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The Opinions of a Judge

by the Rt. Hon. Lord Justice Denning

This is an extract from "The Lawyer and Justice", published by Sweet & Maxwell, 1978.

This independence of the Judges carries with it, of course, great responsibilities — the responsibility of deciding without fear or favour, affection or ill will — but also the responsibility of being wise and discreet in all they say. But this does not mean that they must say nothing. If matters come before them where injustice is being done, they are entitled to point it out so that the public may know of it and form an opinion upon it.

There have been of late suggestions in some quarters that some Judges have not shown a due regard for their responsibilities. They have been reminded that the legislature is not free to criticize them; so they are not free to criticize the legislature. The Attorney-General recently said in the House of Parliament, and so they must act in accordance with what Parliament says. They should show proper respect for, and confidence in, what Parliament has decided and should always carry out faithfully the intentions of Parliament. If a Judge or magistrate should say, "I do not agree with this statute or regulation, and, therefore, I will only inflict a nominal penalty," he would be doing a grievous wrong. Nor should a Judge enter into any captious or irresponsible criticism of what Parliament has done. If a Judge should say to a young blackguard, "I wish I could have you birched, but Parliament in its wisdom says I cannot," that borders on the captious, or at any rate displays a want of confidence in Parliament which it is underdesirable to express. But Parliament is not infallible. Its policies may have results which it did not foresee. Its enactments may not work out in practice in the way in which it had intended. The draftsmanship may be obscure and give rise to unexpected difficulties. When this happens the Judges have the right, and indeed the duty, to point it out; and in the past they have often done so without being accused of impropriety. The Judges are able to see how the Acts of Parliament work in practice, and, when defects appear in them, their observations may be of great help to those responsible for making or amending the law. Not only the public but also the legislature may be left in ignorance of the defects unless they are pointed out to them.

The Privacy Law and Inmates

by Inger Hansen

Ms. Hansen is the Privacy Commissioner for the Canadian Human Rights Commission.

The year before I turned fourteen, my father thought of an interesting project and enlisted me as his helper. He wanted to trace our ancestors and for about a year, I spent many happy hours in the Danish archives going through registers of birth, marriage and death, guessing the year in which distant relatives might have given birth to children.

I learned the frustration of reaching a dead-end because a church had burned to the ground and records lost. But I also realized the reward of finally tracing my family back into the fifteenth century. And I learned that a great-grandfather won a competition by emptying the greatest number of beer-mugs, and that a great-aunt had been a notorious flirt.

At no time did it occur to me that our research or the registration of births, marriages and deaths might be an invasion of privacy.

During that year, I discovered the ease with which the Danish registry of people was able to give me the address of anyone living in that small country. Only much later, after my arrival in Canada, did I realize that many on this continent would consider the European systems of registering people the way we register cars a threat to civil liberties.

In my early years, I also submitted to medical treatment without ever considering whether I might have a right to read the doctor's file or whether he had a right to pass it to an insurance company.

Later, I paid Canadian unemployment insurance and taxes, and gave away the information given to the Tax Department in order to obtain a loan from a bank for the purpose of opening a law practice. I applied for a passport and obtained credit and I seldom questioned the correctness, completeness, relevancy or currency of the information others kept in their files about me.

Only in the seventies did the question of the right to protect personal information enter my consciousness.

I do not think I was alone in this casual treatment of information about myself. Many individuals, I am certain, felt the same way because they had never encountered difficulties because of a mistake in identity or clerical error. It is only since the amount of information collected about us and the ability to store, manipulate, and transfer it, has so dramatically increased that we have become aware of the need to limit the information we give away about ourselves; only now are we urged to give out information about ourselves carefully and to insist on fairness in information practices.

We are just a few years away from 1984 and we feel acutely that big brother, the computer, is watching us.

We know that when we buy that expensive dinner for two or that little special week-end, we leave a trail of information "bits", easily followed by an experienced, interested observer.

And I remember, while I was practicing criminal law in British Columbia and corresponded with inmates in the federal penitentiary, I received their letters with an official notice attached, "Please reply in duplicate" and I replied in duplicate, saying practically nothing, but it never occurred to me to raise the issue publicly that this might violate solicitor-client privilege of incarcerated persons let alone their privacy. You may all be aware of the Solosky case which is about to be argued in the Supreme Court of Canada and I will refrain from further comment on that.

Why do we tolerate having so much information about ourselves collected and stored?

Because it makes things easy, because we enjoy the benefits of communal living, easy credit, extensive medical records and follow-up, instant flight reservations, and we cannot have them unless we are prepared to give up some of our privacy in return.

But are we worse off than our grandfathers?

I don't believe so. In their days, credit was harder to get, and I have a nagging suspicion that before they could watch "All in the Family", people watched each other very carefully instead. I actually believe that we have a greater opportunity today to control what information we give, to whom and for what purpose. We have greater awareness of our right to know. And we are more conscious of the cost/benefit ratio of giving away information about ourselves.

As you know, the Canadian Human Rights Act was passed in July, 1977, and the operative portions of the Act were implemented on 1st March, 1978. As of that day, an individual could exercise his or her rights to know what records that are used for administrative purposes are held by federal government institutions concerning him or her.

He can demand to know the uses to which the information has been put since the 1st of March, 1978, and challenge the correctness of the information or require a notation on file when the correction is not accepted. As of the 1st of March as well, an individual became entitled to be consultd in respect of proposed non-related uses for administrative purposes of information provided to the federal government by such an individual.

There are exemptions to those rights to protect the interest of the collective, to balance private rights against those of the public interest. Part IV of the Canadian Human Rights Act provides for various categories of exemptions to those rights in Sections 50, 53, 54 and 62(1)(d).

Section 50 provides that information cannot be released in contravention of a federal-provincial agreement.

Section 53 permits the exemption of a personal information bank as a whole, with Cabinet approval.

Section 54 permits exemptions of parts or the whole of a specific file on the authority of the Minister.

And Section 62(1)(d) provides that medical or psychological reports may be withheld if in the opinion of a duly qualified medical practitioner examination by the individual would be contrary to his or her best interests.

You have all heard and read about the exemptions and I shall be pleased to deal with them in discussion; but, at this stage, I will only say that the comparison with European acts reveal that they, including the Swedish act, have similar exemptions in the public interest. The most interesting difference in European data protection acts is that they appear aimed at big business and other countries. There is much less evidence of adversary tension between individual and government.

The responsibility for administering the personal information rights rests on the federal government departments and institutions covered by the legislation. The President of the Treasury Board is designated as the Minister responsible for the general co-ordination of personal information rights. The designated Minister is also responsible for the publication, at least once a year, of an index which describes all federal information banks covered by the Act. He or she is to ensure that the index is available to the public, together with application forms. The index and the forms are available to the public in most post offices, in some public libraries, and in foreign missions.

There are some 20 totally closed banks out of the 1,500 listed in the Index.

Each government department and institution has appointed a senior official as privacy co-ordinator, to be responsible for responding to the requests from the public.

Individuals who wish to exercise their right under the Act must select the specific data banks they wish to search, and application forms for access or correction must be mailed by the individual to the government department concerned.

Critics have suggested that having to search through the index is too complicated. That criticism appears to disregard that simplification or a centralized system might result in lessening of personal information rights.

Firstly, subject to other provisions in law, Part IV entitles an individual to object to a proposed non-derivative administrative use of personal information provided by an individual. If the federal government were to establish a central storage facility for personal information, that right to object would probably disappear.

Secondly, if the choice of banks to be searched were made by public servants, the individual seeking access might legitimately complain that a certain measure of control had been taken away from him or her. As long as government departments and institutions keep separate personal information banks and as long as the individual concerned makes separate access requests, it is possible to provide some protection against the illegal passing of information. With a central system, that protection would disappear.

The mandate of the Privacy Commissioner resembles that of a parliamentary ombudsman and calls for impartiality until the facts are established and thereafter may require advocacy on behalf of a complainant, based on the established facts.

The investigation of complaints must be conducted in private, and no one is entitled as of right to a hearing before the Privacy Commissioner. The Act demands, however, that any government institution or person that may be adversely affected by a report or a recommendation made by the Privacy Commissioner shall be given a full and ample opportunity to answer adverse allegations or criticisms before findings or recommendations are made. Those involved are entitled to be represented by counsel.

The Privacy Commissioner is authorized to compel the attendance of witnesses and the production of documents and has the right of access to premises occupied by a government institution concerned in an investigation. Restrictions may be placed on the Privacy Commissioner by the Governor-in-Council in the interest of national defence or security, but no such restrictions have been imposed.

Convicted persons have the right of

(continued on p. 26 . . .)

imprisonment will no longer be the normal punishment for the more serious form of this offence.

Behind the increased use of fines there lies a re-evaluation of economic punishments as an instrument of criminal policy. Formerly, fining was regarded as a sanction to be used when no other sanction was available and then only for comparatively small offences. Nowadays the preventive function of fines is regarded as good. The high standard of living makes people more reluctant than formerly to pay out money for offences and thus deprive themselves of opportunities to buy TV sets, cars, etc., or to be forced to postpone holiday trips to parts of the world with a more favourable climate than Sweden.

In Sweden, short-term imprisonment is nowadays generally considered to be an inappropriate sanction from the social, ethical and economic points of view. We wish to find other sanctions which have the same preventive effect as prison. Fining in the form of day-fines is regarded as a good alternative. One ought to remember, however, that day-fines as a sanction are a part of the accumulated reaction that follows upon a crime (the discovery of the crime, the police investigation, the prosecution and the court procedure, the publicity, the punishment, and special sanctions such as withdrawal of the offender's driving license).

(ONTARIO EDUCATION . . . continued from p. 21)

Toronto. During the three days of that conference each section of that investigative facility explained and demonstrated its area of expertise making much easier the understanding of that type of expert testimony.

The Judges Association in co-operation with the Chief Judge each June conducts at the University of Western Ontario in London a University School of Continuing Judicial Education. This School operates a weekly programme which is repeated for a second week. To each weekly session about one-sixth of the Judges are invited so that each Judge attends once every three years. Each weekly session is divided into nine segments and a legal or procedural subject is considered in depth in each of these segments. The Judges are billeted in a university residence and are housed, fed and exposed to the educational content of the programme in this complex. The University's athletic facilities are also made available for periods of exercise and relaxation.

A distinct attempt is made to vary the format of the segments so that the concentration of academic effort will not be unduly tiring.

Each year the people who assist the Chief Judge in developing this programme have produced a dramatic presentation of some matter of concern recorded on TV colour tape lasting about 2½ hours. The tapes are used for three years and then retired so that the production of one such tape a year produces a dramatic presentation for three of the segments of each week of study. Some of the matters considered have been the protection of privacy legislation, sexual assaults, conspiracy joint trials, sentencing law and procedure and Experiences with Evidence.

The other segments are used by panels or Provincial Judges assigned to study and discuss a particular topic – lectures by Judges of the Court of Appeal, particularly Judges who had extensive criminal trial experience before their appointment (in recent years this task has been shared by Mr. Justice G. Arthur Martin and Mr. Justice Charles Dubin) – and by law professors who teach in the criminal law area.

One of the nine segments is devoted to discussing and dealing with practical problems which each Judge in the course brings from his practical experience. At this session the Chief Judge and the "Dean" of the course attempt to take opposing views of each issue to bring out full discussion and, if possible, an acceptable and hopefully the best solution.

The papers prepared for and given at this School have been transcribed and are supplied to all of the Judges. They are particularly valuable to newly appointed Judges who are, on appointment, supplied with a complete set. Each newly appointed Judge receives instruction during his induction period on a one-to-one basis as he may be assigned by the Chief Judge, and each new Judge is included in the next Summer School programme following his appointment.

Under the direction of the Chief Judge, a number of the Provincial Judges are involved in the operation of annual regional conferences for the continuing education of Justices of the Peace, including presiding J.P.'s who try the vast majority of all provincial offences in Ontario. This project is increasingly becoming a supervisory task for the Judges as the J.P.'s undertake an increasing role in their continuing education.

The Provincial Judges of Ontario are justifiably proud of their programme of continuing judicial education – they have the whole world in their hands.

(PRIVACY . . . continued from p. 2)
access to their files, but the Act provides specific exemptions in respect of them. Section 54(d) states that information may be withheld from an individual "under sentence" if disclosure, in the opinion of the Minister, might:

(i) lead to a serious disruption of that individual's institutional, parole or mandatory supervision program,
(ii) reveal information originally obtained on a promise of confidentiality, express or implied, or
(iii) result in physical or other harm to that individual or any other person.

