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LE POUVOIR JUDICIAIRE EN 1984

Les textes qui suivent représentent la contribution des participants à une table ronde organisée par la Section de droit constitutionnel et international de l'Association du Barreau canadien lors de son 55e Congrès annuel, à Vancouver, le 28 août 1973. Qu'il s'agisse d'une véritable communication, de notes brèves ou de la retranscription d'un exposé oral, ces textes n'ont pas été remaniés et doivent être appréciés en outre en fonction de la date à laquelle ils ont été livrés. Vu le sujet dont ils traitent et ceux qu'ils abordent incidemment, ils conservent un caractère d'actualité qui justifie encore aujourd'hui leur publication.

Gérald Beaudoin

doyen de la Section de droit civil
de la faculté de droit de l'Université d'Ottawa

> Justice is the interest of the
> man on the earth.
> Daniel WEBSTER.

On a coutume de dire depuis Locke et Montesquieu que l'État moderne comprend trois pouvoirs: le pouvoir législatif, le pouvoir exécutif et le pouvoir judiciaire.

La constitution américaine fut la première constitution écrite à respecter la séparation des trois pouvoirs. C'est le système bien connu du «check and balance». Les auteurs de cette constitution ont visé à l'équilibre des trois pouvoirs. Au début, c'est le pouvoir législatif qui était le plus fort. Thomas Jefferson aurait affirmé que par la suite viendrait le tour de l'exécutif. Alexander Hamilton disait de son côté que le plus faible des trois pouvoirs était le pouvoir judiciaire[1]. On doit ajouter cependant que depuis le juge en chef John Marshall le pouvoir judiciaire a occupé toute la place qui lui revient, et, qu'à certaines périodes de l'histoire américaine, celle du juge en chef Earl Warren, par exemple, le pouvoir judiciaire a joué un rôle très considérable.

Dans les démocraties de type parlementaire comme la Grande-Bretagne et le Canada, la séparation des trois pouvoirs est moins nette, attendu que les détenteurs du pouvoir exécutif (le Conseil des ministres) font partie du pouvoir législatif. Le cabinet est même responsable à la chambre basse en vertu du principe non écrit du gouvernement responsable. Chez nous, la législation est la principale origine du Cabinet, et, toute législation ne peut être adoptée, en pratique, que si le Cabinet le veut bien, ou, encore, ne s'y oppose pas.

Cependant, le pouvoir judiciaire est séparé et indépendant. Les juges ne font plus partie d'aucune chambre législative et ce depuis plusieurs années avant la Confédération. De plus, un article de notre constitution écrite, soit l'article 99, consacre dans une certaine mesure l'indépendance du pouvoir judiciaire. Je dis dans une certaine mesure car cet article ne concerne que les juges des cours supérieures et non les juges de la Cour suprême et de la Cour fédérale, cours qui n'existent qu'en vertu d'une simple loi fédérale passée sous l'empire de l'article 101 de la Constitution. Mais, à ce haut niveau la même indépendance existe en vertu d'un texte de loi (celui qui établit lesdites cours), et, en vertu d'une vieille tradition que tout Cabinet et tout Parlement respectent avec soin. Le même principe joue au niveau des tribunaux inférieurs créés par les provinces.

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[1] *The Federalist Papers,* No. 78.

Les juges possèdent un pouvoir réel. Il ne s'agit pas d'un simple service. Ils participent à la puissance même de l'État. Ceci ne veut pas dire que nous devrions être gouvernés par les juges. Ce serait une erreur. Mais le pouvoir judiciaire dans un état démocratique doit occuper toute la place qui lui revient pour que la société soit bien gouvernée.

Quelle est la tâche des juges? En bref, c'est d'interpréter les lois.

Ce pouvoir est cependant considérable. Tout juriste sait bien que devant un texte laissé vague par le législateur, soit de façon délibérée, ou, par nécessité, le juge est appelé à faire la loi dans une certaine mesure. (Que l'on songe ici au concept de l'homme raisonnable, au concept de la négligence, au concept de l'obscénité[2], etc.) Le devoir fondamental du juge est d'interpréter la loi, la volonté du législateur, en l'appliquant à un cas donné. Ce qui n'empêche pas le juge d'interpréter la loi de façon évolutive parfois. Mais les juges doivent être capables de pratiquer un certain self-restraint[3].

Toutes les lois ne sont pas interprétées de la même façon. À commencer par la constitution qui est la loi fondamentale du pays. En certains pays, nous avons même plusieurs écoles d'interprétation de la constitution.

Nous avons aussi des textes législatifs comme la Déclaration canadienne des droits que certains jugent être de nature constitutionnelle mais que d'autres ne considèrent que comme un code d'interprétation. Notre Cour suprême épouse la seconde théorie.

Que sera le pouvoir judiciaire en 1984?

Sur le plan international il est à souhaiter que les décisions rendues par les instances judiciaires internationales aient enfin force obligatoire. Mais c'est là faire preuve de beaucoup d'optimisme.

Sur le plan interne qu'en sera-t-il?

Notre Cour suprême devra enfin obtenir un statut constitutionnel. On pourra même assister à certaines modifications au niveau de la nomination de ses juges. Le Titre IV de la Charte de Victoria de juin 1971 s'orientait dans ce sens. Plus le fédéralisme canadien se perfectionnera, plus la Cour suprême sera appelée à jouer un grand rôle.

Notre Cour fédérale prendra plus d'importance. Le droit statutaire fédéral se développe à un rythme accéléré. La Cour fédérale devra assumer un rôle qui n'a aucune mesure avec celui qui fut rempli jusqu'ici par la Cour de l'Échiquier.

Notre société devenant plus complexe, il y aura plus de sources de conflits et notre système judiciaire devra se perfectionner. On juge du degré de civilisation d'un peuple à la manière dont la justice est rendue chez lui. Plus un peuple est raffiné et civilisé plus il se soumet à la primauté du droit[4].

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[2] Vide un article de l'honorable juge L. P. Pigeon intitulé «*Human element in the judicial process*, dans *Alberta Law Review*, 1970, pp. 301 à 304. L'auteur fait remarquer à la page 303 que lorsqu'une discrétion est donnée au juge, alors, «discretion really is law-making to a limited extent» et que «the manner in which the discretion is exercised becomes a judge-made law». L'auteur conclut que: «In any case, the picture of judges blindly applying an inflexible law is idealistic and unrealistic» (p. 304) et que «It is therefore in theory only that there is a sharp and unyielding line of demarcation between the law-making and the law-finding processes» (p. 304).

[3] Vide à ce sujet, à titre de comparaison Henry J. ABRAHAM, *The Judicial Process*, 2nd Edition, pp. 355 à 377. L'auteur énonce seize maximes relatives à la self-restraint de la Cour suprême des États-Unis.

[4] On attribue à John Locke cette remarque: «Là où la loi s'arrête la tyrannie commence.»

Le nombre des juristes croîtra. Nos dix-sept facultés de droit sont prises d'assaut. À la réflexion, il se peut bien qu'il n'y ait pas trop de juristes. La société a besoin de juristes, non seulement dans les prétoires et les parlements mais dans les conseils d'administration, la fonction publique, les salles de rédaction, les syndicats et les universités. Le droit est une science de tous les jours qui touche à tout.

Notre profession est appelée à repenser son rôle dans une certaine mesure.

Le législateur doit perfectionner l'ordre judiciaire.

On parle de tribunaux judiciaires, quasi-judiciaires, administratifs. On parle aussi de tribunaux spécialisés.

Le gouvernement intervenant de plus en plus, le droit administratif est appelé à un développement aussi grand que le droit privé au XIXe siècle. Il faudra de plus distinguer entre acte judiciaire, acte quasi-judiciaire, et, acte administratif. Il faudra arriver à des distinctions plus claires. Ce rôle incombera en partie au pouvoir législatif, mais, en dernière analyse, je crois que c'est le pouvoir judiciaire qui jouera le rôle prépondérant en ce domaine.

Pour que le pouvoir judiciaire remplisse adéquatement son rôle, il faut qu'il demeure indépendant et impartial, que les structures reflètent son impartialité[5], que les juges soient compétents, que l'administration de la justice soit bien organisée.

Les cinq panelistes qui vous adresseront la parole à tour de rôle traiteront de plusieurs facettes du pouvoir judiciaire.

