Ontario Court of Justice

A History

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Opening the Doors on Magistrates' Courts

The doors to the Magistrate's Court, Ottawa Police Station

The Magistrates' Courts – although the busiest in the province – were often the most neglected. In 1951, a collection of photographs was taken in Magistrates' Courts in a variety of locations around the province. The sorry state of these courtrooms, combined with the fact that many were situated within a police station, led Chief Justice James McRuer to write about Magistrates' Courts in 1968: "One cannot come to any other conclusion than that those responsible have no concept of the elementary rights of accused persons and witnesses who may attend trials, and the rights of the public, to have justice administered with dignity and in circumstances that convey a respect for the law."

"The history of the Ontario courts shows that…it is a history of constant change and adaptation…The Ontario courts have survived because they have always adapted themselves to the needs of the people." (The Honourable T.G. Zuber, *Report of the Ontario Courts Inquiry*[1])

The modern Ontario Court of Justice is presided over by judges and justices of the peace appointed by the provincial government. It is distinct from other courts in Ontario whose judges are appointed by the federal government.

Here is a sampling of what magistrates' courtrooms looked like in 1951:

Hamilton, Ontario

Morrisburg, Ontario

Sarnia, Ontario

(McRuer, J.C. *Royal Commission Inquiry Into Civil Rights.* Toronto: Queen's Printer, 1968. Vol. 2, p. 539. All photos courtesy of the Law Society of Upper Canada Archives.)

The story of the Ontario Court of Justice can be said to begin at Confederation on July 1, 1867. This is when the Canadian constitution came into force, dividing jurisdiction between the federal and provincial levels of government, including the province of Upper Canada which later became Ontario.

From 1867 to 1967, the collection of courts that would ultimately become the Ontario Court of Justice grew in a haphazard manner to form a patchwork system of courts across the province. The evolution of these courts can be directly traced through the history of the province itself – shaped by social and political developments, population growth, technological changes and urbanization.

At the time of Confederation, Ontario had a system of trial courts that included superior, district and county courts, together with a system of local courts. In the superior, district and county courts, legally trained judges dealt with the most serious criminal and

civil matters.[2] Less–serious criminal offences, provincial offences and municipal by-law infractions, and small civil disputes were heard by local courts – often called the “lower” or “inferior” courts – presided over by magistrates and justices of the peace.

In the early years, almost all judicial officers of the local courts were lay ("non-lawyer") members of the public and were concerned solely with disputes over property and crime.[3]Gradually, they began to acquire jurisdiction over matters involving children, juveniles and families. Together, the local juvenile, family and criminal courts ultimately evolved into the Ontario Court of Justice.

For most members of the public, the only image of the administration of justice is what they found in the local courts.[4] As Magistrate J.R.H. Kirkpatrick recalled in 1962: “More people see them in action than any other of all our courts.”[5] Before 1968, the local courts included justices of the peace courts, police courts, magistrates’ courts, juvenile courts, family courts and small claims courts. Some were established and funded by municipalities, others by the province. Not all of these courts were in existence at the same time. Not every type of court was found in every jurisdiction throughout Ontario. Despite this confusing mishmash, these courts were the places where the public met the justice system.

It was in these courts that cases involving trespass, thefts, common assaults, loitering, traffic offences and municipal by-laws — to name a few — were heard. Neglected children, young people charged with delinquency, and deserted wives also had their cases heard here. These courts tended to be poorly funded and housed in inadequate and inappropriate accommodations, such as town halls, jails and police stations.

While the English court system served as the prototype, the Ontario system slowly changed to reflect the nature, geography and the people of the province. Yet, despite the changes they endured, the collection of local courts remained the busiest — and most neglected — in the province.[6] The issue of

neglect — and the possible reasons for it — should not be ignored. “Individuals with low income and low social status” made up most of the people who came before these courts. The higher “superior” courts were involved with adjudicating disputes about property and civil rights of the middle and upper classes. “If members of these classes had been more involved as litigants in the lower criminal courts, it is unlikely that their shoddy and unjudicial conditions would have been tolerated for so long,” [7] wrote renowned political scientist, Peter Russell.

In 1968, the local courts – except for those dealing with small civil lawsuits — were amalgamated into the new Provincial Court (Criminal Division) and Provincial Court (Family Division). Then began a new era in the history of the Ontario Court of Justice.

Given the complicated evolution of the local courts from 1867 to 1967, their stories are best told through the three types of judicial officers who presided in them – the justice of the peace, the magistrate and the juvenile and family court judge. And to make a confusing story even more confusing, one person often acted in all three of these roles!

The Constitution and the Courts

On July 1, 1867, the Constitution Act, 1867 – originally called the British North America Act (BNA Act) – enacted by the British Parliament took effect to create the Dominion of Canada and bring about Confederation. The new Dominion was divided into four provinces: Ontario (Upper Canada), Quebec (Lower Canada), Nova Scotia and New Brunswick. The new constitution gave certain powers to the federal government, others to the provincial governments. The structure of courts in the provinces is the product of the division of powers in the constitution.

The Constitution Act, 1867 made the establishment and administration of most courts a provincial responsibility. Those powers include the constitution, maintenance, and organization of provincial courts both of civil and criminal jurisdiction (s. 92(14)). However, the province did not have the power to

appoint all judicial officers to all the courts it administered. The federal government was given the power to appoint judges of a province's superior, district or county court (s. 96). Further, the federal government was given exclusive jurisdiction over both criminal law and procedure (s. 91(24)).

The Fathers of Confederation of the Quebec Conference, October 1864, who drafted the basic plan for the federal union of Canada. The original of this famous painting by Robert Harris was destroyed in the 1916 Parliament buildings fire. (Library and Archives , accession number 1989-565 CPA, item 90)

The effect of this jurisdictional division is that the provinces establish the courts that administer the federal criminal law. But, in the case of courts outside of s. 96, the provinces have the power to appoint judges and justices of the peace. To further complicate matters, the province and municipalities can create offences — so long as they are not criminal offences — in aid of the enforcement of laws enacted within legislative jurisdictions. These are "provincial offences" and "municipal by-law infractions."

Justices of the Peace

Introduction

The office of justice of the peace was imported into Canada in 1763 together with all the laws of England, both civil and criminal.[8] At that time, the justice of the peace possessed "great powers and authority" in the judicial system, including trials of nearly all serious criminal offences.[9]By degrees, those powers were taken over by magistrates and legally trained judges.

In the early 1800s, justices of the peace were "creatures of necessity."[10] The country was sparsely settled, it was difficult to travel around, and legally trained individuals were a rare commodity. A

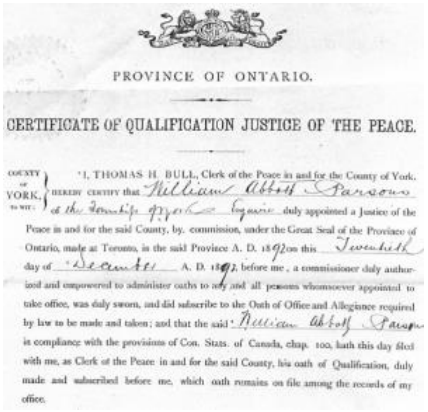
centralized and organized court system was an impossibility, both practically and financially. The solution? The introduction of the justice of the peace – a local person who typically had no legal training.

At the time of Confederation, Ontario justices of the peace continued to have extensive powers in minor criminal matters, dating back to 1800 when the Legislature of Upper Canada adopted the criminal law of England as it stood in 1792.[11] Ontario's Lieutenant Governor assumed the responsibility for appointing justices of the peace in 1868.[12]

By 1967, a hundred years later, the powers of the justice of the peace had been significantly limited to taking "informations,"[13] issuing warrants, granting bail and presiding at the trials of summary offences.[14] This evolution was tied to the urbanization of the province. As villages grew into towns and cities, justices of the peace saw their jurisdiction diminish.

William Abbott Parsons, Justice of the Peace

In 1892, one William Abbott Parsons, Esquire was "duly appointed a Justice of the Peace" for the County of York. A local farmer, Parsons was the ideal candidate – he could and did file his "oath of qualification" on December 20, 1892, swearing that he met the minimum standards, at the time, of landownership required to be a justice of the peace.



PROVINCE OF ONTARIO.

CERTIFICATE OF QUALIFICATION JUSTICE OF THE PEACE.

COUNTY OF YORK, to wit: I, THOMAS H. BULL, Clerk of the Peace in and for the County of York, HEREBY CERTIFY that William Abbott Parsons of the Township of York Esquire duly appointed a Justice of the Peace in and for the said County, by commission, under the Great Seal of the Province of Ontario, made at Toronto, in the said Province A. D. 1892 on this Twentieth day of December A. D. 1892, before me, a commissioner duly authorized and empowered to administer oaths to and all persons whomsoever appointed to take office, was duly sworn, and did subscribe to the Oath of Office and Allegiance required by law to be made and taken; and that the said William Abbott Parsons in compliance with the provisions of Con. Stats. of Canada, chap. 100, hath this day filed with me, as Clerk of the Peace in and for the said County, his oath of Qualification, duly made and subscribed before me, which oath remains on file among the records of my office.

(City of Toronto Archives, Fonds 85, File 6)

The Origins of the Office

The position of justice of the peace originated in England. In fourteenth century England, justices of the peace were selected from among the "most worthy" persons in their counties[15] or the "most sufficient knights, esquires and gentlemen of the land."[16] In the fifteenth century another qualification was added: they also had to be landowners.[17]

Importing the image of the "landed gentry" or "country squire" into the rough-hewn back country of Ontario proved to be an "impossible aim."[18] At the time of Confederation, Ontario justices of the peace

were to be the "most sufficient persons, dwelling in the…district" and they were also to be landowners.[19]

Finding people in the wilds of the province who could fill these property requirements – and had any understanding of the law – proved to be a challenge. As a result, several *Qualifications Acts* were enacted in the late 1800s which cancelled commissions of unqualified justices of the peace who didn't meet the minimum standards of land ownership.[20] Gradually, the requirements became less stringent and, in *The Justices of the Peace Act,* 1935, all references to minimum property qualifications were repealed.[21]

The Challenges of the Office

Justice James McRuer (seated) reviewing recommendations to the Royal Commission Inquiry into Civil Rights with commission counsel, John W. Morden. (Photo: Gerald Campbell)

Despite attempts to exercise some sort of control over the office, the justices of the peace were not administratively organized and functioned largely independently.

By 1934, the appointments process was out of control. Some 10,000 justices of the peace were on the rolls at that time. The attorney general of the day, Arthur Roebuck, dismissed them all by order-in-council, reappointing only 243.[22]

An inquiry conducted by the Honourable James McRuer — then Chief Justice of the High Court for Ontario — in 1968 revealed the names of 925 justices of the peace on "incomplete records but

we are informed that in addition an unknown number whose names are not officially recorded anywhere…We have been unable to determine how many justices of the peace there are in Ontario."[23]

How did this happen? According to McRuer, the appointments process devolved into a "comic opera title system that can only be described in no more appropriate language than 'just silly.'"[24] Appointments to the office were political rewards by the provincial governments of the day — often bearing no relationship to the ability or skill of the appointee to carry out the work of the position.[25]

The dignity and reputation of the office was further compromised by a near complete lack of training for justices of the peace. Wrote one justice of the peace in 1968:

"After my appointment, I found it extremely difficult to acquire knowledge of my duties, and because of lack of instruction, I wandered along learning by trial and error. The only books I could find were about English J.P.'s which were of little use in our country. It is my hope to attend lectures or courses of instruction, and I would gladly attend at my own expense, or even just be recommended books that I may study to enable me to perform more efficiently."[26]

The "Fee" System

In the early days, very few justices of the peace were paid salaries. The vast majority were paid on a "fee for service" basis.[27] The fees were assessed against convicted persons. This meant that if a person was convicted, he or she paid a fee to the justice of the peace. If there was no conviction, the justice of the peace did not receive a fee.[28]

As McRuer explained in his report: "The fee system is a real inducement to justices of the peace to curry favour with police officers in order to 'get business.'"[29] At that time, one justice of the peace wrote:

"The position of Justice of the Peace has no security because it depends upon keeping the goodwill of police officers if he or she is to continue processing their summonses. I feel that we could perform our

old time function of protecting the rights of accused persons if we were made independent by being paid a salary."[30]

A Widely Criticized Office

By the late 1960s, the flaws in the structure of the office of the justice of the peace were readily apparent. An office that was intended to stand as a safeguard of the civil rights of the individual against the exercise of arbitrary police power was criticized as being "little more than a sham."[31]

The appointments process was highly politicized. The payment arrangements led to justices of the peace being too close to the police, which detracted from the independence of the office. Justices of the peace were not organized or managed. They were not trained for their work. Substantial change was required to ensure public respect for law and order. That change was coming.

William Peyton Hubbard, Justice of the Peace

William Peyton Hubbard

William Peyton Hubbard was appointed a "Justice of the Peace in and for the County of York" in 1908. His appointment was a typical one for the time. Hubbard had served as an alderman in the City of Toronto — on and off — since 1894. In addition, as chairman of a special committee, he spearheaded an effort to introduce provincial legislation enabling the city to generate, produce, lease and develop hydro-electric power — this led to the establishment of the Toronto Electric Hydro system. When Hubbard's bid for re-election failed in 1907 — probably as a result of his support for the hydro system, which was roundly condemned in many quarters — he received an appointment as a justice of the peace and served in that position for six years until his re-election as an alderman in 1913.

Looking at this story, it is uneventful in many respects until one factors in a key detail. Hubbard was a black man. He was born near Bloor and Bathurst streets in Toronto in 1842, the son of freed slaves from Virginia. After leaving school, Hubbard worked as a liveryman and, later, a driver for George Brown, a publisher of *The Toronto Globe* (now *The Globe and Mail* newspaper.)

So the story goes, it was George Brown, impressed by Hubbard, who suggested he enter public life. A search of the newspapers of the day reveals references to the fact that Hubbard was the city's first black alderman and the County of York's first black justice of the peace. When a portrait of Hubbard was unveiled in 1913, commemorating his many years of public service, he was called "the true civic spirit" and complimented for being a "credit to the city, to the country and to the race from which he has sprung." (*The Toronto Daily Star*, November 7, 1913)

Magistrates – Criminal Courts

Introduction

"I am independent of everyone."

(Police Magistrate George T. Denison in *Recollections of a Police Magistrate*, 1920.)

The evolution and expansion of the office of magistrate — like that of the justice of the peace — was fuelled by the urbanization of the province from 1867 to 1967. Interestingly, this office too was plagued by a lack of independence, training, and organization. But, unlike the justices of the peace, magistrates expanded their powers. By the mid-1960s, virtually all criminal offences — from the most minor to the most serious — were heard in magistrates' courts.[32]

The office of magistrate in Ontario dates back to 1849, when *The Municipal Corporations Act* established a Police Office in each town listed in a schedule to the act and directed the police magistrate of that

town 'to attend daily, or at such times and for such period as shall be necessary for the disposal of the business to be brought before him as a Justice of the Peace…"[33] In this way, the police magistrate began gradually assuming the role previously the domain of the "country squire" justice of the peace. Magistrates, like justices of the peace, were appointed by the province.[34]

"I refused, as I have said, to act as president or director of any company, and I am pleased to see that of late years provision has been made by statute preventing judges from accepting any such offices. Such legislation should not have been necessary, but the practice at one time was a common one. I also decided to take no fees. I have a great aversion to the fee system; in time, it is sure to bring the pendulum off plumb. A man acting in a judicial capacity should have nothing to affect him, pecuniary or otherwise, in deciding either way."

George T. Denison

(Police Magistrate George T. Denison in *Recollections of a Police Magistrate*, p. 5.)

Police Courts – Police Magistrates

By the late 1800s, legislation provided that there should be a police magistrate in each Ontario city and town where the population exceeded 5,000. In certain conditions a police magistrate might also be installed in smaller towns and counties. The legislation introduced the terms "police magistrates" sitting in "police courts."[35] There is no doubt these courts intermeshed judicial and police functions – a direct challenge to maintaining any sort of real judicial independence.

"I am independent of everyone." So wrote Colonel George T. Denison in his 1920 memoir, *Recollections of a Police Magistrate*.[36] He came to the office with a strong understanding of the need for judicial independence, in the sense of not owing any favours or accepting any fees.

Sworn in as a magistrate in 1877, Denison wrote with pride about not taking any "favours":

"Very soon after my appointment I received season passes on the Ontario railways, and on steamboat lines, etc. I sent them all back politely explaining that formerly I would have been glad to receive them, but that I had recently been appointed Police Magistrate and could not accept them. This policy has been a great satisfaction to me ever since…I am constantly trying cases between the great railways companies, and citizens, thieves, and trespassers, and I am just as independent of the great railway companies, who can and do influence both the Dominion and Provincial Governments, as I am of the poor tramp who is found trespassing on their lines, or stealing a ride."[37]

"Police Courts"

"It does not help to educate (the public) to see prosecutions handled by police officers, members of the same force that brought about their arrest or summons to court and who, it is widely thought, have a deep and abiding interest in an accused's conviction. Nor does it impress them with the integrity and independence of the court; they have often heard that 'your word is never as good as a cops', and when police officers testify against them and another police officer prosecutes them, they can hardly be blamed for thinking that the dice are loaded against them before the games starts." Tupper Bigelow, himself a magistrate, wrote these words in 1962, deeply critical of the reputation of Magistrates' Courts as Police Courts.

(S. Tupper Bigelow, *A Manual for Ontario Magistrates* (Toronto: Queen's Printer, 1962) p. 33.)

By 1934, the legislation began to eliminate the references to "police." The reality of these courts, however, continued to be intertwined with police functions.[38] The overlap between judicial and police powers remained a challenge to judicial independence.

While *The Magistrates Act*, *1934* declared that in the future every police magistrate and deputy police magistrate was to be styled as a magistrate or deputy magistrate and the court known as the magistrates' court, the terminology of police magistrates and police courts persisted. In his 1962 book, *A Manual for Ontario Magistrates*, S. Tupper Bigelow wrote: "[the] public still refers to Magistrate's Courts as 'police courts,' although in Ontario, that objectionable nomenclature was abolished long ago."[39]

Magistrate Edward Jones Presiding in the New Women's Police Court in Toronto, January 24, 1935 (City of Toronto Archives, Fonds 1266, 35764)

When hearing breaches of provincial statutes or municipal bylaws, it was a common practice for police officers to conduct the prosecution and examine the witnesses — many of whom would be other police officers. Yet another police office might serve as court clerk — and the entire trial would take place in a police station.[40]

Structural Organization of the Bench

Accommodations: In the early years, a magistrate's access to courtrooms was rather tenuous. "A police magistrate…shall have the right to use any court room or town hall belonging to a county or municipality in which he may sit or hold his court, but in so using a court room or a town hall he shall not interfere with the ordinary use of the court room for other courts or with the use of the town hall for the purposes for which the same is maintained."[41]

In practical terms, this meant that the accommodation for a magistrate's court depended on his relationship to the municipal officials. If those relations were not good, the proceedings could be held in desperately inappropriate and inadequate spaces.[42]

Senior and Chief Magistrates: The structural organization of magistrates' courts began when *The Magistrates Act, 1922* allowed for the appointment of four police magistrates for the City of Toronto and provided that one of those could be designated senior magistrate.

Court Facilities in 1967

"In Watford, the magistrate conducts the court in the basement of the public library. The room is a sort of furnace room. When the furnace comes on during the sessions of court it is necessary either to turn it off or submit to the noise…In Metropolitan Toronto, the accommodation provided for magistrates can only be termed disgraceful. One court is held in a police station…"
(McRuer Report, p. 539)

The senior magistrate was given authority to:

- Designate courts to be held;
- Allocate cases to courts;
- Assign police magistrates to the courts;
- Investigate all complaints as to the conduct of police magistrates;
- Give directions regarding the business of the courts; and
- Arrange for sittings of the court.

In 1934, the legislation was amended to establish magisterial districts across the province, and designate senior magistrates for each district. Every magistrate was given jurisdiction to act anywhere in Ontario, though he might be assigned to a specific district.[43]

In 1964, *The Magistrates Amendment Act* created the new position of chief magistrate within Ontario and stipulated that the chief magistrate should be the senior magistrate of the Municipality of Metropolitan Toronto. This legislation provided that "the chief magistrate shall have general supervisory powers over arranging the sitting of magistrates and assigning magistrates for hearings, as circumstances require."[44]

Payment of Magistrates

"The salary structure is quite illogical." These were McRuer's comments about the payment of magistrates in 1968.[45] That salary structure had been illogical since the first magistrates were appointed, resulting in significant variances in remuneration across the province, and questionable practices about how magistrates were appointed and paid for their services.

Perennial issues relating to the adequacy of salaries paid to magistrates prevailed, particularly in light of the compensation judges appointed by the federal government were receiving. Poor pay was a subtext of Magistrate George Denison's memoir, written in 1920 about his long career which began in 1877: "The question of salary did not weigh with me a particle. I have always felt that the pecuniary side of any question should not be allowed to have undue weight…Solomon says, 'How much better it is to get wisdom than gold.'"[46] But he also makes it very clear that provincially appointed magistrates were treated differently than federally appointed judges when he recounts the story of an offer made to him to join the High Court of Justice as a judge: "I was pleased at the offer, but declined it at once (although my salary would have been much larger), because I felt my position was more important in many ways, and that I might be much more useful to the community where I was."[47]

Though fixed by the province, the salaries of magistrates varied throughout Ontario. Typically, salaries were higher in the most populous jurisdictions where courts would be busier. However, much depended on the favour in which the magistrate was held. As Magistrate Bigelow wrote in 1962, "annual increments are usually, though not always, granted."[48] In other words, each magistrate negotiated his own salary. Further, magistrates who were lawyers were paid more than those who were not.

As McRuer wrote, "If the magistrate is qualified for the office, there should be no distinction between those who are qualified lawyers and those who are not…the salaries provided have no relation to the importance of the office. It is not an office to be filled by older men who may regard it as a form of semi-retirement. Men appointed to it should be vigorous young persons who bring to the office a broad practical experience of life gained from some years in the practice of law. They should be paid salaries that will enable them to live and educate their families in dignity."[49]

Reading between McRuer's lines, it is easy to imagine a bench of older men, retired from earlier careers, merely supplementing their incomes with a magistrate's slim salary. Further, it is easy to imagine situations where those keen to augment their incomes might compromise their independence to please their government paymasters.

Part-time magistrates posed another challenge to the independence of the courts. It was common for a part-time magistrate to continue practising as a lawyer or running a business. The potential for conflicts of interest was often realized. McRuer details one such "undesirable" situation: "Certain members of a labour union were accused of assault. At the trial before a part-time magistrate they received sentences they felt were out of proportion to other sentences imposed in other cases of assault. The magistrate was a part-time magistrate who practised as a lawyer. It was alleged that he acted for clients who were employers who had disputes arising out the employee/employer relations with the union in question. We are quite prepared to assume that the magistrate acted entirely without bias, but the fact that the

circumstances were such as could give rise to the appearance of bias is sufficient to give just cause to the complaint."[50]

Reflections on Magistrates' Court in 1950s Toronto

The Honourable Roy McMurtry who went on to become the Attorney General of Ontario and Chief Justice of Ontario had his first courtroom experiences in Magistrates' Courts:

Roy McMurtry's Osgoode Hall Law School graduation photograph

"Soon after I entered law school (in 1954), I became interested in particular in the human dramas that occurred daily in the Magistrates' Criminal Courts in the east wing of City Hall. Many of the magistrates were not legally trained and, as a result, were often overly influenced by the Crown prosecutors. Although the magistrates generally attempted to discharge their duties in a conscientious fashion, I often gained the impression that, rather than the important legal presumption of innocence, there was an evidentiary onus on the accused to demonstrate innocence. The fundamental requirement that, before the accused could be convicted, the Crown must satisfy the court beyond a reasonable doubt, was not always respected. The advantages that the prosecution generally enjoyed in the Magistrates' Courts, which heard over 90 percent of the criminal cases, were increased significantly by the fact that many of the accused were not represented by lawyers. Until a "fee for service" legal aid plan began in 1967, the only legal assistance available for the indigent was provided by a few voluntary counsel. The local Sheriff's Office attempted to assist the unrepresented accused by administering a sporadic criminal pro bono legal aid service."

(Roy McMurty, *Memoirs and Reflections*, (Toronto: The Osgoode Society for Canadian Legal History, 2013) pp. 51-52.)

Appointment and Removal of Magistrates

In 1877, Magistrate Denison was on his way home from Russia when he received a cablegram from the premier of Ontario asking if he would accept an appointment of Police Magistrate of Toronto. “This surprised me,” wrote Denison, “as I had made no request for any appointment, and had no desire to take a public office.”[51]

For many years, the appointment process for magistrates was frankly political and informal. Political parties engaged in the practice of appointing their own supporters. In essence, the provincial government of the day invited people to become magistrates.

While a great many fine magistrates had been appointed, McRuer commented negatively on the “corrupting” influence of the appointment process. “It is not consistent with the elementary concepts of justice that one who has attained office merely by political service should have the right to preside over the liberty of the subject."[52]

Once the government appointed a magistrate, it continued to maintain control over that appointee by retaining the ability to remove that magistrate. In 1952, a provision was added to *The Magistrates Act* which allowed the provincial government to remove a magistrate who had been in office for two years for “misbehaviour or for inability to perform his duties properly.”[53] The legislation did not clarify what was meant by “misbehaviour or inability to perform duties,” leaving the ability to remove a magistrate for almost any reason. Despite the fact that this provision had never been used between its introduction and 1968, McRuer roundly criticized it as being an “unwarranted interference with the independence of magistrates.”[54] McRuer called for the introduction of a body that could, while maintaining the independence of the magistrates, allow for the presentation of “grievances with respect to the conduct of members of the judiciary.”[55]

While there was no statutory requirement for magistrates to have legal training, by 1968, of the 114 magistrates in Ontario, 90 were qualified lawyers and there were calls for all magistrates to have legal training. As McRuer wrote: "In view of the importance of the office and the complexity of many cases that come before the magistrates' courts, it is an unjustified encroachment on the rights of the individual that he should be compelled to have his rights determined by one untrained in the law, or have to submit to the alternative of taking his case to a higher court in order that he may have a decision from a legally trained mind. This is without question an infringement on basic civil rights."[56]

Expansion of Jurisdiction

By the late 1960s, 95 per cent of people charged with indictable offences in Ontario were tried by magistrates. That meant only five per cent were heard by federally appointed judges in "superior courts". All summary offences made their way to magistrates' courts and, depending on the type of summary offence, were heard by either magistrates or justices of the peace.[57]

Let's look at the statistics for 1965: an astonishing 2,089,648 cases were disposed of in the magistrates' courts across the province.[58] The population for the province had yet to hit 7,000,000 by 1965.

In criminal matters, by 1965, the jurisdiction of the magistrate had evolved to include the power to sentence the accused to life imprisonment and impose corporal punishment.[59] In many criminal cases, an accused person had the choice to be tried by a magistrate, judge alone or judge and jury. The majority of the criminal cases heard by magistrates were those where an accused elected to be tried by a magistrate. This speaks to the importance of the magistrates' courts – and the expertise they had developed despite years of neglect.

An Appointment to Magistrates' Court: A Call from the Police Chief

Judge Donald Dodds served first as a magistrate, then as a judge of the Provincial Court (Criminal

Division) and the Ontario Court of Justice in Oshawa. Here is his own account of being appointed as a magistrate.

"I was appointed to the bench on January 15, 1967. The process followed an unusual course from start to finish, and totally unlike the one followed today.

It started when the city police chief, aware of the pending retirement of the presiding magistrate, Frank Ebbs, inquired if this would be an appointment that would be of interest to me. A few days later, Richard Donald, a city lawyer, came to my office and asked if there was any truth to a rumour I was about to be appointed and, if so, would I entertain the possibility of selling him my practice. Nothing came of this rumour but eventually Richard and I did form a law firm under the name Dodds and Donald.

Three years later, however, the matter sprang up once again.

When I appeared in the Magistrates' Court in Bowmanville, His Worship Ronald Baxter, upon seeing me, invited me into his chambers to congratulate me on my appointment to the Oshawa bench. I assured him that this was not the case.

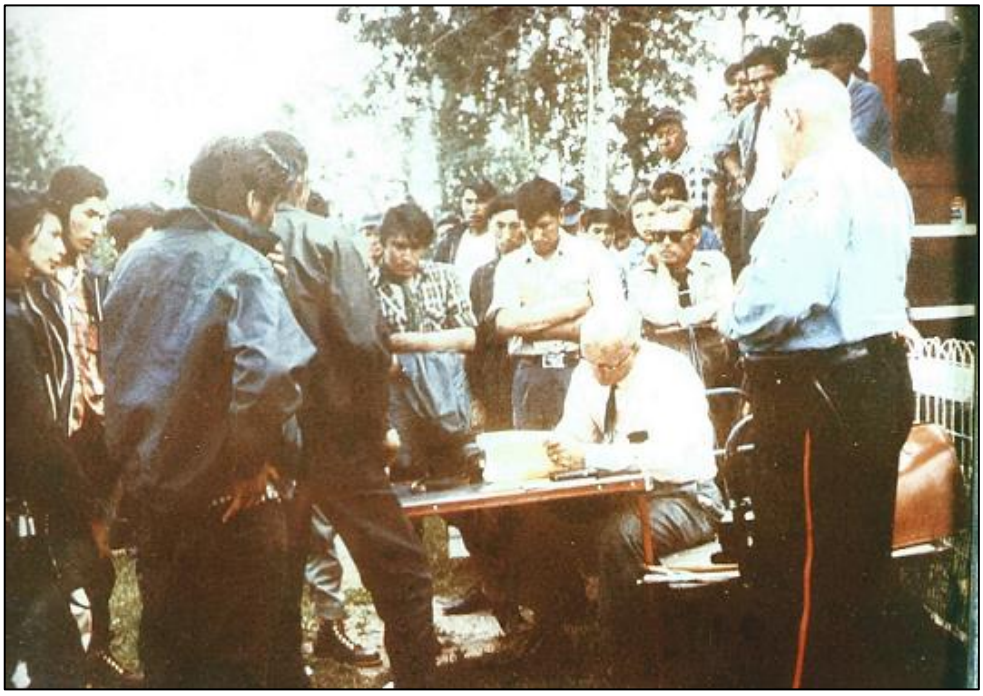
In the circumstances, I decided to telephone the office of the provincial secretary and inquire if there was any substance to this recurring rumour. A few days later I received an invitation to meet with the Deputy Minister. That was in November 1966.

The rest, as they say, is history."

(Donald Blake Dodds, *A History of the Provincial Court in the Region of Durham* (October, 2009) [unpublished])

Serious criminal cases often attract attention. They tend to involve the most heinous offences – murder and serious physical assaults, for example, that fill newspapers and the writings of legal scholars. But, for

the average person, the trial of summary offences is for most "the only image of the administration of justice."[60] The magistrates' courts is where alleged breaches of, for example, the *Highway Traffic Act*, municipal noise by-laws and minor criminal cases landed members of the public. In 1965, the magistrates' courts heard 15,509 indictable offences and 2,074, 139 summary offences. This is where the public met the court.[61]



Magistrate Jack Cox presiding in Fort Hope, Ontario. This photo was taken sometime between 1957 and 1963. It was provded by Mary Jane Willis, daughter of Constable George A. Sangster, court officer, standing to the left of Magistrate Cox.The magistrates' courts could be found in the province's most remote communities, often in unorthodox settings, like this one. Fort Hope, also known as Eabametoong, is an Ojibway First Nation in Kenora District, Ontario. This photograph was provided courtesy of Mrs. Mary Jane Willis.

Powers of Police Magistrates

"Not long before my appointment (in 1877), the powers of police magistrates had been very much

enlarged, and shortly after they were more increased. With the consent of the accused, I have been able to try all the serious offences, except murder, manslaughter, rape, high treason, and one or two crimes connected with the misuse of explosives, without a jury, and with power in some cases to sentence to imprisonment for life. This wide jurisdiction has made my Court, for the last forty years, the principal court of Ontario, for up to two or three years ago about ninety percent of the indictable offence have, with the consent of the accused, been tried by me."

(Police Magistrate George T. Denison in *Recollections of a Police Magistrate*, pp. 3-4)

What Cases Were Heard in Magistrates' Court?

Indictable offences

These are the most serious federally created offences. They include crimes such as murder. Magistrates would hear such cases only where the accused person chose to have a trial before a magistrate (as opposed to a federally appointed judge sitting with or without a jury).

Summary offences

These are less serious or "petty" federal offences such as causing a disturbance in a public place. By law, these cases were heard by magistrates.

Hybrid offences

These are federal offences that the prosecutor could choose to be tried as a summary or indictable offences. Magistrates heard hybrid offences that were tried as summary offences.

Provincial or municipally created offences

Offences created under provincial statutes or regulations, or by municipal bylaws, were heard by magistrates or justices of the peace.

Since 1967, many indictable offences have become categorized as hybrid. This has contributed to the fact that the vast majority of criminal cases are now heard in the Ontario Court of Justice.

Women Join the Bench

The 1926 *Magistrates Act* recognized a significant change – in a city with a population of 100,000 or more, a woman magistrate or deputy magistrate might be appointed if desirable. If the city had more than one magistrate, such an appointment might be in addition to any magistrate then in office or to fill an existing vacancy. That provision – considered progressive at the time, but now decidedly out of date – remained on the statute books until 1952.[62] The first female magistrate was Margaret Patterson, appointed in 1922 to sit in Toronto's Women's Court. A physician by training, she brought a moralistic approach to the bench with her efforts to rescue women from vice and immorality.

Funding of the Magistrates' Courts

The system for funding magistrates' courts across the province contributed to its "piecemeal" state.[63] Here's how it worked. The province paid the salaries of magistrates. The courts themselves were mainly organized, staffed and financed by municipalities and counties.[64] "The service provided by these courts depended on the interest of the community and the amount of money available."[65]

Before 1859, municipalities were responsible for financing the administration of justice — from supporting a jail and a courthouse, to paying court staff. Only in the northern districts of Ontario was the province responsible for the administration of justice.

In 1859, the province took over the cost of financing the administration of "criminal" justice, which was limited to those matters which were found in the *Criminal Code.* Everything else continued to be financed by municipalities, including the maintenance of court buildings and the salaries of court officers.[66]

The result? An enormous disparity of what justice looked like across the province. This explains why magistrates' courts were conducted in furnace rooms in some towns and proper courthouses in others, and why police officers served as court officers in some places, while others had well-trained court clerks.

Assessing Costs Against Convicted Persons

In the late 1800s, "costs" — fees and charges required by law to be paid to courts or their judges or justices of the peace — were routinely assessed against people convicted of offences. "Costs" are different from fines. Fines are levied for punishment. Costs are levied to compensate a municipality or the province for the expense of the prosecution.

Before 1954, when an accused person was convicted of an indictable offence, the court had the power to order the convicted person to pay "the whole or any part of the costs or expenses incurred in and about the prosecution and conviction for the offence of which he is convicted."[67]

This provision was dropped from the *Criminal Code* when it was revised in 1954, but the power to award costs with respect to the trial of summary offences remained. For example, fees were payable to justices of the peace for hearing cases, fees were payable for interpreters and, unbelievably, the convicted person could be ordered to pay the cost of conveying himself or herself to prison.[68]

If a convicted person could not afford to pay the costs, the court could order the sale of the person's possessions or impose a term of imprisonment. The "debtor's prison" was still a very real possibility for

many impoverished people in 1967.[69] And, of course, there was the obvious conflict of court officials — including magistrates and justices of the peace — having a monetary interest in securing the conviction of an accused person.

To make this situation even more objectionable, the practice of awarding costs varied dramatically across the province. This meant that, by 1968, costs were waived by some jurisdictions and, in others, people paid the full freight if they were convicted of a summary offence.[70]

Juvenile and Family Court Judges

Introduction

In 1867, there were no juvenile or family court judges in Ontario. In fact, there were no specialized courts to consider matters affecting children or families at that time.

By 1967, juvenile and family courts were spread — in a hodge-podge fashion — across the province. Over this period, these courts gradually acquired a significant jurisdiction which fell into three categories:

- Conduct of the child – the "juvenile delinquent";
- Conduct of adults toward the child – "contributing to juvenile delinquency"; and
- Obligations of parents towards one another and their children.[71]

Despite this evolution, these courts were acknowledged as "the poor country cousins to the magistrates' courts."[72] Remember — as recently as 1967, the magistrates' courts were considered to be the most "neglected" courts in Ontario.[73] So, where did this leave the poor relations — the juvenile and family courts and its collection of judges?

Let's begin by tracing the history of these courts and their judges beginning at the end of the 19th century when social reformers turned their focus on children, pleading for more sympathetic treatment of the youngest members of society — "juveniles" — by the justice system.

The Juvenile in the Court System

In 1867, the trials of children and adults were held in the same criminal courts, and children served their sentences in the same prisons along with hardened adult criminals. The age of criminal responsibility was seven years — and, in 1967, it was still seven.[74]

Social reformers recognized that "juveniles" should be treated as children needing help, encouragement and guidance — not as criminals. Legislators began to respond. In 1893, the first act for the protection of children was passed in Ontario, setting out special treatment for children who had broken the law.[75]

This *Children's Protection Act* was limited, however. It only applied to cases where children were convicted of offences under provincial statutes. In such cases, power was given to the court to commit them to the care of Children's Aid Societies,[76] which were created by this legislation.

The Introduction of the Juvenile Delinquents Act: "Aid, Encouragement, Help and Assistance"

Because the federal government had (and continues to have) exclusive jurisdiction over the criminal law, children convicted of criminal offences — no matter how minor — were still treated as adults in Ontario after 1893. That only changed in 1908 with the enactment by the federal government of *The Juvenile Delinquents Act* (the "JDA").[77]

The social nature of the JDA stated in the act itself: "…every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."[78]

A Toronto newsboy. From J.J. Kelso, Early History of Humane and Children's Aid Movement (Toronto: King's Printer, 1911.)

The "Waifs and Strays" of Toronto in 1889

"Six small boys presented themselves at Police Headquarters yesterday asking for three years in the reformatory so they could learn to read and master a trade. They were referred to Inspector Archibald who told them to come back this morning. Half an hour later they returned with a hand sleigh which they claim to have stolen from 90 Yonge Street. All pleaded guilty to theft and were sent down." ("From Police Blotters," *Toronto World*, 14 December 1889.)

"The Police Magistrate yesterday discharged six little boys who had stolen a hand sleigh in order to go to the reformatory." ("Jottings about Town," *Toronto World*, 31 December 1889.)

Despite these lofty philosophical intentions, implementation proved to be a challenge. The JDA, wrote Ted Andrews, the former Chief Judge of the Provincial Court (Family Division), "turned out not to be the panacea for which social reformers had hoped."[79]

What happened?

First, the JDA was not applicable across the province, creating a confusing and uneven collection of juvenile courts. By 1952, only 30 municipalities in Ontario had set up juvenile courts.[80] Special juvenile courts were established only in those areas where they were authorized — and paid for — by local authorities. If a child committed a criminal offence on one side a boundary road, she could be charged as an adult. If she committed the same offence on the other side of the road, she could be charged as a juvenile delinquent, if that locality has set up a juvenile court under the JDA.[81] Only in 1963 was the JDA finally proclaimed for all jurisdictions in Ontario.[82]

Second, the judicial officers sitting in the juvenile courts were often not trained for the position of "juvenile judge." In 1910, with the enactment of *The Juvenile Courts Act*, the province took a convenient

step and simply appointed every magistrate and federally appointed judge to be a "juvenile judge" in all areas where the JDA applied.[83] This meant that no training or special skills were required to take on the new role of juvenile judge. This situation continued for almost sixty years. In 1967, no special qualifications or training were required for a judge hearing juvenile matters,[84] this despite repeated calls for juvenile judges with training in both law and social sciences, capable of comprehending the issues facing young people and families.[85]

The Jurisdiction of Juvenile Court Judges

In 1967, the JDA applied in Ontario to children apparently or actually under the age of 16. A child was a "delinquent" if he or she violated any provision of the *Criminal Code*, any provincial or federal statute or any municipal by-law. A school-age child who was "habitually absent" from school was also considered a juvenile delinquent. A child guilty of "sexual immorality or any similar form of vice" was also a delinquent.

This broad definition resulted in the situation where the term "juvenile delinquent" applied to a wide range of offences – from murder to unlawfully riding a bike on the sidewalk.

The court could take several courses of action if a child was found to be delinquent, ranging from levying a fine to placing the child in a foster home or under the care of a Children's Aid Society to sending the child to a training school.

These powers, combined with the broad definition of the term "delinquent," could result in a child being sent to a training school for the breach of a city by-law – such as unlawfully riding a bike on the sidewalk.

Juvenile court judges also had a wide jurisdiction to try adults for contributing to juvenile delinquency and to impose penalties on parents or guardians of juvenile delinquents. With the first JDA in 1908,

social reformers had aimed to eliminate the stigma of treating children as "little criminals" or "convicts." By the end of this period, however, the term "juvenile delinquent" had acquired that very stigma.

The JDA had significant "rehabilitative" purposes. The act provided for the service of probation officers not only to provide background information about the juvenile delinquent for sentencing purposes but also as correctional counsellors with juveniles placed under their supervision. Recognizing that juveniles should not be jailed with adults, the act also provided for the establishment of detention homes for children.

(Sources: JDA, R.S.C., 1952, c. 160; McRuer Report, pp. 550-554; H.T.G. Andrews, *Family Lawyer in the Family Courts*, (Toronto: The Carswell Company Limited, 1973) pp. 2-5.)

The Court's Jurisdiction Expands to Family Matters

In 1934, *The Juvenile and Family Courts Act* was passed.[86] This legislation broadened the scope of the work of the juvenile courts and added "family" matters to the work of the court. These family matters pertained primarily to issues of child neglect and domestic relations within the family.

The juvenile and family courts were given jurisdiction over a collection of the provincial statutes, including the following:

- *The Child Welfare Act*
- *The Children's Maintenance Act*
- *The Deserted Wives' and Children's Maintenance Act*
- *The Minors' Protection Act*

- *The Parents' Maintenance Act*
- *The Schools Administration Act, and*
- *The Training Schools Act.*[87]

Passage of the 1934 statute created a period of confusion as the courts had different names and jurisdictions, with some called juvenile court, others known as family court, and yet others called juvenile and family court. Because each municipality financed its own such court with "marginal budgets," variance — and confusion — was the rule.[88]

As detailed by the Ontario Law Reform Commission, much of the confusion was eliminated in 1954 when an amendment to *The Juvenile and Family Courts Act* gave all these courts the same jurisdiction. Until the passage of *The Provincial Courts Act* in 1968, however, there was no central organization or financing of Ontario's juvenile and family courts.[89]

Tragedy in Port Arthur

Judge B.J. McKitrick

"Estranged Husband Slays Judge, Wife and Self at Port Arthur," read the newspaper headline on June 21, 1949 in the *Fort William Daily Journal*. It was a tragic chapter in the history of the juvenile and family courts. Judge B.J. McKitrick, together with Irene Gray, was shot and killed in the courtroom by Mrs. Gray's husband, William Gray, a former police officer. Mr. Gray, who was appearing on charges of not financially supporting his three young children, then turned the gun on himself. Judge McKitrick, a former social worker, was appointed in 1945 to the juvenile and family court in Port Arthur, which is now part of the municipality of Thunder Bay.

Further, while the 1934 statute provided for the appointment of juvenile and family court judges, these judges were all deemed to be ex officio magistrates for the province with the jurisdiction to try criminal cases. Practically speaking, this meant that many juvenile and family judges were also doing the work of a magistrate.[90] By 1967, for most of these judges, juvenile court cases only accounted for approximately one-third of their work.[91]

An Inequitable Kind of Justice?

