleasant for the offender. In my view, the question hinges not on whether in fact the work causes suffering -- virtually **any** compulsory service will cause **some** suffering, if only because it is compulsory — but on whether the suffering is **intended,** i.e., whether the work is punitive in aim. We have rejected that aim for CS.

Convenient, attractive, and satisfying work, suited so far as possible to the skills and interests of an offender and perhaps imaginitively related to the specific harm entailed in the offence is obviously desirable on many counts, not the least of which is the commitment of the justice system to be as humane as possible. But such work is not essential.

7) Due process.

As indicated above, CS, if it is to approach its potential as a constructive, rational, fair and humane way of expressing

(Continued on page 14)

absolute discharge, was widely approved of.

It was felt, and I think correctly, that the public embarrassment and humiliation of being arrested and going through a trial was punishment enough. In the news reports, however, it was widely reported that because he received an absolute discharge he did not have a criminal record. That is not the case.

Although the pardon "vacates" a conviction, this does not mean that the ex-offender can deny the fact of conviction. If asked whether he/she has ever been convicted, the answer is "Yes".

In addition, criminal records, once created, are extremely difficult to erase. At present, the records of pardoned offenders are "sealed", i.e., kept separate, and cannot be divulged without my approval. Although most provinces and municipalities cooperate in not revealing information about persons who have been pardoned, there are records in some courts and police departments — not to mention those in newspaper morgues — that remain more or less accessible. I want to develop a system of pardons based on the full cooperation of the criminal justice agencies in Canada that will minimize unauthorized access to these records.

Last year, I received approximately 8,000 applications for pardons. At present the pardoning process is costly in terms of both time and money. A system has to be developed that will ensure the most efficient use of limited resources. In this regard, I think that we can benefit from the experience gained in other countries.

In particular, careful consideration should be given to the pardoning process instituted in the United Kingdom in 1974. Briefly, their Rehabilitation of Offenders Act stipulates that, where an offender received a noncustodial sentence or one that did not exceed thirty months imprisonment; waited the specified periods; and, was not re-convicted of an indictable offence in the interim, his conviction automatically becomes "spent" and he becomes a "rehabilitated person". As a result, all legal disabilities are erased although the criminal record may be used in criminal proceedings if deemed relevant to the charge and certain occupations, e.g., law enforcement, and professions are excluded from the provisions. All offences that involve more than thirty months incarceration can never be spent.

It has been suggested that our pardoning process could be improved if a similar system were implemented for less serious offences. While this proposal deserves careful scrutiny, steps must be taken to ensure that ultimately our system of pardons is uniquely suited to our needs, i.e., made in Canada, by Canadians, for Canadians.

Given the concerns that I have outlined in the course of these brief comments and my responsibilities as Solicitor General, I recently initiated a comprehensive review of our current clemency provisions. The study will be carried out by officials from my Ministry in consultation with representatives from the Department of Justice.

In addition, I intend to request provincial participation by way of consultation and to solicit ideas and suggestions from criminal justice agencies, private sector organizations active in criminal justice, and concerned citizens. Ultimately, I hope to go to Cabinet and Parliament with a series of amendments to the present legislation that will contribute significantly to effective and equitable systems of clemency in Canada.

Community Service

(Continued from page 12)

for the greatest number of cases to be handled over the shortest period.

The New Westminster program has handled a large volume of cases by using three guidelines: establishing a network of community volunteers to assist in the program, having offenders work in groups, and using community agencies which can provide supervision seven days a week. The CS officer maintains contact with the offenders on the program by meeting with them both individually and in groups on a regular basis. Presently the program handles an average of 136 offenders per month who complete their hours at an average rate of four hours per week.

Where is further research needed?

While ours and other research has shown that CS appears to be an appropriate sentence for a wide range of offenders convicted of less serious offences, certainly a further review will be necessary if CS is used more extensively to include more serious offenders. Additionally, research should be conducted to determine how effective CS is in terms of impact on recidivism when compared to other dispositions available to the court. In the meantime, all things considered, there seems good reason to be optimistic.

of the National Parole Board would be quite literally swamped.