— Le pouvoir judiciaire devrait-il répondre directement aux chambres législatives sans passer par le ministre de la Justice ou le solliciteur général?

— Devrions-nous avoir un ordre judiciaire qui serait autonome et «self-administering,» sous la gouverne d'un conseil de la magistrature qui lui répondrait à la Chambre?

Ce sont là deux suggestions que l'on entend depuis quelque temps. Elles supposent des changements radicaux. Personnellement je ne suis pas convaincu que nous devrions nous engager sur cette voie.

— La réduction des peines et les libérations devraient-elles ne relever que des juges?

— Les juges devraient-ils être spécialisés?

— Les juges devraient-ils être soumis au recyclage?

— Le système de nomination des juges doit-il être modifié?

— Les juges devraient-ils être mis à la retraite plus tôt?

— De quelles façons doit-on rendre l'accès à la justice plus facile pour les défavorisés?

— Ne devons-nous pas nous interroger sur le bien-fondé de l'adversery system dans certains cas comme le Premier Ministre du Canada nous invitait à le faire lors de l'inauguration de la Conférence Nationale sur le Droit à Ottawa en février 1972?

Je laisse la parole à nos participants.

[5] Lord Hewart C. J. in Re: *The King* v. *Sussex Justices* (1921) I K.B. 256 à la page 259: «... a long line of cases shows that it is not merely of some importance but is of fondamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done.»

Marcel Cinq-Mars

Bâtonnier du Québec

On a dit qu'un système judiciaire est profondément inséré dans la réalité historique, sous tous ses aspects, politiques, sociologiques, économiques et techniques. Les éléments que contient cette pensée peuvent, à la lumière du présent, nous aider dans une recherche certes osée mais sans doute nécessaire de ce que sera le pouvoir judiciaire dans 10 ans d'aujourd'hui.

Dans cette perspective, plusieurs questions viennent à l'esprit dont celle-ci: Un pouvoir judiciaire est-il encore nécessaire dans une société moderne? À la première réflexion, on serait porté à penser que, les besoins essentiels humains étant satisfaits par législation, la justice traditionnelle n'a plus l'importance qu'elle avait. Mais, phénomène peut-être curieux, il faut constater que le recours à cette justice est de plus en plus fréquent.

L'explication réside sans doute dans le progrès lui-même qui, en plus de ses bienfaits, a amené ce qu'un sociologue contemporain appelle ses «désillusions» dont l'une est l'occasion plus fréquente de conflits entre les personnes et les groupes. Si la communication, l'habitat et le travail ont rapproché physiquement les êtres humains, n'est-il pas vrai de dire qu'ils les ont éloignés sur le plan des idées et des intérêts?

De plus, sans faire une profonde étude psycho-sociale, il faut, je pense, observer que le concept du juge devant qui tous sont égaux est fortement ancré dans la conscience humaine, peut-être encore plus aujourd'hui, dans un monde où l'individu sent son impuissance grandir continuellement.

Deuxième question: Le citoyen a-t-il encore confiance en notre système judiciaire?

La réponse doit être nuancée, parce que, à la réalité, cette confiance n'est pas complète. Le doute qui perce, à mon avis, n'est pas étranger à l'état de dépendance du pouvoir judiciaire vis-à-vis des deux autres pouvoirs. Dans tout état, démocratique ou autre, l'indépendance absolue du «judiciaire» est un mythe. Cependant, on doit tendre au plus haut degré d'autonomie; il faut tenter de dégager le plus possible le judiciaire du législatif et de l'exécutif auxquels on attache communément le vocable «politique», afin de maintenir la confiance collective. Et cette autonomie résulterait, entre autres choses, de l'identité du pouvoir judiciaire, dans ses structures et dans ses attributions.

Un inventaire rapide de nos institutions judiciaires nous démontre qu'elles sont constituées par un labyrinthe complexe des tribunaux qui n'ont entre eux aucun lien interne sauf, dans certains cas, celui d'un conseil de la magistrature, à pouvoirs très limités. Quant aux attributions, ce n'est pas sans une certaine appréhension pour l'avenir du pouvoir judiciaire qu'on voit s'installer cette pratique d'amputation en faveur de créatures nouvelles qualifiées de «tribunaux administratifs». La rationalité de cette pratique me paraît pour le moins douteuse en constatant que, parmi ces organismes, les uns exercent des fonctions purement administratives, certains, des fonctions proprement judiciaires et d'autres, les deux à la fois. Ajoute à la confusion le fait qu'ils relèvent d'une diversité considérable d'autorités gouvernementales.

Dans le but d'affermir l'identité du pouvoir judiciaire, et sans que ceci constitue, pour les autres pouvoirs, une abdication de leurs prérogatives ni une renonciation à leurs responsabilités, il me paraît s'imposer des modifications de base. La première, à mon avis, serait l'établissement d'un partage le plus net possible entre la juridiction judiciaire et la juridiction administrative suivant des critères clairement définis. La seconde serait le regroupement des ces tribunaux dans chacun leur cadre respectif, mais au sein d'une entité

qui leur serait propre. Quant aux tribunaux judiciaires, je les verrais bien réunis, au niveau provincial, sous un Conseil de la Justice dont les pouvoirs seraient non seulement d'ordre consultatif mais nécessairement administratif.

Autre question: Le citoyen est-il satisfait du service judiciaire?

Ici, il faut admettre que la machine n'a pas suivi le rythme de la demande. Quand on voit un inculpé vivre dans l'angoisse d'une accusation pendant deux ans, trois ans, sinon plus, quand il faut autant de temps pour trancher un litige civil, les reproches, parfois acerbes, qu'on adresse à la justice sont justifiés. Des réformes s'imposent donc aussi pour améliorer l'efficacité de l'appareil judiciaire.

D'abord, la distribution des juridictions au sein des tribunaux judiciaires doit être repensée en fonction des besoins. Il existe, en effet, dans certains domaines, d'une part un éparpillement et d'autre part un empiètement des juridictions qui sont causes de confusion, en plus d'entraîner des pertes de temps, une multiplicité de procédures et la possibilité de jugements contradictoires.

Cette restructuration devrait évidemment se faire en même temps qu'un inventaire des ressources tant humaines que matérielles, pour en assurer une utilisation maximum et la plus uniforme possible.

Autres réformes utiles:

— la décentralisation administrative au niveau régional, afin de permettre une plus grande mobilité des juges;
— la création d'une réserve de juges, pour assurer la continuité du service judiciaire; à ce sujet, l'initiative prise par le gouvernement fédéral et adoptée par certaines provinces est heureuse;
— l'adjonction d'auxiliaires (law clerks) aux juges;
— enfin, la modernisation de certaines méthodes administratives.

Passant brièvement à notre mécanisme procédural, il faut avouer qu'il est d'une complexité et d'un manque d'uniformité stupéfiants. Ici je pense particulièrement au domaine civil et au domaine administratif. Tout en reconnaissant que la procédure écrite est la garantie que les droits des parties seront protégés, on ne peut s'empêcher d'observer qu'elle n'existe pas en droit pénal où, pourtant, on a trouvé moyen d'assurer la protection de ces droits. Je n'irai pas aussi loin que ceux qui préconisent l'abolition de toute procédure écrite en matière civile, mais je crois qu'une simplification de nos règles procédurales est nécessaire pour hâter la solution des litiges. De même, l'immense variété de ces règles, d'une juridiction à l'autre ou d'un tribunal à l'autre, ne me semble pas supportée par un souci d'efficacité; une sérieuse tentative d'uniformisation serait à l'avantage de tous. Le travail de recherches sur le sujet serait d'autant plus facile que des études ont été faites et même l'expérience est déjà acquise dans certaines provinces ainsi que dans d'autres pays.

Toutes ces modifications, et peut-être d'autres, quelle qu'en soit la valeur, ne peuvent toutefois, à elles seules, garantir la qualité de justice que le citoyen est en droit d'espérer. La justice demeurera humaine, parce qu'elle continuera d'être dispensée par des êtres humains.