By the 1960s, the marginalized approach to the juvenile and family courts was roundly criticized. As McRuer wrote,

"The change of attitude that is required when one moves from an ordinary court to a juvenile and family court is difficult. In the latter court, the adversary system is of lesser importance. One is more concerned with the social welfare of the people appearing before the court and in seeking solutions to their difficulties within the social context, than is the case with other courts. A magistrate functioning within the framework of an adversary system under strict and formal rules requiring proof beyond a reasonable doubt, and where punishment must be a consideration, is engaged in an inquiry of an entirely different one in which he seeks solutions where these attributes are not the predominant features. It is not right to vest these different aspects of the administration of justice in the same judicial officer….The juvenile and family court can no longer be considered to be merely an 'extra' court or an added function of the county court judge or the magistrate." [92]

"An inequitable kind of justice." This was Andrews' simple and concise view of the justice meted out to juveniles and families. However, Andrews recognized the contributions of the judicial officials who sat in these courts – particularly in the early days. In the face of all the challenges presented, the judges "kept the Juvenile Courts from going off the rails."[93]

Family Court Matters

After enactment of *The Juvenile and Family Courts Act* in 1934, what sorts of matters could be added to the workload of the judge sitting in these courts?

Here are three examples:

The Minors' Protection Act: This legislation act was passed for the purpose of protecting young people from an "unsavoury" environment existing in pool halls — "which were the favourite hangouts for criminals, gamblers and unrefined and immoral men. The keeper of such premises was not allowed to admit any person under 18 unless he was accompanied by his parent or a legal guardian."

***The Deserted Wives' and Children's Maintenance Act*:** This act was intended to force husbands and fathers to provide financial support for their wives and children who had been deserted by them without providing them with adequate financial support when able to do so. After a financial "maintenance" order was made, the judge could also make provision as to custody and access of children.

The Training Schools Act: This act provided that any person could bring any child under 16 years of age before the Court, and the Court could send that child to a training school for an indeterminate period if the child's parent or guardian, in the view of the Court, was "unable to control him or to provide for his social, emotional or educational needs." The Court also had the power to commit to a training school any child between 12 and 16 who had contravened any statute which contravention would be punishable by imprisonment if committted by an adult. Once committed to a training school, the child became a ward of that school until he or she turned 18, unless the wardship was terminated earlier.

(H.T.G. Andrews, *Family Law in the Family Courts* (Toronto: The Carswell Company Limited, 1973) pp.7-9.)

Appointment and Qualifications of Juvenile and Family Court Judges

Serving "At Pleasure"

"It will not be taken amiss, I am sure, if I point out that up until 1941, magistrates, who of course are appointed by the Provincial Government of the day, held office only during the pleasure of the Lieutenant Governor in Council, i.e., the provincial cabinet. In 1941 the Magistrates Act was amended to provide that salaried magistrates, after being in office for two years, could only be removed upon the recommendation of a Commissioner after a public inquiry, such Commissioner being required to be himself a Judge of the Supreme Court of Ontario. Even this amendment left many magistrates without such protection and subject to being dismissed at the will of the Provincial Government. That has been the law of this Province by statute then since 1941, the only real changes in the intervening years being brought about by the Provincial Courts Act, 1968."

(Justice Donald A. Keith, Inquiry Re Provincial Judge Lucien Coe Kurata, 1969, p. 7.)

"Convenience appears to have dictated the appointment of magistrates and county court judges to occupy the juvenile and family court bench," wrote McRuer in 1968.[94] That aptly summed up the situation. By 1967, the majority of juvenile and family judges were magistrates whose main work was sitting in the magistrates' courts. This situation often made it "unfeasible" for the magistrate to "give adequate time to his juvenile and family court work."[95]

There were no legal qualifications to become a judge of a juvenile or family court. Judges held their positions "during good behaviour," meaning there was no "security of tenure." "Once a man is appointed, the tenure is only dependent upon good behaviour," wrote McRuer.[96]

Salaries for judges were paid by municipalities — and tended to be lower than what magistrates of the day were making. As Andrews pointed out: "Salaries were not high enough to attract many lawyers. There was more dedication than remuneration. After all, this was an experiment

in sociological justice."[97] This meant that those who were appointed to magistrates' courts and juvenile and family courts ("two hatters"), received two salaries, one from the province and one from the municipality.[98] The salary received for work as a juvenile and family judge tended to be the lesser of the two, however.

The result was a court that was often considered to be an "extra." For many of the judges, the work was simply an added function to their regular judicial positions. Further, no training was given to these judges despite the "change in attitude that was required when one moves from an ordinary court to a juvenile and family court."[99]

Administration and Funding of the Juvenile and Family Courts

Funding – specifically, the lack of it – was a constant challenge for the juvenile and family courts.

Unlike the magistrates' courts which, by the late 1960s, were financed by the provincial government, the juvenile and family courts were typically financed by municipalities within counties across Ontario. In parts of northern Ontario, the province did finance juvenile and family courts — but the vast majority were funded by municipalities.

By 1967, problems, caused by lack of funding, were "acute" in most juvenile and family courts, according to McRuer.[100] Andrews was far blunter: "There was a great disparity in facilities and staff of the various courts throughout the province. Unlike the Magistrates' Courts, the Juvenile and Family Court was not a revenue producing one. In fact, it was almost a total liability."[101] What does Andrews' mean by this? The "revenue" he wrote about refers to the fines levied on and collected from offenders in magistrates' courts for infractions such as speeding and parking offences. Juvenile and family courts were typically not levying fines and, therefore, not generating revenue.

Andrews went on to give a good sense of the ad hoc approach taken to these courts: "It usually turned out that the courts that fared the best were the ones where the Judges had the best relationships with the municipal and/or county councils, some of which were not fully convinced of the Court's usefulness. Besides having a working knowledge of the law, sociology and administration, Judges were expected to be good public relations men, as well, if they hoped to have an efficient Court."[102]

Procedure and Structure of Juvenile and Family Courts: Social Physicians

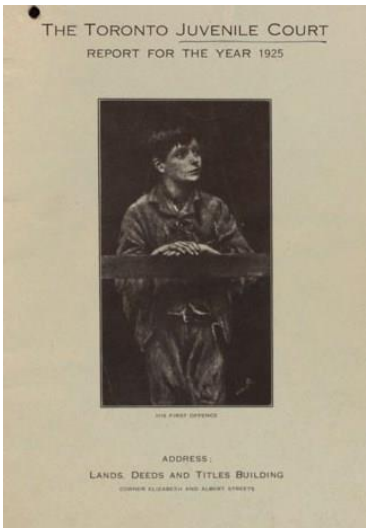
As Andrews wrote, family courts were considered to be experiments in sociological justice – and this caused a degree of nervousness within the court system. How to protect the civil rights of people coming before these courts, yet still achieve the social objectives they were designed to accomplish?

"The function of the judge is not so much to determine guilt as to find out the underlying causes which have brought the child before the court, and when these have been determined to prescribe treatment," wrote McRuer. "He is a social physician charged with diagnosing the case and issuing the prescription. This cannot be properly performed if he is surrounded by too many legalistic trappings; nevertheless, there must be some basic ones." [103]

McRuer went on to reinforce the need to balance the social function of the court with the need to, as he put it, "dispense justice according to the law" like every other court.[104] He recommended the development of general rules of procedure to be followed by all juvenile and family court judges — and that recommendation came with a pointed criticism: "The rule of thumb of the individual judge is not sufficient."[105]

A Glimpse at Toronto's 311 Jarvis Court

"311 Jarvis" — that address has had a long and storied history in the realm of juvenile and family courts in Ontario. The story begins in 1922 with the decision of the City of Toronto's Juvenile Court Special Committee to purchase the house at 311 Jarvis for a sum "not to exceed $25,000" to serve as the Observation Home for Toronto's Juvenile Court. Until 1954, 311 Jarvis served that purpose. Typically, the home had a daily population of 10 to 12 children and the average length of stay was two to three days.



His First Offence (The Cover of The Toronto Juvenile Court Report for the Year 1925)

311 Jarvis as it appeared in 1925.

The *Report of the Toronto Juvenile Court for the Year 1925* provides a strong indication of the sentiments of the day regarding "delinquent" children. That report is introduced with a quote from author Victor Hugo: "All the vagabondage in the world begins in neglected childhood." It was seen as a civic duty to repair such neglect.

REPORT OF THE TORONTO JUVENILE COURT FOR THE YEAR 1925.

"The common human problems of children and their parents find expression in interviews, investigations, and personal service which are not accounted for statistically. In this regard the real value of the Court in its dealings with individual and family problems can never be expressed in a report."

The report for the year 1925 registers an increase in the number of children brought into Court charged with delinquency over the year 1924, there being 2,298 in 1924 and 2,529 in 1925. But it is interesting to note that in 1925 1,045 of the children, who were brought to Court, were not found guilty. Their parents were warned, the children counselled and allowed to go home without any conviction being registered against them. In some cases assistance of a Big Brother or Sister or Court Officer was given to them, thus trying to assist the child without touching or marring its good name by a conviction.

Some, at first thought, might be disposed to view this increase as just reason for alarm, fearing that the increase of delinquency presages a weakening in our home life and associations. But there is another factor that should enter into our consideration. If the police and social workers of a community earnestly direct their attention towards making and keeping the homes suitable and fit for the children to be in this action would naturally increase the work of a Juvenile Court, but also would be as a crutch to assist the home in its important function of rearing and caring for the child. Thus the efficiency of the police and social workers might show an increase in delinquency and also that the constructive agencies are efficiently trying to keep the homes in fit condition for the child to normally unfold. Of course there are many other causes that might result in the increase or decrease of delinquency.

(The Toronto Juvenile Court Report of the Year 1925. City of Toronto Archives, CTA, Fond 2, Series 60, Item 1706)

A sketch of Judge V. Lorne Stewart from the 1950s. (Courtesy of The Osgoode Society)

In the 1950s, Judge V. Lorne Stewart of the Juvenile and Family Court campaigned to have a facility which housed all services under one roof: the court, family counselling, probation services and detention services. This was a radical idea for the time, a facility that was more clinic than court. As Stewart wrote: "The perennial discussion as to whether the Juvenile and Family Court is more clinic and welfare agency than it is a court points up the significantly important double role that these courts are

called upon to perform…Its purpose is mending the rifts in family life; establishing a just and reasonable financial plan of support when the home has fallen apart; and providing proper control and guidance for children who break the law or are in need of care and protection…How far (the court) should move out into the treatment area is a moot question but the courts that is able to write its own prescription can usually command results more quickly and frequently achieve more satisfactory results." ("*The Juvenile and Family Court,*" in S. Tupper Bigelow, *A Manual for Ontario Magistrates*, (Toronto: Queen's Printer, 1962) pg. 81.)

In March 1957, the new 311 Jarvis opened its doors to extensive coverage of the building and Judge Stewart in the newspapers of the day. "The approach to delinquency at the Jarvis St. Centre will be as progressive as the building's unusual front — a towering wall of cut limestone broken by hundreds of small windows. Children received by the centre and judged to be delinquent will undergo a solid week of observations stressing psychiatric examination and a review of their homes and conditions there…'Don't get the idea we will be pampering the youngsters here,' observed Senior Judge V. Lorne Stewart in *The Toronto Daily Star*, on March 12, 1957, as he proudly showed off the new building. 'We believe in handling discipline by being humane.'" In 1966, the province assumed responsibility for all detention homes, including 311 Jarvis.

Interior of Juvenile Court, 311 Jarvis Street, 1956
(Photo: Barry Stewart, City of Toronto Archives, Fonds 220, Series 35, File 50)

311 Jarvis Street, 1960

In the late 1990s, when Stewart was 88, he returned to visit 311 Jarvis and was saddened to see his creation eroded. He was accompanied on that visit by Judge James P. Felstiner, who also served as a juvenile and family court judge. Judge Felstiner wrote of that visit: "After seeing the children in handcuffs in court and the dirty, crowded, windowless steel cells in which the detained children are now held, tears started to come to his eyes and he asked me to take him home. Only after his death did I discover what he had written about that day: 'What did I see – handcuffs, locked doors, more court than clinic.' His dream was no more." (James P. Felstiner, "Lives Lived," *The Globe and Mail* (June 17, 2002)).

Conclusion

The proliferation of courts that characterized the 1867-1967 period changed in 1968 with the creation of provincial courts with two divisions – criminal and family. A new era had begun in the evolution of what would become the Ontario Court of Justice.

Selected Statutes Related to Justices of the Peace

AN ACT RESPECTING QUALIFICATIONS OF JUSTICES OF THE PEACE* SUBSEQUENTLY RE-ENACTED AS: *THE JUSTICES OF THE PEACE ACT	**Legislation Governing Justices of the Peace** This legislation, originally enacted before Confederation, was revised, amended and re-enacted numerous times and later consolidated in 1952. The 1952 statute, while periodically amended and revised, formed the basis of the justice of the peace system until the mid-1980s.
***THE JUSTICES OF THE PEACE ACT*, 1897**	**Right to Use Town Hall** A justice of the peace was given the right to use town hall of a municipality, but not so as to interfere with its ordinary use, unless another suitable place was provided by the municipality. This provision existed until the 1950s.
***THE JUSTICE OF THE PEACE ACT*, 1935**	**Minimum Property Requirements** All references to minimum property qualifications were repealed. Prior to this date, justices of the peace were to be of "the most sufficient persons dwelling in the places" for which they were appointed and were to have land valued at $1200 or more.

Selected Statutes Related to Juvenile and Family Courts

***CRIMINAL CODE*, 1892**	**Separate Trials for Children** Section 550 of the *Criminal Code* required children to be tried separately from adults. Trials of children were to be held "in camera," without the public present.
***THE CHILDREN'S PROTECTION ACT*, 1893**	**Children's Aid Societies** Neglected and delinquent children could be assigned to the care of Children's Aid Societies. Delinquency related only to convictions under provincial statutes.
***THE JUVENILE DELINQUENTS*, 1908**	**Establishment of Juvenile Courts** Local authorities could establish Juvenile Courts to handle young offenders and adults who contributed to their delinquency.
***AN ACT RESPECTING JUVENILE COURTS*, 1910**	**Police Magistrates as Juvenile Courts** Police magistrates were constituted as juvenile courts. A justice of the peace, on the written request of the Attorney General, could act as a juvenile court judge in a specific case.
***THE MAGISTRATES JURISDICTION ACT*, 1929**	**Jurisdiction Conferred to be Juvenile Court** This Act enabled additional jurisdiction to be conferred on Magistrates' Courts to become Juvenile Courts.

***THE JUVENILE AND FAMILY COURTS ACT*, 1934**	**Family Courts** Juvenile Courts could also become Family Courts.
***THE MAGISTRATES ACT*, 1934**	**Juvenile Court Judges to be Magistrates** Judges and deputy judges of Juvenile Courts became *ex officio* magistrates, but could only act as such when directed to do so by the Attorney General.
***THE JUVENILE AND FAMILY COURTS ACT*, 1954**	**Consistent Name: Juvenile and Family Court** Juvenile Courts and Family Courts were all renamed Juvenile and Family Courts.
***THE JUVENILE DELINQUENTS ACT*, 1963**	**Full Proclamation of *Juvenile Delinquents Act*** *The Juvenile Delinquents Act* was proclaimed for all counties, provisional districts and separate cities and towns in Ontario.
***THE JUVENILE AND FAMILY COURTS ACT*, 1964**	**Senior Judge** A senior judge and an associate senior judge could be designated whenever there was more than one judge of a Juvenile and Family Court.
***THE JUVENILE AND FAMILY COURTS*, 1967**	**Chief Judge of the Juvenile and Family Courts** The Lieutenant Governor in Council could appoint a chief judge of the Juvenile and Family Courts with "general supervisory powers

	over arranging the sitting of judges and family court and assigning judges for hearings, as circumstances permit."
***THE PROVINCIAL COURTS ACT*, 1968**	**The Provincial Court (Family Division)** The Juvenile and Family Courts were subsumed into the Family Division of the new Provincial Court.

Selected Statutes Related to Magistrates

***THE MUNICIPAL CORPORATIONS ACT*, 1849**	**Police Office Magistrates** This pre-Confederation statute established police offices in towns listed in an attached schedule. The police magistrate for each town was required to dispose of business brought before him as a justice of the peace.
***AN ACT RESPECTING POLICE MAGISTRATES*, 1877**	**Magistrates in Ontario Towns and Cities** The Lieutenant Governor in Council was directed to appoint a police magistrate in each city and town where the population exceeded 5000 and, under certain conditions, in smaller towns and in counties.
***THE MAGISTRATES ACT*, 1922**	**Designating a Senior Magistrate** The Lieutenant Governor in Council could appoint four police magistrates for the City of Toronto, one of whom could be designated senior

	magistrate.
***THE MAGISTRATES ACT*, 1926**	**Female Magistrates** Female magistrates could be appointed, but only in cities with populations of 100,000 or more and only where a resolution of council declared that it was desirable for a woman to be appointed.
***THE MAGISTRATES ACT*, 1934**	**Change of Name: Magistrates Court** The Police Magistrates Court became known as the Magistrates' Court. Each magistrate had jurisdiction across Ontario but could be assigned to a specified magisterial district.
***THE MAGISTRATES ACT*, 1941**	**Removal from Office** A magistrate who held office for more than two years could only be removed for cause, such as misconduct or inability to continue.
***THE MAGISTRATES ACT*, 1952**	**Repeal of Special Provisions for Female Magistrates** The special provisions regarding female magistrates were repealed.
***THE MAGISTRATES AMENDMENT ACT*, 1964**	**Chief Magistrate** The position of Chief Magistrate for Ontario was created, with "general supervisory powers over arranging the sitting of magistrates and assigning magistrates for hearings, as circumstances require."
THE PROVINCIAL COURTS	**The Provincial Court (Criminal Division)**

***ACT*, 1968**	The Magistrates' Courts were subsumed by the Provincial Court (Criminal Division) of the new Provincial Courts.

[1] Zuber, T.G. Report of the *Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987), p. 28
[2] Civil matters are those concerned with the private affairs of citizens, for example marriage, property ownership, contractual disputes rather than criminal matters
[3] Zuber Report, p. 25
[4] McRuer, J.C. *Royal Commission Inquiry into Civil Rights*, Volume 2 (Toronto: Queen's Printer, 1968), Volume 2, p. 527.
[5] Bigelow, S. Tupper. *A Manual for Ontario Magistrates,* (Toronto: Queen's Printer, 1962), p.78.
[6] McRuer Report, Vol 2, p. 526
[7] Peter Russell, *The Judiciary in Canada – The Third Branch of Government* (Toronto: McGraw-Hill Ryerson Limited, 1987), pp. 208-210
[8] Mewett, Alan W. *Report to the Attorney General of Ontario and Function of Justices of the Peace in Ontario*. (Toronto: Ministry of the Attorney General, 1981) p. 2
[9] Mewett Report, p. 3
[10] McRuer Report, Vol. 2, p. 515.
[11] McRuer Report, Vol. 2, p. 520.
[12] Zuber Report, p.22.
[13] An "information" is a sworn statement which charges that a particular individual has committed a criminal act. A member of the public or a police officer can come to a justice of the peace and swear an information before that justice of the peace. This commences a criminal prosecution.
[14] Summary offences are less serious criminal offences which usually carry a penalty of a fine or a short jail term
[15] Mewett Report, pp. 2-3
[16] Mewett Report, pp. 2-3
[17] Mewett Report, pp. 2-3
[18] McRuer Report, Vol. 2, p. 516
[19] *An Act for the Qualification of Justices of the Peace*, Statutes of Upper Canada 1842, 5 Victoria, c. 3, ss. 1, 3
[20] *An Act Respecting Qualifications of Justices of the Peace*, C.S.C., c. 100 (later consolidated by 1952, c. 47)
[21] Mewett Report, p. 4
[22] The Toronto Daily Star, Friday, August 17, 1934
[23] McRuer Report, Vol. 2, p. 517
[24] McRuer Report, Vol. 2, p. 519
[25] McRuer Report, Vol. 2, p. 519
[26] McRuer Report, Vol. 2, p. 520
[27] McRuer Report, p. 521 – In 1968, only 89 of the more than 900 justices of the peace were paid on a salary basis. The remainder were paid by fees
[28] McRuer Report, Vol. 2, p. 521
[29] McRuer Report, Vol. 2, p. 523
[30] McRuer Report, Vol. 2, p. 524
[31] McRuer Report, Vol. 2, p. 524
[32] Banks, Margaret A., "The Evolution of The Ontario Courts", 1788-1981" in Flaherty, David H., ed. Essays in the History of Canada, Volume II (Toronto: The Osgoode Society 1983 492 at p. 546) and McRuer Report, Vol. 2, p. 526
[33] 12 Vict. (1849), c. 81, s. 69 (P. of Can.), Banks, The Evolution p. 546
[34] Banks, The Evolution, p. 546
[35] Banks, *The Evolution*, p. 546, RSO 1877, c. 72, ss 1-2; RSO 1887, c. 72, ss. 2, 3, 8, 21

[36] Denison, George T. *Recollections of a Police Magistrate* (Toronto: The Mission Book Company Limited, 1920), p.3
[37] Denison, *Recollections*, p. 3
[38] McRuer Report, Vol. 2, p. 531, Banks, *The Evolution*, p. 546
[39] Bigelow, *A Manual for Ontario Magistrates* (Toronto: Queen's Printer, 1962), p. 33.
[40] McRuer Report, Vol. 2, p. 532
[41] *Magistrates Act, 1926,* s. 36(1)
[42] McRuer Report, Vol. 2, p. 538
[43] Banks, *The Evolution*, p. 547
[44] Lennox, p. 4
[45] McRuer Report, Vol. 2, p. 528
[46] Denison, *Recollections*, p. 5
[47] Denison, *Recollections*, p. 4
[48] Bigelow, *A Manual*, p. 4
[49] McRuer Report, Vol. 2, p. 529
[50] McRuer Report, Vol. 2, p. 530
[51] Denison, *Recollections*, p. 1
[52] McRuer Report, Vol. 2, p. 539
[53] S. 3, *Magistrates Act*, R.S.O. 1960, c. 226 – this provision first enacted in 1952
[54] McRuer Report, Vol. 2, p. 541
[55] McRuer Report, Vol. 2, p. 541
[56] McRuer Report, Vol. 2, p. 528
[57] McRuer Report, Vol. 2, p. 526
[58] McRuer Report, Vol. 2, p. 526
[59] McRuer Report, Vol. 2, p. 526
[60] McRuer Report, Vol. 2, p. 527
[61] McRuer Report, Vol. 2, p. 527
[62] Banks, *The Evolution*, p. 546
[63] Zuber Report, p. 27
[64] Zuber Report, p. 26
[65] Zuber Report, p. 26
[66] Zuber Report, p. 26
[67] *Crim. Code* 1927, s. 1044
[68] McRuer Report, Vol. 2, p. 535
[69] McRuer Report, Vol. 2, p. 536
[70] McRuer Report, Vol. 2, p. 549
[71] McRuer Report, Vol. 2, p. 536
[72] Andrews, H.T.G. *Family Law in The Family Courts* (Toronto: The Carswell Company Limited, 1973, p. 11 p. 11
[73] McRuer Report, Vol. 2, p. 526
[74] Andrews, *Family Law*, p. 1
[75] *An Act for the Prevention of Cruelty to, and Better Protection of, Children, Ont.* 1893, c. 45
[76] McRuer Report, Vol. 2, p. 547
[77] McRuer Report, Vol. 2, p. 547
[78] *The Juvenlile Delinquents Act*, R.S.C. 1952, c. 160. , s. 38
[79] Andrews, *Family Law*, p. 2
[80] McRuer Report, Vol. 2, p. 548
[81] McRuer Report, Vol. 2, p. 547
[82] McRuer Report, Vol. 2, p. 548
[83] *Juvenile Courts Act*, RSO, 1910, Andrews, *Family Law*, p. 3
[84] McRuer Report, Vol. 2, p. 558

[85] McRuer Report, Vol. 2, pp. 558-562
[86] *Juvenile and Family Courts Act*, 1934
[87] Andrews, *Family Law*, p. 7
[88] McRuer Report, Vol. 2, p. 564
[89] Ontario Law Reform Commission, Report on Family Law, Part V, Family Courts, Ministry of the Attorney General, ch. II.
[90] Andrews, *Family Law*, p. 8
[91] McRuer Report, Vol. 2, p. 554
[92] McRuer Report, Vol. 2, pp. 560-561
[93] Andrews, *Family Law*, p. 6
[94] McRuer Report, Vol. 2, p. 560
[95] E.H. Silk, Assistant Deputy Attorney General, Legislature of Ontario Debates, 1961-62, c. 67, s. 4
[96] McRuer Report, Vol. 2, p. 558
[97] Andrews, Family Law, p. 6
[98] Interview of T. Andrews for OCJ History Project, 2014.
[99] McRuer Report, Vol. 2, p. 561
[100] McRuer Report, Vol. 2, p. 563
[101] Andrews, *Family Law*, p. 10
[102] Andrews, *Family Law*, p. 11
[103] McRuer Report, Vol. 2, p. 555.
[104] McRuer Report, Vol. 2, p. 556.
[105] McRuer Report, Vol. 2, p. 555.

Period I: 1867-1967 Notable Cases

R. v. King: "Defining *Mens Rea*"[1]

On October 8, 1959, Grant King went to the dentist. He was given a general anaesthetic – sodium pentothal – and then had two teeth extracted. Mr. King regained consciousness about 45 minutes after the extraction, paid the dentist's account, and was warned by the dentist's nurse not to drive a car "until his head was perfectly clear." He left the office, drove away and promptly hit a parked truck. The police officer on the scene said Mr. King staggered when walking, denied he'd been drinking, and said he just had teeth extracted and the dentist had given him sodium pentothal. Mr. King was adamant – he stated he did not hear the nurse's warning about not driving and didn't know about the possible effects of the anaesthetic.

Mr. King's tale of woe took him from Toronto's Magistrates' Court to the Supreme Court of Canada – and ultimately resulted in a leading case on the essential elements of a criminal offence.

Magistrate T.H. Wolfe convicted Mr. King of driving a motor vehicle impaired by a drug contrary to the Criminal Code. He imposed a fine of $50.00, or imprisonment for a term of 10 days in the event of non-payment of the fine. This despite the fact that Mr. King argued he should not be found guilty because he was acting involuntarily.

Dissatisfied with this result, Mr. King pursued a trial *de novo* before a County Court judge – a federally appointed judge. At this time, an appeal from a magistrates' court was heard by way of trial *de novo.* Instead of today's practice, where an appeal judge generally relies on a trial judge's factual findings, a trial *de novo* means the entire trial is heard over again – additional witnesses could be called, arguments could be strengthened. With a trial *de novo*, it's as if the original trial was never held. Not surprisingly,

the possibility of a "second try" did nothing to strengthen the reputation of the magistrates' courts of the day. Their decisions could be easily ignored – and often were.

Mr. King's conviction by Magistrate Wolfe was affirmed in the County Court. He then appealed that decision and this is where his luck started to turn and the case began to make legal history. The case eventually made its way to the Supreme Court of Canada.

Punishment for the commission of a crime in Canada is only permitted where a person has committed a criminal act for which that person is "morally responsible." This means that under Canadian criminal law, "a crime consists of the commission of the prohibited act (in Latin – the *actus reus*) with the required degree of 'moral fault' (the *mens rea*). The *actus reus* may consist of an act, an omission or sometimes even a state of being (for example, being in possession of some prohibited matter, such as a weapon.) The *mens rea* is the so-called subjective element of the crime because it concerns the accused's state of mind at the time of the commission of the alleged offence."[2]

The final judgment in this case came down to the question as to whether mens rea relating to both the act of driving and to the state of being impaired was an essential element of the offence. In other words, did Mr. King possess that "moral fault?" The Supreme Court found that he did not – Mr. King became impaired through no act of his own will and he could not reasonably be expected to have known his ability was impaired or could have become impaired when driving his car[3]. Mr. King had a good defence to the crime and his conviction was reversed.

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[1] [1961] O.J. No. 23, [1962] S.C.R. 746
[2] F.C. DeCoste, *On Coming to Law: An Introduction to Law in Liberal Societies* (Toronto: LexisNexis Canada Inc., 2011), p. 265.
[3] *R. v. King* [1962] S.C.R. 746

Period I: 1867-1967 Notable Cases

R. v. Cameron: "Art Found Obscene"[1]

In the 1960s, "Toronto the Good" was an apt moniker for the city, still a bastion of Victorian morality. Change, however, was on the horizon. Yorkville was flourishing as a hippie hub, attracting young people from across Canada. Politicians, all the while, heatedly denounced the neighbourhood. An MPP of the day, Syl Apps, called Yorkville a "festering sore in the middle of the city." The Dorothy Cameron Gallery was located on the eastern fringe of Yorkville during that period. A sculptor, Cameron, was committed to showing the best of Canadian art of the day, including abstract paintings of nudes.

Gallery owner, Dorothy Cameron (Photo: Courtesy of CCCA Canadian Art Database)

In May 1965, Cameron launched a show of nudes – some depicting lesbian behaviour and all with a strong sexual connotation – called "Eros 65." Cameron quickly found herself facing seven Criminal Code charges of "exposing to public view obscene pictures." In November 1965, she found herself in front of Magistrate F.C. Hayes, the man who would become Chief Judge of the Provincial Court (Criminal Division). Hayes convicted her and imposed seven fines of $50 each. The case was appealed to the Ontario Court of Appeal where the appeal was dismissed – the Court of Appeal agreed with Magistrate Hayes. As Hayes had written in his decision "the search for artistic merit cannot be allowed as an excuse to exceed the bounds set by the definition of obscenity…There is in my judgment, such a relationship created between the figures [in the paintings] than an over-all consideration of each picture leaves no other impression than the dominant characteristic in each exhibit is the exploitation of sex." Hayes considered the question of whether the

public good was served by the acts in the paintings alleged to constitute the offence. Hayes was emphatic – the public good was not served by these seven pictures in question.

The case is interesting for a variety of reasons.

One dissent was recorded in the Court of Appeal decision. It was delivered by Bora Laskin who would become the Chief Justice of Canada in 1973. Reading his reasons, one can see a move away from the Victorian strictures that still bound society in the 1960s. He wrote: "Having regard to the terms in which Parliament has cast the definition of obscenity, I do say that if the artistic purpose of the author emerges as a dominant characteristic, as in my opinion is the case here, it will be a rare instance indeed in which that dominance can be said to be so suppressed by a sexual theme as to make the exploitation of sex a dominant characteristic which is undue…Literature [or art] which serves the public good cannot be obscene. It should be a simple as that."

"Burlesque Series: Couching," a 1962 work by Canadian artist, Robert Markle. Markle was one of the artists whose work was included in Cameron's Eros 65 show. This piece typifies the work included in that exhibition. (Photo: Courtesy of CCCA Canadian Art Database)

Magistrate Hayes was not the only future chief judge associated with the Cameron case. Police raided Dorothy Cameron's gallery during the opening of the "Eros 65" show. One of those in attendance was Sidney Linden who, at that time, was the general counsel for the Canadian Civil Liberties Association. In 1990, Linden would become the Chief Judge of the Ontario Court of Justice (Provincial Division) – the successor of Hayes. Linden watched Dorothy Cameron face off against the police during that raid. As recounted in the Court of Appeal reasons, when Cameron realized that police were taking possession of

the pictures in question, “she threw herself against the wall with her arms out and exclaimed: ‘You’ll have to kill me first before you take my pictures.’” Linden has cited this event as a transitional moment in his legal life, watching the police in action and considering the role of the law as it intersects with the liberties of Canadians to express themselves. It reinforced his commitment to protecting civil liberties.

[1] [1966] O.J. No. 1047, 1966 CanLII 162 (ON CA)

Period I: 1867-1967 Profiles & Stories

Dr. Margaret Patterson and the Toronto Women's Court

In 1911, prompted by concerns about the treatment of women in Toronto's police courts, members of the Toronto Local Council of Women (TLCW) began attending daily court sessions to observe and record proceedings involving women defendants.[1] What they observed was deeply troubling. The issue was not with the judiciary or court staff but rather with members of the audience. As Council member Margaret Patterson later recalled, "the younger women, who were compelled to appear in the police court, were subjected to a great deal of unpleasantness, not by the officials of the court but by the men who collected in the court as spectators. These men took down their names and addresses and followed them afterward for immoral purposes."[2] In cases where women were sentenced to incarceration, Council members observed that men took note of the length of their sentences, and women reported "being met when they came out of jail by these men, who, taking advantage of their lonely, often friendless, and penniless condition, induced them to go into immorality."

Magistrate Margaret Patterson presiding in Toronto Women's Court in the 1930s. (Courtesy of the Toronto Police Museum and Discovery Centre.)

Armed with the data they had collected, the TLCW applied to the Board of Police Commissioners for the creation of a separate women's court, "to which men would not be admitted unless they could show

just cause for being there."[3] Despite some initial resistance, the Board formally approved their request on February 5, 1913, and the Toronto Women's Police Court heard its first cases on February 10, 1913.

The creation of the Toronto Women's Police Court, one of the earliest women's courts in North America and the first of its kind in Canada, was part of a broader movement for "woman-specific legal justice."[4] Men continued to have a significant presence in the Women's Court, however, both as defendants charged with "morals offences" and as clerks, witnesses, police officers, and lawyers. In fact, for the first eight years of its operation, the Women's Court was presided over by Colonel George Taylor Denison, a well-known, highly experienced, and male police magistrate. It was not until Denison's retirement in 1921 – and again at the urging of the Toronto Local Council of Women – that a female magistrate was finally appointed to preside over the Women's Court.

That magistrate was Margaret Patterson. Appointed on January 4, 1922, Patterson was the first woman magistrate in Ontario and only the fourth in Canada. "When, in 1920, Denison announced his imminent retirement, the TLCW 'and kindred organizations' were quick to act, sending a deputation to the newly elected United Farmers of Ontario (UFO) and 'asking for legislation providing for and, in due course, the appointment of a woman magistrate in Toronto.' In 1921 the UFO, attentive to the demands of its recently enfranchised female supporters, amended the Police Magistrates' Act to enable any Ontario city with a population over one hundred thousand to appoint a female magistrate. [5]

Patterson was a woman both of, and ahead of, her time. Prior to her appointment, Patterson studied medicine at the University of Toronto's Women's Medical Centre and then received her Master of Surgery degree from Northwestern University in Chicago. Following an internship at the Detroit Women's Hospital, she travelled to India as a medical missionary in 1900. From 1900 to 1907 she served as the director of the Seward Memorial Hospital in Allahabad, and in 1902 received the Kaisar-i-Hind medal – awarded for "distinguished service in the advancement of the interest of the British Raj" –

recognition of her work to combat an outbreak of bubonic plague. Patterson's mission in India also foreshadowed her later efforts to rescue women from vice and immorality as a magistrate of the Women's Court. Between 1903 and 1905, she served as the medical adviser to Lord Kitchener's investigation of the social and moral conditions of the Indian army, and in that role she opened and supervised a rescue mission for camp followers. Patterson also taught obstetrics at the North India College of Medicine. In 1906, she married meteorologist and fellow Ontarian John Patterson. The couple returned to Toronto in 1910 with their infant son, Arthur. Patterson did not continue her medical practice in Toronto, but instead devoted her considerable energy and skill to reform politics and social service. In addition to her work with the Toronto Local Council of Women, Patterson organized and provided training to Red Cross, St. John's Ambulance, and other voluntary health initiatives, as well as lecturing widely.

Dr. Margaret Patterson, serving as a National Health convenor, demonstrated the milking of a cow in 1921 in a Toronto public park. (Archives of Ontario, RG 10-30-2, 1.8.9)

With Patterson as magistrate, the jurisdiction of the Women's Court was expanded to include all "domestic relations" cases as well as all criminal matters in which women were accused and all sexual offences in which women were involved, including as victims. This meant that women appeared before the court not only as defendants but also as complainants in both criminal and domestic cases, and the Women's Court was one forum – perhaps the only – in which women could find redress for various wrongs done to them.

In domestic relations cases, Patterson saw her role largely as one of mediator, and her primary aim as the reconciliation of families. In 1925, she wrote, "Some idea of the extent of the work in this Court may be gained from the fact that during the past year over sixty thousand dollars was collected from husbands who were trying to shirk their duty. The chief object of this Court, however, is not to collect money but to re-establish homes, and much valuable work has been done in this connection and many families re-united."[6] Patterson's vision of harmonious family life explicitly embraced marital equality and emphasized the need for partnership between husband and wife.

In criminal matters in which women were defendants, Patterson saw herself as a reformer and she was critical of short sentences that punished offenders without addressing the causes of crime. In an article entitled "Care of Criminals," Patterson wrote: "The police records show that the same people come before the court again and again, and each time more confirmed criminals than before. The sentence is given as punishment, not as a means of reform. The trouble with our present system is that we think only of the offence, and not of the offender. We deal with cases, forgetting that each case represents a human being with an immortal soul."[7]

Although Patterson was praised for her "kindly and sympathetic judgment," her focus on reform frequently led to the imposition of sentences that offenders likely experienced as neither kindly nor sympathetic. In particular, Patterson was a proponent of the indeterminate sentence. Rather than a fixed period of time – for example, six months imprisonment on conviction for theft – an indeterminate sentence allowed a magistrate to impose a sentence of up to two years less a day, with the length of that sentence to be determined by the offender's conduct in jail. In effect, offenders could earn "early" release through good behaviour, which was understood to demonstrate that they had been rehabilitated. On the other hand, offenders who would not or could not comply with prison rules and requirements often served sentences far longer than would ordinarily have been imposed given the nature of the offence. Although there have been significant changes to the criminal law over the

decades since, Patterson's focus on the offender rather than the offence continues to resonate today and finds a modern echo in risk-based approaches to sentencing and conditions of incarceration.

Patterson's term as magistrate of the Toronto Women's Police Court came to an end in 1934. The newly elected Liberal government restructured Ontario's court system and advised Patterson that she was to be replaced as magistrate of the Women's Court by Thomas O'Connor, KC (who, it may be noted, was paid nearly twice the salary Patterson had received). Patterson was offered a position as a Justice of the Peace, but declined what she viewed as a demotion. The Women's Court itself closed shortly thereafter.

Although the Women's Court was a short-lived and imperfect attempt to respond to women's needs in relation to both criminal and family law, it demonstrated the availability of alternative approaches to the administration of justice and helped pave the way for future reforms. Patterson's approach to domestic relations cases was an important precursor both to modern family law and to the work of the Family Division of the Provincial Court, created in 1968.

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[1] Amanda Glasbeek, *Feminized Justice: The Toronto Women's Court 1913-1934* (Vancouver, BC: UBC Press, 2009) p. 1.
[2] "Magistrate Patterson On Advantages Of Women's Court", *Ottawa Citizen* March 26, 1926, p. 13.
[3] "Magistrate Patterson On Advantages Of Women's Court", *Ottawa Citizen* March 26,1926, p. 13.
[4] Glasbeek, *Feminized Justice*, p. 13.
[5] Glasbeek, *Feminized Justice*, pp. 34-35.
[6] Margaret Patterson, "The Women's Court of Toronto," *Social Welfare* 10 (July 1925) p. 188, cited in Glasbeek, *Feminized Justice* p. 42.
[7] Margaret Patterson, "The Care of Criminals," in Social Service Congress, *Annual Report of Addresses and Proceedings* (Ottawa, n.p., 1914) pp. 226-30, cited in Glasbeek, *Feminized Justice*, p. 62.

Period I: 1867-1967 Profiles & Stories

Colonel George Taylor Denison

While Margaret Patterson was the first woman to preside in Toronto's Women's Court, she was not the first magistrate to serve in that role. Colonel George Taylor Denison took that honour when the first cases were heard Women's Court opened its doors in 1913. Appointed a police magistrate in 1877, Denison retired in 1921 – and Patterson took his seat on the bench.

One of the most sensational matters to come to the Women's Court involved an 18-year-old maid. In 1915, a member of one of Canada's wealthiest families was killed by a young domestic servant. Charles "Bert" Massey was shot by Carrie Davies, a British immigrant working as a maid in the Massey family home. In the language of the day, Massey had made "improper proposals" to Davies. On February 9, 1915, Denison presided over a courtroom in Old City Hall, and remanded the woman to the Don Jail. On February 16, Davies returned to appear before Denison in the Women's Court. At that time, she was formally charged with murder and the case moved to the Ontario Supreme Court (High Court Division). Rendering a decision which stunned Torontonians, the jury, at trial, found Davies not guilty of the murder of her employer. In The Massey Murder, author Charlotte Gray offers her colourful take on the crime, the trial, Denison himself, the workings of the justice system of the day, and the Toronto over which Denison so firmly presided for 44 years:

> *Magistrates in England and Canada were often referred to as "beaks," but in Toronto there was only one court official who was invariably called "The Beak," and he was a favourite of the Press Gallery. Denison was the unchallenged monarch of City Hall's police courts. One journalist had recently written that a trip to Toronto without visiting a Denison courtroom "would be like going to Rome and not seeing the Pope."*

Police Magistrate Denison stood for everything that was most British about Canada in 1915…

Before becoming the police court magistrate, City Hall's Colonel Denison saw service in the militia against the Fenians at Ridgeway in 1866 and the Metis and Indians during the Northwest Rebellion in 1885. He had also made himself an authority on military tactics, especially the élan of the cavalry charge: in 1877, he had travelled to Moscow to receive an award from the Russian tsar for his book History of Cavalry. This Colonel Denison's most passionate commitment was to Canada's destiny as an integral part of the British Empire: chief organizer of the United Empire Loyalists and president of the British Empire League in Canada, he crossed the Atlantic frequently to remind British politicians of the importance of Empire in Canada, and Canada to Empire…

The Denison dynasty in 1877; Colonel George Taylor Denison III (seated at left) was proud of the family's military traditions. (Toronto Public Library 974-30-5)

The Denison dynasty in 1877; Colonel George Taylor Denison III (seated at left) was proud of the family's military traditions. (Toronto Public Library 974-30-5)

All in all, Colonel George Denison was a nineteenth-century figure increasingly at odds with the twentieth century. But he was not alone in a Toronto that, despite the city's rapid growth, was still run by a Protestant elite of families who flaunted their British origins…

Boasting that he presided over "a court of justice, not a court of law," (Denison) cantered through cases at a breathtaking pace, relying more on intuition than evidence, and flaunting his impatience with legal technicalities and procedural niceties. Denison handled an average of twenty-eight thousand cases a year, which, according to Harry Wodson, police court reporter for the Evening Telegram, constituted an astonishing caseload of over five hundred a week. To the exasperation of the magistrate's seven clerks, Denison routinely cleared his docket in a couple of

hours before lunch, ordered the court adjourned, and then, stick in hand and homburg hat on head, strolled off to the handsome dining room of the National Club, at 303 Bay Street.

The Denison dynasty in 1877; Colonel George Taylor Denison III (seated at left) was proud of the family's military traditions. (Toronto Public Library 974-30-5)

In Denison's court, people who "knew their place" (retired soldiers, hard-working British immigrants, and the penitent) could expect leniency. In contrast, striking workers, people of Irish or African-American descent, and the nouveaux riches found little mercy. Admirers like Harry Wodson, who shared Denison's outlook, thought he was a terrific fellow: "A swift thinker, a keen student of human nature, the possessor of an incisive tongue, he extinguishes academic lawyers, parries thrusts with the skill of a practised swordsman, confounds the deadly-in-earnest barrister with a witticism, [and] scatters legal intricacies to the winds… His mind is more or less remote from the affairs of the rank and file of humanity… Just what mental process is used to make the punishment fit the crime, only the magistrate himself knows." But Denison infuriated those who regarded him as a whip-cracking fossil, mired in the assumptions of a borrowed class system.

Phillips Thompson, a journalist and labour sympathizer who worked on the publication the Western Clarion, excoriated the magistrate in print: "He is true as hell to the ideals of his Tory U.E. Loyalist ancestors, and holds like them that all popular notions of liberty are rank delusions and that the masses were bound to be exploited for the benefit of the ruling class."

