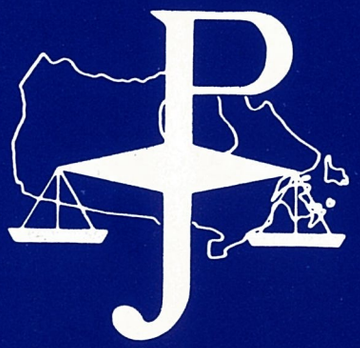

# PROVINCIAL JUDGES

# Journal

# DES JUGES PROVINCIAUX

Volume 12, No. 3 SEPTEMBER 1988



THE CANADIAN ASSOCIATION OF
PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES
JUGES DE COURS PROVINCIALES

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## THE CREATION

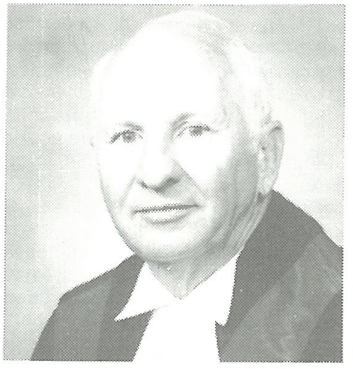
In the beginning was the plan
And then came the assumptions
And the assumptions were without form
And the plan was completely without substance
and the darkness was upon the faces of the Workers
And they spake unto their Group Heads, saying:
"It is a crock of shit, and it stinketh."
And the Group Heads went unto their Section Heads, and sayeth:
"It is a pail of dung, and none may abide the odour thereof."
And the Section Heads went unto their Managers, and sayeth unto them:
"It is a container of excrement, and it is very strong,
Such that none here may abide by it."
And the Managers went unto their Director, and sayeth unto him:
"It is a vessel of fertilizer, and none may abide its strength."
And the Directors went unto their Director-General, and sayeth:
"It contains that which aids plant growth, and it is very strong."
And the Director-General went unto the Assistant Deputy Minister,
And sayeth unto him:
"It promoteth growth, and it is very powerful."
And the A.D.M. went unto the Deputy Minister, and sayeth unto him:
"This powerful new plan will actively promote the growth and
Efficiency of the Department, and this area in particular."
And the Deputy Minister looked upon the plan,
And saw that it was good
And the plan became policy.

— *Author unknown*



# President's Page

**by/par Judge Kenneth Crowell / M. le juge Kenneth Crowell**



I am fully cognizant of the heavy responsibilities and the tremendous honour you have accorded me as President of the C.A.P.C.J. for the ensuing year.

Many pressing and continuing matters are already on the agenda in the coming months and I look forward to the participation of the full executive and of all judges in achieving a final determination of many of these concerns.

This undoubtedly will evolve into a year of consolidation and reflection as we move towards a greater recognition of the Provincial Court.

In order to progress towards equality, uniformity and standardization, we must continue to be positive about our position within the justice system. For far too long we have been referred to and designated as the "inferior" court and it is encumbent upon us, individually and collectively, to dispel any remaining vestiges of this concept.

With each representation to the respective Provincial and Federal Departments and Agencies, there is an ever growing awareness of the important role the provincial court judges (Criminal, Family and Civil) perform within our expanding and demanding society.

**The Canadian Judicial Center**

The creation of the Canadian Judicial Center represents many opportunities to express our concerns and goals as we create common education programmes for all Judges in Canada.

With regard to the Canadian Judicial Center I'm pleased to report that I have already participated in four meetings with the Executive Director, Judge David Marshall. We fully expect that two Provincial Court Judges, (Jean-marie Bordeleau and Bernard Grenier) will shortly be in their posts as Associate Directors.

The C.J.C. will be working closely with the Western Educational Judicial Center under the direction of Judge Doug Campbell from B.C. and with the Committee for the Atlantic Regional Education Seminar.

We must of course jealously guard our present

Je reconnais pleinement les lourdes responsabilités et l'honneur insigne que vous m'avez accordés en tant que président de l'A.C.J.P. pour cette année.

Beaucoup de questions présentes et soutenues sont déja à l'ordre du jour pour les mois prochains. J'attends avec impatience la participation du bureau au complèt et de tous les juges pour achever une résolution finale de la plupart de celles-ci.

Sans doute ce sera une année de consolidation et de réflection alors que nous avançons vers une plus grande reconnaissance de la Cour provinciale.

Dans notre chemin vers l'égalité, l'uniformité et la standardisation, nous devons continuer à être positifs quand à notre position au sein du système judiciaire. Trop longtemps on a fait allusion et on nous a désigné comme la Cour "inférieure" et il nous incombe donc, individuellement et collectivement, de chasser tout vestige de ce concept. Avec chaque représentation au ministères et agences provinciaux et fédéraux, il y a une prise de conscience gradissante du rôle important des juges de la Cour provinciale, tant au pénal qu'en compétence de droit familial et civil au sein de notre société exigeante et changeante.

**Le Centre Judiciaire Canadien**

La création du Centre Judiciaire Canadien offre beaucoup d'occasions pour exprimer nos soucis et nos but alors que nous créons des programmes d'enseignements commun pour tous les juges au Canada.

Je suis content de rapporter, quant au centre Judiciaire Canadien, que j'ai déja participé à quatre réunions avec son directeur, M. le juge David Marshall. Nous escomptons que deux juges de la Cour provinciale (Jean-Marie Bordeleau et Bernard Grenier) seront bientôt installés dans leurs position comme Directeur Associé.

Le C.J.C. travaillera en collaboration avec le centre d'enseignement judiciaire de l'ouest sous le direction de M. le juge Doug Campbell de la Colombie Britannique et avec le comité des colloques d'enseignement régional de l'Atlantique.

funding and seek an increase as we focus upon the other important functions of the Association besides education.

**Liaison — Canadian Bar**

The Canadian Bar Association continues to show a greater interest in the many concerns of Provincially-appointed judges. The National President, Pat Peacock, Q.C., has been most supportive and we anticipate early recognition of our position re compensation parity with federal judges.

This first ''President's Page'' affords me the opportunity of expressing my thanks (both personal and on behalf of the Association) to our Past President, Associate Chief Judge Ken Page. His efforts, representations and direction during the past year on all matters, particularly The Canadian Judicial Center, Compensation and liaison with The Canadian Bar Association have greatly enhanced the position of both our Association and Judges generally within the Canadian legal community and the Judicial system.

I wish to thank all judges for their expressions of support and interest and look forward to a busy and productive year on your behalf.

Nous devons évidemment présever avec vigilance notre source existante de fonds et chercher à l'augmenter alors que nous nous concentrerons, outre l'éducation, sur les autres fonctions importante de l'Association.

**Liaisons Avec le Barreau Canadien**

L'Association du Barreau Canadien continue à démontrer un intérêt grandissant au soucis des juges nommés par les provinces. Le président national, maître Pat Peacock, c.r. a été très positif et nous anticipons bientôt la reconnaissance de notre position quand à la parité des salaires avec les juges nommés par le Fédéral.

Cette première ''page du président'' m'offre l'occasion de remercier (et au point du vue personel et au nom de l'association) M. le juge en chef associé Ken Page. Ses efforts, représentations et directions cette année sur toutes les questions, particulièrement le Centre Judiciaire Canadien, la compensation et la liason avec l'Association du Barreau Canadien ont beaucoup amélioré la position de notre Association et de nos juges en général, au sein de la communauté légale canadienne et du système judiciaire.

Je désire remercier aussi tous les juges pour leur expression d'encouragement et d'intérêt. Je me réjouis à l'avance d'une année chargée et féconde à votre service.



# IN LIGHTER VEIN

The following was delivered to the Journal in a ''plain brown envelope''. However, we would like to dispel any hint or innuendo of this being an excerpt from the syllabus of The Canadian Judicial College.

**COURSE SELECTION**

**SELF IMPROVEMENT**

S11100 Creative Suffering
S11101 Overcoming Peace of Mind
S11102 You and Your Birthmark
S11103 Guilt Without Sex
S11104 The Primal Shrug
S11105 Ego Gratification Through Violence
S11106 Holding Your Child's Behavior Through Guilt and Fear
S11107 Dealing with Post-Realization Depression
S11108 Whine Your Way to Alienation
S11109 How To Overcome Self-Doubt Through Pretense and Ostentation

**BUSINESS AND CAREER**

BC1 ''How I Made $100 in Real Estate
BC2 Money Can Make You Rich
BC3 Packaging and Selling Your Child
BC4 Career Opportunities in El Salvador
BC5 How to Profit From Your Own Body
BC6 The Underachiever's Guide to Very Small Business Opportunities
BC7 Tax Shelters for the Indigent
BC8 Looter's Guide to Canada's Cities
BC9 Mortgage Reduction Through Arson

**CRAFTS**

C101 Self-Actualization Through Macrame
C102 Needlecraft for Junkies
C103 Cuticle Crafts
C104 Gifts for the Senile
C105 Bonsai Your Pet
C106 How to Draw Genitalia

**HOME ECONOMICS**

EC403 How to Convert Your Kirby Vacuum to a Fully Automatic Rifle
EC404 How You Can Convert Your Family Room Into a Garage
EC405 Burglarproof Your Home With Concrete
EC406 Sinus Drainage at Home
EC407 Basic Kitchen Taxidermy
EC408 1001 Uses for Your Vacuum
EC409 Repair and Maintenance of Your Virginity
EC410 How to Convert a Wheelchair into a Dune Buggy
EC411 Christianity and the Art of R.V. Maintenance
EC412 Cat Hair Macrame
EC413 What To Do With Your Conversation Pit

**HEALTH**

H202 Creative Tooth Decay
H203 Exercise and Acne
H204 The Joys of Hypochondria
H205 High Fiber Sex
H206 Suicide and Your Health
H207 Biofeedback and How to Stop
H208 Understanding Nudity
H209 Tap Dance Your Way to Social Ridicule
H210 Optional Body Functions
H211 Dressing Right, Dressing Left — How It Can Change Your Life
H212 Braille System of the Female Anatomy

Deux prisonniers tentent de s'échapper par le toit de la prison, quand l'un d'eux trébuche sur le rebord. Le gardien, alerté, demande: «Qui est là?»

Le premier prisonnier miaule, pour faire croire que ce n'est qu'un chat. Rassuré, le gardien repart à son travail, quand le deuxième prisonnier trébuche à son tour.

«Qui est là? répète le gardien, soudain inquiet.

— C'est l'autre chat», répond le prisonnier.

cial Court Judge has done here, file additional material with the superior court. In my view, the judge of the lower court is entitled to do that even in the absence of statutory provisions similar to those of the English statute of 1872.

In cases where the Attorney General is not the applicant he is also served, and one expects that he will take steps to protect the jurisdiction of lower court.

As the issue in this case is not a pure question of jurisdiction but rather the validity of an order made because the Provincial Court Judge felt he was, on constitutional grounds, without jurisdiction to try to the respondent, it is not an appropriate case for the Provincial Court Judge to appear and argue either personally or by counsel and leave for him to so appear is refused.

Whether in a case involving a pure question of jurisdiction or allegations of misconduct it would be appropriate for a magistrate to be heard personally or by counsel will have to be decided in other cases. But before seeking to be heard a magistrate would do well to ask himself whether it is seemly for him to do so. Judges and magistrates know that they are not to descend into the arenas of their own courts. It can be argued just as strongly that they should not seek to ascend into the arenas of higher courts to argue issues better left to the parties to the particular litigation.

The learned Judge suggests that if he is not heard he will be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his obligations contrary to s.2(e) of the *Canadian Bill of Rights*.

We must keep in mind that the role and function of judges and magistrates have changed and improved with the passage of time. The independence enjoyed by the judiciary carries with it an obligation of detachment and impartiality. Less than eighty years ago Supreme Court Judges in this province sat on appeals from their own decisions, a role that would now be instantly challenged as inconsistent with the concept of impartiality. The practice of trial Judges sitting en banc ended only with the *Judicature Act* of 1909. Just as a judge may not now sit on an appeal from his own decision, neither should he become an adversary in any appeals from or reviews of his decisions.

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



# Editorial Page

Judges at all levels are being called upon to re-examine the relationship of the criminal justice system and the aboriginal peoples of this country.

At present, the main initiative for such re-examination in the legal community comes from the Canadian Bar Association. In the past year there have appeared various news stories regarding the conclusions of different committees of the association. These and other like reports, for example from the Parliamentarians, all have a tone that is consistently critical. The legal system, and most especially the criminal justice part of that system, is said to have failed the aboriginal peoples.

The statistics on incarceration are most condemning of our system. With only four percent of the population, Native peoples constitute 10% of the federal penitentiaries and 14% of provincial correctional centres. The disproportion is even greater among women inmates and young offenders. This clearly reveals a failure, but not everyone would agree that the significant causes or potential remedies lie within the criminal justice system as opposed to other social, economic and political institutions. And to the extent that causes and especially remedies are within the criminal justice system, these seem to lie more with corrections, or counselling services or policing than with the judiciary. And to the extent that effective responsibility does lie with the judiciary, the real options open to judges at our level are limited by sentencing criteria established by higher courts or by the lack of resources put at our disposal by society.

In short, however much anguish and anxiety a Provincial Court Judge feels as he daily confronts this failed system, even the most charitable and considerate among us cannot easily see how, given the restraints we face, we could be an effective force for change. We are not, neither as individual judges nor as an isolated institution within the system, going to effect dramatic or immediate change. But we can be open to the efforts of others and develop an awareness and understanding of the need for change.

We can, in the words of the Canadian Bar Association Committee on Native Justice, "establish a moral awareness of a duty owed."

**Judge G.T. Seniuk**
**Provincial Editor**
**Saskatchewan**

Our Annual Conference was held this year in Halifax, Nova Scotia from September 10-13.

To chairman Judge Robert Ferguson and his Committee go our congratulations and if there is any one word that expresses the real mood and achievement of the Conference, it is: "Wow!"