Therefore, an effective response must be developed that will provide the appropriate relief in those exceptional circumstances where it is warranted but that will not "second-guess" the criminal justice system or frustrate the will of the Parliament.

In fact, the formulation of an over-all clemency policy is an urgent matter. Given the "exceptional" nature of executive clemency, it's impossible to specify rigid criteria for its exercise. Nevertheless, some general guidelines are necessary and these have to be made clear as possible. This task is a vital one because the forms of clemency that I've just described are, in reality, the "last" opportunities that we, as citizens, have at our disposal to correct the wrongs that may inadvertently be created by the State.

There is yet another form of clemency that I would like to discuss in some detail. The vast majority of pardons in Canada are granted by virtue of the Criminal Records Act. It is a formal recognition that the offender has completed the sentence imposed and has subsequently demonstrated that he/she is a responsible citizen.

It has often been suggested — and I am sure many would agree — that the completion of sentence marks the beginning of the offender's "real" punishment. That is, the ex-offender must cope with the stigma of a criminal record and the disabilities that flow from it.

The pardon granted by the Criminal Records Act is intended to end this second period of punishment at a certain and determinable time by removing the stigma that often creates social, economic, and psychological problems for the convicted offender.

Since the Act was given royal assent in 1970, it has attracted considerable criticism from both the public and criminal justice community. Contrary to popular belief, the pardon, when granted, does not return the individual to the state he would be in had he never been convicted. In reality, its effect is much more limited. Let me illustrate some of the limitations with a couple of examples which have come to my attention.

My first example concerns as aspiring bank manager who, in his youth, had been convicted of shoplifting, which is theft under $200.00 in the Criminal Code. Here again, this is a very common offence, particularly among adolescents. He had since done well in school and had become an assistant manager in one of our large banks and was being considered for promotion to manager.

When he joined the bank he had to fill out an application form which asked the question "Have you ever been convicted of a criminal offence?" He had answered "No", either because he had forgotten about his earlier indiscretion or because, at the time, he did not really consider what he had done to be "truly" criminal so much as merely one aspect of growing up. Now that he is somewhat older, however, he was aware that his youthful indiscretion was a criminal offence and that this could perhaps cause him difficulties in his advancement in the bank. He, therefore, consulted his lawyer who helped him submit a pardon application that was subsequently referred to the National Parole Board for investigation and recommendation.

As a part of the consideration as to whether a pardon should be granted or not, the Parole Board had an investigation conducted by the R.C.M.P. The investigation was reasonably cursory but in this case it did involve the investigating officer phoning the applicant's employer — the bank manager — and indicating to him that his employee had an application for a pardon and how was he doing. When the bank manager asked what the offence was, he was told that this was information that could not be divulged. Because he applied for a pardon, the very thing occurred that the applicant was hoping to avoid.

He received a pardon, he didn't get the promotion.

And he didn't get what he thought he would get. He thought he would get a "pardon" in the sense of wiping the slate clean, i.e., erasing his earlier indiscretion. What he got, in fact, was the right to answer, when asked the question: "Have you ever been convicted of a criminal offence?", "Yes, but I have been pardoned".

What he wanted and what he should have received was a more complete forgiveness for his earlier indiscretion so that he could put it behind him once and for all. That's what I would have expected, and that's what I think the law should reflect.

My second example touches on a very special sentence that is possible in Canada called the "absolute discharge" and concerns Ferguson Jenkins, the well known Canadian baseball pitcher. I don't need to go into the details of the Jenkins case. As you know, he was arrested for possession of a narcotic, in his case, cocaine. Because he was a public person, the case attracted a good deal of publicity and the resulting sentence, an

Community Service: Some Questions and Answers

by Darryl Plecas and John Winterdyk

Mr. Plecas is a Criminology Instructor and Research Associate at Fraser Valley College, B.C., and Mr. Winterdyk is a Sessional Instructor and Researcher at Simon Fraser University, B.C. Details of the comments presented here are contained in "Community Service in the North Fraser Region: A description and analysis of Program Efficiency", a report prepared for Mr. Archie Campbell, local Director, Maple Ridge, B.C. Corrections Branch.