Denison had no interest in what drove individuals to break the law. One woman whom he regularly fined for drunkenness amused Harry Wodson by reproaching the magistrate: "The only diff'rence between me and Lady O'Flaherty up in Rosedale is that I have no powdered flunkeys to carry me up to bed whin I'm drunk." Denison paid no attention and sent her to the slammer.

Only a sense of humour softened Denison's paternal Toryism and patrician bias. He filled scrapbooks with cartoons of himself (he was easy to caricature), and Harry Wodson enjoyed watching the Beak suppress a chuckle at the cheeky remarks from court regulars. Dodson suggested that his genial manner endeared him to most defendants who appeared before him. A 1913 cartoon pictured a tattered husband and wife jostling each other in front of Denison's seat, and the woman saying to her husband, "Ain't I got as much right to enjoy the pleasure of bein' tried by Colonel Denison as you have?"

(Gray, Charlotte. *The Massey Murder: A Maid, Her Master, and the Trial That Shocked a Country* (Toronto: HarperCollins Publishers Ltd. for the Osgoode Society for Canadian Legal History, 2013) pp. 23-28. Reproduced with the permission of the author.)

Period I: 1867-1967 Profiles & Stories

Three Chiefs in Four Months

NEW CHIEF MAGISTRATE. — Magistrate Johnstone L. Roberts, of Niagara Falls, has been appointed Chief Magistrate of Ontario it was announced by Attorney General A. Wishart in Toronto. Magistrate Roberts, 45, will also carry out the duties of senior magistrate of Toronto.

(*The Ottawa Journal*, Friday June 12, 1964, p. 25)

MAGISTRATE F. W. BARTREM, 63, chief magistrate of Ontario, who died in Toronto Friday of a heart attack. He was appointed chief magistrate Sept. 1.
(CP-Journal Wirephoto)

(*The Ottawa Journal*, Saturday September 19, 1964, p. 34)

ARTHUR O. KLEIN has been named chief magistrate of Ontario. The appointment of the 55-year-old deputy Crown attorney for Toronto is effective Nov. 1.

(*The Ottawa Journal*, Saturday October 24, 1964, p. 11)

On June 11, 1964, the Ontario government appointed Johnstone L. Roberts to be the first Chief Magistrate for Ontario. This historic appointment was made possible by amendments that year to *The Magistrates Act*. The amendments created the new position with "general supervisory powers over arranging the sitting of magistrates and assigning magistrates for hearings, as circumstances require."[1]

Approximately three weeks after his appointment was announced, Roberts stepped down, citing health reasons. On September 1, 1964, the government appointed Frederick W. Bartrem. Sadly, Bartrem died of a heart attack two and a half weeks later.

On November 1, 1964, the government appointed Arthur O. Klein to replace Bartrem. Klein had a much longer run than his two predecessors, serving as Chief Magistrate for four years. He then became the first Chief Judge of the new Provincial Court (Criminal Division), a post he held for another four years following the enactment of *The Provincial Courts Act* in 1968.

In 1972, Klein returned to government, serving as Crown Attorney for Metro Toronto. Fred Hayes was appointed as Chief Judge (Criminal Division), remaining in that position for 18 years until the Court was restructured as the Ontario Court (Provincial Division) in 1990.

1964	
June 11	Johnstone L. Roberts appointed to be first Chief Magistrate of Ontario
July 3	Roberts steps down
September 1	Frederick W. Bartrem replaces Roberts
September 18	Bartrem dies of a heart attack
November 1	Arthur O. Klein replaces Bartrem
1968	
December 2	The Provincial Court (Criminal Division) is created and Arthur O. Klein becomes first Chief Judge of the new Court
1972	
September 27	Frederick Clair Hayes replaces Arthur O. Klein. Hayes remains Chief Judge until 1990

Johnstone Llewellyn Roberts

Before his appointment to Magistrates' Court, Johnstone Llewellyn Roberts was a well-respected magistrate in Niagara Falls. Criminal defence lawyer Edward Greenspan, also from Niagara Falls, recalls how Roberts stood out as a fine jurist whose decisions were occasionally reported in the Canadian Criminal Cases, a rare occurrence at the time for the magistrates' bench.[2] Roberts also served as a juvenile and family court judge.

Born in 1919, Roberts was only 33 when he became a magistrate – "the youngest magistrate ever," reported *The Toronto Daily Star*.[3] A lawyer, he had served four years in the navy during the Second World War – and was discharged as a sub-lieutenant.

He stepped into a difficult job as the first chief. "Old City Hall first problem for new chief magistrate" blared the headline in *The Toronto Daily Star*, announcing his appointment. He will "find his desk stacked high with problems when he takes over," read the *Star.*[4]Among those problems? The Old City Hall had just been vacated by municipal politicians – and there was considerable wrangling about who would move in and when. It was to be split between police headquarters and the courts but the decision had been made that it was too small to accommodate both.

Roberts was also under pressure from the Attorney-General Arthur Wishart who was quoted in the *Star* article stating: "[O]ne of Mr. Roberts' main duties will be to introduce uniformity of sentencing principles across the province." That comment sent Roberts to the barricades on behalf of judicial independence – he fought back with these words, also quoted in the *Star* piece: "Mr. Roberts, in a telephone interview stressed that 'it is not my job to interfere with the individual magistrates.'" The battle lines were drawn.

Interestingly, Roberts saw no conflict between his position as an "independent" magistrate and his significant relationship with the police. As Chief Magistrate, he was set to serve as a police commissioner for Metro Toronto (although he resigned before he could be sworn in), in addition to also serving as a member of five police commissions in his home county of Welland.

A "Reported" Case, Decided by Chief Magistrate Roberts

R. v. Mingle [1965] C.C.C. 172 was a case decided by Chief Magistrate Roberts subsequently reported in the Canadian Criminal Cases. Only those cases which deal with significant points of law are considered to be valuable precedents and included in law reports. The case involved the serious injury of a young woman sitting on a bus. A bottle, thrown through the door of the bus, hit her. Only one of the six Crown witnesses swore that it was the accused – Mr. Mingle – who threw the bottle which injured the

young woman. The best description the witness could give was that the bottle thrower had "kind of light brown hair" and was about 5'4" or 5'5" tall. Chief Magistrate Roberts acquitted the accused relying on an earlier Nova Scotia court judgment: "Unless the witness is able to testify with confidence what characteristics and what 'something' has stirred and clarified his memory or recognition, then an identification confined to 'that is the man', standing by itself, cannot be more than a vague general description and is untrustworthy in any sphere of life where certitude is essential."

Frederick W. Bartrem

Very little is known about Frederick Willard Bartrem. Like Roberts, he too was a lawyer, called to the Ontario Bar in 1926. He was appointed a magistrate on May 1, 1954. He died at 63, just 18 days after assuming the duties of Chief Magistrate, collapsing of a heart attack in his offices at the Willowdale Magistrates' Court.

Graduation photograph from Osgoode Hall Law School (Reproduced courtesy of the Law Society of Upper Canada Archives.)

Arthur Otto Klein

Flying Officer and Lawyer

According to newspaper reports, Arthur O. Klein was born in Walkerton, Ontario in 1907. Appointed assistant Crown Attorney in 1945, he handled many high profile cases, including 50 charges of murder.

Flying officer Arthur Klein in 1942. (Published in Contact Trenton – The official organ of the R.C.A.F. Station, Trenton, Ontario)

In three of the murder cases he prosecuted, the convicted persons were hanged – among the last so punished in Ontario. Klein also received significant media attention for his prosecution of municipal officials in York Township.[5] He had practised law in Brantford before joining the Department of the Attorney General of Ontario.

When Klein assumed the position of Chief Magistrate, his first order of business was modernizing the Court. "At present, our courts are a maze of antique facilities which are quite inadequate. I have every hope for some improvement in the next year," he told the *Toronto Daily Star.*

A Flying Officer, Klein served the Royal Canadian Air Force, starting in July 4, 1941, in Halifax, Uplands and Trenton.[6] After serving as Chief Magistrate, he became the first judge of the Provincial Court (Criminal Division), following the creation the Provincial Courts in 1968 and the repeal of *The Magistrates Act.*

A Laid-Back Chief

It appears that Klein had an informal leadership style. In his memoir, Judge David Vanek recalls his swearing in as a magistrate by Chief Magistrate Klein in 1968:

"The swearing in was far from the elaborate ceremony and social affair it became later. It happened without prior notice one morning when I was seated beside the Chief Magistrate, having a cup of coffee with the other magistrates, at a long rectangular table in the room (in the Old City Hall) that became known as the judges' common room. Arthur Klein casually turned toward me and remarked that it was about time I was sworn in as a magistrate. So I took the bible that was handed to me, raised my right hand, the Chief administered the prescribed oath of office, which I affirmed, and I signed a document in confirmation."[7]

In Vanek's opinion, Klein was more outstanding as a prosecutor than as administrative head of the Court:

"Arthur Klein had an excellent reputation as a senior assistant crown attorney who had prosecuted some important criminal cases. Unfortunately, he was a disappointment as Chief Magistrate and later as Chief Judge of the Provincial Court (Criminal Division). He seemed to have no interest in the work and left the administration of the courts almost wholly in the hands of Fred Hayes who acted as his deputy."[8]

Return to Government

In 1972, Arthur Klein returned to the Ministry of the Attorney General and Fred Hayes became Chief Judge, a position he held for 18 years. Newspaper reports suggest that Klein's return to government may have been controversial. Upon his retirement from the Court, Klein was appointed as Crown Attorney for Metro Toronto.

Klein's appointment was roundly criticized in the press: "The appointment made last week by Attorney General Dalton Bales creates a questionable relationship in the courts of Metro Toronto where Mr. Klein

will be directing the prosecution of citizens before courts and judges he has overseen since 1964. It can be argued that the Crown Attorney of Toronto is an administrator rather than a prosecutor, but the final responsibility for all the decisions of the prosecution – what charges to lay, what courts to proceed in, what sentence to seek and what decisions to appeal – are his."[9]

The main criticisms of the appointment were not levelled at Klein himself – "this is not to questions Arthur Klein's fairness, competence and ability"[10] – rather the media coverage had its sights set on the Attorney General – Dalton Bales — and casting doubt on his judgment in making the appointment.

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[1] *The Magistrates Amendment Act*, 1964
[2] Interview with E. Greenspan for OCJ History Project, 2014.
[3] *The Toronto Daily Star*, June 12, 1964
[4] *The Toronto Daily Star,* June 12, 1964
[5] *The Toronto Daily Star*, October 23, 1964.
[6] "Strictly Business," Contact Trenton (The Official Organ of the R.C.A.F. Station, Trenton, Ontario), p. 6.
[7] Vanek, David. *Fulfilment: Memoirs of a Criminal Court Judge* (Toronto: The Osgoode Society for Canadian Legal History, 1999) pp. 223-224.
[8] Vanek, *Fulfilmen*t, p. 224.
[9] *The Ottawa Journal*, October 4, 1972
[10] *The Ottawa Journal*, October 4, 1972

Period I: 1867-1967 Profiles & Stories

Judge S. Tupper Bigelow: A Man of Many Interests

Sherburne Tupper Bigelow was appointed an Ontario magistrate in 1945, bringing with him a lifetime of experience literally from across the country. Born in Truro, Nova Scotia, in 1901, he was raised and educated in Regina. Following law studies at Osgoode Hall and the University of Saskatchewan, Bigelow became a member of both the Alberta and Saskatchewan bars and held the position of crown prosecutor in Edmonton. He joined the RCAF in 1940, then practised law in Toronto and sat on the Toronto Board of Education before being appointed to the bench.

In 1950, Bigelow took on a new challenge, in addition to his duties as a magistrate. He became the first chairman of the newly created Ontario Racing Commission.

Judge S. Tupper Bigelow

When Bigelow was inducted into the Canadian Horse Racing Hall of Fame in 1991, his work for the commission over a 15-year term was described as follows.

The man appointed by Premier Leslie Frost in 1950 to legislate the sport of horse racing in Ontario admitted that all he knew about a horse 'was what my old riding instructor told us at RMC (Royal Military College).' As to what the job entailed, Magistrate Sherburne Tupper Bigelow was not quite sure. One of his functions, he knew, would be to cut down bookmaking…. It wasn't long before the government came to realize that the 49-year-old Bigelow was the ideal individual for his role of correcting many of the problems hindering the growth of both thoroughbred and standardbred racing in Ontario. The early years under the chairman were evolutionary ones for the commission, which was the first one in Canada. One of its first moves was the introduction of the 'film

patrol.' The motion picture camera, used to film races from several vantage points, enabled the commission to build up a case in a betting-ring scandal in 1951 at Fort Erie, one that saw 10 jockeys and a trainer ruled off North American tracks for life….He served as Commissioner until 1965.

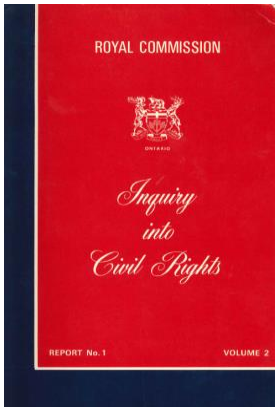
But there's more. Judge Bigelow was one of the world's leading authorities on Sir Arthur Conan Doyle, from whose imagination and pen sprang the famed sleuth Sherlock Holmes in the pages of four novels and 56 short stories. In 1970, the Toronto Reference Library acquired an extensive collection of Holmesian ephemera from collector Judge S. Tupper Bigelow and the library also published a collection of scholarly Holmesian essays written by Bigelow – *The Baker Street Briefs.* Bigelow died in 1993.

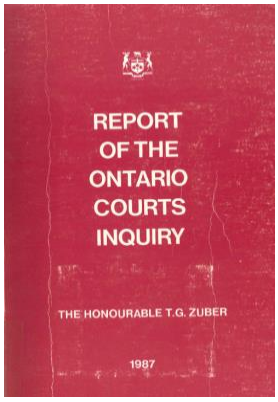
(Photos and text courtesy of the Canadian Horse Racing Hall of Fame)

Period II: 1968-1989 – The Provincial Courts

Overview

Introduction: A Time of Transition





The McRuer Report *(Royal Commission Inquiry into Civil Rights)* was published in 1968. The Zuber Report *(Report of the Ontario Courts Inquiry)* followed in 1987.

Canada began a great transformation in the 1960s, exemplified by the promise of the "Just Society" – a place where injustice and inequality had no place. The era was defined by the struggle for equality rights, and the rise of feminism and multiculturalism. Traditional legal institutions were turned on their collective heads. By the 1970s, courts across the nation were undergoing the "Great Canadian Judicial Revolution."[1] Criminology departments were launched at Canadian universities, a law reform commission was established by the Ontario government "for the reform of the law and legal institutions," and the Canadian constitution was amended, in 1982, to include the *Charter of Rights and Freedoms.*

This was a time when the courts that would later become the Ontario Court of Justice experienced a substantial improvement in their status and a similar improvement in the calibre of their judges and justices of the peace.[2] In 1968, the piecemeal collection of magistrates' courts and juvenile and family courts were consolidated into two new sets of Provincial Courts: the Criminal Division and Family Division. Not only did the structure of the Courts change, but their workload expanded as the Courts were given additional jurisdiction to hear many more types of criminal and family cases.

These advancements were no accident. They came from critical examinations of the state of the courts of the day – and the pressures placed on them by a growing and changing society.

Bookends: The McRuer and Zuber Reports

The period was "bookended" by two inquiries called by the government of Ontario into the workings of the province's justice system and its courts. Both of these inquiries – the McRuer Inquiry[3] in 1968 and the Zuber Inquiry[4] in 1987 – proposed significant changes to the courts by way of specific recommendations, many of which were acted upon.

While these were the two most significant inquiries, other reviews also occurred and contributed to the re-working of the Provincial Courts. Continuous and significant reform – though sometimes slow and halting – was the result. Despite the growing professionalization and responsibilities of the Provincial Courts, by 1989, they were still considered by many to be at the low end in the hierarchy of the courts in Ontario. Judges and justices of the peace were daunted by heavy caseloads, often unsatisfactory court facilities, and low remuneration compared to federally appointed judges in the superior courts.[5] They were still seen as administering the "poor law" in the "poor man's court."[6]

The Impact of the McRuer Report, 1968

Reform was definitely in the air in 1964 when James Chalmers McRuer, then Chief Justice of the High Court for Ontario, was appointed to lead the "Royal Commission Inquiry into Civil Rights." The McRuer Report had a transformative impact on what had been the Magistrates' Courts and the Juvenile and Family Courts in Ontario.[7] Even before the release of the report, a bill had been drafted to implement McRuer's recommendation to replace these courts with what were to be called "Provincial Courts." A series of reforms was put into motion to address McRuer's concerns, which included worries about the

competence of judicial officials, their judicial independence from the government of the day and the inadequacy of court accommodations.

McRuer delivered his report on February 7, 1968. *The Provincial Courts Act, 1968* was introduced into the Legislative Assembly in March 1968, received royal assent on May 30, and came into force on December 2, 1968.[8] In each county, the Magistrates' Courts were replaced with a Provincial Court (Criminal Division) and the Juvenile and Family Courts with a Provincial Court (Family Division). There were two Chief Judges for the Provincial Courts – one for the Criminal Division and the other for the Family Division. (A Provincial Court (Civil Division) – a "small claims court" – was introduced in 1980, and its judges and jurisdiction were later transferred to the superior court. In 1980, the *Provincial Offences Act* designated the Provincial Court (Criminal Division) as a provincial offences court, with jurisdiction over all offences under provincial statutes.)

The McRuer Report served as the fundamental point of departure for the modern history of the Court.

Perhaps the most telling comments in McRuer's report focused on his concern with the "infringement on the basic civil rights" of those coming before the magistrates' and juvenile and family courts.[9]

The McRuer Report catalogued a litany of serious concerns with these courts.

Among other things, McRuer was critical of the "strong political influence" in the selection process both for magistrates and family judges, inadequate training and qualifications of these judicial officers, and their inadequate accommodations.[10] The fact that many of these judicial officers served part-time and held down other jobs compromised their independence, he stated.[11] An over-close relationship of many magistrates with the police did the same.[12]

McRuer was forceful in his criticism of the justice of the peace system, condemning it outright and calling for the "whole system pertaining to the office of the justice of the peace" to be "reorganized." All

of the appointments of "present justices of the peace" should be cancelled, with only those "qualified for the office" reappointed. Further, McRuer advocated that justices of the peace be "allowed a meaningful share of the judicial work…so as to relieve the magistrates of those duties which appropriately can be performed by well-trained justices of the peace."[13]

It would take another report – the Mewett Report in 1981 – to stimulate a major reform process for Ontario's justices of the peace.

Who was J.C. McRuer?

"McRuer was the greatest law reformer this country has ever seen." Senator Richard Doyle

"*McRuer! He was the meanest son-of-a-bitch I ever encountered."* Senator David Walker

Both of these quotes appear side-by-side in author Patrick Boyer's biography of McRuer, *A Passion for Justice: The Legacy of James Chalmers McRuer.* Boyer concluded that both senators were correct in their appraisal of the man. Some saw him as a saint, others called him "Vinegar Jim."

Born in 1890, his legal career spanned more than 50 years and included work on penal reform in the 1930s, an appointment to the Ontario Court of Appeal in 1944 and then as Chief Justice of the Ontario High Court in 1945. During that time, he heard many murder cases and garnered the nickname "Hanging Jim" for sending people to the gallows.

From 1964 to 1971, he was head of the Royal Commission Inquiry into Civil Rights – and produced the McRuer Report. He was also the chairman and later the vice-chairman of the Ontario Law Reform Commission – the first such body in the British Commonwealth – which was created largely through his efforts.

He was passionate that the justice system should serve the oppressed, regardless of their ability to pay. He well understood the changing nature of society in the 1960s and knew that the justice system could

be redesigned to better serve the public.

In 1968, McRuer holds a press conference at Queen's Park to unveil the first three volumes of his inquiry into civil rights. (Photo: Maier, *Globe and Mail*)

"Nothing quite like McRuer's inquiry into civil rights had been seen in Canada before. In a sense, it became a great work of constitutional reform," wrote Boyer. In his attempt to ensure the rights of ordinary Canadians, he harshly criticized the manner in which justices of the peace, family judges, and magistrates were appointed and – once appointed – administered. And, he offered "bold and refreshing recommendations for change" that served to inform all the reforms to these offices for years to come.

When the McRuer Report was released, commentators called it "a blow for liberty" and predicted its influence would "be felt for the next fifty years."

(Boyer, Patrick. *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: The Osgoode Society for Canadian Legal History, 1994)

The Recommendations of the Zuber Report, 1987

The *Report of the Ontario Courts Inquiry*, authored by Justice Thomas G. Zuber, was published in 1987. In many ways, the Zuber Report was a response to the many changes that occurred in the justice system as a result of the McRuer Report, the introduction of Canada's *Charter of Rights and Freedoms* and many other legislative reforms, and – generally – "changes in society."[14]

Ian Scott, the Attorney General who appointed Zuber, provided him with "the widest scope to deal with any question that arises in the area of organization, structure, jurisdiction or workload of any court of

Ontario." Scott stated: "Mr. Justice Zuber's inquiry is not intended to be a mere tinkering with the existing system but rather a fundamental re-thinking of all the assumptions on which our courts have operated since 1792 when they were first established on the creation of the Province of Upper Canada."[15]

Justice Thomas G. Zuber (Photo by Nick Brancaccio, *Windsor Star*)

Zuber saw his task as making recommendations to rationalize and simplify the justice system in Ontario – for the benefit of the public it served.[16] Like McRuer, Zuber proposed major changes to the entire court system in Ontario. Zuber's principal recommendation was, as much as possible, that the various levels of trial courts, criminal and family, in the province be amalgamated into single trial courts. To reduce the complexity of the system, Zuber foresaw the ultimate unification of the superior courts with the Provincial Courts into single criminal and family courts. This recommendation was supported by then Attorney General, Ian Scott, and the Association of Provincial Criminal Court Judges of Ontario.[17] The concept of unified trial courts was strongly opposed by, among others, the leadership of the superior courts and the federal government. Unified family courts had previously been introduced in some jurisdictions in Canada. While a unified criminal court never did materialize, many other significant changes did occur – which changed the face of the Provincial Courts.

The plans ultimately resulted in a wholesale reorganization of the courts in Ontario. These changes were effected by *The Courts of Justice Amendment Act, 1989*, which came into force on September 1, 1990. The District Courts and the High Court (the trial division of the Supreme Court of Ontario) were merged to become the Ontario Court (General Division). The two Provincial Courts were replaced by the newly created Ontario Court (Provincial Division), with a single Chief.[18]

Calls for Court Reform: The Reorganization of Provincial Courts Begins

The move for reform was on – and agitation was coming from many quarters – for open, fair, and independent courts.

On the heels of the McRuer Report, and before the release of the Zuber Report, came several other reports, including:

- a collection of reports prepared by the Ontario Law Reform Commission in the 1970s, touching on all aspects of the Provincial Courts, judges and justices of the peace,
- "Report to the Attorney General of Ontario on The Office and Function of Justices of the Peace in Ontario," submitted by Professor Alan W. Mewett in 1981 (the "Mewett Report"),
- "Report of the Provincial Criminal Court Judges' Special Committee," prepared by the Association of Provincial Criminal Court Judges of Ontario in 1987 (the "Vanek Report"), and
- "Report of the Ontario Provincial Courts Committee," prepared for the Ontario Ministry of the Attorney General in 1988 (the "Henderson Report").

All of these reports – like the McRuer Report – recognized the growing importance and professionalization of the Provincial Courts. All were highly critical of the lack of judicial independence, lack of education for judicial officers, and lack of financial supports for both the administration of justice and the Courts' judicial officers.

The New Provincial Courts: Reforms from 1968 to 1989

The Provincial Courts era heralded a growing awareness of "the need to preserve and protect basic principles relating to the civil liberties, human rights, fundamental freedoms and privileges of the individual inherent in citizenship."[19] These words are contained in the Order-in-Council that established the McRuer Inquiry, which released the report that so altered the shape of the Provincial Courts.[20]

The courts presided over by provincially appointed magistrates and justices of the peace – already the busiest in the province prior to 1968 – kept getting busier. By the mid-1970s, they were recognized as being "the most important courts in Ontario. The vast majority of our citizens who appear in court make their appearance exclusively in these courts, which have very great powers over the individuals tried in therein."[21]

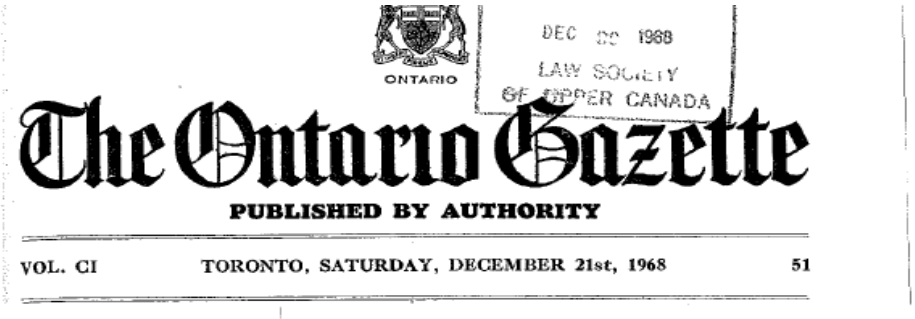
The challenges of change were again acknowledged and recognized at the end of this 20-year period. In 1987, the Zuber Report concluded: "It became clear that the problems with the justice system are enormously complex and that there is no quick fix or magic solution. It became apparent that what was needed was a detailed and major overhaul of an extremely complex machine."[22] Despite the fact that Zuber was calling for significant reforms to the court system in 1987, he – like many others – recognized that many things had changed following the creation of the Provincial Courts in 1968. "Changes which were considered too radical ever to occur were adopted, almost without a murmur, a few years later."[23]

Reforms during the Provincial Courts era (1968 to 1989) took two fundamental forms:

1. Institutional and structural innovations, including changes to the qualifications, appointment and regulation of judges and justices of the peace, and changes to court accommodations, and
2. The introduction of new laws and other changes which dramatically affected and increased the work of judicial officers of the Provincial Courts.

Institutional and Structural Innovations: Judges

On December 2, 1968, Ontario's magistrates and family judges were appointed to be Provincial Judges. Many other changes followed.



ONTARIO

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Appointments

Provincial Secretary's Office,
December 11, 1968

His Honour the Lieutenant Governor has been pleased to make the following appointments under The Provincial Courts Act, 1968:

Andrews, Harry Tedford Gee, to be a Provincial Judge in and for the Province of Ontario and also to be Chief Judge of the Provincial Courts (Family Division) effective from the 2nd day of December, 1968.

Klein, Arthur Otto, to be a Provincial Judge in and for the Province of Ontario and also to be Chief Judge of the Provincial Courts (Criminal Division) effective from the 2nd day of December, 1968.

The following have been appointed to be Provincial Judges in and for the Province of Ontario, effective from the 2nd day of December, 1968.

Addison, Joseph Louis
Archambault, Joffre Albert
Baker, Philip Edwin Derry
Barnum, Frederick Ralph
Barron, Alan Douglas
Batten, Richard Bentham
Baxter, Ronald Burr
Beaulne, Jean-Pierre
BeGora, Thomas Robert
Bennett, Ross Taylor
Bergeron, Percy Charles
Bick, Charles Otter
Bice, Douglas George
Bigelow, Sherburne Tupper
Black, James Robinson
Bolsby, Peter John
Boyd, Clifford Earl
Butler, James William
Carson, Egbert Harold Alder
Carter, Charles Edward
Cecile, Louis Pierre
Chambers, Margaret Moncrieff
Cloney, Michael Joseph
Connor, Thomas Alexander
Cox, John Alfred
Creighton, William Wilbur
Cunningham, Hugh Thomas
Deacon, John Albert
Dnieper, Robert Borden
Dodds, Donald Blake
Drukarsh, Charles
Dunlap, John Campbell
Duthie, John Calvin
Ehgoetz, Warren Arbogast
Fair, Ross Harold
Fairbanks, Edwin Arthur
Falzetta, Anthony
Foster, Hugh Derek
Foster, Gordon Richard
Fox, William Henry
Fregeau, Joseph Victor
Gardhouse, George William
Gardner, Joseph Morgan
Gardner, William Stanley
Garvin, James Bernard
Genest, Maurice Herbert
Glass, Albert John
Golden, William Floyd
Good, Dr. Robert
Graham, Donald Ferguson
Graham, Robert James
Graham, Thomas John
Greco, James Dominic
Greene, Godfrey Benning
Guest, Crawford Walter
Hallett, Harley Donald
Hamilton, Marjorie May
Hayes, Frederick Clair
Hays, Harry Glenn
Henriksen, Lloyd Alrik
Hollinrake, Osborn Shore
Howitt, Henry Robinson
Jackson, Ronald Cogswell
Jasperson, Frederick Kent
Jermyn, Henry Traverse Warburton
Johnston, Ian Campbell
Kennedy, William Russell
Kenrick, Edward Walter
Kirkpatrick, James Ralph Hilborn
Kurata, Lucien Coe
Lane, Blake Arthur
Langdon, Kenneth Murney
Leger, Marcel
Little, William Thomas
MacDonald, William Aloysius
McClevis, Otto Conrad
McKnight, John Ross
McLean, Allan Alexander
McLennan, Arthur Douglas
McMahon, Joseph Peter
McNeill, Harold Wilfred
Maloney, Mary Catherine
Marck, Albert Joseph
Marin, Rene Jean
Marshman, Gordon Glenn
Menzies, Donald Bruce
Michel, Gerald Edward
Moore, Terrence McNally
Morrison, Clare Whitney
Morrison, William Robert
Munro, Ian
Newall, Albert Edward
Nighswander, Quincy Lloyd
Opper, Charles Philip
Ord, John Dolwood
Pearse, Russell Gill
Pearson, William Scott
Perkins, Carroll Emerson
Philp, William Russell
Powell, Francis Colenso
Rennicks, James
Roberts, Johnstone Llewllyn
Ross, Walter Edwin
Runciman, George Fleming
Sauve, Joachim
Seneshen, John Morris
Sherwood, Livius Anglin
Slater, Harold James
Smith, Donald Clair
Stewart, Alan Simpson
Stewart, Gordon Roy
Stewart, Victor Lorne
Strike, Glenn Elford
Swabey, Thomas Russell
Sweeny, George Robert
Taylor, Robert Charles
Thoburn, Charles Augustus
Tinker, Stanley Gordon
Tuchtie, Walter John
Van Duzer, John Elston
Vanek, David
Waisberg, Carl
Walmsley, Robert James Kerfoot
Wilch, Peter John
Williams, Harry Godfrey
Williamson, Stuart James Anthony
Wills, Thomas Yarwood
Woodliffe, William Frederick

The following have been appointed to be Provincial Judges in and for the Province of Ontario, for the period from the 2nd day of December, 1968 to the 30th day of April, 1969.

Austen, Charles Leroy
Cloutier, Jean-Louis
Fitzpatrick, Michael Joseph
Gauthier, Harold Wood
Groom, Robert Glen
Holder, George Derek
Hunter, Herman Bruce
Peterson, Harold Douglas
Thompson, Bertha Esther
Wallace, George Ernest
Young, Norman Richard Henderson

Gianelli, Norman Angelo, of the City of Toronto, to be a Provincial Judge in and for the Province of Ontario, for a period from the 2nd day of December, 1968 to the 31st day of December, 1968.

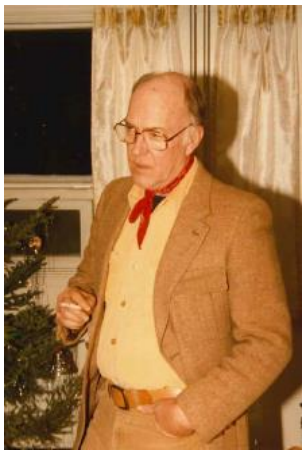
ROBERT WELCH,
Provincial Secretary
and
Minister of Citizenship.

Positions of Chief Judges, Senior Judges and Associate Chief Judges

The *Provincial Courts Act, 1968* created the positions of Chief Judge within each of the two Provincial Courts.[24] Arthur Klein was the first Chief Judge of the Provincial Court (Criminal Division). Fred Hayes succeeded him as Chief in 1972 and served until April 1990. Sidney Linden replaced Hayes as Chief and, then, on September 1, 1990, became the Chief Judge of the new Ontario Court (Provincial Division). Ted Andrews served as the first Chief of the Provincial Court (Family Division) and continued in that position until September 1, 1990 when that Court became part of the Ontario Court (Provincial Division).

The 1968 *Act* also provided for the designation by the Attorney General of Senior Judges within the 10 regions into which the province was then divided.[25] These Senior Judges were to assist the Chief Judges in their work – although there were often times when certain regions were without Senior Judges.[26] The *Provincial Courts Amendments Act, 1977* provided for the appointment of an Associate Chief Judge in

Arthur Klein, shown here with his family, served as the first Chief Judge of the Provincial Court (Criminal Division). (Photo: Getty Images)



Ted Andrews served as the first and only Chief Judge of The Provincial Court (Family Division) until 1990. (Courtesy: G. Michel)

Fred Hayes was Chief Judge of the Provincial Court (Criminal Division) from 1972 until 1990. (Courtesy: G. Michel)

each of the two Provincial Courts.[27] In September 1978, Robert Walmsley was the first judge appointed as an Associate Chief for the Family Division. Harold Rice was the first judge appointed to this position for the Criminal Division.

Associate Chief Justice Harold Rice

Associate Chief Justice Harold Rice (Courtesy: S. Linden)

Harold Rice was known as the man who "would smooth the waters and make sure that everyone would be happy." Appointed to the Provincial Court (Criminal Division) in 1971, he became the first Associate Chief Justice of that Court in 1979. As the Court grew in the 1980s and became busier, Rice initiated a system to manage cases at Old City Hall in Toronto. In addition, he served as a mentor to newly appointed judges of the Criminal Division – many of whom received their initial training at Old City Hall.

(Source: Benchmark, A Newsletter for the Judges of the Ontario Court of Justice, Vol. 9. No. 2, Spring 2000, p. 1)

The structure of the Courts was described as "loose."[28] According to the *Provincial Courts Act, 1968,* [29] the Chief Judges could supervise and direct the sittings of the Courts and assign judges for hearings.[30] This limited definition of the functions of the Chiefs was criticized. Who had responsibility for education of judicial officers? Who established guidelines on policy matters with a view to encouraging uniformity of judicial practice? Who had the responsibility for assigning justices of the peace? In fact, the Chiefs, senior judges, and Associate Chief Judges did these tasks – but in an *ad hoc* fashion, with a limited budget over which they had no control, and very little administrative support.

When Fred Hayes was Chief Judge of the Criminal Division, he had an office in Toronto's Old City Hall and was supported by one administrative assistant – even though, at the beginning of his tenure in 1972, over 2,000,000 cases were disposed of in the Provincial Courts (Criminal Division) and he was responsible for the assignment of more than 120 judges.[31]

Former Chief Justice Brian Lennox, who was appointed to the Court in Ottawa in 1986, confirmed that loose approach to the Court's structure. "Chief Judge Hayes had taken a fragmented criminal Court in 1972 and was moving it towards a more organized and systematic institution. However, when I was appointed in 1986, my experience was that local judges and local courts operated with a great deal of individual autonomy and with little interaction from the office of the Chief Judge," Lennox recalled.

A Day in Court with Judge June Bernhard, March 1985

Judge June Bernhard made history in 1979 when she was appointed the first female judge on the Provincial Court (Criminal Division). She held her own, however, joining the "brotherhood" at Toronto's Old City Hall and, as detailed by author Jack Batten in his book, *Judges*, earned the respect of the legal community. This excerpt from *Judges*, not only provides a glimpse into the typical daily work of a criminal court judge, it also gives a good sense of the empathy June Bernhard brought to her work.

Judge June Bernhard in 1990. (Courtesy: S. Linden)

Judge June Bernhard grimaced. For her, a grimace is a rare expression. She's more frequently seen with a smile in her courtroom. She smiles in court more than any other judge in Old City Hall, an appealing smile that springs from neither contempt nor derision. In her late fifties, Judge Bernhard is petite and dark-haired and has a slight overbite that gives her smile an attractive cast. She smiles in an understanding way when she is debating a legal point with counsel. She smiles in encouragement when she's questioning a confused witness. The smile is a reflex, and it's

indicative of a judge whom defence counsel and crown attorneys respect for her generosity and kindness. But on this March 1985 day, in Thirty-three court, not liking what she was hearing, Judge Bernhard grimaced.

She was conducting a robbery case. The accused man, husky with a gloomy face, had gone into a variety store and told the young woman behind the cash register he was packing a gun and wanted the store's receipts. The girl called for her father, the proprietor of the store, and when he appeared, the man threatened to kill him. The store owner handed over five hundred dollars, and the man vanished down the street. He was arrested nine days later. The police had no difficulty getting a line on the man. He had been released from prison only a few months earlier on mandatory supervision from a nine-year sentence for another robbery. In court, the accused man's defence counsel told Judge Bernhard that his client had no skills, no job prospects, no money. All he had when he came out of prison was a fondness for drink and drugs and a sense of hopelessness. "He slipped back into crime," the defence counsel said. The crown attorney said that the accused man was "part of the revolving-door syndrome," out of prison, into crime, and back to prison. Judge Bernhard grimaced and sentenced the man to another four and a half years in prison.

"It's not the kind of case I enjoy," Bernhard said later, "Nobody gets any pleasure or challenge out of that kind of awful predicament."

(Source: Jack Batten, *Judges* (Toronto: MacMillan of Canada, 1986), pp. 90-91)

Appointment and Removal of Judges

The 1968 Act provided for the appointment of "such provincial judges as he (the Lieutenant Governor in Council) considers necessary" to sit in the provincial courts and also provided for the removal of a judge "only for misbehaviour or for inability to perform his duties properly."[32]

The Act also provided for the creation of a "Judicial Council for Provincial Judges" to perform two functions:

1. To consider, at the request of the Attorney General, the proposed appointment of provincial judges, and
2. To receive complaints of alleged misconduct by provincial judges and conduct inquiries into those complaints.

In the event the Judicial Council recommended a public inquiry into such a complaint, that inquiry was to be conducted by a judge of the Supreme Court of Ontario.[33]

These changes were a great leap forward for the independence and reputation of the Court, providing a formal process to deal with appointments and removal from the bench.

What constituted "misbehaviour" of a judge?

Despite several Commissions of Inquiry into complaints about judges, there was never a concrete definition of what constituted "misbehaviour" in s. 4(1) of the *Provincial Courts Act.*

It was clear, however, that misbehaviour sufficient to remove a judge under the *Act* did not, however, need to be confined to the judge's judicial duties.

In the 1978 Commission of Inquiry respecting Provincial Judge Harry J. Williams, the Commissioner, Justice Sydney Robins expressed the view that a judge must respond to a higher standard of conduct in his personal life than required of other citizens. In his report, he wrote:

"His misbehaviour, even if it is in his private life, can damage that essential sense of trust and thus adversely affect his judicial work and the justice system."

He went on to say that: "Each case must ultimately depend on the nature of the conduct, all the facts surrounding it, its effect on the judge's ability to perform his official duties, and the extent to which it has impaired public confidence in the judge and in the administration of justice."

(Source: Justice Sydney Robins, Commission of Inquiry Re: Provincial Court Judge Harry J. Williams, 1978)

Previously, magistrates and family judges served "at the pleasure" of the government which meant that they could, in theory, be removed without cause. In fact, until the 1968 *Provincial Courts Act*, in the first two years of their tenure, judges could be removed from the bench at the whim of the government.[34]

The Judicial Council appointment process set out in the 1968 *Act* went some way to alleviating the whiff of patronage that had accompanied many appointments to the former Magistrates' and Juvenile and Family Courts.

In 1988, the Attorney General acted on the 1973 recommendation of the Ontario Law Reform Commission and announced the establishment of a three-year project setting up an independent, multi-disciplinary body – the Judicial Appointments Advisory Committee (JAAC) to select and recommend candidates for appointment as a provincial judge.[35] The Attorney General could only make recommendations to Cabinet for judicial appointment from the list of candidates provided by JAAC. JAAC was not a statutory body until 1994.[36]

The "Lay-dominated" Judicial Advisory Appointments Committee (JAAC)

Attorney General Ian Scott announced the establishment of JAAC in the Ontario Legislature on December 15, 1988. At that time, Scott told the legislature that JAAC would be "lay-dominated," (which meant that the majority of its members would be non-lawyers) with members from different parts of the province. He hoped that such a committee would "ensure that the justice system reflects the needs, the values and the attitudes of the community as a whole" and that it would "do a great deal to remove

any unwarranted…political bias or patronage in appointments to the judiciary while enhancing community and public involvement and reinforcing confidence in the judiciary and the justice system."

(*Hansard*, Ontario Legislative Debates 6835 (15 December 1988))

Qualifications of Judges

The 1968 *Act* did not require judges of the Provincial Courts to be lawyers. In fact, there were no minimum qualifications required in 1968. However, no judge could preside over a trial sitting as judge alone for an indictable criminal offence unless he or she had been a member of the bar for at least five years, or had acted as provincial judge for five years, or had been a full-time magistrate or judge of the Juvenile and Family Court prior to December 2, 1968. As a result, the practice had developed during the late 1960s to appoint lawyers to the Provincial Court (Criminal Division). A similar practice had developed for the Family Division.

By 1973, for example, 108 of 123 provincial judges in the Criminal Division were lawyers.[37] By the mid-1970s, as the workload and complexity of cases was increasing in the Provincial Courts, calls were coming for all new appointments to be legally trained.

The practice of appointing only lawyers as provincial judges was formalized with the *Courts of Justice Act, 1984* which stipulated that "no person shall be appointed as a provincial judge unless he or she has been a member of the bar for at least ten years."[38]

Part-time Judges

The practice of appointing part-time judges, who were also working in other careers, was phased out. Instead, the Court began to rely on judges who had retired from the Court and were subsequently

appointed as *per diem* judges, sitting on a part-time basis. The system was fully detailed in the *Courts of Justice Act, 1984*, in the provisions concerning "continuation of judges in office" after the age of retirement (65).[39]

Judicial Independence

The concept of judicial independence – that judges have "complete liberty to hear and decide the cases that come before them"[40] – was an integral part of the heritage of the Provincial Courts. The concept received a significant review by the Supreme Court of Canada in 1985 in *R.* v. *Valente,*[41] a case that got its start at a trial in the Provincial Court (Criminal Division). The *Charter* had come into effect in 1982 and it provided that any person charged with an offence has the right to be tried by an "independent and impartial tribunal."[42] In *Valente,* the Supreme Court decided that Provincial Court judges had sufficient judicial independence and set down the three requirements for judicial independence:

- Security of tenure,
- Financial security, and
- Institutional independence in a court's administrative matters relating to judges.

Valente added fuel to the fire of an already heated discussion between the judges and the government on the issue of financial security.[43] Provincial Courts Committees were established by the government to make recommendations concerning the remuneration of judges. In 1988, one of those Committees concluded that:

- The compensation for judges should be determined and provided "separately from the usual theatres of government activity,"[44] and

- "The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office."[45]

Judicial Education

Led by the efforts of Ted Andrews, Fred Hayes, the Association of Provincial Criminal Court Judges of Ontario and the Association of Juvenile and Family Court Judges, formal continuing education of all judicial officers became recognized as an essential element of a judicial career. As Judge David Vanek wrote about this time, "…successive governments had been responsible for the enactment of a huge amount of legislation that added enormously to the importance and burden of work in the Provincial Court. Amendments to the *Criminal Code* on a variety of topics brought forth an entirely new spectrum of charges and defences. Provincial Court judges were being called upon to hear and determine issues of a very high order of complexity. Educational courses were necessary to keep the judges abreast of developments in the law and the educational conferences became more focused."[46]

A New Name Adds Dignity?

