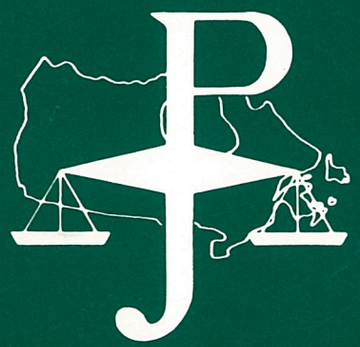

PROVINCIAL JUDGES

# Journal

## DES JUGES PROVINCIAUX

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THE CANADIAN ASSOCIATION OF
PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES
JUGES DE COURS PROVINCIALES

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# The Westin, Winnipeg, Manitoba
# 21 - 24 septembre 1994

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Téléphone _____ Fax _____

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Date d'expiration _____

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**Date limite d'inscription:** 15 août 1994

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# Editor's Notebook / Remarques du rédacteur

In his report on behalf of the CAPCJ to the mid-winter meeting of the Canadian Bar Association held in February, our president Gerry Barnable said "Our interest does not include having any judges in the news...." As I have discovered myself on a couple of occasions during the past few months, we judges are considered to be very newsworthy. Almost anything said or done by a judge seems to be a "man bites dog" story. Because the media and the public put an inflated value on us and our activities, if we speak or act rashly, we do so at our peril.

In his report Gerry Barnable offers a brief but clear picture of what we provincial judges are and what we aren't, how we came to be this way and where we are headed. His comments are not only an explanation or description of us to the bar, they are also a challenge for us.

Judicial behaviour is also the subject of a scholarly article written by Judge R.E. "Bud" Kimball of the Provincial Court in the Annapolis Valley of Nova Scotia. Judge Kimball has been a critical observer of judicial activity throughout his quarter century on the bench. On a few occasions when I practised I had the good fortune to appear in Bud's courtroom. Everyone there was treated with courtesy and dignity.

Judge Donna Martinson of Vancouver has not only found a new lease on life since she moved from criminal to civil law, she has also provided us with a clear picture of why British Columbia's Provincial Civil Court is held in such high regard. Is the B.C. civil court success adaptable to our criminal courts?

While reading a recent issue of Le Praetor, the interesting and informative monthly publication of Provincial Judges in Quebec, I was delighted to come upon "Une Bonne Action", the first chapter of a judicial mystery story being written by retired judge Paul Robitaille. found the story itself

Dans son rapport au nom de l'ACJCP lors de la réunion d'hiver de l'Association du barreau canadien, notre Président Gerry Barnable a dit «Il n'est pas de notre intérêt que les juges fassent parler d'eux dans les médias...» Comme je l'ai découvert moi-même à plusieurs reprises au cours des derniers mois, les juges sont considérés comme particulièrement dignes de faire parler d'eux. Presque tout ce qui est dit ou fait par un juge semble faire l'objet d'un fait divers. Dans la mesure où les médias et le public nous accordent et accordent à nos activités une importance exagérée, si vous parlons ou agissons sans réfléchir, nous le faisons à nos propres risques.

Dans son rapport, Gerry Barnable présente un tableau bref mais explicite de ce que sont et ne sont pas les juges provinciaux, de la manière dont nous en sommes arrivés là et de la direction vers laquelle nous nous dirigeons. Ses commentaires ne sont pas seulement une explication ou une description de notre rôle au barreau, ils sont aussi pour nous un défi.

Le comportement judiciaire est également le sujet d'un article érudit écrit par le Juge R.E. «Bud» Kimball de la cour provinciale de la vallée de l'Annapolis en Nouvelle-Écosse. Le Juge Kimball a été un observateur critique de l'activité judiciaire durant le quart de siècle pendant lequel il a exercé la fonction de juge. À plusieurs reprises, lorsque j'exerçais, j'ai eu la chance de plaider dans la cour de Bud. Tout le monde y était traité avec courtoisie et dignité.

Madame la Juge Donna Martinson de Vancouver a non seulement retrouvé une nouvelle jeunesse lorsqu'elle est passé du droit pénal au droit civil, mais elle nous a également dressé un tableau explicite des raisons pour lesquelles la cour civile provinciale de Colombie-Britannique était tenue en aussi haute estime. La réussite des



# Registration Form
# C.A.P.C.J. Annual Meeting
# The Westin, Winnipeg, Manitoba
# September 21 - 24, 1994

Name of Judge _____

Name of Court _____

Mailing Address _____

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Telephone _____ Fax _____

Name(s) of Guests(s) _____

Any special concerns or requests _____

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**Registration Fee:** Judges $300. Guests $150.

**Registration Deadline:** August 15, 1994

**Mail or Fax this form To:** Judge John Guy
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**Telephone:** 204-945-8005
**Fax:** 204-945-0552

# Feedback/ Réactions

*When the following letter was published in Vol.17, No4, the final paragraph was inadvertently omitted. At the request of Judge Bourassa the letter is now printed in full: ed.*

November 2, 1993

Dear Pat:

I write in response to Parker Barss Donham's article in the Fall 1993 Edition of the Journal - "Priestly Cult of the Law".

I have great respect for Mr. Barss Donham and the journalists of his caliber. However, I fear he has fallen victim to the propaganda of lesser journalists who would cover their own lack of caliber with the cloak of sanctimony - also sometimes referred to as the Hide of the Sacred Cow.

The complaint he incants is a cliche of the trade - "Leave us alone, to do what we do, regardless of the consequences", the media says, "the excesses that we perpetrate are a small price to pay for the higher good of a free press".

Unfortunately, for many journalists, "free" means unrestrained, non-accountable and irresponsible.

To allow the media to do their unbridled worst and turn a trial into a media circus - a term invented by them - happens, and frequently. When it does, there is no justice, fairness or balance. Innocent people are hurt, rights are compromised, the Courts and the Rule of Law become tainted by the spectacle. Any higher good is long lost in the dirt and clamour raised by the pack.

We have all witnessed this for years. It is hardly surprising that the law is developing protective rules for those involved in court process. The law is simply responding to a need. It's surprising it hasn't happened sooner.

The warm sentiments that Mr. Barss-Donham quotes in support of his proposition are from another era. Today, the same sentiments read "Extremism in the pursuit of liberty is no vice" (VP Spiro Agnew) - a sentiment roundly condemned by all.

Yours truly,

R.M. Bourassa
Territorial Court Judge
Yellowknife, NT



so interesting, as well as the demonstration of how a retired judge could put his time to good use, that I sought permission from the author and the editor to reproduce the story in the Journal for a wider audience. They promptly gave their permission. If space permits as the story unfolds, future chapters might also appear in the Journal.

Unless backlogs are much shorter where you are than where I am, it's not too soon to be blocking out time and making preliminary plans for attending the CAPCJ annual meeting to be held in Winnipeg from September 21 to 25. I am told that Winnipeg is one of the sunniest places in Canada, although I can recall experiencing a lot of "liquid sunshine" during a visit there. I did wrangle an official promise of nothing but clear skies for the convention.

Pat Curran
*Editor*

tribunaux civils en C.-B. est-elle adaptable à nos cours pénales?

En lisant un récent numéro de Le Praetor, la publication mensuelle, intéressante et informative, des juges provinciaux du Québec, j'ai été ravi de découvrir «Une Bonne Action», premier chapitre d'une intrigue judiciaire écrite par le Juge à la retraite Paul Robitaille. J'ai trouvé l'histoire en elle-même tellement intéressante, en plus de montrer comment un juge à la retraite peut mettre son temps à profit, que j'ai demandé à l'auteur et au rédacteur la permission de reproduire cette histoire dans le Journal pour un public plus large. Ils ont promptement donné leur accord. Si l'espace le permet, les chapitres suivants pourraient également paraître dans le Journal.

À moins que les arriérés de travail soient beaucoup plus réduits chez vous que chez moi, il n'est pas trop tôt pour prévoir le temps et faire des projets en vue d'assister à l'assemblée générale annuelle de l'ACJCP qui se tiendra à Winnipeg du 21 au 25 septembre. Il paraît que Winnipeg est l'un des endroits les plus ensoleillés du Canada bien que je me souvienne avoir essuyé beaucoup de «soleil mouillé» durant une de mes visites. J'ai réussi à extorquer une promesse officielle que le ciel resterait clair durant tout le congrès.

Pat Curran
*Rédacteur*

**Deadline for Next Issue**
**May 1, 1994**

Whenever possible, submissions should be on 3.5 inch computer disk, Wordperfect to version 5.0, Microsoft Word to version 4.0 or ASCII, as well as in hard (printed or typed) form.

**Date limite pour le prochain numéro : le 1er mai 1994.**

Dans la mesure du possible, les soumissions devraient être présentées sur disquette de 3,5 po, en format Wordperfect jusqu'à la version 5.0, en format Microsoft Word jusqu'à la version 4.0 ou en format ASCII, ainsi que sur copie papier (imprimée ou dactylographiée).

# CAPCJ President's Report to The Mid-Winter Meeting of The Canadian Bar Association

# Rapport du Président de l'ACJCP à la réunion d'hiver de l'Association du barreau canadien

*The Honourable G.J. Barnable / L'honorable G.J. Barnable*

I have come to tell you about the 'other' judiciary - the one that Canadians who haven't got a lot of trouble, or a lot of money, or a lot of power usually get to know.