As soon as the Canadian Human Rights Act became operative in the spring of 1978, an unexpected large number of inmates asked to see their files. So far, they are not satisfied with the results.

Many of them complained to our office and between 1 April, 1978, and 31 December, 1978, 156 convicted persons contacted us. They had 353 complaints, 309 of which were about delays.

A general problem existed and inmates were doubting the good intentions of Parliament and administrators and, therefore, one investigator was assigned full-time to those complaints. He was asked to prepare a general report dealing with the underlying reasons for the delays.

He reported that the Ministry of the Solicitor General did not appear to have been prepared for the large volume of requests from inmates and former inmates.

It is obvious that inmates' files need thorough scrutiny before release. But it also became apparent that, in the past, unnecessary information had been placed on file, simply because it was collected, and, in many cases, inmates' files were inches thick.

In addition to having to cope with the large volume of requests, the Ministry of the Solicitor General had to face the resistance to a new policy among the staff, which is human and normal, and fear of disclosure, which is peculiar to some government institutions, particularly in the law enforcement and correctional field. The anxiety was based on concern for inmates and fear for the safety of others.

I think there is some value to the argument that when an inmate receives his file in "black and white", (s)he is more likely to react adversely than when (s)he is shown the same information by a supportive person. But we must recognize that the risk of harm is inherent in correctional work as it is not caused exclusively by the provisions of the Canadian Human Rights Act.

Parliament has spoken and inmates have the right to access to their files and it is the task of our office to assure that they get everything to which they are entitled in law.

Under the Act, if adverse comments are to be made by the Privacy Commissioner, the department or an individual is entitled to respond. The Department of the Solicitor General has responded and my report and some recommendations will be delivered shortly to the Minister for his consideration. Every inmate who has complained will receive a copy.

I am concerned about the apprehension of staff and of voluntary agencies about these new rights that I have talked about. But I am also concerned that whenever possible, inmates be fully informed about the assessments others make about them and that they be given the reasons for administrative decisions that affect them.

But experience has taught me that it will take time before these new rights are accepted by all. In the long run, however, I am personally convinced the new personal information rights will lead to greater honesty and better communication between the keeper and the kept.

(DAY-FINE . . . continued from p. 20)
has led to some changes in these methods, and, as I have mentioned before, the maximum amount was increased to 500 kronor in 1962.

When questions concerning the day-fine system were discussed among representatives of the Scandinavian countries 23 years ago, Professor Ivar Strahl said: "To a Swede who is used to the day-fine system, it seems to be a merit of the system that it forces the courts to consider the economic circumstances of the accused and to account openly for the way in which such consideration has been done. It is less important how the system is shaped in detail. Given wise application, different enactments can produce good results." As a Swede I can fully concur with these words also today.

The question of an increased use of fining is of great current interest in Sweden and the other Nordic countries. In Sweden there is a movement to extend the sphere of application of fines, notably day-fines, to offences which traditionally are regarded as rather grave. The increased use of fining against offences which formerly were punished by imprisonment, has mainly been brought about by the courts. But now the legislator, too, is showing a tendency to adapt himself to the evolution in practice. Thus imprisonment has been abolished as a punishment for some offences of a certain gravity. One important example is careless driving. Of especial interest is a proposal made by a committee to amend the law concerning drunken driving in such a way that

Reforme du Pouvoir Judiciaire

par le juge Denis-R. Lanctot

L'auteur est un juge de la Cour des Sessions de la Paix.

Ce court mémoire est soumis à la fois pour appuyer les recommandations de l'association canadienne des Juges provinciaux d'unifier la justice criminelle, et pour en amorçer la discussion sur la création d'un conseil suprême de la magistrature au Canada.

Le ton affirmatif des énoncées n'est qu'une commodité d'écriture. Il a davantage l'effet d'éveiller l'attention parce qu'il fait scandale. Aussi doit-on y voir une préoccupation très audacieuse d'assurer au pouvoir judiciaire sa pleine autonomie.

Ce qui va suivre doit être considéré un document de travail visant à reviser en profondeur tout le pouvoir judiciaire pour l'adapter aux besoins des temps mdernes. Les habitudes acquises, les difficultés d'ordre constitutionnel et les impératifs de la politique ont pu jusqu'à maintenant voiler l'intérêt supérieur de la Justice. Il est à espérer que ces forces de résistance finiront par cédar à l'analyse objective de l'imbroglio qui caractérise notre système judiciaire et laisseront les hommes de bonne volonté étudier froidement les solutions qui s'imposent.

La classification des conflits d'ordre juridique relève de critères extrêmement diversifiés auxquels il n'y a pas lieu de s'attarder pour l'instant. Dans les grandes lignes toutefois, il apparait aujourd'hui qu'à l'intérieur du fédéralisme canadien, trois grandes disciplines retiennent l'attention des tribunaux de première instance; le droit civil, le droit public et le droit pénal. Selon l'importance relative des conflits, les juridictions sont supérieures ou inférieures.

Jusqu'à maintenant la Cour supérieure a monopolisé les trois grands ordres de juridiction., Laissant de côté pour le moment les possibilités d'un éclatement au niveau du civil et de l'administratif, il y a lieu de s'attarder sur l'anachronisme de sa juridiction en droit pénal à compter du postulat suivant:

La Cour provinciale de juridiction criminelle ne répond ni aux critères qui en feraient un tribunal inférieur ni à ceux qui en feraient un tribunal supérieur. Elle est devenue une Cour hybride qui, en fait et en droit, a la responsabilité d'administrer la quasi totalité de la justice pénale.

La quantité des causes qu'elle entend est certes lourde de conséquence et justifierait à elle seule les recommandations de l'association. Ce qu'on aurait négligé, c'est la qualité de la criminalité moderne et la compétence supérieure exigée des juges appelés à y fiare face.

Cette criminalité est extrêmement sophistiquée et n'a qu'un rapport éloigné avec celle qui préoccupait les Pères de la Confédération. Il n'est qu'à songer aux domaines de la fraude économique et du trafic des stupéfiants pour en saisir un peu la dimension. A côté de la criminalité proprement dite, la Cour provinciale de juridiction criminelle est saisie des causes relevant du droit statutaire fédéral et provincial. Aussi bien en droit statutaire qu'en droit criminel, bon nombre de procès exigent du juge qui les entend une culture juridique embrassant le droit public et le droit civil. Le droit statutaire a aussi évolué considérablement.

Habitués que nous étions à gaspiller les richesses naturelles, nous avons subitement découvert les impératifs de l'écologie dans son sens le plus large. La pollution, la protection de la flore et de la faune, la qualité de l'environnement, pour n'en évoquer que quelques facettes, ont suscité de nouvelles législations normatives et prohibitives entrainant la discussion du concept de la responsabilité pénale de nature criminelle, stricte ou absolue.

Conscients de sa responsabilté sociale accrue, la magistrature de la Cour provinciale de juridiction criminalle s'est structurée en corporation professionnelle modelée sur le Barreau, ce qui est beaucoup dire.

Sur le plan individuel, les juges ont à écouter les criminologues et les spécialistes de la santé physique et mentale. Le vaste éventail des sentences possibles leur impose chaque jour la tâche de réconcilier l'intérêt public et celui du délinquant. Il sait que le droit qu'il doit appliquer mi jote dans la marmite active de la Commission de réforme du droit pénal. Une philosophie particulière s'insinue dans les concepts traditionnels de la criminalité et de son traitement. En effet, les sciences humaines ont tendance à se substituer à la morale traditinnelle pour apporter les correctifs qui s'imposent.

Il faut aussi penser que le code criminel est resté stigmatisé par son atavisme de Common Law, ce qui a pour effet, de provoquer un afflux quotidien de décisions qu'un juriste consciencieux doit assimiler en un temps record s'il veut rester à la hauteur.

Et pour tout dire, la tâche d'administrer le droit criminel en est une à plein temps. Elle est celle d'une magistrature spécialisée chargée de protéger l'ordre public d'un océan à l'autre à une époque où l'affaissement des moeurs poursuit sa trajectoire en chute libre. Telle est aussi la tâche de ceux parmi les juges de la Cour supérieure qui sont affectés à l'audition des procès par jury, à celle des appels des tribunaux inférieurs et au contrôle juridictionnel. Ces juges sont irréprochables, mais ils sont titulaires d'une Cour généraliste.

Il n'est pas déplacé de penser qu'un juriste nommé à la Cour supérieure doive être capable de circuler à l'aise parmi les différentes disciplines légales qui sont du ressort de sa juridiction. Or il est intellectuellement impossible d'y arriver.

Autant les grandes études légales sont compartimentées, autant les avocats nommés au banc de la Cour supérieure y arrivent avec leur spécialité propre. Une partie de ces juristes spécialisés préfèrent ne pas présider les procès par jury en droit criminel, ou se sentent mal à l'aise en droit public. Il n'y a pas à se le cacher, l'omni-compétence exigée des juges de la Cour supérieure est devenue une utopie et cette Cour a tendance à se compartimenter selon la compétence personnelle de ses titulaires.

Telles sont, brossées sommairement les données du problème. Les esquisses de solution apparaissent dans les quatre chapitres qui suivent et dans un corollaire consacre d'autres questions tout aussi fondamentales.

LA SPECIALISATION CHEZ LES MAGISTRATS:

Dans les limites de leur juridiction territoriale, les tribunaux actuels ont la spécialisation des compétences qui leur sont dévolues. Seule la Cour suprême du Canada est un tribunal parfaitement généraliste. Malgré sa spécialité, le nombre de lois qu 'un tribunal doit appliquer lui confère une dimension généraliste variable.

Face au pouvoir législatif, qui doit multiplier les lois pour satisfaire aux exigences de la société moderne, le pouvoir judiciaire doit s'adapter en augmentant le nombre des tribunaux et le nombre des magistrats. Malgré cette adaptation quantitative, le pouvoir judiciaire se doit de ne pas saturer ses titulaires, d'où les nombreux démembrements du tribunal originel en secteurs judiciaires ou quasi judiciaires spécialisés dans l'application d'un domaine particulier du droit.

Le stress imposé aux juges de la Cour suprême est modéré par les amendements qui limitent le nombre et la qualité des appels et par la discrétion qui leur est accordée en certains cas d'en endiguer le flot par le biais des jugements sur requête pour permission d'appeler.

Il en est de même pour les juges des Cours d'appel.

Ces deux Cours sont généralistes à des degrés différents. La Cour d'appel a la généralité des appels émanant des tribunaux d'une province donnée. A cette limite territoriale s'ajoute la confiance que lui accorde le législateur quant à ses décisions relevant de l'application du droit provincial. Malgré tout, la Cour d'appel compte parmi ses titulaires des juristes hautement spécialisés qu'elle affecte à l'audition de causes qui réclament une telle spécialisation.

A la Cour supérieure, la spécialisation "de facto" est spectrale. Le bagage de connaissances juridiques exigé des juges de la Cour supérieure est exorbitant, accablant, et certainement surhumain. Au sein d'une pléiade de juges affectés au secteur criminel, certains ont un entrainement général alors que d'autres ont été choisis parmi les plus éminents criminalistes. En droit, aucun n'est limité à n'entendre que des causes criminelles. Ils doivent, au fil des semaines passer du criminel au familial, et du civil à l'administratif.

Ainsi qu'il a été mentionné plus avant, aucune discipline particulière du droit ne doit être contraignante pour un juriste affect à la Cour supérieure. Si telle contrainte existe, ce peut être que ce puriste n'est pas à la hauteur. Ce peut être aussi, et c'est le cas le plus fréquent, que l'étendue de la juridiction dévolue à cette Cour a franchi le cap de la saturation.

A notre époque de spécialisation, il faut ambitionner de confier à des spécialistes les tâches compliquées sans perdre de vue leur formation générale et leur culture. Un domaine aussi vaste que le droit pénal exige de ceux qui s'y adonnent une attention exclusive et ne peut plus aujourd'hui être laissé à des généralistes.

Fort heureusement dans cette discipline, le nombre de causes relevant de la juridiction exclusive de la Cour supérieure a diminué. Cependant cette constatation en amène une autre, à savoir que ce sont les Cours provinciales de juridiction criminelle qui ont pris la succession. Elles sont véritablement spécialisées en droit pénal et leurs titulaires y consacrent tout leur temps.

effective as any of the sophisticated custodial treatment programs we now use. Secondly, as mentioned before, money can be saved by revised treatment systems deploying non-custodial measures such as probation or supervision where the cheaper systems are more often than not also more humanitarian. Thirdly, much money appears to be wasted in many countries by unnecessary custodial care of juveniles. The costs of community programs are at least one half the cost in money and time than in the case of institutionalizing a delinquent, where in most instances there is equal, if not more, protection to the public even in the more serious cases of the psychopathic or psychotic.