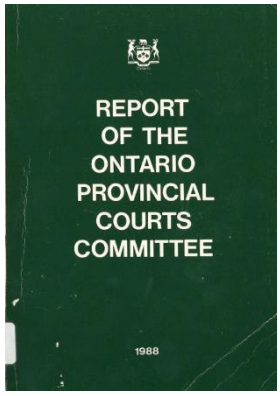
"The dignity of our Magistrates has now been enhanced by the designation of Provincial Judge – instead of being addressed as "Your Worship," they are now accorded the dignity of "Your Honour."[47] This was written in 1969 by a Supreme Court judge, Donald Keith. Was he correct?

Despite many structural changes to the Provincial Courts via the *Provincial Courts Act, 1968* and the *Courts of Justice Act, 1984*, some might have wondered if much had really changed for the judges.

"Despite the changes effected in 1968, the status of the Provincial Courts…remains low," concluded the Ontario Law Reform Commission in 1973. "One of the best indications of the low status of the Provincial Courts is the continuous failure to allocate resources to those courts consistent with their obvious needs….The factors which are integral to the concept of a 'lower court' are the very factors which

demand that greater attention be given to that court in terms of resources and facilities. Some of these factors are the number of people affected by these courts, their broad jurisdiction and the resulting voluminous caseload."[48]

Importance, volume, jurisdiction and complexity of legal matters continued to grow – yet status remained low.



Known as the "Henderson Report," The Report of the Ontario Provincial Courts Committee was published in 1988.

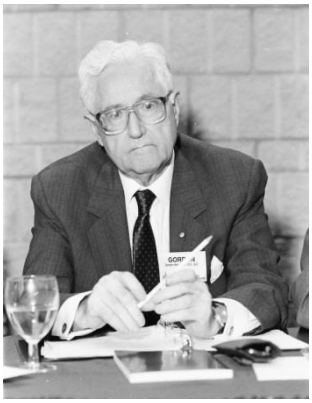
In 1988, the Henderson Report concluded "it takes a special kind of lawyer to flourish as a judge of the Provincial Court," and summarized the lot of the Provincial Court judge at that time:

"Because it is so important, the Provincial Court must be in every sense more accessible to the people of the province than are the higher courts. It is, accordingly, in session much more frequently, and in far more locations, than the other Ontario courts; its procedures are more informal, streamlined and flexible, and proceedings before it are typically much less expensive than before higher courts. Although legal representation is increasing before the Provincial Court, judges must still be able to deal fairly and simply with numbers of people who appear without counsel.

For these reasons, the life of a Provincial Court judge can differ in several respects from that of a judge on a higher court….in the Provincial Court one sometimes finds rawness, even desperation, rarely found in other courts. Because the Provincial Court's primary purpose is to deal in volume with cases the system expects will be legally straight-forward, the work of a Provincial Court judge historically has drawn heavily on common sense and basic good judgment. In the past several years, however, complex regulatory matters, more aggressive defensive tactics and the introduction of the Charter of Rights have

transformed the Provincial Court into a forum where legal decisions are required to be more sophisticated.

Because of the relentless accumulation of matters that come to the Provincial Court for disposition, judges in that court almost never have the luxury of in-depth legal research or reflection about the merits of particular cases. In making most of their decisions, they must rely heavily on their accumulated intellectual capital, for there is limited opportunity for detailed assistance from counsel. And, not least, when Provincial Court judges have to travel – as many do, particularly in the north, they do not go to county towns but to more remote locations, which often lack such basic perquisites as a courtroom or a private room in which a judge may robe."[49]



Gordon Henderson at the Canadian Bar Association conference in 1987. (Photo: Law Society of Upper Canada Archives, Paul Lawrence Fonds, "Photographs of Canadian Bar Association conference", 2001088-339)

Up to Winisk: Judge Gérard Cloutier's Memories of Fly-in Courts

Following his appointment to the Provincial Court (Criminal Division) in 1977, Judge Gérard Cloutier began regular fly-in trips to hold court in the most northerly communities in Ontario, including Moosonee, Attawapiskat and Fort Albany. "About once or twice a month, I'd fly up north. It depended on the list of cases in each community and I also couldn't neglect my regular circuit of Kapuskasing, Cochrane, Smooth Rock Falls, Hornepayne and Hearst," recalled Cloutier.[50]

"In the early days, we flew into remote communities in float planes and once airports were built, we'd fly in on Otters and Beavers. In the 1970s and 1980s, everybody went in on one plane, including the Crown Attorney, Legal Aid lawyer, defence attorneys, court staff and the court reporter. After receiving complaints from those living in these communities, the government decided this wasn't right. The independence of the judiciary was at issue and after that the judges travelled alone with court staff and the court reporter."

"In the winter months, we'd be met upon landing by snowmobiles. I can tell you they weren't Cadillacs – the ride was very cold and very rough, often over large boulders on river beds. The first time I travelled north, I thought we'd be going into an airport hangar. So I dressed like a city slicker in a light winter coat and toe rubbers. I was so cold I had to hold onto the others I was travelling with to keep warm. It took me two weeks to thaw out. After that I went out and bought a skidoo suit and good boots. I was prepared from then on."

"We always travelled with sleeping bags, a bit of food and a survival kit. Sometimes we'd get fogged or

The photos above detail Judge Gérard Cloutier's time in the North, with a focus on fly-in court sittings in Winisk. (Courtesy: G. Cloutier)

snowed in and then we'd have to spend the night on the floor of a Legion Hall or a school."

Winisk was as far north as we in the north-eastern region of the province went." When he began his journeys north, the "Winisk" in which Cloutier sat was a Cree community on Hudson's Bay near the mouth of the Winisk River. It was also home to Royal Canadian Air Force Station Winisk, a radar control station from 1958 to 1965. In 1986, Winisk was flooded and the population of about 200 was forced to abandon the town and relocate 30 kilometres up river to higher ground. The town is now called Peawanuck and is still served by the judges of the Ontario Court of Justice who fly in regularly. In 2014, the Court sat on three separate occasions in Peawanuck.

When Cloutier began flying into Winisk – in the late 1970s and early 1980s – Court was held in a community hall or school room. Cloutier recalls his first time presiding in Winisk in a community hall – he had to serve as janitor first, cleaning up garbage and setting up chairs to accommodate spectators. Like other judges who flew into these remote places, Cloutier's job as judge also involved working closely with Chiefs and Band Councils of these communities. Often, the Chief of a community would sit beside the presiding judge and speak directly to the accused person about the penalty being imposed.

"Often cases were minor – a person driving a skidoo hit someone, or maybe minor assaults, or charges of being drunk in a public place. But sometimes they were serious – domestic violence or a person

attacking another with an axe, for example."

"It was not an easy life," stated Cloutier. "But I tried very hard to resolve situations fairly and justly."

(Source: Interview of G. Cloutier for OCJ History Project, 2014)

Institutional and Structural Innovations: Justices of the Peace

The Justice of the Peace System and the Mewett Report – "Urgent Need for Reform"

One cannot read the Mewett Report, published in 1981, without imagining its author – Professor Alan Mewett – sputtering in anger, apoplectic as he wrote sentences like this one about the justice of the peace system in Ontario: "The system is hopelessly confused and unnecessarily complex."[51] Or these: "It gives me great concern that the duties and functions of the Justice of the Peace are not always clearly understood by those involved in the criminal justice system – by the public, the police, Crown Attorneys, and even judges, to say nothing of government officials. Indeed, I am not at all sure that all Justices of the Peace fully understand their own duties and functions."[52]

"The JP's Awesome Power"

The Attorney General's request for Professor Alan Mewett to inquire into the structure of the office of the justice of the peace had been preceded by calls from the media dating back many years.

In 1966, *The Globe Magazine* called the office of the justice of the peace a "longstanding, province-wide, judicial mess." It described the situation of the justices of the peace as "a patchwork of convenient practice, statutory clutter, responsibilities-by-extension, and duties-by-default…a scandal in the purest sense of the term: a stumbling-block to final faith in the due process of the law." The author, Albert Warson, wrote of justices of the peace signing blank arrest warrants and "rubber stamping traffic

The JP's awesome power

Last year there was an uproar over Ontario's "police state" bill but there is little disquietude over the fact that 950 persons who are unversed in the law and owe their jobs to political patronage have the power to jail a citizen in perpetuity

(Source: *The Globe Magazine*, 1966).

summonses" in order to gain the fees associated with issuing them. He criticized the fact that no qualifications were required to become a justice of the peace and no formal training once appointed.

Justice Gerald Lapkin – who would become responsible for the justices of the peace as the first Coordinator of Justices of the Peace in 1990 – recalled that critical articles like Warson's were not unusual at this time.

(Warson, Albert. *The Globe Magazine,* February 1, 1966, p. 6; Interview of G. Lapkin for OCJ History Project, 2014)

It was Alan Mewett's task – one he undertook with great relish – to determine why the justice of the peace system was in such a bad state and, then, to propose solutions to the problems – and he identified plenty of them. His work – "Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario*"* – was delivered to the Attorney General, Roy McMurtry, in 1981. The vast majority of its recommendations, however, were not acted upon until the 1990s.

The Role of the Justice of the Peace in the 1980s

Writing in 1981, Professor Alan Mewett provided a short outline of the role and importance of the office of the justice of the peace in Ontario:

"It has been easy, over the past 100 years or so to downplay the role of the justice of the peace while at the same time burdening him with more and more responsibilities….

Justices of the peace…perform a large number of functions and without them the system as we know it would collapse.

They try cases, subject to their jurisdiction, where there is not a guilty plea; they bear the brunt of disposing of the guilty pleas or guilty with an explanation pleas; they may adjourn cases in the absence of a judge; they often deal with the large numbers of failures to appear; they handle a great deal of the bail applications and the accompanying administrative problems; they are in constant demand for swearing affidavits for various purposes essential to the administration of criminal justice; they must consider search warrant applications and decide whether to issue search warrants; they must receive criminal process informations, and decide whether to issue process; they must confirm or cancel appearance notices or promises to appear; they spend much of their time on parking and highway traffic violations; they provide over-the-counter advice for private informants….

The functions now performed by justices of the peace can be broadly categorized as the adjudicative (including trials, sentencing and so on), the bail processing, and the criminal process-issuing (including search warrants, signing affidavits, etc.)….

The justice of the peace is the person who stands between the individual and the arbitrary exercise of power by the state or its officials."

(Mewett Report, pp. 38-39)

Setting out the History of the Office of Justice of the Peace

Mewett premised his report on two previous ones which dealt with the office and functions of justices of the peace in Ontario:

- The "Ontario Royal Commission Inquiry into Civil Rights" (the McRuer Report[53]) published in 1968; and

- The "Ontario Law Reform Commission Report on the Administration of Courts," which contained a chapter on justices of the peace and was published in 1973.[54]

Changes Resulting from McRuer Report

McRuer had recommended "a fresh start" for the office. He had condemned appointments as a political reward and recommended that all previous commissions be cancelled and the province start anew.[55] That hadn't happened by the time of Mewett's report. McRuer was highly critical of the payment of justices of the peace on a piece-work basis, elaborating: "The fee system is a real inducement to justices of the peace to curry favour with police officers to 'get business.'"[56] The fee system was still partially in place when the Mewett Report came on the scene more than a decade later.

However, by the time the Law Reform Commission issued its report, some important changes had been introduced based on the recommendations contained in the McRuer Report:

- In 1968, a training manual was prepared for the justices of the peace by the senior Crown Attorney;
- In 1970, the salaries and working conditions of full-time justices of the peace were established by Order-in-Council – this did not extend to the many part-time justices of the peace in the province (who continued to be paid on a piece-work basis); and
- In 1971, justices of the peace were given additional powers to adjourn cases in the absence of a trial judge.[57]

Calls for Change in the OLRC Report

The Ontario Law Reform Commission reiterated – with distinct urgency – McRuer's basic call: put the office of the justice of the peace on an established and organized basis. "The exact number of justices of

the peace is not known…the relationship of the justices of the peace to the Provincial judges and the Provincial Court system as a whole is a somewhat loose one and in urgent need of clarification."[58]

In 1973, it appeared to the Law Reform Commission that the number of justices of the peace had risen to slightly over 1,000, and despite McRuer's calls for a "fresh start," appointments as a political reward were continuing apace.[59] Echoing the McRuer Report, the Ontario Law Reform Commission (OLRC) noted that, on the grounds that they were completely inactive, over 500 of those justices of the peace should never have been appointed, or ought not to be continued in office.[60]

The Law Reform Commission made the following findings and recommendations:

- **Control:** The Commission envisioned a system in which justices of the peace would be appointed to serve in only one county or district and would be supervised and controlled by the local judges of that county or district. Further, "it is anticipated, for example, that one justice of the peace might be assigned to try certain offences while another might be assigned to conduct "show cause" hearings with respect to interim custody and release."[61] This assignment of particular duties would mean the justice of the peace would then develop expertise in one area.[62] Ultimate supervision and control for the justices of the peace would rest with the Chief Judge of the Provincial Court (Criminal Division).

- **Appointments and Review of Justices of the Peace:** The Commission was critical of the process of appointing existing court staff to be justices of the peace – serving as justices of the peace while they were still holding their civil service appointments. It recommended the establishment of a Justice of the Peace Review Council to both examine proposed appointees and to receive and investigate complaints.

- **Fees vs. Salaries:** The recommendation was simple – all justices of the peace should be paid on a salary basis.

- **Education:** The Commission found the training to be "totally inadequate" and recommended that the Chief Judge of the Criminal Division take on responsibility for developing a continuing education program for all justices of the peace. It further was highly critical of the role Crown Attorneys could play in terms of "advising justices of the peace" with respect to offences.[63]

"Baleful Quarters"

In discussing the accommodations for justices of the peace, Alan Mewett said "in no case are they more than adequate and in most cases they remain less than adequate. The reason is that no one has objectively decided precisely what the needs of the Justices of the Peace are. In the first place, whatever is provided, the one location where a Justice of the Peace should not have office facilities is in a police station."

The Don Jail in the 1980s.

The media was alert to the impropriety of locating justices of the peace in police stations too. Here is an excerpt from a *Globe and Mail* editorial entitled "Baleful Quarters" on October 31, 1980:

"We find surroundings so dismal and so inappropriate that Justice of the Peace R.E. Faulkner simply refused to allow the proceedings – bail hearings – to continue. It was not just that the reception area for prisoners at the Don Jail (a room used for delousing and rectal examinations) contributed to the bleakness of the atmosphere; it meant exclusion of members of the public from a process which is supposed to be open. Mr. Faulkner, there for show-cause hearings concerning bail for 16 prisoners arrested the previous night, was quite right to hold out for an open court and for improvements all around."

The Office of the Justice of the Peace as Mewett Found It in 1981

A couple of significant changes had occurred as a result of the OLRC Report:

1. A Justice of the Peace Review Council was established in 1973 – but it did not have the full range of powers the OLRC had recommended. Rather, its functions were limited to reviewing the conduct of justices of the peace and receiving and investigating complaints. The old style of recruiting new appointments – a casual word-of-mouth process, that favoured existing court staff – was still in existence and heartily criticized by Mewett for lack of transparency and little emphasis on actual qualifications of new appointments.[64]

2. Justices of the peace were made subject to the general supervision of the Chief Judge of the Provincial Court (Criminal Division).

So What Did the Structure of the Office Look Like in the 1980s?

Short answer: confusing! Justices of the peace performed a wide variety of roles in the justice system – but not all did everything. In fact, some were justices of the peace in name alone – they did no work at all, but still held the title.[65]

A common theme from 1968 until 1989 was the lack of complete knowledge about who was doing what. In 1971, it was reported that the number of justices of the peace rose to slightly over 1,000.[66] In 1981, Mewett estimated that approximately 730 people held commissions as justices of the peace – but only about 600 of them were working as justices of the peace, some full-time, some part-time. But this was no more than an educated guess.

In the group of "active" justices of the peace, there were four basic classifications, which were referred to as "directions." When first appointed, a justice of the peace had absolutely no real powers or duties

until "directed" by the Chief Judge of the Criminal Division, the Chief Judge of the Family Division, or a Provincial Court judge designated by either Chief.[67]

There were five categories of directions that conferred power on the justices of the peace: A Expanded, A, B, C and D. A Expanded was the broadest, and D the narrowest. Each category could do everything that the categories below it could do, but could not do anything specified for the categories above it.

The Five Categories of Justice of the Peace

A review of the five categories "directions" provided to justices of the peace reveals the significant difference in powers amongst this bench.

A Expanded: could preside at trials of summary conviction offences under provincial statutes or municipal by-laws, and deal with certain offences under federal legislation;

A: could do everything an A Expanded direction could do, but could not deal with certain offences under federal legislation;

B: could conduct bail hearings;

C: could issue search warrants;

D: could receive informations and issue summons and warrants.

(Source: Mewett Report)

So, how were these directions allocated? Again, Mewett was highly critical of this process. "The issuing of directions does not always work well. Directions are unfortunately considered by many to be a question of prestige – the A direction justice of the peace being perceived as being higher up the ladder than a D direction justice of the peace. There is an unfortunate tendency to issue A directions quite

unnecessarily as a kind of reward when a lower direction would adequately suffice….Similarly, it appears that the local judge does not always seem to recognize that being satisfied that a person is qualified as a justice of the peace is not the same as being satisfied that he should have a particular direction."[68]

Mewett's Recommendations

Mewett saw the office of the justice of the peace as essential to the functioning of the justice system in Ontario. He concluded, however, that the "loose" structure of the office – as demonstrated by, for example, the lack of training, the threats to judicial independence, the *ad hoc* appointment process, and the "fee for service" remuneration system – needed to be rectified.

Many of his recommendations echoed those of the OLRC but he added a key recommendation that would serve to radically change the structure of the office of the justice of the peace.

"It will by now be apparent that I propose an office considerably more structured than at present for the general supervision of Justices of the Peace,"[69] Mewett concluded. He recommended the creation of a position he called "Associate Chief Judge (Co-ordinator of Justices of the Peace)" in the Provincial Court. "His duties as I see them would be the assignment and organization of all justices of the peace, including the organization of all training programmes and educational seminars; the circulating of all memoranda, recent decisions and matters of interest to all justices of the peace; the initiation of requests for Directions on all doubtful matters of law or practice; and presiding over the Justices of the Peace Review Council in all its functions as to the appointment proceedings or recommendations as to withholding pay increases or as to long-term disability leave."[70]

Another landmark recommendation made by Mewett concerned the appointment of native justices of the peace. "Justices of the peace should bear some reasonable correlation to the communities they serve. ...On any criteria it is impossible to justify the relative total absence of native peoples from the

ranks of justices of the peace, save on, namely, that they are not in fact, available."[71] To rectify this situation, Mewett proposed public education programs and training on reserves about the role of the justice of the peace, with the goal of actively recruiting native candidates to become justices of the peace and to ensure that these candidates had been approved by their communities.[72]

Mewett's Recommendations Take Flight

When Zuber published his report in 1987, he acknowledged the Mewett Report and the fact that there was little for him to recommend because Mewett's Report had been so comprehensive – and influential. "There is presently before the legislature an Act to review the *Justices of the Peace Act* which will, in general terms, implement most of the Mewett recommendations, particularly with respect to the appointment, remuneration and supervision of the justices of the peace."[73] The legislation Zuber was referring to was the *Justices of the Peace Act, 1989.*[74] It came into force on August 30, 1990. However, two key initiatives had been acted on prior to this new legislation:

1. The development of the Ontario Native Justice of the Peace Program in 1986, and
2. The appointment of a Provincial Court judge – Gerald Lapkin – as a "Senior Provincial Judge" in 1988. He would later become the Coordinator of Justices of the Peace in 1990.

Organizing the Office of the Justice of the Peace: The Appointment of a Senior Provincial Judge in 1988

Gerald Lapkin took on the role of Senior Provincial Judge in November 1988 and immediately began organizing the office of the justice of the peace. Justice of the Peace Frank Devine said of Lapkin: "He spent a good deal of time figuring out how many justices of the peace there were in the province. Then he started to put in place a structure to administer them. He also instituted a lot more training for us and that meant we started doing more sophisticated work. A lot more bail hearings, for example,

because we'd received training to do them."

According to Lapkin, part of that administrative structure involved converting justices of the peace from the old fee system into a full-time, salaried bench. "There would be no more fees for services. That had led to many of the problems. The first thing I had to do was to find out how many justices of the peace there actually were. There were no complete records! I found someone in Courts Administration to help me – Anatol Sywak. We started as two people in an office in Old City Hall. We actually found people who were acting as justices of the peace who never had an Order-in-Council from the government! Some justices of the peace never put in for fees. They saw their work as a public service. We tracked other people by payments made to them. It took us over a year to identify what we felt were most of the justices of the peace acting in the province. But even over the next few years, we discovered others. We sent out letters to everyone involved in the legal system, bar, police offices, court offices: tell us of anyone who is a JP. Ultimately we came up with a list – with some 650 names on it."

Justice Gerald Lapkin in 1990. (Courtesy: S. Linden)

This would serve as the groundwork for a process that would begin in earnest in 1994 – the "conversion" of the justices of the peace to a fully "salaried" bench – no more fees.

(Source: Interview of F. Devine for OCJ History Project, 2014 and Interview of G. Lapkin for OCJ History Project, 2014)

"Dear Justice of the Peace"

On May 18, 1989, Senior Provincial Judge, Gerald Lapkin, sent out a letter to all known justices of the peace in the province – asking them for basic information about themselves and their work. Reading the introductory paragraphs of the letter, it's obvious how little information was known about who served as a justice of the peace in 1989 and what precisely they were doing in that role:

Ontario

Judge's Chambers
Cabinet du Juge

Provincial Court (Criminal Division)
Cour provinciale (Division criminelle)

Judicial District of York
District judiciaire de York

Room 12, Old City Hall
60 Queen Street West
Toronto, Ontario
M5H 2M4

Pièce 12, Old City Hall
60, rue Queen, ouest
Toronto, Ontario
M5H 2M4

416/965-7227

May 18, 1989

Dear Justice of the Peace,

Pursuant to the direction of Chief Judge Hayes, I am enclosing a questionnaire, which he has asked be completed by every Justice of the Peace in Ontario and returned to my office within two weeks.

As you are undoubtedly aware, the proposed Justices of the Peace Act will enact a number of fundamental changes to the current system which will impact on every Justice of the Peace. A considerable amount of planning must therefore be undertaken to facilitate the transition. Unfortunately the files pertaining to Justices of the Peace are in many instances incomplete or out-dated.

Consequently, it is vital that you respond to every item on the questionnaire. Our further objective is to develop and maintain an automated data bank which will profile the Justice of the Peace personnel in this province. This will ensure the fullest consideration on behalf of yourself and the public we serve.

In order to maintain the accuracy of the information which we will be compiling, I would ask that from this point on you provide written notification to my office, as to any subsequent changes in any of the circumstances which are identified in the questionnaire. Information pertaining to change of address/telephone is especially essential to maintain on-going contact between our office and you.

Yours truly,

Gerald S. Lapkin
Senior Provincial Judge

Court Facilities and Accommodations

Funding for the Provincial Courts

Low levels of funding for Provincial Courts had always been an issue – and dramatically affected the accommodations for both judges and justices of the peace. McRuer described them as "probably the most important and most neglected courts in Ontario."[75]

Chief Judge Andrews graphically described the rag-tag system developed for family courts and which affected the consistency of the courts with respect to staffing levels, court facilities and calibre of judges. He described the situation pre-1968 as depending on whether "…it was a 'good roads' municipal council or one with a social conscience." Further, a great deal depended on the "salesmanship" of the local family court judge – with the result that there was no uniformity in the type and quality of service available.[76]

The 1968 *Provincial Courts Act* was intended to rectify this situation. One of the major effects of the 1968 *Act* was to regularize the status of the family courts, and centralize their administration. One important step in that direction was the creation of a Rules Committee to make rules regulating any matters relating to the practice and procedure of the new Provincial Courts (Family Division).[77]

Places of Sitting and Physical Facilities

Lack of funding caused the sometimes dire accommodations for courtrooms across the province. The ability to conduct a fair trial was often placed in question. "Makeshift courtrooms exist in rented parish and legion halls, community centres, service clubs, tavern and lounge areas (complete with a bar located in front of the judge's dais displaying a sign admonishing patrons to 'return all glasses'), motel rooms and basements, and in police offices in which the apparent, close and unavoidable contact between the

judge and police officers before court does not, in the eyes of the public create an atmosphere of impartiality."[78] Judges sat in courtrooms like this across the province. In 1971, for example, they sat in 129 different cities, towns and villages – and many judges were itinerant, travelling from town to town.

An Itinerant Court

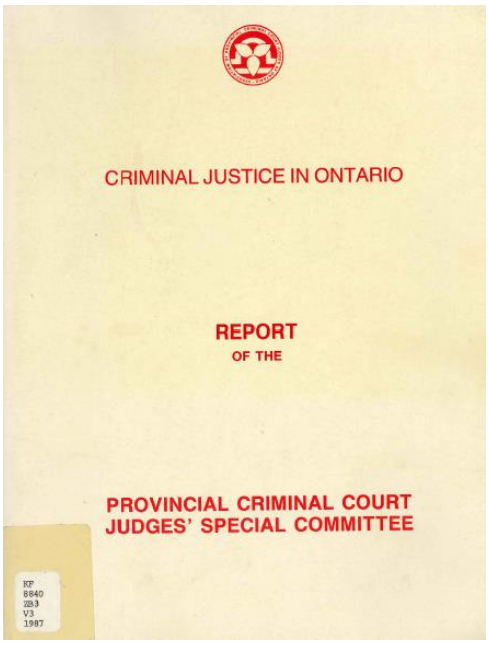
What did a week look like for the judge of an itinerant court in 1971?

"The situation in the County of Bruce is illustrative of what prevails in southern Ontario, that county being typical of most, it not all, of the counties where the court is itinerant. The court sits in four different localities as follows: in Walkerton every Monday; in Wiarton every Tuesday; in Southampton every Wednesday, and in Kincardine every Thursday. Fridays are set aside in Bruce County for special cases or overflow cases. Thus the judge, who has his office in Walkerton, must travel three times a week to the other three centres, the distance from Walkerton to Kincardine being 25 miles, from Walkerton to Wiarton 63 miles, and from Walkerton to Southampton via Kincardine 63 miles."

(Source: OLRC, Report on the Administration of Ontario Courts, Part II, 1973, p. 23.)

In 1975, author Sheila Gormley aptly described the experience of appearing in a Provincial Court in *Maclean's Magazine:*

> *"…every day…thousands of people – not just thieves and rounders and bleary-eyed drunks but decent folks just like ourselves and our neighbours – stand before a judge in a bare, functional, usually undersized room and admit guilt or protest innocence. These are the lower courts; in Ontario they used to be called Magistrates' Courts, and are now (for the purposes of creating a veneer of dignity) the Provincial Courts.*



Known as the "Vanek Report," this report was published in 1987 by a committee of criminal judges, chaired by Judge David Vanek.

Justice here is no shining abstract, but something to be negotiated, fumbled for, approximated. It's unfortunate, certainly, that the only confrontation most people will ever have with the majesty of the law will be at this terribly unmajestic level, but as with most things we get what we pay for and the Ontario government is paying as little as possible for the administration of justice. The result is overcrowded courtrooms and dockets, too few judges, confusion and error and sharp tempers and a good many people wondering if they've really had their mythical day in court."[79]

By 1989, Gormley's description was still all too apt. In the 1987 *Report of the Provincial Criminal Court Judges Special Committee on Criminal Justice in Ontario* (the "Vanek Report) , the judges of the Criminal Division, prompted by their concerns about the state of justice in Ontario and their ability to deliver it in the existing conditions, spoke out about the dire courtroom facilities, stating that not much had changed since 1975 in many of their courtrooms.[80]

The northern reaches of the province proved particularly difficult to serve. "There are special problems created [in the north] by the greater distances between court locations and by transportation difficulties, especially during the winter months and the spring break-up."[81]

The Fight for a New Ottawa Courthouse

Ottawa's Elgin Street Courthouse Opens in 1986

"Our courts were spread all over town," recalled Justice Paul Bélanger. This was the situation faced by the Provincial Courts in Ottawa during the 1970s and early 1980s before the opening of the Elgin Street

Courthouse in 1986.

The Ottawa Courthouse sits at the corner of Elgin Street and Laurier Avenue. (Photo: *Ottawa Citizen*)

As the Provincial Courts had grown and become busier, courtrooms were found in several locations, including a police station and even a ballroom at a downtown Holiday Inn.

"Because of legislative changes, our jurisdiction had expanded. This meant more cases coming in. As we hit the *Charter* years, things got more complicated as we began receiving numerous *Charter* applications and trials grew in length," explained Bélanger, who was appointed to the Provincial Court (Criminal Division) in July 1978. Not only were lawyers running all over town for hearings, judges – as they became increasingly professionalized – grew concerned about the perception of holding court in a police station.

The Ottawa Courthouse is home to both the Ontario Court of Justice and the Superior Court of Justice. (Photo: *Ottawa Citizen*)

The years of "long pleading" for new court facilities began with then Attorney General Roy McMurtry. Bélanger, who prior to his appointment to the bench served as president of the County of Carleton Law Association in 1977, was renowned for his "tenacity of purpose" in making the case with McMurtry for a new courthouse. Problems of security and overcrowding became so dire that the Association threatened to sue the provincial government and, finally, in the fall of 1979, McMurtry announced a new facility would be built to house all levels of court in one structure.

The symbolism of including all courts under one roof was a clear sign of the government's recognition of the enhanced reputation and importance of the Provincial Courts and a marked departure from the previous practice of housing Provincial Courts in often isolated and substandard premises.

"It was a gradual process," stated Bélanger, "but there was gradual recognition by everyone in the

justice system that courts aren't meant to accommodate judges but, rather, the people who come to them. A judge is a judge and a courtroom is a courtroom where size and interior configuration should be predicated on function and not court level."

Justice Paul Bélanger (Photo: Ministry of the Attorney General)

Bélanger, together with members of the County and High Courts (precursors of the Superior Court), the bar and administration, was an active participant in the "users' committee" that worked with the architects in the design of the new courthouse. As he remembered, it was a challenging committee to serve on because of the ingrained approach to courthouse construction where vertical location and interior appointments reflected the perceived hierarchical status of individual courts. It is to be noted that Bélanger who served as the region's senior judge during the years of the courthouse planning and construction, was an influential and successful advocate for the Provincial Court, because the courts and accommodations for both the Provincial and Superior Courts are remarkably similar.

Upon its completion, the Elgin Street Courthouse was the largest courthouse in Canada at 400,000 square feet. Although not all courtrooms were completed on the date the courthouse opened, space was allocated for 35 courtrooms – some of which were meant to be shared by all courts housed in the new building. The equality of the courts was further recognized in a variety of architectural features, including an 85-foot atrium at the centre of the building. "That is a symbolic opening between the levels of courts in Ontario," stated Bélanger. Another symbolic opening exists in an internal atrium between the fifth and sixth floors of the building, with a broad staircase which links the offices of the judges of the Ontario Court of Justice with those of the Superior Court.

When it opened, critics immediately recognized the new courthouse as "an austere and appropriately

respectful temple for the dispensing of Ontarian justice."

Although they appear real, the stones on the side of the Ottawa Courthouse are works created by the artist collective General Idea.

Upon Bélanger's retirement from the bench in 2008, tales were told of his integral involvement with the courthouse. "Justice Paul Bélanger has been such a fixture on the bench of the Ontario Court of Justice that a courthouse legend holds that he personally chose the stones that adorn the outside of the building on Elgin Street….The rock story is one myth he is quick to dispel."

The stones on the side of the courthouse had been an architectural challenge. The province had decided to affix large natural stones that would represent the geology of the Ottawa Valley, recalled Bélanger. During construction, however, the real stones were found to be too heavy to attach safely and they were replaced with fibreglass castings.

"There's not a real stone in that bunch," Bélanger said.

(Sources: Colin D. McKinnon, "County of Carleton Law Association, The Brass Ring: 1965-1988," *The First Century: The County of Carleton Law Association, 1888-1988*, Bonanza Press Limited, pp. 68-106; Rhys Phillips, "Powerful and somewhat aloof, courthouse still a success," *Ottawa Citizen,* December 27, 1986; "Courthouse legend Bélanger flourished in leadership role," *Ottawa Citizen*, November 13, 2008, Interview of P. Bélanger for OCJ History Project, 2015.)

Toronto's Old City Hall – "Organized Confusion"

In 1973, the Ontario Law Reform Commission was highly critical of the situation of the Provincial Court (Criminal Division) at Old City Hall, "where the largest number of criminal cases are tried and the greatest number of problems occur." At that time, an average of between 200 and 300 new criminal

charges were received at Old City Hall each day.

A number of factors were criticized:

Toronto's Old City Hall in 1965.

- Not enough personnel, including four judicial vacancies,
- An overworked Chief Judge – which meant an absence of any central administrative co-ordination and control over the scheduling of cases, and
- The inappropriate physical structure at Old City Hall – it was not built as a courthouse, which meant no waiting rooms, no proper facilities for prisoners, who are transferred through public hallways, inadequate courtrooms especially concerning acoustics. "Even under ideal conditions it is difficult for an accused person who is appearing for the first time, often without counsel and highly apprehensive, to understand what is happening."

The result? "The backlog of cases is enormous. Trials do not proceed, and indeed are often not expected to proceed on the dates for which they are set…there arise the occurrences of delay, haste and confusion, which are a reflection of the low priority given to the administration of justice at Old City Hall."

(Source: OLRC, Report on the Administration of Ontario Courts, Part II, 1973, pp. 39-41.)

By 1989, the vast majority of both criminal and family matters in Ontario were heard in the Provincial Courts. Nearly 80% of the total family law caseload for the province was dealt with in the Provincial Court (Family Division) and more than 90% of the criminal cases were disposed of in the Provincial Court (Criminal Division).[82]

How did this come about?

Work of the Criminal Courts

The Expanded Criminal Jurisdiction

The Ontario Court of Justice is the *de facto* criminal trial court for the province. That position was firmly established as a result of changes to the *Criminal Code* which began in earnest in the 1960s. These changes served to consistently increase the jurisdiction of the Provincial Court (Criminal Division) during this period. What did this mean in practical terms? This was a sea change from a Magistrates' Court handling vagrancy matters to criminal judges hearing the most complex armed robberies and sexual assaults. More complex criminal cases, with more sophisticated legal arguments began coming to the Provincial Court – and the Court began to establish itself as the "specialist" criminal court for the province.

"All of these changes to the *Criminal Code* both enhanced and expanded our jurisdiction," recalled Justice Paul Bélanger who was appointed to the Provincial Court (Criminal Division) in 1978. "These additions were one of the key factors that forced our bench to become more professional."[83]

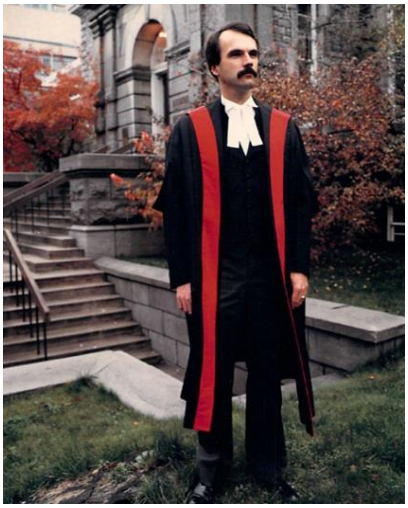
What did a trial look like before a judge of the Provincial Court (Criminal Division)?

It was a simpler time during the 1970s and 1980s, when Brian Lennox was practising as a defence lawyer and Crown Attorney. He described how a provincial criminal court operated in those days and what a trial judge would have heard and seen:

"The pace of litigation was rapid, the cases generally short in length…

At that time, the practice of criminal law in the Provincial Courts of Canada was almost entirely oral. Prior to 1991, there was no formal requirement of disclosure, which appeared to be entirely within the discretion of the Assistant Crown Attorney. Although such a practice would now likely be considered

negligent, it was not unusual for defence counsel to receive disclosure of the Crown's case for the first time by listening to the Crown's witnesses testify in chief.



Justice Brian W. Lennox in 1986. (Courtesy: B. Lennox)

Counsel, both Crown and defence, prided themselves on their ability to adjust quickly to new or changing evidence and to argue in consequence.

At a time when the principle ground of admissibility of evidence was relevance, legal argument was limited and most arguments were entirely fact-based. If evidence was relevant and material, it was generally admissible.

The search warrant provisions of the *Criminal Code* were largely ignored because of the principle of relevance and it was rumoured that, in some jurisdictions outside of Ontario, pre-signed blank search warrants were available to police for the asking.

Pre-trial and trial motions were largely unheard of within the provincial criminal courts and it was a rare counsel who would ever be obliged to put pen to paper in a criminal trial."

(Lennox, Brian W. "Opportunities for Advocacy in the Ontario Court of Justice," Remarks to The Advocates' Society, February 17, 2004)

The Elimination of Trial *de Novo*

Until the late 1970s, an appeal from either the Criminal or Family Division of the Provincial Court was often heard by way of trial *de novo* – or "new trial." In other words, if a decision of a Provincial Court judge was appealed, a federally appointed judge would re-hear the trial all over again. Practically, this meant the original trial before the Provincial Court could be considered a "test run," with the ability to

do it all over again in the appeal to a superior court. Not only was this situation demoralizing for the Provincial Court judges, it was also inefficient. The *Criminal Code* amendment which eliminated the trial *de novo* in summary conviction matters came into force in 1977 – and thus increased the importance and weight given to summary conviction trials in the Provincial Court (Criminal Division).[84]

The Creation of Provincial Offences Courts

In 1979, the jurisdiction of the Court was changed so that judges generally no longer dealt with minor summary matters but only the more serious summary conviction matters.[85] The responsibility for minor summary offences – things like not wearing a seatbelt and highway violations like speeding – was transferred to justices of the peace (although judges could still be assigned to cases involving provincial offences – these cases tended to be more serious provincial offences). As Justice Gerald Michel recalled: "In the 1960s, magistrates spent half of their time presiding over highway traffic offences or other provincial regulatory offences. That changed with the enactment of the *Provincial Offences Act."*[86] This meant that, just as judges had seen their jurisdiction and workload increase due to changes in the *Criminal Code*, justices of the peace now took on significantly more work and responsibility. "The justice of the peace bench began to mirror the natural history of the police magistrates, evolving into a more professional bench."[87]

In the early 1970s, "the criminal justice system was headed for a complete breakdown," recalled Judge David Vanek.[88] The Courts were clogged with these minor summary offences – which were then tried in the same ways as criminal offences – as more and more of those offences were heading into the Provincial Courts. The crunch was on and the *Provincial Offences Act* (*POA)* was designed to streamline and simplify the legal procedures for minor offences.[89]

The *POA* served as a procedural code for the prosecution of provincial regulatory offences. At the same time, Ontario – notionally – created a new set of "Provincial Courts" called the "Provincial Offences

Courts."[90] The *POA* provided that either a justice of the peace or a provincial judge could preside in provincial offence proceedings. In practice, justices of the peace began presiding over almost all provincial offences trials. At the same time, the legislation conferred on Provincial Court judges appellate jurisdiction to hear all appeals in these minor summary matters. There is provision for an application to be made to have a provincial judge preside over the trial of more complex provincial offence trials – for example, under the *Environmental Protection Act* or the *Occupational Health and Safety Act.*

Controversy! Default Convictions and Set Fines

The *Provincial Offences Act* was revolutionary when it came into force on March 31, 1980. A key element of simplifying court procedures was the notion of "default conviction." Simply – if a person ignored a ticket and didn't respond to it, the Court could assume the person wasn't disputing the charge and impose a "set fine," which served as the base fine that could be imposed on the person.

"The idea that you could give someone a ticket and if they didn't respond they could be convicted was shocking to criminal lawyers."[91]

Because people needed to know what the financial penalty would be if they didn't respond, Chief Judge Fred Hayes created a list of "set fines" for each of the hundreds of offences created under provincial laws. "It was a massive task to introduce set fines and Hayes created the system from scratch."[92] The list of set fines continues to be regularly maintained, updated and publicized by the Chief Justice of the Ontario Court of Justice.

Work of the Family Courts

The period between 1968 and 1989 was a time of significant change in both the structure of the Provincial Court (Family Division) and the work of the family judges.

In 1968, the jurisdiction of the Family Division fell into the following broad categories.

- The conduct of the child – the "juvenile delinquent" as defined by the *Juvenile Delinquents Act* – and the conduct of their parents as contributors to delinquency; the Court also heard applications to send children to training schools under the *Training Schools Act.*
- Spousal and child support under the *Deserted Wives' and Children's Maintenance Act* that required the judge to decide who was at fault for the failure of the marriage. Only an "innocent" wife could receive support, and her adultery was a bar to her support claim. This also included the enforcement of support orders made under this legislation or the *Divorce Act.* The Court could also deal with custody and access as part of a support order.
- Affiliation proceedings to determine paternity and then impose support obligations; a woman required "corroboration" for her testimony to establish paternity.
- Child protection proceedings brought by Children's Aid Societies.[93]

In essence, there were two family law systems. Superior court judges had, for constitutional reasons, exclusive jurisdiction over divorce and family property and, as part of the divorce proceedings, the superior courts also dealt with support and custody. Family judges in the Provincial Court were doing a large segment of the family law work in the province, but the Court was perceived as the "poor person's" court, with the real applicant in many support cases being the government body that was providing welfare to the separated or unwed mother. Those with resources and property went to the superior courts.[94]

Even when a matter had begun in the Provincial Court (Family Division), it was sometimes possible to start all over again in the superior courts, if a litigant was unhappy with the result.

By 1989, the Family Division still dealt with the vast majority of family law cases but much had changed.

- Its jurisdiction had broadened to include support and custody proceedings for unmarried couples. Affiliation proceedings no longer existed, as children were treated in the same way whether or not parents were married. Even more important, the fault-based system of family law had been eliminated.

- The *Juvenile Delinquents Act* had been repealed and replaced by the *Young Offenders Act* that provided more legal rights for youth, including the right to legal counsel.

- The Court now had exclusive jurisdiction over adoption.

- Child welfare laws had been amended in ways that greatly increased the Court's authority to hold the children's services system accountable, for example by determining when a young person could be placed in new secure treatment facilities.

- The right to have a fresh trial (a trial *de novo)* before the superior courts had been eliminated.

- A well-developed family duty counsel system was put into place.

Two systems of family law still existed, however, and, at least in larger centres, wealthier separating couples and their lawyers usually began proceedings in the superior courts. However, the status and profile of the Provincial Court (Family Division) had changed dramatically. This was, in large measure, due to the calibre of the judges who had joined the Court in the 1970s and 1980s.

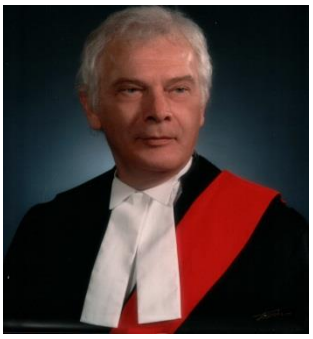
The New Family Court Judge

Judge James Karswick was a good example of the judges who joined the Court. His experience illustrates the changing world of family law in the Provincial Division.

Karswick began his career practising law in downtown Toronto. He was appointed in October 1975 to sit in the Family Division in Toronto at the Family Court located at 311 Jarvis Street. In 1982, he transferred

to Brampton. He sat in Brampton and Orangeville until his retirement in 2009.

"When I came in as a young judge, Ted Andrews was our Chief. Ted could see that, by the 1970s, we needed to be taking a more legalistic approach, where the law and rules of evidence were consistently applied – and judges were ready to assimilate and apply the many changes that were set to occur in family law."[95]



Former Family Court Judge Jim Karswick, 2001. (Courtesy: J. Karswick.)

"Prior to my appointment, many of the judges were not lawyers," recalled Karswick. "Those judges often came from careers in social work, the church, probation and training schools' administration. The development by the legislature of an aggressive legislative policy emphasizing individual legal rights in all aspects of the law, the greater participation of the bar [lawyers] in the family courts, and above all, the development of a more complex family law all reinforced the decision to ensure judges came to the Court with significant legal experience."[96]

The Court increasingly attracted lawyers who were experienced in family law and family court practice. With the reform in the judicial appointment process, the Judicial Appointments Advisory Committee began to play an important role in seeking out the best possible candidates for the Court.