Twenty years ago the provincial judges and magistrates organized themselves nationally. Their Association has had one purpose ever since - to better their working lives.

Prior to that time, education for such officials amounted to no more than an annual invitation to the provincial capital, there to be told what the various heads of government departments meant by their laws, and instructed in how to fill out forms and reports.

So, naturally the new national association focused on education in a broader sense. While our purpose is quite singular, our perception of what is our interest is very broad. our interest includes not only education on substantive and procedural law but also education on social concerns and attitudel change. This is what Judge Campbell and the WJEC have been doing for years.

Our interest is to enhance our status by every honourable means. Job actions and protests are not in our interest.

Our interest includes reaching out and connecting with marginalized people and disadvantaged people on the one hand and to powerful people like yourselves on the other. And even if our touch is sometimes clumsy, or when the gesture goes unnoticed or unappreciated, we will continue to reach.

Our interest does not include having any judges in the news, either in criminal,

Je suis venu vous parler de 'l'autre' pouvoir judiciaire - de celui auquel ont généralement affaire les Canadiens qui ont peu de problèmes, ou peu d'argent ou peu de pouvoir.

Il y a vingt ans, les juges et les magistrats provinciaux se sont organisés au niveau national. Leur association a eu depuis pour principal objectif d'améliorer leur vie professionnelle.

Avant cette époque, l'éducation de ces fonctionnaires se réduisait à une simple invitation annuelle à la capitale provinciale, où ils apprenaient ce que les différents dirigeants des ministères gouvernementaux entendaient par leurs lois et comment remplir des formulaires et des rapports.

La nouvelle association nationale a donc naturellement mis l'accent sur l'éducation au sens plus large. Bien que notre objectif soit très spécifique, notre perception de notre intérêt est très vaste. Nous nous intéressons non seulement à l'éducation en matière de droit substantiel et de droit de la procédure mais également à l'éducation concernant les préoccupations sociales et les changements d'attitudes. C'est ce que font le Juge Campbell et le WJEC depuis bon nombre d'années.

Il est de notre intérêt d'améliorer notre statut par tous les moyens honorables.

Les moyens de pression et les protestations ne sont pas dans notre intérêt.

Il est de notre intérêt de tendre la main et de communiquer d'une part avec les personnes marginalisées et défavorisées et d'autre part avec les gens puissants, comme vous-mêmes. Et même si notre effort est



proceedings but because these decisions have the effect of bringing the proceedings to an end they should be made by a judge.

The obtaining of admissions and the making of disclosure orders help significantly in making the trial proceed expeditiously and inexpensively. Before the new **Act** came into force a day of hearing small claims trials could be unpleasant for all concerned. As all disputed cases were set for trial, a judge, usually with a very large trial list, would end up acting as mediator, adjudicator and general traffic director. People arrived unable to prove their cases and with claims unknown at law. Now a trial coordinator sets the trial based on the time estimates given by the judge at the Settlement Conference. Civil trials are a much more civilized event and generally the judge has sufficient information to make a reasoned and accurate decision on both the facts and the law.

## Conclusion

Provincial Court Judges should hear civil cases. People have disputes that need to be resolved but not everyone can afford lengthy and costly superior court litigation. This is a gap in the administration of justice that can be filled by Provincial Court Judges. We can provide a relatively inexpensive and streamlined process that will enhance both the administration of justice and its image. The mandatory settlement conference presided over by a judge plays an important role in achieving that result.

Is this a role that judges will find interesting and professionally challenging? I find the civil work to be both. With the increase in jurisdiction more and more lawyers appear. Yet there are often cases where only one party is represented. That was not the norm for me when sitting in a criminal court. I tend to take a more active role in the proceedings as a result.

I have had to study a number of areas of the civil law and I have found the experience to be interesting and refreshing. I prepare written reasons in many of my cases. Several of my colleagues do as well. Presiding at a Settlement Conference is the most difficult task I've performed as a judge. It can be tiring and sometimes frustrating. But, by combining legal, mediation and human skills, the experience can be particularly rewarding.

While I have concluded that the civil jurisdiction of the Provincial Court is one worth preserving, I also see that it is being seriously challenged. I hope Provincial Courts across the country do not let it slip away.

## Notes

1. Of thirty-eight nominations from the United States and Canada, the program received an Honourable Mention, one of three awards given.
2. B.C. Regulations 477/90. See **Small Claims Act** SBC 1989 c. 38 and the Small Claims Rules.
3. Rule 7, **Small Claims Rules.**
4. **Small Claims Act**, supra. note 2, section 19(4).
5. Semmens & Adams, **Evaluation of the Small Claims Program,** Province of B.C., Ministry of Attorney General.
6. In Manitoba, for example, the Small Claims jurisdiction ($5,000.00) is under the administration of the Court of Queens Bench and is presided over by non-lawyer, clerical staff known as Deputy Registrars.
7. Dennis Schmidt, "Endangered Species" - "The Universal Custom of the Realm", **The Verdict** Issue 61, January/94, The Trial Lawyers Associations of British Columbia, P. 16.
8. Deschenes, Jules "Independent Judicial Administration of the Courts", a 1981 Study sponsored by the Canadian Judicial Council in cooperation with the Canadian Judges Conference and the Canadian Institute for the Administration of Justice.
9. *Ibid.*, p. 108
10. *Ibid.*, p. 107.

*There are methods of dispute resolution apart from the courts which may be appropriate to certain fact patterns. However, should the tax payers who build our great edifices of law be required to abandon their rights and obligations in law because their case is not important enough to apply the law to it?*

There is also the issue of judicial independence. In 1981 an extensive study on the independent judicial administration of the courts was prepared by the Honourable Jules Deschenes. Justice Deschenes considered Small Claims Courts and had strong reservations about using non-judges as decision makers. He recommended that "the tendency to raise the monetary limit for small claims and simultaneously to entrust decisions on small claims to adjudicators or officials appointed during pleasure, should be resisted". In referring to trends in Nova Scotia and the Yukon he said:

> *There is therefore a trend in both the east and the west to treat small claims (a misnomer, really) in a different way, by placing them in the hands of officials who have no permanent status. This method does nothing to enhance the prestige of the courts in the eyes of the public. To diminish the quality of the legal apparatus on the grounds that the interests at stake are minimal and justify neither the effort nor the required expenditure of a "real" trial before a "real" judge betokens a false concept of the public interest.*
>
> *Those who nourish this trend are putting a worm in the fruit, for if the ceiling on small claims continues to rise, we shall soon — and all unaware — have a system of bureaucratic justice in which not even a semblance of the primacy of the rule of law will remain. Petty officials with pared-down independence will replace professional judges. It is not certain that the public will pay less under this system but it will have lost the guarantee of impartiality and competence previously taken for granted and its freedoms will have been eroded. The formula is* a short-sighted one and no economic or geographic arguments can justify it.

## Should the civil role extend to mandatory settlement conferences?

The experience in British Columbia during the three years of operation of the **Small Claims Act** is that the mandatory conference does facilitate settlements and helps organize cases for trial. It organizes the case by creating a "one-stop shopping" forum which substitutes for the extensive disclosure provisions of superior court rules that can lead to numerous pre-trial steps.

Should a judge perform this function? My answer is a definite "yes". Sixty-four per cent of the disputes are resolved at the Settlement Conference stage. For the reasons referred to above, litigants are fully entitled to have their disputes considered at this stage by legally trained and independent judges.

I recognize the advancements that have been made in the area of alternate dispute resolution and believe it is in the interest of all parties in the process to be advised that there are alternative dispute mechanisms available and how to obtain access to them. However, the **Rules** make the Settlement Conference compulsory. Once a case enters the court system it is, in my opinion, essential that the conference should be presided over by a Judge, rather than a lawyer or a lay mediator. This is also the view of the vast majority of the civil judges sitting in Vancouver.

There are practical considerations as well. With respect to mediation, only 20 - 30 minutes is allocated to a Settlement Conference. To have any hope of success in that time the credibility of the mediator must be established immediately. Our experience suggests that simply by virtue of their position, judges are "given" credibility by the parties. In the more conventional mediation, it would take considerably longer to establish that credibility.

It is even more obvious that judges should perform pre-trial functions. Judges have the power at a Settlement Conference to dismiss frivolous claims or make Payment Orders where no defence is raised. This should be done at an early stage of the



scandalous or even colourful settings. Nor are we interested in giving comfort to any judges whose utterances demonstrate lack of appreciation for right and wrong, or for what is acceptable and unacceptable conduct

Our interest is in keeping every provincial court judge closely attached to his or her oath of office and far away from judicial council disciplinary proceedings.

Mine reads in part, **"...I will do right to all manner of people, after the laws and usages of this province, without fear or favour, affection, or ill-will, so help me, God."**

When a person makes an oath he commits himself in a very particular way to the truth of the statement. He offers himself as guarantee. The entitlement to behave independently only follows after, and is empowered by the pledge to "do right to all manner of people" There is a whole code of ethics contained in this oath. An oath must mean at least this much to a judge, even in this day and age.

Not so long ago the sum total of a judges's accountability was to her conscience. Reason combined with conscience and the evidence allowed a judge to do her duty of interpreting the law.

It's no longer so simple. A tension now exists between judicial independence and judicial accountability. I've even seen it suggested that provincial court judges might be responsible for greater attention to accountability.