Tracing the development of Community Service (CS) from its English beginnings of nearly a decade ago would show that it has enjoyed the support of virtually all its observers. Indeed, those who have questioned the aims of CS have been careful not to deny that our courts should be awarding community service hours for one reason or another. The literature on the subject reads like a set of success stories, giving the clear message that CS is regarded as an appropriate disposition for a wide range of offenders convicted of less serious offences.

Moreover, wherever, CS programs are carried out they appear to be operating with reasonable success regardless of how they are managed. Dr. S.A. Thorvaldson, who has written extensively on CS summed up this track record in a recent presentation to the Canadian Association for the Prevention of Crime (1981 Conference), "from the beginning community service has received a very smooth ride, it has been almost uniquely free of controversy. Certainly it has been implemented with astonishing speed."

Until now, though, "success" has been measured only by community acceptance, by increases in the number of hours of service provided to the community and by increases in the number of offenders successfully completing hours awarded. Now authorities are beginning to take a closer look at CS with a view to producing research findings which show which offender types respond best to CS and what program models provide the best results for the widest range and number of offenders at the least possible cost.

Going a step further, authorities are beginning to look at more than the reparative aspect of CS and are looking at its capability to habilitate offenders. As well, authorities are looking to expand the role of CS to include direct service to victims and to include offenders on parole and temporary absence.

Recently we had the opportunity to take part in this closer look at CS by conducting an evaluation of the efficiency of CS as it operates from five area offices in British Columbia's South Fraser region. The research was based on an examination of program activities during the first six months of 1981 and employed a number of research methods.

The findings are based on the results of personal and telephone interviews with 37 community agencies and 120 offenders, analysis of all monthly statistics sheets and office records held during the period under review, and an analysis of a mail survey of citizen attitudes towards work programs for offenders. In this article we' offer some answers to questions about CS by presenting some of our research findings.

How do offenders feel about CS?

As other studies have shown, our study confirmed that the large majority of offenders feel they are getting "something" out of CS. Specifically offenders feel the work they do is appreciated, that CS will help them stay out of trouble, and that they are paying back the community for having committee an offence. Very few offenders would prefer a fine to CS, very few feel they were given too many hours and few feel offenders should be paid for doing CS. Most of those few offenders who believe offenders should be paid for CS indicate that at least some of the money should go to charity or to the victim. The interview responses we received clearly show that offenders do have some understanding of the aim of CS as a sentence.

Do offender attitudes change through through participation in CS?

Yes. Our study revealed that regardless of offender type, the offenders with the most positive attitudes generally were those who had completed the greater number of

hours and who have been on CS for the longest time. To obtain this finding we compared the attitudes of offenders who had completed less than fifty hours of CS to the attitudes of the group of offenders who had completed over fifty hours. To ensure our findings were not simply a reflection of some other factor we examined the program at each office individually, controlling for the number of hours originally awarded, offender characteristics, and number of months each offender had spent on the program.

As a double check on our findings we compared those offenders who, against a five-point scale, held the most positive attitudes to those offenders who held slightly less positive attitudes (e.g. less than 5 on the scale being used). This comparison provided findings consistent with those reported above. One particularly interesting finding this comparison showed was that by the time most offenders have completed 100 hours of CS their attitudes rate at the top of the scale.

The findings of this comparison caused us to recommend in our study report that offenders should be awarded at least 50 hours but no more than 100 hours where the primary consideration in sentencing is to instill in the offender the notion of the reparative aim and a better attitude towards offending generally.

Do some offender types hold more positive attitudes than others towards CS?