During our stay in Halifax the accommodations were superb, the educational component of the conference was excellent and the social events unsurpassed. Even the weather cooperated so that it can be stated without fear of contradiction that this conference was second to none yet sponsored by our Association.

We were particularly honoured this year to be able to host a large number of visitors from other countries of the Commonwealth who were in Canada for the Commonwealth Magistrates Association Conference in Ottawa in late September.

It is through this annual event that the real value and worth of our Association as an agent of fellowship and mutual support of judges becomes manifest.

Next year the conference will take place in the great city of Edmonton, Alberta and from preliminary indications it too will be a monumental event. We would urge all who can do so to attend.

**M. Reginald Reid**
**Editor-in-Chief**

# News Briefs

## NEWFOUNDLAND

### Retirements

His Honour Chief Judge Clement P. Scott, effective September 20, 1988 after serving on the Bench for more than 32 years. He had been Chief Judge for the past nine years.

### Appointments

His Honour Judge W. Michael Roche, effective July, 1988. Judge Roche will sit in the Judicial District of Channel-Port aux Basques.

Prior to his appointment, Judge Roche served as Senior Crown Counsel in Corner Brook.

His Honour Chief Judge Donald Luther of Corner Brook has been named to succeed Chief Judge Scott effective October 1, 1988.

Judge Luther was appointed to the Bench in November, 1974.

## ONTARIO

### Retirements

His Honour Judge S. Gordon Tinker - Toronto, effective July 18, 1988. Appointed March 1, 1968. President of the Association of Provincial Criminal Court Judges of Ontario 1976-1977.

His Honour Judge Clifford E. Boyd — Sault Ste. Marie, effective July 12, 1988. Appointed December 15, 1958. President of Association of Provincial Criminal Court Judges of Ontario 1972-1973.

### Career Change

His Honour Judge James Crossland, Toronto, appointed to Provincial Court (Criminal Division) for Ontario September 16, 1974. Appointed to the District Court of Ontario effective September 2, 1988.

### Appointments

His Honour Judge Jean G. Lebel, North Bay, effective July 18, 1988.

Judge Lebel is a graduate of University of Ottawa Law School. He has worked in private practice and as a Crown Attorney.

Judge Lebel is fully bilingual and has conducted numerous French language trials throughout Ontario.

His Honour Judge Donald G. Fraser, Kenora, effective July 4th, 1988. His Honour Judge Fraser has the pleasure and distinction of being the husband of Her Honour Judge Judythe P. Little who was appointed May 12th, 1986 to the Provincial Court (Family Division) at Kenora. This is the first husband and wife of our Association to be presiding at not only the same time, but in the same area as well as the same Bench.

### Report of the 1988 Annual Meeting

The 1988 Annual Meeting and Education Conference of the Association of Provincial Criminal Court Judges of Ontario was held from May 25th to May 28th, 1988 at the King Edward Hotel, Toronto, Ontario.

The meeting was chaired by the President, His Honour Senior Judge Charles Scullion of Toronto with His Honour Judge Milton A. Cadsby of Toronto, acting as Conference Chairman. The educational portion of the conference was under the chairmanship of His Honour Judge John D.D. Evans of Cobourg.

The educational portion of the program included the following:

1. Presentation of a paper "Charter Up-date" by Mr. Justice Peter DeC. Cory, member of the Court of Appeal of the Supreme Court of Ontario.

2. Presentation of a paper on "The Victim in the Criminal Court Process" by His Honour Judge Donald J. Halikowski, Provincial Court (Criminal Division) Oshawa.

3. Panel discussions on alcoholism by the director, staff and patients of the Brentwood Centre of Windsor, Ontario, including: Father Paul Charbonneau, Dr. Patrick K. Ryan, Mr. Samuel Devin, Mr. William Delaney, Mr. Harley Smith, classification officer at Collins Bay Penitentiary, an inmate of Collins Bay Penitentiary, and a parolee resident in St. Leonard's House.

The ladies enjoyed a tour of the Toronto Stock Exchange and a luncheon. The members and their spouses and guests enjoyed a joint luncheon in the King Edward Hotel and were entertained with a presentation of Gilbert & Sullivan's "Trial by Jury" by the Mississauga Opera Society. The judge was properly gowned in the robes



*R. v. Sperling* (1873), 21 W.R. 461 at 462 Cockburn, C.J., said that:

> All that was intended by the statute was that, instead of the justices being put to the expense of instructing counsel, or being brought up in person, they might make affidavits themselves, and send them by post to one of the masters of the court.

In *The Queen v. Field and Others, Justices of Hampshire* (1895), 11 T.L.R. 240 there had been a trial before Admiral Field and two other magistrates. A proceeding was taken in the Queen's Bench Division for a mandamus to compel the magistrates to state a case. The magistrates filed an affidavit under the Act of 1872 and Admiral Field appeared in person to show cause. The Court, referring to the Act,

> thought that, as clearly the magistrates might appear by counsel as well as file an affidavit, it followed that they might appear in person.

In a more recent English case, *R. v. Camborne Justices, Ex parte Pearce,* [1954] 2 All E.R. 850 justices appeared by counsel on a certiorari application. No issue seems to have arisen as to their right to do so but in that case, when the application was dismissed, counsel for the justices asked for costs. The report states, at 855-856:

> Refusing that application, Lord Goddard, C.J., stated that the Act of 1872 gave the justices the right to file an affidavit in reply to the evidence of the applicant, and, as there was no allegation of misconduct against the justices, there was no necessity of their being represented by counsel.

The decision in *R. v. Llanidoes Licensing Justices, Ex parte Davies,* [1957] 2 All E.R. 610 indicates that it was not uncommon for justices to be represented by counsel. One must keep in mind that in England justices perform administrative functions in addition to trying casts. The *Llanidoes* case involved an application to justices for an extension of licensing hours. Lord Goddard, C.J. there pointed out that the 1872 statute permitted justices, against whom an application for certiorari or mandamus was made, to put in affidavits giving their reasons for opposing the motion so the Court could decide the case on affidavits without the justices becoming liable for costs. In his view, if the justices chose to appear they made themselves parties to the lis and took the risk of being ordered to pay costs if they lost.

We do not have any statute comparable to the English Act of 1872. However, when an application for judicial review relates to a proceeding before a lower court, Rule 69.05(1)(a) requires service on the Clerk or Judge of the lower court and on the Attorney General. In this case, of course, the Attorney General is the applicant. Service was duly made on the Judge.

It is important to note that the applicant has not sought an order under Rule 69.10 for the Provincial Court Judge, as the person having custody or control of the record of the proceeding below, to produce at or before the hearing the whole or any part of the record of that proceeding or of the evidence therein.

In *Tremeear's Annotated Criminal Code,* 6th ed., at p. 1409 it is stated with respect to prohibition applications that "it is usually the party, and only very rarely the court, that shows cause against the rule", citing *Rosenberg v. The Maccabees,* [1923] 2 W.W.R. 320 which in turn quotes a passage from *The Mayor and Aldermen of the City of London v. Cox* (1867), L.R. 2 H.L. 239 at 280. *Tremeear* also cites *Re Holman and Rea* (1912), 21 C.C.C. 11 as a case in which counsel for a magistrate appeared on a motion for prohibition.

The Provincial Court Judge has cited the decision of the Supreme Court of Canada in *Canada Labour Relations Board v. Transair Ltd.,* [1977] 1 S.C.R. 722 in support of his right to appear and argue. That case dealt with an administrative tribunal rather than a court and is authority for the proposition that such a tribunal may only be heard to defend its jurisdiction and not to argue the merits of the case or whether its decision was correct.

In the instant case I do not perceive that there is any attack on the Provincial Court Judge's jurisdiction to rule as to the constitutionality of provisions of the *Criminal Code* and to base the exercise of a discretion on his conclusion with respect to the constitutional issue. The question in this case is — was the Provincial Court Judge wrong on the constitutional issue and, if so, did he err in exercising his discretion?

In the older formal procedures with respect to the prerogative writs the tribunal or inferior court was required to make a return of the proceedings to the superior court and was called upon to show cause. Now a return is not required unless an order is made under Rule 69.10. Such an order is usually made only if requested by a party to the application.

Service of notice of the application on the lower court pursuant to Rule 69.05 gives that court notice of what material the applicant is putting before the superior court. If the judge of the lower court perceives that some relevant material is not being proffered he may, as the Provin-

# IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
# TRIAL DIVISION
# JUDICIAL DISTRICT OF FREDERICTON

**BETWEEN:**

**HER MAJESTY THE QUEEN**
**APPLICANT**

**— and —**

**LAWRENCE McGANN**
**RESPONDENT**

**DATE OF HEARING:** April 7, 1986

**DATE OF DECISION:** April 10, 1986

**APPEARANCES AT HEARING:**
Glendon J. Abbott for the applicant;
Thomas R. Evans for the Respondent;
His Honour Judge James D. Harper in person.

**DECISION**

**STEVENSON, J.**

In this application for judicial review the Crown, as represented by the Attorney General of New Brunswick, seeks to quash the decision of a Provincial Court Judge ordering the respondent to stand trial on a charge of possessing a narcotic for the purpose of trafficking and further seeks an order that the Provincial Court Judge be directed to forthwith hear and determine the trial of the respondent, he having on December 2, 1985 elected to be tried by a magistrate without a jury. The Provincial Court Judge had concluded that, for constitutional reasons, Provincial Court Judges have no jurisdiction to try ''serious indictable offences''

The notice of application was returnable at the Motions Day sitting at Fredericton on April 7, 1986 when May 5, 1986 at 9:30 a.m. was fixed for the hearing of the application.

Prior to Motions Day the Provincial Court Judge filed with the Clerk of the Court documents entitled respectively ''Affidavit as to Status'', ''Additional Authorities to which the Court's Attention is Directed'' and ''Supplementary Affidavit as to Status''.

Those documents touch upon, inter alia:

(a) the statutory nature of the Provincial Court;

(b) the status of the Crown to apply for judicial review;

(c) the Provincial Court Judge's status to pursue argument in support of his jurisdiction;

(d) the status of a statutory tribunal to ''argue and take active part in any appeal from a decision of a Court which has impeached its jurisdiction;;'

(e) what matters are relevant to the present application;

(f) the Judge's fear of a grave miscarriage of justice should the application proceed unopposed;

(g) his ''unfettered right'' to convert a trial to a preliminary inquiry;

(h) when mandamus lies and when it does not;

(i) the status of a magistrate to appear to contest the application; and

(j) whether mandamus can be granted to compel the exercise of a discretion in a certain way.

The learned Judge's fear of a miscarriage of justice should the application proceed unopposed seems paradoxical in view of the fact that his decision on the constitutional issue was made unilaterally, i.e. without either hearing or inviting any argument on behalf of either the Crown or the accused.

Unquestionably there is precedent for a magistrate or justice to appear or be represented by counsel. The United Kingdom Parliament enacted *The Review of Justices' Decisions Act, 1872*, 35 & 36 Vict., c.26. The preamble recites that there is no fund at the disposal of justices to defray the expense of appearing by counsel to support their decisions when those decisions were under review in a superior court and that it was expedient that the justices should, without expense to themselves, have an opportunity of informing the court of ''the grounds of their decision, and of all material facts bearing upon the same''. Section 1 of the Act expressly authorizes a justice to make and file an affidavit setting forth such grounds and facts without being required to pay any filing fee or stamp duty. Section 2 requires the superior court, before making a rule absolute against the justice or overruling or setting aside the act of the justice, to take into consideration the matters set forth in the affidavit, notwithstanding that no counsel appears on his behalf. A footnote on page 819 of **11 Halsbury's Laws of England,** 4th ed., tells us that in



of the Provincial Court and His Honour Judge J.D. Smith of Brampton performed as part of the cast.

The formal dinner and dance was held on Friday evening, May 27th, 1988 in the Vanity Fair Room of the King Edward Hotel and special guests included the following: The Honourable W.G.C. Howland of Toronto, the Chief Justice of Ontario and his wife Mrs. Patsy Howland; The Honourable G. Arthur Martin, Q.C., L.L.D. of Toronto, retired member of the Ontario Court of Appeal and his sister Ms. Arlene Martin; His Honour Chief Judge Frederick C. Hayes of Toronto, Chief Judge of the Provincial Court (Criminal Division) and his wife Mrs. Betty Hayes; His Honour Chief Judge Timothy C. Turner of Ottawa, President of the Association of Provincial Court Judges (Civil Division) and Mrs. Turner; His Honour Associate Chief Judge Kenneth D. Page of Burnaby, British Columbia, President of the Canadian Association of Provincial Court Judges and Mrs. Page; His Honour Judge William C. Atton of Halifax, Nova Scotia, President of the Nova Scotia Provincial Judges Association and his wife Mrs. Janet Alton; His Honour Judge R. Harvie Allan of Regina, Saskatchewan, President of the Saskatchewan Association of Provincial Court Judges; His Honour Judge Gerald L. Barnable of Placentia, Newfoundland, President of the Association of the Provincial Court Judges of Newfoundland; Mr. Harvey J. Bliss, Q.C. of Toronto, President of the Ontario Branch of the Canadian Bar Association and his wife; Mr. Morris Manning, Q.C. of Toronto, Counsel to the Association and his wife Dr. Linda Rapson.

At the dinner His Honour Chief Judge Frederick C. Hayes presented an engraved Royal Doulton figurine of an English Judge representing an honorary life membership in the Association to His Honour Senior Judge Sidney R. Roebuck of Toronto, and to His Honour Judge Charles Drukrash of Toronto.

A special presentation of a suitably engraved Royal Doulton figurine was made on behalf of the Association by His Honour Chief Judge Frederick C. Hayes to Mrs. Catharine McKenzie, wife of His Honour Judge Donald A. McKenzie of Kenora who had died during service. His Honour Chief Judge Hayes paid tribute to the late Judge McKenzie and his service to the Bench and the community and the presentation to his wife was a reflection of the great esteem and regard that the Association had for them both.