ROLE OF THE COMMUNITY

There needs to be a proper balance between professional and citizen participation in the legal structures dealing with our children. It is not unusual for otherwise responsible people to publicly criticize the Juvenile Court without taking the time to acquire some knowledge. Lack of such knowledge is undoubtedly one of the main cuases for such criticisms as "juvenile offenders are treated with sloppy sentimentality", or on the other hand, that "justice is dispensed far too harshly or punitively". Thus, much of the court's image unfortunately is based on preconception and innuendo. To overcome this problem the court must open its doors discreetly and invite a mature community, who invariably pays the tax dollar, which in turn pays our salaries. For example, many legal systems throughout the world are utilizing the services of citizens of the community as volunteers in the field of corrections as case-aides. In turn these responsible people would be acting as a liaison between the court and the community and would assist not only our already overburdened professionals in areas of case work and group work, but would also educate the public as to what are the real purposes of the administration of juvenile justice. In this same context courts must also invite the news media who will report responsibly and maturely, not merely on sensational issues, bu the function and philosophy of the system to the community at large. Far too long has the press and the administration of justice been skeptical of each other's motives. Journalism is needed in the juvenile justice system.

There needs to be a partnership within the proliferation of services now existing, whether private or public, whether funded or self-sustaining. There is just too much fragmentation and polarization amongst agencies who oftentimes compete for power and control over our children.

A MORE PRACTICAL APPROACH

There should be also a balance in our attitudes where we should look realistically at our treatment services in a practical sense. Today's youth, to a great extent, are capable of influencing their own destinies, and we must allow them to do so. Perhaps we are too treatment-conscious with a "save the child" complex. In essence, most children passing through the total system usually do not need psychiatric or psychological care where these services already are overloaded with work and thus should not be used indiscriminately. Perhaps instead we might look upon our youth on a more practical basis as self-determined people who mainly need assistance in obtaining employment or a good education. We should understand that much anti-social behavior is natural for adolescents and they pretty well grow out of it especially if we do not intervene.

Lastly, there must be an immediate partnership and balance between the legal profession and the social sciences. The frightening urban crises and the wide range of skills needed to resolve the problems of the child in a changing society point up the tragedly of the almost total isolation of the skills of law, social work and medicine. This isolation is tragic because more and more lawyers, doctors and social workers will be handling separate but closely-interrelated aspects of the life of the same person such as in the area of the battered child syndrome, matrimonial matters of adoption, custody, maintenance and delinquency. There must be then an assimilation and exchange of knowledge within these respective philosophies through revised curricula so that their mutual academic approaches could be eventually sustained and carried into the world of practice in team approaches working in multipurpose units.

In conclusion, our role today is to encourage a global ethic, an ethic that abhors the imbalances and inequities we see happening to our youth. The ethic of nations demands of us the attainment of the one element that should prevail in any structure or service dealing with children and that element is *humanism*, the ability to feel, touch and dispense justice with compassion and sensitivity.. *Humanism* must be the matrix, the seed-bed that must be nourished if our legal and social structures are to flourish side by side in peaceful and productive co-existence with our changing youth. And we should always ask ourselves "Is it well with our children?" – if it is well with the child, the wellbeing of our community, the wellbeing of our nations, and ultimately the wellbeing of the world can be assured.

looked upon as a running stream, carrying society's hopes, and reflecting all its values, and hence requiring a constant attention to its tributaries, the social and other sciences, to see that they feed in sustaing elements."

REVIEW PROCEDURES

Further, we need a check and balance on the judge and his court and also we need a check and balance on those who treat children. With respect to the courts, we must infuse into all these legal systems speedy and economical appellate and review procedures not merely perfunctory procedures set out in superficial statutes rarely used. The youth of today want and need their legal rights protected from overzealous courts and welfare administrations. In essence then, the court should be a full court of law which has a duty to determine the guilt or innocence of the delinquent child, but must be obliged to act in the best tradition of individualized justice and assure equitable due process.

Similarly, the child also needs devices that will act as a check and balance on treatment agencies, especially in those instances where the youth are institutionalized under some form of legal committal. In my opinion, what is even more traumatic and insiduous than some juvenile courts is any form of an unchallengeable and unchangeable bureaucratic child welfare agency, board or panel who pontificates with unfettered power at times as to what is best for the child and has the discretion, but not necessarily the competence, to place and refer children as it sees fit. We must then ask ourselves in these instances, who is to save our children from their saviours? We might well consider the words of Pascal, the philosopher who said: "Justice without power is impotent – power without justice is tyranny".

LAWYERS FOR CHILDREN

I believe we can provide this check and balance to protect the child from the worst of both these worlds by the use of lawyers acting for them in all phases of the system from the very point of apprehension by the police to custodial care. But this will take a particularly well-trained lawyer, a new breed of lawyer imbued with a strong social and legal conscience, who understands the juvenile justice system in its entirety on a modern basis. It must be a lawyer acting independently, who cannot be co-opted either by the courts or treatment agencies in defending the child. It would be counsel's function to act as an advocate in compelling welfare agencies and legal bodies to do what they say they will do, once the child passes through the processes so that there will be no loss of liberty through unfair detention practices or because of lack of resources. In essence, the lawyer, the cornerstone of a juvenile court, must be encouraged and welcomed by both the judiciary and the treatment services to provide the constitutional protection to the child.

We also need a balance between custodial and non-custodial care in dealing with our maladjusted youth. In this kaleidoscope of change we must build a malleable mosaic of treatment services for children whose needs vary greatly. As a re-treaded correctional officer turned judge, I am particularly partial to supervision of the young offender in the community. It is also evident tha probation or supervision in some form in the child's environment seems to offer the most proficient and economical alternative to institutional care. However, this is not a simplistic solution by any means because there is a universal lack of definitive and qualitative standards when dealing with disturbed youth in general. Therefore, there is a dire need to evaluate our existing methods of classification with respect to the delinquent and neglected, both legally and therapeutically.

Hence, many children are merely given lip service and held in custody, deprived of their liberties where so-called professionals use pseudo scientific methods not yet fully developed or proven through backup research. Administrators of these treatment centres, in Canada at least, say with sincerity and frustration that 90 per cent of their time is spent on 10 per cent of the population. Within this 10 per cent is a pathetic minority for whom treatment does not exist – the psychotic, the mentally defective, the brain damaged or the sexual psychopath. In other words, we are still proving our genius to perpetuate cruelty and stupidity, when dealing with our emotionally disturbed youth, utilizing out-moded methods of confinement that dates back to the 18th and 19th centuries at least where we exile for expediency our emergencies. These approaches are no better than those in our present adult criminal system; that is, we are using incarceration and punishment in default because of our failure in delivering services to the child in an appropriate fashion.

NEW TREATMENT SYSTEMS

In the light of our oftentimes phenomenal ignorance, certain universal propositions, with respect to treatment, should be considered by all of us in the field of corrections. Firstly, humanitarian systems of treatment within a community are at least as

LE RE AMENAGEMENT DES PALIERS SUPERIEURS ET INFERIEURS DE JURIDICTION ET LES ANOMALIES ACTUELLES:

L'organigramme de la hiérarchie des juridictions au sein du pouvoir judiciaire au Canada est une classique à respecter.

Le tribunal de première instance par excellence est la Cour supérieure. Entre parenthèses, toute réforme du pouvoir judiciaire devrait trouver un nom pour les Cour suprême des provinces anglaises.

La juridiction de la Supérieure a trois grands volets, à savoir la juridiction rationae materiae, la juridiction d'appel des décisions des tribunaux inférieurs et celle de contrôle juridictionnel. Il n'y a pas lieu de déranger ces trois ordres de juridictions, mais de les resituer dans leur véritable perspective.

Pourquoi un tribunal est'il inférieur? Il faut recourir à plusieurs critères pour reconnaitre le caractère inférieur d'un tribunal. L'importance mineure des causes qui lui sont confiées, le champs d'application territorial restreint des lois qu'il doit appliquer, la simplification de la preuve susceptible d'amener une décision, le nombre réduit de causes contestables, une hyperspécialisation, voilà autant d'exemples de ces critères. Les titulaires de ces tribunaux sont recrutés parmi ceux dont la culture s'y prête, mais qu'on ne songerait pas à nommer la Cour suprême du Canada.

Deux réflexions s'imposent:

1. Si le législateur, par la dynamique de ses lois et de leur amendement périodique, amplifie la juridiction d'un tribunal inférieur et lui assigne des tâches exigeant une compétence accrue chez ses titulaires, ils en modifie le caractère inférieur.
2. Le contrôle juridictionnel n'a de sens que s'il met en opposition une Cour organiquement supérieure et une Cour organiquement inférieure. Si cette équation n'apparait pas clairement, le contrôle n'a plus sa raison d'être et encombre le chemin de la justice. Aussi bien, dans ces conditions, un contrôle par voie d'appel.

Quels sont alors les traits dominants d'une Cour supérieure?

Constitutionnellement parlant, on peut répondre que c'est une Cour dont les juges sont nommés par le Gouverneur général. Ainsi, sans plus de commentaires, la Cour fédérale est une Cour supérieure. Les Cour suprême de première instance des provinces anglaises et la Cour supérieure du Québec sont des Cours supérieures. L'inactive Cour de circuit au Québec doit en être une, mais les County Courts des provinces anglaises n'en sont pas. La distribution du droit pré-confédératif est prévue dans l'Acte de l'Amérique du nord britannique, mais le résultat est tacheté de zones grises. La jurisprudence continuera de s'interroger sur les véritables critères de définition de la Cour supérieure tant qu'un amendement constitutionnel n'aura pas clarifié la question.

Dans les faits cependant, les critères de supériorité se retrouvent tous dans les Cours supérieures de chaque province. Outre leur juridiction de contrôle sur les tribunaux inférieurs, sur les corporations privées et publiques et sur les corps politiques, elles ont une compétence d'attribution proportionnelle à l'importance et à la diversité des matières qui lui sont dévolues, et une compétence d'appel des décisions des tribunaux inférieurs. A la complexité des problèmes qu'elle doit résoudre s'ajoute celle d'une procédure et de règles de preuve destinées à faire apparaitre le droit.

A l'intérieur du fédéralisme, une Cour supérieure se surpasse quand sa compétence d'attribution s'étend sur des sujets relevant des compétences législatives fédérale et provinciale. C'est le cas pour nos Cours supérieures. Plus modestes, les juges nommés par le Gouverneur général à la Cour fédérale se contentent d'administrer le droit fédéral. On pourrait leur refiler la faillite, le divorce et la lettre de change sans que leur modestie n'en soit blessée pour autant, mais là n'est pas la question.

On a plus d'une fois souligné le paradoxe d'une Cour supérieure affectée principalement à décider en vertu des lois relevant de la compétence législative des provinces, alors que la Cour provinciale de juridiction criminelle décide principalement en vertu des lois relevant de l'autorité législative du Parlement.

Une observation s'impose. La compétence de la Cour provinciale de juridiction criminelle se distingue par trois traits fondamentaux de grande envergure:

1. Elle exerçe dans l'un des domaines les plus importants du Droit;
2. Les lois qu'elle doit appliquer sont le code criminel et la constellation des lois provinciales et fédérales générée par le droit statutaire;
3. Enfin elle est un tribunal hautement spécialisé.

Telle est l'évolution de ce tribunal orginellement une Cour inférieure, dont les titulaires vivent quotidiennement le droit criminel et une criminologie dont l'ampleur et l'intérêt ont été évoqués plus avant.

C'est sur les juristes appelés à présider une telle Cour que le contrôle juridictionnel de la Cour supérieure s'exerçe. On objectera que la Cour provinciale de juridiction criminelle a deux ou plusieurs classes de juges.

A cette objection, on doit répondre que les projets de réforme de la procédure démarqueront les juridictions inférieures et

(continued on p. 11 . . .)

In Brief

IMPAIRED DRIVING INFORMATION FOR THE CLASSROOM

A $250,000 program that will provide school teachers with class room programs based on impaired driving information gathered by the Ministry of the Attorney-General's CounterAttack program against drinking driving has been instituted in B.C.

The Province-wide program will enable all B.C. junior and high school teachers to integrate information about impaired driving into the existing class curricula of their 200,000 students, or to present it as a self-contained unit of study.