While the differences are slight, our research revealed that females hold more positive attitudes than males, first offenders more positive attitudes than recidivists, and adults more positive attitudes than juveniles. Our research did not show any difference in the case of either juveniles or adults when age or the type of offence were considered. Interestingly, court ordered cases held more positive attitudes than did diversion cases. Perhaps this is an indicator that diversion cases do not take CS as seriously as do court ordered offenders.

Does the type of service performed make any difference in how offenders respond?

Each of the five programs we examined assigned offenders to one or more of a wide range of both manual and non-manual work tasks provided by a variety of different agencies. Some offenders work alone, while others work beside other offenders, but one factor common in nearly all cases is that an employee of the agency itself or an adult volunteer from the community provides supervision.

Another commonality is that virtually all work done is a "needed" service which would not be done otherwise. The difference which exist in the work being done, though, appear, to matter little. We found in our analysis that the type of work (manual or non-manual) and how it is done (alone or beside other offenders) does not seem to affect attitudes significantly.

Should CS be expanded to include direct service to victims?

In B.C. it is already a Corrections Branch policy that an effort be made to provide direct service to victims whenever possible and appropriate. However, a recent survey of 2000 Greater Vancouver area residents (part of the Prision Industry Feasibility Study conducted by us through S.F.U. Institute for Studies in Criminal Justice Policy) suggested that the overwhelming majority of citizens don't want victim assistance in the form of direct service by the offender.

The same survey revealed they nearly half of the community would prefer to have nothing to do with the offender who committed an offence against them. This survey response indicates then that we should either drop the idea of direct service to victims or at least hold off until community attitudes towards offenders are changed. Perhaps having the offender work for the victim is one way to change community attitudes, but, CS officer's reports of past experiences suggest that the exercise is time consuming and not always successful.

Is there any one operational model of CS that is better than others?

The five CS programs we examined, are all essentially successful despite being administered differently. Each program has a different emphasis, and this is, in part, because managing the program, which includes developing and selecting suitable work placements, assessing the type of supervision provided, and constructing the time table by which the CS is to be performed, are left to each CS officer's discretion. Still, in our research report we recommended that one of the five programs (the New Westminster program) serve as the model to be used elsewhere because it allows

(Continued on page 19)

Reform of Clemency in Canada

by the Hon. Bob Kaplan, P.C.

The author is Solicitor-General of Canada, and delivered these remarks to the John Howard Society of Sarnia.

Although clemency is one of the less visible facets of the criminal justice process, it is nevertheless a vital one.

It springs from one of our most fundamental legal principles — that justice should be tempered with mercy — and it is a matter of very real concern to thousands of Canadians who have paid their debt to society and want the slate to be wiped clean.

Although we commonly use expressions like "excuse me" or "pardon me" in our daily lives, they are usually uttered in a rather perfunctory manner. As Solicitor General, however, I receive thousands of requests every year that say, in essence, "pardon me", and each of these requires very careful consideration. I think it essential, therefore, that the concept of clemency and the issues that surround it be clearly situated within the context of criminal justice. Moreover, I hope that my comments will stimulate you to think seriously about the pardoning process in Canada and, more specifically, about improvements that might be made to the current mechanisms.

Let me begin by describing the current clemency provisions in some detail. Clemency stems from the ancient prerogative of kings and queens to dispense mercy in deserving cases or on special occasions. In this country, similar powers have been vested in the Governor General who can, as the Queen's representative, exercise the Royal Prerogative of Mercy and in the Governor-in-Council i.e., the Federal Cabinet, which can exercise clemency by virtue of Sections 683 and 685 of the Criminal Code and the Criminal Records Act.

For the most part, both the Royal Prerogative and the Criminal Code provisions are unfettered discretionary powers that permit exceptional remedies to be applied in extra-ordinary circumstances. The remedies can range from a free pardon when it has been proved that a convicted person was actually innocent, to a variety of other options such as a conditional pardon, the remission of sentence, fine, or forfeited goods, and respite.