His Honour Senior Judge Charles Scullion made a presentation of an engraved Royal Doulton figurine of an English Judge representing an Honorary Life Membership in the Association to the Honourable G. Arthur Martin, Q.C., L.L.D., retired member of the Ontario Court of Appeal in his recognition of his contribution to the educational program of the Association and his continued support and encouragement. The Honourable G. Arthur Martin was the first recipient of an Honorary Life Membership outside of the general membership of the Association of Provincial Criminal Court Judges.

His Honour Senior Judge Scullion presented the ''Presidential Crest'' to the new President, His Honour Judge C. Russell Merredew of Pembroke representing the change of office.

His Honour Judge C. Russell Merredew expressed the appreciation of the Association to His Honour Senior Judge Charles Scullion for his dedication and efforts on behalf of the membership and presented a television set as a token of that appreciation.

The dinner continued with an evening of hospitality and dancing.

**Saturday, May 28, 1988**

The conference ended with a joint farewell breakfast in the Consort Lounge for the members and their guests.

The 1989 Annual Conference will be held at the Westin Hotel, Ottawa, Ontario from May 24th to May 27th, 1989 under the conference chairmanship of His Honour Judge J.M. Bordeleau of Ottawa.

The 1990 Annual Conference will be held in London, Ontario from May 23rd to May 26th, 1990.

The officers and executive members of the Association for 1988-89 are as follows:

President: His Honour Judge C. Russell Merredew, Pembroke.
Past President: His Honour Senior Judge Charles Scullion, Toronto
1st Vice President (President Elect): His Honour Judge J. Douglas R. Walker, London
2nd Vice President: His Honour Judge Leonard T. Montgomery, Orillia
Secretary: His Honour Judge Douglas V. Latimer, Milton
Treasurer: His Honour Judge William S. Sharpe, Milton

**Executive Committee:**
His Honour Judge Jean M. Bordeleau, Ottawa
His Honour Judge Samuel E. Darragh, Toronto
His Honour Judge Donald C. Downie, Kitchener
His Honour Judge Donald A. Ebbs, Windsor
His Honour Judge John D.D. Evans, Cobourg
His Honour Judge Walter P. Hryciuk, Toronto
His Honour Judge Stanley W. Long, Toronto
His Honour Judge Gilles (Sid) R. Matte, Sudbury
His Honour Senior Judge Raymond J. Walneck, Thunder Bay

**Representative to C.A.P.C.J.**
His Honour Senior Judge Charles Scullion, Toronto

## MANITOBA

### Appointments

In March of this year, the Provincial Government made five new appointments to the Provincial Court as follows:

— His Honour Judge C. Murray Sinclair - Associate Chief Judge of the Provincial Court;
— His Honour Judge Brian M. Corrin - Judge of the Provincial Court;
— Her Honour Judge Susan V. Devine - Judge of the Provincial Court;
— Her Honour Judge Linda M. Giesbrecht - Judge of the Provincial Court; and
— Her Honour Judge Lea A. Duval - Judge of the Provincial Court

## BRITISH COLUMBIA

### Honours, Awards and Changes

The Provincial Court of British Columbia welcomes Chief Judge Bruce Josephson and his family to the world that waits at the top of the stairs.

Bruce Josephson was born in Saskatchewan and educated at the University of Saskatchewan. Obtained his L.L.B. in 1968 and articled at Enderton and Kent in Nelson. Admitted to the bar in 1969. Became Associate and partner of the firm Moran, D'Andrea, Geronazzo and Josephson in Castlegar, B.C., 1969. He was appointed as Provincial Court Judge at Castlegar on February 1, 1975 and sat in the West Kootenay District.

During the years 1983-1984 he served as President of the Association.

In May 1986 he was appointed Administrative Judge for the West Kootenay District.

On January 1, 1985, he was appointed Associate Chief Judge to Chief Judge Coultas, a position he has continued to hold until this present appointment.

Judge Ellis was appointed a stipendiary magistrate September 29, 1960. Appointed to full time service October 21, 1965. Made an Administrative Judge for the Okanagan region in 1981. Was supernumerary for the term May 1, 1983 to May 1, 1988. Is currently an ad hoc Judge.

Judge Gale Sinclair was installed in office at Penticton on Friday, June 17, 1988. He has been appointed to the Okanagan District. He was born and raised in Cranbrook, later attending Selkirk College. He is married. He has been assigned to sit as temporary relief in the Kootenays.

Judge Sarich of Campbell River went supernumerary on June 1, 1988.

## Nationally

At the annual meeting of CAPCJ the following committee reports were submitted in writing and adopted:

### PRESIDENT'S REPORT
### September 13, 1988
### by Judge Kenneth Page

This is my final report as President of the Association bringing to an end one of the busiest, most interesting and rewarding years of my life. During my term it was my pleasure to be able to attend the Annual Meetings of five of the Provincial Associations, those being Alberta, Newfoundland, Quebec, Ontairo and Saskatchewan. Regretfully I was unable to visit Manitoba, Nova Scotia, New Brunswick or the North West Territories due to other commitments. All of these visits were most interesting and enjoyable and to all of you who have so graciously extended your hospitality to Alisen and me, we give our sincere thanks.

The most important event to which I have devoted my time and energy this past year has been the establishment of the Canadian Judicial Centre. The Interim Management Board initially and now the Board of Governors of the Centre has been concerned with the formal incorporation of the Centre, the appointment of an Executive Director and Associate, the selection of site and the priorities and planning of the Centre's operations. The following decisions have now been made. The Centre has been formally incorporated under the Canada Corporations Act and the Board of Governors is composed of four persons representing this Association, the Chief Judges of the Provincial and Territorial Courts, the Canadian Judicial Council and the Canadian Conference of Judges. The Chairman of the Board is the Chief Justice of Canada.

David Marshall of the Supreme Court of the North West Territories has been appointed as Executive Director for a three-year term commencing April 1, 1988. Jean Marie Bordeleau of the Provincial Court of Ontario (Criminal Division) Ottawa and Bernard Grenier of the Cour du Québec, Montreal, have been chosen to share the position of the Associate Executive Director. These Judges were chosen by the Board of Governors recognizing that to be effective the Centre requires direct participation by Canada's Provincially appointed Judges and the choice of these two men brings to the Centre a distinctly Provincial Court and Francophone perspective. Both are highly respected Judges of this Bench and I know that they will bring to their new duties the enthusiasm and dedication required to ensure that the Centre serves the needs of the Provincially and Territorially appointed Judges. Arrangements are now being made to have these Judges freed from their judicial duties so that



courts, the profession's initiatives in the support of your association's goals must necessarily be provincial — and must come from the branch level.

I have however agreed — subject to obtaining the necessary budgetary approvals — to establish a Canadian Bar Association to do three things on a national level:

First, — to liaise with this association to assist in whatever ways possible to further the goals of your association nationally.

Second, — to study and where appropriate advise the national executive on the proper support and response to give to those positions taken by your association to further the advancement and independence of the provincial judiciary.

Thirdly, — and most importantly — to compile the results of and co-ordinate the efforts of the twelve provincial and territorial branches of the Canadian Bar Association who have the prime responsibility for this initiative in their respective provinces and territories.

The provincial courts of this country have come a long way in the past twenty years since I began to practice law.

You have for the most part been patient in your push to make appointments to the bench attractive and life on the bench rewarding.

Through necessity you have avoided stridency and confrontation in making the impressive gains you have.

Our profession has — in a disjointed but meaningful way — moved along with you and I hope — with the co-operation and co-ordination of our respective national associations — that our input will be more meaningful in the future.

I expect that you anticipated a push by me to say that in return for all of this I want 750 applications for membership at the Canadian Bar Association's offices in Ottawa tomorrow morning.

One of the things I have talked about with Ken Page, Ken Crowell and Ron Jacobson, is the fact that we would like to see a stronger contingent of provincial court members in our association.

We will continue to pursue this with your executive — perhaps beginning with something as mundane as a starting point such as a joint annual national meeting.

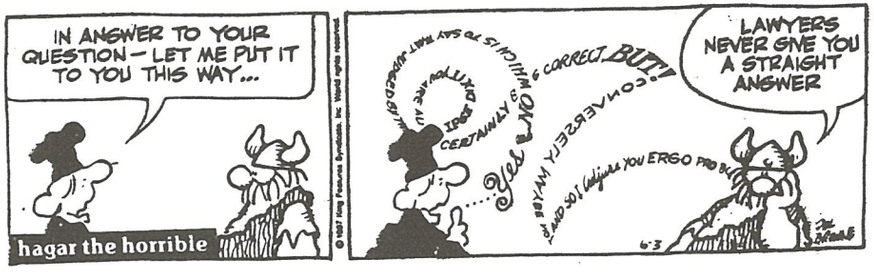
I believe that our closer relationship can do nothing but benefit us all and ultimately the administration of justice in this country.

I became president of the Canadian Bar Association twelve days ago.

I celebrated by returning to Calgary last week to start an eight day trial.

I have taken a break to be here and with the blessings of the court and my colleagues I have tomorrow off so that I can enjoy your hospitality and friendship today and this evening.

I wish to thank you for your attention this morning and godspeed in the rest of your deliberations this week.



We also announced a plain language initiative in conjunction with the Canadian Bankers Association which is underway now.

As you can appreciate, these are all federal or national initiatives which in addition to the twenty to twenty-five projects on law reform being administered by our legislation and law reform committee — are in addition to the numerous and various activities of the twelve provincial and territorial branches of our association.

In addition to all of the initiatives discussed in our current year's access to justice program — I also announced in Montreal my commitment on behalf of the National Canadian Bar Association to work in concert with the Canadian Association of Provincial Court Judges to support the association's goals for a properly compensated and independent provincial judiciary.

No one in the legal profession is unmindful of the fact that:
1. With few exceptions the provincial court is involved at some point in every criminal case in Canada.
2. That I believe the figure is eighty-two percent, but it may be approaching eighty-five percent of all contact with the judicial system by the public in Canada is at the provincial court level.
3. That apart from the issues of salaries and pensions, the provincial court systems in Canada are for the most part, underfunded, underdesigned, understaffed (both judicially and administratively) and undersupported, and are not keeping up with the demands that society continues to heap upon them.

Now I don't want to suggest that there haven't been substantial strides made.

I cite my own province, where since the Kirby Commission Report in, I believe, 1978, new impressive facilities have replaced community halls and hockey changing rooms as court rooms.

Provincial judges salaries and benefits have been substantially increased — and tied to federal appointment levels which, over the past ten years, has seen a dramatic increase in interest and appointment of competent, seasoned, experienced lawyers to provincial judgeships in the province.

There are however problems — suggestions by the now replaced attorney general that pegging salaries to a percentage of federal judges salaries may be abandoned — pension problems and a general failure to advance the financial interests of the provincial judiciary quickly and responsibly are all threats to the competence and ultimately the indepence of the provincial bench.

Strides in economics and working conditions in Alberta have not been matched in other areas of the country — and I believe your association and its goals are in part a move in the right direction to begin to remedy these disparities.

But the constant and never ending battle continues.

What can the Canadian Bar Association do?

From the perspective of the legal profession — the pay levels, working conditions, pensions and employment benefits and national parity — aren't as important as the fact that judges should not have to go hat in hand to the attorney general of their provinces to beg or negotiate for appropriate conditions for the proper function of their duties.

The Canadian Bar has a good history of pushing the federally appointed judges into the economic twentieth century.

On a national basis we have, through our committee on judges' pensions and salaries, worked long and hard to advance the position of our judiciary and latterly with considerable success.

We haven't, on a national basis, been doing the same thing for provincial judges, and in part for good reason.

We have left it up to the individual provincial branches to carry the burden of our profession's support for the provincial judiciary.

Some of our efforts have been noteworthy.

The Nova Scotia branch was supportive of the establishment of the newly created independent commission on provincial court remuneration in this province.

The Ontario branch in March made a strong and persuasive submission to the Ontario Provincial Courts Committee on remuneration, allowances and benefits of provincial court judges, through a committee of seven distinguished members of the CBAO — advocating acceptance of many of the goals of your association — most noteworthy — parity in remuneration with federally appointed judges.

The profession, and indeed the branches, are not yet in unanimous agreement with that proposal — but strong support in B.C. and Quebec indicates that the profession has finally taken up the cause of proper compensation for that segment of the judiciary which touches the broadest part of Canadian life.

I temper my comments today with this reservation — because of the nature of provincial



they may assume their new posts as soon as possible.

The University of Ottawa has been chosen as the site for the Centre. Space at the university is now being readied and the Centre should be formally established there by October 1, 1988.

During its first year of operation the Centre has defined the following as priorities:

1. To provide information and publicize the Centre's activities including the development of the exchange of information between Chief Justices, Chief Judges and local Associations respecting their views as to priorities and the identity of individuals in their respective Courts and Associations particularly concerned with judicial education.

2. To create programs for new Judges including a mentor system and preparation of bench books.

3. To conduct a thorough survey of on-going judicial education sources.

4. To develop programs and materials relating to new Federal and Provincial Legislative initiatives.

With the foregoing arrangements in place I feel confident that the Centre is now constituted both with respect to structure and management in a way which will enable it to function equally for the benefit of all Judges in Canada whether they be Federally or Provincially appointed.

My second area of concern has been the Judicial Compensation Committee and liaison with the Canadian Bar Association. The Compensation Committee has produced the 1987 Judicial Survey, a most worthwhile endeavour and arrangements are in place to keep that survey current. That can only be achieved if Provincial Representatives forward all changes in Provincial positions to the Committee Chairman in a timely fasion. I urge all Provincial Representatives to take this responsibility most seriously.