D'autres, au cours du présent colloque, ont parlé et parleront des juges et de leurs attributs. Je me contente d'appuyer sur la nécessité de vérifier leur valeur et de leur accorder l'indépendance collective et individuelle, cette dernière que, sans doute, Shakespeare avait à l'esprit lorsqu'il faisait dire à un de ses personnages:

> Happy am I that have a man so bold
> That dares do justice on my proper son

Enfin, les avocats. Le sujet est trop vaste et le temps trop court pour le traiter ici d'une façon adéquate. Qu'il me suffise de rappeler que, sans leur intégrité et leur compétence, une bonne justice est impossible et que la concentration de leurs efforts est indispensable à une meilleure justice.

Que sera le pouvoir judiciaire en 1984?

Il en dépendra de la volonté de ceux qui ont la responsabilité personnelle ou sociale de le façonner, à condition qu'au départ ils soient déterminés à lui assurer le caractère double de crédibilité et d'efficacité.

André Dufour *

professeur titulaire à l'Université Laval
directeur de la recherche et coordonnateur de la planification
au ministère de la Justice du Québec

La prophétie demeure toujours étrangère à la science juridique et nul ne peut prédire ce que sera devenu dans dix (10) ans notre système judiciaire ni la place qu'y occupera la magistrature. Toutefois, la prospective, dans la mesure où elle s'appuie sur les causes économiques, sociales et scientifiques qui accélèrent l'évolution du monde moderne, permet de prévoir les situations qui pourraient découler de leurs influences conjuguées. C'est donc dire que les quelques idées qui vont suivre sur l'évolution du pouvoir judiciaire doivent reposer sur une conjoncture aussi cohérente que possible et voilà pourquoi elles s'appuieront de la situation québécoise du système judiciaire. Même si ce système ne diffère pas grandement de celui des autres parties du Canada, il repose tout de même sur des données législatives et sociales différentes qui pourront peut-être influencer différemment son évolution et qui expliquent sûrement ses particularismes actuels. Il ne faudrait pas croire en particulier que certains effets extérieurs comme les condamnations pour outrage au tribunal, les délais de jugement et les conflits de juridiction ne sont que des épiphénomènes. Ils ne sont que le reflet d'une situation dont les causes profondes demeurent à la base de ce que sera demain le pouvoir judiciaire en cette province. Voilà pourquoi, même si les remarques qui vont suivre s'inscrivent dans une perspective aussi large que possible de l'avenir de la magistrature, elles devront faire appel à un contexte qui n'est pas le même partout et qui explique l'orientation des hypothèses qui seront avancées.

La contestation sociale et parfois violente qui marque notre vie publique n'a pas évité le pouvoir judiciaire. Bien au contraire, c'est dans la mesure où cette contestation s'est faite violemment que ses acteurs se sont retrouvés devant les tribunaux et qu'ils y ont trouvé à la fois matière et nouveau forum de contestation. De plus, de toutes les institutions publiques visées, le pouvoir judiciaire est sans doute celui qui est le plus vulnérable puisqu'il ne possède aucun moyen de défense qui lui soit propre et que sa capacité d'adaptation est fortement limitée puisqu'elle lui vient essentiellement de l'extérieur. C'est d'ailleurs cette absence d'autonomie et cette distance qui le séparent des principes démocratiques qui le rendent si vulnérable et qui poussent certains esprits à chercher dans ces causes la source de toute solution d'avenir. Avant d'en juger l'opportunité, il convient d'analyser successivement les deux idées maîtresses qui président à l'avenir du pouvoir judiciaire: l'indépendance de la magistrature et le rôle qu'elle doit jouer dans l'administration de la justice.

* Les idées exprimées dans ce texte sont purement personnelles à son auteur et n'impliquent aucune approbation ni prise de position de la part du ministère de la Justice ou du gouvernement du Québec.

I. — L'INDÉPENDANCE DU POUVOIR JUDICIAIRE.

De tous temps l'indépendance du pouvoir judiciaire a constitué au sein des institutions britanniques une nécessité et un dogme.

Une nécessité parce que selon notre conception de la séparation des pouvoirs il fallait confier à un organe distinct du Parlement et du Gouvernement la tâche de dire le droit et d'appliquer les normes juridiques aux situations particulières. Mais il s'agit également d'un dogme dans la mesure où ce pouvoir judiciaire se trouve en fait étroitement relié au pouvoir législatif qui édicte les règles de droit et au pouvoir exécutif qui nomme et paie les juges. Bien plus, une hiérarchie s'impose entre ces pouvoirs et la suprématie du Parlement, s'impose même aux tribunaux selon la théorie de la « rule of law », comme elle s'impose à l'Administration. Or, dans la mesure où l'évolution du système parlementaire, par le jeu des partis et par la règle de la majorité gouvernementale, a conduit au fusionnement des pouvoirs législatif et administratif aux mains du parti au pouvoir, on comprend jusqu'à quel point peut s'être rétrécie l'indépendance du pouvoir judiciaire.

C'est d'ailleurs en analysant les relations qui s'imposent entre la magistrature d'une part et les pouvoirs législatifs ou exécutifs d'autre part que nous pourrons mieux saisir le degré d'indépendance qui subsiste aujourd'hui.

A. Le pouvoir judiciaire et le Parlement.

Il est inutile de s'étendre sur la règle de la suprématie du Parlement. Elle constitue le fondement de notre Constitution et s'impose aussi bien aux juges qu'à l'administration.

Aussi longtemps que l'intervention législative du Parlement se limitait à régir les rapports entre individus ou à sauvegarder les principes élémentaires d'ordre social, la magistrature pouvait demeurer à l'écart de l'activité politique et du fonctionnement général de l'État. Le Gouvernement lui-même n'était que rarement impliqué directement dans un litige et lors d'une instance criminelle par exemple, il n'avait pas d'intérêt personnel à défendre. Quant aux litiges de droit civil, le pouvoir exécutif a longtemps joui du pouvoir de déterminer les cas où il acceptait d'être poursuivi partant de la règle générale voulant que « The King can do no wrong ».

Mais tout cela a radicalement changé. Tout d'abord l'Administration est graduellement devenue une partie comme les autres, susceptible d'être fréquemment contrainte devant les tribunaux, mais surtout l'intervention de l'État dans l'activité sociale et économique du pays a conduit la Législature à adopter des lois qui impliquent des objectifs d'ordre politique de plus en plus précis. Or, face à ces nouvelles législations, le travail du pouvoir judiciaire qui est celui de « dire le droit » implique nécessairement une dimension politique. En effet, si le tribunal interprète la loi selon l'esprit du législateur, il doit tenir compte de cette dimension politique et il entre de plein pied sur un terrain qui jusque là lui était étranger. Ou bien il confirme l'orientation sociale ou économique du législateur et on pourra alors accuser le tribunal d'être l'instrument et le serviteur de cette politique, ou bien, si le tribunal se prononce en contradiction de cette pensée, on pourra l'accuser de se constituer en pouvoir d'opposition et de vouloir supplanter le législateur en déterminant à sa manière ce que doit être l'intérêt public.

À cette question de fond, il faut ajouter certaines dispositions législatives qui viennent sévèrement sanctionner les objectifs de la loi et qui ont pour conséquence de laisser entre les mains de la magistrature tout l'odieux de la mise en œuvre d'une loi. Ainsi par exemple, lorsqu'une loi impose le retour forcé au travail d'une catégorie de travailleurs en grève et que ceux-ci refusent d'obtempérer à l'ordre législatif, c'est du tribunal que l'on exigera de prononcer sentences et amendes et c'est aux juges qui auront ainsi décidé que l'on fera

reproche des rigueurs, voire même des excès, de cette législation. C'est surtout en ce sens que certains voudront en tirer la conclusion que les juges ne sont que les instruments du pouvoir exécutif puisque c'est lui en fin de compte qui est responsable de l'adoption de telles lois par le Parlement.

Mais les relations directes avec le pouvoir exécutif ont elles-mêmes grandement évoluées et c'est là que les difficultés s'avèrent les plus grandes.

B. LE POUVOIR JUDICIAIRE ET L'ADMINISTRATION.

Selon la tradition britannique, c'est au gouvernement qu'il appartient de choisir et de nommer les juges. C'est aussi à lui qu'il appartient de leur payer ce qu'il estime raisonnable comme salaire et de mettre à leur disposition les facilités matérielles qu'il juge nécessaires à une saine administration de la justice.

Or, si ces liens étroits entre l'exécutif et le judiciaire existent depuis longtemps, ils soulèvent de plus en plus d'objections et de reproches, tant de la part des citoyens qu'au sein même de la magistrature.