"Examples of this could be the use of impaired driving statistics in mathematics or learning in biology the effects of alcohol on the body, brain and vision," Attorney-General Gardom said.

There is no doubt in my mind that we must bring about attitudinal changes in our society regarding drinking and driving," he said. "I see this school program as an essential element in providing our youngsters with a deeper understanding and a better basis for making a decision about drinking and driving.

"The *Criminal Code* of Canada provides tough penalties for impaired driving, but we want our children to consider this serious social problem and understand the risks involved before they find themselves in court facing a $2,000 fine, six months in jail and a criminal record.

* * * *

SEAT BELT INFRACTIONS

A total of 2,300 people in British Columbia have been convicted to the end of September for not using their seatbelts, Attorney-General Garde Gardom announced.

"This compares to 1,400 people convicted in all of 1978 for the offense," Gardom said.

"Quite clearly, these figures indicate that seatbelt legislation is being enforced by the police even more firmly than it was last year."

Gardom said he has asked the Criminal Justice Division of the Attorney-General's ministry, in consultation with police throughout the province, to review the use of seatbelts by the motoring public.

"I am informed that a survey earlier this year of 3,100 drivers and passengers showed a significant decrease in the use of seatbelts," he said.

"Yet I have had so far no indication from the police of a decline in seatbelt use, even though thousands of cars are being checked every day throughout British Columbia as part of the CounterAttack Program."

* * * *

NEW TORONTO COURT BUILDING

A major new court facility providing improved services to the people of Toronto recently opened.

A total of ten new courtrooms and related support services and offices are located in the College Park development, the former Eaton's store on the southwest corner of Yonge Street and College Street.

"The opening of this facility represents an important step in our continuing effort to make the justice system more accessible to and convenient for the public it serves," Attorney-General McMurtry said. "This location was chosen because it is central and can be reached easily by public transit."

Mr. McMurtry said eight of the ten new courtrooms will be used by the Provincial Court (Criminal Division).

The remaining two courtrooms will be used by the Small Claims Court which will be relocated from 67 Richmond Street East.

"With this facility open, we will have more than doubled the number of courtrooms in two years to serve the people of Metropolitan Toronto," Mr. McMurtry said.

A total of 39 new courtrooms have been provided in the Metro area since the fall of

tradition to the one effort, which can keep a country democratically healthy – that effort is to perpetuate the potential intelligence of the younger generation.

Transition is so rapid we might well consider the ballad of Bob Dylan, an American musician-philosopher, which goes:

Come mother and father throughout the land;
And don't criticize what you can't understand;
Your sons and your duaghters are beyond your command.
Your old role is rapidly aging.
Please get out of the new one if you can't lend a hand;
For the times they are a-changin'.

BALANCING THE EQUITIES

Thus, if change is to occur constructively, there must be delicate balancing of the equities to do away with the inequities in the juvenile justice system where one factor invariably affects another factor and where one service affects another service. Let me then set out generally, hopefully acting as a catalyst, for your consideration and discussion during the Conference sessions, some of these areas that need to be balanced, blended and complemented in order to assist our changing youth.

First and foremost, we need to have a co-operative balance between the juvenile justice system of jurisprudence and the emerging social sciences when dealing with the child. Basically, we should not eclectically cling to the precendential past in law nor should we proselytize "all for treatment and treatment for all!". In order to shore up this self evident cleavage between the two structures the courts firstly must overcome their "star chamber and black magic aura". They must do away with the mystique and magic of judical procedure which perpetuates itself in many courtrooms of our nations. In other words, procedures must fit children – children should not fit procedures. There must be a balance between formality and informality where the judge is able to "shoot the breeze" with the child in simple language without insulting his intelligence or imagination. Our sophisticated youth of today will not necessarily accept any longer paternalistic preaching or punishment per se from the Bench. Thus, a judge in a profession demanding inter-relationships cannot divorce himself by simply sitting on a dais and cannot hide behind the judicial cult of indifference and admonish a youth simply because it is his reputed duty to do so for society.

SOCIAL SCIENCE CRITICISM

On the other hand, just as the courts are looking for the elixir of law, so too, the social sciences keep looking for the "sociological Holy Grail" to solve the problems of juvenile delinquency. These fledgling disciplines should not cast stones of moral judgment at the Juvenile Court structures especially when their findings are often based on scanty research and prejudicial hypothesis. They have often stated that Juvenile Court offers nothing but a stigma and only reinforces deviant behavior in the child. So too, other professional disciplines such as psychiatry and psychology would also prefer to deal with the young offender apart from the judicial procedure, acting like cubicle clinicians isolating a disease. These professional people must however attempt to adjust their attitudes since they may have just as many monopolistic motives as law, based on unsophisticated experimentation which in the long run could be worse than mere legal stigma on children. Thus, caution and patience must prevail where we must not make radical and rash changes in a changing society for want of new solutions. At least we should analyze this penchant for progress where I believe we would be in error in diluting our courts by narrowing the judicial boundaries and over-expanding the treatment expertise. I am suggesting that we re-instill confidence in our court's role whatever its structure. The judicial process including sanction and authority should not be abandoned as long as it is used equitably and interrelatedly.

I firmly believe there are therapeutic as well as legal virtues in court structures. They can be in essence laboratories for human behavior that could provide clues for treatment and rehabilitation. A well-run courtroom should represent a balance between purely technically-defined judicial functions on the one hand and the totally non-judicial therapeutic approach at the other extreme. In other words, the court must be a middle ground, a balance if you will, in the treatment process where a good cross-section of the professions, student and practitioner alike, such as psychiatrists and social workers, who deal with children, would observe and participate in the process of human dynamics occurring in court and then inculcate them into their after-court assessments when treating these same children outside the courtroom.

To sum up this balance between law and the social sciences, Chief Justice Bora Laskin of the Supreme Court of Canada put it very well when he said:

"The law is not a still pool merely to be tended and occasionally skimmed of accumulated debris, rather it should be

The Child — A Social and Legal Structure in Transition

by Judge Herman Litsky
Judge Litsky is a Judge of the Alberta Family Court in Calgary. These are excerpts of his keynote address presented to the 8th Biennial Conference of the Australian Crime Prevention Council at Adelaide, Australia.

Initially, I wish to take this opportunity to thank all the planners of this Conference who so graciously invited me to give this Keynote address.

While I was at Oxford, England some time ago as a Rapporteur at the 9th Congress of the International Association of Youth Magistrates, it was very clear to me that there was an identity crisis amongst most of the three to four hundred Youth Magistrates, as they are called internationally, from some 45 countries and jurisdictions. Much of this identity crisis seems to stem from very realistic universal factors. There is a definite trend today with many of our nations, when dealing with youth problems, to accentuate the concept of prevention and deflection from the court's processes and involvement. Many countries are fervently restructuring their courts or judicial administrations as in England, the United States and Canada, even abolishing them, as in Scotland. Thus, we judges are beginning to wonder what our future role will be with juveniles and some of us are actually fearing the entrenchment of treatment systems upon our authority whittling away at our traditional structures.

YOUTH IDENTITY CRISIS

As we pondered our position in Oxford, as judges, so too we realized that our youth are also going through their own kind of identity crisis where they are just as much in a state of legal and social transition as are our courts. In essence, judges throughout the world may be only frustrated people running parallel or along side our youth barely keeping up, both parties striving to acquire an inner equilibrium and balance in a world that only offers paradoxical mixtures of mechanization and underdevelopment – peace and violence – affluence and abject poverty. As judges we may be failing in most instances to touch their lives in our every day contact with them, especially in face to face relationships. In many instances our court structures seem to be a sterile legal ceremony where our judiciary may not really be a part of contemporary therapeutic processes, and at the most, may provide only an inequitable contiuum with change.

But might I also say to you in defence of the courts, having worked both professionally and practically in the fields of law and social work, that there is also an identity crisis with the helping professions who literally are reaching out with their satchels of semantics towards our youth assessing, classifying, categorizing, diagnosing, but not necessarily touching them in terms of treatment. We all, therefore, seem to have this kind of academic illiteracy for abstracitons and the all-too-prevalent and professionally popular practice to label but not necessarily help in rehabilitating the child.

Thus, since there is a changing youth in our global village today, our task as adults is to change with them. Children are maturing in an era where the rate of social change is faster than ever before in human experience. There is evidence that one quarter of our world population is under ten years of age. Even if we hold everything constant, that is, just go on with what we are doing today, we can easily predict that there will be a very large increase in crime and delinquency in the next five to ten years. This enigma almost resembles a dream much akin to the Red Queen who said to Alice in Wonderland: "It takes all the running you can do, Alice, to keep in the same place. However, if you want to get somewhere else you must run at least twice as fast as that." Indeed, we might say in dealing with our youth that we are only poor poker players in the game of real life with children as our chips.

There has been a marked change of attitude especially in the last decade in the character of education related to our children who now basically believe in academic freedom. In general, many countries are disturbed indicating a prevailing skepticism of our youth's alienation towards today's social and legal structures in our educational system. From my point of view, this skepticism is unwarranted. It is apparent that not only will they not be intellectually intimidated, but they are also more politically astute and socially conscious and very sensitive to every kind of injustice, wanting their rights protected by the due processes of law. They make demands, and justifiably so, for greater participation in decision making of life's problems and are striving to be partners with their parents. They rationalize this since they are acquiring legal responsibilities at an early age to marry, to vote and to drink – not necessarily in that order. We must, therefore, exert all our energies giving absolute priority even over precedent and

1977, including: 11 new courtrooms in Etobicoke at 80 East Mall; nine new courtrooms in Scarborough at 1911 Eglinton Avenue East; seven new courtrooms at 1000 Finch Avenue West and two new courtrooms at 45 Sheppard Avenue East in North York.

In addition to the expanded facilities, the number of judges of the Provincial Court (Criminal Division) presiding in Metropolitan Toronto has been increased from 28 to 42, a 50 per cent increase in the past four years.

In the same period, the number of full-time judges of the Small Claims Court presiding in Metropolitan Toronto has increased from one to five.

* * * *

DO NOT ADJUST YOUR SET

The City of Las Vegas anticipates annual savings of $50,000 and a more expeditious judicial process through the implementation of an idea generated by Chief Municipal Judge Seymore H. Brown. Persons charged with city misdemeanors no longer must be transported from the County Jail to City Hall for arraignment before a Judge. Arraignments, bail reduction hearings, and probable cause hearings are conducted through the use of television cameras and monitors installed at both the court and the jail.

Judge Brown conceived the televised hearings more than a year ago while watching inmates being escorted out of a police bus into a holding facility at Municipal Court. The bus made two or three trips a day from the jail to City Hall and back to the jail, transporting inmates for hearings and trials. Each bus required at least three police officers to assure security. Fights often broke out in the holding room where as many as 40 inmates awaited their appearance before a judge.

The number of persons transported from jail to Municipal Court has been greatly reduced. The only arraignments conducted in the courtroom now are for persons who are out on bail and on cases where there is a possibility that jail time may be imposed by the judge. A bus is no longer needed to transport prisoners and a van is used instead. Also, persons jailed on weekends can be arraigned before Monday afternoon as an alternate municipal judge conducts television hearings on city misdemeanors both Saturday and Sunday. The judge can release the person on his own recognizance or reduce the amount of bail he must post to be released from jail.

A room in the municipal court section of the City Hall has been set aside for televised arraignments. The judge sits in front of a television camera and watches the inmate on a monitor while the inmate stands in front of a camera at the jail and watches the judge on a screen. Microphones allow both the judge and the inmate to speak to each other.

* * * *

HOW DO YOU PLEAD? CASH OR CHARGEX?

Las Vegas Municipal Court has a new computerized credit system that allows "customers of the Court" (offenders), particularly tourists whose vacation might be spoiled by requiring payment in cash, to pay fines and post cash bail almost instantly if they possess a Master Charge card or Visa card.

The system is dependent upon a device (CEN-TEL INSTANT CHECK) offered in Las Vegas by Cental Transaction Services, a division of the Central Telephone and Utilities Corporation. The device looks like a telephone with a digital read-out window and accepts the credit cards through a slot. After consulting a computer, the machine either approves or disapproves the transaction, or instructs the operator to telephone the cardholder's bank for further information. Most transactions take a matter of seconds and secure the amount of the bail or fine in the person's account for 21 days.

The new system is being operated through Valley Bank of Nevada which has waived its normal service fee as a civic service to the community.

Lloyd W. Zook, Court Administrator, expects the service to benefit the City by speeding arrested persons out of jail, thus saving the City more than $18.00 per day it costs to hold a prisoner. Court officials hope to install another unit at the jail which, along with a new video arraignment system, will add to the speed with which prisoners can be processed.