At the Spring Executive meeting in Montreal the Association adopted a policy that all Provincial and Territorial Court Judges receive not less than parity in remuneration and benefits with Federally appointed County/District Court levels. To implement this goal our Association has sought the support of the National Canadian Bar Association. In the Provinces of Ontario, Quebec and British Columbia the local branches of the Canadian Bar have supported this position to aid Provincial Judges Associations in their negotiations with Government. I believe that the Canadian Bar Association nationally will pass a resolution endorsing this policy. In this regard, members of the Compensation Committee met with members of the Executive of the Canadian Bar Association on June 18, 1988 and I attended a meeting with the Presidents and Vice-Presidents of the Canadian Bar in Montreal on August 20th to further these goals. As a result of these meetings I would hope that the forthcoming year will see in each Province, Provincial Committees formed composed of local Judges and members of the local Bar Associations seeking to find ways and means of implementing this goal of parity. The new National President of the Canadian Bar Association, Mr. Patrick Peacock, is most supportive of these efforts as you will have heard in his address to this Conference. Mr. Brian Morris of the Yukon Bar has been appointed liaison officer between the Canadian Bar Association and this Association for the coming year and will coordinate the efforts of local committees. I feel confident that support from the C.B.A. will continue and grow and that it, above all, will be most effective in achieving uniform National treatment respecting salaries and benefits for all Provincial and Territorial Court Judges.

There are few Provincial and Territorial Court Judges who have retained their membership in the C.B.A. — far fewer than those who are Federally appointed. There are many reasons for this and Mr. Peacock has indicated that the National C.B.A. will consider in the coming year, ways to make the C.B.A. more relevant to Judges generally. The Bar has never taken the position that there is a quid pro quo involved in their attempts to support this Bench which they have done in the past and continue to do with added vigor. At the same time there are many areas in the administration of justice which are the mutual concern of lawyers and judges where a closer involvement will bring a better result. I would therefore ask all of you to think again respecting the prospect of membership in the C.B.A.

As I said earlier it has been a busy but rewarding year for me. I have met so many colleagues in all Provinces all of whom are dedicated to their profession and supportive of this Association. It is extremely important to create unity in this country with respect to the administration of justice. This Association is the best vehicle I know to achieve that. It is my hope it may continue to strengthen and grow to provide for all of its members a vehicle which will promote national unity in the administration of justice and equal treatment for the Judges of this Bench.

In closing I wish to thank my Executive and the Committee Chairmen for their support and encouragement. And particularly I wish to thank all of the members of this Association for giving me this opportunity to have served as President. Thank you.

## RAPPORT DU PRÉSIDENT
## le 13 septembre 1988
## par Juge Kenneth Page

Ceci est mon dernier rapport en tant que président de l'Association terminant ainsi l'une des années les plus actives, les plus intéressantes et les plus enrichissantes de ma vie. Au cours de mon mondat, j'ai eu le plaisir d'assister aux reunions annuelles de cinq associations provinciales (Alberta, Terre-Neuve, Québec, Ontario et Saskatchewan) mais, en raisin d'autres engagements, je regrette de n'avoir pu me rendre a celles du Manitoba, de la Nouvelle-Écosse, du Nouveau-Brunswick et des Territoires du Nord-Ouest. Toutes ces visites furent aussi agréables qu'interessantes. Alisen et moi-même adressons nos plus sincères remerciements à toutes celles et à tous ceux qui on fait preuve de tant d'amabilité à notre égard.

Au cours de l-année qui vient de s'écouler, l'événement le plus important auquel j'ai consacrè mon temps et mon énergie a été la création du Centre canadien de la magistrature. Au début, le Conseil d'administration intérimaire et maintenant le Conseil des gouverneurs ont consacré leurs efforts à la constitution officielle du Centre, à la nomination d'un directeur exécutif et de son adjoint, au choix de l'emplacement ainsi qu'à la planification du fonctionnement du Centre et la priorité à donner aux questions devant être étudiès. Les décisions suivantes ont maintenant été prises: Le Centre est maintenant officiellement constitué conformement a la Loi sur les corporations canadiennes; le Conseil des gouverneurs se compose de quatre personnes représentant cette Association, les juges en chef des Cours provinciales et territoriales, le Conseil canadien de la magistrature et la Conférence canadienne des juges. Le president du Conseil est le juge en chef du Canada.

David Marshall, de la Cour suprême des Territoires du Nord-Ouest, a étè nommé directeur executif pour un mandat de trois ans à compter du 1er avril 1988. Jean Marie Bordeleau de la Cour provinciale de l'Ontario (division criminelle), Ottawa, et Bernard Grenier de la Cour du Québec, Montréal, ont été choisis afin de partager les fonctions de directeur exécutif adjoint. Ces juges ont été choisis par le Conseil des gouverneurs sachant bien que l'efficacité du Centre repose sur une participation directe des juges canadiens nommés par les provinces et la choix de ces deux hommes confère au Centre une perspective francophone ainsi qu'un caractère propre aux Cours provinciales.

Ces deux juges sont des membres fort respectés de la magistrature et je sais qu'ils apporteront à leurs nouvelles fonctions l'enthousiasme et le dévouement nécessaires afin que le Centre puisse répondre aux besoins des juges nommés par les provinces et les territoires. Des dispositions sont en cours afin de libérer ces juges de leurs fonctions judiciaires pour qu'ils puissent assumer leurs nouvelles responsabilités aussitôt que possible.

L'Université d'Ottawa a été choisie comme emplacement pour le Centre. Les bureaux sont en cours de préparation et le Centre devrait étre opérationnel d'ici le 1er octobre 1988.

Le Centre s'est fixé les priorités suivantes pour sa première année de fonctionnement:

1. Fournir des informations et faire connaitre les activités du Centre, y compris le developpement de l'échange d'informations entre les juges en chef de la Cour suprême, les juges en chef de la Cour provinciale et les Associations locales en ce qui concerne leurs opinions sur les questions prioritaires et l'identification de personnes dans leurs Cours et leurs Associations respectives s'intéresseant particulièrement à la formation des juges.

2. Créer des programmes pour les nouveaux juges, y compris la mise en place d'un systeme de mentor et la préparation de livres á l'intention de la magistrature.

3. Mener une enquéte approfondie sur les moyens de formation offerts actuellement aux juges.

4. Élaborer une documentation et des programmes relatifs aux nouvelles initiatives du fédéral et du provincial en matière de législation.

Ces initiatives me permettent de pouvoir affirmer que le Centre est maintenant fermement établi aussi bien en ce qui concerne la structure que la direction, et qu'il sera ainsi en mesure de servir, sans aucune distinction, tous le juges du Canada, qu'ils ou qu'elles soient nommé(s) par le gouvernement fédéral ou celui des provinces.

Ma deuxième préoccupation avait trait au Comité sur la rémunération et la pension des juges et la liaison avec l'Association du barreau canadien. Le Comité sur la rémunération et la pension des juges a publié l'Etude de la magistrature de 1987, une entreprise fort utile et des dispositions ont été prises afin d'en assurer la pertinence. Toutefois, cela ne pourra se faire que si les représentants provinciaux fournissent, en temps voulu, tous les changements intervenus dans les postes provinciaux au président du comité. Je prie tous les représentants provinciaux de prendre cette responsabilité très sérieux.

Lors de la réunion de printemps de la direction qui s'est tenu à Montréal, l'Association a adopté une politique visant à ce que tous le juges



# REMARKS OF J. PATRICK PEACOCK, Q.C. PRESIDENT CANADIAN BAR ASSOCIATION TO THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

**Halifax, Nova Scotia**

**Sunday, September 11th, 1988**

Your program organizers asked if I might say a few words this morning as president of the Canadian Bar Association about the provincial judiciary and what the Canadian Bar might do with respect to your role and position in the Canadian judicial system.

I welcome this opportunity because I can say, without reservation, that you have a truly sympathetic and enthusiastic supporter in this year's Canadian Bar president.

In 1983 when I was the Alberta branch president I was asked — as were my other provincial presidential counterparts — to write a column in the national, our monthly newspaper, outlining what I thought were the most important issues facing the legal profession at that time.

Ironically they are the same problems that are facing the legal profession today — an inefficient, expensive cumbersome, delay-filled justice system.

Five years ago I wrote that all of the public relation efforts and dollars, all of the energy and time spent trying to inspire confidence and respect of the public in our system of justice, will never convince the independent witness, who was subpoenaed to give evidence at a traffic trial, and sat in a court for four hours, to either give four minutes of evidence or to be sent home as the charge was ultimately withdrawn — that this system is something he should treat with reverence and awe.

Ask the litigant whose personal injury case and loss of income claim have taken six years to get to trial, what he thinks of our judicial system.

The fact is that our court systems, from the top to the bottom, are beginning to fall behind in efficiency, relevance and eventually the expectations of the public.

More and more they are being abandoned for alternate dispute resolution methods — such as arbitration and mediation — because they are not fulfilling the demand which our society continues to place upon them.

I applaud new initiatives — such as the commercial arbitration centers in Vancouver and Quebec City.

I applaud the increased use of mediation as a dispute resolver in matrimonial disputes as a step in the right direction.

But I am most concerned that these initiatives arise because they are the right thing — not because the judicial system is failing through cost and inefficiency to do the job it was intended to do.

Last year our Canadian Bar Association president, Jean Bazin of Montreal, set the theme and priority for his presidential year as "access to justice" — with a commitment to put the resources of the Canadian Bar Association and its thirty five thousand members to studying and recommending changes and improvements to the judicial system in Canada to make it more open, less mystifying, less expensive and more efficient — in other words, more accessible to the people it serves.

We are still trying to put the funding together to establish a committee to co-ordinate provincial intiatives such as the forthcoming report of the Hughes' Committee in British Columbia, the recent conference on Access to Justice sponsored by Ian Scott in Ontario, and such studies as the Zuber Report from Ontario — and to try to compile the legal profession's views on a national basis into this important subject.

Because I still feel this is the most important issue that we in the legal system continue to face — I am continuing that theme this year.

I announced in Montreal that the access study initiative just discussed will be continued as a priority item.

We propose as well to continue our push for the full implementation by the minister of justice of the Canadian Bar Association's McKelvey Report on appointments of federal judges.

We are continuing our study into the appointment and independence of administrative tribunals in Canada.

I announced continued efforts to implement on a trial basis our Merrick Report recommendations of access by the public to our judicial system through cameras in the courts.

the date of the enactment of the **Bill of Rights.** In many cases under the Charter, the judges refuse to rely on legislative history of the Charter to guide them in their interpretation, emphasizing that the document is a "living tree" which must evolve over time. A word of caution is in order here, however. The Court, in rejecting interpretivism based on the framers' intent, is not necessarily rejecting tradition as a value in determining the scope of rights. For example, in the trilogy of cases dealing with the issue whether a right to strike is incorporated in the guarantee of freedom of association, the majority of the Supreme Court seems to draw on a Canadian tradition in which there have been limitations on labour activity to help in the understanding of the guarantee of freedom of association in s.2(d). (See, for example, **Reference re Public Service Employees Act (Alta.),** [1987] 3 W.W.R. 577).

Certain other trends appear in the cases. For example, the Court seems willing to consider comparative materials, both American and from other jurisdictions, to help both in the determination of the scope of rights and the concept of reasonable limits under s.1. The Court has made it clear that it is not bound by materials or approaches to interpretation in other jurisdictions, and in particular, has emphasized that American material, while of assistance, is based on a different tradition than ours, which may not be appropriate to follow. In addition, we see in some cases, the emergence of elements of moral philosophy. For example, in **Minister of Employment and Immigration** v. **Singh** (1985), 17 D.L.R. (4th) 422, dealing with the fairness of procedures for determining refugee status, Madame Justice Wilson rejected government arguments about cost, put forth to justify a limitation on hearings in refugee proceedings. She stated that utilitarian arguments such as these were inappropriate under s.1.

In sum, at this point in the interpretation of the Charter, there is no overarching theory of interpretation for all rights, and this is fortunate. Our judges are slowly working out an approach to interpretation, which does not blindly follow the will of the legislature, yet at the same time does defer to the legislative branch in certain circumstances. There is a clear rejection of interpretivism and a recognition that values beyond the words of the document must be incorporated or considered to fill out the content of those rights. As our judges continue to work through this process inevitably the debate will become more heated as to the appropriateness of judges making such determinations in the appropriateness of the values upon which they draw.





des Cours provinciales et territoriales obtiennent au minimum une parité de rémunération et d'avantages sociaux avec les juges nommés par le fédéral au niveau des Cours decompté/district. Afin de réaliser cet objectif, notre Association a cherché d'obtenir l'appui de l'Association nationale du barreau canadien. Les branches locales du Barreau canadien des provinces de l'Ontario, du Québec et de la Colombie-Britannique ont décidé d'apporter leur soutien aux associations des juges provinciaux lors de leurs négociations avec le gouvernement. Je pense que l'Association du barreau canadien adoptera une résolution dans ce sens au niveau national. Á cet affet, les membres du Comité sur la rémunération et la pension des juges ont rencontre les membres de la direction de l'Association du barreau canadien le 18 juin 1988 et j'ai assisté à reunion avec les présidents et les vice-présidents du Barreau canadien le 20 août à Montreal, afin de poursuivre cette revendication. Suite à ces rencontres, je pense pouvoir prédire que, dans l'année à venir, les comités provinciaux de chaque province seront constituées de juges locaux et de membres des associations du barreau locales à la recherche de méthodes et de moyens nécessaires pour atteindre une telle parité. Le nouveau président national de l'Association du barreau canadien, Monsieur Patrick Peacock, soutient totalement ces efforts comme vous pourrez l'entendre lors de son discours durant cette conférence. Monsieur Brian Morris, du Burreau du Yukon, a été nommé responsable de la liaison entre l'Association du barreau canadien et cette Association pour l'année à venir et il sera chargé de coordonner les efforts des comités locaux. Je suis certain que le soutien de l'Association du barreau canadien continuera à se développer et que, par dessus tout, il permettra d'atteindre un niveau de rémunération et d'avantages sociaux uniforme sur le plan national pour tous les juges des Cours provinciales et territoriales.