These options are considered when a sentence or conviction has created "hardship" or "inequity" due to circumstances that were either unknown to the Court when it pronounced sentence or that arose after conviction, for example, the terminal illness of an inmate.

Although I only receive about 70 applications for these two forms of clemency a year, each case is unique. Of course, many are rather straightforward, e.g., a request that a fine be remitted because of financial hardship. Others are much more complex.

For example, I have recently begun to receive requests for clemency from persons convicted of murder and sentenced to life imprisonment. These cases are particularly troubling.

As you know, the legislation abolishing capital punishment significantly altered the penalties given persons convicted of murder and their parole eligibility periods. Those convicted of first degree murder all receive a life sentence with parole eligibility available only after twenty-five years have elapsed. For those convicted of second degree murder and sentenced to life imprisonment, the parole eligibility date set by the judge can vary from ten to twenty-five years.

Although both classes of murderers can, after having served fifteen years, request a judicial hearing in an attempt to have their parole eligibility period reduced, there are, in fact, very few mechanisms that will permit these offenders to seek modifications to their sentences.

In short, clemency is, for all intents and purposes, the only avenue of relief open to these persons. It is precisely for that reason that I expect an increasing number of applications from "lifers".

A decision to grant clemency in such a case could easily be misinterpreted as a deliberate circumvention or violation of the existing legislation. In addition, such a decision could prompt a veritable "flood" of requests from the 535 persons currently serving life sentences in our penitentiaries with the result that the Clemency Division

about during my stay. Amid the widespread reaches of their jurisdictions, they, and their equally dedicated court parties, are evolving a high standard of justice for the very special needs of northern Canadians.

It is hard to think of friends like Jim Slaven and Bob Halifax as legends — to me they are just friends. But I am confident that their common sense and sincere interest in the welfare of the North in adapting the sometimes-criticized Sissons approach to the rapidly-changing social fabric of the North West Territories will earn them a significant spot in the annals of northern justice.

And so, intimidated with that realization, I sat for a week in Yellowknife and tried not to make waves. That was probably wise on two counts: first, I'm not by nature a trail-blazer anyway, and second, because there's a fair skepticism in the Territories about "southern experts" and their solutions to particular Northern issues. The North wants to develop some of its solutions by itself. And why not?

I believe I got through the week all right, thanks to the superlative help I recieved from counsel and a court staff who were uniformly likeable, well-organized and completely supportive.

Our Association has made a wise choice in designating Yellowknife as the convention city for 1983. When we arrive in July of that year, we will be part of an estimated 40,000 tourists who will chose the Territories for a vacation.

Yellowknife, a city of 10,000 is the largest community in the North. Located on the north short of Great Slave Lake, the city has fast become a favourite spot for campers, sports fishing enthusiasts and tourists who arrive to enjoy the rugged rock landscape and lakes that dot the surrounding coutryside.

White settlers did not come to Yellowknife until 1934, when visible gold was first discovered. Since those days, the city has grown through many stages. From a gold boom town in the 1930's, to nearly a ghost town during the late war years, when six of the operating mines closed, it revived in 1945 with a second major gold discovery. discovery.

Today, the city is located between two gold mines: Cominco and Giant Yellowknife. Tours are possible at both mines.

Gold made this city, but Yellowknife has developed into a thriving centre for business, industry and the offices of local, territorial and federal governments.

A great way to explore Yellowknife is by foot. The Bush Pilot's monument in the community's colourful Old Town affords a beautiful vista of the town and surrounding waters, from which you can see the fascinating variety of housing — everything from tents to cabins to houses clinging to hillsides.

A sand green golf course boasts the annual Midnight Tournament on June 21, and club rules generously allow "no penalty when ball carried off by raven".