Même si le processus s'entoure d'une consultation plus ou moins ouverte et fondée, il n'en reste pas moins qu'une nomination de magistrat, si elle ne signifie pas nécessairement une récompense politique, témoigne, par la possibilité du choix, d'une sélection orientée selon l'esprit et la politique du gouvernement au pouvoir. À l'âge où ils sont nommés et compte tenu de leur passé, on sait à quoi s'attendre. Qui, par exemple ne peut prédire la tendance constitutionnelle d'un juge nommé à la Cour suprême? Certes il est difficile de prévoir ce qu'il fera devant tel litige en particulier, mais l'on sait fort bien selon son échelle de valeur quelles seront les paramètres de ses raisonnements.

Le seul contrepoids à cette dépendance matérielle demeure l'inamovibilité du juge. Quoiqu'il advienne et même s'il renversait son échelle de valeur pour rendre des décisions à l'encontre de ce qu'on pouvait attendre de lui, il conserve son poste et son autorité et demeure à l'abris de toute représaille matérielle directe de la part du pouvoir gouvernemental.

Comme on le voit cependant, il s'agit là d'une protection individuelle et cela ne signifie nullement que le pouvoir judiciaire soit à l'abris de l'exécutif même si chaque juge conserve son inamovibilité.

Il ne faut pas oublier non plus que l'Administration a trop souvent tendance à abuser de cette réserve d'énergie que constitue la magistrature. Sans parler de ceux qui vont y puiser des candidats pour une éventuelle bataille électorale, sans se soucier de l'image défavorable ainsi projetée sur l'ensemble des juges. Il faut regretter que l'on puise si facilement parmi ce réservoir de compétences que constitue la magistrature, pour agir dans des fonctions étrangères à leur rôle propre, même s'il s'agit de la poursuite d'objectifs éminemment profitable pour l'intérêt public. En effet, que l'on ait besoin d'un président de commission d'enquête ou d'un médiateur au sein d'un conflit, le choix d'un juge, s'il implique une sage impartialité, conduit à engager la magistrature dans la détermination de l'intérêt public en dehors des règles juridiques existantes et donc dans l'élaboration de solutions politiques.

Nul doute que la magistrature peut compter dans ses rangs la perle rare capable d'apporter la solution à un grave problème social. Mais compter régulièrement sur cette réserve pour effectuer des tâches de cette nature emmène inévitablement à confondre justice et administration.

De même en est-il lorsque par l'usage abusif du recours en injonction, on exige constamment du pouvoir judiciaire qu'il se prononce sur l'intérêt public d'une situation et

qu'il interdise ou qu'il permette de poser certains actes en s'appuyant non plus sur une disposition précise de la loi mais uniquement sur son appréciation subjective de la balance des inconvénients. Appliquée à toutes les sauces, l'injonction a ainsi conduit, au cours des dernières années, les tribunaux à combler les lacunes des législations existantes ou à remplacer par leurs jugements des décisions administratives qui auraient dues être préalablement prises.

Mais c'est en voyant au sein même de l'administration de la justice les relations existantes entre le judiciaire et l'exécutif que l'on peut encore mieux juger de l'orientation nouvelle de la magistrature.

II. — LA PLACE DU JUDICIAIRE DANS L'ADMINISTRATION DE LA JUSTICE.

L'un des traits marquants de l'évolution récente du pouvoir judiciaire demeure le profond changement intervenu au sein même de l'administration de la justice. Le rôle du juge par rapport aux officiers de justice s'est rapidement transformé au profit du pouvoir exécutif et par conséquent au détriment de la « puissance judiciaire ». Cela mérite que l'on fasse le point de la situation d'hier et d'aujourd'hui.

A. L'ÉVOLUTION DU RÔLE ADMINISTRATIF DE LA MAGISTRATURE.

Seul maître de ses décisions, le juge a toujours possédé au sein du palais de justice la déférence des uns et le respect, voire même la crainte, des autres.

Tout était finalement centré vers lui et l'on comprend qu'il lui était facile alors d'avoir une incontestable ascendance sur ceux qui l'entouraient et qui au fond n'avaient de raison d'être qu'en fonction de son droit à rendre la justice. Cette situation fut longtemps favorisée par le fait que ceux qui détenaient ces postes d'officiers de justice (protonotaires, greffiers, huissiers, avocats) étaient des professionnels qui exerçaient leurs tâches en toute liberté, sans contrainte aucune de l'État. Ainsi existait-il entre le gouvernement, responsable de l'administration de la justice, et la magistrature une zone de libre influence, une zone tampon sur laquelle le juge avait beaucoup plus d'influences que l'État. C'est donc très souvent une véritable « cour » peuplée de « courtisans » qui entourait le pouvoir judiciaire et qui donnait aux juges cette impression de puissance et d'importance même si elle ne reposait ni sur une base financière, ni sur la détention de pouvoirs matériels inhérents à la fonction.

Or voici que ces dernières années, la rationalisation du système judiciaire et la prise en charge du personnel des palais de justice par l'État a transformé les courtisans en de vigilants syndicalistes qui se tournent maintenant plus volontiers vers le gouvernement pour y négocier leurs conditions de travail. Plus que toute autre chose, c'est cette révolution de palais qui a secoué la magistrature. Mais il s'agit là d'un fait accompli dont il ne reste plus qu'à tirer les leçons d'avenir.

B. LA RESPONSABILITÉ DU POUVOIR JUDICIAIRE DANS L'ADMINISTRATION DE LA JUSTICE.

Regrettant le passé, on comprend que certains veuillent songer à rétablir la situation antérieure en donnant aux juges le pouvoir financier de se payer une nouvelle autorité sur le personnel qui les entoure. Mais est-ce bien là que repose l'intérêt du pouvoir judiciaire? Ce qu'il gagnerait en prestique personnel vaut-il le danger que constitue la responsabilité de la gestion d'une telle entreprise? A-t-il songé aux pièges que pourrait receler la négociation de conventions collectives entre le judiciaire et les employés du Palais? Peut-on imaginer que ces sommes d'argent soient versées sans exiger une reddition de comptes publiques devant le Parlement?

Certes, on peut concevoir que l'administration de la justice soit entièrement remise entre les mains du pouvoir judiciaire, mais ce dernier serait, à mon avis, le premier à en souffrir. Il ne lui appartient pas, en effet, d'administrer les biens publics mais de trancher des litiges à la lumière du droit. Que pour remplir ce rôle il lui faille compter sur un personnel de soutien et sur de l'équipement ou une organisation matérielle, cela va de soi. On ne rend plus la justice assis au pied d'un chêne. Mais toute cette structure ne doit avoir qu'un but: permettre au citoyen d'avoir justice et non pas permettre au juge d'avoir prestige.

La puissance et l'indépendance de la magistrature, c'est en son sein que le pouvoir judiciaire saura les trouver et non dans la quantité de commis qu'il saura commander ou dans l'épaisseur du budget qu'il voudra administrer.

Soumis au Parlement, le pouvoir judiciaire devra se garder des liens qui l'unissent à l'exécutif. Pour ce faire, nombreuses sont les solutions qui visent à entourer la nomination des juges d'un mécanisme obligatoire et éliminatoire de consultation. On peut également songer à travers un Conseil de la Magistrature à y trouver un mécanisme d'évolution des conditions matérielles de travail pour éviter que les traitements des juges soient uniquement soumis aux aléas politiques.

Pour le reste, il faut compter sur la sagesse du législateur qui évitera de confier aux juges des responsabilités administratives dans l'interprétation des lois et sur la prudence du gouvernement qui saura non seulement réserver ses nominations aux personnes les plus aptes mais qui évitera ensuite de les exploiter au profit de politiques à courtes vues.

Les manques de respect et les outrages commis devant les tribunaux témoignent d'une dégradation de l'image du pouvoir judiciaire. Les causes en sont multiples mais il ne faudrait pas croire qu'elles découlent d'un mouvement irraisonné de violence. Il importe au contraire de procéder aux réformes qui s'imposent pour adapter aux exigences de demain la magistrature d'aujourd'hui. Certains éléments sont irréversibles, comme la syndicalisation des officiers de justice, la modernisation des tribunaux et des procédures. Il appartient aux juges d'assurer le recyclage que leur impose le choc du futur.