In a 1992 speech given at Dalhousie Law School Mr Justice David Marshall, former Executive Director of the National Judicial Institute, recalled the arcadian days when a judge was only responsible to himself and suggested that such a high degree of judicial independence, and I quote, **"...may have been possible, acceptable and beneficial...before the nearly 1000 provincial magistrates were judicialized." (Ted Wickwire Lecture, Nov.16, 1992)**

I am pleased to accept the proposition that Canada's magistrates have become **judicialized,** but am less willing to accept

parfois maladroit ou si notre geste passe inaperçu ou laisse indifférent, nous continuerons à tendre la main.

Il n'est pas de notre intérêt que les juges fassent parler d'eux dans les médias, qu'il s'agisse d'affaires criminelles, scandaleuses ou même simplement attrayantes. Il n'est pas de notre intérêt de réconforter les juges dont les paroles démontrent un manque de jugement vis-à-vis de ce qui est bien ou mal ou vis-à-vis de ce qui est acceptable ou inacceptable en matière de conduite.

Il est de notre intérêt que les juges des cours provinciales restent étroitement liés à leur serment d'entrée en fonction et qu'ils restent à l'écart des procédures disciplinaires du conseil de la magistrature.

Mon serment se lit en partie **«...J'agirais honorablement envers toutes sortes de gens, d'après les lois et les usages de cette province, sans crainte ni faveur, sans affection ni malveillance, je le jure devant Dieu.»**

Lorsqu'une personne prête serment, elle s'engage de manière très particulière à l'égard de la véracité de cette déclaration. Elle s'offre personnellement comme garantie. Le droit de se comporter de manière indépendante ne vient qu'ensuite et est appuyé par l'engagement «d'agir honorablement envers toutes sortes de gens». Ce serment contient tout un code de déontologie. C'est le moins qu'un serment puisse signifier pour un juge, même à notre époque.

Il n'y a pas si longtemps, un juge était essentiellement responsable devant sa propre conscience. La raison, alliée à la conscience et aux preuves présentées, permettait à un juge de faire son devoir d'interprétation de la loi.

Ce n'est plus si simple. Il existe à présent des tensions entre l'indépendance judiciaire et la responsabilité judiciaire. J'ai entendu suggérer que les juges des cours provinciales pourraient être chargés de se préoccuper davantage de la responsabilité.

Dans un discours donné en 1992 à la Faculté de droit de Dalhousie, le Juge David Marshall, ancien Directeur exécutif de

major or complete responsibility for the present-day appetite for judicial accountability.

Where is the institution that is not under close scrutiny today? Is it the army, the police, the political system, the medical profession, the universities? Then, why not the judicial system and the law profession? More issues end up in court today than ever before. Court decisions touch more lives than ever. The Charter gave the entire judiciary a tremendous new grant of power. We didn't seize it, we didn't even seek it, but now we are being asked to account for the use of it, even by the very legislators who handed it over.

Also, it should be acknowledged that some of the interest in judicial accountability has been borne on south winds - from the United States. What the American Bar Association and the National Judicial College see as issues at a given point in time eventually end up in Canada for discussion, refinement and Canadianization.

Close scrutiny, the consequent discovery of defects and the call for reform are not new for any institution, including the court system. The High Court of Chancery was the very center of the fog that plagued London in Dickens' time. A century ago the editor of **the Evening Telegram** in Newfoundland spent two weeks in prison for having said in his paper that the Supreme Court circuit boat, taking the court party around the coast was nothing more than a floating brothel.

What makes it seem new is that close scrutiny and attack is periodic, not constant. In the 20's they used to blame it on the Bolsheviks. In the 90's it might be better to say it is an expression of vigorous or restless democracy... and leave it at that.

Don't misunderstand me. We of the provincial court equate accountability with credibility, with acceptability and take it very seriously. our court is the first one to feel the temper of the times, for, to quote the Zuber Report,

**"The contact with, and the perception of, the judicial system by the over-**

l'Institut national de la magistrature, a rappelé l'époque révolue où un juge était uniquement responsable devant lui-même. Il a suggéré d'un tel degré d'indépendance judiciaire, et je le cite, **«...aurait peut-être été possible, acceptable et bénéfique... avant que les presque 1000 magistrats provinciaux n'aient accédé au statut de juge». (Conférence Ted Wickwire, 16 nov. 1992)**

Je suis d'accord pour accepter la suggestion que les magistrats canadiens ont accédé au statut de juge, mais je ne suis guère disposé à accepter une responsabilité importante ou complète pour l'appétit actuel en faveur de la responsabilité judiciaire.

Quelle est l'institution qui n'est pas soumise aujourd'hui à un examen minutieux? L'armée, la police, le système politique, la profession médicale, les universités? Alors, pourquoi pas le système judiciaire et la profession légale? Plus de problèmes se règlent aujourd'hui en cour qu'à tout autre époque. Les décisions des tribunaux touchent de plus en plus de gens. La Charte a octroyé à l'ensemble du corps judiciaire un formidable pouvoir. Nous ne l'avons pas saisi, nous ne l'avons même pas cherché, mais les mêmes législateurs qui nous l'ont transmis nous demandent à présent de rendre compte de son usage.

Il devrait également être reconnu qu'une part de l'intérêt à l'égard de la responsabilité judiciaire nous est venue du Sud -des États-Unis. Ce qui est considéré, à un moment donné, comme un enjeu par l'Association du barreau américain et le Collège judiciaire national, finit par échouer au Canada pour être discuté, peaufiné et «canadianisé».

L'examen minutieux, la découverte des défauts qui en résulte et l'appel à la réforme ne sont nouveaux pour aucune institution, y compris le système judiciaire. La Haute Cour de la Chancellerie était au centre même du brouillard qui tourmentait Londres au temps de Dickens. Il y a un siècle, le rédacteur en chef de **The Evening Telegram** de Terre-Neuve a passé deux semaines en prison pour avoir écrit dans son journal que le bateau de croisière de la Cour suprême,



ing on a Settlement Conference Record the settled and disputed issues, the number of witnesses required and an estimate of the trial time. In addition, any orders for discovery of documents, inspection of property and similar orders for disclosure are made.

Litigants are entitled to have a lawyer represent them and attend the settlement conference with them. The **Small Claims Act** however specifically prohibits the awarding of legal fees as part of the costs of the litigation.

## Evaluation of the Program

The Ministry of the Attorney General commissioned an evaluation of the Small Claims program. The Semmens & Adams Evaluation, completed in December, 1992, concluded that the program provides a fast and inexpensive way of resolving disputes, but increasing backlogs could eventually turn this success into failure. Settlement conferences achieve more settlements and offer litigants a true alternative in dispute resolution. The Report found that the Court now has a more understandable court process.

## Recent Changes

In the Spring of 1993, in an effort to deal with the backlog, more Judges were appointed to the civil division and funds were made available to have retired judges assist. The **Small Claims Rules** were amended October 1, 1993 to address some of the problems raised. The thrust of the changes was to encourage resolution at the Settlement Conference and to discourage delay tactics. Explicit authority was given to a judge to dismiss a claim, counterclaim or reply at a settlement conference if there is no reasonable claim or defence or if the claim, counterclaim or reply discloses no triable issue.

Parties, including corporations, must attend and may not just be represented by a lawyer. Defendants must specifically set out the basis for a denial in their Reply. Judges can order up to 10% of a claim or counterclaim to be paid to the other party if the party has proceeded through to trial with no reasonable basis of success.

## The Role of Provincial Courts in Civil Law

Some jurisdictions in Canada are taking different approaches to small claims cases. Rather than using provincial court judges to resolve small claims disputes, they are using specialized lay people or ad hoc lawyers as adjudicators or transferring jurisdiction to other courts.

These approaches should be viewed with caution. In my view, citizens are not well served by a system that relegates a significant portion of the population, that portion who do not qualify for legal aid, but who cannot afford the expense of superior court litigation, to a process that does not contain the historical safeguards of a justice system presided over by legally trained Judges.

Judge Dennis Schmidt, the Administrative Judge for the Vancouver civil division, recently cautioned that we ought not to create two standards for the applicability of the "rule of law" based on expediency:

> *During the last month I have received inquiries from several provinces, where the use of lay persons to mediate, arbitrate or adjudicate cases up to $15,000.00 is being proposed by government. Surprisingly, neither the Bar nor the Bench have united to speak for the citizens who will thus be deprived of the benefit of the common law. What is it about those disputes that makes them unworthy of the application of the law? Is our defence of the civil law motivated by a deeply held belief in the benefits of the common law in society (the universal custom of the realm) or is it motivated by some other factor?*
>
> *Distasteful as it seems we, the guardians of the law, must ask these questions. How will the wrongfully dismissed secretary, the senior citizen abused by a contractor or the consumer facing down the bank be served by the law". If the case meets the economic standard required for a law practice to be viable the wronged will be served. If not, what then?*

# The Civil Jurisdiction of the Provincial Court
# A Perspective of a Criminal Court Judge

*By the Honourable Donna J. Martinson, Provincial Court Judge, Vancouver*

## Introduction

Last year I had the opportunity to move from the criminal courts in New Westminster, British Columbia to the civil division of the Provincial Court in Vancouver. This would mean hearing civil trials within the $10,000.00 monetary jurisdiction of the Court. It would also mean participating in mandatory settlement conferences.