The Prince of Wales Northern Heritage Centre features displays of northern lifestyles and the environment. Opened by Prince Charles in 1979, the visitor can look back at the customs and traditions of the Inuit, Dene and the Metis and Euro-Canadian explorers, traders and settlers who followed them.

The float base in Old Town is a reminder of the vital air links between Yellowknife and the outlying reaches of the Territories. The constant activity of all varieties of planes reveals tourists loading up gear for a weekend at a lodge, prospectors off to work their claims, nurses flying out to a camp to bring a patient to hospital, and forestry personnel and equipment going to fight forest fires. The bush pilot opened up the north, and the bush pilot is keeping it open.

Around the town are a variety of hiking trails, from half a mile to two miles, on which you can enjoy rapids, falls, scenic outlooks, beaver dams, remains of a prospector's camp, and pink (yes, pink!) granite boulders.

The reminders of a different world are even apparent in the street names, memorializing some of those who laboured to build the North: McMeekan Causeway, Hearne Hill Road, Sissons Court. I suspected that the notorious Ragged Ass Road commemmorated Jim Slaven, whose attire might be usually described as casual, but he assured me it was named after an old mine in the vicinity. He's the northerner. I wasn't about to argue.

Our convention hotel in 1983, the Explorer Hotel, is a modern 120-room facility, with a licensed dining room lounge, tavern, gift shop, sauna and hot tub Jaccuzzi. Other hotels available for the convention include kitchenettes and family accommodation.

Shopping in Yellowknife can be a unique experience, from Arctic parkas with hand-sewn embroidery, Arctic furs, Inuit prints and carvings, and birchbark items and

(Continued on page 23)

The Misuse of Community Service Orders

by Judge John B. Varcoe

The author is a judge of the Provincial Court of British Columbia. This article first appeared in the Newsletter of the B.C. Provincial Judges' Association.

Judges have felt the need for a non-custodial penalty that would be a satisfactory alternative to jail and the fine, and that would not only impose punishment and act as a deterrence, but also emphasize the offender's responsibility to the community. The Community Service Order is a means of providing restitution to society for the harm caused by the offender who is involved in unlawful behaviour.

This form of penalty, a very useful alternative to the traditional methods of sentencing, emphasizes the offender's responsibility to society in a direct way. Other methods of sentencing may not only be harmful to some accused persons, but also costly to society in relation to jail facilities and caring for offender's families while on welfare.

This non-custodial form of sentence is in some instances more appropriate and effective as means of re-habilitation of the wealthy offender. Instead of receiving a large fine which such a person can easily produce, the community work order will cause him or her concern and responsibility to the law and order needs of society. The ability to use this form of sentencing is at present restricted to the provisions of the Criminal Code in relation to Probation Orders.

Judges are learning and appreciating the value of the Community Service Order, but must impose this useful condition of Probation in such a way so as not to cause the law maker to restrict or limit its use. Proper liaison by Judges with the coordinator of the program in their area will easily determine if sufficient work experience projects are available to accommodate those ordered to perform the work. It is easy to make the order, but an exercise in futility if work projects are not available. The problem can be resolved by simple common sense and dialogue with those concerned.

In the community of Maple Ridge, approximately 5,000 hours work was performed by persons ordered to perform Community service during the year 1980. The work could be undertaken because a very active Probation service in a community where suitable projects are available continued to make the program successful and beneficial.

Judges were undoubtedly surprised to learn from the news media of a program that existed in North Vancouver where Probation Staff allowed persons subject to Community work service orders to pay money to designated charities instead of performing the work. These arrangements were made instead of returning the matter to the Court for a review under the provisions of Section 664 (3) of the Criminal Code whereby the Court, after hearing from the accused and the Prosecutor, may change the conditions of the Probation Order to reflect changed circumstances since the conditions were prescribed. Obviously the section does not allow the court to substitute a different form of penalty and replace the Community work order with a fine.