Bien moins de juges des Cours provinciales et territoriales continuent d'être membres de l'Association du barreau canadien que leurs homologues nommées par le fédéral. Bien qu'il semble y avoir plusieurs raisons à cela, Monsieur Peacock a indiqué qui l'Association nationale du barreau canadien prendra des mesure au cours de l'année qui s'en vient afin que cette association soit plus conforme aux désirs de l'ensemble des juges. Le Barreau n'a jamais estimé qu'il y avait un quid pro quo l'empêchant de donner son appui à cette magistrature, ce qu'il n'a pas manqué de faire dans la passé et continuera avec encore plus de vigueur à l'avenir. Il y a également d'autres preoccupations concernant l'administration de la justice qui sont communes aux avocats et aux juges et ou une coopération plus étroite permettra d'obtenir de meilleurs résultats. Dans ce contexte, je vous prie tous de bien vouloir reconsidérer votre décision de devenir membre de l'Association du barreau canadien.

Comme je l'ai déclaré au tout début, cette année fut pour moi fort active mais également trés enrichissante. J'ai pu ainsi rencontrer de nombreux collègues dans toutes les provinces qui sont fidéles à leur profession et dévoués envers leur association. Il est extrémement important d'en arriver à un consensus national en ce qui concerne l'administration de la justice; je sais que cette Association en est le meilleur instrument et j'espére qu'elle pourra continuer á croître et à sa développer afin de promouvoir, pour tous ses membres, une unité nationale en ce qui concerne l'administration de la justice et l'égalité de traitement pour les juges de cette magistrature.

Pour terminer, je désire remercier les membres de mon administration et le président du comité pour leur soutien et leurs encouragements et j'aimerais aussi remercier tours les membres de cette Association pour m'avoir permis de servir en qualité de président. Merci à tous.

### COMPENSATION
### September 13, 1988
### bu Judge Ron Jacobson

Unfortunately, illness kept Judge Jacobson away from the meeting personally. Nevertheless, an extensive, up-dated report on judicial compensation in Canada was filed on his behalf and adopted. Copies of that report should be available from Provincial Representatives.

Also, at the Annual Meeting the following resolution on judicial compensation was passed:

Que l'association canadienne des juges de cours provinciales appuie la position des juges de la cour du Quebec dans leur effort pour atteindre la parité de traitement avec les juges de la cour superieure du Quebec.

That the Canadian Association of Provincial Court Judges supports the position of the Judges of the Court of Quebec in their efforts to achieve parity of all salary and benefits with Superior Court Judges of Quebec.

### ANNUAL REPORT ON THE CANADIAN JUDICIAL COLLEGE
### September 13, 1988
### by Judge J.M. Bordeleau

In September of 1987, Judge Kenneth D. Page, the President of the Canadian Association of Provincial Court Judges, appointed me as Chairperson of the above Committee. While I have been closely involved with education in the As-

sociation since 1979, this is my third term as Chairperson.

On March 26th, 1987, I presented my interim report to the Executive of this Association meeting in Montreal, and in the event that this report has been mislaid, I have annexed a copy of same.

The main activity of the Committee is the New Judges Programme; and this year it was held, as in the past two years, at the Far Hills Inn, in Val Morin, Quebec. A total of upwards of 40 judges attended. THis year the keynote speaker at the Conference was the Honourable Antonio Lamer of the Supreme Court of Canada. The convenor of the Conference was again my dear colleague and close friend the Honourable Stephen Cuddihy of St. Jerome. The Honourable Andre St. Cyr was again responsible for the Family & Youth Section. I am indebted to these two colleagues. It is always a pleasure to work with them, and without them this conference would not have succeeded as well as it did.

After consultation with the incoming President, The Honourable Kenneth L. Crowell, it was decided that the New Judges Programme will again to be held at the Far Hills Inn from April 7th/89 to April 14th/89. The Honourable Stephen Cuddihy has again agreed to be the Convenor. For your information, I enclose a copy of the 1988 Programme.

Since my last report, The Honourable David Marshall, a Justice of the Supreme Court of North West Territories has been appointed as the Director of the Canadian Judicial Centre. The University of Ottawa has been chosen as the site for the Centre. I understand that, the Director and staff will be moving there in early November. At the time of the preparation of this report, the interim Committee of the Centre of which Chief Judge Hayes, and Judge Page are members, have not appointed an Associate Director from the Provincial Court Bench. It is hoped that such appointment will be made shortly. A copy of the report of the Atlantic Seminar prepared by Her Honour Judge P.L. Cumming of the Provincial Court of New Brunswick is enclosed.

I would again like to thank all judges for their work on their respective committees dealing with education.

Special thanks again for the Convenor of the New Judges Programme, The Honourable Stephen Cuddihy, and the Honourable Andre St. Cyr for their help.

In closing I wish again to thank the President, the Executive Committee and the Provincial Representatives for the encouragement, wise counsel and support.

Since the date of the preparation of this report, I have received the report of Judge Ross Colliver, Director of the Western Judicial Education Centre, and it is annexed hereto.

## RAPPORT ANNUEL DU COLLEGE JUDICIAIRE CANADIEN
**le 13 septembre 1988**
**par juge Jean Marie Bordeleau**

En septembre 1987, M. le juge Kenneth D. Page, président de l'Association canadienne des juges de la Cour provinciale m'a nommé président du comité précité. C'est la troisième année que je siège au comité en tant que président bien que le domaine de l'éducation au sein de notre association m'intéresse depuis 1979.

Lors de la réunion qui a eu lieu à Montréal le 26 mars 1987, j'ai présenté mon rapport provisoire au comité de direction de cette association. J'en annexe une copie au présent rapport au cas où vous n'auriez pas ce premier rapport sous la main.

Le nouveau programme de formation pour les juges, l'occupation première du comité, s'est déroulé au Far Hills Inn, à Val Morin, au Québec. C'est la troisième année que nous nous réunissons à cet endroit et plus de quarante juges étaient présents. L'honorable juge Antonio Lamer de la Cour suprême du Canada a prononcé le discours inaugural cette année. Mon cher collègue et bon ami, Monsieur le juge Stephen Cuddihy de Saint Jérôme, a présidé le congrès encore une fois.

L'honorable André Saint Cyr s'est de nouveau chargé du volet qui traitait du droit de la famille et de la jeunesse. Je tiens à leur exprimer ma sincère reconnaissance. C'est un plaisir renouvelé que de travailler avec eux; le succès du congrès est redevable en grande partie au travail de ces deux collèges.

Après en avoir discuté avec le nouveau président, l'honorable Kenneth L. Crowell, il a été décidé que le nouveau programme de formation pour les juges aurait lieu au même endroit que par le passé, c'est-à-dire au Far Hills Inn du 7 au 14 avril 1989. L'honorable Stephen Cuddihy a accepté d'assumer encore une fois les fonctions de président. Vous trouverez ci-joint une copie du programme de 1988.

Depuis la rédaction de mon dernier rapport, l'honorable David Marshall, juge à la Cour suprême des Territoires du Nord-Ouest, a été nommé directeur du Centre judiciaire canadien. Le siège social du centre a été fixé à l'Université d'Ottawa; je crois que le directeur et son personnel s'y installeront au début de novembre. Au moment de la rédaction du présent rapport, le



stitutional bill of rights should be interpreted in accordance with principles of moral philosophy. Those who advocate this view believe that there is nothing illegitimate about judicially imposed limitations on legislative will in order to protect rights, for the constitution enshrines certain values which both protect the democratic process and ensure its basic fairness. The content of these rights is to be found in concepts of moral philosophy. Of course, the problem then arises as to which theory of moral philosophy is to govern-Nozick's libertarianism, Rawls' liberalism, Kantian theory? In Ely's book there is a delightful passage in which he discusses the theory of moral philosophy, imagining a U.S. Supreme Court of the future in which the judges' decision is announced as, "5 for Rawls, 4 for Nozick, Rawls wins". While he seems to make light of the debate about competing moral philosophies, there is a serious point to be made - namely, that there is not widespread agreement in our society about moral values, and Ely, at least, questions the legitimacy of judges choosing among moral philosophies which are then imposed on the state.

A further approach to judicial review, which is espoused in Ely's book, emphasizes process. Ely argues that courts should essentially restrain themselves in applying constitutional bills of rights, deferring to the legislative will, except in circumstances where the courts must intervene to redress inadequacies of the democratic political process and to keep it functioning properly. Accordingly, he would afford special protection for political expression or the drawing of electoral boundaries. As well, he would use a substantive approach to the scrutiny of legislation which seems to prejudice discrete and insular minorities. This theory is very much based on a footnote in a U.S. Supreme Court case, **Carolene Products.**

Any theory of judicial review is vulnerable to criticism and there has been much discussion about the issue in American literature. But what does this debate have to say to Canada, as Canadian judges embark on their task of interpreting the **Canadian Charter of Rights and Freedoms?** Some would say that a search for the legitimacy of judicial review is unnecessary in Canada - that there is no need for a grand theory to justify judicial review. Indeed, Lamer J., in **Reference re Section 94(2) of the Motor Vehicle Act (B.C.)** (1986), 24 D.L.R. (4th) 536 (S.C.C.), stated "Adjudication under the Charter must be approached free of any lingering doubts as to its legitimacy". There is some truth to this statement. Canadians, or at least Canadian politicians, opted for judicial review under a constitutional Charter of Rights knowing, from American and European experience, what this would mean for the democratic process. Nevertheless, the Charter includes s.52, which states clearly that the Charter is the supreme law of the land, and any law inconsistent with it is of no force and effect. Moreover, the Charter, acknowledging concerns about the democratic process, places a political check on the judiciary. Section 33 provides for a legislative override, when a law contains a provision stating that it operates notwithstanding s.2 (the fundamental freedoms section) and ss.7 through 15 of the Charter (the legal rights and equality rights). Thus, with regard to these rights, while the Charter gives the judges an important role in patrolling the democratic process (both procedurally and substantively), ultimately the judiciary is subject to the democratic will. Moreover, the Canadian Charter tries to provide some guidance for the judiciary in interpreting the Charter and thus to avoid some of the debates in the United States as to appropriate methods of interpretation. Section 1 makes clear, by stating that the rights are subject to reasonable limits, justifiable in a free and democratic society, that rights are not absolute, and that judges will be determining the limits on them. Therefore, it is clear from the words of the Charter that judicial review for the protection of rights is contemplated and accepted in the Canadian legal system.

But let me come back to Lamer J.'s statement in the **Motor Vehicle Reference.** I think that Mr. Justice Lamer may have overstated his case when he indicated that there should be no doubts about the legitimacy of judicial review. Even if Canadians appear, in their constitutional document, to accept the institution of judicial review, there is still room to debate the appropriate role of the courts in the interpretation of the Charter and the degree to which judges should defer to the legislative will. This arises because there is a wide discretion in interpreting the Charter, even with s.1. Therefore, Canadian judges must also face the question preoccupying Americans - namely, what principles do you bring to Charter interpretation; what values are enshrined in the constitution; and when should courts defer to legislatures? The answers to these questions are highly contestable, as we see increasingly in decisions in the Canadian courts, such as the **Edwards Books and Arts Ltd.** v. **The Queen** (1986), 35 D.L.R. (4th) 1 (S.C.C.), dealing with Sunday closing laws.

It is early in the life of the Charter to speculate as to whether Canadian judges are adhering to particular theories of judicial review in interpreting the Charter. Certain trends appear to be emerging, however, in the decisions of the Supreme Court of Canada and particularly in those of some members of the Court. Overall, there seems to be a rejection of an historical approach similar to American interpretivism based on the framers' intent. Our judges have learned from the criticisms of the **Canadian Bill of Rights** jurisprudence, in which the rights seemed to have been frozen by interpretation linked to 1960,

# PRESENTATION TO CANADA — U.S. LEGAL EXCHANGE THEORIES OF JUDICIAL REVIEW

**Katherine Swinton***

Canadian academics are struck by the vigour of American debate about judicial review under the constitution. Over and over again, in the law reviews and even in the popular press, there is heated discussion about whether judicial review of legislative action can be justified in the democratic system of government. Essentially, those concerned about judicial review feel some disquiet that appointed judges, exercising wide discretion in interpreting broadly worded constitutional guarantees such as equality rights or freedom of expression, overrule the decisions of democratically elected institutions, for the result appears to be counter-majoritarian. Throughout the American literature, as a result of this disquiet, there is a search for a grand theory of judicial review that will answer all questions about the legitimacy of this function and reveal the values to limit judicial discretion. As well, numerous articles respond by criticizing the theories of others (without necessarily providing a theory in substitution).

The range of theories of judicial review in the American literature is familiar to many. There are very good summaries of the competing views in John Hart Ely's book, **Democracy and Distrust** or Paul Brest's article, "The Fundamental Rights Controversy" (1981), 90 Yale L.J. 1063. In the following paragraphs, I shall briefly outline these theories and some of the concerns about them.

One of the major theories of judicial review is that of interpretivism. The interpretivist emphasises the words of the constitutional document, and, to assist in the interpretation of these words, often draws on the intent of the framers of the constitution. The goal underlying this approach to interpretation is to eliminate judicial discretion in interpreting the words of the constitution, and to ground the decisions in a higher authority-namely, the word of the superior document, the constitution, or the intention of those who originally formulated those words. Thus, although the result of constitutional interpretation is the overruling of decisions of present legislators by Courts, the judges, in making their decisions, appear to draw upon neutral sources.

Many find problems in this approach to constitutional interpretation and deny that it avoids the problems of judicial discretion and judicial overruling of legislative will. For one thing, the words of the constitution rarely disclose easy and uncontroversial answers when legislation is attacked as incompatible with the constitutional document. The guarantees of rights in a constitution are necessarily broadly worded phrases, such as freedom of expression, freedom of religion and conscience, or equal protection, and there is much room for debate about the meaning of those words. Moreover, there is often little guidance from history and the intent of the framers to answer precise questions about the validity or invalidity of legislation today. Often those drafting a constitution did not (and moreover could not) foresee the range of issues which might arise under the constitution. Beyond this, even if the framers **did** contemplate some of the problems which arise today, their views about the proper interpretation of the words of the constitution may often seem inappropriate today. This is well illustrated by the American debate about the interpretation of the equal protection clause with regard to desegregation of schools. Raoul Berger, in his book **Government by Judiciary,** has shown, through historical evidence, that the framers of the United States Constitution would not have found segregated schools in violation of the equal protection clause. While that may be true on the historical record (and I am not qualified to know), an interpretation of an equality clause that permits segregation of races in public schools is inconsistent with current views of equality. Finally, there are debates as to how to divine the intent of the framers. Does a constitution reveal general concepts of rights, such as equality, or does it contain specific and precise conceptions determined by the framers? If the former, the content of the constitution can evolve over time, but the result is that the judges, once again, have a great deal of discretion in determining the meaning of the constitutional guarantees.