D. C. McDonald

juge à la Cour d'appel de l'Alberta

Two years ago I organized and chaired the panel discussion at the annual meeting held at Banff, on the selection, appointment, training, discipline and removal of Judges. As the other members of this year's sequel panel will likely continue the discussion of all or some of those problems, I propose to dedicate my allotted time to a seagull's view of a number of other matters which properly may be raised if we are labouring under the broad rubric "The Judiciary 1984".

What I propose to do is little more than to identify a number of ways in which the role and functioning of the judiciary may undergo changes between now and the Orwellian target year. Not being a prophet, I do not have many of the answers to the questions I will pose; indeed, even the questions are not original. Many of the questions I will pose have been discussed during recent years by our Chief Justices, by our judges, and by lawyers. However, the judicial discussion are *in camera*, and the lawyer's discussions have been informal and unrecorded. Therefore it may be useful to itemize these questions, and open them to public debate.

A. Will the Role of the Judiciary Change?

Will automobile accident cases be removed from the purview of the courts through an exclusive or modified no-fault system of state financial relief to accident victims? The effect of the Saskatchewan system may be of interest to you: I am advised by a judicial friend in Saskatchewan, where today all Saskatchewan drivers are insured by the Saskatchewan Government Insurance Office, that he has been informed by an officier in the S.G.I.O. Legal Department that about 90 percent of claims are settled at the adjuster's level, and that of the 10 per cent that reach the Legal Department about 90 percent are settled before they reach court. This is largely because the issue of liability is meaningless when both drivers involved in an accident are insured by the same insurer. The maximum limit of standard S.G.I.O. coverage per accident is $35,000.00 The S.G.I.O. also sells extended endorsement coverage. There is a $200 deductible on the compulsory insurance. Cases concerned with the deductible are fought in Small Debts Court. My judicial friend, a member of the Court of Queen's Bench, says that during the past year he has presided over the trial of only three automobile accident cases — two were liability and damages were in issue (both involved one car from outside Saskatchewan) and one where damages only were on issue.

A friend who is a member of an important American federal court of appeals, in a letter to me last week on this and other points I am raising today, predicts that in the United States a no-fault system of automobile insurance will come, "because experience in Puerto Rico. Massachusetts and elsewhere has shown that it is no much cheaper. The lawyers who are now making their living in this field have a golden opportunity to shift over to environmental and other forms of public interest law. There is lots of litigation there, really crying for attorneys to take it."

Will going to court become such a luxury in commercial cases other than those involving very large sums, that arbitration will increasingly take its place?

A British Columbia judge who, when at the Bar, had extensive experience in arbitrations, says that the saving of money is not one of the advantages of arbitration. This, he says, is particularly in commercial matters where the three-man board is usual.

Will some kinds of criminal charges now heard by judges at all levels instead be disposed of on what might be called a community-arbitration basis, where the accused and the complainant work out a "solution", not necessarily in a judicial setting?

Will many private civil disputes and criminal matters be disposed of at a more localized level, in some less restrained or austere setting than in a supreme courtroom or even a magistrate's courtroom in the central courthouse of a large city? We are of course aware of the new Quebec system for the resolution of civil disputes up to $300. This is a division of the Provincial Courts, which the procedure is informal and no party may be represented by a lawyer. The cases are heard in almost 100 centres. There is no appeal. During the 10 month period ending June 30, 1973, over 60,000 cases were commenced. The average claim was $130.00. 78% of the cases were decided and the average time-lag was 49 days.

We need to know much more about the functioning of "block-courts" in such cities as Havana, as a possible mean of attacking the problem which our judicial system suffers from as much as do other branches of the public administration — the sense that the institution is inaccessible, distant, a place only for those with professional assistance because only the professionals have the keys to accessibility. Now, you know and I know that in fact our courts are very accessible to the people, but do the people feel it? In this regard I am indebted to Professor D. T. Anderson of the University of Manitoba, who in a recent letter wrote:

I suspect that increasingly the public is going to look on the courts as dispensing certain services: it is going to demand that those services be good, accessible and cheap; and the expectations may often be higher than our capacity to fulfill them. We may therefore expect more critical studies, along the lines of that just published by the Criminological Institute of the University of Toronto, calling for the use of the best modern methods of business administration in scheduling and concluding court business.

B. Will New Methods Be Adopted, to Heighten the Responsiveness of our Judiciary?

Our trial judges in particular run the risk of fatigue and stagnation arising from the volume of work and, frequently, its repetitiveness. In a country such as ours, the provincial boundaries should not be allowed to prevent such ameliorative steps as:

1. *Interprovincial judicial exchanges.* — Particularly in criminal matters there is no reason why a provincial Supreme Court trial judge ought not to be available to sit in a province other than his own. Indeed, not only should provincial legislation be amended so as to permit it, but the practice should be encouraged. It would be good for the Bench and for the Bar. It might be said in opposition to such a proposal, in criminal matters, at least as to sentence, there is a difference in community standards from province to province, which an "exchange judge" would not readily be aware of. I should think that an exchange judge would be equally as capable of overcoming his cultural disadvantage in that regard as novice judges are capable, somehow, of instructing themselves as to what the local "going rate" is for various offences. Nor is there any reason why judicial exchanges should be restricted to trial judges appellate judges would benefit from such a practice, as would appellate courts as a whole benefit from the intimate exchange of ideas as experience.

My American judicial friend observed in this connection:

> Judicial exchanges are indeed fruitful, but here congress and the public are inclined to look upon them as boondoggles. Actually, it works out that the judge takes on an extra burden in another circuit besides the work of his own court, so it's no boondoggle. Here, there must be the justification that one circuit or district is behind in its work, and a judge is sent in from one that is comparatively ahead.

An Edmonton Supreme Court Appellate judge with extensive trial experience disagrees with this suggestion. He says:

> I believe that an intimate knowledge of the community in which he lives is one of the most important attributes that a judge can have. Most of the cases we decide, certainly at the trial level, do not involve the interpretation of legal principles, but rather a search for a common-sense, equitable solution.
>
> To achieve that result in one's own community is always difficult. For me to try to do so, for instance, in Newfoundland would be next to impossible. As for Quebec, even if that Province were to countenance such a move, which is unthinkable, the task would, in fact, be impossible.

2. *Temporary assignment of trial judges to appellate courts.* — It is not unusual in some provinces that occasionally a Supreme Court trial judge will sit on a panel of appellate judges. The potential benefits to the trial judge and the regular appellate judges sitting with him, especially if the latter have had little or no experience as trial judges, are not difficult to imagine.

3. *Temporary assignment of appellate judges as trial judges.* — It is less usual, indeed rare in most provinces, that a provincial court of appeal judge will sit as a trial judge. It seems to me that, especially in the case of appellate judges without prior experience as trial judges, they would benefit from doing so from time to time. This is even more probably the

case if, as is sometimes the case with appellate judges, the nature of their practice before appointment to the Bench took them nowhere near the courtroom. Even in the case of appellate judges with prior courtroom experience, whether as barristers or as trial judges, I am only expressing what is often heard at the Bar when I say that it may be that the occasional return to the hurlyburly of the trial courtroom may be salutary. Moreover, it might be salutary that occasionally judges of the Supreme Court of Canada should similarly sit as trial judges.

The late Chief Justice Horace Harvey of Alberta writing in 1948 after 44 years on the Bench, said that "it is an advantage for a trial judge to have some experience as an appellate judge, as it is for an appellate judge to have experience at trials."

My American judicial friend, who is an appellate judge without experience as a trial judge, observes: "The appellate judge sitting as a trial judge would be equally as good as the temporary assignment of trial judges to appellate courts, except, frankly, most appellate judges would foul it up as trial judges. Your point on the need of trial experience for appellate judges is unquestioned — the issue is whether the system can afford the boo-boos that the inexperienced appellate judges would make."

However, an Edmonton appellate judge says:

> This is a good idea, and one that in fact takes place in Alberta, although not on a systematic basis. For myself, I would welcome a stint of, say, a couple of months every two or three years on trial work. I say that for three reasons:
>
> 1. The work of a trial judge and of an appellate judge is quite different. For want of a better term, there is more "human interest", more excitement, if you will, on conducting a trial than in hearing appeals, reading appeal books and listening to arguments. Thus, for me at least, a trial stint every so often would add to the spice of life.
> 2. It seems to me important, as an appeal judge, to try to remember always that there are human beings behind the written word of an appeal book. One way to do this would be to spend some time hearing trials.
> 3. I consider one of my most important functions as an appellate judge is to ensure that there was a fair hearing at the trial, particularly in criminal cases. After having spent 4½ years as a trial judge I hope I have some idea of what goes on in these trials. In some cases it amounts to a sort of sixth sense, of reading between the lines, if you will. As a result, periodic trial sittings would help in the fulfillment of that role as a watchdog.