* * * *

ACQUITTED PERSONS' DEFENCE COSTS REIMBURSEMENT CONSIDERED

The Law Reform Commission of Saskatchewan and the federal minister of justice have been asked to consider the question of reimbursement of reasonable defence costs of accused persons who are

acquitted, Attorney-General Roy Romanow said.

"I have been concerned for some time, as the minister responsible for administration of justice in this province, that in certain circumstances, reimbursement would be only fair and proper," Mr. Romanow told a news conference.

"Under our laws a person is presumed innocent until he is found guilty. It does not seem just that a person who may be put to considerable expense to prove his innocence should not receive compensation in cases where, for example, he was improperly identified.

"I have requested the Law Reform Commission of Saskatchewan to undertake a study with respect to offences under provincial legislation. I have asked the federal minister of justice to ensure the topic is examined insofar as criminal offences are concerned," he said.

Remedial legislation in this area has been enacted in such jurisdictions as New Zealand, New South Wales and The United Kingdom. It is time that some jurisdiction in Canada took the lead and Saskatchewan is prepared to take that role," Mr. Romanow said.

"I would expect that the bodies considering this subject would recommend guidelines under which reimbursement would be made.

"Under our legal aid system in this province, there is provision for those who cannot afford legal services. What I am concerned about here is reimbursement for those who have had to expend their own funds," the Attorney-General said.

* * * *

TRANSLATION SERVICES TO BE EXPANDED

The Manitoba government is expanding its translation services substantially in what Attorney-General Gerry Mercier describes as "a major first step to meet both the spirit and the legal requirements" of the recent Supreme Court decision on Manitoba's language legislation.

Mr. Mercier said that additional expenditures – amounting to nearly $500,000 – will be made to develop the capacity necessary for the translation of legal documents, including statutes and other material deemed to come under the scope of the ruling.

In complying with the Supreme Court decision, the provincial government has subdivided the total workload into three levels:

– The catch-up phase during which about 10,300 pages of statutes plus an unknown number of pages of regulations and other documents will have to be translated from English to French.

– The on-going needs of the government, particularly where bills and legislative documents must be provided in both languages.

– To meet increases in general translation services.

Mr. Mercier said negotiations are underway with the federal government in an effort to obtain the services of expert advisors and qualified translators; to obtain professional and technical advice in areas of staff recruitment and training, and to acquire supervisory assistance.

Senior managerial and professional levels of the federal Bureau for Translations have taken part in the consultative process.

The province's translation unit will be increased by 11 staff-man-years. This increase, plus use of translators on contract, will allow for the completion of the catch-up phase in three to five years. This time period can be reduced depending on the amount of assistance provided by the federal government.

Mr. Mercier said translation work will begin immediately, with particular emphasis on new legislation being introduced at the forthcoming session of the Legislature.

In order to improve productivity further, full use will be made of the computerized word bank of the federal government.

With the Supreme Court decision declaring Manitoba's Official Language Act to be inoperative, Section 23 of The Manitoba Act of 1870 will once again become fully operative. That section declares:

"Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective records and journals of those Houses; and either of those languages may be used by any person, or in any pleading or process, in or issuing from any court of Canada established under The British North America Act 1867 or in or from all or any of the courts of the province. The Acts of the Legislature shall be printed and published in both those languages."

Continuing Judicial Education in Ontario

by Woolsack

"Woolsack" is the nom de plume of a Provincial Court Judge who sits in Chatham, Ontario.

The story is told of a Provincial Judge in Ontario who was conducting a first call Court in which a comely young lady appeared for the Crown. A number of lesser miscreants had pled guilty – their pre-disposition reports had been prepared and the time for sentence had arrived. The Crown had had a very busy day with no time to prepare her submissions on these sentences, really barely time to read the reports, and as she was called on in each succeeding case she adopted as her comment the phrase "Your Honour, I am in your hands". The possible nuances of meaning to which this phrase was open drew smiles and chuckles from the male chauvinists who sat at the defence table.

With great coolness and presence of mind the Judge indicated that he would adjourn for a few minutes and suggested that since the Crown was a young lady she might consider more appropriate words in which to couch her submissions. As the Judge retired from his Court room a senior police security officer was heard singing to himself "I've got the whole world in my hands".

That cool competence in the face of the unexpected which we require of our Judges in their Courts, whether the challenge be from a humorous incident, a contemptuous incident or legal conumdrum, comes to a substantial degree from programmes of continuing judicial education, a field in which the Provincial Courts of our country have been in the forefront.

The real pioneer in all of this is the Provincial Judges Association of Ontario, Criminal Division. Their programme has been developed over many years and has several facets.

Over the years the Annual Convention has developed an educational content to accompany the yearly business meeting of the Association. In recent years a theme has been given to this Conference and panels and guest speakers arranged to develop this theme. In 1978 the theme was "Expeditious Justice".

One of the most active and most important Committees of the Ontario Association is the Education Committee and it has two or three main projects each year.

The first of these is a series of four regional seminars for each of which a similar programme is provided. Each seminar lasts for three days and the time is about equally divided between two matters. The first is the consideration of sentencing problems and "hypotheticals" with a panel of Provincial Judges joined by one member of the Ontario Court of Appeal. The second is a consideration of recent amendments to the law or "land mark" decision which have been delivered during the preceding year. In this area representatives of the ministry responsible for the amendments under consideration are often participants in the discussions.

A second project under the auspices of this Committee is the Court of Appeal visitation programme. Each year a third of the Provincial Judges of the criminal Division are invited to spend three consecutive days observing the hearing of criminal appeals. The programme continues weekly over several months and involves four to six judges in each group. On Monday morning these Judges are provided with copies of the appeal books and factums for each of the appeals expected to be reached during their visit. The appeal panel and the visiting Judges hold two informal discussions about the cases that have been completed. On Tuesday the visiting Judges are the guests of the Court of Appeal at lunch and when the Court rises on Wednesday afternoon they adjourn with the visiting Judges for a couple of hours of frank discussion. The Justices of Appeal are not offended by reasonable criticism and they have often said that they gain more from this exchange than do the Provincial Judges. The most important result is that each Bench increases its respect for the other and a better understanding of each other's problems.

When funds are available this Committee also conducts a central educational conference to which all of the Provincial Judges are invited to participate in a programme that could not be adapted to the regional seminar format. An example of this type of programme was one held several years ago at the Centre of Forensic Sciences of the Ministry of the Ontario Solicitor-General in

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and their staffs, are very well equipped to assess other people's income and property.

Obligations to support one's children or other dependants are supposed to decrease the amount of the day-fine. For a child who is dependent on the offender an amount of 2-3 kronor is deducted by the courts from the provisionally calculated amount of the day-fine. According to the circular of the Chief Public Prosecutor a sum of 3,700 kronor for each child is to be deducted from the yearly income before this is divided by 1,000. When the wife of the offender has no income of her own or only a very small one, this circumstance is usually taken into consideration. In such cases, according to the circular, a fifth of the income of the offender is to be deducted before the division by 1,000.

Moreover, the courts very often make a discretionary deduction in these cases as part of a rounding-off of the amount of the day-fine.

The offender can also bring up other financial liabilities in the hope of persuading the prosecutor of the court to reduce the amount of the day-fine. Such items as interest due on a loan, hire-purchase commitments, unpaid taxes, or unpaid fines from earlier sentences usually influence the fixing of the amount of the day-fine. If the court in the same proceeding finds the offender liable for damages which substantially affect his economy, the general opinion is that it has to take the amount of these damages into consideration when deciding upon the amount of the day-fine.

In general, the prosecutors and the courts try to get an overall view of the offender's finances and within reason they pay regard to his financial liabilities.

Although the Penal Code prescribes two kronor as the minimum amount of a day-fine, nowadays a lower amount than five kronor is unusual. According to my information, a lower amount than three kronor is never used. For a student or a national service-man the amount of the day-fine is usually five kronor. In the case of old-age pensioners some courts fix the amount at three kronor and others at five kronor.

When fines are collected, the competent administrative agency is empowered to extend the time for payment and to allow payment in installments. In principle the collecting agency can use the same methods of enforcement as are used when enforcing judgments concerning debts. Fines which are not paid can be *converted* to imprisonment. The conversion is done according to a sliding scale (five day-fines are converted to ten days imprisonment, 100 day-fines to 64 days, 120 day-fines to 70 days and 180 day-fines to 90 days imprisonment). The conditions for conversion are, however, rather strict. These conditions, together with the rule that day-fines should be adapted to the offender's ability to pay, as well as an appropriate use of the device of extensions of time, payment in installments, and enforced payment, are intended to reduce conversion of fines to the smallest number which is possible without jeopardizing the preventive effect of the fines. Often the enforcement of imprisonment to which fines have been converted is suspended. The result is that about 130 cases a year of such imprisonment are enforced in Sweden, whereas the number of people punished with fines by the prosecutors and the courts is about 250,000 a year. We do not think that this has injurious effects on the general obedience to the law.

The relation between the two fining systems in Swedish law is apt to cause some difficulties. It has been pointed out that persons with a good economy who commit an offence for which day-fines are ordered can be sentenced to pay an amount which might seem to be too great in relation to the gravity of the offence. To avoid this, the law allows the amount of the day-fine to be abated if the offence is petty. This is an exception from the principle that the gravity of the offence should influence the *number* of day-fines and not the *amount* of each of them.

The possibility of abating the amount of the day-fine has been used in situations of different kinds, even in sentences for offences which do not appear to be typically petty offences. The Ombudsman has reacted against this practice. In 1960 he pointed out that abatement of the amount of a day-fine should not take place except in cases where the offence is without any doubt petty.

In recent years, however, all petty offences have been transferred to the category of offences for which fines are fixed directly at a comparatively small sum of money. The number of situations in which abatement of the amount of day-fines seems indicated is therefore now very small.

The day-fine system has not been unanimously approved of in the Scandinavian countries. When the system was new in Sweden it was heavily criticized in some quarters, especially by judges. What was criticized, however, was mainly the way in which the system was used in practice. In some respects the practice has been improved under the influence of this criticism. During the last 25 years, however, the system has been very little discussed in Sweden, and what discussion there has been has only concerned details, such as the number of day-fines for different kinds of offences or the methods of deciding the amount of the day-fine. The increasing tax-burden carried by most people in Sweden

(continued on p. 26 . . .)

ON A SADDER NOTE

Delegates who attended the Charlottetown conference in September of 1979 will certainly recall Rae MacFarlane, the ex-convict panel member, who received a substantial amount of local publicity as a result of his participation on the panel.

He arrived in Edmonton during the Christmas holiday, reports Judge Walder White, broke and out of work.

He indicated to Judge White that the day after his appearance on the panel he had only one customer in his hairdressing shop (the others had cancelled) and it was almost that bad in successive days, forcing him to go out of business.

People he used to have coffee with had shunned him, and he lost his house through inability to make the payments.

Judge White reports that he has assisted Mr. MacFarlane in relocating in Edmonton, with some hope of a permanent job in the future. It is indeed a sobering thought to consider the repurcussions experienced by this man who gave us his assistance just a few months ago.

A CONFERENCE ON ALTERNATIVES

"Alternatives to Imprisonment" is an international conference to be held in early June at York University, Toronto.

The conference, jointly sponsored by the Ontario Ministry of Correctional Services, the federal Department of the Solicitor General, and the National Council on Crime and Delinquency, U.S.A., is designed to expose law enforcement agencies, the judiciary and others involved in criminal justice alternative ways of dealing with the problem of crime and the planning involved in the process.

The four-day meeting will survey such alternatives as neighbourhood dispute settlement, bail verification, victim-offender reconciliation, fine options and community service orders. Additional sessions will deal with effective volunteer management, evaluation techniques, sentencing information and police discretion.

The opening date for registration is April 1, 1980. Dates of the conference are June 8 – June 12. Contact Mr. Michael Hordo, Alternatives to Imprisonment Conference, Four Seasons Sheraton, 100 Richmond Street West, Suite No. 312, Toronto M5H 3K2 for conference prospectus and registration forms.

THE WESTERN REGIONAL RIDES AGAIN

"The Young Offender: Adult and Juvenile" is the theme of the Western Regional Educational Seminar, to be held at Banff from April 27 to May 1.