For Karswick, it was an amazing time. "I was so impressed. Suddenly, we'd gone from an "inferior court" to having concomitant jurisdiction with the superior court. Just like them, we could deal with support, custody and restraining orders. Things became so much clearer."

"By providing a clear definition of the best interests of the child, this brought real clarity to the role of our Court," commented Karswick. "It also clarified our role regarding the children's aid societies across the province."

"Consider sentencing, for example," recalled Karswick, "Under the new *Young Offenders Act*, a sentence imposed on a young person would have to have relevance to the gravity of the offence committed. Under the *JDA,* if a young person stole a chocolate bar, he or she could potentially be sent for an indefinite period of time to a training school."

""By the late 1970s, we realized we needed to manage our cases better and introduce a less adversarial approach to solving the problems of the families who came before us," stated Karswick. At that time, he was sitting in the Family Court at 311 Jarvis Street. "We realized that so much of what was coming into the Court was based on emotional conflict and the litigants' inability to reflect on the impact of that conflict on their children. There was good evidence that a mediator, usually a social worker, could have real success in helping the parties find an acceptable resolution. We introduced a formal mediation service in the late 1970s – it was initiated, moderated and supervised by the judges. If I thought there was a basis for mediation, I would discuss that with the litigants. If a mediator was appointed and the parties came to an agreement, the mediator would prepare a written report for the judge, who would then make a decision based on that report. Our success was mirrored in programs across the province and this was the decade when the mediation services within and outside the Court began to flourish."

(Source: Interview of J. Karswick for OCJ History Project, 2015.)

New Family Laws

The 1970s and 1980s were a time when family law experienced a virtual revolution in the laws and procedures that applied to cases that came before the Family Court. Some of the most important reforms included:

- *Family Law Reform Act, 1978,*
- *Child Welfare Act, 1978,*

- *Children's Law Reform Act, 1978* and
- *Young Offenders Act, 1984.*

Family Law Reform Act, 1978

The *Family Law Reform Act, 1978*, replaced the *Deserted Wives' and Children's Maintenance Act* and echoed the *Divorce Act* in moving away from the former fault-based system of family law.

In describing the new *Act,* then Attorney General Roy McMurtry stated:

"Traditional legal concepts governing family property and support must be reconsidered in light of the impact of major social and economic changes on modern family life…In creating equal legal status for married men and women, the Act recognizes wives as separate individuals, not as satellites of their husbands."[97]

The *Act* contained many significant changes. In addition to recognizing the equal legal status of men and women, it served to standardize the criteria that applied to decisions in proceedings before all of the courts in Ontario. For example, the new *Act* gave Provincial Court judges the new power to award custody, independent of maintenance. There were still challenges associated with the superior courts' exclusive jurisdiction over divorce and the division of property, but the tests to be applied in all courts when deciding on issues where both levels of court had jurisdiction were essentially the same.

Child Welfare Act, 1978* and *Children's Law Reform Act, 1978

During the 1970s, the fundamental importance of child welfare proceedings became much more apparent and Family Division judges played a major role in the effort to improve the services available to high-risk children and families who came before the Court. These two statutes represented a significant effort to clearly define the powers of child welfare authorities. They also greatly increased the power of

the Court to ensure the child's best interests were served and that child welfare organizations would be held accountable for their decision-making.

This *Child Welfare Act* also brought jurisdiction over adoption back to the Provincial Court. The juvenile and family courts did have adoption jurisdiction, which was shared with the superior courts. It had been taken away in 1954 by the *Child Welfare Act, 1954,* and reserved for the superior courts.

Young Offenders Act, 1984

The repeal of the *Juvenile Delinquents Act* by the federal parliament and the introduction of the *Young Offenders Act* in 1984, signalled a major change in the Court's approach to young persons who faced criminal charges. While the new *Act* retained a focus on the needs of the young offender, it also introduced many of the substantive and procedural protections provided to adults, with appropriate adaptations recognizing that a young person was before the Court – not an adult. Jurisdiction was restricted to those charged with criminal offences. "The YOA was unambiguously criminal law."[98]

The Ontario government created a two-tier youth corrections system to implement the YOA, with the older youth aged 16 and 17 falling under the adult corrections system. The Provincial Court generally followed this approach, by having Criminal Division judges sitting in youth court for 16 and 17 year olds and Family Division judges sitting in criminal matters brought against young persons 12 through 15 years of age.[99]

Child and Family Services Act, 1984 (CFSA)* and *Family Law Act, 1986

During the 1980s, the Ontario government undertook a further round of legislative reforms. The 1984 *CFSA* recognized the fundamental importance of child welfare proceedings, and extended the rights of parents, while giving priority to the concept of keeping children with their families. The 1986 *Family*

Law Act increased the legal recognition given to unmarried couples, and to marriage as a partnership of equals.

Resources to Support the Work of the Court

Family Division judges played an important role in the development of programs and services to support the Court in its work. These included family court clinics, observation and detention homes for youth, diversion programs, and various programs for legal assistance. Beginning in the 1980s, judges and others began to put an emphasis on finding ways to support the resolution of matters outside the courtroom. With young offenders, this was reflected in a substantial growth of diversion programs for those charged with less serious offences. For support and custody proceedings, there was a growing focus was on mediation services and judicially facilitated dispute resolution, designed to help couples and parents reach a negotiated settlement of their disputes.

The late 1970s also saw the introduction of a government-funded child representation program. This meant that children were more often represented by lawyers in child protection and custody proceedings. The family judge's role was pivotal, because it was his or her order that led to the assignment of a lawyer (selected from a panel of lawyers specifically trained to do this type of work) to represent the child.

Similarly, at this time, judicial "case management" began to be an element of family court proceedings. "Case management involved a judge 'managing' a case – ensuring the case was prepared for trial, estimating the time to trial, identifying the issues to be tried, and determining whether certain of those issues or the case itself could be settled in advance of trial. We began to see the value of assigning one judge to a case. If the same judge – as opposed to many judges – worked with litigants and lawyers before a case went to trial, that judge could get a good understanding of the family and the issues they

were facing. It made for good communications – and many issues could be resolved before trial. If the case did go to trial, another judge would hear the trial."[100]

The case management system did not begin to be formalized in the Family Division until the late 1980s.

The Rules Committee of the Family Courts was established in 1978

With the enactment of the *Family Law Reform Act*, which largely eliminated the notion of fault, the quasi-criminal aspects of the *Deserted Wives and Children's Maintenance Act* were eliminated. Over the next decade, an essential task was to develop procedural rules for these new custody and support proceedings. These rules – which were provided for in the *Provincial Courts Act*[101] – were prepared by the Rules Committee of the Provincial Courts, chaired by Chief Judge Ted Andrews. These rules applied not only to the *Family Law Reform Act* but to child protection cases as well.

An Experiment Begins – The Introduction of the Unified Family Court in 1977

These many reforms did not change the fact that the family justice system was still essentially two systems. For litigants, family proceedings presented a fragmented and confusing process that often involved at least two courts and a bewildering number of proceedings.

"Absurdities in the Judicial System"

In 1974, the Ontario Law Reform Commission provided an example of the problems the duplication of family court systems created. Here is the OLRC's commentary on the matter of child custody – before the legislative changes which occurred from 1978 onwards.

One of the clearest examples of how fragmented jurisdiction in family law matters can cause practical problems for litigants, as well as result in absurdities in the judicial system, is the matter of custody.

Consider the ways in which custody can be claimed. Custody may be awarded in the Provincial Courts (Family Division) under The Deserted Wives' and Children's Maintenance Act*, but only if maintenance is also awarded. Custody* per se *may be sought in the Surrogate Court*, *or the Supreme Court under* The Infants Act. *Custody may also be sought in the Supreme Court or in the County Court in conjunction with a divorce petition under the* Divorce Act.

In a number of recent cases, judges have found themselves caught in a maze of conflicting statutory authority concerning the status of their respective jurisdictions. Questions have been raised about the status and effect of a custody order of a Provincial Court (Family Division), even accepting that such orders are constitutionally sound.

(OLRC, *Report on Family Law, Part V, Family Courts,* 1974, pp. 32-33.)

Many were critical of the confusion caused by this "jurisdictional mosaic."[102] Chief Judge Ted Andrews was a vocal advocate for the creation of a "unified family court" – a single court that could address all aspects of a family dispute. The Association of Juvenile and Family Court Judges of Ontario, which he founded, was set up to ensure that, among other things, there was a strong judicial voice in support of unification of the family courts.

In 1977, the Ontario and federal governments agreed to establish an experimental Unified Family Court. The Hamilton Family Court was the first Unified Family Court (UFC) in Canada, beginning as a pilot project. This UFC had exclusive jurisdiction to deal with all family law matters. Three judges of the Provincial Court (Family Division) – Judges David Steinberg, John VanDuzer, and Patrick Gravely – were selected to be the judges of this new court. The UFC was essentially an expansion of the existing Provincial Court (Family Division) in Hamilton-Wentworth, but structured as a superior court and the

judges were given all of the authority of superior court judges as well. The UFC did not expand further in Ontario until the mid-1990s.

Judges John Van Duzer, Patrick Gravely and David Steinberg, (left to right) newly appointed to the Unified Family Court in Hamilton. Beginning as a pilot project in Hamilton in 1977, the Unified Family Court enabled a judge to hear any family law issue, regardless of whether it fell within federal or provincial jurisdiction. (Photo by John Mahler/*Toronto Star*, Getty Images, January 26, 1978)

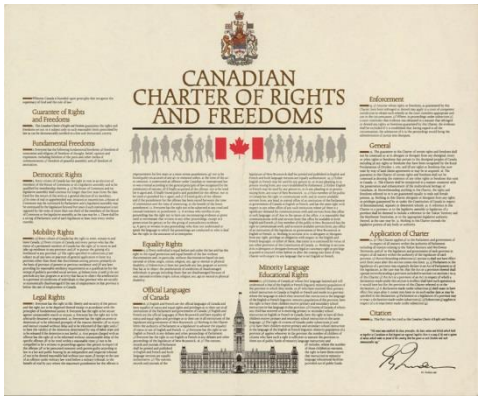
The Civil Division of the Provincial Court

Courts of small claims in Ontario predate Confederation, going through a variety of names. In 1980, an experimental small claims court, named the Provincial Court (Civil Division), was established in Toronto with a jurisdiction up to $3,000. The Court was made permanent in 1982 and was expanded beyond Toronto.[103] Under the set of court reforms in 1989, the Provincial Court (Civil Division) was converted into a branch of the Superior Court called the Ontario Court (General Division) and it no longer had any affiliation with the provincial courts.[104]

The Impact of the *Charter* on Provincial Courts

In 1982, the *Canadian Charter of Rights and Freedoms* was proclaimed. It has been called "the most significant political event of post-Second World War Canada" and credited with changing our trial courts forever.[105]

However, back in 1982, "it was initially possible for some to hold the view that the *Charter* would have a minimal impact on our criminal justice system. It could easily have gone the way of its disappointing predecessor, the *Canadian Bill of Rights* – "a modest instrument of guidance to courts reluctant to challenge elected officials."[106] But it didn't.



The *Charter* applies only to governmental actions and sets out various rights that are protected by it, including right to life, liberty and security of person, protection against unreasonable search and seizure, and the right when charged with an offence to a trial within a reasonable time.

The massive and fundamental impact of the *Charter* had only begun to be felt by the Provincial Court (Criminal Division) and (Family Division) by the end of 1989. The progression of *Charter* decisions handed down from the Supreme Court of Canada only began to flow in the late 1980s.

However, it became quickly apparent that both Provincial Court judges and justices of the peace would be hearing *Charter* challenges – a person claiming an infringement of a *Charter* right could seek a remedy from a judge or justice of the peace.

One important remedy that began to be ordered for a *Charter* infringement was the exclusion of evidence that was obtained in violation of an accused person's *Charter* rights.

But one of the most important cases in *Charter* history had started its way through the courts of Ontario. *R.* v. *Askov*[107] would be decided by the Supreme Court of Canada in 1990. Mr. Askov's trial had been delayed for almost two years and the question to be answered by the Supreme Court was whether his right to be tried within a reasonable time under s. 11(b) of the *Charter* had been violated. The Supreme Court's decision that it had been violated and that the only appropriate remedy for the violation of that right was a stay of proceedings was to have a dramatic impact on the workings of the Provincial Courts come 1990.

The *Charter* would also have a profound impact in the realm of family law, though the impact on family law issues was not strongly apparent until the 1990s when several important decisions were rendered by judges of the Ontario Court (Provincial Division).

The *Charter* Serves to Increase the Court's Responsibilities

"The criminal justice system is continually striving to strike an appropriate balance between crime control and the protection of society on the one hand, and fairness to accused persons and the prevention of abuse of police powers on the other. The courts have always played an important role in this exercise. However, by entrenching a number of procedural rights in the constitution, the *Charter of Rights and Freedoms* has increased the courts' responsibility to delineate the line between crime control and due process. In addition, other values are relevant such as the right of privacy and other rights of

victims of crime, and the equality rights of groups such as women, children, and minorities who may be disproportionately subject to some crimes. While the fundamental purpose of the Canadian criminal justice system remains the protection of society, there can be little question that the result of the courts' efforts has been to move Canada closer towards the due-process end of the spectrum."

(Source: Sharpe, Robert J., Swinton, Katherine E. and Roach, Kent. *The Charter of Rights and Freedoms, Second Edition* (Toronto: Irwin Law, 2002), p. 207.)

Conclusion

By 1989, the reality of the Provincial Courts presented an "astonishing paradox."[108]

In every way, the Provincial Courts – and the judges and justices of the peace – gained in recognition and status from 1968 onwards.[109]

And yet, the Family Division and Criminal Division – which for the most part were the principal criminal and family courts of the province – continued to be relegated to the status of "inferior" courts in many ways. [110]

The positive changes that had begun during these years, however, were set to continue – pushed by reformers and judicial officers themselves. The stage was set for yet more radical transformation.

Reforms At a Glance

Radical changes to the structure and work of the Provincial Courts began in 1968 and continued throughout this period.

Here are a few highlights of those reforms:

1. The province took over full financial responsibility for the administration of justice – as opposed

to the previous system in which municipalities often funded the Courts.

2. Although *The Provincial Courts Act, 1968*, did not require appointments to the Courts to be legally trained, the practice of appointing lawyers as judges grew during the 1970s. This was a significant change because many of those appointed as magistrates and family judges had no legal training. In 1984, the *Courts of Justice Act* stipulated that appointments to the bench must have at least 10 years' experience as a lawyer.

3. *The Provincial Courts Act, 1968* provided for the creation of a new body – a Judicial Council for Provincial Judges – to perform two critically important functions: to consider the appointment of provincial judges and to receive complaints of alleged misconduct by provincial judges.

4. Previously, judicial officers were often paid through fees and fines collected by the Courts and many judicial officers served only in a part-time capacity. Slowly, that too began to change for both judges and justices of the peace. All were on their way to becoming full-time, salaried judicial officers, though this process was a slow one and not fully completed during this time period.

5. It had been long known that "political considerations intrude upon the [judicial] appointments process."[111] In 1988, the Judicial Appointments Advisory Committee was established, with the mandate of removing any unwarranted political bias or patronage in appointments to the judiciary – and ensuring that the best candidates were considered and that appointments were merit based.

6. During these years, the Provincial Court (Criminal Division) was given increased jurisdiction to hear more and more criminal offences, including many of the most serious offences in the *Criminal Code.* Its responsibilities were expanded through the introduction of the *Canadian*

Charter of Rights and Freedoms in 1982 – and the entrenchment of various procedural rights in the Canadian constitution.

7. The Provincial Court (Family Division) saw significant changes to its jurisdiction and the approach to its work. By 1988, the Court was carrying 77% of the total family law caseload for all courts in Ontario and its judges had garnered the reputation as "the" judicial experts in family law in Ontario. Additional responsibilities were conferred on this Court with the result that its judges exercised a very broad jurisdiction over virtually all family law matters, with the exception of divorce and the division of property.

8. Justices of the peace took on more work and responsibility with the enactment of the *Provincial Offences Act* and the creation of the Provincial Offences Court.

(Sources: Henderson Report and Zuber Report.)

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[3] McRuer, J.C. *Royal Commission Inquiry into Civil Rights,* Volumes 1 and 2 (Toronto: Queen's Printer, 1968).
[4] Zuber Report.
[5] "Criminal Justice," Report of the Provincial Criminal Court Judges' Special Committee, January 2, 1987, p. 2.
[6] Steinberg, David M. *Family Law in the Family Courts (Second Edition)* (Toronto: Carswell Company Limited, 1981), p. 33.
[7] McRuer Report.
[8] *The Provincial Courts Act, 1968,* S.O. 1968, c. 103. For a detailed overview of changes to all of Ontario's courts from 1788 to 1981, see: Banks, Margaret A. "The Evolution of the Ontario Courts, 1788-1981," in E*ssays in the History of Canadian Law, Volume II* ed. Flaherty, David H. (Toronto: The Osgoode Society, 1983).
[9] McRuer Report, Vol. 2, pp. 528-529.
[10] McRuer Report, Vol. 2, p. 544.
[11] McRuer Report, Vol. 2, p. 544, p. 570.
[12] McRuer Report, Vol. 2, p. 544.
[13] McRuer Report, pp. 524-525.
[14] Zuber Report, p. 2
[15] Scott, Ian, with McCormick, Neil. *To Make a Difference: A Memoir* (Toronto: Stoddart Publishing Co. Limited, 2001), p. 178.
[16] Zuber Report, pp.273-275.

[17] Statement to the Legislature by The Honourable Ian Scott Attorney General Re Reform of Ontario's Trial Court System, May 1, 1989; *Report of the Provincial Criminal Court Judges' Special Committee, Criminal Justice in Ontario,* January 2, 1987.
[18] *Courts of Justice Amendment Act, 1989* SO 1989, c. 70.
[19] McRuer Report, Vol 1. p. xi.
[20] McRuer Report, Vol. 1, p. xi.
[21] Ontario Law Reform Commission, Report on Administration of Ontario Courts, Part II (Ministry of the Attorney General, 1973), p. 2.
[22] Zuber Report, p. 4.
[23] Zuber Report, p. 28.
[24] *Provincial Courts Act, 1968* SO 1968, c. 103, s. 10..
[25] *Provincial Courts Act, 1968* SO 1968, c. 103, s. 11.
[26] OLRC, Report on Administration of Ontario Courts, Part II, p. 20
[27] *Provincial Courts Amendments Act, 1977,* SO 1977, c. 46, s. 1.
[28] OLRC, Report on the Administration of Ontario Courts, Part II, p. 20.
[29] *Provincial Courts Act, 1968,* SO 1968, c. 103.
[30] *Provincial Courts Act, 1968*, SO 1968, c. 103, s. 10.
[31] Interview of A. Edgar for the OCJ History Project, 2014; OLRC, Report on the Administration of Ontario Courts, Part II, pp. 2-3. According to the OLRC Report: "Over 2,000,000 cases were disposed of in the Provincial Courts (Criminal Division) in Ontario in 1971 (the latest year for which figures are available). Of this total more than 90% involved offences which for convenience we shall refer to generally as provincial offences: Offences under municipal by-laws (approximately 35% of the total number of cases), offences under *The Highway Traffic Act* (approximately 48%), offences under *The Liquor Control Act* (approximately 6%) and offences under other provincial statutes (approximately 2%). The remaining cases (slightly under 10% of the total) involved criminal offences, namely offences under the *Criminal Code* or under other federal statutes. In practice, all criminal cases are tried by Provincial judges, while provincial offences are tried either by Provincial judges or justices of the peace. Even though the criminal cases constitute only 10% in volume of the workload of the Provincial Courts (Criminal Division), these cases represent about 95% of the total volume of criminal cases tried in Ontario. It may be noted further that even where an accused person is not ultimately tried in the Provincial Courts (Criminal Division), his first appearance or appearances will inevitably be before a Provincial judge who will conduct the preliminary inquiry."
[32] *Provincial Courts Act, 1968*, SO 1968, c. 103, s. 2 and s. 4.
[33] *Provincial Courts Act, 1968*, SO 1968, c. 103, s. 4(2).
[34] *Magistrates Act*, RSO 1969, c. 226, s. 3(2).
[35] *Hansard,* Ontario Legislative Debates 6835 (December 15, 1988).
[36] *Courts of Justice Statute Law Amendment Act, 1984*, S.O. 1984, c. 12, s. 16.
[37] OLRC, Report on the Administration of Ontario Courts, Part II.
[38] *Courts of Justice Statute Law Amendment Act, 1984*, S.O. 1984, c. 12, s. 52(2). Without being a statutory requirement, the 10-year rule had become standard practice prior to 1984.
[39] *Courts of Justice Statute Law Amendment Act, 1984*, S.O. 1984, c. 12, s. 54.
[40] *R. v. Beauregard,* [1986] 2 S.C.R. 56, p. 69.
[41] *R. v. Valente,* [1985] 2 S.C.R. 673.
[42] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982,* c 11, s. 11(d).
[43] In 1987, for example, salaries of Provincial Court judges were approximately 30% lower than those on the superior District Court. Report of the Provincial Criminal Court Judges Special Committee on Criminal Justice in Ontario, January 2, 1987, p. 52.
[44]Report to the Ontario Provincial Courts Committee, 1988, p. 51. This committee was chaired by Gordon Henderson and is known as the "Henderson Report."
[45] Henderson Report, p. 56.

[46] Vanek, David. *Fulfilment: Memoirs of a Criminal Court Judge* (Toronto: The Osgoode Society for Canadian Legal History, 1999), p. 227.
[47] Justice Donald Keith, Report of the Commission of Inquiry re: Provincial Judge Lucien Coe Kurata, 1969, p. 1.
[48] OLRC, Report on the Administration of Ontario Courts, Part II, pp. 3-4.
[49] Henderson Report, p. 2
[50] All quotes are compiled from Interview of G. Cloutier for OCJ History Project, 2014
[51]Mewett, Alan W., Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario, Part 1, (the "Mewett Report"), 1981, p. 14.
[52] Mewett Report, p. 38.
[53] McRuer Report, and Mewett Report, p. 5.
[54] OLRC, Report on the Administration of Ontario Courts, Part II and Mewett Report, p. 6.
[55] Mewett Report, p. 5.
[56] Mewett Report, p. 5.
[57] Mewett Report, p. 6.
[58] OLRC, Report on the Administration of Ontario Courts, Part II, p. 17.
[59] OLRC, Report on the Administration of Ontario Courts, Part II, p. 17.
[60] OLRC, Report on the Administration of Ontario Courts, Part II, p. 17.
[61] OLRC, Report on the Administration of Ontario Courts, Part II, p. 17.
[62] Mewett Report, p. 7.
[63] OLRC, Report on the Administration of Ontario Courts, Part II, pp. 16-20. It should be noted that the provision concerning Crown Attorneys providing advice to justices of the peace continues to this day in s. 11(h), *Crown Attorneys Act,* R.S.O. 1990. C. 49 as a historical anomaly with no practical application.
[64] Mewett Report, p. 69.
[65] Mewett Report, p. 10.
[66] OLRC, Report on the Administration of Ontario Courts, Part II, p. 17.
[67] Mewett Report., p. 9 and see also *Justices of the Peace Act,* 1980, s. 6.
[68] Mewett Report, p. 17.
[69] Mewett Report, p. 98.
[70] Mewett Report, p. 98.
[71] Mewett Report, Part II, p. 8.
[72] Mewett Report, Part II, p. 11.
[73] Zuber Report, p. 95.
[74] S.O. 1989, c. 46
[75] McRuer Report, Vol 2, p. 526.
[76] OLRC, Family Courts, Part V, 1974, p. 4.
[77] *Provincial Courts Act, 1968, SO 1968, c. 103,* s. 26.
[78] *Report of the Provincial Criminal Court Judges' Special Committee,* 1987, p. 38.
[79] Gormley, Sheila, "Doing Justice," *Maclean's Magazine,* 1975.
[80] *Report of the Provincial Criminal Court Judges Special Committee on Criminal Justice in Ontario,* January 2, 1987
[81] OLRC, Part II, p. 23
[82] The Ontario Provincial Courts Committee, convened pursuant to the *Courts of Justice Statute Law Amendment Act, 1994,* S.O. 1994, c. 12, is the source of the statistic pertaining to the family court. The Provincial Court (Criminal Division) statistic is found in the *Zuber Report*, p. 30.
[83] Interview of P. Bélanger for OCJ History Project, 2015.
[84] *Criminal Law Amendment Act,* 1975, 1974-75-76 (Can.) c. 93, s. 94
[85] *Provincial Offences Act,* SO 1979, c. 4.
[86] Interview of G. Michel for the OCJ History Project, 2014.
[87] Interview of F. Devine for the OCJ History Project, 2014.
[88] Vanek, *Fulfilment,* p. 233.
[89] *Provincial Offences Act,* S.O 1979, c. 4.

[90] It is to be noted that, although the legislation defining these courts had changed, in fact, it was the same group of justices of the peace and judges who were sitting in the same courtrooms as they had under previous legislation. Edgar, A. "The Evolution of the Ontario Court of Justice," p. 14 (unpublished). See also *Provincial Offences Act,* SO 1979, c. 4 and *Provincial Courts Amendment Act, 1979.*
[91] Interview of D. Ewart for OCJ History Project, 2014.
[92] Interview of D. Ewart for OCJ History Project, 2014.
[93] McRuer Report, Vol. 2, p. 551.
[94] McRuer, Report, Vol. 2, pp. 548-549.
[95] Interview of J. Karswick for OCJ History Project, 2015.
[96] Interview of J. Karswick for OCJ History Project, 2015.
[97] McMurtry, R.Roy in Forword to *Family Law Reform, 1976*, (Ministry of the Attorney General), p. vi.
[98] Doob, Anthony N. and Sprott, Jane B., "Youth Justice in Canada," Vol. 31, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (Chicago: The University of Chicago Press, 2004), pp. 185-242 at pp. 193-194.
[99] Henderson Report, pp. 11-12.
[100] Karswick Interview, 2015
[101] *Provincial Courts Act,* RSO 1970, c. 369, s. 26.
[102] Zuber Report, p. 96.
[103] *Provincial Court (Civil Division) Project Amendment Act, 1982,* S.O. 1982, c. 58.
[104] *Courts of Justice Amendment Act, 1989*, S.O. 1989, c. 55.
[105] Louise Arbour, How the Charter helped define Canada, *The Globe and Mail*, Monday, April 16, 2012.
[106] Louise Arbour, How the Charter helped define Canada, *The Globe and Mail*, Monday, April 16, 2012.
[107] *R. v. Askov,* [1990] 2 S.C.R. 1199.
[108] *Report of the Provincial Criminal Court Judges' Special Committee,* 1987, p. 3.
[109] Vanek, *Fulfilment,* p. 227.
[110] *Report of the Provincial Criminal Court Judges' Special Committee,* 1987, p. 4.
[111] Zuber Report, p. 246.

Period II: 1968-1989 Major Changes

Provincial Court (Civil Division), 1980-1990

For ten years – from June 1980 until September 1990 – Ontario had a Provincial Court (Civil Division) to adjudicate Small Claims Court cases. Small Claims Courts resolve civil lawsuits where the amount claimed is less than a specified dollar amount. They are more informal than other courts and have less complex and technical procedures.

Pilot Project in Toronto

The Civil Division began as a three-year pilot project in the Municipality of Metropolitan Toronto. The maximum claim was $3,000 as opposed to the $1,000 amount that applied to Small Claims Courts elsewhere in the province. During the pilot phase, full-time judges appointed under the *Small Claims Court Act* were assigned to the Civil Division.

A Permanent Civil Division in Toronto

The Civil Division became permanent in January 1983 but still operated only in Metropolitan Toronto. At that time, the eleven full-time judges were formally sworn in as provincial court judges by the Chief Justice of Ontario.

Amalgamation of all Ontario Small Claims Courts

In 1985, all Small Claims Courts were amalgamated into the Provincial Court (Civil Division). Although a single court, distinctions remained between Toronto (Judicial District of York) and the rest of the province. Notably, the maximum amount remained at $3,000 for Toronto and at $1,000 elsewhere.

Small Claims Court Transfer

On September 1, 1990, the Provincial Court (Civil Division) ceased to exist. In its place, the Small Claims Court became a branch of the Ontario Court (General Division) which later became the Superior Court of Justice. The former Civil Division judges did not become Superior Court judges as part of the transfer. They remained as provincial appointees who were assigned to the new Branch.

The Ontario government stopped appointing full-time small claims court judges in 1987. As of 2014, there were only two who remained on the bench and they were sitting part-time on a per-diem basis. Although Superior Court judges may sit in the Small Claims Court Branch, the reality is that the vast majority of cases are heard by lawyers who serve as part-time Deputy Judges.

Profile: Chief Judge S. Douglas Turner

S. Douglas Turner became the Senior Judge when the Provincial Court (Civil Division) was established in 1980. He became Chief Judge when that position was created after the Civil Division and Small Claims courts amalgamated in 1985. Before becoming a judge, Turner had worked for the Ontario Ministry of Commercial Relations where he had helped to draft the *Business Practices Act*, a ground-breaking consumer protection statute.

Turner also had the distinction of having played football for the Toronto Argonauts in 1947 and 1948. As Ted Andrews, former Chief Judge of the Provincial Court (Family Division) recalls, “I liked Doug Turner. He was a big guy with huge feet. You wouldn’t know him for more than a few hours without learning he had been a linesman for the Argonauts football team. He was a congenial guy.”

Toronto Argonauts in action. From left to right: Pete Titanic (78), Les Ascott (52), Bill Zock (80), Doug Turner (66), Frankie Morris (59), Steve Levantis (51), and an unidentified player. (Photo source unknown)

Reflections: Pamela Thomson

In 1981, Pamela Thomson was appointed as a full time Small Claims Court judge, assigned to the new Provincial Court (Civil Division). She was 37 at the time and one of a handful of provincially appointed female judges in Ontario. Thomson wanted to be a Small Claims Court judge to show people the power of mediation and sitting down to talk before trial. "We were the first court in Canada to do pre-trials", says Thomson. Our concept was later copied by many other courts in Ontario and beyond." Thomson's previous experience as a labour lawyer had convinced her that pre-trial processes to resolve issues would be in everyone's best interest.

Thomson recalls the less than spacious quarters of the early days and the unusual assortment of court settings. On many occasions she presided over hearings in the auditorium of a Polish hall on the Lakeshore in Toronto. "That was fine in the morning until midday when the sausages would go on. The beer would come out at 1:00 o'clock and there would be all these people having lunch at the back of the auditorium while court was in progress."

A group of Small Claims Court Judges being sworn into Provincial Court in 1983. From left to right, back row: Ronald Radley, Gordon Chown, Stewart Kingstone, Ben Lamb, T. Charles Tierney, Marvin Zuker. From left to right, front row: Douglas Turner, Moira Caswell, Gerald Vickers, Pamela Thomson, Reuben Bromstein. (Photo courtesy of P. Thomson)

Thomson recalls a hard fought battle for the full-time Small Claims Court judges to achieve parity with the Criminal and Family Division judges. She felt that the criminal bench, in particular, did not feel that Small Claims Court judges were entitled to be treated as "real judges." She found the family bench, under the leadership of Chief Judge Ted Andrews, to be much more supportive.

In 1990, Attorney General Ian Scott called the full-time Small Claims Court judges to a meeting to describe the upcoming transfer to the Ontario Court (General Division). "Ian Scott's idea was that the Small Claims Court was really important and that he would elevate the Court. He thought that the

General Division justices would sit in Small Claims Court as part of their rotation, but that never happened."

Reflections: Marvin Zuker

Marvin Zuker is the only provincially appointed Ontario judge who has sat full-time as a small claims, family, and criminal court judge. His first judicial appointment was to the Toronto Small Claims Court in 1978, two years before the Civil Division was created as a pilot project.

Like Thomson, Zuker was a strong believer in pre-trial resolution. During his twelve years in Small Claims Court, Zuker would often ask the clerk to bring litigants to his chambers around 9 a.m. "My goal was to settle as many cases as possible before Court began at 10 a.m."

Not all of Zuker's cases were straightforward. In one instance, he issued a judgment in favour of civil rights activist Charles Roach who had sued the police in Small Claims Court. As Zuker recalls, "Roach, a Black lawyer, had been stopped by the police near his office because they were looking for somebody Black." Zuker wrote a lengthy decision essentially saying that the police cannot stop someone simply on the basis of skin colour. The decision was ultimately upheld by the Ontario Court of Appeal.

Like many of his colleagues, Zuker was unhappy that the Small Claims Court transferred in 1990 from a Civil Division of the Provincial Court, with its own Chief Judge, to a Branch of the federally appointed Court. He said, tongue in cheek, that the status of the Court was so diminished that it could more aptly be described as a "twig" rather than a "branch."

Zuker found that his Small Claims Court experience helped him in his subsequent work in family court. Like Small Claims Court, the role of the family court judge can be inquisitorial, especially when parties are not represented. When Zuker came to criminal court, however, he had to learn a new style of

judging. “I had to sit back and play a less active role in moving the case forward because almost everyone had lawyers.”

Statutory History: Rise and Fall of Provincial Court (Civil Division)

Small Claims Courts Act, 1970	The Division Courts in Ontario were renamed “Small Claims Courts.” Cases could be heard by County Court or deputy judges and, for the first time, by provincially appointed full-time Small Claims Court judges. The maximum jurisdiction was $400.
Small Claims Courts Amendment Act, 1977,	The maximum jurisdiction was raised to $1,000.
Provincial Court (Civil Division) Project Act, 1980	The Provincial Court (Civil Division) of The Municipality of Metropolitan Toronto was created as a court of record on a three-year trial basis, presided over by full-time small claims court judges. The maximum jurisdiction was $3,000 but only in Metropolitan Toronto. A Senior Judge had general supervision and direction over sittings and assignment of judges. This statute was enacted on June 22, 1979 and became fully in force on June 30, 1980. It was slated for repeal on January 1, 1983.
Provincial Court (Civil Division) Project Amendment Act, 1983	The Provincial Court (Civil Division) was continued on permanent basis, but still operated only in Metropolitan Toronto. The amendments came into force on January 1, 1983.

Courts of Justice Act, 1985	The Small Claims Courts and the Provincial Court (Civil Division) were amalgamated into a single court named the Provincial Court (Civil Division), also known as the Small Claims Court. The maximum jurisdiction remained at $3,000 in the Judicial District of York and at $1,000 elsewhere and for deputy judges. Cases were heard by provincial, District Court, and deputy judges. The Chief Judge of the Provincial Court (Civil Division) had general supervision and direction over sittings and assignment of judicial duties in the Judicial District of York. These provisions came into force on January 1, 1985.
Courts of Justice Act, 1990	The Provincial Court (Civil Division) ceased to exist on September 1, 1990. At that time the Small Claims Court became a branch of the Ontario Court (General Division) which later became the Superior Court of Justice. Cases could be heard by General Division judges, deputy judges, or provincial judges assigned to the Provincial Court (Civil Division) immediately before September 1, 1990.

Period II: 1968-1989 Major Changes

The Demise of the Trial *de Novo*

Until the late 1970s, the majority of appeals from decisions of the Family or Criminal Division of the Ontario Provincial Court were heard by way of trial *de novo*, or new trial, before a federally appointed judge in the District Court[1]. In criminal matters, this procedure applied to all summary conviction offences[2] and in family matters, to appeals under statues such as *The Deserted Wives' and Children's Maintenance Act* and *The Parents Maintenance Act*. Appeals from decisions made by justices of the peace were also heard by trial *de novo*. In a trial *de novo*, both sides would present their evidence and arguments all over again, as if the Provincial Court trial had not occurred. In fact, at the trial *de novo* before the District Court Judge, either party was free to call new witnesses who had not testified at the original trial.

Appeal on the Record and Trial *De Novo*

An appeal from a trial decision ordinarily proceeds on the basis of the record before the trial judge. The evidence the trial judge heard and the arguments made by counsel are recorded word-for-word by court reporters. These records are called transcripts of proceedings, and are provided to the appeal court along with the trial judge's decision and reasons. Although it can review the transcripts of evidence, the appeal court generally does not make its own, independent factual findings. Instead, the appeal court defers to the trial judge's factual findings, on the basis that the trial judge had the best opportunity to assess the credibility of various witnesses and the weight to be given to each piece of evidence. Ordinarily, the only questions in an appeal on the record will be whether the trial judge properly understood the law, and whether he or she properly applied the law to the facts that were found to

exist.

In an appeal by way of trial *de novo*, the appeal court hears from witnesses directly – including, in some cases, witnesses who were not called at the original trial. Because the appeal court has its own opportunity to hear and consider the evidence in a trial de novo, it is not bound by the trial judge's factual findings. The appeal court hearing a trial *de novo* will make its own factual findings, and then interpret the law and apply it to those facts. An appeal by way of trial de novo will therefore be much broader than an appeal on the record.

An appeal by way of trial *de novo* could be a benefit or a burden, depending on the outcome in the first trial and the resources of each party. For the losing party, a trial *de novo* provided an opportunity to address any weaknesses that became apparent during the original trial before the Provincial Court. Arguments could be strengthened and additional witnesses called to shore up the case. For the winning party, a trial *de novo* meant having to go to the trouble of another full hearing, simply to try to preserve the same outcome. For lawyers and for litigants who could readily afford the cost of multiple hearings, a trial *de novo* on appeal meant that the Provincial Court trial could be treated as a "practice run" – a chance to test their case and discover what evidence and arguments their opponents would be relying on, without the risk that they would later be bound by anything that happened there. This could be very useful for individuals charged with criminal offences, who at the time were not entitled to disclosure of the Crown's case in advance of trial as they now are under the *Charter of Rights and Freedoms*. For those litigants with fewer resources, however – including many accused persons – the expense associated with two full trials could be overwhelming.

"It was demoralizing to see some counsel doing an inadequate job before me, treating the proceeding as a form of discovery for a later trial in the County Court," recalled George Thomson, who sat in Provincial

Court (Family Division) as a judge in the 1970s and early 1980s. "For me, it represented a statutory declaration that the Provincial Court couldn't be trusted to do its job well. Even more important, in family cases it could mean lengthy damaging delay for children and their parents."[3]

New Rules for Appeals

Over time, appeal by way of trial *de novo* gave rise to increasing concern about inefficiency, waste of judicial resources, and potential abuse. In 1975 the federal government, led by Liberal Prime Minister Pierre Trudeau, introduced an amendment to the *Criminal Code* that changed the procedure for appeal from a summary conviction. That amendment came into force in Ontario on November 1, 1977.[4] Under the new rules, which continue to apply today, summary conviction appeals from decisions of provincially appointed judges are usually made on the basis of the existing record. The appeal court can look at the transcript of the witnesses' evidence and the submissions made in the Provincial Court, but does not usually hear evidence itself and is largely bound by the trial judge's factual findings. In certain circumstances, an appeal can still be heard by way of trial *de novo*, but this remedy is now rarely sought and rarely granted[5].

During Parliamentary debates in late 1975 and early 1976, Members expressed mixed views of the proposed amendment to the *Criminal Code*. John Gilbert, the NDP Member of Parliament for Broadview-Greenwood who was himself a lawyer, observed: "From my experience many lawyers always welcomed the trial *de novo*, especially when they lost in the lower court, because it gave them a second chance to present their cases and probably to strengthen them."[6] For his part, Claude-André Lachance, the Liberal Member of Parliament for Lafontaine-Rosemont, described the changes as "improvements which law practitioners had been requesting for some time," noting that they would allow higher courts to "assess more easily the evidence introduced before a court of first instance, without the appellant having to establish again this evidence."[7]

One of the staunchest opponents of the change to the *Criminal Code* was Eldon Woolliams, the Progressive Conservative Member of Parliament for Calgary North. Prior to being elected to public office, Woolliams had been a celebrated criminal defence lawyer – the best defence trial lawyer of his day, according to his close friend and former Prime Minister John Diefenbaker. Although Woolliams allowed that there had been some abuse of the trial *de novo*, "because lawyers sometimes would have a trial run before a provincial judge and then go to the district court," he also stressed the importance of meaningful and searching review of Provincial Court decisions. His remarks reveal a great deal about how provincial courts functioned – or were perceived to function – during this period:

> *There is something I wish to point out which I know the minister and hon. Members who have practised law understand. In provincial courts, judges have to sit all morning. Anyone who attends these courts will realize how many cases a judger hears in a day. The judge does not have time to weigh all the pros and cons. There is, of course, the safeguard that in exceptional cases the whole thing can be reviewed by the [federally appointed judge of the] district court. In some cases the magistrate merely says, on the basis that the Crown witnesses and policemen are honest, that he finds the accused guilty. That is a finding of fact and there is no appeal unless there is a rehearing and a re-evaluation of the witnesses.*
>
> *That is the weakness of our system.*[8]

Trial *De Novo* and New Trial

Even though the words mean the same thing, a "trial *de novo*" is different from a new trial. A trial de novo is an appeal, whereas a new trial is the result of a successful appeal. This may seem like a very fine distinction, but it has significant practical effects.

Imagine an accused person is convicted at trial. If that conviction is appealed by way of trial *de novo*, it

remains in effect until the appeal court determines the outcome of the trial *de novo*. The accused person may be convicted or acquitted at the trial de novo, but the original conviction stands until the trial *de novo* is concluded.

A new trial, in contrast, can only be ordered following a successful appeal. For an accused person who was convicted at trial, a successful appeal means that the conviction is overturned. Once a conviction is overturned, the person is once again presumed innocent unless and until he or she is convicted at the new trial.

Woolliams was pleased that the amendment would permit federally appointed judges to order an appeal by way of trial *de novo* in certain circumstances, but also expressed doubt that this provision would have much effect. In his view, federally appointed judges would generally not be inclined to grant a trial *de novo* since it would mean additional work for them:

> *Knowing judges as I do – many of them are good friends of mine and I hope they remain so – they are liable to say that they do not want all the hard work involved, and very often will not exercise the discretion. It will become a very rare discretion, if ever it is used.*[9]

Interestingly, no such concerns were expressed in the provincial legislature when the *Provincial Offences Act* was introduced in 1979. Like the earlier amendments to the *Criminal Code*, the *POA* abolished appeals by way of trial *de novo* except in cases where the appeal court is of the opinion that a trial *de novo* will better serve the interests of justice. Even those Members of Provincial Parliament who expressed concern about this change, such as future Superior Court judge Albert Roy, recognized its importance in curbing abuses of the trial *de novo* procedure,[10] and none appear to have doubted the capacity of the Provincial Court to adjudicate regulatory offences fully and fairly.

Appeals in Family Law Matters

The amendments to the *Criminal Code* also affected appeals in family law matters. This is because several Ontario statutes administered by the Provincial Court (Family Division), such as *The Deserted Wives' and Children's Maintenance Act*[11] and *The Parents' Maintenance Act*,[12] stated that an appeal from a Provincial Court decision had to be made in accordance with *The Summary Convictions Act*. *The Summary Convictions Act* in turn applied the *Criminal Code* provisions relating to appeals – including the provision that made every appeal from a Provincial Court decision a trial *de novo*.[13]

Ironically, elimination of the trial *de novo* came latest where it was needed most – in child protection matters where the impact of delay is greatest.[14] "Both judges of the Provincial Court (Family Division) and Children's Aid Societies pressed strongly to have the change in appeal procedures applied to child protection cases," said Thomson.[15] That change was finally made in 1979.[16]

New Appeal Procedures Have Stood the Test of Time

Today, as Eldon Woolliams predicted, it is indeed rare for an appeal from a Provincial Court decision to be heard by way of trial *de novo*. An on-the-record appeal is now the primary procedure for review of a Provincial Court decision by a higher court, and a trial *de novo* has become the exception.[17] Contrary to Woolliams' concern, however, this is not because applications are being routinely dismissed by higher court judges anxious to avoid the work involved in hearing and adjudicating the same matter over again. Rather, it is because almost no one applies for a trial *de novo*. Since 1977, there have been only a handful of reported cases in Ontario in which appeal by way of trial *de novo* has been sought.[18] It appears that litigants have not commonly shared Woolliams' view that the Provincial Court lacked the time and judicial independence required to render balanced and considered judgments.