Work performed pursuant to a community service order is not a fine. Bull J.A. in *Reg. vs. Stennes* (1976) 35 CRNS 123 @ 125 said "in my view, a condition in a probation order to do certain work, if appropriate, is not a fine." When is a community service order appropriate? Hinds Co. Ct. J., as he was the, in *Reg. vs. Gladstone* (1978) 2 W.W.R. 751 pointed out the purpose of conditions in a probation order and stated at page 755 as follows: "A condition of Probation based upon s. 663 (2) (h) should be reasonable and it should be designed to secure the good conduct of the accused and to prevent a repetition by the accused of the same offence or the commission of other offences.

"The primary purpose of a condition of probation attached under s. 663 (2) (a) to (h) inclusive should be for the rehabilitation of the accused, not the imposition of punishment. This is particularly relevant when a condition of probation has been prescribed following the suspension of sentence, as distinct from a condition of probation being imposed following the

passing of sentence, be it the imposition of a term in goal or of a fine."

To be appropriate, community service orders must be reasonable (see *Reg. vs. Stennes*, Supra) not primarily a form of punishment but as a means of securing the offender's good conduct and the prevention of further similar offences directed to the rehabilitation of such persons. The condition of probation directed to community work must be appropriate to the circumstances of the offence.

To include in a probation order a condition prohibiting driving in an assault case is not appropriate (see *Regina vs. Ziatas* (1973) 13 C.C.C. (2d) 287. Similarly to order community service of 40 hours of work per month unless gainfully employed was regarded as inappropriate, (see *Reg. vs. Stennes*, Supra). Judges may impose community service as a condition of probation when appropriate, reasonable and consistent with the offence. Dubin J.A., with reference to community service orders said in *Regina vs. Shaw and Brehn* (1977) 36 CRNS 358 @ 362, "During the appeal some concern was expressed as to the validity of that term in each probation order which required both of the respondents to perform community services. The trial judge was anxious that both these two young men make amends in a positive way for the damage that they had done, not only to society, but to their own peer groups. In my opinion s. 663 (2) (h) of the Criminal Code authorizes the imposition of such a term."

Judges must be aware that otherwise appropriate and reasonable community service orders are meaningless if impossible to perform. Probation Officers are anxious to facilitate Court orders, but must be frustrated where the order is loaded with so many hours that the performance becomes unrealistic whereby an attempt is then made to find a way to satisfy an impossible situation and still give credence to the Court order. An order to perform 200 hours of work for a person who works five days a week becomes difficult if not impossible to perform. If the individual is only available during weekends and if the kind of work available is such that only two or three hours may be performed each week, it can readily be seen that to perform 200 hours may take several years. The Ontario Court of Appeal stated in *Regina vs. Shaw, Brehn* (Supra) that where appropriate, community service orders should be used and the practice should be extended. The use of the condition must, of necessity, be based on practical consideration relative to the ability of the offender to perform the work and the community to provide the avenues of enterprise.

Justifiying Community Service

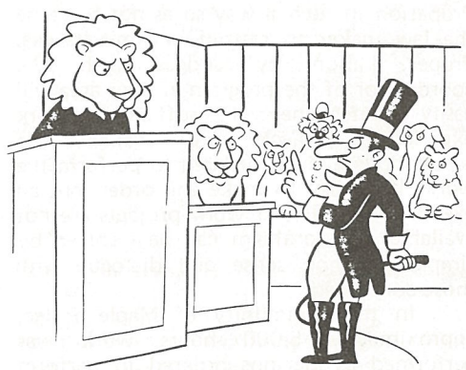
(Continued from page 10)

and maintaining the principle of equitable justice in society, and move us significantly away from punishment-according-to-deserts for that end, can be a very severe sentence. It exerts the power of the state over a citizen and as such in principle constitutes just as great a threat to individual rights as any other sentence. There is nothing necessarily in the 'interests of the offender'. Surely our experience with the rehabilitative aim has reminded us that so-called benevolent authority can be the worst of all possible tyranny.

8) The 'voluntary' nature of Community Service.