Before my appointment to the court I practised primarily in the area of criminal law, first as crown counsel and then in private practice. I taught criminal law for two years as a full time member of the law faculty at U.B.C. My civil experience in practice was confined mainly to family law. I did study comparative civil law while completing my L.L.M. at Cambridge University but the course focused on civil procedure rather than substantive law.

I was therefore concerned about my relative inexperience in the vast areas of the law that would apply in civil cases. In addition to that, my first reaction to the mandatory settlement conference was negative. I thought that a judge should not be sitting down with litigants, in business attire, in an informal setting.

At the same time I found it intriguing that the British Columbia Small Claims Court program made B.C. the first jurisdiction outside of the United States to win the National Association for Court Management Justice Achievement Award. That award, presented in July 1993 in San Diego, recognized the program's fast and effective access to justice features.

I decided to make the change. Over the past year I have had the chance to consider whether provincial courts should be hearing civil cases at all, and if they do, whether the judges of those courts ought to be presiding over mandatory settlement conferences. Some information about the B.C. program will assist in considering these questions.

## The British Columbia Small Claims Program

When the present program was introduced in 1991, access to justice was the primary goal, so that litigants could have a faster, less expensive means of resolving disputes, a more understandable court process and an effective way of enforcing judgments. The changes combined the use of plain language and a simplified procedure with some flexibility in the use of the rules of evidence. The monetary limit was raised from $3,000.00 to $10,000.00.

A significant aspect of the program was the use of the mandatory settlement conference, presided over by a Judge. Though other models were considered, it was decided that Judges can best apply judicial discretion to assist in the resolution of disputes. The Judge has broad powers, including the power to mediate disputes. Provincial Court Judges across the province participate and each receives training in mediation techniques.

The Conferences are not held in courtrooms and the judges do not wear gowns. Each conference is allotted 20 to 30 minutes. The cases are scheduled for fixed times to minimize waiting time. The judge reviews the case with the parties in an effort to come to a satisfactory resolution of the dispute. If it is resolved, the settlement is signed by the parties and the judge. Each party is given a copy which becomes the judgment or minutes of settlement.

If the dispute cannot be resolved, the judge organizes the case for trial by record-



**whelming majority of the people...is with the provincial court system...The provincial court system handles by far the largest number of cases and touches the lives of the greatest number of people." (Zuber Inquiry, 1987, Ont.)**

Consider the situation: When the public thinks of courts by and large it thinks of the provincial court system and provincially-appointed judges. When the law profession thinks of the judiciary, it thinks only of one judiciary too - the federallyappointed judiciary. That leaves everybody thinking there is only one judiciary in Canada when in fact there are two.

The existence of two judiciaries, especially two that are often confused as one, has important implications for the reduction of, or resolution of the tension between judicial accountability and judicial independence.

As an example, would it be okay if provincial court judges were mandated to take in-service training in **what to think** from time to time, while improved appointment procedures for the superior courts took care of the same sort of problem by insuring that only the 'best' lawyers were ever selected for this bench; 'best' meaning men and women of such moral fibre and intelligence that it wouldn't be necessary (or appropriate) to attempt to tell them **what to think** after appointment?

Naturally, we would prefer if only the 'best' were recruited for both benches. But it's up to you as an interested and informed group, to advise, and for governments to decide just how independence and accountability is to be sorted out among the courts. Its time enough for judges to have a say when a dispute arises and an answer has to be given to a concrete question.

## The Wilson Report

We have read the Wilson Report, just as we read the Seaton Report, and your recommendations on judicial appointments. We try to read everything that is said about us and are particularly attentive when it is a document of the CBA.

qui transportait les membres de la cour le long de la côte, n'était rien d'autre qu'un bordel flottant.

L'impression de nouveauté vient du fait que l'examen minutieux et l'attaque sont périodiques et non plus constants. Dans les années 20, c'étaient les Bolcheviks qui étaient tenus responsables. Dans les années 90, il est peut-être préférable de dire que c'est l'expression d'une démocratie vigoureuse et agitée... et s'en tenir à cela.

Ne vous y méprenez pas. Nous, membres de la cour provinciale, assimilons la responsabilité à la crédibilité et à l'acceptabilité et nous la prenons très au sérieux. Notre cour est la première à subir l'humeur des temps car, pour citer le Rapport Zuber,

**«Le système judiciaire que perçoivent et auquel ont affaire la vaste majorité des gens...est le système judiciaire provincial... C'est de loin le système judiciaire provincial qui traite le plus grand nombre de cas et touche le plus grand nombre de gens». (Enquête Zuber, 1987, Ontario)**

Réfléchissez à la situation : lorsque le public pense aux tribunaux, il pense en général au système judiciaire provincial et aux juges nommés par l'autorité provinciale. Lorsque la profession légale pense au pouvoir judiciaire, elle pense aussi à un seul corps judiciaire - le corps judiciaire nommé par l'autorité fédérale. Tout le monde en vient par conséquent à penser qu'il n'existe qu'un seul pouvoir judiciaire au Canada alors qu'il en existe en fait deux.

L'existence de deux pouvoirs judiciaires, particulièrement lorsqu'ils sont souvent confondus, a d'importantes conséquences sur la réduction ou la résolution de la tension entre responsabilité judiciaire et indépendance judiciaire.

Pour vous donner un exemple, serait-il acceptable que les juges des cours provinciales se voient dans l'obligation de suivre de temps en temps une formation en cours d'emploi sur **quoi penser**, alors que les procédures améliorées de nomination aux cours supérieures ont réglé ce genre de problèmes en assurant que seulement les

CAPCJ takes the position that sexual assault is a crime, that sexual harassment is also prohibited and that the law is no respecter of persons. However, when the content of a confidential complaint or complaints is made public without identifying the complainant or complainants, the offender or offenders, then the entire suspect class is left with nothing to do but squirm.

I don't know what to say about supervision at functions where liquor is served, but we have been fully participating in the Lawyers Assistance Program of CBA and in this way hope to help those of our members for whom the use of liquor is a problem.

The issue of gender equity has been part of our agenda at least since 1990. In September of that year at our annual meeting one of the workshop topics was "Is Gender Bias Alive and Well in Your Court?" In 1991 the Association passed a resolution promoting policies that favor non-discrimination on the basis of sex, sexual orientation etc..

In September, 1993 we met for our annual meeting about two weeks after receiving Chapter 10 of the Wilson Report. We passed two resolutions that were influenced by the Report and set up a judicial development committee to realize these resolutions. At the same time there was a public inquiry taking place in Ontario into the conduct of a judge and we wished this committee to keep it in mind also as it began its work

CBA has been supplied with copies of the resolutions so I will tell you a little of this committee.

It is chaired by Judge Ann Rounthwaite of British Columbia, our third vice president. She will be our president in 1996. she is hoping to develop a voluntary evaluation program for judges that will include, a questionnaire illustrating ideal judicial performance, trained mentors who will be fellow judges, and respondents who may include just about anybody normally found around courtrooms, including lawyers.

Participating judges can go into this process as deeply as they wish. For instance,

'meilleurs' juristes soient sélectionnés pour cette magistrature? 'Meilleurs' signifiant évidemment des hommes et des femmes d'une telle force morale et d'une telle intelligence qu'il ne serait pas nécessaire (ni approprié) de tenter de leur dire **quoi penser** après leur nomination.

Naturellement, nous préférerions que seulement les 'meilleurs' soient recrutés pour les deux magistratures. Mais c'est à vous, en tant que groupe concerné et informé, de conseiller, et aux gouvernements de décider exactement comment l'indépendance et la responsabilité doivent être réparties parmi les cours. Il est grand temps que les juges aient leur mot à dire lorsqu'un conflit survient et qu'une réponse soit apportée à cette question concrète.

## Le rapport Wilson

Nous avons lu le Rapport Wilson, tout comme nous avons lu le rapport Seaton ainsi que vos recommandations en matière de nominations à la magistrature. Nous essayons de lire tout ce qui se dit sur nous et nous sommes particulièrement attentifs lorsqu'il s'agit d'un document de l'ABC.

La position de l'ACJCP est que l'agression sexuelle est un acte criminel, que le harcèlement sexuel est également prohibé et que tout le monde est égal devant la loi. Néanmoins, lorsque le contenu d'une plainte confidentielle est rendu public sans identifier le ou les plaignants, le ou les contrevenants, l'ensemble de la classe suspecte ne peut que se retrouver dans l'embarras.

Je ne sais pas quoi dire au sujet de la surveillance des réceptions où l'on sert de l'alcool, mais nous avons pleinement participé au Programme d'aide aux avocats de l'ABC et nous espérons de cette manière aider nos membres pour qui l'usage de l'alcool constitue un problème.

La question de l'égalité des sexes fait partie de notre programme depuis au moins 1990. En septembre de cette année-là, lors de notre assemblée générale annuelle, l'un des sujets d'atelier était «Le parti pris contre l'autre sexe est-il bien vivant dans votre



Le senior arriva; il était déjà au courant de ce qui s'était passé.

- *Ne vous en faites pas, Albert,* lui dit-il, *vous vous en êtes très bien tiré; je vais aller parler à l'accusé, aux cellules; vous pouvez partir...*

Le soir, de retour dans sa famille - car Dubois demeurait encore chez ses parents, ne gagnant pas assez d'argent pour louer un appartement - il raconta son aventure pendant le dîner. Outre son père et sa mère, il y avait là ses deux jeunes soeurs, encore aux études.