[1] Prior to 1990 in Ontario, there were three separate trial courts: 1) Provincially appointed judges sat in the Provincial Court at different locations throughout the province, 2) One or more federally appointed District Court judges were assigned to the District Court in the county town of each judicial district and 3) A large number of federally appointed High Court Judges sat primarily in Toronto but also sat *on assize* as needed in county towns to deal with High Court cases.
[2] Indictable offence appeals have always gone directly to the Ontario Court of Appeal.
[3] Interview of G. Thomson for OCJ History Project, 2014.
[4] *Criminal Law Amendment Act, 1975*, 1974-75-76 (Can.) c. 93, s.94.
[5] The party requesting a trial de novo must satisfy the appeal court that the interests of justice would be better served by a trial de novo than by an appeal on the record, either because of the condition of the trial record or for some other reason.
[6] Ontario *Hansard*, November 18, 1975, p. 9214.
[7] Ontario *Hansard*, November 19, 1975, p. 9247.
[8] Ontario *Hansard*, January 27, 1976, p. 10356.
[9] Ontario *Hansard*, January 27, 1976, p. 10356.
[10] Ontario *Hansard* March 13, 1979; March 27, 1979.
[11] R.S.O. 1970, c. 128, s. 13.
[12] R.S.O. 1970, c. 336, s. 6.
[13] R.S.O. 1970 c. 450, s. 3.
[14] The *Child Welfare Act*, R.S.O. 1970, s. 36(4) provided that an appeal from a child protection order "shall be a hearing *de novo* and the judge may rescind, alter or confirm the decision being appealed or make an order or decision that ought to have been made."
[15] Interview of G. Thomson for OCJ History Project, 2014.
[16] New appellate provisions were introduced in *An Act to revise the Child Welfare Act*, S.O. 1978, c. 85, s. 43, which came into force on June 15, 1979.
[17] See *R. v. R.N.-Z.M.*, [2005] O.J. No. 5497. (S.C.); *R. v. Elias*, [1980] O.J. No. 1523 (Div. Ct.); *R. v. Prasad*, [1995] B.C.J. No. 1829 (S.C.); *R. v. Ford*, [1987] P.E.I.J. No. 29 (S.C.); *R. v. Faulkner* (1977), 37 C.C.C. (2d) 26 (N.S. Co. Ct.); *R. v. Carelli*, [1978] M.J. No. 246 (Co. Ct.); *R. v. Salomon*, [1995] O.J. No. 3268 (Gen Div.); *R. v. Mackie*, [2001] B.C.J. NO. 2887 (S.C.).
[18] See *R. v. R.N-Z.M.*, *supra*; *R. v. Geisbrecht*, [1978] O.J. No. 3768 (Co. Ct.) (Crown application for trial *de novo* dismissed); *R. v. Steinmiller*, [1979] O.J. No. 856 (C.A.) (matter remitted to summary conviction appeal court for trial *de novo*); *R. v. Elias*, [1980] O.J. No. 1523 (Div. Ct.) (appeal from refusal to grant trial *de novo* dismissed on the basis that there was insufficient evidence to support the request); *R. v. Lapierre*, [1980] O.J. No. 1974 (Dist. Ct.) (trial *de novo* ordered where a Francophone accused was originally tried in English); *R. v. Sheridan*, [1990] O.J. No. 359 (C.A.) (accused was acquitted by a Justice of the Peace of various provincial offences; the Crown appealed and applied for a trial *de novo* on the basis that part of the transcript had been lost; Provincial Court ordered a new trial. The Court of Appeal held that the Provincial Court judge should either have ordered a trial *de novo* before himself on the basis of the lost transcript, or, if he was of the opinion that the acquittal could not stand, ordered a new trial); *R. v. Hilderley*, [1990] O.J. No. 560 (Dist. Ct.) (accused sought trial *de novo* on appeal from *Provincial Offences Act* convictions entered by a Justice of the Peace; Provincial Court judge affirmed convictions on the record; on further appeal the District Court ordered a new trial); *R. v. Sebastian*, [1999] O.J. No. 1329 (Gen. Div.) (application for trial *de novo* dismissed); *R. v. Hanneman*, [2001] O.J. No. 839 (S.C.) (application for trial *de novo* on the basis of problems with the transcript of original trial dismissed but alternative remedy ordered); *R. v. MacDonald*, [2007] O.J. No. 3551 (S.C.) (trial *de novo* ordered and held where there was no transcript of the original hearing).

Period II: 1968-1989 Major Changes

Simple Justice: The Introduction of the *Provincial Offences Act*

The Provincial Court was profoundly changed on March 31, 1980, when the *Provincial Offences Act* (*POA*) came into force. At the time, the *POA* was described as "one of the most sweeping legislative reforms of procedures governing the prosecution of offences since the enactment of the Criminal Code in 1892."[1] The *POA* established a comprehensive, self-contained code of procedure for prosecuting and enforcing regulatory offences in provincial statutes and regulations and municipal by-laws.

This is a poster, published by the Ministry of the Attorney General, announcing the introduction of the *Provincial Offences Act*. It appeared in courthouses, public buildings and newspapers across the province.

The *POA* replaced a complex and convoluted system with one "designed specifically and exclusively for minor offences."[2] It was "the first attempt in Canada to create a procedural framework, which at each stage recognizes and responds to the important distinctions between provincial offences and true crimes."[3]

"Persons who breach provincial laws have to be prosecuted and the offences have to be fairly and firmly interpreted, but offenders ought not to be treated like criminals, whether inadvertently or by association."

(Douglas Drinkwalter & Douglas Ewart, Ontario Provincial Offences Procedure (Toronto: The Carswell Company Limited, 1980), p. iii)

Our Lives Are Regulated

In *R. v. Wholesale Travel Group Inc*., a case involving the regulatory offence of false or misleading advertising, the Supreme Court of Canada had this to say about regulatory law:

It is difficult to think of an aspect of our lives that is not regulated for our benefit and for the protection of society as a whole. From cradle to grave, we are protected by regulations; they apply to the doctors attending our entry into this world and to the morticians present at our departure. Every day, from waking to sleeping, we profit from regulatory measures which we often take for granted. On rising, we use various forms of energy whose safe distribution and use are governed by regulation. The trains, buses and other vehicles that get us to work are regulated for our safety. The food we eat and the beverages we drink are subject to regulation for the protection of our health.

In short, regulation is absolutely essential for our protection and well-being as individuals, and for the effective functioning of society. It is properly present throughout our lives. The more complex the activity, the greater the need for and the greater our reliance upon regulation and its enforcement. … Of necessity, society relies on government regulation for its safety.

(*R. v. Wholesale Travel Group Inc*. (1991), 67 C.C.C. (3d) 193 at pp. 239-240 per Cory J.)

What is a Provincial Offence?

To fully appreciate the significance and impact of the *POA*, it is important to understand what provincial offences are and how they differ from criminal offences. A provincial offence is a violation of a provincial regulatory law or a municipal by-law passed by a town or city council. Unlike criminal law, which *prohibits* certain activities, laws such as the *Highway Traffic Act*, the *Occupational Health and Safety Act*, and the *Food Safety and Quality Act*, *regulate* activities that are otherwise lawful and often quite useful to society. Although a small number of provincial offences carry heavy fines or even the risk of imprisonment on conviction, most penalties are relatively minor. One common and familiar example of a provincial offence is a parking infraction.

A "True Crime"…(e.g., murder)	A Regulatory Offence…(e.g., parking in a no-parking zone)
…is an abhorrent violation of fundamental principles and social norms	…violates useful rules or norms, like rules to achieve the smooth flow of traffic
…carries a significant stigma	…attracts little if any stigma.
…is a wrong that has long been considered to be unlawful	…is a relatively modern invention
…is a wrong that we commit simply as people	…is a wrong that we commit in certain roles or activities (e.g. as a driver)
…causes direct harm to identifiable victims	….has the potential for harm, whether actually caused or not (e.g., traffic delay)
(Source: Law Reform Commission of Canada, Studies in Strict Liability (Ottawa: Information Canada, 1974))	

By the mid-1970s, the Law Reform Commission of Canada estimated that the statutes and regulations of any one province created on average 18,540 provincial offences, not including those created by municipal by-laws. When by-law offences are added into the mix, the total number of provincial offences increases dramatically.

Municipal By-Laws

By-law offences are classified as provincial offences because the power to create by-laws is delegated by the province under provincial statute.

The provincial *Municipal Act* gives municipalities the power to pass by-laws governing a wide range of matters including highways, transportation, waste management, parks, structures, animals, and business licensing, as well as more generally for the "economic, social and environmental well-being of the municipality," the "health, safety and well-being of persons," and the "protection of persons and property, including consumer protection."

We sometimes speak of a "hierarchy of laws," with federal statutes like the *Criminal Code* at the top, provincial statues in the middle, and municipal by-laws at the bottom, but that doesn't mean that municipal by-laws are unimportant. In fact, municipal by-laws govern many of our everyday activities.

The number and scope of by-laws vary depending on the size and nature of each municipality, but for a large urban centre like Toronto or Ottawa, municipal by-laws can number in the tens of thousands.

Municipal by-laws create a wide range of offences, from building a fence too high to keeping too many dogs or making excessive noise. These offences are prosecuted under the *POA*.

Pre-1979 – Summary Conviction Process

In Ontario, prior to the introduction of the *POA*, all provincial offences – no matter how minor – were prosecuted under the *Summary Convictions Act*. The *Summary Convictions Act* in turn adopted the procedure set out in the *Criminal Code* for summary conviction offences. That meant that parking tickets, for example, were dealt with in the same courts and according to the same rules as far more serious offences. This was no small matter. By the late 1970s in Metropolitan Toronto alone nearly three million parking tickets were being issued each year, with 60 per cent of them – approximately 1.8 million – requiring at least some court process for collection.[4] If the entire court process was required, the cost of enforcing an unpaid parking ticket ranged from $50 to $75 – at a time when the usual penalty was a $5 or $10 fine.[5]

In addition to being a relatively expensive process and treating minor offenders like "criminals," using the summary conviction procedure to prosecute provincial offences also imposed enormous financial and workload pressures on the provincial court. As then-Attorney General Roy McMurtry observed in 1978:

> *"Few people realize that the real administrative and workload burden on our justice system comes not from complex criminal trials, but rather from the ever-increasing flood of minor offences which is threatening to engulf the administration of justice in this province.*
>
> *The problem is volume. While in one year the Ontario courts receive about a quarter of a million criminal offences, they're hit with more than three and one half million provincial offence charges. Because the basic structure of the current provincial offence procedure is the same as the criminal procedure employed in a murder trial, and because the paperwork burden is similar, minor offences are being tried in a manner which clogs the courts. This inevitably leads to multiplying adjournments and delay for defendants, together with ever-mounting costs for both defendants and the taxpayers of this Province."*[6]

Bringing the entire weight of criminal procedure to bear on such minor offences as parking tickets was not only administratively burdensome; it also risked bringing the administration of justice into disrepute. Frank Devine, who became a justice of the peace in 1971, describes shortcuts taken in an attempt to speed the process along, but notes these came at a cost:

> *"Under the* Summary Convictions Act*, all speeding tickets had to go through a full trial – even if the accused chose not to appear. Following the proper procedure for each trial would have meant that only a small fraction of the cases before the court would be heard each day. Instead, a single police officer – a 'radar man' – would be sworn in on all of the matters on the docket that morning, and testify about a pile of documents recording the speed at which each defendant was travelling. The court could process dozens of these an hour, with some cases taking as little as a minute. The court was trying to be efficient and prevent a total breakdown of the system, but cutting corners like this made a mockery of the officer's oath and turned court proceedings into a farce."*[7]

A New Approach to Provincial Offences

By the early 1970s it was clear that radical change was required. In 1973, a committee was struck to identify ways to reduce the number of persons jailed for non-payment of fines for provincial offences. The original committee members were Archie Campbell, then Crown Counsel for Criminal Appeals and Special Prosecutions,[8] Douglas Drinkwalter, Crown Attorney for the Judicial District of Norfolk, and Justice Norman Nadeau of the Provincial Court (Criminal Division). This was one of the first times a sitting judge participated in a law reform and policy development committee, and his first-hand experience of day-to-day challenges faced by the Provincial Court was no doubt invaluable to the committee's efforts. In 1975, Doug Ewart, then counsel in the Criminal Law Division and Policy

Development Division of the Ministry of the Attorney General, began to assist the committee, which soon broadened its mandate to cover "all aspects of provincial offence proceedings."[9]

Norman Nadeau (left) with Archie Campbell, two of the members of the law reform and policy development committee responsible for re-thinking the approach to provincial offences.

By 1978, the committee had designed and received approval for "comprehensive reforms."[10] In March 1979, the *POA* was passed. Its coming into force was delayed for a year, however, in order to allow time to implement new court systems and procedures and provide training to justice system participants — ranging from judges and court personnel to provincial and municipal police. Finally, in March 1980, the *POA* replaced the *Summary Convictions Act*, "opening a whole new era in provincial offence procedure in Ontario."[11]

The *POA* was intended to create a procedure that reflects the distinction between provincial offences and criminal offences[12] and to foster "convenience, clarity, efficiency, and simplicity."[13] Under the POA, all provincial offences are dealt with in the same fashion if and when they come to trial. Prior to trial, however, the POA distinguishes amongst methods of proceeding with offences. One category includes 90 per cent of provincial offences that are relatively minor in nature, such as failing to come to a full stop at a stop sign or failing to properly maintain one's yard. Another comprises 10 per cent of offences – such as environmental protection offences, major construction safety violations, security trading offences, consumer protection offences, and serious driving offences – that are more serious, both in terms of the harms they cause and the penalties they warrant. While the more serious provincial offences continue to be governed by a more formal and detailed framework akin to the summary conviction procedure, most provincial offences are governed by a simplified procedure.

Under the *POA*, proceedings for minor offences are commenced by a police officer or provincial offences officer giving the person charged a "certificate of offence," often referred to as a "ticket." A person disputing that he or she committed the offence described in the certificate could now request a trial simply by checking the appropriate box on the back of the notice and submitting it by mail. A person wishing to plead "guilty" could also now do so and pay the associated fine by mail (or today, online) without having to attend court. The *POA* also made it possible to plead "guilty with an explanation" without needing to attend court at a set date and time. A person could go to court at his or her convenience, meet informally with a justice of the peace, and give an explanation or request additional time to pay the fine. The justice of the peace then assessed the appropriate penalty in light of the person's submissions.

A Range of Procedures for a Range of Offences

The *POA* contains three procedural streams that correspond to different categories of provincial offences.

Part I of the *POA* applies to routine minor violations – such as failure to wear a seatbelt – that are prosecuted by a certificate of offence.

Part II of the *POA* covers parking infractions, prosecuted by a certificate of parking infraction.

Part III of the *POA* covers more serious offences – for example, a violation of the Occupational Health and Safety Act that resulted in severe injury to a worker. These are prosecuted by laying an information, much like Criminal Code offences.

As Doug Ewart observes, "The offences covered by the three parts of the Act ranged from speeding tickets to multi-million dollar pollution offences." The creation of three procedural streams helps to ensure that the process adopted for each offence corresponds to its gravity.

(Interview of D. Ewart for OCJ HIstory Project, 2014)

These measures may now seem entirely commonplace – indeed, only too familiar to those of us who have had to deal with parking tickets or other minor offences – but at the time they were profound innovations. In fact, some thought certain aspects of the new regime went too far. For example, if a person simply didn't respond to a ticket – in other words, he or she did not select any of the three options set out above – he or she would be found guilty of the offence without the need for a trial. Doug Ewart recalls, "The idea that you could give someone a ticket and if they didn't respond they could be convicted was shocking to the criminal bar."[14]

A New Element of the Court

At the same time as it implemented these changes, the Ontario government adopted the *Provincial Courts Amendments Act*. The legislation created the Provincial Offences Courts as a separate division of the Provincial Court with exclusive jurisdiction over all provincial offences. Previously, provincial offences had been tried in the Provincial Court (Criminal Division), with the result that persons charged with provincial offences – even very minor ones – would find themselves sharing courtrooms with individuals charged with serious crimes.

The distinction between Provincial Offences Courts and criminal courts – like the distinction between provincial offences procedure and criminal procedure – was intended to ensure provincial offences could be addressed with "much less rigidity and formality"[15] than crimes – and without the stigma commonly associated with criminal proceedings. As Drinkwalter and Ewart wrote, the creation of the Provincial Offences Court was intended to accomplish two goals:

> *"[F]irst, persons charged with provincial offences will not await arraignment alongside persons charged with robbery, rape and murder; second, it is anticipated that, over time, prosecutors and judicial personnel will come to associate the Provincial Offences Court with a different mind-set and approach. With an entirely different type of offence and offender before it, the court can*

> *relax some of the attitudinal rigidity which may be necessary in courts dealing with criminal offences. Persons who breach provincial laws have to be prosecuted and the offences have to be fairly and firmly interpreted, but offenders ought not be treated like criminals, whether inadvertently or by association."*[16]

The task of cultivating this new and different approach fell primarily on the shoulders of justices of the peace, who heard most of the cases in Provincial Offences Court.

Impact On the Work of the Provincial Court

The *POA* significantly expanded the role of both justices of the peace and judges of the Provincial Court, although it affected the work of justices of the peace much more extensively. From the outset, *POA* matters were ordinarily tried by justices of the peace, and a decision of a justice of the peace in a *POA* trial could be appealed to a judge of the Provincial Court. The *POA* thus made the justice of the peace bench a trial court, and the Provincial Court judges bench an appeal court. Both faced challenges in growing into these new roles.

With justices of the peace handling most trials, the need for education was vital, as George Thomson recalls:

> *When I was Deputy Minister of Labour, we were always concerned that many justices of the peace did not understand the importance, in both real and symbolic terms, of prosecutions against employers and employees who violated health and safety regulations. Often these cases were handled quickly, with small fines for activity that had major implications for workplaces across the province. Our sense was that the education of justices of the peace did not adequately bring home the importance of their role under the new legislation.*[17]

In fact, for an extended period, it was simply assumed that justices of the peace would learn on the job. Andrew Clark, the Senior Advisory Justice of the Peace for Ontario from 2004 to 2014, recalls that when he was sworn in as a justice of the peace in 1987 he was expected to begin work the next day – presiding over *POA* matters in night court at Old City Hall in Toronto – without any formal training at all. At his swearing-in ceremony, Clark raised his hand and asked Chief Judge Hayes if he could "shadow" a sitting justice of the peace. He was allowed to do so for several weeks, and "shadowing" is now a routine part of the training that new justices of the peace experience.[18]

Clark was a lawyer before becoming a justice of the peace, and therefore already had experience interpreting statutes and cases. The same was not true of most of his colleagues. Justices of the peace are "not traditionally lawyers" but instead "come from all walks of life."[19] At the time the *POA* and *Provincial Courts Amendment Act* took effect, virtually none of the sitting justices of the peace and very few new appointees were legally trained. A great deal of commitment, hard work and perseverance was required of justices of the peace, who were suddenly expected to become familiar with, and effectively and fairly apply the hundreds of statutes and by-laws covered by the *POA*. They were assisted in this process by members of the committee that had developed the *POA*, who travelled across the province providing training to prepare justices of the peace for the coming into force of the *POA*.

The judges of the Provincial Court faced their own difficulties in exercising their new appellate role. Provincial Court Judge Rick Libman was a Crown Attorney at the time these changes came into effect, and describes the appeal procedure as cumbersome:

> *"The testimony heard before a justice of the peace in Provincial Offences Court was recorded but it wasn't transcribed. That meant that if a decision of a justice of the peace was appealed, a Provincial Court judge would have to listen to the recording in order to know the evidence. The tapes were sometimes lengthy and often there were equipment malfunctions or other issues, so*

parts would be inaudible. As a Crown Attorney I found it incredibly time-consuming and often frustrating to have to review these tapes in order to prepare for an appeal, and I'm sure judges found it an equally vexing process."[20]

Complex Justice: Liability and Penalties

This drawing of a Justice of the Peace hearing and recording a *Provincial Offences Act* proceeding was included in *Minor Offences*, a Ministry of the Attorney General publication explaining the new legislation and procedures.

Although the *POA* was billed as "simple justice," administering it was a complex role for justices of the peace to take on. Justices of the peace have been described as "the workhorses of the provincial regulatory system,"[21] enforcing hundreds of statutes ranging from the *Highway Traffic Act* to the *Occupational Health and Safety Act* to the *Environmental Protection Act*. And while provincial offences are distinct from "true crimes"; they still require that the court determine liability — that is, whether the defendant is guilty of the offence – and decide on an appropriate penalty. Those questions can be very complicated, both factually and legally, and pose specific and unique challenges in the context of regulatory offences.

In criminal proceedings, the Crown Attorney bears the burden of proving that the defendant not only committed the act alleged but did so "intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them."[22] This is referred to as having a "guilty mind" or *mens rea*. For regulatory offences like those covered by the *POA*, in contrast, there is no

requirement of mens rea. For some provincial offences, the only question is whether the defendant did the act alleged. These are called "absolute liability" offences.

In *R. v. Sault Ste. Marie*, a case decided in 1978 – shortly before the *POA* came into effect – the Supreme Court of Canada held that there should be a middle ground between crimes and absolute liability offences.[23] Most provincial offences fall into this middle ground, called "strict liability." Once the Crown Attorney has proven beyond a reasonable doubt that the defendant committed the act, it is then open to the defendant to prove, on a balance of probabilities, that he or she took reasonable care to prevent the harm from occurring, or, in other words, was not negligent. This is often referred to as a "due diligence" defence.

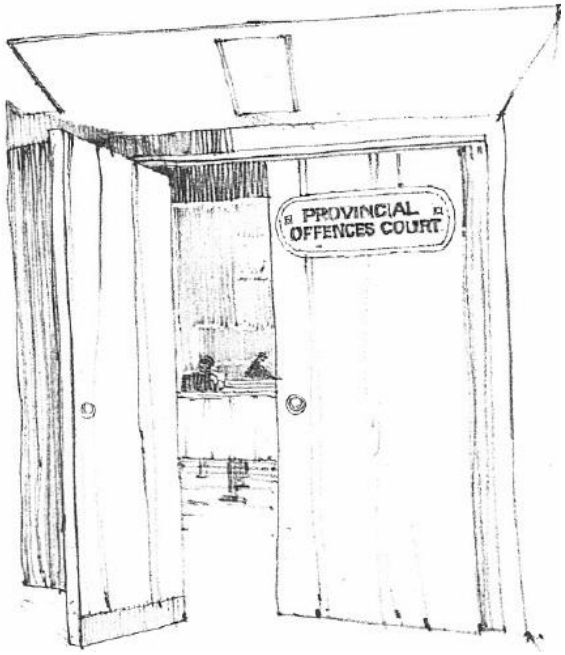
For example, a defendant charged with a violation of the *Occupational Health and Safety Act* for allowing dangerous machinery to be operated without properly functioning protective equipment might show that he or she took reasonable care by conducting regular inspections of the machinery, holding training sessions to educate workers about the importance of the protective equipment, and instituting a policy that required all protective gear to be checked at the beginning of each shift. In these circumstances, even if the Crown Attorney could prove that the protective equipment failed, the defendant would almost certainly be acquitted.

At first glance, it would seem to be a good thing for individuals charged with provincial offences to have the possibility of a due diligence defence. Justice of the Peace Susan Hoffman, who is also a Special Lecturer in Regulatory Offences at the University of Windsor Law School, explains the reality was far different. "Neither the general public nor, in many cases, members of the legal community fully appreciated the substantive and procedural impact of the *Sault Ste. Marie* decision. A lot of cases came down to a company's or an individual's inability to lay out a due diligence defence. Often a justice of the peace would be hearing a trial and a witness would refer to documents – employee policies, for

example, or correspondence – that seemed to suggest that a due diligence defence might be available, but those documents wouldn't be introduced into evidence. This was especially true in cases in which the defendant was self-represented."[24]And the vast majority of people appearing in *POA* courts were self-represented, as they are today.[25]

Not only did justices of the peace have to interpret and apply the new strict liability standard that is unique to regulatory offences, they frequently had to do so without the assistance of counsel and without all of the evidence that might be available.

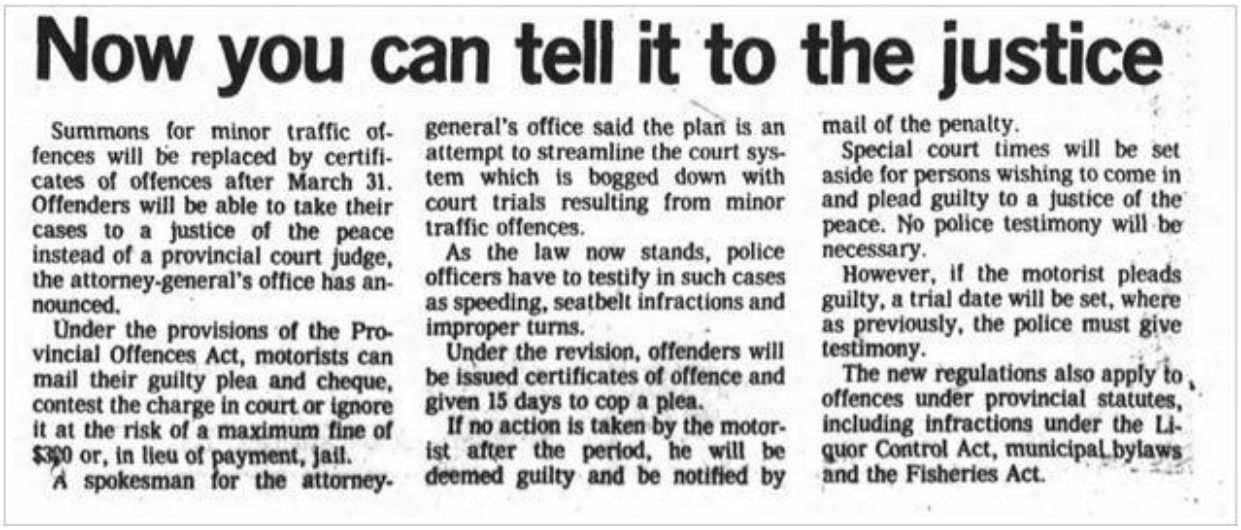
Justices of the peace also had to craft appropriate penalties for those convicted of provincial offences, and at this stage, too, they faced unique challenges. The *Criminal Code* sets out a number of sentencing principles, including denouncing the unlawful conduct, deterring both the offender and other persons from committing offences, rehabilitating offenders, and promoting a sense of responsibility and acknowledging the harm done to victims and the community. When a judge issues a sentence for a *Criminal Code* offence, he or she can look to all of those principles for guidance. In the 1982 case of *R. v. Cotton Felts*, the first sentencing appeal under the *POA* to reach the



This illustration is taken from a booklet, Minor Offences, published by the Ministry of the Attorney General to inform the public of this new legislation and new Court.

Ontario Court of Appeal, the court held that general deterrence was the primary objective of sentencing under the *POA*. In other words, a sentence imposed for a *POA* offence should first and foremost deter the general public from committing such an offence.

It is certainly understandable that the objective of general deterrence is "particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens at large to expect that basic rules are established and enforced to protect the physical, economic and social welfare of the public."[26] At the same time, it can be very difficult to balance that goal against the circumstances



Now you can tell it to the justice

Summons for minor traffic offences will be replaced by certificates of offences after March 31. Offenders will be able to take their cases to a justice of the peace instead of a provincial court judge, the attorney-general's office has announced.

Under the provisions of the Provincial Offences Act, motorists can mail their guilty plea and cheque, contest the charge in court or ignore it at the risk of a maximum fine of $300 or, in lieu of payment, jail.

A spokesman for the attorney-general's office said the plan is an attempt to streamline the court system which is bogged down with court trials resulting from minor traffic offences.

As the law now stands, police officers have to testify in such cases as speeding, seatbelt infractions and improper turns.

Under the revision, offenders will be issued certificates of offence and given 15 days to cop a plea.

If no action is taken by the motorist after the period, he will be deemed guilty and be notified by mail of the penalty.

Special court times will be set aside for persons wishing to come in and plead guilty to a justice of the peace. No police testimony will be necessary.

However, if the motorist pleads guilty, a trial date will be set, where as previously, the police must give testimony.

The new regulations also apply to offences under provincial statutes, including infractions under the Liquor Control Act, municipal bylaws and the Fisheries Act.

This article appeared in *The Ottawa Journal*. Given the profound changes the *POA* brought to the justice system, the new legislation received extensive coverage in the newspapers of the day. *The Ottawa Journal* published a correction to this article. In the second-last paragraph of this story, it should have read: "if a motorist pleads NOT guilty, a trial date will be set." (The *Ottawa Journal,* January 22, 1980.)

of individual offenders. A fine that is large enough to deter the general public from committing an offence may totally bankrupt an individual on a fixed income. Moreover, whereas the *Criminal Code* sets out a sentencing range for each offence, most laws covered by the *POA* do not provide any such guidance. For these reasons, the task of crafting a fit sentence can be far more challenging for a justice of the peace sitting in Provincial Offences Court than for a judge of the Provincial Court (Criminal Division).

In some respects, streamlining the process for defendants made the work of the court more challenging. In the criminal context, an accused entering a guilty plea must appear before a court. The court will be advised of the specific facts of the offence and the circumstances of the offender, and will have a chance to ask for any further information that may assist in reaching the decision on sentencing. Recall that as a result of the changes made by the *POA*, a defendant who wished to plead guilty to a provincial offence could do so simply by checking the appropriate box on the notice or ticket and returning it by mail. But what penalty should be imposed on those who did not choose to go to trial? The only fair solution was to impose a fixed and automatic penalty for each offence. This too involved a great deal of work for the court. As Doug Ewart has noted, "The Chief Judge of the Provincial Court had to come up with a standard penalty ("set fine") for hundreds of offences. A 'set fine' was a new concept, and determining the appropriate "set fine" for each offence was a new role."[27]

A Balancing Act

Achieving "simple justice" requires finding an appropriate balance between efficiency on the one hand, and procedural fairness on the other. Striking that balance is rarely easy and maintaining it can be even more difficult. In 1980, the *POA* shifted the balance significantly in favour of increased speed and informality. At the time, there was general agreement that this was a much needed and profound transformation to the justice system in Ontario. As George Thomson explains, "It was clear to everyone at that time that reform was absolutely essential if the court system was not to become totally paralyzed."[28] Whether, in fact, the *POA* met its goal of simplifying court processes and procedures while preserving justice would be determined over the years that followed.

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[1] Douglas Drinkwalter & Douglas Ewart, Ontario Provincial Offences Procedure (Toronto: The Carswell Company Limited, 1980), p.iii

[2] "Simple Justice" poster. This poster was prepared by the Ministry of the Attorney General to announce the introduction of the POA. It was posted in courthouses and published in newspapers across Ontario.
[3] Drinkwalter & Ewart, Provincial Offences Procedure, p. ii.
[4] Ministry of the Attorney General, Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals (Ontario: Ministry of the Attorney General, April 1978), p. 20.
[5] *Ibid*.
[6] Ministry of the Attorney General, Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals (Ontario: Ministry of the Attorney General, April 1978), p. 3.
[7] Interview of F. Devine for OCJ History Project, 2014.
[8] Campbell later served in a number of other roles, including Deputy Attorney General, Provincial Court judge, and Superior Court judge. He also presided over inquiries into the Ontario SARS outbreak and the police investigation of Paul Bernardo.
[9] Drinkwalter & Ewart Provincial Offences Procedure, p. vi.
[10] Drinkwalter & Ewart Provincial Offences Procedure, p. vi.
[11] Drinkwalter & Ewart, Provincial Offences Procedure, p. vii.
[12] Ministry of the Attorney General, Minor Offences, p. 2. (A booklet published at the time the POA was enacted.)
[13] Ministry of the Attorney General, Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals (Ontario: Ministry of the Attorney General, April 1978), p. 6.
[14] Interview of D. Ewart for OCJ History Project, 2014.
[15] Ministry of the Attorney General, Provincial Offences Procedure: An Analysis and Explanation of Legislative Proposals (Ontario: Ministry of the Attorney General, April 1978), p. 92.
[16] Drinkwalter & Ewart Provincial Offences Procedure, preface.
[17] Interview of G. Thomson for OCJ History Project, 2014.
[18] Interview of Andrew Clark for OCJ History Project, 2014
[19] Ontario Justice Education Network, Update, Fall/Winter 2005, p. 2.
[20] Interview of R. Libman for OCJ History Project, 2014.
[21] Jamie Cameron, "A Context of Justice: Ontario's Justices of the Peace – From the Mewett Report to the Present" (2013). Comparative Research in Law & Political Economy. Research Paper No. 44/2013. p. 18
[22] *R. v. Ste. Sault Marie*, [1978] 2 S.C.R. 1299, p. 1309.
[23] *R. v. Sault Ste. Marie*
[24] Interview of S. Hoffman for OCJ History Project, 2014.
[25] Interview of Andrew Clark for OCJ History Project, 2014
[26] *R. v. Cotton Felts Ltd. (1982),* 2 C.C.C. (3d) 287 at [need to get actual reporter to determine page number]
[27] Interview of D. Ewart for OCJ History Project, 2014.
[28] Interview of G. Thomson for OCJ History Project, 2014

Period II: 1968-1989 Major Changes

Moving Bail Hearings from Jails and Police Stations to Courthouses

Inappropriate Surroundings

> "We the find surroundings so dismal and so inappropriate that Justice of the Peace R.E. Faulkner simply refused to allow the proceedings – bail hearings – to continue. It was not just that the reception area for prisoners at the Don Jail (a room used for delousing and rectal examinations) contributed to a bleakness of atmosphere; it meant the exclusion of members of the public from a process which is supposed to be open."
>
> *The Globe and Mail*, Editorial, October 31, 1980

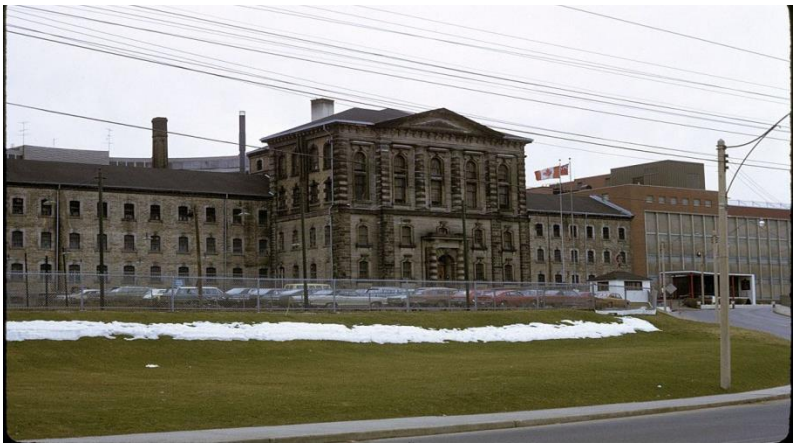
There are two decisions by justices of the peace that received little attention over the years but they have had a profound impact on the Ontario Court of Justice. A decision by Justice of the Peace Ralph Faulkner in 1980 resulted in thousands of citizens being spared improper and possibly illegal time in jail. Faulkner's decision and a decision by Justice of the Peace P. Deacon in 1989, were catalysts in opening courts to the public and the press by moving bail hearings from jails and police stations to proper courtrooms.

Hearings in the Don Jail

In 1980 and before, bail courts were set up in Toronto's Old City Hall on weekdays and Saturdays. People arrested on Friday and not released by that evening were typically held overnight in a single cell in a police station and then taken before a judicial officer presiding in the Saturday bail court at the Old City Hall. These people were accorded their legal rights and many were able to obtain release on bail.

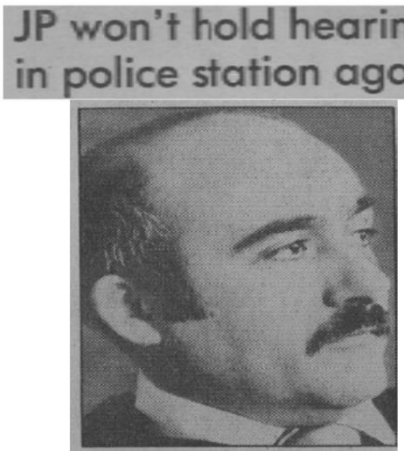
However, no bail courts operated at the Old City Hall on Sundays. To deal with that situation, a person arrested Saturday evening or early Sunday morning was taken to Toronto's Don Jail – not a cell in a police station – put through an invasive body search at the jail and routinely held, often in shared cells, until Monday morning. For many people, this meant an extra day in jail.

The *Criminal Code* required – and continues to require – an arrested person to be brought before a justice within twenty-four hours or as soon as practicable. It was to comply with this requirement – and to assist the police in getting people out of the holding cells in the various police stations – that people arrested on a Saturday night or early Sunday morning were taken directly to the Don Jail. A justice of the peace was assigned to attend at the jail on Sunday mornings for hearings involving people arrested that morning or the night before. The justices of the peace would routinely remand the accused person to appear on Monday morning in one of the various bail courts located in courthouses throughout Toronto. Because the person had no access to counsel, there was no possibility of a full bail hearing in the jail to determine whether the person should be released or not. The jail was not open to the public or press. There was no Crown Attorney or duty counsel present. If a friend or relative contacted a police station on a Saturday evening looking for someone who had been arrested, they were advised the person would be attending a bail court on Monday morning. There was no mention of the Sunday so-called "bail court" held in the Don Jail.



Don Jail, December 2009. (Photo courtesy: City of Toronto Archives, Fonds 124.)

Senior members of the judiciary were made aware of the conditions at the Don Jail and the fact that these proceedings were not open to the public. Despite this knowledge, justices of the peace continued to be assigned to the jail on Sunday mornings for these proceedings. On Sunday, October 26, 1980, Justice of the Peace R. E. Faulkner attended at the jail and declined to exercise jurisdiction over the sixteen prisoners in custody at that time. "Would you not agree," Faulkner asked during the proceedings, "we're sitting here in the bowels of the jail?" "Yes, I would agree," responded the staff sergeant who was acting in the capacity as prosecutor. Faulkner continued:



Justice of the Peace Ralph Faulkner. (Source: *The Globe and Mail*, October 31, 1980.)

> *"We have here no defence counsel, there are no legal aid representatives, there are no members of the public present, including the press and there can be no witnesses present to give evidence or speak on behalf of the accused. What is alarming…is the fact that none of these persons would be allowed admittance to these proceedings…The open court provides some safeguards against unjust or unfair proceedings against an accused. It certainly maximizes the chances of an equal and impartial administration of justice to all persons. These basic rights of the accused in public deserve our constant attention.*
>
> *On the basis of the facts already described, it is my opinion that I would not be complying with fundamental legal principles or the requirements of the statutes if I were to attempt to hold court here and now. For these reasons, I am refusing to exercise jurisdiction until proper facilities are made available with the courtroom or place being open to the public and where the court can effectively exercise its authority and preserve order."*[1]

The Attorney General made no attempt to appeal this decision or to seek any order to continue the practice and Chief Judge Hayes was forced to move these hearings out of the jail.

Justice of the Peace Faulkner exhibited considerable courage in making that decision. At that time, the *Justices of the Peace Act* was far different than it later became. There was no Justice of the Peace Review Council in place to deal with complaints against justices of the peace. There was no requirement for a public hearing before a justice of the peace could be removed from office. In effect, justices of the peace were appointed to office at the pleasure of the Lieutenant Governor in Council. Fortunately, at the time the case became public and Faulkner's decision was widely reported and enjoyed support in the press. Further, the Canadian Civil Liberties Association strongly supported the decision.

Hearings in Police Stations

Unfortunately, the solution to the problem devised by the Chief Judge and officials of the Ministry of the Attorney General was almost as bad as holding the hearings in the Don Jail. Sunday hearings were moved to four police stations in Toronto. The police stations were not equipped with accommodations that could be used to function as a courtroom. Public access was still an issue as the various rooms selected in police stations for these hearings could barely accommodate the participants and left almost no room for the public.

The transcript of the proceedings in *R. v. Sytron*, heard on April 9, 1989 before Justice of the Peace P. Deacon vividly highlights the folly of attempting to hold bail hearings in a police station. "I would be pleased to know why we have to be in the back room of a police station where really the public, if they had access, couldn't get in the room," stated Deacon. "There is no room for them. I note we have whiskey bottles behind us. We have the tailgate of a truck beside us. There must be a hundred empty courtrooms in this community today. Is there some reason why we have to be down here?...the spirit of the law certainly is being offended by calling this an open bail hearing."[2] The whiskey bottles and truck

tailgate were in fact exhibits to be used in another proceeding but all agreed that the room was not open to the public and Deacon refused to proceed with the bail hearing.

In early 1992, an official of the Toronto Police Service recommended to the senior judiciary, including Chief Judge Sidney Linden, that the bail hearings held in courtrooms at the Old City Hall on Saturdays could be moved into these police stations and dealt with as they were on Sundays. This plan would have made a bad situation even worse. Fortunately, this plan was not implemented and, shortly afterwards, bail courts were moved out of police stations and into courthouses.

The decisions of Justice of the Peace Faulkner in 1980 and Justice of the Peace Deacon in 1989 were the catalysts that led to all bail hearings – no matter what the day – being heard in an open court. Further, Faulkner's decision resulted in thousands of accused persons having a proper bail hearing on a Sunday and not simply being routinely held in a jail until Monday.

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[1] *Bail Proceedings* (26 October 1980) Toronto (Provincial Court (Criminal Division))
[2] *R. v. Sytron* (9 April 1989) Toronto (Provincial Court (Criminal Division))

Period II: 1968-1989 Major Changes

The Introduction of the *Charter of Rights and Freedoms*

NOTE: This essay was written by Justice Shaun Nakatsuru

On February 24, 1942, an order-in-council passed under the *Defence of Canada Regulations* of the *War Measures Act* gave the federal government the power to intern all "persons of Japanese racial origin."

NOTICE TO ALL JAPANESE PERSONS AND PERSONS OF JAPANESE RACIAL ORIGIN

TAKE NOTICE that under Orders Nos. 21, 22, 23 and 24 of the British Columbia Security Commission, the following areas were made prohibited areas to all persons of the Japanese race:—

LULU ISLAND (including Steveston)
SEA ISLAND
EBURNE
MARPOLE
DISTRICT OF QUEENSBOROUGH
CITY OF NEW WESTMINSTER
SAPPERTON
BURQUITLAM
PORT MOODY
IOCO
PORT COQUITLAM
MAILLARDVILLE
FRASER MILLS

AND FURTHER TAKE NOTICE that any person of the Japanese race found within any of the said prohibited areas without a written permit from the British Columbia Security Commission or the Royal Canadian Mounted Police shall be liable to the penalties provided under Order in Council P.C. 1665.

AUSTIN C. TAYLOR,
Chairman,
British Columbia Security Commission

In 1942, the federal government was fully entitled to exclude Japanese Canadians from areas in Canada and also to intern them.

One consequence of this law was that men of Japanese origin between the ages of 14 and 45 were taken into custody and consigned to work as road camp labourers in the British Columbia interior or on farms in the Prairies.

The forced relocation and internment of persons who looked different from the mainstream of Canadian society – universally recognized today as a shameful injustice perpetrated on Japanese-Canadians – was the legitimate product of the democratic process. Parliament did what it was fully entitled to do under the prevailing constitutional law. Had a legal challenge to such an exercise of power been made to the courts at the time the order was issued, that challenge would not have succeeded. Parliament was supreme in its own domain. Furthermore, such a challenge would have not been met with much sympathy by the white men (and they were almost uniformly white men) who were judges sitting in the courts. This was not because the judges were lacking in integrity or compassion. Rather, they were the

product of their times. Judges were educated, practised as lawyers, and then presided when appointed, in the legal era when the Canadian constitution meant little more than the "peace, order, and good government" clause when it came to the concept of civil liberties. In short, judges had a mindset that promoted the idea that the surest path to a civil, peaceful, and harmonious community was the strict application of law, the due promotion of social order, and the consequent preservation of the *status quo*.