4. *Judicial Sabbaticals.* — The word "sabbatical" seems to have fallen into a degree of disfavour recently, at least among those envious of the Canadian university practice. The concept is one of many derivatives of Scottish academe. The critics claims that it is unnecessary, wasteful, and a form of boondoggling. However, the intent of sabbaticals at universities is not that a sabbatical is to be a year of idleness, akin to summerfallow. The analogy is rather to the seeding of wheatland every three years or so to clover or some other restorative crop. It is to be a change of pace, not a standing still. Surely it is evident that after many years on the Bench, some judges feel battleworn and exhausted. Would they not benefit, and hence the Bar and litigants as well, from an organized programme which might contain a number of possible options? For example: six months teaching at a university, preferably in some other province or Commonwealth country; touring other provinces or countries, to sit with, but not as participating members of, trial and appellate courts; and I am sure other useful options would occur to some of you. For example, a Quebec judicial friend has suggested that through the Canadian Judicial Council, a judge could take sabbatical leave to travel and conduct across the country small judicial seminars in his specialty. He suggests that this would be a useful addition to the annual judicial conference, attended by 48 judges for 5 days, which he find too large to be effective as a learning process.

5. *Temporary judges.* — In Canada there seems to be an unnecessary adhesion to the principle of lifetime appointments to the superior courts, or at least until the age of 75. This seems to be associated with the doctrine of the independence of the judiciary, and properly so. Yet from time to time the trial dockets become crowded, some would say it is a rather permanent disease in most provinces, and yet it is felt that the appointment of a large number of additional judges might be regretted if the litigation peak should be reached and we might then find a bevy of idle judges on our hands. In England, practising barristers may now be appointed as part-time judges or "Recorders". Since 1971, Recorders are Q.C.s or Juniors or solicitors of 10 years' standing. They accept an obligation to sit for at least 20 days a year. Q.C. Recorders sit frequently at the Old Bailey, and in the Provinces will be reserved for bigger cases. Juniors and solicitors of 10 years standing will try minor crime: burglary, theft, dangerous driving but not robbery. In addition, Q.C.s may be appointed as Deputy Judges of the High Court pro term for one particular sitting in a provincial town. Recorders may also sit in civil or divorce cases as County Court Judges. My English barrister friend, who is a Junior and a Recorder in a large provincial town, assesses these features of the Beeching system as "probably leading to a fairly well-trained pool of ability; with opportunity to show judicial as apposed to advocacy skill, but could show up temperamental *incapacities* — which I regard as a good safety measure, bearing in mind the difficulty of getting a bad Judge out. Recorders are there for three years, but no one need provide them with a Court, if they prove bad."

Would it not be possible to consider such appointments in Canada, with non-renewable terms of appointments or other safeguards against executive interferences?

An Albertan judicial friend who has read the initial draft of these remarks disagrees with me. He is not in favour of the appointment of temporary judges. He believes that "an efficient use of judicial time would solve any problems arising from excessive case load. The long summer vacation should be abolished and we should operate our courts on a twelve-month year."

Another judicial friend from Alberta also disagrees, for different reasons. He says: "I'm not sure if I agree that there is a place for part-time judges. We live in an age when, as never before, young people and others are questioning the role of the courts, and are suggesting that the judges are but another arm of the political authorities, or of the 'establishment'. I believe it is important to do everything possible to maintain the independence of the judiciary, and, equally as important, that the appearance of independence be maintained, and, indeed, strengthened."

My American friend, who is very familiar with Latin America, observes that in Chile and Argentina, "there is provision for the appointment of temporary judges, even on the Supreme Court, whenever one of the regular members must disqualify himself. It's a great honour to be so designated, and those picked are usually from among the senior and most respected members of the Bar."

6. *Specialized judges.* — We have, in different provinces, recognized judicial specialties. Certain provincial supreme court judges assume responsibilities in bankruptcy, although in theory all such judges have jurisdiction in the area. Some judges are regarded by the Bar as being more astute and knowledgeable in matters involving the prerogative remedies, others in complicated commercial matters, others in criminal cases. At least in large urban centres, as the population and therefore the volume of litigation grows, it may become desirable to seek a greater degree of formalized specialization. How would it work? I am sure that no single formula would satisfy the needs of all jurisdictions. However, if it is felt that a degree of specialization has advantages, then possible systematization should be examined.

I am informed by an English barrister that in London there exist High Court, metropolitan, Revenue, Patent, Restrictive Practices and Chancery specializations, but that there is little specialization elsewhere. He says that the general approach under the Beeching recommendation "is to laydown broad categories of work, but to allow cases to be allocated to individual Judges of known aptitudes, eg. frauds to whose wholike long detail."

I was curious about the new Commercial Division of the High Court in England, which a distinguished Canadian academic friend has described to me as a court the idea of which was "avowedly to reclaim business from the arbitrators, with no gowns, relaxed rules of evidence, jurisdictional limited determined to some extent by the parties." My English friend tells me that the Division has not attracted the expected Commercial work.

He does say that the new Industrial Relations Court is the most used new specialist Court. In it Judges of the High Court rank with lay industrialists, there are different rules and an informal procedure.

7. *Specialized Assistance for judges.* — This raises the chestnut about the possibility of increased use of the kind of power which is exemplified by Alberta Rule 235:

> The Court may at any time order any cause, matter or issue to be tried by a judge sitting with assessors.

Those of us who are landlocked know nothing of the extent to which, and manner in which, a similar power is exercised in Admiralty Courts. Apart from that field it is my impression that such powers are not used much or at all today. Should they be used more? Similarly most provinces no doubt have a Rule similar to Alberta Rule 218:

> (1) The court on its own motion or upon the application or any party in any case where independent technical evidence would appear to be required (including the evidence of an independent medical practitioner) may appoint an independent expert (herein called "the court expert").

It would be desirable to know the extent to which this power is now used. Will it be used more frequently in the future? In Alberta and Ontario (the practice in Ontario being described by Mr. Maurice Galligan in the *Canadian Bar Journal* for April, 1973), some judges have developed an analogous practice of appointing an *amicus curiae* to represent the interests of infants in a custody issue. The problems that arise if this kind of inroad on the adversary system is to be fostered have not been analyzed in print, in depth.

Yet the future may hold promise for more of this kind of development. Professor Anderson has suggested to me that a particular field in which special assistance may be required for courts is in relation to environmental matters. The growth of litigation in this area of experience, he says, and "the scope of the issues — affecting, in some cases, a significant sector of the economy as well as natural resources, and calling for a balance of values and interests exceedingly difficult to identify and weigh."

By analogy to the Alberta and Ontario practice of the Court appointing an *amicus curiae* in custody matters, Professor Anderson observes that "the Courts (or whatever adjudicative body is involved) may increasingly have in the future to consider interests not necessarily represented by the parties. In matters dealt with outside the courts (e.g. labour disputes), there has been a demand in recent years that means be found to represent the public at the bargaining table, as a sort of third party. In matters of free speech, the American courts, by their extensive conception of *amicus curiae,* have allowed parties interested in the principle of an action, but not parties to the actual dispute, to be heard."

My American friend observes that specialized assistance is very common in the courts of the United States. "Any time the trial judge feels that he needs an expert, there is usually a provision for appointing him, whether it's medical, financial or what. Similarly, whether the trial or appellate court, we do not hesitate to appoint an *amicus curiae* to repre-

sent any interest which it appears the litigants will not be able to represent adequately themselves."

My British Columbia judicial correspondent observes that under M.R. 426, which is like the Alberta Rule, assessors have been used in British Columbia rarely. However as two examples he cites the action between the B.C. Electric Co. and the provincial government over the expropriation of B.C. Hydro in 1964, in which Chief Justice Lett was assisted by two assessors; and a case now being tried before Macdonald J. The latter case is between B.C. Hydro and a group of contractors. The judge is sitting with one assessor (the trial has lasted for two years, with sittings every three weeks out of four). My informant, who has wide experience in the arbitration process, is of the view that "where there is sufficient money involved and expertise is required, there is nothing better designed to prevent a misunderstanding of the evidence than the assistance of one or two experts of independence."