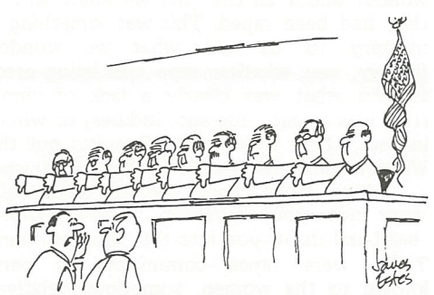
Designed to be of interest to both the criminal and family benches of the provincial courts, the seminar surveys the particular problems of understanding, assessing and sentencing teenagers and individuals in their early twenties.

Seminar planner Judge F.W. Coward of Lethbridge indicates that several of the sessions will be joint, hearing such speakers as Dr. Roger Kittrie of the Washington College of Law, Chief Constable Brian Sawyer of Calgary, Chief Judge Harold ff. Gyles of Manitoba and Mr. Justice A.M. Harradence of the Court of Appeal of Alberta.

Some of the sessions have been designed to be of particular interest to family court judges, such as lectures on Sex and the Single Adolescent, School Attendence Problems, and discussion groups on child protection cases.

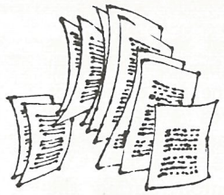
Particular issues facing the criminal bench will be dealt with in lectures by Mr. Justice J.H. Laycraft on The Art of Rendering a Judgement, Gun Control Legislation by Charles Musk of the Alberta Attorney-General's Department, and Sentencing by Judge R.B. Wong of Vancouver.

Although the week is a busy and informative one, time is also available for socializing and for renewing acquaintanceships. From all accounts, the seminar promises to be a full and enjoyable one. Registrations have been coming in rapidly, and indications are that this seminar will be the best attended of any held in the four western provinces.



"FRANKLY, I EXPECTED SOMETHING A LITTLE MORE ELOQUENT FROM THESE GUYS!"

Other Views



JUVENILE JURIES

As in all worthwhile projects, approval of student juries to sit in on hearings involving juvenile offenders in Brandon has clearly not been easily won. And we, the general public, have been privy to only the highlights of the discussions and negotiations.

But now that Brandon school division trustees have granted the juvenile jury project a one year try-out, it can be given its proper, breakthrough label. It is a first for the province and a credit to its originators.

Students involved will not have much power. They will do no more than observe and recommend sentences. But that alone promises to be one educational experience worth having. Through it, participating students will not be able to avoid the reality of juvenile crime in the community and the agony of having to come up with punishments that fit the severity of particular offences. The court system, for its part, will not be able to avoid careful consideration of appropriate sentences which it otherwise might never have imagined.

The project may in the end prove unworkable. But if it does, let's hope it fails only for want of offenders to sentence.

* * * *

WHEN A GIRL SAYS 'NO'

My old roommate, Neil, and I used to wonder about all the girls we knew who said they had been raped. This was something of a mystery to us and what we wondered, frankly, was whether rape was being used to explain what was clearly a lack of virginity (this was a long time ago, kiddies) or whether, in fact, there were a lot of rapists out there. We now think the woods are full of rapists.

The rapes these women talked about were not your common bang-you-over-the--head-and-throw-you-into-the bushes variety. These were rapes committed by persons known to the women, sometimes relatives – men who did not know how to take no for an answer.

If these rapes had one thing in common, it was that they entailed a minimum of violence. Sometimes there was little violence, maybe a threat, but not really more than that. The women called it rape. You can bet the men called it something else – "scoring" would be a good guess.

I bring this up now because of the recent ruling of the Maryland Court of Appeals in which a rape conviction was overturned on the grounds that the victim did not have sufficient cause to think she was in danger. In this case, the woman met the man at a bar, drove him home but refused to go inside his home with him. The man then reached over, grabbed the keys out of the ignition, scaring the woman into going into the house with him, where he "lightly" choked her. She then did what he wanted, little realizing, in the words of the court, that the man's actions were not enough to create a "reasonable fear" that if she resisted him he would have harmed her.

This is almost precisely the sort of rape my roommate Neil and I used to hear about and which we found puzzling. We knew as men that folklore said that very often "no" did not mean "No!" In fact, there were three kinds of nos – a no that meant yes and a no that meant maybe and a no that meant no. The only way you could tell for sure was to keep pushing, since the wisdom of the streets held that women sometimes succumbed to passion. In other words, with a little force the lady with you could become some witless and brainless writhing thing.

We are now finding that these are among the most common of rapes – that rape, like murder, often occurs when the parties know each other, and it happens, in the case of rape, because men for some time have believed that a certain amount of force – or the threat of force – is permitted in the wooing of a lady. It is a quaint concept.

You sort of have to step back off the planet, get a really good and objective look, to realize how amazing this sort of thinking is. Sex, for some reason, is the last stronghold of violence, the one area of daily life where society sanctions it. You could not grab the keys and lightly choke someone you were

prosecutors and the courts when determining the amount of a day-fine.

The general impression gained from the interviews is that the courts do not act quite uniformly and that sometimes their consideration of certain circumstances is made intuitively.

The lay members of the lower courts often take a very active part in the decision of the amount of the day-fine. The prosecutors, on the other hand, naturally have to follow the directions in the Chief Public Prosecutor's circular. According to the *travaux preparatoires* of the legislation of 1931, the offender's *per diem* income should be the starting point for determining the amount of the day-fine. This income ought in the general opinion to be the offender's mean income per day calculated on the basis of his economic circumstances during a not too short time. The thousandth part of the income during a year, which later was chosen as a basis, was regarded as the *per diem* amount which would be left when the offender had spent what was absolutely necessary for himself and his family.

The calculation of the annual income is made on the basis of the offender's circumstances at the time of the sentence. Usually they are based on statements by the offender to the police or to the court. What is meant by income in this connection is not exactly the same as income according to the tax laws. It is roughly the total amount which the offender has received during a year in the form of wages, salary, interest on pension, annuities, etc. Usually his statement is compared with the tax authorities' assessment of his income and of his property (in Sweden there is a wealth tax).

Some courts base their calculations on the annual income of the offender after deduction of taxes (the "net method"). Other courts, and the public prosecutors in obedience to their chief's circular, base their calculations on the annual income before deduction of taxes (the "gross method"). When the gross method is used, the effects of the progressive direct taxes are taken into consideration by deducting an amount proportional to the level of the income from the calculated thousandth part of the income. In the circular of the Chief Public Prosecutor this amount is fixed for different sizes of income. Many courts which use the gross method make, however, a rough calculation to take account of the effect of the taxes.

This taking into consideration of taxes, whether it is done according to the net or to the gross method, is most important, since the direct taxes are very high in Sweden for practically everybody who has an income. The mean income of a manual worker is about 35,000 kronor a year, and from this income he has to pay more than 40% in national and local income tax.

A state official or a business man who earns 80,000 kronor a year has to pay more than 50% of that amount in income tax.

The Penal Code prescribes that the amount of the offender's property shall influence the amount of the day-fine. According to the *travaux preparatoires*, the property must be taken into account to a higher degree than is justified solely by the amount of interest earned on it. The interest is regarded as part of the income, as mentioned above.

The question is how the property itself is to influence the amount of the day-fine. It has been pointed out that the consideration of the property must not lead to a practice which virtually means confiscation of the offender's property. In practice the courts and the prosecutors take into consideration the form in which the property is held. A distinction is made between easily convertible property and tied-up capital. Capital which is invested in industry or trade or in real estate usually does not increase the amount of the day-fine to the same degree as does money deposited in a bank. Owner occupied houses do not seem to be regarded as part of the property of the offender, except when they are exceptionally valuable.

An important question, of course, is whether the prosecutors and the courts are able to obtain reliable information concerning the offender's finances. Obviously they do not always get correct information. It is, however, on the whole very easy in Sweden to get information about other people's economic circumstances. In principle the documents in all government offices and the courts are open to inspection by the public. There are some exceptions to this rule. Thus tax returns are confidential, but the tax authorities' records of the amount of the individual citizen's taxable income and the amounts of the income tax and wealth tax payable by him are open to public inspection. Moreover, information about the tax payable by people with an income above a certain level appears annually in a privately published "tax calendar" – a work that is a best seller and more widely read than pornographic papers. The evening papers delight in publishing extracts from the tax authorities' records concerning people who are rich or well known or both (much to the annoyance of those intellectuals who earn their living by advocating economic equality).

Moreover, assessment of income and wealth taxes is in the first instance carried out by local boards, dominated by laymen. For these and other reasons, knowledge of other people's economic circumstances is widely spread in Sweden. Consequently, the professional judges and the lay members of the lower courts, as well as the public prosecutors

The Day-Fine System in Sweden

by Hans Thornstedt

The author is a professor of criminal law at the University of Stockholm. From time to time in Canada the suggestion is raised that a day-fine system be implemented in criminal and juvenile courts. This article points out most clearly that adoption of such a scheme in Canada is impossible, given our present criminal procedure and confidentiality of our taxation returns. – Ed. note.

The idea that the amount of a fine ought to be settled in accordance with the *per diem* income of the accused was discussed as early as the beginning of the 20th century. Finland, however, was the first Nordic country to introduce a "day-fine" system. This happened in 1921. Sweden followed in 1931. In Denmark the system was introduced in 1939, in a half-hearted way against strong opposition. The common opinion among lawyers is that it has never worked well in Denmark. Among the Nordic countries, Norway and Iceland, have not introduced the system and it seems unlikely that they will.

There are differences between the day-fine systems in the Nordic countries. In this paper I shall confine myself to the Swedish system, which I know best.

A feature of the Swedish system that is of practical importance is that fines are to a large extent determined by the public prosecutors. The prosecutor can invite the perpetrator of an offence to accept a fine proposed by the prosecutor. An acceptance of this proposal has the same legal effect as a sentence by a court. This system, which was introduced in 1948, nowadays applies to all offences with fines as the maximum punishment and to some smaller offences, e.g. petty larceny, which can be punished by a fine or a short prison term. The prosecutor, however, cannot propose a more severe punishment than 50 day-fines (or, if his proposal concerns more than one offence, 60 day-fines).

More than 75% of the fines in Sweden are determined by the prosecutors in this way.

Besides day-fines, Sweden has fines of the traditional kind which are fixed by the court or the prosecutor directly at a certain sum of money. Such fines are nowadays used only for petty offences (e.g. small traffic offences or drunkeness and disorderly behaviour). The amount can vary between 10 and 500 kronor.

Technically, the charges levied by policemen for certain petty offences or by policemen or traffic wardens for parking offences are not regarded as fines. These charges are small (maximum 250 kronor in the first case and 100 kronor in the second case) and are levied according to schedules issued by the Chief Public Prosecutor of Sweden.

In the day-fine system the *number* of day-fines represents the measure of punishment, and the *amount* of each day-fine is estimated in accordance with the financial situation of the accused.

In Sweden the *number* of day-fines is normally 1-120. If a person is sentenced at the same time for several offences, of all which deserve day-fines, he has to be sentenced to a joint punishment, which may not exceed 180 day-fines.

The *per diem amount* of a day-fine is in Sweden 2-500 kronor. Accordingly, the highest sum which can be imposed in one sentence to day-fines is 60,000 kronor for one offence (120 x 500 kronor) or 90,000 kronor for more than one offence (180 x 500 kronor). A fine with a lower amount than 10 kronor may not be imposed.

The scale of 1-120 (180) day-fines is intended to fit both petty offences and more serious offences. Only in very exceptional cases do the courts apply the maximum of the scale.

The normal amount for ordinary traffic offences is 10 or 15 day-fines. On the other hand, the punishment for the less serious type of drunken driving (driving with 0.5-1.5 mgs. alcohol in the blood) may be 40-100 day-fines.

In the decision of the amount of the day-fine, a circular from the Chief Public Prosecutor plays an important part. As the public prosecutors had to an increasing extent to impose day-fines and accordingly very often had to decide the amount of a day-fine, the Chief Public Prosecutor felt that he had to interfere to ensure uniformity in the practice of the prosecutor in this respect. In 1963 he therefore issued a circular concerning the fixing of the amount of day-fines.

This circular has been reproduced in the commentary to the Penal Code which is used by all criminal lawyers. Accordingly it has been studied by the judges and has to a greater or less extent influenced the practice of the courts. Inflation and higher taxes, however, very soon made this circular obsolete, so the Chief Public Prosecutor issued a new circular on the subject in 1973, which is still in force.

On the basis of interviews with a number of judges and public prosecutors, the following can be said about the methods used by the

doing business with – the painter, for instance – or someone in a social situation, but you can with sex. It makes no sense.