Enactment of the *Charter*

The *Canadian Charter of Rights and Freedoms* has fundamentally changed this. Since its enactment in 1982, the *Charter* has imposed limits on the extent to which the state can interfere with the rights and freedoms of Canadians. In the criminal law context, the *Charter* is not meant to promote or protect collective rights or advance equality. It is primarily a means to delineate the boundary between an individual's autonomy, his or her right to be left alone, and state action. In so doing, the *Charter* has changed the face of criminal justice in this country. No longer are individuals powerless to challenge state laws and actions that are supported by the majority. No longer are judges required to respect the choices of the executive or legislature when those choices violate fundamental societal values.

On Parliament Hill in Ottawa, on April 17, 1982, the Queen signed the *Constitution Act, 1982* into law.

For the overwhelming majority of those interacting with the criminal justice system in this province, the Ontario Court of Justice is the face of justice in Ontario. The *Charter* has helped transform this Court. It has altered the face of justice significantly, and for the better. The following outlines some of the ways the *Charter* has had that impact.

Enhanced Powers and Responsibilities of the Court

First of all, the *Charter* has meaningfully enhanced the powers and responsibilities of the Court. This can be illustrated by a few examples.

> Section 52(1) of the *Constitution Act, 1982* states:
>
> *The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*

The *Charter,* as part of the Constitution, is therefore given primacy over other laws. Early on in constitutional litigation, the question arose: could provincial courts such as the Ontario Court of Justice exercise this power under section 52(1)? The Supreme Court of Canada held that provincial courts have the power to declare legislation invalid in criminal cases and this included the power to dismiss charges where the legislation is invalid by reason of a violation of the *Charter.*[1] This declaratory power under section 52(1) was not the preserve of the superior courts. In effect, if an order-in-council such as that used to intern and relocate Japanese-Canadians during World War II resulted in charges being brought in the Ontario Court of Justice, and that order-in-council was found to be constitutionally invalid, then the Court's decision would trump Parliament's will. The charges, no matter how serious, would be dismissed. One can hardly imagine a greater authority or responsibility being given to a single, unelected, presiding judge.

In a similar vein, before the advent of the *Charter*, under the common law, judges had little discretion to exclude evidence based upon conduct of the investigative authorities. In other words, regardless of the nature and scope of illegal or unconscionable actions of the police, the judge was required to receive at trial any evidence uncovered as a result of those actions. But under section 24(2) of the *Charter*, a court is authorized to exclude evidence obtained in violation of *Charter* rights when its admission could bring the administration of justice into disrepute. The test for such exclusion has evolved, but its latest formulation requires a balanced approach be adopted whereby the factors taken into account give consideration to the seriousness of the violation, the effect on *Charter*-protected interests, and society's interest in the adjudication of the charge on its merits.[2]

Right to Counsel and Freedom from Unreasonable Search and Seizure

When one considers some of the substantive legal rights defined under the *Charter,* clearly it has impacted not only the administration of justice, but also had a deep influence in the nature of policing in the community and the rights enjoyed by all. The right to counsel and the freedom from unreasonable search and seizure are two such legal rights. With respect to the former, individuals arrested or detained are in a vulnerable state under the control and direction of the police. The right to counsel recognizes the interest of such individuals to have ready access to legal advice; in particular to be advised of their right to remain silent and how to exercise that right. While there are always exceptions, the police generally recognize and respect the right to counsel of those who are under their authority. Many of the important right-to-counsel issues were litigated before the Ontario Court of Justice in drinking and driving cases.

With respect to the section 8 right to be free from unreasonable search and seizure, the care and attention the police pay to the limits of their authority and to the drafting of informations to obtain search warrants before intruding into the privacy of the subjects under investigation has significantly

increased in the past years. While other explanations may have contributed to this change – including improved police force education and professionalism, for example – the threat of exclusion of important evidence if the *Charter* right is found to have been breached has played no small role as a catalyst. Being the over-seer of the vast majority of criminal cases – and situated so "close to the ground" when it comes to supervision of the police and familiarity with issues in the communities it serves – the Ontario Court of Justice has proved to be fertile ground for the nurturing of such substantive rights.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

One specific case that could be cited relative to the section 8 right involved police use of sniffer dogs to uncover illegal drugs. [3] In that case, the Ontario Court of Justice judge found that searches at a high school by a sniffer dog and police were unconstitutional and excluded the evidence found as a result of such searches.

Landmark Case: Sniffer Dogs, School Searches, and the Charter: *R.* v. *A.M.*

In 2002, the police accepted a standing invitation from a principal at a Sarnia, Ontario high school to bring sniffer dogs into the school to search for drugs. The sniffer dog reacted to A.M.'s backpack and, without obtaining a warrant, the police opened the backpack and found illegal drugs. A.M. was arrested and charged with possession of drugs for the purpose of trafficking. A.M. argued that his right to be free from unreasonable search or seizure under section 8 of the *Charter* had been violated, and that the evidence should therefore be excluded under section 24(2) of the *Charter*.

The Ontario Court of Justice judge found that there were two searches conducted. The first was by the sniffer dog, which alerted the police to the presence of drugs. The second was the physical searching of A.M.'s backpack by the police officer. The judge found that both of these searches were

"unreasonable," and therefore unconstitutional and excluded the evidence. The Crown appealed this ruling to the Court of Appeal. That court agreed with the earlier ruling. Crown then appealed the decision to the Supreme Court of Canada.

The Supreme Court of Canada held that students are entitled to privacy in a school environment and police do not have the right to conduct searches of public spaces when the search is not authorized by statute or at common law. Since there was no authority for the police search of A.M.'s backpack, it amounted to a violation of section 8 of the *Charter*. The Supreme Court of Canada ruled that the evidence should be excluded pursuant to section 24(2) of the *Charter*.

(R. v. A.M., [2008] 1 S.C.R. 569.)

Right to Trial within a Reasonable Period of Time

Perhaps most controversial has been the section 11(b) guarantee according an accused the right to trial within a reasonable period of time. The implementation of this important right has not been an easy one and has not yet achieved much success in some instances. The dockets of the Ontario Court of Justice remain crowded and in some jurisdictions, particularly in large urban areas which have seen significant population growth, the time to trial has actually increased unacceptably. Early in the developing jurisprudence under the *Charter*, thousands of cases were stayed due to unreasonable delay in the Ontario Court of Justice. This led to much public criticism and a quick retreat by the Supreme Court of Canada in its approach to the test applied for determining whether this section has been violated.[4] That said, the right to a trial within a reasonable time has resulted in innovation in courts in Canada, including the Ontario Court of Justice: more reliance on diversion and alternative methods of dealing with charges; more effective pre-trial screening and disclosure; and a more active role for judges in managing cases and ensuring efficient and timely disposition, whether it be by guilty plea, preliminary

inquiry, or trial. The traditional image of the passive and non-interventionist jurist engaged only when the accused is brought before the Court bears little resemblance to the reality of the role of the judge today. The requirements of section 11(b) have played a major part in development of this type of judicial activism.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right…

(b) to be tried within a reasonable time;

The Impact of the Charter on Judicial Independence

A second positive impact the *Charter* has had on the Ontario Court of Justice relates to judicial independence. Section 11(d) guarantees an accused the right to trial by an independent and impartial tribunal. The Supreme Court of Canada held that under this section, the Ontario Court of Justice enjoys constitutional independence from the government; thus, its judges are accorded security of tenure and financial security.[5] In other words, judges of statutory jurisdiction are treated in these fundamental provisions similarly to Superior Court judges of inherent jurisdiction. It is fair to say that provincial governments have increasingly come to appreciate the constitutional recognition of this status when it comes to working conditions and remuneration of Provincial Court judges. In turn, this has played a substantial role in attracting many more highly qualified applicants to the Ontario Court of Justice, thereby enhancing professionalism on the bench.

A Balancing Act: Charter Values and Court Decisions

The final way the *Charter* has significantly affected the Court is less tangible and more abstract, but at the same time, very apparent and real. It is not only the written text of the Constitution that informs the work of a judge; *Charter* values such as the fundamental freedoms, equality, respect for individual autonomy, and sensitivity to diversity and difference guide a judge's hand when it comes to the interpretation of the common law and the exercise of discretion.[6]*Charter* values are also not confined within the workings of the criminal justice system. They pervade society. These values are informed by and in turn shape community and personal value systems. *Charter* values have greatly influenced the development of the Ontario Court of Justice. It is not a Magistrates' Court of years past but a *Charter* Court: *Charter* values are protected, promoted, and promulgated in everything the Court does. This is not to say that such values are limitless, or that collective values such as community security or legitimate state interests such as law enforcement are ignored or sacrificed at the altar of individual freedom. It has always been, and remains, a Court of balance.

A good illustration of this balance – and how *Charter* values can infuse a decision even when not specifically raised – is provided by a case originating as a child protection matter in the Ontario Court of Justice.[7] Under section 7 of the *Charter*, the liberty interest of a parent was held to encompass the right to nurture and care for one's child, including fundamental decisions such as those involving medical procedures. On the facts of that case, the parents, due to their sincere religious beliefs, refused blood transfusions for their infant child as a part of her medical treatment. The parents' decision could have potentially threatened the life of the child. While the Supreme Court of Canada recognized that section 7 protects the right of the parent to make such a decision, this liberty right does not mean unconstrained freedom.

In any organized society, individual freedom is subject to numerous constraints for the common good. While the state's intervention in this case deprived the parents of their liberty interest, it was held this

action was taken in accordance with the principles of fundamental justice in order to protect the life and well-being of the child.

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Ontario Court of Justice decision in 1995 to grant the Children's Aid Society temporary wardship so that the infant could obtain the blood transfusion was upheld. Beyond the important constitutional principles involved, this case is also noteworthy because the judge at first instance in the Ontario Court of Justice made the ruling without resort to the *Charter*. The case had been brought on an urgent basis and constitutional arguments were not specifically raised. However, the judge recognized the fundamental issue was balancing the rights of the parents with the right of the child and thus, even without expressing it, gave due consideration to competing values underpinning important rights and freedoms specified under the *Charter*.

Engaging the Basic Values of the Canadian Criminal Justice System

This requirement to consider *Charter* values has placed additional burdens and responsibilities on the Ontario Court of Justice. Another example of this is a case involving a witness who wished to testify at a preliminary inquiry while wearing a niqab covering her face except for her eyes due to her religious belief.[8] A preliminary inquiry into charges involves the determination of whether there is sufficient evidence for an accused to stand trial in the Superior Court. Such inquiries also serve an ancillary discovery purpose for the defence. Preliminary inquiries, while not trials, are routinely conducted under well-established tests and laws for procedure and evidence. This particular proceeding, involving the

wearing of a niqab, raised a novel issue which was ultimately litigated to the Supreme Court of Canada. The Supreme Court majority held that the answer to whether the witness could testify wearing a niqab lay in a just and proportionate balance between freedom of religion and trial fairness, based on the particular case before the Court. Writing for the majority, Chief Justice Beverly McLachlin said the decision on whether to allow the face covering must be decided on a case-by-case basis and that judges would have to consider a set of questions before deciding whether to order a witness to remove her niqab.

A niqab is a veil worn by some Muslim women in public. (Photo: Getty Images)

One of those questions would be whether permitting the witness to wear a veil while testifying would create a serious risk to trial fairness. A judge must also consider whether there is a way to accommodate both the rights of the witness and the rights of the accused to see their accuser. According to the majority, in cases where liberty of the accused is at stake, "the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab."

Following the Supreme Court ruling, the preliminary hearing judge followed the test laid out by the Supreme Court and ruled that the witness must remove her veil to testify. However, only the back of the woman's head would be visible to most of the courtroom, and only the accused, lawyers, court staff and the judge saw the front of her face without her niqab.

It was recognized by the Supreme Court that decisions in such cases as this one engage basic values of the Canadian criminal justice system. Such decisions, made by judges of the Ontario Court of Justice, have a life beyond the walls of the courtroom. *Charter* values and how they are respected in our diverse

but equal communities can and often are debated at work, social gathering places, and homes. Every judicial decision respecting Charter values places a great responsibility upon the judge deciding it.

There is though no denying the influence of *Charter* values. These values have fundamentally changed the face of justice in Ontario. Indeed, the values in section 15 – the equality rights section of the *Charter*– have been a factor in changing the face of the Court where judges – women and men of diverse backgrounds and racial groups – not only preside but feel welcome and respected. Such has been the reach of *Charter* values on the development of the Ontario Court of Justice.

The Influence of the Charter

There are of course critics of the influence of the *Charter* in the legal realm. Some of the criticisms are valid and worthy of due consideration. However, fundamentally, the *Charter* has had a positive effect on the Ontario Court of Justice. If nothing else, the *Charter* and the Court can provide a shield to individuals or minorities who may be vulnerable to ill-advised and unjust state action responding to the clamour of an uninformed majority. In a newspaper article in *The Globe and Mail,* former justice of the Supreme Court of Canada, Louise Arbour, insightfully set out her opinion of how the *Charter* helped define Canada.

> *Many will deplore so-called judicial activism and the legalization of politics. They are wrong. Fundamental rights enforced by independent courts enrich a democracy that has set constitutional limits on itself.* Charter *litigation has provided a high-quality intellectual forum in which to debate issues that are not best left to majority diktat.*[9]

[1] *R. v. Big M Drug Mart,* [1985] 1 S.C.R. 295.
[2] *R. v. Grant,* (2009) 245 C.C.C. (3d) 1 (S.C.C.).
[3] *R. v. A.M.,* [2008] 1 S.C.R. 569.
[4] *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771.
[5] *R. v. Valente,* [1985] 2 S.C.R. 673.

[6]*Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640; *R. v. National Post*, [2010] 1 S.C.R. 477; *Mackin v. N.B.*, [2002] 1 S.C.R. 405.
[7]*B. (R.)* v. *Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315.
[8]*R. v. N.S.,* [2012] 3 S.C.R. 726.
[9]"How the *Charter* helped define Canada," *The Globe and Mail,* April 16, 2012.

Period II: 1968-1989 Major Changes

The Introduction of Legal Aid

One of the most significant developments during this period was the advent of the modern Ontario Legal Aid Plan. For many years, legal services had been offered to low-income Ontarians on a purely voluntary and largely charitable basis. In 1951, the provincial government and the Law Society of Upper Canada – the body that governs lawyers in Ontario – took the first steps toward formalizing the provision of volunteer legal services. The *Law Society Amendment Act, 1951* authorized the Law Society to establish the "Ontario Legal Aid Plan," in order to compensate lawyers for the expenses they incurred, but not the time they spent, when representing low-income Ontarians.

By 1963, however, it was clear that the plan made excessive demands of volunteer lawyers, whose efforts could not keep up with the demand for legal aid services. The Attorney General convened a Joint Committee of the government and Law Society to review the *status quo* and make recommendations for the future of legal aid in Ontario.

The Joint Committee rejected the public defender model adopted in the United States on the basis that, for criminal cases, it was "wrong in principle that both prosecutor and defender are employed by the same master" and that the impersonal and bureaucratic nature of the public defender model made it impossible to exercise "the zeal and vigour which should be characteristic of defence counsel in every case."[1]

Instead, the Joint Committee recommended a plan much like those operating in England and Scotland. Under this approach to legal aid, sometimes referred to as the "judicare" model, services are provided to low-income persons by private lawyers on the basis of certificates issued by the legal aid plan. In order to ensure that recipients of legal aid had a meaningful choice of counsel and that senior members

of the bar participated in the plan, the Joint Committee recommended that lawyers' fees be paid at a reduced but reasonable rate – approximately 75 per cent of their usual fees.

The "Judicare" Model

The "judicare" approach to legal aid is much like the "medicare" approach to health care. Under our publicly-funded health care system, Ontarians are free to see any doctor they wish, so long as that doctor has space available. Similarly, under our publicly funded legal aid system, an Ontarian with a legal aid certificate is free to retain any lawyer he or she wishes, provided that lawyer is prepared to take the case.

In addition to certificates, our legal aid system also provides "duty counsel" – lawyers who are present in court to provide advice and assistance to anyone who does not have a lawyer.

In keeping with the analogy between medicare and "judicare," a lawyer retained on a legal aid certificate can be thought of as roughly comparable to a family doctor – at least for the duration of the matter for which the certificate is issued. That lawyer will know the individual's file, be available to provide advice and obtain instructions on an ongoing basis, and represent the individual at all stages of the proceeding.

A lawyer acting as duty counsel, in contrast, is more like a doctor in a walk-in clinic who treats patients who do not have or have not been able to see a family doctor. Duty counsel assist individuals in court, but do not have ongoing lawyer-client relationships with them.

Just as the same standards of practice apply to all doctors, the same standards apply to all legal aid-funded lawyers, whether they're retained on a certificate or acting as duty counsel. For example, all communications between duty counsel and the people they assist are privileged and confidential, just like any other solicitor-client communication.

Although the judicare model was the primary means through which legal aid services were proposed to be provided, the Joint Committee also recommended the establishment of "duty counsel," lawyers paid to attend court to provide summary advice and assistance to those who had not yet been able to retain counsel or obtain a legal aid certificate.

In 1967, the Ontario government adopted the Joint Committee's recommendations and enacted the first comprehensive legal aid statute.[2] The establishment of publicly funded, widely available legal aid went hand-in-hand with the general growth of the welfare state during this period. The 1960s also saw the introduction of publicly funded health care, the Canada Assistance and Canada Pension plans, and provincially funded and administered social assistance programs. The principles underlying the development of the modern legal aid plan – that equality before the law required that individuals have access to legal representation regardless of their means, and that legal aid should therefore considered as a right, not a charitable gift – were part of a larger vision of a "just society."

This was the original logo of Legal Aid Ontario, adopted in 1970 and used until 2004.

Duty Counsel in Criminal Court

Duty counsel are now a familiar sight in criminal court, but when duty counsel were first introduced not everyone welcomed their participation in proceedings.

On July 16, 1969, Judge Bolsby was presiding over Provincial Court (Criminal Division) in Toronto. Mrs. Rosa, charged with shoplifting from Honest Ed's department store, appeared before him. She did not have counsel present and said she only spoke a bit of English.

Sidney Linden was acting as duty counsel that day. Linden ultimately became Chief Judge of the

Provincial Court in 1990, but at the time, he was a young lawyer, newly called to the bar. When he heard Mrs. Rosa say she didn't speak very good English he stood up, walked over to her, and asked the court for a moment to consult. Judge Bolsby said he was not interested in hearing from Linden unless he had been instructed to appear for Mrs. Rosa. Linden told Judge Bolsby that he was appearing as duty counsel. Judge Bolsby took the view that Linden had no authority to intervene. When Linden continued to attempt to assist Mrs. Rosa, Judge Bolsby ordered him removed from the courtroom.

Linden was devastated and thought his career was effectively over, especially after the incident drew media attention and Judge Bolsby gave oral reasons for his decision to have Linden removed from court –and then sent a copy of those reasons to the *Criminal Law Quarterly*, which published them in their entirety. To Judge Bolsby it was "inconceivable that the Legislature and Law Society [in enacting the *Legal Aid Act*] would affront a trial judge by compelling him to suspend the business before the court to allow a lawyer, not retained in any way, to interview a person appearing in answer to a charge."

The Legal Aid Programme Committee of the Law Society published a reply to Judge Bolsby in the next edition of the *Criminal Law Quarterly*, which staunchly defended Linden. "It is clear," the Committee wrote, "that Mr. Linden quite properly became concerned that the accused lady may not have understood the proceedings in which she was involved and he took the measures that were appropriate for Duty Counsel under the circumstances." The Committee concluded by acknowledging its considerable debt to those lawyers who had acted as duty counsel, "often at great personal sacrifice," and observing that "the ends of justice are not well served when those counsel are subjected to unnecessary embarrassment and unwarranted criticism."

(Sources: 11 *Criminal Law Quarterly* 354; 12 *Criminal Law Quarterly* 124; Interviews with S. Linden for the OCJ History Project, 2014-15.)

The *Legal Aid Act, 1967* "established a statutory right to legal aid for individual applicants who qualified by virtue of the type of service they required and their financial circumstances."[3] Legal aid certificates began to be issued for a variety of proceedings, including serious criminal offences and family law matters, to applicants whose incomes fell at or below a certain level. The certificate program grew rapidly. By the early 1970s, more than 40,000 certificates were issued annually, and, by 1980, that number had more than doubled to 83,000 certificates per year.[4]

Although some of these certificates were issued for matters heard in other courts or were largely or entirely resolved before reaching the hearing stage, a large majority were issued to individuals whose matters were heard in the Criminal or Family Divisions of the Provincial Court. Otherwise, they would have appeared before the Court without legal representation. The effect of legal aid for those individuals was readily apparent. Rather than having to attend Court and do the best they could to make their case without guidance or assistance, they could retain a lawyer of their choosing to provide them with legal advice and represent them in Court.

The Importance of Representation to the Work of the Court

The impact of legal aid on the work of the Provincial Court was perhaps less obvious but no less profound. As Regional Senior Justice Marc Bode describes, the tasks required of judges increase in both number and complexity when a proceeding involves an unrepresented party:

> *When one or both parties is unrepresented the role and responsibilities of the presiding judge change in two significant ways. In court a judge who deals with unrepresented parties must go to considerable lengths and spend significant time ensuring the court process is understood by the unrepresented parties and remains fair to both parties. Once the "in court" part of a case is completed, a judge dealing with unrepresented parties then needs to arrive at an appropriate decision without having the benefit of receiving at least one lawyer's submissions.*

In court a judges' duties become significantly more challenging when one or both of the parties to a proceeding is unrepresented. A judge cannot act as anyone's lawyer, but will do his or her best to ensure that an unrepresented individual is made aware of the rules of court, understands how to adduce evidence, and appreciates the possible consequences of decisions made in the course of the proceeding. A judge's concern to ensure that the proceeding is fair to both parties despite the fact that one or both is unrepresented will be especially pressing where the outcome is potentially serious – for example, loss of custody of children or a criminal conviction. As a result, proceedings with one or more unrepresented parties typically require far more court time, since part of that time will be spent educating them about procedural matters. Unrepresented parties usually also have to be informed about the substance of the law. Lawyers are trained to perform legal research, identify useful precedents, prepare for and conduct proper examination-in-chief and cross-examination, and then craft legal arguments. Unrepresented parties typically do not have those skills or expertise. Judges must therefore give unrepresented parties as much information as they can about the law while also taking care not to cross the line into providing legal advice.

At the conclusion of the "in court" part of a trial or a sentencing process involving unrepresented litigants, the presiding judge takes on additional responsibilities. After all of the evidence has been heard, litigants who are represented enjoy the benefit of having their lawyers summarize and comment on the evidence, point the judge to the strengths of their case and the weaknesses of the opposing party's case and then provide the judge with a comprehensive legal argument that supports their position. Unrepresented litigants have none of these advantages. This reality obliges the presiding judge to devote significant time and energy outside the courtroom conducting a thorough review of the evidence to ensure all the points that counsel would normally make have been considered. Beyond that, a judge dealing with unrepresented litigants

has the additional responsibility of ensuring that all the legal principles and precedents counsel would normally draw to their attention are considered.

The work of judges outside, as well as inside the courtroom, is almost always more time-consuming in proceedings involving unrepresented parties than in ones in which everyone has a lawyer – and the difficulties judges face are compounded if one or more of the parties is also dealing with mental health or other challenges.[5]

Justice Marion Cohen describes the challenges facing judges in family court matters involving unrepresented parties:

The difficulties for the parties begin when one or both of them first appear in court. The court is presented with pleadings which are hand written, and may be indecipherable. Basic information is missing, such as the names and ages of the children, the dates of cohabitation, and the employment status of the parties. Pages and pages of material may be filed setting out the history of telephone conversations between the parties, or rumours they have heard from friends and relatives. Since no lawyer, bound by responsibilities as an officer of the court, has prepared the pleadings, after preliminary interviews and perhaps investigations, there is nothing to ensure at a prima facie level the credibility or reliability of the pleadings.

When parties are unrepresented the court is obliged at the earliest appearance to inquire into the issues between the parties. Because the parties are unsure themselves, the judge to a degree must assume the role of inquisitor. Thus, whether one or both parties are unrepresented, the judge is compelled to enter into the arena from the outset of the case. Once the judge is able to ascertain the actual relief being sought, the parties will often be sent out to prepare an amended application, or a motion, which will be drafted on the spot.[6]

Given these challenges, it is easy to imagine how much the Court benefitted from increased rates of representation as a result of legal aid. Justice Jack Nadelle, who began his career as an assistant Crown Attorney in 1968 – immediately after the introduction of the Legal Aid Plan in 1967 – and continued to serve as a prosecutor until 1977 when he was appointed to the Provincial Court in Ottawa, saw first-hand the effects of legal aid on the work of the Provincial Court (Criminal Division). He has "no doubt that having accused represented was a relief to both Crown Attorneys and judges. It levelled the playing field and allowed judges to judge and prosecutors to prosecute."[7]

Legal Aid and the Criminal Defence Bar

Justice Jack Nadelle recalls that the advent of Legal Aid also brought a new crop of defence counsel before the court:

Justice Jack Nadelle

> *By the time I started as an assistant Crown Attorney in 1968, the Legal Aid Plan seemed well-established but not yet fully realized. All of the accused seemed to be represented by a small number of lawyers from what was then the criminal bar. At the time, almost all criminal lawyers had ties to a few main law firms that handled criminal cases. It was almost impossible for someone who was not connected to these firms to get retained. With the advent of full legal aid the workload on that small number of criminal lawyers increased, and in response they took on associates or started new firms. In my opinion, this brought many young lawyers into the practice of criminal law as they could now make a living with the certificate legal aid system.*

(Source: Interview with J. Nadell for OCJ History Project 2015)

The Growth of Legal Aid

The Ontario Legal Aid Plan expanded significantly between 1968 and 1989. The first two decades of legal aid in Ontario coincided with massive changes in the law, including the adoption of the *Charter of Rights and Freedoms*, which increased the complexity of many proceedings. The workload of the Provincial Court (Criminal Division) grew as a result of continued "hybridization" of criminal offences, while the Provincial Court (Family Division) had to interpret and apply a range of new legislation such as the *Family Law Act*, the *Children's Law Reform Act*, the *Child and Family Services Act*, the *Family Support Act*, and the *Reciprocal Enforcement of Support Orders Act*. The importance of counsel – both to low-income Ontarians as well as to the Provincial Court – became even more pronounced as a result of such changes. These legal developments – along with population growth – steadily drove up demand for legal aid, with the late 1980s being the "high water mark" of legal aid services in Ontario.

The introduction and widespread availability of legal aid during this period in the Court's history profoundly improved access to justice, making the work of the Provincial Court more efficient, more effective, and more professional.

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[1] Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review*: *A Blueprint for Publicly Funded Legal Services*, August 1997 [McCamus Report], Vol. 1, p 11.
[2] *Legal Aid Act*, S.O. 1966, c. 80, proclaimed in force March 29, 1967.
[3] McCamus Report, p. 12.
[4] McCamus Report, p. 13.
[5] Interview with M. Bode for OCJ History Project, 2015.
[6] Justice Marion Cohen, Chair, Legal Aid Review Submissions Committee of the Ontario Family Law Judges Association and the Ontario Judges Association, "Brief Submitted to: The Ontario Legal Aid Review" April 2, 1997, pp. 13-14.
[7] Interview with J. Nadelle for OCJ History Project, 2015.

Period II: 1968-1989 Major Changes

Expansion of the Provincial Courts' Criminal Law Jurisdiction

> *All criminal cases originate in the Provincial Court (Criminal Division) and 90% of criminal cases are disposed of in the Criminal Division.*
>
> T.G. Zuber, *Report of the Ontario Courts Inquiry,* 1987[1]

When Canada's first *Criminal Code* was enacted in 1892, magistrates were given the power to hear certain types of criminal cases, although many matters were reserved for the Superior Courts.[2] Eventually, the Provincial Courts (which replaced the Magistrates' Courts) began to hear the vast majority of criminal cases, including many serious matters. This transformation was due in large part to a series of *Criminal Code* amendments that took place from 1968 to 1989, during Ontario's Provincial Courts era.

Types of Offences

To appreciate how various amendments expanded the Court's criminal law jurisdiction, it is important to understand the different types of criminal offences.

In Canada, criminal offences are set out in the *Criminal Code,* a federal statute. The *Criminal Code* creates three types of offences, ranging from most to least serious.

Indictable Offences: At the most serious end of the spectrum are "indictable" offences such as murder, aggravated sexual assault, and theft over $5000.
Hybrid Offences: In the middle are "hybrid" offences. They can be treated as indictable or summary conviction offences depending on the facts of each case. It is

up to the Crown Attorney to decide whether a hybrid offence should be treated as indictable or summary.
Summary Conviction Offences: At the least serious end of the spectrum are "summary conviction" offences, such as disturbing the peace or trespassing at night.

Different courts have jurisdiction over different categories of offences:

A small number of the most serious indictable offences—including murder and treason—are exclusively within the jurisdiction of the Superior Court and will normally be tried with a jury.

For most indictable offences—including hybrid offences that the Crown chooses to treat as indictable—accused persons can "elect" or choose the mode of trial. This means that they can choose to be tried by:

- a Provincial Court judge ;
- a Superior Court judge sitting alone ; or
- a Superior Court judge with a jury.

However, there is a category of hybrid offences where, even when the Crown elects to proceed by indictment, the accused will have no choice as to mode of trial, but must be tried by a Provincial Court judge. These offences are referred to as "absolute jurisdiction" offences[3] and typically involve charges of theft, fraud, etc., where the value of the property in question is less than $5000.

Summary conviction offences—including all hybrid offences where the Crown chooses to proceed summarily—are within the exclusive jurisdiction of the Provincial Court.

Re-categorizing Offences

During this period, the federal government amended the *Criminal Code* several times to re-categorize offences. These changes had the effect of transferring jurisdiction to the Provincial Court.

(a) Fewer Offences Exclusive to Superior Court

Several indictable offences that had been within the exclusive jurisdiction of the Superior Court were reclassified to allow the accused to choose the mode of trial, including trial before a Provincial Court judge. Examples: bribery, criminal negligence causing death, manslaughter, and threatening death.

(b) More Hybrid Offences

An increasing number of offences that had been strictly indictable were reclassified as hybrid. This meant that the Crown could treat them as summary where appropriate and the trial would take place in the Provincial Court. Examples: obstruction of justice, obstructing a police officer, assault with intent, assault causing bodily harm, and public mischief.

(c) More Summary Conviction Offences

Some offences that had been classified as hybrid were reclassified as strictly summary, which meant Provincial Court trials for all of them. Examples: theft under $200 and obtaining money or property by false pretences under $200.

> *There are relatively few pure summary conviction offences in the* Criminal Code*. The hybridization of indictable offences was the single most important change that increased the volume and types of cases heard by the Provincial Courts.*
>
> Justice Brian Lennox, former Chief Justice of the Ontario Court of Justice[4]

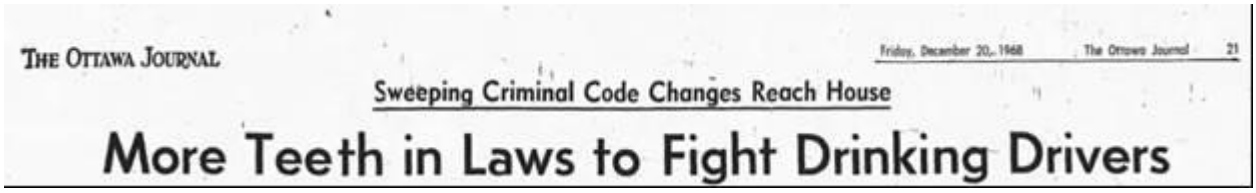
New Offences

In addition to re-categorizing offences, Parliament created some new offences and reclassified others, reflecting shifting societal understandings of how to characterize and respond to certain behaviours. A few examples:

- In 1968-69, the *Criminal Code* was amended to introduce the new drinking driving offences of "over .80" and failing to provide a breath sample. Initially, they were enacted as summary conviction offences but amendments in 1975 made them hybrid offences. The impaired driving related offences ultimately proved to be technically complicated, greatly increasing the number and complexity of charges coming before the Provincial Court—they remain a significant part of its workload.

- In the 1968-69 amendments to the *Criminal Code*, the drug offences of possession of a narcotic and trafficking in LSD and in methamphetamine were created as hybrid offences.

- The 1983 *Criminal Code* amendments replaced the old crimes of rape and indecent assault with the new offence of sexual assault. Depending on the nature and circumstances of the offence, "sexual assault" was either an indictable or a hybrid offence.


THE OTTAWA JOURNAL

Friday, December 20, 1968 The Ottawa Journal 21

Sweeping Criminal Code Changes Reach House

More Teeth in Laws to Fight Drinking Drivers

This headline appeared in *The Ottawa Journal* in 1968. The impaired driving provisions are an example of *Criminal Code* amendments that affected the nature and volume of criminal trials in the Provincial Courts.

Choosing the Provincial Court

As the Provincial Court's criminal law jurisdiction and workload increased, so did its expertise and reputation in criminal law matters. This meant that, for indictable offences where the accused could

choose what court would hear the case, increasing numbers of people chose to have their trial in the Provincial Court.

This trend has continued in the Ontario Court of Justice, successor to the Provincial Courts. Over a three-year period ending on March 31, 2001, 92 percent of all accused persons who had an election as to the court of trial chose to proceed before the Ontario Court of Justice, as opposed to eight percent in the Superior Court of Justice. Over the same period of time, 98.3 percent of all criminal cases were resolved in the Ontario Court of Justice versus 1.7 percent in the Superior Court of Justice.[5] Those statistics have stayed consistent over the past decade. In 2015, the percentage of criminal cases resolved in the Ontario Court of Justice remains at approximately 98 percent.

Conclusion

Criminal Code amendments during the Provincial Courts era, coupled with the Court's growing reputation and expertise in criminal trials, have combined to give the Ontario Court of Justice a large and diverse volume of criminal cases.

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[1] T.G. Zuber, *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987), p. 30.
[2] A Royal Commission Report on Ontario's Police Magistrates, 1921, pp.4. Note: "The Evolution of the Ontario Court of Justice," a paper written by Allen Edgar, Research Counsel, Centre for Judicial Research and Education, Office of the Chief Justice, was used as a source for this article.
[3] These offences are found at s.553 of the *Criminal Code.*
[4] Interview of B. Lennox for OCJ History Project, 2015.
[5] Cheryl Marie Webster, and Anthony N. Doob, "The Superior/Provincial Criminal Court Distinction: Historical Anachronism or Empirical Reality?", *Criminal Law Quarterly*, 48, 2003, 77-109, at pp.82,83, 105-107.

Period II: 1968-1989 Major Changes

Le français et la Cour provinciale

NOTE : This essay was written by Justice Brian W. Lennox, former Chief Justice of the Ontario Court of Justice.

Le français n'avait pas droit de cité devant les tribunaux ontariens avant 1976. La province et son administration, ses ministères et leurs employés, les tribunaux administratifs et judicaires étaient carrément et uniquement unilingues anglaises. Bien que le Règlement 17[1], introduit en 1912, ne soit à l'époque que de triste mémoire, la *Loi sur l'organisation judiciaire* en 1976 stipulait que tout bref, acte de procédure ou plaidoirie devant tous les tribunaux devait être préparé ou présenté dans la langue anglaise seulement. Il existait quand même quelques brèches : à la Cour de petites créances, dans certaines parties de la province, le français était parfois utilisé comme langue du procès oral lorsque les parties en cause étaient d'expression française et que le règlement de la Cour (qui interdisait un appel où la somme en jeu était inférieure à 200$) faisait de cette Cour un tribunal à la fois de première et de dernière instance; dans d'autres Cours, le français était utilisé couramment parmi les juges, membres du personnel et avocats bilingues, mais cet usage s'arrêtait à l'entrée de la salle d'audience; finalement, on accordait parfois un traitement de faveur à la langue française dans certains districts judiciaires où les francophones étaient assez nombreux pour le justifier - ainsi, avant 1978, il existait au palais de justice à Ottawa une interprète d'expression française au service du Ministère du procureur général. Cette interprète, lorsqu'elle ne s'occupait pas des affaires du Ministère, était à la disposition de toute personne qui avait besoin de ses services dans des affaires civiles ou criminelles. Également à Ottawa à

cette même époque, en matière criminelle, un interprète était affecté en permanence à la Cour de premières comparutions à la Cour provinciale (Division criminelle).

À part ces quelques exceptions, le français se trouvait sur le même plan que toute langue autre que l'anglais. Au criminel, le prévenu ou le témoin francophone dans un procès avait droit aux services d'un interprète rémunéré par la province tout comme un prévenu de langue italienne, allemande ou grecque.

Interpretation Major Problem Now

August 23-71

Judge Urges Permanent French Court

The "communication gap" between the English and French languages, usually associated with Quebec, has found its way into Sudbury, particulary the courtroom.

Designated as a "bilingual district" in a May 5 report from the commission on bilingualism and biculturalism, Sudbury has a high percentage of French-speaking residents.

Provincial court Judge Gerry Michel, one of 10 French-speaking Ontario judges, estimates the ratio at 40 per cent French and believes a blingual courtroom could be the answer to the problem.

As all proceedings must be recorded in English, Judge Michel is in the same position as other court officials when faced with a "French-only" witness or accused person.

SEES NEW JOB

"Some areas in the province, such as Sudbury, Sturgeon Falls, and Mattawa, could have a permanent French court," Judge Michel told The Star. "Or they might have professional interpreters available. Such a person might hold down two jobs, such as a clerk's position with the provincial couft offices, and would be called upon to interpret if the situation arose."

The problem of finding an interpreter in a hurry, is a touchy one with the persons who are selected.

Sheriff Larry Lamoureux is reluctant to fill such a role. "I only do it help out the judge," said Lamoureux, "because it takes so long to find an interpreter. But I have so much of my own work to do, I don't like to get all tied up in court."

'FINE LINE'

A major problem faced by the sheriff is bridging the fine line between Ontario and Quebec French. "There is a different slang used and sometimes the meaning might be changed."

At the June general sessions of the peace, Lamoureux interpreted for several witnesses at the trial of Jean St. Amand, who was charged with robbing The Toronto-Dominion Bank on Frood Rd.

"In this particular case, I had some difficulty understanding them," admits Lamoureux. "That was an appeal trial and at the original trial, the interpreter was criticized for his work."

NOT PAID

Since the interpretations are usually done by court officials, the results are, understandably, not perfect. They are never paid for their work and are often embarrassed when the defence lawyer is French-speaking and suddenly, leaps out of his seat claiming the interpreter is mistaken.

After being raked over the coals in such a manner, their reluctance to perform this function again is understandable.

COURT ALTERNATIVES

The answer to the problem is a French court, which, as Judge Michel explained could be established in areas with a heavy French population.

Another alternative proposed by Judge Michel, is based on the travelling court system, which is already in use in such areas as Manitoulin Island, Espanola and Chapleau. According to the judge, a touring all-French court would pay periodic visits to various areas of the province and hear the cases.

"A major obstacle to this system, namely an adquate supply of bilingual court reporters, has been eliminated with the advent of the separate school and the introduction of the steno-mask," said Judge Michel. "Another large difficulty dealing with the court of appeal remains. The translation of transcripts would involve a tremendous increase in paperwork."

OTHER DIFFICULTIES

Since Sudbury has become a melting pot for various ethnic races, other language difficulties are often faced in the courtroom.

"Next to French, the major difficulties are with people who speak the Finnish language. However, I meet this problem on an average of once every three months, compared with the French question once every three days. Usually there is a Finnish-speaking police officer who resolves the problem."

Michel, 36, was born in the Lockerby section of McKim township and received his law degree from Ottawa University in 1960. He was named assistant Crown attorney to A. G. Burbidge in 1966.

In 1968 he was appointed to the bench as a magistrate for North Bay, and one year ago was named to the Sudbury court.

JUDGE GERRY MICHEL

Ahead of his time, Judge Gérald Michel proposed a bilingual court in 1971.
(Source: "Judge Urges Permanent French Court," *Sudbury Star*, August 23, 1971.)

Au civil, une partie francophone (hispanophone, arabophone, etc.) ne pouvant s'exprimer en anglais devait elle-même engager son propre interprète.

Le français langue de justice

Dans sa biographie, *Memoirs and Reflections,* l'honorable Roy McMurtry indique que la première décision majeure qu'il a prise lorsqu'il est devenu Procureur général de l'Ontario en 1975 était de créer un système bilingue de justice là où le besoin se ressentait. À l'occasion d'une conférence sur le bilinguisme tenue à Ottawa à l'automne de 1975, le procureur général McMurtry a annoncé l'engagement de son ministère à créer un projet-pilote au sein de la Cour provinciale (Division criminelle) à Sudbury. Procureur général nouvellement élu dans un gouvernement minoritaire, il a pris cette décision seul, sans consulter le premier ministre (William Davis) ou son *caucus*[2].

Sudbury : les premiers pas

Le projet-pilote était lancé à Sudbury à l'été de 1976. Initialement, la ville de Sudbury a été sélectionnée parce que 35% de la population étaient francophone et qu'un personnel bilingue était déjà sur place. Pour des raisons pratiques, cette expérience a été tentée d'abord uniquement au niveau de la Division criminelle de la Cour provinciale.

Avant le lancement formel du projet, les juges Gérald Michel et Sid Matte ont assisté aux procès en français à Moncton et à Montréal. Puisque les juges et avocats franco-ontariens avaient pour la plupart reçu leur formation professionnelle et avaient plaidé devant les tribunaux uniquement en anglais, la terminologie juridique française appropriée posait un problème. Les juges et avocats à Sudbury ont décidé d'utiliser la version française du *Code criminel* comme source terminologique et de s'entraider

pour des questions linguistiques. Il fallait également ajuster la terminologie pour qu'elle soit comprise par les justiciables et les témoins.

Expansion du projet

De projet-pilote, cette expérience est devenu un programme du gouvernement provincial et a été étendu le 6 juin 1977 aux villes d'Ottawa, l'Orignal, Hawkesbury et Rockland. Au mois d'octobre de la même année, Cochrane, Kapuskasing, Hearst, Smooth Rock Falls et Hornepayne sont venues s'ajouter à la liste des villes où les procès criminels pouvaient être entendus en français.

Dans chacune de ces villes, le Ministère du procureur général assurait la présence de juges, de greffiers, de sténographes, d'interprètes et de procureurs bilingues de sorte que de tels services étaient déjà, en 1977, accessibles à 66% des Franco-Ontariens. Le Ministère s'employait en même temps à traduire tous les documents de base de la Cour.

Un peu plus tard, le gouvernement provincial, toujours sans aucune loi-cadre, a étendu le système des tribunaux bilingues aux affaires de famille à la Cour provinciale (Division de la famille), d'abord à Sudbury et ensuite à Ottawa.

Cours de langue

Quand l'utilisation du français devant les tribunaux commençait, le Ministère du procureur général de l'Ontario a organisé un premier cours de français juridique à Montréal destiné aux juges et procureurs de la Couronne. Au cours des années 1980, les Cours provinciales ontariennes ont commencé à se servir d'excellents programmes de français juridique offerts par le Bureau du commissaire à la magistrature fédérale. Ces cours nécessitaient des stages d'une à trois semaines au Québec et étaient offerts tous les ans. Récemment, des cours de français juridique spécifiquement adaptés aux besoins des juges de

nomination provinciale et présentés au Nouveau Brunswick ont été mis en place par l'Association canadienne des juges des cours provinciales.