An article by Silverman in (1973) 11 *Alta. Law Review* 40 discusses reported cases where assessors have been appointed.

In 1972 Mr. Justice Sinclair of the Supreme Court of Alberta, then a judge of the Trial Division, had before him a bitter dispute over the construction of a dwelling house. Some 100 items were in contention. Had the case gone to trial, it would have lasted at least three weeks. Instead, the parties initiated a series of pre-trial conferences with the judge, and consented to the appointment of an architect to assist the Court. The architect made several inspections, recommended remedial work, and secured estimates of costs. The parties agreed that the judge would act as an arbitrator, and that his decision would be final.

8. *More judicial assistance for juries.* — The present President of the Canadian Bar Association, Mr. L. P. deGrandpré, Q.C., in a recent address has suggested that, as in some continental systems, judges should retire with juries while they consider their verdicts: (he recommends) "that the judge retire with the jury when they consider their verdict. This practice, which is known to France and to other Continental countries, makes it much more reasonable to admit all relevant evidence of whatever type possible. The question of admissibility then becomes a relatively minor one, the true question being the weight to be given to each particular piece of evidence" (*Canadian Bar Bulletin,* May, 1973). This should not shock us, for in England it has long been accepted that a legally trained justice of the peace may sit with lay justices, which amounts to the same thing. Nevertheless, like most novel suggestions it requires careful consideration, and, coming from the source it does, it deserves serious debate. The fundamental unknown is what effect the system would have on the lay juror. That this is conjectural is rendered even truer by the fact that we know so little today about the way juries function. It has long seemed to me to be an abdication of reason, that we should allow the life and liberty of men and women to be decided by processes that are known or understood even less than are the dark recesses of the minds of judges. This is not to be interpreted as an attack on the jury system. It is really on to observe that with this problem as in general it is desirable constantly to render more explicit the elusive processes by which facts are found to exist. Assuming this approach to the law to be desirable, it might well be that a greater knowledge of the way juries function would leave us to accept Mr. deGrandpré's suggestion. To do so without knowing more about how the jury works would be to add conjecture to imponderability.

9. *Women as judges.* — As the proportion of women practitioners grows, it will be desirable to increase the proportion of women judges. So far in Canada no appellate judge is female, three judges of provincial Supreme Court or High Court trial level are female (Madame Justice Réjane Colas and Madame Justice Claire L'Heureux-Dubé of Quebec, and Madame Justice Mabel Van Camp of Ontario, all appointed since 1969). I do not know how many female judges there are at the county or District Court level, or who are provin-

cial court judges, magistrates, or family and juvenile court judges. In the next decade their numbers will and ought to grow.

10. *Judicial Clerks,* — In the Supreme Court of Canada each judge for some years has had a clerk, usually just graduated from law school. In some provinces the Chief Justice of the appeal court has a clerk. It would be of interest to know from those judges how valuable the experience has been *for them* (no doubt it is for the clerks). Assuming there has been benefit to those judges, might the practice be extended? The Alberta Appellate Division has one judicial clerk, who is articled to the Chief Justice; one member of the court believes there should be two. In Quebec the Court of Appeal since four months ago has had two law clerks in Montreal and one in Quebec City. They are all qualified lawyers: two just admitted to the Bar and one with experience as a Crown attorney for a year. Could provincial Supreme Court trial courts benefit from having one or more clerks available to serve a number of judges? My American judicial friend, who has two clerks, observes:

> When Oliver Wendell Holmes started the clerkship business in the Supreme Court, this was a remarkable innovation. I don't see how mature judges could really do anything like their current work without the assistance of one or two young, bright, law graduates. They supply not only youthful energy, but different ideas, and a completely different way of approaching problems. I don't think any judge really lets the clerk get the upper hand of him, for one thing they stay only one or two years. The judge's experience and more mature judgment is sufficient protection against the idea that law clerks really make the decisions. But they can contribute to the decisions, and frequently do. The infusion of new ideas in ancient veins is certainly highly desirable.

11. *Probationary appointments and continuing judicial training.* — This is a subject which I discussed in the 1971 discussion, and I do not intend to add anything further at this time other than to observe once again that these are important methods of heightening the responsiveness of our judges. They may not assure ability where ability is absent, but they ought to test and enrich abilities and talents already endowed.

C. The Relationship of the Judiciary to the Public.

Ten years from now will the judges continue to be regarded as a race apart? Most of us readily assume today, that the trappings so familiar to us are reflections of the dignity of the courtroom and the majesty of the law. Will they be replaced by a philosophy that if justice is to be significant to the people it must not seem to be artificial or divorced from the realities of life? A recent correspondent in the *Edmonton Journal* argued that it is an affront to the citizen to require him to rise when the Judge enters court, or to address him as "My Lord". A committee has been struck by the Council of the Alberta Branch of the Canadian Bar Association, in response to a submission by a member, to consider whether barristers' robes should continue to be worn. Yet whatever the merits, I would not look too quickly for rapid change in these matters or tradition. It was at least 91 years ago that Judge Pitt Taylor of the County Court in England urged that gowns and wigs no longer be used: indeed he would not allow them in his court. History shows that he had few converts.

Mr. Justice Sinclair, in commenting on this part, says:

> I myself believe there is need for change, and not just in the matter of robes, and in the way that lawyers address the Court. It involves something much more basic than that, a change in attitude, a recognition that judges exist to serve the public, and not the reverse. In the final analysis, the courts can function in a democratic society only when they have the good will and the support of the great majority of the people behind them.

Perhaps a more serious side to this question of dignity and decorum is the power of a judge to commit summarily for contempts committed in the face of the Court, and in the

case of superior courts for contempts committed outside the court. This power may be thought to be an exception to the general rule that a man shall not be a judge in his own cause. In years to come it may come to pass that this summary power may be replaced by a procedure on motion, perhaps before another judge than the one who believes that he has been brought into contempt or his authority lowered. It took a long time to provide for appeals from such convictions. It would be interesting to know whether our judges regard the existence of this summary power as essential to the administration of justice in their courtrooms. I am aware that this is an exceptionally difficult problem, one that we haven't yet really come to grips with, and which is the subject of a report about to be published by the Law Reform Commission of Canada.

Another problem that the future must resolve is the need to reconcile two conflicting notions in the light of technological developments. The first notion is that our courts are public, and it follows that what occurs in them may be publicized. The second is that unnecessary distractions should not be permitted in the courtroom. Hence flash photography and television cameras should not be permitted. However, why should all photography (however silent) be banned, while sketch pads may be used? Why allow fair and accurate newspaper reporting but deny the right to televise, however unobtrusive it may be (as, for example, from soundproof boxes)? I realize that even to mention such a possibility will outrage many of you: but I ask you to consider whether the present position necessarily reflects a wise reconciliation of the two notions — if in fact there is no conflict. I realize that even if some changes of this sort are permitted, the trial judge ought to retain a discretion to prohibit such forms of publicity in appropriate cases.

All these matters of courtroom dignity and decorum, change may be slow, but it does occur. Many decades ago, Mr. Justice Byles said: "I always find difficulty in appreciating the arguments of counsel whose legs are encases in light-coloured trousers." How many judges would even think of expressing that thought today?

Conclusion

Judge Arthur Vanderbilt said that court reform is no sport for the short-winded. It takes time to change and to decide whether it is the right time to change. But in so many of these matters, if the judges and the profession do not initiate the changes, events will do so. The people must feel that our system of the administration of justice is constantly introspective, self-searching, capable of change, responsive to the needs of people as well as to the need to apply the rules. Unless the people feel that our system, and the judges who are at the fulcrum of the system, possess those qualities, they will not believe us if we say, "Ah, but the system is proven, and it is all-important to maintain our present traditions."

Ed Ratushny

conseiller spécial auprès du Ministre de la Justice du Canada

I should say at the outset that in the comments I make I am not stating Government policy. I will try to comment on some of the things that I know that the Minister of Justice is concerned about and pass on some of the views he has expressed to me.