It follows immediately from the above that CS is no more voluntary than any other sentence. I agree with Harland and others that such a claim is patent nonsense. Perhaps the fiction stems from the early development of CS where there was a desire to select tasks otherwise done by citizen volunteers, and also from the desire to avoid conflict with international codes prohibiting compulsory unpaid labour.

I will leave it at that. This has been an attempt only to raise the issue of the need for good theory, suggest a predominant aim for CS and demonstrate some of its implications for one sphere of issues – the legislative and administrative.



"I will not allow this circus to be turned into a courtroom!"

A WEEK IN THE NORTH

by Judge Rodney Mykle

The author is Editor of the Provincial Judges Journal.

It was sweltering in town that day. After a busy morning in court I wandered off down Main Street in 30 degree temperatures, rejoicing in the halter tops and cutoffs which the bright sun had been encouraging all morning. A half hour or so of this was enough, as I found refuge in a quiet air-conditioned dining room for a relaxing and enjoyable lunch before the afternoon list began in the modern court facility a couple of blocks away.

And where was this, you say? Was it Calgary, Chatham or Cornerbrook? Not on your life. While the temperature in each of those places that day (July, 1981) managed a fitful 21 to 23 degrees, in Yellowknife the high was 31 degrees.

My trip to the sheltering palms of Yellowknife came at the behest of Chief Judge Jim Slaven of the N.W.T. Territorial Court, who suggested I come up to Yellowknife to sit for a week and look over the town and the area in July, at roughly the same time of year our Annual Meeting would be held in two years time.

I had a chance to have a short visit with Chief Judge Slaven in the new Yellowknife courthouse before he took off on a far-flung circuit that would take him over a large part of the more than a million square miles of the Territories, Canada's largest court jurisdiction.

After having been introduced to the court staff, all of whom were efficient and helpful during my stay, I had a few moments to wander around the second floor of the Court House, where the Territorial Court does its business. I was drawn to a display case which had a number of Eskimo carvings.

On closer examination, I found out that this was the Sissons collection of carvings depicting landmark cases in the north. I recalled that Jack Sissons at 63 undertook a tough job at a time when most men are thinking of retirement. Polio had crippled his leg, and he often walked with the assistance of cane.

But this man thought nothing of flying 20,000 miles and more a year bringing justice to "every man's door." From 1955 to 1966, as the first Justice of the Territorial Court, Judge Sissons made precedent-setting decisions from the Mackenzie Delta in the West to Baffin Island in the East.

While in the North, Judge Sissons became an avid collector of Inuit art. His collection of carvings dealing with the outstanding trials of his northern career was begun when one of the accused coming before him, Kaotak, a man found not guilty of killing his father, presented the Judge with a carving in 1956.

It gave the man's impression of being on trial. This first carving launched the Sissons trials carving collection. From that day on, on completion of a particularly noteworthy case, Judge Sissons would seek out local carvers whom he commissioned to depict the events.

Upon the Judge's death in 1969, the collection was given to the people of the North, deeded in trust to the Northwest Territories Bar Association. Among those cases commemorated are *Sikyea*, on the Migratory Birds Convention Act (including the actual duck shot!), *Re Noah Estate*, in which an Eskimo custom marriage was recognized, and *Tootalik*, in which the sea-ice was held to be part of the territorial jurisdiction.

And here was that collection, that rich bit of history, displayed just a few steps from the entrance to the Territorial court room where I was to work for the next week.

It was a powerful reminder that the history of justice in the North has been shaped – and recently – by a group of dedicated, determined and sensitive individuals who are keenly aware that this jurisdiction is not like the "south", and that court practices have to be adapted if they are to have any meaning in the north.

This "Sissons tradition" has been carried on, with some refinements, in current operations in the North by the present judges of the Territorial Court, Jim Slaven, Bob Halifax and Peter Ayotte.

These three judges are making continuing impact in the northern concept of justice in a variety of ways I kept hearing