The long-term solution is education. The women's movement has gone a long way toward educating men about women. (I can't believe the things I once believed.)

In the short term, though, it is the courts and the law that have to get the message across and this is why the Maryland decision is such a step backward. For saying that there is such a thing as insufficient force implies that there is a permitted or sanctioned level of force – that the guys were right in thinking that you could use a little muscle on a lady. It is that sort of thinking that led that guy to lightly choke that woman in Maryland and it is that sort of thinking that accounted for the stories that my roommate and I heard years ago.

A lot has changed for Neil and me since then. But for the women of Maryland, things remain the same.

– *The Washington Post*

(REFORME . . . Continued from page 5)

supérieures au sein de cette Cour et que, de toute façon, dans l'état actuel des choses, la juridiction de magistrat est comprise dans celle donnée aux juges.

Ainsi donc le projet de réforme est à mettre en place les deux paliers hiérarachique de la juridiction de la Cour provinciale de juridiction criminelle. Il doit aller plus loin et lui accorder le contrôle juridictionnel sur les cours inférieures redéfinies.

Qui oserait prétendre aujourd'hui que la culture juridique d'un juge spécialisé en droit pénal n'égale pas celle d'un généraliste de la Cour supérieure. La confiance que lui a accordée le législateur a l'effet d'une consécration.

Le contrôle juridictionnel de la Cour supérieure, quant à la Cour provinciale de juridiction criminelle est donc révolu, et constitue une entorse dans l'expédition des affaires. Le plaideur non satisfait de la décision de contrôle de la Cour supérieure sait que la Cour d'appel aura le dernier mot, en sorte que cette décision peut n'avoir pas plus de poids qu'une dissidence en appel. Si le plaideur s'en contente, il peut en être autrement chez les juristes, et l'occasion de faire avancer le Droit aura avorté au départ.

Les raisons de préférer en droit une décision rendue par une Cour d'appel à celle rendue en première instance, tiennent principalement du fait qu'elle est rendue par une majorité de juges. Le science juridique d'un juge de la Cour d'appel est-elle supérieure en principe à celle d'un juge de la Cour supérieure? C'est un peu s'engager dans une discussion sur le sexe des anges. La valeur d'une décision rendue par la Cour d'appel tient du vote majoritaire chez d'éminents juristes.

Il en est autrement des raisons qui font préférer la décision d'une Cour supérieure à celle d'une Cour inférieure. L'élément quantitatif cède le pas à l'élément qualitatif. Une Cour organiquement inférieure a des titulaires à qui la pratique dans un champs restreint impose ses limites. Ainsi, et à titre d'exemple seulement, la décision d'un juge de la Cour supérieure possédant une vaste expérience en droit pénal, à l'encontre de celle d'une Cour municipale, a des chances de satisfaire les esprits les plus combatifs, et le recours en appel apparaitre le plus souvent illusoire.

Dans l'état actuel des choses, la juridiction de contrôle met en opposition la décision d'un spécialiste en droit pénal et celle d'un généraliste du droit. En fait-il davantage pour y trouver une singulière anomalie doublée d'un état de fait anachronique?

Vous trouverez la continuation de cette article dans la prochaine edition.

"That's Scarface Mariano. He's helping us with our inquiries"

A Kenyan Looks at Alberta

by Chief Magistrate F.E. Abdullah

The author is Chief Magistrate of Kenya, and Chairman of the Kenya Magistrates' Association.

Mrs. D. Winton, the Secretary of Commonwealth Magistrates' Association visited Edmonton, in Alberta, Canada in August, 1978, when she met Chief Judge R.A. Cawsey of the Provincial Court of Alberta. They discussed many aspects of the value and contribution of the Commonwealth Magistrates' Association to the members of the judiciary all over the Commonwealth. During their discussions it was felt that a visit from a judge of one of the developing countries to a developed country to observe the system and functioning of administration of justice would be of mutual benefit.

The upshot of the discussions were that Chief Judge Cawsey undertook to host such a visit. As a result, Mrs. Winton contacted my Association in Kenya and after consultation with my Association and the Government of Kenya, an invitation was extended to me by Chief Judge Cawsey to spend a month in Alberta as his house guest and of the Provincial Judges of Calgary, Lethbridge and St. Paul in the Province of Alberta.

The visit was made possible through the generosity of Commonwealth Foundation and Air Canada, who provided my air fare from Nairobi/London/Nairobi and London/Edmonton/London respectively. Mrs. Winton and Canadian High Commission in Nairobi rendered me valuable assistance in getting the above grants. Moreover, my Government subsidised to some extent the proposed visit to Alberta and thereafter my participation at the 5th Commonwealth Magistrates' Conference at Christ Church, Oxford, September. I am deeply grateful to all those involved in my visit which has greatly enriched my knowledge and experience as well as brought me great number of friends.

I left Nairobi for London in the early morning of 16th August, 1979, and from the moment I boarded the First Class Cabin of Air Canada at the Heathrow Airport on the afternoon of the 16th of August, 1979 to the conclusion of my visit in the Province of Alberta, I have been overwhelmed with kindness, generosity, friendship and warmth of hospitality of Canadians everywhere. It was simply fantastic.

EDMONTON

After sight seeing the grandeur and majesty of Niagara Falls as well as the beautiful City of Toronto, I reached Edmonton on Monday 20th August, 1979, and was received by warm, friendly and welcoming smile of Chief Judge Cawsey. I spent a week at his house concluding with the weekend at his cottage appropriately called "The Crown Rests" by the lake called Pigeon Lake, some 50 miles from Edmonton. Both Judge Cawsey and Mrs. Cawsey and their daughters Jane and Caroline made me feel utterly at home and attended all my needs. They were perfect hosts. I am grateful to them.

During my stay in Edmonton, I had several opportunities to exchange views with Chief Judge Cawsey and other judges about our mutual problems and achievements in the administration of justice. I visited Provincial Judges' Courts, spoke to judges at a lunch (amongst those present were Chief Justice W.R. Sinclair of the Court of Queen's Bench of Alberta) and attended a press conference. Everyone whom I met at the Provincial Courts, lunches, dinners, golf outings and other places were eager to learn about my country and were attentive listeners to what I had to say.

From observation of the Court Proceedings and discussions, it at once became obvious that we treaded on many common grounds. We both have inherited the English system of administration of justice. The independence of the judiciary, the presumption of innocence, the open-court trial, the right of accused persons to have legal representation, the opportunity to prepare defence, oral examination and cross-examination of the witnesses, *voir dire*, the provisions of bail, the right of the accused to give evidence or remain silent, the right of appeal and the requirement of persons arrested by police to be brought to court as soon as practicable reflect the common principles inherited from the United Kingdom.

The major departure that I observed was the functioning of the courts in Alberta. In our courts, the judge is required to record in long hand all that is said in court which

Leveque of Calgary.

Theme of the Western Regional Conference will be "The Young Offender: Adult and Juvenile". Speakers will be from various social disciplines with emphasis on understanding and sentencing the young offender. Estimated number of judges attending from the four Western Provinces and the two Territories, will be seventy-five, with the majority from the Province of Alberta.

The Atlantic Regional Seminar for the four Atlantic Provinces will be held May 26th-30th at Littledale Academy, St. Johns, Newfoundland. The program will include discussion on recent cases pertaining to confessions, strict liability offences, procedural problems in interim release and adjournments, sentencing alternatives, and problems in procedure and enforcement of probation orders.

Like the Western Regional Seminar, there will be both Criminal and Juvenile and Family Court sections. The Criminal Court program will be chaired by Judge John Trahey of St. Johns and the Juvenile and Family Court section by Judge Bob Ferguson of Sydney. Social convenor, or "leg man" as he calls it, will be Judge Terry Corbett of Placentia.

Francine Altman of our Education Secretariat in Ottawa, reports that our catalogue of seminar papers has been recently up-dated and sent to all Provincial Chief Judges and Association presidents. Copies of any seminar papers on file may be obtained by writing to Mrs. Altman at the Education Secretariat, c/o Canadian Judicial Council, 130 Albert Street, Suite 717, Ottawa, Ontario, K1P 5G4.

I would like to remind judges that our Association has had in existence for about one year, the services of a speakers bureau, available to Provincial Associations, for either their annual general meetings or educational seminars. Basically, it is a project started by Walder White consisting of a roster of available speakers, recognized as experts in their subject fields. If a speaker from this roster is required by a Provincial Association, the National Association would contact the speaker and pay the speaker's transportation expenses to and from the speaking engagement. The Provincial Association would pay for the speaker's local expenses.

I am pleased to report that the Education Committee has now changed the format. If a Provincial Association wants to invite *any* speaker, subject to the approval of the Education Committee and the availability of funds, the National Association will provide the speaker's transportation expenses. The speaker's local expenses will continue to be paid by the Provincial Association extending the invitation. I trust this change will encourage Provincial Associations to make more extensive use of prominent speakers on subject matters relevant to their local educational programs.

The Federal Departments of Justice and the Solicitor-General have asked the National Association together with Federally-appointed judges, to sponsor the writing of a sentencing handbook for trial judges in Canada. It has been suggested that the handbook might consist of three parts:

1. Information and compilation of the Law on principles of sentencing. Professor Ron Delisle, a former Ontario Provincial Court Judge and now a professor of law at Queen's University, has been asked to prepare this particular section.
2. An index and compilation of Federal Statutes pertinent to sentencing. This part would include various statutes which impose minimum or consecutive sentences in given circumstances, with up-dating of new changes as it arises.
3. A compilation of necessary information to sentencing judges on the range of programs, institutional and otherwise, that are available to his or her jurisdiction. This section would be prepared by Federal and Provincial correctional authorities, of the areas being served.

It has been suggested that the handbook be prepared on a loose-leaf format and be capable of regular up-dating.

Another sentencing project which the Federal Government has asked the National Association, together with the Federally-appointed judiciary to assist, is in the area of sentencing guidelines for certain offences. Because of a concern about sentencing disparities for similar offences in local areas, a statistically-compiled sentencing grid reflecting the views of judges in a local area about certain offences could be used as an informational tool to judges, about the "going tariff". It would be emphasized that such sentencing guidelines are proposed only as an informational tool which the sentencing judge may or may not choose to use. The proposed guidelines do not fetter a judge's sentencing discretion. In certain instances where there may be exceptional circumstances as to either the offence or the offender, the "going tariff" clearly would not be an appropriate factor in the imposition of a particular sentence.

The Education Committee is open to suggestions about future seminar topics, speakers, and the direction which National continuing judicial education should be headed. I encourage you to let your views be known to either myself or to the two vice-chairmen, Judges Coward and Bernier.

Educational Programs of the Association

by Judge Randal B. Wong

Judge Wong is a judge of the Provincial Court of British Columbia. He is the current chairman of the Education Committee of the C.A.P.C.J.

Last fall, upon assuming the mantle of chairman, Judge Walder White of Edmonton, my predecessor, was most helpful in briefing me on the work of the Committee and has been unstintingly available for advice. I would like to publicly acknowledge my gratitude and thanks to Walder.

Members of the present Education Committee consist of Judge Fred Coward of Lethbridge, as Western Vice-Chairman, Judge Raymond Bernier of Montreal as Eastern Vice-Chairman, and myself as Chairman. The Committee then selects various judges across Canada to assist in the planning of seminars held throughout the year.

I am pleased to report what the Education Committee has done in the last few months and what the Committee proposes to do for the balance of the year.

Last November, the Fourth Annual New Judges Orientation Course was held at the Park Lane Hotel in Ottawa. Thirty-seven newly appointed judges were in attendance: British Columbia – eight; Alberta – seven; Saskatchewan – three; Manitoba – three; Ontario – four; Quebec – ten; Nova Scotia – one; and Yukon Territory – one. This was an eight-day course designed to acquaint and to review with newly appointed judges, problems in evidence, procedure, sentencing and transition of adjustment from Bar to Bench. Traditionally, the New Judges Course consists of two sections, Criminal, and Juvenile and Family Court. This year, due to insufficient numbers of Family Court appointments to warrant a separate program, only the Criminal Court section of the program was held. We hope to reinstitute the two-section program at the next New Judges Course to be held this fall.

The opening day key-note address was delivered by Mr. Justice Willard Estey of the Supreme Court of Canada, on the topic of Judicial Independence. Mr. Justice Estey's address set the tone of the course rather well, as he covered the topic from a scholarly historical point of view and then related the concept to the present, with some practical advice. This practical theme continued for the Evidence portion of the course which was conducted by Mr. Justice Fred Kaufman, of the Quebec Court of Appeal, and Professor Ron Delisle of Queen's University Law School. Faculty for the balance of the course consisted of experienced Provincial and Superior Court judges across Canada.