- *Comment se nomme ce juge?* demanda son père.
- *Auguste Morin, tout le monde le déteste. Son greffier m'a dit qu'il souffre des hémorroïdes et que c'est ce qui le rend si coléreux.*

Le père, qui était médecin, se mit à rire.

- *Je crois le connaître,* reprit-il. *Il a épousé la fille d'un riche industriel, qui a de grosses relations dans le monde des affaires et de la politique. C'est grâce à son beau-père qu'il a été nommé juge, et ça lui est monté à la tête.*
- *Si tu le rencontres,* intervint la mère en s'adressant à son mari, *j'espère que tu lui diras ce que tu penses de sa façon d'agir.*
- *Oui, c'est bien possible, il vient quelquefois manger au Club, le midi, quand il est invité, parce que je crois qu'il n'a pas les moyens d'être membre, c'est un pique-assiette.*
- *Et un pisse-vinaigre,* ajouta l'une des filles.

L'affaire en resta là pour le moment. Les journaux du soir rapportèrent l'algarade avec, bien en évidence, le nom de l'avocat.

Le lendemain matin, à son bureau, il eut la visite du chroniqueur judiciaire du journal "Le Canard", qui avait, lui aussi, fait un article illustré et qui venait réclamer sa récompense. Un article valait deux dollars; avec illustration (dessinée par le journaliste) c'était cinq dollars. L'avocat s'exécuta avec plaisir.

# News Briefs / En Bref

## ALBERTA

### Appointments

*Hon. Suzanne Bensler*
Court of Queen's Bench
formerly of the Provincial Court
effective February 3, 1994

## MANITOBA

### Appointments

*Hon. Judith Webster*
Chief Judge of the Provincial Court
effective December 15, 1993

## NOVA SCOTIA

### Appointments

*Hon. Robert Prince*
effective February 1, 1994

## QUÉBEC

### Nominations

*l'Hon. Luc Grammond*
à la Cour du Québec
le 1 décembre 1993

*l'Hon. Morton S. Minc*
à la Cour municipale de Montréal
le 1 décembre 1993

*l'Hon. Daniel Lavoie*
à la Cour du Québec
le 5 janvier 1994

*l'Hon. Rock St-Germain*
à la Cour du Québec
le 19 janvier 1994

*l'Hon. Raymonde Verreault*
juge en chef de la Cour municipale de Montréal
le 19 janvier 1994

*l'Hon. Michèle Toupin*
à la Cour du Québec

*l'Hon. Robert LaFontaine*
à la Cour du Québec

### Retraite

*l'Hon. RenEeCousineau*
le 24 novembre 1993

*l'Hon. Jacques Coderre*
le 30 novembre 1993

*l'Hon. André Fauteux*
le 30 décembre 1993

*l'Hon. Yvon Côté*
le 31 décembre 1993

### Déces

*l'Hon. Robert Turgeon*
le 9 janvier 1994

*l'Hon. Camille Beaulieu*

d'appeler à haute voix Me Lacouture, ce qui fut fait, sans résultat. Alors l'huissier glissa à l'oreille de l'avocat:

- *Le juge est de mauvaise humeur... soyez poli!*

Les trois pénétrèrent dans la cour, l'accusé se tenant à la barre et l'avocat face au juge. Il répéta ses explications, espérant que s'il réussissait à étirer la discussion, Me Lacouture finirait bien par apparaître. Peine perdue... Le juge lut dit:

- *La farce a assez duré; ne me prenez pas pour un naïf, je sais très bien pour quelle raison votre associé ne se présente pas, mais le truc ne prendra pas cette fois. Vous êtes avocat, n'est ce pas?*
- *Qui, votre Seigneurie.*
- *Alors, greffier, inscrivez au dossier que l'accusé est représenté par Me... - votre nom, s'il vous plaît?*
- *Albert Dubois.*
- *Par Me Albert Dubois et procédons.*
- *Je ne suis pas prêt à procéder*, intervint le jeune avocat, *je ne connais rien de la cause et, de plus, je n'ai pas de mandat de l'accusé de le représenter au procès.*
- *C'est pas mon avocat*, clama l'accusé...
- *Vous*, lui dit le juge, *vous n'avez rien à dire pour le moment.*

L'avocat de la Couronne voulut intervenir:

- *Votre Seigneurie, dans les circonstances, je pense qu'il est préférable de ne pas forcer mon confrère à plaider une cause qu'il ne connaît pas; je ne m'opposerai pas à une demande de remise...*

Le juge: *"Il fallait le dire plus tôt, depuis au moins une bonne demi-heure tout le rôle a été vidé et j'attends que Me Lacouture arrive; d'ailleurs sa conduite est inqualifiable et je lui réserve un outrage au tribunal; il se moque de la Cour; l'accusé a un avocat, la Couronne est prête, les témoins sont là... procédez!*

- *Je regrette*, dit l'avocat Dubois, *mais je n'ai pas de mandat, la Cour ne peut pas me forcer à représenter l'accusé et je refuse de le faire.*
- *Me Dubois*, répondit le juge, *je vous ordonne de procéder dans cette cause.*
- *Je refuse*, dit Dubois, *et je ne resterai pas ici une minute de plus*, ajouta-t-il en esquissant un mouvement vers la porte.
- *Si vous sortez*, dit le juge, *vous aussi vous serez accusé d'outrage au tribunal.*

Devant cette menace, le jeune avocat ne riposta pas; il alla dire quelques mots à l'accusé et la Couronne appela son premier témoin.

Après l'interrogatoire, on demanda à Me Dubois s'il désirait contre-interroger, mais il déclina l'offre. Le procès se déroula rapidement, Dubois refusant toujours d'intervenir. Après l'audition des témoins de la poursuite, le juge demanda àl'accusé s'il désirait témoigner. Dubois alla encore lui souffler quelques mots à l'oreille et l'accusé déclara qu'il n'avait rien à dire.

L'avocat de la Couronne, manifestement mal à l'aise plaida très brièvement et Me Dubois, encore une fois, refusa d'intervenir dans le déroulement du procès. Le juge se borna à dire: "COUPABLE" et ordonna à l'accusé de prendre le chemin des cellules en attendant le prononcé de la peine, remis à la semaine suivante.

Avant de quitter la Cour, Me Dubois prit la parole:

- *Je tiens à protester contre le traitement qui m'a été fait ici et j'espère que cette affaire ira en appel.*
- *Vous ferez ce que vous voudrez*, répondit le juge, qui quitta la salle d'audience en coup de vent.

En sortant de la Cour, le jeune avocat fut bien étonné de se voir entouré de quelques avocats et journalistes; l'affaire avait fait du bruit dans le Palais, ses confrères le félicitaient d'avoir tenu tête à un juge qui terrorisait tout le monde, et les journalistes voulaient plus de détails. Tout en répondant prudemment, il se réjouissait de la publicité que cet incident lui rapporterait. Pour une fois, il n'était pas obligé de payer des journalistes pour faire parler de lui.



one judge might be satisfied to receive the questionnaire himself and use it to test himself against the ideal. Another might like the full treatment.

A great many issues remain to be ironed out, issues of confidentiality, independence, interest in participation, the role of chief judges, funding, the use of pilot projects, etc.. Judge Rounthwaite has been reading the American literature, of which there's a great deal, and it would seem that it will take at least two years to get such a plan going.

Additionally, Judge Rounthwaite was asked to consider whether we would be improved by having a national code of ethics for judges and has been examining some provincial codes to this end.

Although we may be overtaken by events outside our control, our deadline was never February 18,1994, and this meeting. Judge Rounthwaite is a full-time judge, a married woman and the mother of young children. She is doing this work voluntarily when she has spare time from these other duties. She has to be given time to do this work.

## Conclusion

Our Association is honored to be invited to this gathering. Your interest and ours are the same in many areas, and we look forward to hearing from your President at our Executive Council Meeting in Montreal in April.

cour?» En 1991, l'Association a adopté une résolution visant à promouvoir des mesures favorisant la non-discrimination sur la base du sexe, de l'orientation sexuelle, etc.

En septembre 1993, nous nous sommes réunis pour notre assemblée générale annuelle environ deux semaines après avoir reçu le chapitre 10 du Rapport Wilson. Nous avons adopté deux résolutions qui ont été influencées par ce Rapport et nous avons établi un comité de perfectionnement judiciaire pour mettre en oeuvre ces résolutions. À la même époque, une enquête publique a eu lieu en Ontario au sujet de la conduite d'un juge et nous avons souhaité que le comité en soit conscient au moment de commencer son travail.

L'ABC a reçu des copies des résolutions et je vais vous parler un peu de ce comité. Il est présidé par Madame la Juge Ann Rounthwaite de Colombie-Britannique, notre troisième Vice-présidente. Elle sera notre Présidente en 1996. Elle espère mettre au point un programme d'évaluation volontaire destiné aux juges. Ce programme consistera d'un questionnaire illustrant le comportement judiciaire idéal, de conseillers qualifiés qui consisteront de collègues juges et de répondants qui pourront être toutes les personnes que l'on trouve normalement dans les cours, y compris les avocats.

Les juges participants peuvent s'engager dans ce processus aussi à fond qu'ils le souhaitent. Par exemple, un juge pourra estimer suffisant de recevoir lui-même le questionnaire et de l'utiliser pour se mesurer à cet idéal. Un autre pourra préférer recevoir le traitement complet.