I think that if Mr. Lang were here — but first of all he is very sorry about not being able to be here; the Cabinet met yesterday and met today and there are Cabinet Committee Meetings tomorrow which he must attend as well, all in relation to the current railways situation — I think that if he were here one of the things he might like to comment on would be the very forward looking orientation of much of what is going on here at this Convention.

I think it is true to say that the profession as a whole is tending to look to the future and to realize that change is necessary and it is taking active steps to prepare for the future. The title of this panel: "The Judiciary, 1984" is probably a good example of that. However, the Minister has some very real problems in 1973 and perhaps by touching on some of these, some suggestions and discussion might take place that might be useful, in providing future answers to some of these problems.

The question of change of course is something that has to be dealt with cautiously in some senses because change for the sake of change can be counter-productive and there are a number of good things that we don't want to throw out with the bath water. The Independence of the Judiciary and a number of similar principles that have developed over the years are things that we don't want to tamper with very lightly.

One of the things that I suppose you could say is a specific policy change that the Minister has instituted is that of formally consulting more broadly before making judicial appointments. Now we are talking about the very initial stage of obtaining the names of suitable people for him to consider. He has expressed the concern that he hasn't always been satisfied that the names of all the best qualified people have been brought to his attention at an early stage in the process of filling particular appointments. In order to meet that problem he has taken the step of formally writing to the Presidents of the Provincial Law Societies and Officers of the Canadian Bar Association as well as to Law Professors and Chief Justices and others to make sure that at an early stage he is aware of lawyers whom he should not fail to consider.

Now the role of the Canadian Bar Association Judicial Committee has not changed. It continues to be a valuable step in the process for him, and he continues to submit names to this Committee prior to making the appointments. Mr. Lang did say before the Parliamentary Committee on Justice and Legal Affairs not too long ago that he is not aware of a case where the Judicial Committee has assessed a person as "not qualified" and where the Minister has gone ahead and made the appointment anyway.

But my function in all of this has largely been to make contacts with some of these sources of information and to obtain information about possible appointees and relay that to the Minister. My role is really that of a *conduit pipe* to obtain information and pass it on in the same form as it was given to me.

In the course of these consultations and in the process of the Minister making appointments in recent months — I have only been in Ottawa for 2 and one-half months — but in that period of time, there have been something like 22 or 23 appointments made. There are still 24 outstanding vacancies throughout the country. Much of this situation is the result of recent amendments to the Judges Act which created a number of new positions. All of the remaining vacancies are under very active consideration right now.

But, of course, to attempt to gather more information and to consult more broadly, results in more time being taken. I think Mr. Lang would like to be in a position where he has sufficient names from previous consultations that he already has a bank of people available to consider when future vacancies occur.

Well, there are a number of problems or issues or questions that arise in this process of making appointments and I jotted a few of these down this morning when it became apparent that Mr. Lang would not be able to attend today. They are probably not comprehensive by any means, but they are real problems and problems which I think probably the Bar should be considering.

One is, in this process of consultation, to find the balance as to how far one should go in making the whole consultative process a public one. Because, of course, it is an area

where very personal things are talked about such as the character of an individual, his personal habits, his work habits and so on, it is probably not the sort of subject that is suitable for public discussion. It is an area where a great deal of discretion and care is required. There is the danger that people might not be willing to allow their names to be considered if it would mean placing them in a public arena for discussion about their personal qualities in comparison to those of other persons. On the other hand, arguments have been made that the public should, indeed, become involved. Perhaps some consultation beyond the legal profession is appropriate. But exactly where the line should be drawn is a question that, I think, requires cautious consideration.

Another factor that I am asked about quite frequently is the question of age. People ask me or ask the Minister what is the minimum age and what is the maximum age, for the appointment of Judges. Apart from the formal requirement in the *Judges Act*, requiring ten years at the Bar prior to appointment, I think that the approach Mr. Lang tends to take is that it is important that a lawyer have enough time at the Bar, enough exposure to a sufficient number of areas, that he is capable of doing the job of a Judge. There is also the suggestion that judgment and temperament sometimes improve with age and experience. Yet these factors must be balanced off against the vigor that is usually associated with youth. Now, of course, chronological age does not say a great deal because sometimes people who are old in number of years are very youthful in other ways.

But I think it is fair to say that there is no minimum or maximum in terms of years of age, but that these qualities are the ones that are being sought and often the result is that he will be looking at younger people who possess both experience and maturity.

Judicial age has another dimension. If you appoint a man at a young age he is going to be a Judge for a long time and the suggestion has been made that the longer a person is sitting, the easier it is for him to grow "out of touch". Suggestions have been made that perhaps term appointments should be considered so that appointments would expire after a specified number of years. Of course that would cause all kinds of problems in terms of the personal security of a Judge and, more particularly, in terms of convincing a person to give up a lucrative practice to do something else for ten years, for example, and then try to get back on his feet again in practice. Another consideration is the tradition of sorts that once a person is appointed a Judge he should not subsequently appear as counsel.

Another issue is the question of the availability of lawyers for consideration. In seeking the best person for a judicial position, it is not simply enough, in many cases, to find the best man because often the best man is simply not prepared to be appointed to the Bench. This is a problem of some concern to the Minister and I think it is fair to say that Mr. Lang sometimes has trouble understanding how lawyers can refuse an invitation to be considered for judicial appointment, because there has been something of a tradition in the English legal system that it is the duty of a barrister, when called, to serve. While he can understand certainly the situation where for family reasons or personal reasons, one might have very valid reasons for not accepting an appointment, occasionally, I think he is perhaps slightly disappointed when very competent, capable people, highly recommended, say that they are not interested in being considered for a judicial appointment.

That, of course, raises the question of salary and the proper level for judicial salaries. At the present time, Superior Court Judges receive $38,000.00 and County and District Court Judges receive $28,000.00 under the *Judges Act.* In some provinces judges at both levels receive additional sums from the provincial Government. These salary levels are now reviewed regularly as a result of a committment made by the Minister of Justice a few years ago and the next review is due fairly soon, I think.

Finally, I want to mention the issue of elevation — whether the practice should be adopted of elevating Judges from one level to another. Perhaps these considerations don't apply to elevating a person from the Trial Division to the Appeal Division of a Superior Court. They are more applicable, I suppose, to an elevation from the County or District Court to the Superior Court.

There are some arguments in favour of adopting a practice of elevation. One of them is that you have a chance to see what a person will be like on the Bench if he has had some time in the County or District Court prior to appointing him or her to a Superior Court so that you have a testing ground of sorts. It is not always easy to predict from his performance as a lawyer how he will act once he becomes a Judge. It might also make the County and District Court Benches more attractive to people. It might be that people would be more willing to accept appointments there if they knew that they might eventually be elevated to a higher court.

Well, there are a number of undesirable features as well. One of these is the danger of the criticism that if a Judge hoped to be elevated, there might possibly be the appearance that in deciding matters in which the Government is involved that he might be tempted to want to leave a particularly good impression with one of the parties. There is another factor and that is the danger of a Judge mounting a "campaign" of sorts by writing to the Minister and asking lawyers to write on his behalf in support of the appointment of that Judge to another Court. Such a practice would reflect adversely on the dignity of the Bench and is a practice which Mr. Lang tends to look upon rather negatively as really indicating rather lack of judgment! But it is a very real danger.

One of the Chief Judges of a County Court of one of the Provinces said to me that he had a further objection to elevation and that was that the anticipation of elevations is unsettling and a distraction to the Judges in carrying out their regular duties.

On the other hand, there have been examples of Judges being elevated in recent years and recent months and I think it is, again, fair to say that Mr. Lang's attitude is that he does not want to adopt the practice of elevation but that he won't hesitate to "elevate" occasionally where all of the circumstances indicate that is the best course to follow.

With respect to appointments to the County and District Courts, Mr. Lang prefers to appoint judges to sit in areas other than those in which they practised as lawyers. The importance of this factor varies with the size of the community involved, but, apart from our larger urban centres, Mr. Lang feels that it is desirable that a judge in these courts take up a new residence upon his or her appointment.

I might just say in conclusion that Mr. Lang considers the question of Judicial appointments and his responsibilities with respect to Judges to be of a very high priority amongst his responsibilities as Minister of Justice. He is anxious to do everything possible to continue the high level of appointments in Canada and to assist Judges in carrying out their important function.