But if there are problems with interpretivism, are there other sources to which judges can look for assistance in interpreting the constitution? There have been a range of responses in the American literature. Some would argue that the courts should look to general community consensus for guidance as to the meaning of various constitutional guarantees. Obviously, one danger with this is the tendency to find the meaning of guarantees within the majority's views of rights and appropriate limits, yet constitutional bills of rights are designed to protect minorities from the will of the majority.

There are many who would argue that a con-

***Associate Professor and Associate Dean, Faculty of Law, University of Toronto** **see note at page 18.**



comité provisoire du centre, dont fait partie le juge en chef Hayes et le juge Page, n'avait pas nommé le directeur adjoint parmi les juges de la Cour provinciale. Nous espérons qu'une telle nomination se fera sous peu. Vous trouverez sous pli une copie du rapport du Colloque de l'Atlantique préparé par Madame le juge P.L. Cumming de la Cour provinciale du Nouveau Brunswick.

Je profite de l'occasion pour remercier tous les juges de leur travail au sein de leurs comités respectifs se rapportant à l'éducation. Je tiens à exprimer ma gratitude au président du nouveau programme pour les juges, l'honorable Stephen Cuddihy ainsi qu'à l'honorable André Saint Cyr.

Permettez-moi enfin d'offrir mes remerciements au président, au comité de direction et aux représentants provinciaux. Vos conseils judicieux et l'encouragement que vous avez manifesté m'ont été d'une aide précieuse.

Depuis la date que ce rapport a été préparé, j'ai recu le rapport de Juge Ross Collver, Directeur du Western Judicial Education Centre, et une copie est inclus.

## WESTERN JUDICIAL EDUCATION CENTRE 1987-88 REPORT TO CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES September 13, 1988 by Judge Ross Collver

Since the 1987 CAPCJ Annual Meeting, the WJEC has sponsored or participated in the following programmes:

- Dec. 14 & 15, 1987 — Delivery of Reasons, Vancouver
- Mar. 17 & 18, 1988 — Faculty Development, Vancouver
- Apr. 28-30, 1988 — B.C. Assoc. of Provincial Court Judges, Spring Seminars, Penticton, B.C.
- May 12 & 13, 1988 — Delivery of Reasons, Saskatoon
- May 19 & 20, 1988 — Alberta Association of Prov. Court Judges, Red Deer, Alberta
- May 30 & 31, 1988 — Delivery of Reasons, Winnipeg

The Delivery of Reasons workshops continue to be well received. In addition to the ongoing leadership of Dean Edward Berry, of the University of Victoria, we have been fortunate to enlist the assistance of Mr. Justice Henry Hutcheon, Madam Justice Mary M. Hetherington, Mr. Justice Stuart Cameron and Mr. Justice Charles Huband, respectively of the British Columbia, Alberta, Saskatchewan and Manitoba Courts of Appeal. Programme evaluations by the participating judges have been encouraging. Accordingly, participants have already been selected for workshops in Calgary, on October 31st and November 1, 1988 and in Vancouver on December 19 and 20, 1988.

The Alberta and British Columbia Spring seminars, chaired by Judge Philip Ketchum of Edmonton, and Judge Terry Shupe of Kamloops, (both of whom have been WJEC faculty advisors) were enhanced by the participation of interprovincial teams of presenters sponsored by the WJEC, with the approval and cost-sharing of Chief Judges Kosowan and Coultas. Four Alberta judges made presentations in Penticton, and five British Columbia judges journeyed to Red Deer.

Materials were presented dealing with the sexual offence amendments to the *Criminal Code* and the *Evidence Act* (scripted into a "live" mock trial in Penticton, and a video-taped presentation at Red Deer). In addition, the WJEC sent Judge Bill MacDonald, of Surrey, B.C. and Alison Crone, of the University of British Columbia, to Red Deer to demonstrate the U.B.C. computer Sentencing Database.

The 1988 Faculty Development workshop was again led by Professor Gordon Zimmerman, of the University of Nevada. Fourteen judges participated. All four provinces were represented. Forty-nine judges have now received training at three WJEC Faculty Development sessions. The value of their experience has been evident at provincial education seminars. Future programmes in this area should await the establishment of the Canadian Judicial Centre, as the involvement of Section 96 judges and the availability of CJC resources may justify a longer programme than the two-day presentation organized by Dr. Zimmerman.

The Canadian Judicial Centre is a reality. In my two discussions with Mr. Justice David Marshall, the CJC's first Director, I have assured him of the WJEC's willingness to fulfill the satellite role foreseen in Mr. Justice Stevenson's original CJC report. However, I have emphasized the fact that the WJEC shares the concern of provincial Education Committee chairmen and Western Chief Judges that CJC activities will be supported by provincial court judges only if that support does not jeopardize our own established provincial programmes.

I think it is timely to stress the extent to which provincial associations and Chief Judges (notably Chief Judge Fred Hayes of Ontario, and former Chief Judge Larry Goulet of B.C.) have pioneered judicial education in this country. Even though much of our activity reflects our

concern for preserving and protecting judicial independence (many of us remember the extent to which attorneys general were once responsible for the "education" of provincial magistrates) both the numbers and quality of provincial programmes have continued to improve, and we must be vigilant lest we cede ground already gained. It will be difficult enough to achieve equality with the Section 96 courts in the operation of the CJC and the planning of its programmes. But it will be a bigger challenge to ensure that we lose neither existing governmental financial support for our provincial programmes, nor our enthusiasm to continue their planning and operation. The initiative has been ours. It must not be lost.

My two-year WJEC commitment to the CAPCJ is at an end. I have not accomplished nearly what I had hoped or set out to do. I accept most of the responsibility. But I have encountered obstacles.

When I assumed this position, I had the enthusiastic support of the Western Chief Judges. Three have since departed. To the extent that imminent establishment of the CJC has encouraged a "wait and see" attitude, it is not surprising that there has been an absence of any direction from the Chief Judges reflecting consensus on regional educational needs. That direction is sorely needed.

More effective use must be made of our Faculty Advisors. Their participation in WJEC activities has been largely reactive. Although I value the assistance they have given, funds must be committed to facilitate meetings of the Advisors on a regular basis to ensure that WJEC planning properly reflects regional needs. The Chief Judges have been asked to assist with such a meeting for this October.

The support and enthusiasm of those judges who have participated in WJEC programmes has been rewarding. To those who assisted with planning and with arrangements, I owe and extend special thanks.

**REPORT ON THE**
**CANADIAN JUDICIAL COLLEGE**
**also known as the**
**EDUCATION COMMITTEE**
**March 26, 1988**
**by Judge J.M. Bordeleau**

In September of 1987, Judge Kenneth D. Page, our President, appointed me Chairperson of the above Committee.

In December of 1987, I applied for the position of Executive Director or Associate Executive of the proposed Canadian Judicial College. I was advised in January of 1988, that I was selected to be on the "Short List" and was interviewed by the Interim Committee on February 5, 1988. The Committee was composed of Mr. Justice W. Stevenson of the Alberta Court of Appeal, Mr. Justice Brassard of the Quebec Superior Court, Chief Justice Glube of the Nova Scotia Supreme Court, Chief Judge Hayes of Ontario, and our President. On March 14th I was advised that I had not been selected and that a Section 96 Judge was selected. The order in Council has not to this date been passed appointing him to the post. I am advised by my sources that an Associate Director was not named, and that the Director would make the decision as to whether he would want an Associate or not. My information is that a site for the College has not been chosen.

It is imperative that a provincially appointed Judge be appointed, to protect the interest of our bench, and as your Chairman I will monitor things closely, and I intend to meet the new Director as soon as possible. I want to be reassured that the College will consider our bench as equal partners, as recommended by the Stevenson report.

Judge Patricia Cumming has agreed to Chair the Atlantic Seminar that will be held at St. John's, Newfoundland from June 7th to June 10th, 1988. Judge Kennedy has agreed to be the Venue Chairman.

To date, the programme is not as yet completed but I have arranged to have Professor Ronald Delisle of the Faculty of Law at Queen's University in Kingston to speak on June 9th on evidence. Professor Delisle, formally His Honour Judge Delisle of the Provincial Court (Criminal Division) of Ontario, has been a lecturer on the Law of Evidence at the Judges Training Programme for many years. Tentatively there will be lectures on the Charter of Rights and Freedom and on Firearms.

On this date the Judges Training Programme has not commenced, but it will be held from March 18th to the 25th at the Far Hills Inn at Val Morin, Quebec. To date we have forty-five judges that will attend. The keynote address will be by the Honourable Mr. Justice Antonio Lamer of the Supreme Court of Canada. This year there is a Criminal and Family Programme, Judge Stephen Cuddihy is the Conference Chairman and he, with the writer, is responsible for the Criminal Law Programme. Judge Andre St-Cyr is the Convenor of the Family Programme. At the Annual Meeting in Halifax, I will give a detailed report of the Val Morin and St. John's Conferences.

I again would like to thank the President, the Executive Director, the members of the Executive Committee and provincial representatives



"state's rights" wholly disappeared from the American political scene. But eventually they became closely identified with the so-called "Jim Crow" laws enacted by southern states after the Civil War which required segregation of blacks in public facilities. These laws found virtually no support outside of the South, and the idea of "state's rights" in the minds of people outside the South came to be thought of as a euphemism for discrimination against minorities.

Nor have claims of state's rights disappeared from the American political or judicial horizon even now. Following the decision by our Supreme Court in the case of *Brown v. The Board of Education* in 1954, holding that state enforced segregation of public schools was unconstitutional, more than 100 members of Congress signed a manifesto denouncing the decision and reviving the doctrine of state's rights. Armed confrontation between federal troops and southern elected officials took place on several occasions before the Court's decision could be implemented.

But in spite of these confrontations, the trend in the United States has been towards greater and greater federal control over the daily lives of its 260,000,000 citizens. There is much talk about cooperative federalism, and acts of Congress frequently leave room for considerable activities by the states in the same field. But the trend is unmistakably there; only the repeal of the Eighteenth Amendment imposing national prohibition in 1918 by the Twenty-First Amendment in 1933, returning the control over regulation of sale and consumption of liquor to the states, really went the other way.

So, as I suggested at the beginning, I think that history and largely unforeseen technological developments have played a special part in the evolution of state-federal relations in the United States. This is not to say that considerations of political theory are unimportant; indeed, any thoughtful observer must agree that quite the contrary is the case. Any nation as vast as Canada or the United States must constantly engage in the difficult task of recognizing the legitimate interests of the various sections which compose it while at the same time undertaking to speak with one voice on matters of truly national concern. Few people would quarrel with the necessity for balancing these interests, but the question is just how are matters of "national concern" going to be determined?

In the United States, as a result of our experience of two hundred years under our Constitution, we have come down rather solidly for allowing the national government to make this determination, and thereby have decided to err, if we do err, on the side of speaking with one voice rather than in the recognition of sectional interests. There is obviously much to be said for this solution, but it also is bound to raise some concerns.

Over a century ago the English political philosopher, John Stuart Mill made this trenchant observation:

> "The disposition of mankind, whether as rulers or as fellow citizens, to impose their own opinions and inclinations as the rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power..."

It would require a great deal more certainty than I feel about the matter to say that the distribution of power between the federal and state governments in the United States is the only way that a vast nation may govern itself, or that it is necessarily the best way that it govern itself. It appears from my limited knowledge of the present situation in Canada that no matter how the debate on the 1987 Accords is resolved, your provinces will have more authority than do our states, and that your national government may have more limited authority in domestic affairs than our national government does. While this may not be a great change from your past, the present constitutional activity in Canada is bringing to the attention of those of us south of our border more detailed knowledge about the Canadian system of government. Surely we in the United States may profit from observing how your country decides the questions now pending before it, and how those decisions work out in the day-to-day practice of government. Rest assured we wish you well, and we may yet profit from your experience.

from its threat.

In 1850, as part of a compromise whereby California was admitted to the union as a free state, Congress enacted a more stringent fugitive slave act providing for summary proceedings before a federal court commissioner aganist one charged with being an escaped slave. The operation of this law outraged many northerners; the long arm of the slave catcher now more effectively reached north of the Mason-Dixon Line. Several of the northern states now reacted with their own version of ''state's rights' or nullification. In Wisconsin a newspaper pubisher named Sherman Booth was charged and convicted in the Federal District Court in Milwaukee of having aided the escape of a fugitive slave. The Supreme Court of Wisconsin promptly issued a writ of habeas corpus freeing him from federal custody, insisting not only that it had a right to do so but that its decision could not be reviewed by the Supreme Court of the United States. The Supreme Court of the United States understandably felt otherwise, and reversed the decision of the Wisconsin court; in proceedings on remand, the state court refused to allow the mandate of the Supreme Court of the United States to be filed.

In 1860 the newly formed Republican party elected Abraham Lincoln to be President of the United States. Between the time of his election and the time of his inauguration, the seven states of the deep south proclaimed their secession from the Union and formed the Confederate States of America. This was ''nullification'' with a vengeance. Lincoln, in his very conciliatory inaugural address on March 4, 1861, made this plea to the seceding states:

> ''Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall between them. A husband and wife may be divorced and go out of the presence and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face, and intercourse, either amicable or hostile, must continue between them. Is it impossible, then, to make that intercourse more advantageous or more satisfactory after separation than before? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens than laws can among friends?''