Un grand nombre de questions restent à régler, des questions de confidentialité, d'indépendance, d'intérêt à participer, de rôle des juges en chef, de financement, d'utilisation des projets pilotes, etc. Madame la Juge Rounthwaite est en train de lire la documentation américaine, qui est considérable, et il semble qu'il faudra au moins deux ans pour démarrer un tel projet.

De plus, nous avons demandé à Madame la Juge Rounthwaite d'envisager si nous pourrions bénéficier d'un code na-

tional de déontologie et elle étudie à cette fin certains codes provinciaux.

Bien que nous serons peut-être dépassés par des événements échappant à notre contrôle, notre date d'échéance n'a jamais été le 18 février 1994, date de cette réunion. Madame la Juge Rounthwaite exerce ses fonctions à plein temps, elle est mariée et mère de jeunes enfants. Elle fait ce travail à titre bénévole lorsque ses autres obligations lui en laissent le loisir. Elle doit disposer de suffisamment de temps pour accomplir ce travail.

## Conclusion

Notre Association est honorée d'avoir été invitée à cette réunion. Nos intérêts sont similaires dans de nombreux domaines et nous attendons avec impatience de recevoir des nouvelles de votre Président lors de la réunion de notre conseil exécutif à Montréal en avril.

# Commonwealth Magistrates' and Judges' Association Tenth Annual Triennial Meeting

Victoria Falls, Zimbabwe
August 21 to 27, 1994

The theme of the meeting is "Judicial Independence Through Judicial Education". During the week-long programme, two days will be devoted to workshops discussing contemporary aspects of judicial independence and resultant judicial accountability. Two further days will be spent analyzing the state of judicial education in the Commonwealth and the way forward in judicial education to support an independent judiciary.

The Secretary-General of the Commonwealth expects to be present to receive a resolution on judicial independence to be placed on the next CHOGHM agenda.

Keynote speakers include Commonwealth Chief Justices and The Right Honourable Telford Georges, a former Chief Justice of several Commmonwealth countries and presently a member of the Privy Council. Other participants of interest to Canadians include The Honourable Madame Beverley McLachlin of the Supreme Court of Canada, The Honourable Justice Kenneth Lysyk, and The Honourable Judge Charles Scullion, Past-President of the Canadian Association of Provincial Court Judges. The Honourable Justice J.B. Thomas and Professor Shimon Shetreet, internationally acclaimed authorities on judicial ethics, will also be participants.

The assessment of judicial education in the Commonwealth will be based on the Commomonwealth of Learning Report of 1992, and the Commonwealth of Learning President, Professor James Maraj, and officials will also be present.

A "trade fair" will be held each afternoon during the conference for representatives of National Judicial Centres and others to display their work so that maximum exchange of ideas may be achieved.

The above working sessions will be interspersed with social events and tourist excursions so that the flavour of the meeting place - known as one of the world's great pretty spots - will permeate.



## LES PREMIERES ANNÉES

**Mais qui donc était ce juge assassiné?**

Une trentaine d'années plus tôt le jeune avocat Dubois attendait nerveusement son tour dans le couloir du Palais; fraîchement admis au Barreau, il faisait ses premières armes en Cour criminelle; en réalité, son rôle se limitait à peu de chose: il devait faire suspendre une cause en attendant que son senior arrive. Quelques mois plus tôt, c'est tout-à-fait par hasard qu'il avait appris qu'un avocat criminaliste cherchait un jeune avocat pour son bureau; Dubois s'était présenté et avait été accepté, à des conditions très modestes. Mais il se disait qu'il fallait bien prendre de l'expérience quelque part et pourquoi pas le droit criminel?

L'associé, qui avait une clientèle assez étendue, avait pratiquement chaque matin plus d'une cause à plaider et comme, en théorie, toutes les cours commencent à siéger à la même heure, c'était souvent une course folle d'une cour à l'autre, car les juges n'aimaient pas qu'on les fasse attendre. Comme aimait à le répéter l'un d'eux: *La Cour ne peut pas commencer sans moi, c'est à eux d'attendre*". En somme, Dubois devait faire patienter le juge. Or, ce matin-là il se retrouvait devant un juge réputé pour son mauvais caractère et le senior, en disant à son jeune associé de suspendre la cause, avait comme arrière-pensée de traîner en longueur pour qu'à la fin, la cause soit remise à la semaine suivante, ce qui la placerait devant un autre juge. Pour le plus grand malheur de Dubois, le rôle n'était pas chargé; la cause en question fut appelée une première fois et le jeune avocat eut l'occasion d'expliquer.

- *Votre Seigneurie, je représente Me Lacouture, qui est l'avocat de l'accusé et qui plaide actuellement en chambre numéro 5; je vous demanderais de suspendre la cause.*
- *Très bien*, dit le juge, *mais allez prévenir votre confrère que sa cause procédera bientôt.*

L'avocat sortit, avec l'accusé, qui ne sentait pas très rassuré de se voir avec ce jeune avocat, qu'il n'avait pas choisi. Celui-ci dit au client:

- *Attendez-moi ici, je vais aller avertir mon associé.*

Il revint bientôt et, pour tuer le temps, ils causaient tout en fumant. Le client était accusé de vol par effraction dans un entrepôt; il était presque du même âge que Dubois; il avait une gueule sympathique, pas du tout l'air d'un voleur. Il racontait ce qu'il avait fait:

- *C'était au port de Montréal, j'ai défoncé une porte d'entrepôt qui était rempli de boîtes de bas de nylon; j'en ai pris quelques caisses que je mettais dans ma camionnette lorsque la police m'a surpris.*
- *Alors*, demanda l'avocat, *quelle défense allez-vous offrir?*
- *Je laisse cela à mon avocat; je pense que je vais plaider coupable... Le problème, c'est la sentence.*
- *Avez-vous déjà fait de la prison?*
- *Qui, j'ai déjà eu six mois. Vous savez,* continua-t-il, *j'aimerais mieux faire une vie honnête, mais c'est plus fort que moi, je ne me vois pas obligé de travailler. Si on réussit un bon coup, on mène la belle vie, à rien faire, et quand on n'a plus d'argent, on fait un autre coup... L'ennui, évidement, c'est qu'on se fait prendre de temps à autre.*
- *Qui, et c'est dans ce temps-là que vous avez le goût d'être honnête?*
- *Eh! oui...* répondit l'accusé, qui se mit à rire.

La cause fut de nouveau appelée; le jeune avocat fit encore appel à la patience du juge qui consentit à un dernier délai. Pendant ce temps, le senior n'arrivait toujours pas et Dubois, de plus en plus nerveux, se demandait bien quel moyen employer pour faire durer l'attente.

Il était bien onze heures trente lorsque l'huissier audiencier fit un nouvel appel dans le corridor. Dubois lui demanda

# Une Bonne Action

*par Paul Robitaille, juge à la retraite*

*«Reproduit avec la permission de l'auteur et de l'éditeur du journal Le Praetor.»*

## PROLOGUE

Comme chaque matin, le juge François Duperron fut tiré du sommeil par son radio-réveil à huit heures précises; après une rapide ablution, il descendit, en robe de chambre, et alla prendre à la porte d'entrée le journal du matin auquel il était abonné. Distraitement, en se dirigeant vers la cuisine où, chaque matin également, il préparait lui-même son petit déjeuner - sa femme dormait à cette heure matinale - il ouvrit le journal et la manchette lui sauta au visage:

## "UN JUGE ASSASSINE"

Sans prendre la peine de s'asseoir, il lut:

> *"Apparemment victime d'un crime crapuleux, le juge Albert Dubois a été découvert dans son appartement, poignardé de plusieurs coups de couteau; c'est son épouse qui aurait fait la macabre découverte en rentrant à la maison vers vingt-deux heures. La police refuse, pour le moment, de fournir plus de détails mais, selon des sources fiables, il se pourrait que le vol soit le mobile du crime car il semble que l'appartement était bouleversé, des tiroirs renversés et vidés. La police poursuit son enquête (Voir page 2 pour plus de détails)."*

Comme frappé par la foudre, le juge Duperron dut aller s'asseoir pour se donner le temps de reprendre ses esprits. Car, en plus d'être le juge en chef à la Cour à laquelle appartenait le juge Dubois, Duperron était un ami intime de la victime de ce crime. Mais ce n'était pas le temps de s'apitoyer, il fallait au plus vite se rendre au Palais afin de prendre les choses en main et de répondre a tous ceux - surtout les journalistes - qui viendraient lui poser des questions.

Mais déjà le téléphone sonnait: c'était le ministre de la Justice qui le demandait de Québec:

- *Monsieur le juge en chef, j'apprends à l'instant la terrible nouvelle; savez-vous quelque chose?*
- *Malheureusement, monsieur le Ministre, je viens de l'apprendre par le journal, je ne sais rien de plus; je me demande bien pour quelle raison personne ne m'a mis au courant plus tôt. Je pars immédiatement pour le Palais; dès que j'aurais d'autres nouvelles, je vous téléphonerai; serez-vous à votre bureau?*
- *C'est cela, rappelez-moi le plus tôt possible, si je ne suis pas à mon bureau, je serai au Conseil des ministres, faites-moi avertir et je communiquerai avec vous... j'espère qu'il n'y a pas quelque scandale là-dedans! A bientôt.*
- *A bientôt monsieur le Ministre.*

Le juge remonta en vitesse à sa chambre; sa femme, réveillée par le téléphone, s'informa:

- *Qu'est-ce qui se passe, tu as l'air bien énervé?*
- *Je n'ai pas le temps de t'expliquer; je m'habille et je pars pour le bureau en vitesse; tiens, lis le journal, tu comprendras tout.*

En apercevant la manchette, l'épouse du juge s'affaissa dans un fauteuil, sans un mot.