Although the program schedule was quite structured, some free time was available for the new judges to visit Ottawa. For example, the judges were able to have a tour of both the Supreme Court and the House of Commons while in session, and enjoyed considerably, a private chatting session with Mr. Justice Ronald Martland.

At the end of the course it was obvious that the new judges were suffering from the inevitable effects of informational overload. But the new judges' general response was that it was well worth the effort. It is gratifying to know this, and is atrributed to the fine work by the planners of the course: Judges Jean-Marie Bordeleau of Ottawa, Raymond Bernier of Montreal, and Stephen Cuddihy of St. Jerome.

For the first time in the history of our Association, there will be a course for French-speaking judges from outside the Province of Quebec, to be held in Montreal from March 10th-March 14th next, under the chairmanship of Judge Joseph Tarasofsky of Montreal. This course is designed to assist judges in the conduct of trials in bilingual courts. Topics to be covered will include: problems of simultaneous translations in Court; a glossary of French terminology pertaining to Law; forensic and psychiatric evidence; and problems arising from interpretation of bilingual statutes. All sessions will be conducted in the French language and registrants will be joined from time to time by members of the Quebec judiciary. Thirty judges are expected at this course.

The Western Regional Seminar will be held this year from April 27th-May 1st, at the Banff Centre in Banff, Alberta. Under the chairmanship of Judge Fred Coward of Lethbridge, the program will have both Criminal, and Juvenile and Family Court sections. The Juvenile and Family Court section will be chaired by Judge Peter

includes the plea, the evidence of witnesses and submissions made by the counsel. In the courts of Alberta, every word said in the court is recorded with microphones for the judge, counsel, the accused in the dock and the witness in the box. The judges do take notes but they are also assisted by the court recorder. Although it is an admirable system, it may not suit the needs and circumstances of our country. In Kenya, a jury system was provided for Europeans before the independence. Presently the subordinate courts presided over by a single judge has jurisdiction to hear criminal cases depending on the jurisdictional power of such court. In Alberta, an accused person may, where the sentence of certain period of imprisonment is likely to be imposed, elect to be tried by a jury and this necessitates committal proceedings. It is only when a person is charged with treason or murder in Kenya, that the trial is held before the High Court with the aid of three assessors after the committal proceedings. The judge is not bound by the opinions of the assessors. I also noted that in the Alberta Courts a statement tending to incriminate made by a person to a police constable whilst in police custody is admissible in evidence provided the court is satisfied as to its voluntary nature. It is not so in Kenya. Such statements are admissible, when made to the police officer of the rank of or above inspector, provided they are voluntary and made without inducement, threat or promise. Moreover, the superior courts have held that statements made to the investigating officer are not desirable. Legal Aid is available to the accused person in Alberta, but in Kenya we have not yet been able to do so because of other priorities. However, a person committed by the High Court for trial on a capital charge is assigned a defence counsel from the funds of the judicial vote.

Moreover, I visited the Family and Juvenile Courts as well as Small Claims Court, all presided over by the provincial judges. The Family Court deals with disputes arising out of maintenance and enforcement orders. They also have Family Reconciliation Officers where an effort is made before and after divorce to bring the warring or erring spouses together. Family Court has no jurisdiction to hear divorce proceedings. It is heard by a Judge of the Court of Queen's Bench. Needless to state that the Juvenile Court deals with juveniles. For the purpose of criminal liability, age of majority in Alberta is 16 years whilst in Kenya it is 18 years. The Small Claims Court deals with claims arising out of a debt or damages not exceeding $1,000.00 filed by the plaintiff in person.

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It may be of interest to note that there is an office of Hearing Officers in Edmonton and Calgary, where persons wishing to enter a verbal or written plea of guilty for minor traffic offences may do so before a Hearing Officer who imposes a prescribed statutory fine.

The entire judiciary, consisting of Provincial, Queen's Bench and Court of Appeal Judges is administered, funded and supported by Provincial Government and are created by Provincial Statutes. The jurisdiction of a Provincial Judges' Court is entirely statutory and in criminal matters is circumscribed by the provisions of the Criminal Code of Canada whose source is the British North America Act of 1867, the primary Constitution of Canada and amendments thereto.

During my stay in Edmonton, I visited the forensic laboratory of the Royal Canadian Mounted Police. I was shown around the documents section, firearms section and computer section. Computer section is a depository of criminal records in the Province of Alberta and from this section criminal or traffic record of any person may be obtained within seconds from its headquarters in Ottawa. I had lunch with Chief Inspector Sherman in charge of the laboratory and other senior officers. It was all so interesting and their method of detecting forgery and other crimes is so advanced that I suggested to them whether an exchange of visits for a Kenyan counterpart was feasible.

I was also shown several places of interest such as the Legislative Building, Alberta University, Museum and Fort Edmonton. I concluded my visit of Edmonton on a highly satisfactory note.

CALGARY

Chief Judge Cawsey saw me safely on board a Red Arrow bus for Calgary in the evening of 20th August, 1979. At Calgary Judge G.G. Cioni, who is the President of the Provincial Judges Association of Canada, received me with cordial welcome and took me straight to Convention Centre at Four Seasons Hotel for registration as a guest to the 61st Annual Meeting of the Canadian Bar Association.

I was warmly received by Mr. Cioni at their home and both Mr. and Mrs. Cioni, who were so charming and kind, looked after all my needs. They have adorable children, Tony and Sarah, in whom I found innocent and relaxed pleasure from the hectic schedule of Calgary.

During my stay in Calgary, I attended the opening session of the Canadian Bar Association's meeting attended by about 3,000 members and guests of the Convention. Amongst the distinguished guests were the Presidents of the Bar Association of the United Kingdom, France, United States, Australia, New Zealand and one of the Caribbean Countries as well as the Honourable Justice Sir Gordon Slynn of Royal Courts of Justice and President of Industrial Tribunal of the United Kingdom. The keynote speaker at the opening session was Hon. Senator Jacques Flynn, Q.C., Minister of Justice and Attorney General of Canada who emphasized the need for simplification of statutes and revisions of the salary of judges. Incidentally, our counterparts in Alberta receive a salary, seven times more than in Kenya. The judge's salary in Kenya is also under review. I had also opportunity to attend Judges' Day at the Convention and two of the subjects discussed were "Expeditious Justice" and "Invasion of Privacy or Wire-tapping Legislation". Amongst the issues discussed were the doing away with the preliminary inquiry.

I had also the good fortune to see the world famous Calgary Stampede where cowboys rode bare back wild horses, and bulls as well as roping the steer. This programme was especially laid on for the Canadian Bar Association, as the Stampede Festival is only celebrated during the month of July.

During all of this time I had several opportunities to exchange views with judges and lawyers about the political history, stability, progress and rule of law in my country and the common problems of expeditious justice and penal provisions.

I also took the opportunity to visit courts and exchange views with the Provincial Judges at a special luncheon for me.

I visited Calgary Correctional Centre at Spy Hill. It is a medium security prison where prisoners sentenced to less than two years imprisonment are received. I was taken around the prison and shown the admittance centre, the prisoners cells and dormitory, the dining room for prisoners, a section for backward or mentally handicapped prisoners, the recreational centre and the prison farm. I was informed that the prisoners who respond to rehabilitation treatment are allowed to obtain employment and live in an institution in Edmonton City and for a small charge of $5.00 a day, until completion of sentence. This is to enable the prisoner to adjust and equip himself so that he does not feel alienated from the society where he would return ultimately. I also observed that the meals provided the inmates were the same as those for the officers. I took meal with the officers and I found the meal nutritious and tasty. Although the conditions of the prison are luxurious from our standards I like to believe that the restraint in freedom of the prisoners has a chastening impact.

At the conclusion of my visit to Calgary, Mr. and Mrs. Brian Stevenson, a charming couple, drove me to Banff National Park on September 1, 1979. Mr. Stevenson is a Judge of the Provincial Court and was last year the President of the Provincial Judges Association of Alberta. Banff National Park is in the range of Rocky Mountains and is surrounded by picturesque mountains and beautiful lakes. It was a wonderful and delightful excursion.

LETHBRIDGE

After the generous and warm hospitality of a week, Judge Cioni safely put me on a Greyhound Bus for Lethbridge in the afternoon of 2nd September, 1979.

The congenial and friendly hospitality of Judge A.G. Lynch-Staunton, his wife, daughters and son, all charming and considerate, was soothing relaxation from the hectic activity in Calgary relating to various functions of Canadian Bar Association.

I had the opportunity to sit with Judge Lynch-Staunton, in his court and observe from his angle the justice being meted out to all and sundry charged with minor traffic offences, drunkeness to assaults and break-ins. It made me nostalgic as the punishment imposed for some of the offences was more or less the same as in Kenya.

I had also opportunity to visit circuit courts at Fort Macleod, Cardston, Taber and Pincher Creek, as well as admire the scenic beauty of Waterton Lakes and the vast ranching and farm lands in the neighborhood of Lethbridge. At Gladstone Mt. Guest Ranch, surrounded by some of the mountains of the Rockies, I had the pleasure of dining with the judges of Lethbridge Circuit. This gave me an opportunity to discuss with and compare notes with the judges about the system of justice and social and political issues of our respective countries.

The highlight of my stay in Lethbridge was a visit to Indian Reserve of Blood Tribe at Stand Off where I had the honour to meet Chief Shot Both Sides, a personality of stature and vision, whose tribe is making great strides in joining and contributing to the mainstream of great panorama of Canadian life.

Moreover, I visited exotic Japanese Gardens, built by Japanese inhabitants of Lethbridge to commemorate the Centennial Celebrations of Canada in 1967.

The press and television of Lethbridge gave me more than adequate write-up of my interview with them. It seems that my comments on comfortable prison life evoked agreeable response from some of the citizens of Lethbridge.

ST. PAUL

Judge Lynch-Staunton bid me fond farewell at Lethbridge Airport.

At the Edmonton Airport, Judge M.W. Hopkins, embraced me in his huge bear hug. He is a huge man with gentle heart and has a ready smile for everyone. We drove comfortably to St. Paul where gracious and charming Mrs. Hopkins had prepared herself for my every comfort in their beautiful house.

I had opportunity to observe court proceedings at St. Paul and Bonnyville.

I visited a modern well developed ranching farm at St. Paul, and had opportunity to meet judges and various other personalities at a dinner in my honour.

St. Paul is a growing town of about 5,000 which is in the midst of mixed farming and the tarsands, that wonderful discovery, from which oil is extracted by boiling water process. I am informed that oil reserve from this source is unlimited.

Edmonton, the capital of the province, is the centre of government, transportation, agriculture and oil, whilst Calgary is the oil and money centre. Both have more or less a population of about 500,000, sprawled in a vast area of beautiful single unit homes with gardens.

Lethbridge, with a population of 52,000 essentially caters to farmers and ranchers of the area.

After a restful period under warm hospitality of Judge Hopkins and Mrs. Hopkins, I was driven to Edmonton on my way to London via Toronto, Chicago, Washington and New York.

OBSERVATIONS

Alberta province, which is three times bigger than Kenya in size, about 750,000 square miles, with a population of two million, is endowed with great bounty of nature in oil and agriculture. It is a very rich country with Heritage Fund of five billion dollars for the posterity. Its affluent society is forging ahead with confidence and purpose towards welfare and prosperity of its people and of Canada as well as alleviation of the less fortunates of developing countries of the world. Unemployment is the lowest compared to other provinces of Canada and the social benefits for the unemployed may compare with the comfortable standards of the well to do in the developing countries.

The Provincial Court System manned by qualified and experienced judges is a recent innovation. It is a considerable improvement and improvisation of the earlier system of District and Lay Magistrates' Courts. This Provincial Court System with high standards, utilitarian court houses, sophisticated devices and efficient supportive staff is the basis of Kirby report to the Provincial Government.

CONCLUSION

I said in my interview to CFAC Television, Lethbridge, "It is not enough to hear or read about a country, one must come and visit it to learn something". I have learnt much and it has greatly enriched my knowledge and experience. Not only will I carry home the vivid memories of warmth and hospitality of Albertans, but I like to believe that the wealth of experience and education I have gained will be of great benefit to my country.

The first project of exchange of visits under the auspices of Commonwealth Magistrates' Association, from my viewpoint, is a tremendous success and I urge that several such continuous exchanges be followed up not only to developed countries but also to developing countries including mine.

"Why, Charlie Sprocket, where have you been hiding all this time?"