The southern states did not heed this bit of commonsense advice, and as a result our country fought a long and bloody civil war from 1861 to 1865. What the future of the country would be with respect to state and federal relations was not at all clear at the close of the war. Democrats who had supported President Lincoln's war effort urged that the southern states be readmitted on the basis of ''the Constitution as it was and the Union as it is.'' The Radical Republicans who had become increasingly powerful during the course of the war had much different ideas, and wished to treat the seceded states as ''conquered provinces'' which were to be subjected to a period of military reconstruction before they could be readmitted to the Union. The Radical Republicans prevailed at the polls in 1866; the Civil War amendments to the United States Constitution were adopted, and several important civil rights statutes were enacted by Congress. Many of these provisions lay long dormant, but the tools were there for both Congress and the courts to assert the supremacy of the national government over the states in matters such as this.

A tremendous burst of energy occurred in the United States immediately after the Civil War. Thousands and thousands of miles of railroads were laid, hundreds and hundreds of factories were built, and the country was transformed in a period of less than half a century from a predominantly agrarian society into an industrialized society. The amount of ''interstate commerce'' grew by leaps and bounds. But all of this activity brought with it numerous problems which seemed to demand governmental regulation — the regulation of railroad rates and shipping practices, the enactment of minimum wage and maximum hours statutes, the prohibition of child labor, and the like. The era of ''laissez faire'' during which both the federal government and the state governments had pretty much let people alone, was at an end. The first efforts at regulation in these areas came from the states, but before long it became clear that state regulation of such things as trains moving in interstate commerce had very definite limits. In 1866 the Supreme Court of the United States held that the states might not apply their railroad regulations to trains moving in interstate commerce, and since most trains did move in interstate commerce it became inevitable that Congress would act. It did so by enacting the *Interstate Commerce Act of 1887,* whereby Congress created the first independent regulatory agency — the Interstate Commerce Commission. This was the beginning of a gradual ascendency of federal power in regulating not just transportation, but virtually all of the commercial activities of the country.

Thus, the Civil War and its aftermath fertilized and watered the seeds of national supremacy which had earlier been planted in the United States. The statutes and constitutional amendments enacted at the close of the war vastly increased national authority, and the tremendous industrial expansion in the aftermath of the war demanded national solutions to the problems created by that expansion. This is not to say that



for their continued support and encouragement.

In closing, special thanks to Judges Cumming, St-Cyr, and especially Judge Cuddihy. Without them, it would have been most difficult to fulfill my duties as Chairperson.

## RAPPORT DU COLLEGE JUDICIAIRE CANADIEN également connu sous le nom de COMITE CHARGE DE L'EDUCATION le 26 mars 1988 par juge Jean Marie Bordeleau

En septembre 1987, notre président, M. le juge Kenneth D. Page m'a nommé président du comité précité.

En décembre 1987, j'ai posé ma candidature pour le poste de directeur général ou adjoint du nouveau Collège judiciaire canadien. On m'a informé en janvier 1988 qu'on avait mis mon nom sur la liste des candidats sélectionnés et on m'a convoqué à une entrevue qui a eu lieu le 5 février 1988 devant le comité provisoire. Faisaient partie du comité, outre notre président, Monsieur le juge W. Stevenson de la Cour d'appel de l'Alberta, Monsieur le juge Brassard de la Cour supérieure du Québec, le juge en chef Glube de la Cour suprême de la Nouvelle Ecosse et le juge en chef Hayes de l'Ontario. J'ai appris le 14 mars que l'on n'avait pas retenu ma candidature et qu'un juge avait été nommé en vertu de l'article 96 de la Loi constitutionnelle de 1867. Le décret nommant l'élu au poste n'a pas encore été pris. Je tiens de bonne source qu-un directeur adjoint n'a pas été nommé et qu'il appartiendra au nouveau directeur de décider s'il y aura un adjoint ou non. D'après les renseignements qui m'ont été transmis, le siège social du collège n'a pas encore été fixé.

La nomination d'un juge de la Cour provinciale s'impose afin de protéger les intérêts de notre magistrature. En tant que président, je puis vous assurer que je veillerai au grain; j'ai l'intention de rencontrer le nouveau directeur le plus tôt possible afin de voir à ce que notre magistrature soit représenté à part égale au Collège, tel que le préconise le rapport Stevenson.

Madame le juge Patricia Cumming a accepté de présider le Colloque de l'Atlantique qui se déroulera à Saint Jean, Terre-Neuve du 7 au 10 juin 1988. Monsieur le juge Kennedy a accepté de diriger le comité organisateur.

A l'heure actuelle, le programme n'a pas encore été pris. Je tiens de bonne source qu'un le professeur Ronald Delisle de la Faculté de Droit de l'Université Queen's à Kingston présenterait une communication sur la preuve le 9 juin. On se souviendra que le professeur Delisle était auparavant juge à la Cour provinciale (division criminelle) de l'Ontario et qu'à titre de conférencier, il traite de la preuve aux cours de formation pour les juges depuis plusieurs années. Selon le programme préliminaire, ''La Chartre des droits et les libertés'' et ''Les Armes à feu'' figurent parmi les thèmes qui seront abordés.

Les cours de formation pour les juges n'ont pas encore débuté mais il seront offerts du 18 au 25 mars à Val Morin, Québec, au Far Hills Inn. Quarante-cinq juges s'y sont présentement inscrits. L'honorable juge Antonio Lamer de la Cour suprême du Canada prononcera le discours inaugural. Il y aura, cette année, un volet sur le droit criminel et sur le droit de la famille. Monsieur le juge Stephen Cuddihy présidera le congrès et nous sommes tous les deux chargés du volet qui traite du droit criminel. Le volet se rapportant au droit de la famille est sous la direction de Monsieur le juge André Saint Cyr. Lors des assises annuelles à Halifax, je ferai un compte-rendu des congrès de Val Morin et de Saint Jean.

Je m'en voudrais de clore ce rapport sans remercier vivement le président élu, le directeur général, le comité de direction et les représentants provinciaux de l'appui dont ils ont fait preuve. Je tiens à exprimer ma sincère reconnaissance aux juges Cumming, Saint Cyr et tout particulièrement au juge Cuddihy. Ma tâche de président aurait été beaucoup plus lourde sans l'aide qu'ils m'ont apporté.

## THE ATLANTIC EDUCATION SEMINAR REPORT September 13, 1988 by Judge Patricia L. Cumming

The Atlantic Education Seminar was held June 7-10, 1988 in St. John's, Newfoundland.

The theme of this year's Seminar was ''Evidence'' and the presentations covered various areas of this vast topic. John Frecker, Commissioner with the Law Reform Commission of Canada led off the program with a presentation in the recodification of the Criminal Law. This was followed by a most informative paper delivered by the Assistant Deputy Solicitor General of New Brunswick, Grant Garneau on the application of the Charter of Rights on police interrogation.

Professor Ronald Delisle of the Queens Faculty of Law absorbed those in attendance with his presentations on Bill C-15, Hearsay and Judicial Discretion in admitting evidence. Lively discussion and exchange of views marked these sessions that were accompanied by video clips and hand-outs and as can usually be expected after a session with Professor Delisle, the

members present left with a slightly different perspective on the need for "Rules" of Evidence.

Judge Robert Fowler of the Newfoundland Provincial Court prompted the exchange of helpful comments with his paper on the child witness. An impromptu role-play by two of the judges present underscored the fallibility of all witnesses, not just child witnesses, in the ability to recall details of an incident and illustrated to the Judges present that the main elements of the incident can nonetheless remain firmly and accurately in one's mind.

Finally, the group was brought up to date by Ed Tollefson, Department of Justice, Canada on the status of the project to codify the rules of evidence.

The Seminar was attended by approximately 22 Judges from New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and the Northwest Territories. The high attendance at all sessions and general comments received indicate that the program was a success in providing beneficial information to those attending.

The hospitality of the Newfoundland Judges could not be surpassed. Our hosts freely gave of their time, energy, and automobiles to take us visiting Judges for scenic tours around the area. For those who have not yet had the experience, the Newfoundland landscape is breathtaking, the City of St. John's a delight. I wish to thank all the Newfoundland Provincial Court Judges for their friendliness, hospitality and enthusiasm.

As Chairman of the Education Program, I would particularly like to thank Judge Bruce LeGrow, Venue Co-ordinator, Judge Owen Kennedy, Newfoundland Provincial Judges Education Chairman, and Judge Gerry Barnable, President of the Newfoundland Association for all their work and tireless efforts which made the 1988 Atlantic Seminar a success.

### COMMITTEE ON THE LAW
### September 13, 1988
### by Judge R. Harvie Allan

In September, 1987, our incoming President appointed me to chair the Committee on the Law. I thank President Ken Page for his confidence in me in this regard. I only wish I could report positive results at this time.

Upon my appointment, I added Their Honours Judge Patricia Cumming of New Brunswick, Senior Judge Charles Scullion of Ontario, Judge Louis-Jacques Léger of Quebec, and Judge Daniel C. Abbott of Alberta to the Committee. I then contacted E.A. Tollefson, Co-ordinator, Criminal Justice Review of the Federal Department of Justice, to advise him that our Committee stood ready to consult on future proposed amendments to the Criminal Law.

Mr. Tollefson replied that he was at the present consulting with the provinces on Chapters 2, 3 and 4 of Volume I of the Law Reform Commission's Draft Criminal Code. He indicated that when he had completed his consultation with the provinces, he would carry out similar consultations with our Association, among other interested groups. He undertook to contact me further as soon as his consultative turntable was worked out. I can only assume that the timetable has not as yet been settled, as I have heard nothing from him in the past nine months.

At the meeting of the Executive of our Association in Montreal at the end of March, 1988, a letter from Chief Judge Strange of New Brunswick was considered. The letter was with respect to expanding the absolute jurisdiction of Provincial Court Judges under the Criminal Code to include those offences attracting a maximum term of incarceration of five years from the present situation of offences attracting a maximum term of incarceration of two years. The Executive referred that proposal to the Committee on the Law for further report.

I wrote to the Honourable Ray Hnatyshyn, the Federal Minister of Justice, to advise him of our aspirations to enhance the status of Provincial Courts uniformly across Canada, and I suggested that an increase of the jurisdiction of the Provincial Courts along the lines proposed by Chief Judge Strange would be one initiative to accomplish this. I asked for his reaction to the proposal and whether he and his officials were sympathetic to our aspirations. If his reaction is negative, or if I do not receive any encouraging reply from him, then I propose that the services of the Provincial Representatives be enlisted to contact their respective Ministers of Justice and their provincial sub-sections of the Canadian Bar Association to try to secure their respective support for this increase in our jurisdiction.

This completes my report on what has, unfortunately, been an inactive year for the Committee on the Law. I thank my fellow committee members for agreeing to serve with me on the Committee, and I regret that I could not provide them with a meaningful challenge.

### REPORT ON THE COMMITTEE ON JUDICIAL INDEPENDENCE
### September 13, 1988
### by Judge Jacques Desjardins

At the invitation of our President, Judge Ken Page, I have accepted to chair the Committee on Judicial Independence. The Model Act having been received at the annual meeting in Van-



from Ottawa. This sort of sectionalism is the price that any geographically great nation pays for being a unitary state.

Why, then, if these sectional differences are bound to crop up in any large country such as Canada or the United States, has the resolution of state-national relations in the United States been so different from that which has been reached in Canada? Journey back with me, if you will, to the time in the United States between the end of our Revolutionary War in 1783 and the calling of the Constitutional Convention at Philadelphia in 1787. There was great concern among the then thirteen states operating under the Articles of Confederation that the new nation was rapidly becoming "Balkanized" commercially. It is said, for example, that the State of New Jersey was a "keg tapped at both ends." The state had no seaport of its own, and its exports and imports came either through New York or Philadelphia, and each of these port cities imposed taxes and fees at will on New Jersey's exports and imports. Some authority which could provide uniform regulation of commerce was seen in the eyes of many as a necessity for the survival of the new nation. And so when the Constitutional Convention was assigning powers to the newly created federal legislature — the Congress - it quite naturally gave congress the authority to regulate commerce among the several states and with foreign nations.

The Farmers in constituting the federal government decided, in what seemed at the time to be a very cautious approach, to give the federal government only certain delegated powers, and to reserve all other powers to the states. It is my understanding that the *British North America Act of 1867,* as construed by the Supreme Court of Canada, came out quite differently in this respect, with the provinces having delegated powers and all other power being reserved to the federal government. In 1787 the power to regulate interstate commerce granted to Congress was seen not only as a necessity for the new nation, but probably was not seen to be a grant of any very sweeping authority. Interstate commerce was conducted by sailing ships and horse-drawn wagons — the steamboat was twenty years away, and the steam railroad was forty years away — and there simply wasn't a geat deal of interstate commerce in 1787.

But all of this changed quite rapidly after the adoption of the Constitution. The Supreme Court, under Chief Justice John Marshall, construed the power to regulate commerce broadly, and also made clear that although the national government was a government of delegated powers, when that government operated within those powers its acts were supreme. John Marshall was very much a nationalist — even before the Constitution was adopted, he referred to his experience as a young man commanding an artillery company in Washington's army as having made him think of "the United States as my country and Congress as my government." His presence as a supremely able Chief Justice in the early days of our constitutional history gave our constitutional law a nationalist bent which it might not have otherwise had.

Meanwhile steamboats began plying first the Hudson River and then the Great Lakes, and railroads began to link major cities — interstate commerce grew by leaps and bounds. Thus the way our Constitution was drafted and interpreted, and the transportation revolution that began in the first part of the Nineteenth Century, combined to assure that in the long run the national government, as opposed to the state governments, would be the dominant force in regulating commercial activity.