Rapidement, le juge Duperron descendit à son garage et partit vers le Palais, dans sa modeste Ford Tempo, car il croyait que les juges doivent éviter l'ostentation.



# Judicial Behaviour and R. v. Sussex Justices

*By The Honourable R.E. Kimball*
*Provincial Court of Nova Scotia*

## Introduction

The purpose of this paper is to attempt to determine that the proper standard of judicial behaviour, both inside and outside the courtroom, may be measured and established by the rule in **R. v. Sussex Justices.**[1] This purpose will be accomplished first by examining the **Sussex Justices** case to show how and why the rule originated. Secondly, an explanation of selected cases will show how the **Sussex Justices** standard has been applied to various courtroom situations to shape judicial actions within that setting. Thirdly, the rule will be applied to the question of judicial humor and when it is or is not appropriate and lastly the question of the association of judges with the police or members of any law enforcement agency will be examined in the light of the **Sussex Justices** dicta.

## The Judicial Standard

The standard which requires that judges be fair and just, which meets public expectations and from which all aspects of judicial behaviour may be governed is set forth in the case of **Rex. V. Sussex Justices,**[2] where Lord Hewart, C.J., said:[3]

... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.

In **Sussex Justices** this rule meant that nothing should be done which created even a suspicion that there had been an improper interference with the course of justice.[4] In that case the accused was charged with dangerous driving. At the hearing, the acting clerk to the justices was also a member of the firm who were suing the accused for damages arising out of the alleged offence. At the conclusion of evidence the justices retired to consider their decision and the acting clerk retired with them in case they should desire to be advised on any point of law. The justices convicted the accused and came to that decision without consulting the acting clerk.

The appeal court accepted the fact that the clerk was not consulted by the justices during the decision making process and that he scrupulously abstained from referring to the case in any way, but held that because of his connection with the civil side of the case and because of his legal obligations to the justices his presence with them was improper and cast a cloud on the judicial process. His presence alone created the suspicion of an interference with the course of justice.

**Sussex Justices** stands at least for the proposition that there should be no association by judges, however innocent, in situations which may give rise to the suspicion that there is an improper interference with the course of justice. The position of the clerk to the Sussex Justices was untenable because of the conflict of interest.

The reality of **Sussex Justices** is two-fold: first, that the accused would be hard pressed to believe that the court had arrived at its decision without being influenced by the clerk; and second, even if it was not influenced the justices should not have caused the accused or anyone else to think it was possible. In either case the Sussex Justices were compromised in their pursuit of justice and because of that fact their decision to convict the accused was tainted.

## The Application of the Sussex Justices Standard

The **Sussex Justices** case has been applied to circumstances where the conduct of judges has affected the fairness of a trial or has appeared to do so and as a result it has been used as a guide to encourage proper judicial behaviour. Some brief examples of those applications are as follows.

## Judicial Interference in the Conduct of a Trial

The importance of **Sussex Justices** and the principle which it gives to the law has been followed by the Supreme Court of Canada in the case of **Brouillard (a.k.a. Chatel) v. The Queen**,[5] where the accused was charged with extortion and found guilty. The conviction was upheld by the Quebec Court of Appeal. On appeal to the Supreme Court of Canada a new trial was ordered on the basis that justice was not seen to be done because the trial judge was abrasive with witnesses and had interfered excessively and sarcastically with their testimony. As a result, he appeared to be acting for the Crown and justice did not appear to be done. The trial was not fairly conducted and a new trial was ordered.

## Judicial Contact with a Party to the Proceedings

In **R. v. Hallett**[6] the Provincial Court judge, during an adjournment, spoke privately with a female friend who was subsequently called as a witness for the defence. The judge had no knowledge that she would be a witness at the trial and in any event did not discuss the case with her. The accused was convicted. On appeal the accused stated that he was suspicious that the judge and the witness were friends and he "developed an impression that what [she] said on the witness stand was most likely the matter with which she would have discussed with the judge in private in his office during the trial".[7] The accused believed he was wrongly convicted.

The appeal was dismissed because in the circumstances the Nova Scotia Appeal Court found that the accused had waived the application of the Sussex Justices rule but in the process of its decision the Court quoted extensively from **Sussex Justices** and repeated Lord Hewarts famous comment.8 The Court further stated that the meeting between the judge and the witness caused it "some concern"[9] and referred to it as a "regrettable incident"[10]

## Judicial Friendship With a Party to the Proceeding

**Bowerman et al v. Ferster**[11] was a decision of the Saskatchewan Court of Queens Bench. In that case the Bowermans brought an action against Ferster in Small Claims Court. The presiding Provincial Court judge, prior to the evidence of Bowerman and in reference to him said,[12] "Oh, here's my old friend Ted; haven't seen you in a long time." In fact, Bowerman was not an old friend of the Provincial Court judge and their previous contact was not amicable.

Ferster applied for a judicial review to prohibit the Provincial Court judge from continuing the small claims trial on the ground that there was a reasonable apprehension that the judge was biased in favor of Bowerman.

Mr. Justice Goldenberg, after quoting Lord Hewart's famous dictum stated that the applicant was required to show something more than a mere possibility of bias and that on the facts of the case he had done so. He stated[13] "I have no hesitation in holding, on the facts before me, that Ferster would have a reasonable apprehension of bias", and ordered that the matter be heard before another Provincial Court Judge.

## The Same Judge Trying Different Accused on the Same Fact Situation

In the case of **Regina v. Dnieper, Ex Party Wassilyn**[14] the accused Gary Robert



## WANTED

## CAPCJ ASSISTANT EXECUTIVE DIRECTOR

A Motion of the Executive Committee of September 2, 1987 reads as follows:

> "**Motion:** It was moved, seconded and carried that the term for which an Executive Director, and an Assistant Executive Director, may be appointed shall not exceed four consecutive years, and in order to facilitate the smooth transition, an Assistant Executive Director shall be appointed to work with the Executive Director during the final year of his term, which said term may be extended by a majority vote of the Executive Committee."

By virtue of this Motion an Assistant Executive Director should have been appointed September, 1993. The search is now on for the position of Assistant Executive Director.

Any member who is interested in this important and challenging position should **immediately** contact the Executive Director, in writing, for a job description:

Judge Pamela A. Thomson
Executive Director
444 Yonge St.
Room 207
Toronto, Ontario
M5B 2H4
Phone: 416-326-9916
Fax: 416-325-8944

## AVIS DE RECHERCHE

## DIRECTEUR EXÉCUTIF ADJOINT DE L'ACJCP

Une motion du Comité exécutif en date du 2 septembre 1987 se lit comme suit :

> «**Motion** : Il a été proposé, appuyé et adopté que le mandat pour lequel un Directeur exécutif et un Directeur exécutif adjoint pouvaient être nommés n'excédera pas quatre années consécutives. Afin de faciliter la transition, un Directeur exécutif adjoint sera nommé pour travailler avec le Directeur exécutif durant la dernière année de son mandat, ce mandat pouvant être prolongé par un vote majoritaire du Comité exécutif.»

En vertu de cette motion, un Directeur exécutif adjoint aurait dû être nommé en septembre 1993. Un avis de recherche est maintenant lancé pour le poste de Directeur exécutif adjoint.

Les membres intéressés par ce poste important et exigeant devraient s'adresser **immédiatement** à la Directrice exécutive, par écrit, pour obtenir une description du poste :

Juge Pamela A. Thomson
Directrice exécutive
444, rue Yonge
Pièce 207
Toronto (Ontario)
M5B 2H4
Téléphone : 416-326-9916
Télécopieur : 416-325-8944

affect the work of all judges, those who work in the Provincial Court, because of its great volume of cases, must be particularly aware of unnecessary police contact and strive at all times, to avoid it, no matter how difficult that may be.

## Conclusion

**R. V. Sussex Justices** demonstrates that judicial behaviour is inextricably linked to the proper administration of justice and to the expectation which the public-at-large have that justice should not only be done but should manifestly and undoubtedly be seen to be done.

However, judges may not always live up to this expectation. That is not to say that injustices are deliberate or that the right result is not achieved in any given case, but that an injustice may occur through a lack of understanding of the judicial role and of the impact which the judicial role has on the individuals who are subject to it. Members of the judiciary as human beings, are subject to the frailties which accompany that condition and those imperfections will sometimes exhibit themselves in their work.

The difficulty for judges to know and understand what is proper judicial behaviour or what justice is or ought to be, can be helped by an understanding of the **Sussex Justices** case and in the realization that the ideals of justice and fairness may always be pursued by the proper application of its rule. It is never easy for a judge to achieve justice or at all times to appear to be just but the task is made easier by an awareness and understanding of the **Sussex Justices** case combined with a conscientious effort to apply it.

END NOTES

1 [1924] 1 K.B. 256.
2 *Ibid.*
3 *Ibid.*, at p. 259.
4 *Ibid.*
5 (1985), 17 C.C.C. (3d) 193.
6 (1987), 79 N.S.R. (2d) 48. (N.S.SC. AD.)
7 *Ibid.*, at p. 50.
8 *Ibid.*, at pp. 50-51.
9 *Ibid.*, at p. 49.
10 *Ibid.*, at p. 51.
11 (1986), 46 Sask. R. 236.
12 *Ibid.*, at p. 237.
13 *Ibid.*, at p. 238.
14 (1967-68) 10 Crim. L.Q. 461.
15 *Ibid.*, at pp. 462-463.
16 *Ibid.*, at p. 463.
17 **Encyclopedia Brittanica**, William Benton Publisher, Toronto, 1959, vol. 11, p. 885.
18 See, J.O. Wilson, **A Book For Judges**, (Ottawa: The Minister of Supply and Services, 1980) pp. 3-4, where this same point is made in relation to a judge who is seen by a litigant in earnest conversation out of court with his opponent's counsel.



Cross was tried and convicted by His Worship Magistrate Dnieper of causing a disturbance. The accused Wassilyn was charged with the same offence but by a separate information. Counsel for Wassilyn made an application to Magistrate Dnieper to permit his case to be determined by another magistrate. The motion was refused but the case was adjourned to allow the issue to be heard by the High Court.

The issue was whether the accused Wassilyn could reasonably apprehend bias on the part of the magistrate because the evidence of the Crown and of the defence in his case would come exactly from the same people that testified in the case against Cross. In that case the magistrate accepted the veracity of the crown witnesses and disbelieved the defence.

Mr. Justice Lieff granted the order prohibiting the Magistrate from hearing the charge against Wassilyn. He stated:[15]

> *It appears to me that there is a real danger ... if the present magistrate is permitted to continue with this matter ... he has already heard evidence which would be to all intents and purposes the same as to be offered in the present case. obviously he has already decided whom he should believe and whom he should not believe and in my opinion there is a real likelihood of bias which in all probability might operate on his mind ....*

The learned judge stated also that he was encouraged in his assessment of the circumstances **inter alia** by the **Sussex Justices** judgement and quoted Lord Hewart's famous statement.[16]

The standard created by **Sussex Justices** covers every aspect of the judicial role. When the setting is within the courtroom, it mandates that judges be just in their total function and in order to guarantee that result the rule also demands that that which the judges consider just must also meet the standards of justice of those who are subject to it.

The **Sussex Justices** rule also forms the basis of other considerations of judicial behaviour. For example, judges should not, by their behaviour, detract from the seriousness of a trial or a sentencing. The demeanor and attitude of a judge during court is just as important as that of any witness and judges, for example, who are funny or who try to be, do not enhance the dignity of the court or the dignity of the law which they represent. Further, the **Sussex Justices** philosophy establishes that judges who associate with members of law enforcement agencies may subject themselves to suspicions of partiality and bias.

## Judicial Humor

For the most part there is no place for humor in the courtroom although it may be acceptable if it is of a nature that can be understood and appreciated by all persons who hear it. Acceptable humor must be that which is not insensitive to the responsibilities of all individuals who make the judicial process function properly and it must also be humor that is not insensitive to the plight of the accused person who is before the court. Acceptable judicial humor must impact the same on all parties. It must contain an element of kindness to enhance equally the dignity of the Crown and the dignity of the accused and which is also understanding of those parties. If judicial humor does not meet those criteria it is inappropriate.[17]

> *The element of kindness is essential to humor: there must not only be a perception of the peculiarities, the contrasts and the shortcomings which lend to any character or circumstances an incongruous aspect, but there must be a tolerance or acceptance of them. Where indignation is aroused the humorous conception is lost and amusement ends. Humor is here exchanged for sarcasism....*

Most humor exploits individuals who are in some way disadvantaged, or perceived to be, because of their particular circumstances and the joke exploits those circum-

stances to the amusement of the listener. A joke focusses as much on the teller as on the subject matter and no one would tell a joke if there were not a personal reward for doing so.

A judge must not be the humorous center of attention in the courtroom. It is not his or her function to entertain, even though the opportunity to do so is of ten present. In the final anaylsis judicial humor in the courtroom is at least a form of self-aggrandizement unbecoming of the judicial office and usually unkind or offensive to the accused and to those who support the accused and it is not part of the judicial function for a judge to be unkind or offensive.

Most accused persons do not know what is going on in a courtroom except for the fact that they are forced to be there. Although the legal language may be English or French they do not understand it and they do not understand court procedures, court formalities or legal rituals. That which is commonplace and routine to the judge is often foreign and terrifying to accused persons. They do not understand why they cannot state what someone told them or why lawyers object or raise questions of admissibility or relevance. Many accused are terrified by just being in the midst of an alien legal world and they are fearful of what will happen without understanding why. The last thing they need is a judicial humorist.

The ideals of fairness and justice are not achieved by the judge who exploits the authority of his office by being funny and the humor is quickly gone when the accused is subsequently punished. Justice is not done in these circumstances nor is it seen to be done: the accused at least is not laughing, nor are any of his family "rolling in the aisles". For years thereafter those subject to the rollicking good humor of the judge will wonder why anyone could laugh at them or at their situation. It must be remembered that accused persons are intimidated by the absolute power of the bench and that an accused cannot respond to judicial humor without running the risk of offending the judge and creating the fear that he or she may have affected the outcome of their case. Judicial authority creates a captive courtroom audience which will readily laugh because it is afraid to do otherwise or because it is hopeful that some advantage will thereby accrue for doing so but usually not because the judge is funny. There is not one case that is not of the utmost importance and consequence to at least one of the parties, if not to all of them and this is especially so in criminal matters where usually the liberty of the subject is involved. It is safe to conclude that when a judge tries to be funny, the accused at least will not understand how anyone can laugh, for whatever reason, when the consequences to him or her are so important.

Judicial humor constitutes inappropriate behaviour when it exploits the position of authority of the judge to the disadvantage of an accused or someone like an accused who is in an inferior position. When this occurs, the rule in **Sussex Justices** is offended. In these circumstances justice, although it may occur will not be seen to have done so.

## The Judiciary and the Police

The categorical imperative of **Sussex Justices** and of the judicial role is that partiality and unfairness must not exist in the judicial process. To ensure that this does not occur, members of the judiciary must not associate with the police or with the members of any law enforcement agency. This rule is readily applicable to the provincial courts in Canada because that court is the place where the work of the police is most frequently administered and where the contact between the bench and the police most frequently occurs.

It is often difficult for judges to escape influences which might prejudice their thinking or appear to give an unfair advantage to one side or the other. For example, it is obvious, that an accused who witnesses a judge and police officer in conversation will assume that a bias exists against him or her notwithstanding the actual content of



the conversation[18] and such assumptions may be grounded in reality. It is virtually impossible for a judge to engage in a friendly casual conversation with a police officer and not to be tempted to yield to a bias in his/her favour, however unintentional it may be. Continued associations of that nature may undermine the intellectual independence of a judge and erode the distance which a judge needs from the police to be impartial. Police and judges must not associate with one another even as judges should not associate with accused persons who are scheduled for court or who have been to court. Police officers who witness judges fraternizing with indidviduals who constantly break the law or who have a reputation for doing so, would assume that a bias exists against them when Crown evidence is given, and no doubt such a familiarity would be grounds for judicial censure by disciplinary bodies.

Further, the problem of judicial association with police is more subtle than that which is readily perceived from a social or professional contact. The public look to the police as the preservers of the peace and protectors of society whose function is to prevent crime and to apprehend criminals and the public look to the courts and its judges as the vehicle whereby those individuals are brought to justice. Thus a parallel exists that is not in conflict, between the work of the police and the role of the judge. Police officers bring law breakers to court to protect society from harm and judges sentence them to achieve that same result. This similarity of purpose is not offensive to society and as a result associations which may take place between the police and the judiciary may not generally be viewed as unseemly. It legitimizes a connection between the judiciary and the police which also, for the same reason may create a common bond between members of the police and members of the judiciary that is tacitly understood and approved. However, ideally there should be no relationship between the police and the judiciary any more than their should be a similar relationship between the judiciary and an accused as aforesaid or any other member of society who relies on a judge for impartiality and fairness.

In the final result when a case is not decided objectively and solely on its merits justice is not achieved and the judge and the judiciary, the police officer and the police force and the accused and the society of which he is a part in the long run are the losers.

Impartiality is essential for justice to be done. The observance of intellectual impartiality is just as important as the avoidance of any bias which is open and obvious but intellectual impartiality is difficult to achieve because of the subtlety of the influences which threaten it and because certain objectives of the judicial system are integrated with the objectives of law enforcement agencies.

The judge must remember that within the ambit of the trial process all individuals are the same whether they are members of the law enforcement agency or an accused charged with a criminal offence. Police look for justice too and any courtroom result which is not obtained impartially and fairly reflects on the quality of their work and the integrity of their ideals.

In the final analysis, the judge is the only person who can know if a bias exists and he or she must be ever alert to that possibility. An accused who observes any type of contact between the judge and the police will be concerned and may justifiably say so, but when it is not observed the judge alone will know, or should know whether there is any reason why justice will not occur because of it. At that point the integrity of the trial and of the judicial process itself rests solely on the behaviour and ethics of the judge, on his or her honesty and willingness not to be compromised so that justice and fairness will prevail to all who seek it.

If any party to a criminal trial is treated unfairly by any judge because of a police bias, the entire criminal process is affected. While the subtleties of impartiality may