This was certainly not at first apparent to observers of the young nation in the first part of the nineteenth century. The states jealously watched the new government to see that it stayed within its delegated powers, and indeed Thomas Jefferson and his Democratic party made "state's rights" and a limited role for the national government a tenet of their faith. When Congress in 1798 passed the *Alien* and *Sedition Acts,* rather seriously abridging freedom of speech and freedom of the press by today's standards, Thomas Jefferson and James Madison authored what were called the Virginia and Kentucky Resolutions setting forth the view that these *Acts* were unconstitutional. But the resolutions went further and set forth the much more far-reaching proposition that any time Congress palpably exceeded its authority under the Constitution, each state had an equal right to judge for itself whether this was the case. Here was sown the first seed of the doctrine of "nullification" of which the nation would hear much in the next 60 years.

But nullification and the threat of secession were not the monopoly of Southerners or of Jeffersonian Democrats. In the dark days of the War of 1812 — fought, in large part, of course, between the United States and Canada — the five New England states sent delegates to an assembly called the "Hartford Convention" where rumblings of secession were heard. Favorable news about the contents of the Treaty of Ghent concluding the War of 1812, and of Andrew Jackson's victory over the British forces at New Orleans, put a stop to further disaffection at this time. But the idea of "nullification" reared its head some twenty years later when South Carolina violently objected to a tariff which it felt was unfair to states primarily engaged in agriculture which had to import most of their manufactured goods. At a famous dinner in Washington in 1832, John C. Calhoun, the Vice President of the United States from South Carolina backed away

# FEDERALISM IN NORTH AMERICA

**Montreal - September 2, 1987**

**Remarks for a Luncheon Presentation in Montreal, Quebec on the occasion of La Journée du Barreau***

**The Honourable William Rehnquist**
**Chief Justice of the United States of America**

Surely there could not have been a happier choice than the present year — 1987 — to commence an interchange of lawyers and judges between the United States and Canada. In the United States the year 1987, of course, represents the bicentennial of the signing of our Constitution by its framers in Philadelphia. Thanks to the very effective work of the Bicentennial Commission, under the leadership of former Chief Justice Warren Burger, our country is in the midst of celebrating the anniversary of a constitution created two hundred years ago. Unlike Canada, the United States has never had to "patriate" its Constitution; the Battle of Yorktown in 1781 and the Treaty of Paris in 1783 ending our Revolutionary War took care of that. Thus the attitude in the United States this year towards our Constitution is by and large one of celebration and reflection rather than proposals for change.

In Canada, on the other hand, constitutionally speaking 1987 is not the anniversary of a great event which occurred many years ago, but is itself the very year of the Meech Lake Accords signed by Prime Minister Mulroney and the First Ministers of all ten provinces — Accords which if ratified would make significant changes in its Constitution of 1982. I understand that the Constitution of 1982, in keeping with Canadian tradition, provides for more decentralization as between the provinces and the national government than has been the case in the United States. I am told that the 1987 Accords, if ratified, will have the effect of further decentralizing the Canadian system. Thus, constitutionally speaking, 1987 in Canada is a year, not of celebration of events long past, but of important decisions for the present and the future.

Professor J.R. Mallory of McGill University, in an article published several years ago, quoted a retired Canadian Cabinet Minister as asking, "Why does federal-provincial conflict in Canada loom so large in contrast to federal-state conflict in the United States?" Professor Mallory suggested that the separation of powers both within our federal government itself, as well as between the federal government and the states, and the fact that there are only ten provinces in Canada as against fifty states in the United States, both have a bearing on the answer to this question. I am sure that he is correct, and I must say that I, too, find the question an interesting one, both from the point of view of political theory and of practice. But I would like to suggest to you today that historical considerations quite apart from pure theory have also played a significant part in setting the supremacy of the federal government over the state governments in our country.

No nation that spans the North American continent — whether it be from Maine to California and beyond, as in the case of the United States, or from Cape Race to Nootka Sound, as in the case of Canada, can exist without sectional differences. Large cities need help with urban problems, fishermen need help with their fishing, farmers on land where rain is plentiful want protection against overproduction, those who try to farm land in arid climates need irrigation if they are to produce anything at all. The capital city of any nation covering millions of square miles will seem remote and distant politically as well as physically to citizens in various parts of the country.

I practiced law for sixteen years in Pheonix, Arizona, and during that time it was my privilege to represent some clients from British Columbia who had business interests in Arizona. I became good friends with one of them personally, and we used to talk about more than just his company's legal problems. My British Columbian friend was adamant in his view that the boundary line separating our two countries should have run north and south instead of east and west — he felt that British Columbia had a good deal more in common with the western states of the United States than it did with other parts of Canada. I had to tell him that many people in Arizona were as little able to understand some of the policies being laid down in Washington as he was unable to understand the political emanations

***EDITOR'S NOTE: The first Canada-United States Legal Exchange was held in Ottawa-Montreal-Toronto and in Washington in the fall of 1987. Each country was represented by a team of seven lawyers and seven judges, who met together for one week in Canada and one week in the United States. The Exchange was sponsored by the American College of Trial Lawyers, Chief Justice Rehnquist and Chief Justice Dickson. Professor Ed Ratushny, Faculty of Law, University of Ottawa, served as rapporteur. The Journal has undertaken publication of a number of papers presented at one of the panels on the program of which this and the following paper are the first two.**



couver (prepared under the Chairmanship of Judge Hiram Carver), there remained no ongoing projects for the Committee. Consequently, I felt no need to appoint members to assist me.

At the meeting of the Executive in Montreal, the following motion was adopted:

> "that the Committee on Judicial Independence consider whether judges should be independently represented on appeals of decisions involving contempt proceedings or proceedings involving prerogative writs"

The Committee does not have an answer nor any recommendations to present at this annual meeting. A preliminary study discloses that the Province of New Brunswick has recently set a precedent of some sort in this regard. The present Attorney General has approved payment of a solicitor's fee for services rendered when he was engaged by a Provincial Court Judge. He had sought leave to appeal an order (see page 28 for the text of this order) made by a Superior Court Judge on judicial review (mandamus).

At the outset, it would seem proper in some rare instances where Provincial Court Judges should be independently represented on proceedings involving prerogative writs.

The committee will have to study and recommend guidelines as to when a Judge should seek counsel and also a mechanism on securing his right to independent counsel to be provided at the expense of the Attorney-General. This study, I hope, could be accomplished during this upcoming year by this Committee.

## JOURNAL REPORT
**September 13, 1988**
**by Jude M. Reginald Reid**

Since the last annual meeting at Vancouver, B.C., in September 1987, the Journal has been published quarterly as required by our mandate.

We have not experienced any major problems and no minor ones except the normal difficulties of meeting deadlines, etc.

During the past year you may have noticed an effort to involve Provincial Editors a bit more directly in the Editorial Page through contributions from the provinces and territories. This has worked out very well and it is hoped this process may be continued and enhanced.

You will also notice a change in the manner of distribution of the Journal in that the Journal is now packaged and sent in bulk to the Chief Judges' offices in the two Territories and in all but one province, and the Chief Judges' offices in turn distribute them within the provinces.

Our sincere appreciation goes out to all Chief Judges whose generosity has made my job much easlier, not having to maintain an extensive and somewhat fluid mailing list.

Interest in the Journal continues to be high as we have had enquiries for subscriptions from persons and organizations both within and outside Canada as well as from academics who wish to use our publication from time to time for educational purposes.

We have some regular contributors to the Journal as well as some occasional ones. We would like to thank them all for their contributions of the past and hope they will continue their support in the future.

Finally we would urge every member of this Association to submit items and articles of interest in either or both official languages to the Journal so that we may all share those valuable interests we have in common.

## CIVIL COURTS COMMITTEE REPORT
**September 13, 1988**
**by Judge Pamela Thompson**

### Overview

Some of the initiatives of your Committee seemed to be losing steam. This is partly a reflection of the lack of interest in civil matters within the Association as well as a reluctance on the part of your Chairperson to become a "nag". The initiatives with respect to the reporting of the Civil Court judgments and mediation are essentially at a standstill.

Alberta and Ontario are submmitting judgments but no one else is. It would appear that the topic of training, pre-trial and mediation procedures will have to await a later date and different approach.

The process of consultation with Law Reform Commissions and Attorneys General continues on an ad hoc basis.

### Judicial Education

There will be a civil programme offered at the 1989 Judges' Training Conference. In addition to the many joint sessions with the other two Divisions, there will be a separate continuing education programme. I hope that a seminar on listening and memory skills might be offered.

I attach hereto my report to the Executive in March 1988 which fairly summarizes the activity of the Committee.

**Conference on Access to Civil Justice**

At the request of the President, I was pleased to represent the CAPCJ at the Conference on Access to Civil Justice sponsored by the Attorney General for Ontario in Toronto during June. The Conference was an intensive two and a half day study of the practical, social, political and philosophical issues revolving around this subject. A copy of the papers presented in plenary and workshop sessions have been sent to the Executive Director for access by those who are interested.

Some of the topics which were of particular interest were:

— "Problems and Experience with the Ontario Civil Justice System: A Preliminary Report" by Neil Vidmar and W.A. Bogart who did an extensive research with respect to the operation of the Courts;

— "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship" including a Bibliographic Essay by Professor Mary Jane Mossman which includes an annotated summary of articles written in the last few years, as well an index to Canadian Legal Periodical Literature on the subject;

— "A Lawyer's View of Access to Justice" by lawyer Harvey Bliss. Mr. Bliss made a plea to the delegates that the Attorneys General need a public constituency so that they can go to Cabinet for a greater share of provincial budgets. He suggested that Kiwanis Clubs, Lions Clubs, etc. should be educated with respect to the needs of the justice system;

— "Access to Civil and Administrative Justice in Quebec" by Charles Balleau;

— "Access to Civil Justice: Making Comparisons" by Professor Iain Ramsay;

— "Accessibility Efficiency and Effectiveness: Conflicting Objectives of Civil Procedure and Adjournment Experience" by Konstanze Plett of the University of Bremen;

— "Critical Moments in Access to Justice Theory: The Quest for the Empowered Self" by David M. Trubek of the University of Wisconsin who was very controversial and entertaining;

— "Barriers to Access: Including the Excluded" by Andrew Roman;

— "Access to Civil Justice for Aboriginal People" by Sam Stevens who is Director of the Native Law Program at the University of British Columbia — a most interesting and informative person and paper;

— "The Cost of Justice" by Fred Zemans and Richard Gathercole;

— "Varieties and Mediation Performance; Replicating Differences in Access to Justice" by Sally Engle Merry;

— "Intervenor Status and Funding" by David Poch;

— "Procedural Barriers" by Justice Horace Krever;

— "Paralegals" by Professor Eileen Gillese;

— "Mediation" by Glenn Sigurdson and also by Richard Thomas, Director of Consumer Affairs in the Office of Fair Trading.

I was pleased to be able to meet the Attorneys General of British Columbia, Yukon, Prince Edward Island, Alberta and Saskatchewan. I spent some time with the Attorney General of Saskatchewan discussing the proposed amendments to the Small Claims Act in that province.

I would like to thank the members of the Executive Committee for the continuing support of your Chairperson and Committee.

I would be pleased to hear all ideas as to topics that might be pursued in the year to come.

**LE COMITE DES COURS CIVILES**
**13 septembre 1988**
**par juge Pamela Thompson**

**En Gros**

Les initiatives du comité s'évanouissent, d'une part à cause du manque d'intérêt dans les matières civiles parmi les membres et d'autre part parce que la présidente du comité ne veut pas continuer à harceler. Les projects concernant les recueils de jurisprudence et la médiation sont intérrompus.

Les consultations avec les Commissions de Réforme du Droit et les Procureurs Généraux se poursuivent.

**L'Education Judiciaire**

Il y aura un programme civil au Colloque pour la Formation des Juges en mars 1989. En plus des sessions conjointes, on offrira un programme spécifiquement centré sur les matières civiles. J'espère qu'on va suivre un



séminaire concernant l'habileté d'écoute et de mémoire.

Y'inclu mon rapport soumis en mars 1988 comme sommaire des activités du comité.

**Congres sur l'acces a la justice civil**

A la demande de notre Président, j'ai eu lhonneur de représenter l'A.C.J.C.P. à ce congrès sous l'auspice du Procureur Général de l'Ontario. C'était une étude intensive des questions sociales, politiques et philosophiques soulevées.

J'y ai rencontré les Procureurs Généraux de plusieurs provinces.

Voici quelques uns des exposés d'intérêt presentés:

— "Problems and Experience with the Ontario Civil Justice System: A Preliminary Report" par Neil Vidmar et W.A. Bogart,

— "Access to Civil Justice: A Review of Canadian Legal Academic Scholarship" par la Professeure Mary Jane Mossman,

— "A Lawyer's View of Access to Justice" par l'avocat Harvey Bliss,

— "Access to Civil and Administrative Justice in Quebec" par Charles Balleau,

— "Access to Civil Justice: Making Comparisons" par le Professeur Iain Ramsay,

— "Accessibility Efficiency and Effectiveness: Conflicting Objectives of Civil Procedure in the German Experience" par Konstanze Plett de l'Université de Bremen,

— "Critical Moments in Access to Justice Theory: The Quest for the Empowered Self" par David M. Trubek de l'Université de Wisconsin,

— "Barriers to Access: Including the Excluded" par Andrew Roman,

— "Access to Civil Justice for Aboriginal People" par Sam Stevens, Directeur du "Native Law Program" à l'Université de la Columbie Britanique,

— "The Cost of Justice" par Fred Zemans et Richard Gathercole,

— "Varieties of Mediation Performance: Replicating Differences in Access to Justice" par la Professeure Sally Engle Merry,

— "Intervenor Status and Funding" par David Poch,

— "Procedural Barriers" par l'Honorable Juge Horace Krever,

— "Paralegals" par la Professeure Eileen Gillese,

— "Mediation" par Glenn Sigurdson et aussi par Richard Thomas de l'Anglettere.

Le Directeur Executif a des copies des exposés présentés.

Je voudrais remercier les membres du Comité Executif pour leur appui constant. Votre Comité serait heureux de reçevoir vos idées.