Dans le but de s'assurer de la qualité des services de langue française offerts aux justiciables francophones par la Cour de justice de l'Ontario, la Cour insiste sur la nomination de juges et de juges de paix véritablement bilingues lorsqu'il s'agit d'un poste bilingue. Ces juges et juges de paix bilingues n'ont donc pas besoin d'assister aux programmes de français de base mais seulement aux cours de perfectionnement de langue qui traitent des aspects techniques du français juridique. Les juges et juges de paix de la Cour sont ainsi à même d'offrir la même qualité de service en français qu'en anglais.

Autres développements

La fin des années 70 constituait une période particulièrement fructueuse pour l'épanouissement du français juridique. Au niveau national, la Commission royale d'enquête sur le bilinguisme et le biculturalisme avait publié ses rapport final et recommandations en 1969, juste avant le début de la décennie, et le gouvernement fédéral travaillait activement pour créer une fonction publique authentiquement bilingue et pour promouvoir le bilinguisme. En 1977, la Section de *common law* de la Faculté de droit de l'Université d'Ottawa a été la première à offrir des cours en français. En 1984, ce programme de *common law* en français se dotait d'un cadre administratif et scolaire et commençait à décerner le diplôme du programme français. Entretemps, en 1978, la Faculté de droit de l'Université de Moncton a ouvert ses portes pour devenir la première école de droit au monde à décerner un diplôme de *common law* en français. Maintenant, les Facultés de droit de Moncton et d'Ottawa sont donc uniques au monde. Pour achever la décennie, en 1980, l'Association des juristes d'expression française de l'Ontario, fondée afin de promouvoir le français au sein du système judiciaire de l'Ontario, tenait son premier congrès annuel à Ottawa. Ces développements ont non seulement soutenu mais aussi promu l'utilisation du français devant les tribunaux canadiens.

Renforcer le statut du français : les lois-cadres

Dans le but de doter le système des tribunaux francophones d'un statut juridique incontestable et d'étendre l'usage du français à des tribunaux autres que ceux de la Cour provinciale, le Procureur général McMurtry annonça en août 1977 la création d'un Comité consultatif sur l'usage du français devant les tribunaux ontariens, dont faisaient partie à l'époque les futurs juges Claude Paris et Paul Bélanger. À la suite des délibérations de ce comité, deux nouvelles lois furent adoptées par l'Assemblée provinciale ontarienne et promulguée le 26 mai 1978. La première prévoyait une modification à l'article 127 de la *Loi sur l'organisation judiciaire*, article qui avait assuré jusqu'alors l'usage exclusif de l'anglais devant les tribunaux ontariens. Cet amendement prévoyait la désignation officielle des tribunaux et des comtés et districts dans lesquels toute personne qui parlait la langue française pouvait exiger que son procès se déroule devant un juge ou devant un juge et un jury parlant les langues anglaise et française[3]. En même temps cette loi permettait au lieutenant-gouverneur en conseil de désigner d'autres comtés, districts et tribunaux, et prévoyait aussi l'enregistrement et la transcription en français de la preuve, les plaidoiries en français devant la Cour de petites créances et l'émission de règlements stipulant l'usage de formules bilingues.

Promulguée en même temps, la *Loi modifiant la Loi sur les jurys, 1974*, obligeait le shérif dans tout district judiciaire désigné de dresser le tableau des jurés en deux parties, incluant dans une partie les jurés parlant la langue anglaise et dans l'autre, les jurés parlant la langue anglaise ainsi que la langue française.

Les textes de ces deux lois constituaient donc les lois-cadres qui servaient de base à l'extension de l'usage du français devant tous les tribunaux ontariens, qu'ils soient de juridiction civile ou criminelle.

Aussi en 1978, le gouvernement ontarien s'est engagé à fournir davantage de formulaires, documents et publications gouvernementaux en français. Ce qui était aussi important, le gouvernement a commencé à traduire en français toutes les lois et tous les règlements provinciaux[4].

Le gouvernement fédéral se met de la partie

C'était suite aux initiatives du procureur général McMurtry que le gouvernement fédéral a entrepris de sa part certaines modifications au *Code criminel* au mois d'avril 1978. Intitulé "Partie X1V.1 Langue de l'accusé", ce projet de loi prévoyait une procédure sous un nouvel article 462.1 du *Code criminel* qui permettait que le procès d'un accusé soit présidé par un juge de paix, un magistrat, un juge seul ou un juge et un jury parlant l'une des langues officielles du Canada qui était la langue de l'accusé. Le Code prévoyait aussi la possibilité de renvoi pour des motifs de langue. D'ailleurs, ce projet de loi ajoutait dans son article 5 un nouveau motif de récusation d'un juré au cas où le juré ne parlerait pas la langue (anglaise ou française) de l'accusé.

Heureusement, il existait déjà à la Cour provinciale de nombreux juges et juges de paix francophones au milieu des années 70 qui ont pu tout de suite présider des instances en français. Et le nombre de ces juges et juges de paix a augmenté : en 2015, 12% ou 42 des 343 juges de la Cour de Justice de l'Ontario étaient bilingues: le pourcentage équivalent des juges de paix était de 11%, représentant 44 des 398 juges de paix[5].

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[1] Ce règlement provincial limitait l'utilisation du français comme langue d'enseignement dans les écoles fréquentées par les élèves franco-ontariens aux deux premières années de l'école primaire. Le règlement est devenu inopérant en 1927, mais n'était pas officiellement abrogé qu'en 1944.

[2] *Memoirs and Reflections*, Roy McMurtry, publié pour la *Osgoode Society for Canadian Legal History* par la *University of Toronto Press* 2013, pp. 193-198

[3] Ont été désignés dans cette loi la municipalité régionale d'Ottawa-Carleton , les comtés unis de Prescott et Russell, les comtés unis de Stormont, Dundas et Glengarry, et les districts territoriaux d'Algoma, Cochrane, Nipissing, Sudbury et Temiskaming (à toute fin pratique, l'est et le nord-est de la province).

[4] *Memoirs and Reflections,* ci-dessus

[5] Ces chiffres comprennent les juges et juges de paix à temps plein et *per diem.*

Period II: 1968-1989 Notable Cases

R v. Nelles: "No Evidence to Send Nurse to Trial[1]"

"Undoubtedly, my single most important case was the Nelles case."

Judge David Vanek[2]

"No reader could ever doubt the challenges of Ontario Provincial Court work in the 80's after reading David Vanek's description of his experiences as the preliminary inquiry justice in Regina v. Susan Nelles."

Chief Justice Sidney B. Linden in Preface to David Vanek's *Fulfilment: Memoirs of a Criminal Court Judge*, April 21, 1999.

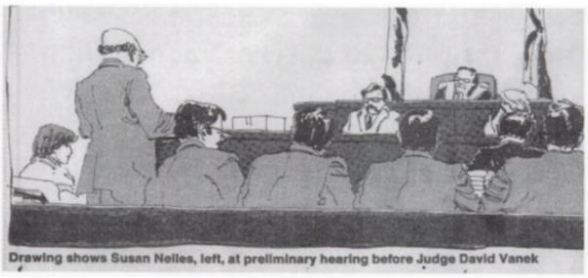
When Judge David Vanek entered the courtroom at Old City Hall in Toronto on January 4, 1982, his task was to preside over a preliminary inquiry on murder charges. He had no idea that this would ultimately entail 45 days of hearings, involve over 100 witnesses and many exhibits[3], and require him to author a lengthy decision that would captivate the public and dominate the headlines.

The defendant was Susan Nelles, a young nurse in the cardiac ward of Toronto's Hospital for Sick Children. She was accused of acts both abhorrent and totally at odds with the values of her profession: murdering four infants by deliberately administering overdoses of the drug digoxin.

In serious criminal matters, trials are preceded by a preliminary inquiry held by a provincial court judge. The purpose is to determine if there is sufficient evidence for the case to go to trial before a federally appointed judge, sitting alone or with a jury. The threshold is not high. As long as the provincial court

judge finds that there is "any evidence" on which a properly instructed jury could find guilt, the case will be sent to trial.

THE NELLES CASE



An artist's sketch of a scene at the preliminary hearing.

(As reprinted in David Vanek's memoir, *Fulfilment: Memoirs of a Criminal Court Judge*.)

Because the threshold is low, most cases do proceed to trial and defence lawyers often decide not to call witnesses at the preliminary inquiry stage. They will, however, cross-examine prosecution witnesses in order to learn more about the case against their clients.

Judge Vanek quickly realized that the Nelles case was not going to be a typical preliminary hearing. The defence team, led by lawyer Austin Cooper, vigorously argued that there was insufficient evidence on which to send Nelles to trial.

Evidence

Although the charges against Susan Nelles related to four specific deaths, "similar fact evidence" indicated that there were "twenty-four babies who had died on the cardiac ward in the same time frame and in suspiciously similar circumstances."[4] There was, however, also evidence that Nelles was not on duty during the day when one of the four babies had died, and that she was on vacation when one of the other suspicious deaths occurred.

Judge Vanek refused to infer guilt on the basis of Nelles not having been fully forthcoming in her statement to the police. He expressed the opinion that the statement "merely reflects the exercise by Susan Nelles of two of the most elementary and fundamental civil rights of a citizen when charged by police officers with an offence: the right to speak to a lawyer and the right to remain silent."[5]

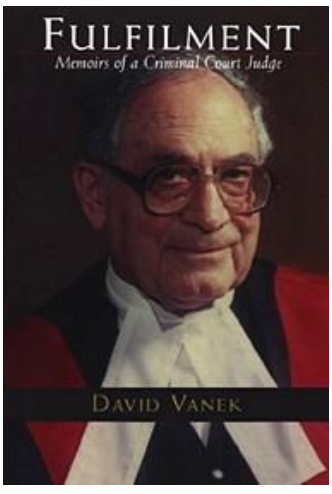
Vanek worked feverishly to prepare his written reasons for judgment which took three weeks to complete. Fortunately, Chief Judge Fred Hayes agreed to free him from his regular schedule of court duties.

The judge gave his ruling in a packed College Park courtroom on May 21, 1982. Tight security was called for, with police officers controlling entry due to intense public and media interest in the case, pent up by the length of the proceedings and the order Judge Vanek made prohibiting publication of the evidence. While media had attended the proceedings, publication of details was banned until judgment was issued.

The Decision

Judge Vanek held that the test for committal to trial had not been met. Accordingly, he directed that Susan Nelles be discharged on all four counts of murder.

This decision was based in part on Vanek's findings that the evidence was entirely circumstantial and no evidence was presented to establish motive.[6] He also concluded that, regarding three of the four children, the evidence was at least equally consistent with innocence as guilt. And for the fourth child, there simply was no evidence that could go before a jury.[7]



Regrets

Ten years after retiring in 1989, David Vanek recalled the experiences of his 21 years on the bench in the book *Fulfilment: Memoirs of a Criminal Court Judge*, and expressed two regrets arising from the Nelles case.

The first regret was having uttered the comment, as an aside,

when reading his judgment, “This is a whodunit!” This was interpreted by the media to mean Vanek believed the four babies had been murdered, which was not a finding he had made or was required to make.[8]

His second regret was having concluded that “[t]here is evidence that points in a different direction.”[9] This was an oblique reference to the fact that another nurse “had as much opportunity as Nelles and was equally or even more likely to be the guilty party.”[10] Newspaper reports indicate that this other nurse never escaped the shadow of suspicion that she may have murdered the babies.

What Came Next?

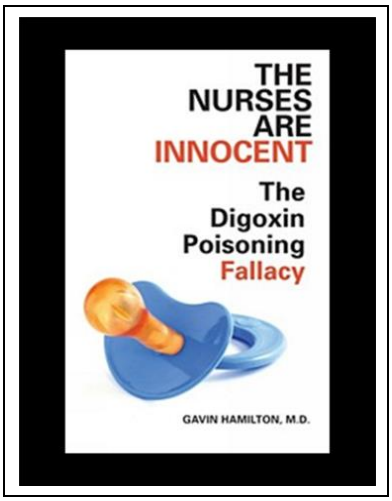
Vanek’s ruling marked an end to the Provincial Court’s involvement in the so-called “Sick Kids murders”. However, other proceedings were initiated – by government and by Susan Nelles – that kept the matter under public and legal scrutiny.

The Ontario government appointed a Royal Commission of Inquiry headed by Justice Samuel Grange of the Ontario Court of Appeal. The purpose was to examine how the infants on the cardiac ward died and review the circumstances surrounding the investigation and prosecution of the criminal charges. Grange’s report was supportive of decisions Vanek had made in the preliminary inquiry and suggested Nelles should receive compensation.[11]

Susan Nelles’ civil lawsuit for malicious prosecution was finally heard by the Supreme Court of Canada on the question of whether cabinet ministers and prosecutors can be shielded from prosecution. In 1989, the Supreme Court ruled that Nelles could continue her action against the Attorney General for malicious prosecution.[12] She had already settled with the police.

Mystery Solved?

Many fine minds thought that the baby deaths were the result of deliberate overdoses of digoxin.



Cooper: "Between January 11 and March 22, 1981, four infants who were patients in the cardiac ward at the Hospital for Sick Children in Toronto died as a result of the deliberate administration of overdoses of a heart drug called Digoxin."[13]

Grange: "There is of course always a chance of fatal error in drug administration, but in my view, if any substantial number of these patients died from an overdose of digoxin, the suggestion that those overdoses were all accidentally administered is preposterous."[14]

Judge Vanek wrote, "In the end, how twenty-four babies, who were not expected to die, came to their death at Toronto's renowned Hospital for Sick Children remains a mystery."[15] That mystery still lingers over 30 years later. Some doctors, lawyers, scientists and journalists are convinced that the babies were not murdered, that the testing of digoxin levels was highly unreliable, that the syringes used at the time were dangerous to frail infants, and that the nurses were the victims of overzealous pathologists and hasty police work.

Conclusion

As Vanek expressed in his memoir, "It would have been expedient, and not unusual, simply to hold there was sufficient evidence for committal, offer a few words to this effect, and leave the issue to a judge or judge and jury for disposition at a trial."[16] But he did not take the easy way out in this complicated and high-profile case where the evidence was circumstantial and, in his mind, not legally probative of guilt.

What conclusion can be drawn, then, about the kind of judge he was? Vanek said he could accept lawyer Harold Levy's assessment published in the *Toronto Star* with reference to the Nelles case: "And she drew a crusty, tough-minded, fiercely independent provincial court judge, who was determined to call the shots as he saw them instead of passing the buck to the judge and jury at trial"[17]


SECTIONS AUTHORS SUBSCRIBE MACLEAN'S

The baby killer at Toronto's Sick Kids was rubber

The real culprit for a wave of deaths in the early 1980s was a compound found in seals on IVs and syringes

Brian Bethune

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[1] *Regina* v. *Nelles* 15 CCC (3d) 97, par. 67
[2]Vanek, David. *Fulfilment: Memoirs of a Criminal Court Judge* (Toronto: The Osgoode Society and Dundurn Press, 1999), p. 285
[3]Vanek, *Fulfilment,* p. 293
[4]Vanek, *Fulfilment,* p. 289
[5]*Regina* v. *Nelles* 15 CCC (3d) 97, par. 67
[6]*Regina* v. *Nelles,* par. 96, items 1 and 2
[7]*Regina* v. *Nelles*, par. 96 and 97
[8]Vanek, *Fulfilment,* p. 298
[9]*Regina* v. *Nelles*, par. 96, item 9
[10]Vanek, *Fulfilment,* p. 299
[11]*Report of the Royal Commission of Inquiry Into Certain Deaths at the Hospital for Sick Children and Related Matters, The Honourable Mr. Justice Samuel G. M. Grange, Supreme Court of Ontario, Commissioner*, 1984.
[12]*Nelles v. Ontario*, [1989] 2 S.C.R. 170
[13]Cooper, Austin. "Susan Nelles: the Defence of Innocence," in Greenspan, Edward L., ed., *Counsel for the Defence: The Bernard Cohn Memorial Lectures in Criminal Law* (Toronto: Irwin Law, 2005)
[14]Grange, *Report of the Royal Commission*, p. 40
[15]Vanek, *Fulfilment,* p. 299
[16]Vanek, *Fulfilment,* p. 293
[17]Vanek, *Fulfilment,* p. 308

Period II: 1968-1989 Notable Cases

Dowson v. Canada (Royal Canadian Mounted Police): Judge accused of sticking to police like Krazy Glue[1]

Ross Dowson was a political journalist and senior official with the League for Socialist Action. He claimed that two officers of the Royal Canadian Mounted Police (RCMP) had conspired to discredit him through false and injurious statements. In 1982 he sued the police force and the officers for damages and the case was heard in the Provincial Court (Civil Division).

The Provincial Court (Civil Division)

During the 1980s, the Provincial Court had a Civil Division in which full-time judges heard Small Claims Court cases.

Dowson's case became notorious, not for the substance of the decision, but for what happened when one of Dowson's lawyers publicly criticized the judge.

The Lawyers and the Judge

The following men were key players in what transpired to make the case notable.

Judge Marvin Zuker

The presiding judge, Marvin Zuker dismissed the case against the RCMP, primarily because the lawsuit had been filed after the six-month limitation period for persons exercising a public duty.

Charles Roach

One of Dowson's lawyers at the trial, Charles Roach had been a plaintiff before Judge Zuker in a previous Small Claims Court case involving a different police force.

Harry Kopyto

Dowson's other lawyer was Harry Kopyto. After Judge Zuker issued his decision, Kopyto was interviewed for an article published in *The Globe and Mail* on December 18, 1985, in which he was quoted as follows.

> *This decision is a mockery of justice. It stinks to high hell. It says it is okay to break the law and you are immune so long as someone above you said to do it.*
>
> *Mr. Dowson and I have lost faith in the judicial system to render justice.*
>
> *We're wondering what is the point of appealing and continuing this charade of the courts in this country which are warped in favour of protecting the police. The courts and the RCMP are sticking so close together you'd think they were put together with Krazy Glue.*

This statement was widely reported in the media and Zuker became known as the "Krazy Glue Judge".

A Charge of Contempt of Court

It is rare for lawyers to be so vocal in their criticism of judges and the courts. Kopyto was charged and convicted of contempt of court on the basis of his comments. The trial judge found Kopyto's statements to be a "vitriolic unmitigated attack" on Zuker and "a blatant attack on all judges of all courts".[2]

Kopyto was later acquitted by the Court of Appeal on the basis of his right to freedom of speech. As poetically put by Justice Peter Cory of that Court, "[t]he courts are not fragile flowers that will wither in the hot heat of controversy."[3]

Postscript: Zuker and Kopyto meet again

Twenty-five years after the Dowson case, Harry Kopyto – then a disbarred lawyer – sought to appear as an agent in a family matter. The matter came before Zuker, who had become a family court judge of the Ontario Court of Justice.

Justice Marvin Zuker in 2013. (Courtesy: M. Zuker)

Justice Zuker did not find Kopyto to be qualified as an agent. Kopyto then lodged a complaint against Zuker with the Ontario Judicial Council. The complaint involved alterations to a transcript which Zuker admitted, with regret, to having done.

A Previous Case Against the Police

Roach v. Adamson et al.

The Dowson lawsuit was not the first case involving Charles Roach and heard by Judge Zuker. While Roach appeared as Dowson's lawyer in 1985 , he was the plaintiff in *Roach v. Adamson et al.*, heard in 1979 shortly before the Provincial Court took on a Small Claims Court role.

According to Zuker, "Charles Roach, a well-known civil rights lawyer, was stopped by the police near his office because they were looking for somebody Black. I wrote a lengthy decision, basically saying you can't stop someone because of the colour of their skin. You have to have some more basis. There was no basis for stopping him, other than the fact they

were looking for somebody Black and he happened to be Black".

Zuker's judgment included a monetary award of $512 for Roach. As a consequence of the amount being over $500, the police were entitled to appeal. The Divisional Court reversed the decision, although a further appeal to the Ontario Court of Appeal upheld Zuker's original decision in favour of Roach.

This case was regarded as somewhat of an anomaly in cases heard at the Ontario Court of Appeal. As Justice Zuker observed, "It may have been the only case that I can recall, offhand, of my ten years as a Small Claims Court that hit the Court of Appeal."

The Dowson case resulted in a perception that Zuker was biased in favour of the police, while in the Roach case he had decided in favour of the plaintiff against the police.

(Sources: M. Zuker, Oral History, 2008-2009, Osgoode Society for Canadian Legal History (used with permission); archival copies of decisions courtesy of M. Zuker: Small Claims Court (Feb. 21, 1980), Divisional Court Order (July 9, 1981), Court of Appeal Order (Feb. 19, 1982).)

Conclusion

The Provincial Court heard Small Claims Court disputes for only a decade beginning in 1980. In 1990 this function was transferred to what later became known as the Superior Court of Justice. However, as the Dowson and Roach police cases show, the issues raised by small claims cases – and the repercussions they may generate – can be noteworthy indeed.

[1] *Ross Dowson* v. *Stanley V.L. Chisholm, Royal Canadian Mounted Police and Ronald Yaworski* [1985] O.J. No. 1762; 16 Admin. L.R. 169; 34 A.C.W.S. (2d) 146.
[2] As quoted by Cory J.A. in *R.* v. *Kopyto*, (Ont. C.A.) 62 O.R. (2d) 449; [1987] O.J. No. 1052.
[3] *R*. v. *Kopyto*, (Ont. C.A.) 62 O.R. (2d) 449; [1987] O.J. No. 1052.

Period II: 1968-1989 Notable Cases

R. v. Askov[1]

Few decisions of the Supreme Court of Canada have had so profound an impact on the practical day-to-day work of the court as *R. v. Askov*, released October 18, 1990. *Askov* concerned the right of a person charged with an offence to be tried within a reasonable time, as guaranteed by section 11(b) of the *Charter of Rights and Freedoms*. The right to be tried within a reasonable time is of such fundamental importance that the Supreme Court decided that the only possible remedy for a violation of that right is a stay of proceedings. This effectively puts an end to the legal action and the accused person walks free. Thus, if the state cannot bring an accused person to trial within a reasonable time, it forfeits the right to try that person at all. Since a stay is such a drastic remedy, the question of what constitutes "reasonable time" is important and frequently a challenge to answer. Often, courts will look at what occurs in other cases and in other jurisdictions to assist in defining what is reasonable. That is precisely what occurred in *Askov*.

In November 1983, Elijah Askov and three co-accused were charged with conspiracy to commit extortion against Peter Belmont. Belmont operated an agency in Montreal that supplied exotic dancers to licenced clubs in Ontario. In the past, Toronto clubs had been among his clients. More recently, however, one of Askov's co-accused, Edward Melo, had established himself as a local supplier of exotic dancers in the Toronto area. When Belmont attempted to re-establish his Toronto operation, a 50% commission payment was demanded. When he refused, Melo and Askov threatened him. They were arrested shortly thereafter, along with two associates. The preliminary inquiry and trial were to be heard in Brampton, Peel District, with the inquiry starting in early July 1984 but not completed until that September. A trial was then set for the first available date in October 1985. An overwhelming number of other cases scheduled for that time resulted, however, in the trial being put over to September 1986 – almost two years after the preliminary hearing. When the trial finally commenced, Askov moved for a stay of proceedings on the basis that his right

to be tried within a reasonable time had been breached. The trial judge granted the stay. That decision was overturned by the Court of Appeal, but subsequently upheld by the Supreme Court of Canada in 1990. This promptly turned the entire justice system on its head.

Sidney Linden, Chief Judge of the Provincial Court (it was then called the Ontario Court (Provincial Division))[2] at the time of the *Askov* decision, recalled that "everybody in the system knew *Askov* was coming, everybody knew there was going to be an explosion down the road. It was taking longer and longer for cases to come to trial. People were coming into the Provincial Division and getting dates two years hence."[3] While the explosion may have been anticipated, no one could have predicted how far the aftershocks would travel or for how long they would continue to be felt.

Trial Within a Reasonable Time

In its reasons for reinstating the stay ordered by the trial judge, the Supreme Court made a number of comments about the then-prevailing state of affairs in Brampton. That venue was – and remains – a very busy court, in part because of urban growth and population density, but also due to its proximity to Pearson International Airport, where drug-related offences frequently occur. At the time, the Brampton Court was also suffering from a lack of court space and judges. As the Supreme Court noted, this area had "long been notorious for the inordinate length of time required to obtain a trial date."[4] The situation in Brampton was "a deplorable state" and something was "terribly wrong."[5]

The Supreme Court cited a study completed by Professor Carl Baar in 1987, which had concluded that Brampton was undoubtedly one of the worst districts in Canada in terms of delay.

> *If Canadian courts were required to set cases for trial within six months, they could almost universally do so. No Provincial Court in Canada is normally setting cases for trial or preliminary hearing more than six months after first appearance. Of the five provinces with county courts, only*

> *one location in one province routinely sets criminal cases for trial more than six months after committal: Ontario's Peel County Court in Brampton. That court has set trial dates a full ten months ahead, perhaps the longest delay in Canada.*[6]

In fact, according to Professor Baar's study, the progress of cases in the Brampton courthouse was substantially slower than even the slowest United States jurisdictions. The delay in *Askov* was longer than 90% of all cases heard in Brampton, making it "one of the worst from the point of view of delay in the worst district not only in Canada, but so far as the studies indicate, anywhere north of the Rio Grande."

The situation actually deteriorated further after those data had been gathered. In 1987 – after the Baar study was concluded – Justice Zuber released his *Report of the Ontario Courts Inquiry*. He had been mandated to investigate the "jurisdiction, structure, organization, sittings, case scheduling and workload of all of the courts of Ontario," and report his findings. Justice Zuber also discovered that "Brampton had the greatest backlog in the province with a waiting period of one year regardless of the anticipated length of trial."[7] He noted that the delay in reaching trial was exacerbated by the absence of a system to ensure an early second trial date was prioritized where – as in this case – the first trial date was missed.[8]

Although the government of Ontario had instituted a Delay Reduction Initiative in six regions – including Brampton – the initiative "stressed more efficient use of the region's facilities rather than the provision of additional resources" and was described by the Supreme Court as "obviously insufficient." In the Supreme Court's view, the "only conclusion that can be drawn from an analysis of the material filed is that the problem of systemic delay in Peel has not and cannot be resolved simply by introducing a more efficient caseflow management system. More resources must be supplied to this district perhaps by way of additional Crown Attorneys and courtrooms."[9] The Supreme Court added that this conclusion could come as no surprise since the problem had existed "for many years, back at least as far as 1981."[10] On this point, the Supreme Court repeated the words of the trial judge in *Askov*, District Court Judge Bolan.

> *I am satisfied that the reason for the delay was caused by the insufficient institutional resources in the Judicial District of Peel. Even if more judges had been available for the jury sittings of October 15, 1985, there would have been no courtrooms in which to hold the trials. It is obvious that this jurisdiction lacks sufficient resources to meet the demands and administer the criminal justice system with minimal delay. This has caused a systematic delay in the administration of justice. It was this way when I came here in 1981 and it continues to be this way today [September 1986]. … Those responsible for the proper administration of justice have known about this systematic delay for at least five years; yet nothing has been done about it.*[11]

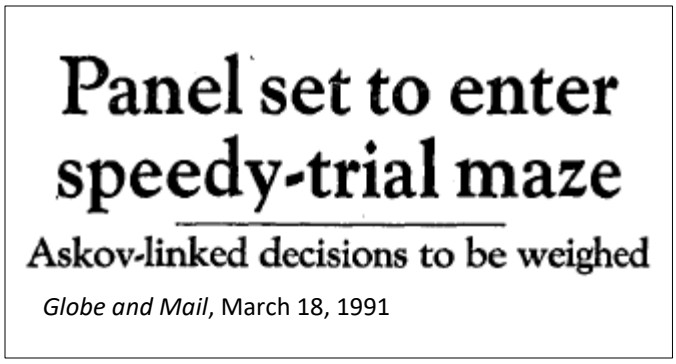
Describing the state of affairs as unacceptable and intolerable, the Supreme Court suggested several possible interim solutions to assist in addressing the problem. Courtroom space could be located in nearby government buildings, or in portable structures such as those often used in schools. In appropriate cases, a change of venue might be ordered so that the trial could be heard more quickly in a less busy court. Whatever the solution, it was clear something had to be done urgently. Otherwise, the Court would increasingly face the "unfortunate and regrettable"[12]situation of having cases end in a stay of proceedings rather than concluding with a trial decision based on the merits.

The Supreme Court noted that the question of "how long is too long" to bring a case to trial would always be difficult to answer and would depend in part on the particular facts of each case. For that reason, it held no fixed "reasonable time" from arrest to trial would be applicable in every region. Nevertheless, the determination of what was reasonable in any region should not be undertaken in isolation, but by comparing the local delay to the best comparable jurisdiction in the country.

Seven districts hurt system, judges told

Three-year wait for appointment of Ontario jurist cited at speedy-trial hearings

Globe and Mail, March 20, 1991



Panel set to enter speedy-trial maze

Askov-linked decisions to be weighed

Globe and Mail, March 18, 1991

The number of cases appearing before the Criminal Division in all locations was increasing markedly, as a result of both demographic and legal changes. In addition to rapid population growth, primarily in urban areas, the Court also had to grapple with the impact of the *Charter* and increased "hybridization" of criminal offences, which expanded the criminal jurisdiction of the Court. Not only were more charges tried before the Court, but the proceedings were often far more complex and time-consuming. The advent of the Charter precipitated an increase in pre-trial motions – for example, seeking the exclusion of evidence alleged to have been obtained in breach of the accused's Charter rights – which further complicated trial scheduling.

Hybrid Offences and Provincial Court

Criminal offences fall into three categories. At the most serious end of the spectrum we find "indictable" offences, such as murder. The least serious are "summary conviction" offences, e.g., causing a disturbance. In the vast middle ground reside "hybrid" offences – which the prosecutor can choose to treat as either summary or indictable depending on the facts of the offence and the circumstances of the offender. For example, the offence of assault is broad enough to encompass everything from a simple shove to a beating. It may be committed by someone who has never been in trouble with the law before or by someone with a lengthy criminal record. Designating the offence of assault as hybrid gives the prosecutor discretion to proceed in a manner that is appropriate to each individual case.

What significance does this have for the work of the Ontario Court of Justice? All summary conviction

matters fall within the exclusive jurisdiction of the Provincial Court. Similarly, all hybrid offences which the prosecutor elects to treat as summary conviction offences also fall within the Court's purview. When Parliament "hybridized" a number of offences in the 1960s to 1980s – that is, made offences that were previously only indictable into hybrid offences – the effect was to dramatically increase the number of cases treated as summary conviction matters and thus heard before the Provincial Court.

The prosecutor is not the only party who has choices to make in a criminal proceeding. If an accused is charged with an indictable offence or with a hybrid offence that the prosecutor has chosen or elected to treat as indictable, the accused generally gets to elect whether to have his or her trial in the Superior Court (in which case a preliminary inquiry will normally be held in the Provincial Court) or to waive the right to a preliminary inquiry and proceed directly to trial in the Provincial Court. Only for the most serious offences, such as murder and treason, is the accused required to be tried in the Superior Court.

As the criminal jurisdiction of the Provincial Court expanded through increased hybridization and as the Court developed greater expertise in criminal law matters, an increasing number of accused persons chose to have their trials in this Court. As of 2015, more than 95% of all criminal offences in this province are tried in the Ontario Court of Justice.

When the comparative analysis set out by the Supreme Court was applied in other cases proceeding in the Provincial Court, the length of time it had taken to bring many of those cases to trial was found to violate the right of the accused to be tried within a reasonable time. The *Askov* decision therefore resulted in thousands of charges being stayed across the province, thus placing Ontario's justice system in "a critical position."[13]

Between October 1990 and March 1991, a total of 205,995 criminal charges were dealt with by Ontario's justice system; 32,254 charges – approximately 15% – were stayed, dismissed, or withdrawn as a result of

Askov. Immediately following the release of the *Askov* decision, 74% of all criminal charges in the Ontario Court (Provincial Division) – more than 150,000 charges in all – were at risk of being stayed. By March 1991, through the efforts of the entire justice system, only 35% of charges remained at risk.[14]

Although the immediate response to *Askov* was swift and, in many respects, quite effective, the number of charges that remained at risk – despite the assiduous efforts of all justice system participants – underscored the need for more permanent systemic change.

Responding to Askov

Michael Code – now Justice Code of the Ontario Superior Court – was counsel to Mr. Askov in his appeal to the Supreme Court. Code recalls that when he took on the *Askov* appeal he knew it would be a significant case, though no one could have anticipated quite how significant.

> *Everyone knew we were in a crisis situation with the growing backlogs. In a cluster of jurisdictions, the situation had become intolerable. It was clear something would have to give. When the Attorney General filed his reply factum, he confirmed how dire things were. Brian Trafford – now Justice Trafford of the Superior Court – appeared on behalf of the Attorney General and was pressed quite hard by the Supreme Court justices. At one point, Justice Bertha Wilson asked whether, if the* Askov *case were to be sent back for hearing in the Provincial Court, it would be given priority. Trafford quite fairly said he couldn't give that assurance. As of that moment, I was fairly certain that the Supreme Court would direct a stay of proceedings.*[15]

When the Supreme Court issued its judgment in October 1990, Code was pursuing a Master of Laws degree at the University of Toronto. His thesis – subsequently published as *Trial Within a Reasonable Time* – involved a comparative study of two counties on either side of the American/Canadian border and the approach each took to the administration of criminal justice. When the Attorney General sought assistance

to help solve the crisis that resulted from the *Askov* decision, Code was an obvious candidate to provide informed advice. In addition to having considerable knowledge and experience, Code also came from the defence bar – outside the Attorney General's office – and brought a wealth of fresh ideas along with a willingness to push for meaningful institutional change in his new position as Assistant Deputy Attorney General-Criminal Law.

Changing the Culture of Criminal Proceedings

As Assistant Deputy Attorney General-Criminal Law, Code focused on three specific measures to relieve pressure on the courts.

- Lobby the federal government to reclassify additional offences as hybrid rather than strictly indictable. This provided Crown Attorneys much-needed flexibility to determine whether the facts of a given offence justified the full indictable procedure, including the right to a preliminary hearing as well as a jury trial, or whether they could be appropriately dealt with through a summary conviction proceeding.

- Make diversion programs available for minor offences and encourage absolute discharges for first offences. This helped ensure that judicial and other resources were appropriately focused on more serious offences.

- Encourage the early resolution of criminal charges. The Attorney General commissioned a report from G. Arthur Martin, a former Court of Appeal judge widely recognized as one of the foremost Canadian criminal law experts, which recommended early charge screening, early disclosure, and early resolution discussions to reduce the number of cases proceeding to trial.

For early resolution to be successful, both Crown prosecutors and defence lawyers had to begin to prepare their cases far earlier, and judges had to assume a more active case management role. As Code recalls,

these were significant changes to everyday practices within the criminal justice system. Prior to *Askov*, the culture was one of last-minute pleas and last-minute withdrawals. That meant that most cases would set trial dates and stay in the system, and continue to demand resources, right up until the eve, or sometimes the very day, of trial. Changes in practice were widely adopted that provided for serious criminal cases to undergo a judicial pre-trial in advance of setting a trial date. Facilitating pre-trial conferences on such a broad scale was a new responsibility for the judges of the Provincial Court, and Code found that some members of the judiciary were initially reluctant to depart from their traditional role of only presiding over trials. Code and newly-appointed Chief Judge Sidney Linden travelled across the province meeting with judges to break down resistance to judicial pre-trials. Over time, and through communication and collaboration, judicial pre-trials became a familiar aspect of the work of the Provincial Court – and continue to play a vital role in encouraging early resolution of criminal cases.

When Michael Code became Assistant Deputy Attorney General in 1991, the early resolution rate (the percentage of cases resolved prior to setting a trial date) was below 50% in Ontario. By the time he left the Attorney General's office in 1996, the early resolution rate had almost reached a targeted 70%.[16] This significantly reduced the pressure on trial courts.

Howard Hampton and Sid Linden in 1990. (Courtesy: S. Linden)

Changing the Composition of the Court

The *Askov* decision presented an opportunity to transform the makeup of the Court as well as its practices. An NDP majority government, led by Premier Bob Rae, had been elected on September 6, 1990 – just weeks before the Supreme Court released its judgment in *Askov*. Howard Hampton, who had been re-elected as MPP for Kenora-Rainy River, was on vacation in Calgary when he received a call from Rae, asking if he wanted to be Attorney General. Hampton was reluctant. He

remembers alerting Rae to the impending upheaval. "The Attorney General's office is a hell of a mess and it's about to get bigger. The *Askov* case has gone to the Supreme Court of Canada, and I think it's going to blow sky high. It will take the first four of five years of any government to deal with it."[17] Despite his misgivings, Hampton was appointed Attorney General on October 1, 1990. Hampton recalls the joke at the time was that Rae himself wanted to be Attorney General but decided against it once Hampton reviewed the potential implications of *Askov* with him.

The impact of *Askov* was even more far-reaching than initially anticipated, in large part because of the government's response. Hampton tells the story of how *Askov* changed the face of the Ontario Court (Provincial Division).

> *John Snobelen, a cabinet minister in Mike Harris' government, once said, "What we need is a good crisis to allow us to make some change."* Askov *was a crisis – and we were determined to take the opportunity it presented to make progressive changes to the courts. We knew there were increasing numbers of women, Aboriginal, and racialized lawyers who were qualified to be appointed to the bench, but they simply weren't applying. So with the help of the Law Society of Upper Canada, we reached out.*
>
> *The response was far beyond anything we could have anticipated. We received an unbelievable number of responses from women who had practised for 15 or 20 years, well recognized as leaders in their area of practice. They said, "It was like somebody had just dropped a bomb." The Judicial Appointments Advisory Committee was incredibly receptive. Peter Russell, the chair of the committee, said to me, "We are flabbergasted by the résumés of some of these people, not just their practice, but their work in professional education, communities, lecturing at law schools,* pro bono *work."*

Askov *came in about two weeks after I was sworn in, in October 1990. The first round of proposed appointments came up towards the end of November. I made it known that we were going to appoint equal numbers of women and men. I was very public about it, and it caused a bit of a commotion. People said, "The best qualified lawyers should be appointed." I replied, "Then in the first round they may all be women!"*

Lawyers also came forward from racialized communities and First Nations. The First Nations appointments got lots of media attention. It was almost unprecedented at the time for members of First Nations to be appointed judges.

Some of the reactions to the push to appoint more women to the bench were unanticipated – and quite humorous. Hampton recounts:

I used to have breakfast with Chief Justice Charles Dubin of the Ontario Court of Appeal, and one morning I found him looking very somber. He said, "Mr. Attorney, I am not happy." He dug in his pocket and pulled out a letter. He said, "My wife got this letter and is seriously thinking of applying to the bench. And I think that one judge in the family is enough!" I knew his wife, Anne Levine, was an excellent and very well-regarded lawyer, so I said, "I hope you will inform your wife that she is welcome to apply, notwithstanding the fact that she is married to you." He said, "You would not believe the reaction from my wife when she got this letter from you. She said that she can do anything I can do, and better!" Then he laughed.

Changing the Administration of the Court

For Sidney Linden, who had been appointed Chief Judge of the Ontario Court (Provincial Division) on September 1, 1990 – less than two months before *Askov* was released – the task of responding to the

challenges it posed was almost overwhelming. As Linden noted in a speech to the Criminal Lawyers' Association in 1996, "all of us in this room knew for years that this crisis was looming, but it couldn't have come at a worse time for a new government, a new Attorney General, and a new Chief Judge."[18] Faced with a heavily overburdened judiciary, a serious lack of administrative infrastructure, and a shifting political landscape, Linden briefly thought about resigning. Instead, he got to work.

New judicial appointments – 35 in total – were certainly very welcome, but like former Attorney General Ian Scott, Linden knew that an effective response to *Askov* would require more than simply increasing the complement of judges. The administration of the Court would also have to be fundamentally reformed – with a formal structure introduced. In fact, the funds the NDP government used to pay for the new appointments had been set aside by Scott to improve court infrastructure, technology, and administration. Although the funds had been reallocated towards new appointments, Linden was determined not to lose sight of Scott's goals. Linden read everything he could get his hands on regarding case-flow management and court administration, and attended conferences across Canada and in the United States, talking to experts on judicial administration. In some respects, he realized, Ontario lagged behind other jurisdictions – a situation he resolved to correct.[19]

Some administrative reform measures were already afoot. On September 1, 1990 – five days before the provincial election that brought the new NDP government to power and approximately seven weeks before the *Askov* decision was released – the *Courts of Justice Act*[20] was proclaimed. The *Courts of Justice Act* created a new regional structure for the Provincial Court, and enabled the appointment of Regional Senior Judges (RSJs) responsible for the day-to-day operational management of each region. Of the 35 new judicial appointments, eight were judges appointed to sit in place of colleagues who were reassigned as RSJs, freeing them to focus on court administration matters. [21]

Two Acting Associate Chief Judges, (ACJs) Mary Hogan and Grant Campbell, were also named. Two positions of Associate Chief Justice were subsequently statutorily formalized, and, in 1996, Marietta Roberts and Brian Lennox were appointed as ACJs. The ACJs, the RSJs, and representatives of the family and criminal judges' associations together composed the newly-formed Chief Judge's Executive Committee (CJEC). Linden, who had extensive administrative and managerial experience prior to being appointed to the bench, established CJEC as part of a formal administrative structure for the Court. CJEC assumed responsibility for setting the policy direction of the Court on administrative matters and for making decisions regarding province-wide issues, such as the backlog problem that *Askov* had brought to the fore.[22]

The Office of the Chief Judge was reorganized and assumed new administrative responsibilities, including providing support to both judges and justices of the peace in areas such as program and financial management, and the implementation of statistical information systems. For the first time, the Court began to systematically gather data on its operations – data essential to determining how best to make use of available resources in order to minimize delay.[23]

The Legacy of *Askov*

Askov was unquestionably a crisis for the Ontario Court (Provincial Division), but it also presented a vital opportunity to re-examine and reform its practices, composition, and administration. The impact of the changes made in the wake of *Askov* continues to be felt today. Pre-trial conferences are now an established part of the work of the judiciary. The judges themselves are more representative of the diverse communities they serve. And the Court is far better organized, and able both to assess its performance and manage its resources effectively using data collected from across the province. While these changes may have come about eventually, there is no doubt that *Askov* dramatically increased the speed and drive with which they were implemented.

[1][1990] 2 S.C.R. 1199.
[2] On September 1, 1990, the Provincial Court (Criminal Division) and the Provincial Court (Family Division) became the new Ontario Court (Provincial Division) and Sidney B. Linden was appointed Chief Judge of the new Court. In 1999, the Court became the Ontario Court of Justice.
[3]Transcript of S. Linden's oral history interview, Osgoode Society, 1998 (used with permission).
[4]*Askov,* p. 1234.
[5]*Askov,* p. 1236.
[6]*Askov,* p. 1235.
[7]Zuber, T. G. *Report of the Ontario Courts Inquiry*. (Toronto: Queen's Printer, 1987), p. 54.
[8]Zuber Report, pp. 190-93.
[9]*Askov*, p. 1237.
[10]*Askov,* p. 1237.
[11]*Askov,* p. 1237.
[12]*Askov,* p. 1240.
[13]Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 35 (26 March 1991) "Court System" (Hon. Howard Hampton).
[14]Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 35 (26 March 1991) "Court System" (Hon. Howard Hampton).
[15]Interview of M. Code for OCJ History Project, 2014.
[16]Interview of M. Code for OCJ History Project, 2014.
[17]Interview of H. Hampton for OCJ History Project, 2014.
[18]Notes for Luncheon Address to: Criminal Lawyers' Association Spring Education Program, April 20, 1996: "Where We Are, Where We're Going!" at p. 3.
[19]Transcript of S. Linden's oral history interview, Osgoode Society, 1998 (used with permission).
[20] R.S.O. 1990, c. C43.
[21]"Where We Are, Where We're Going!" at pp. 3, 6; Transcript of S. Linden's oral history interview, Osgoode Society, 1998 (used with permission).
[22]"Where We Are, Where We're Going!" at p. 6.
[23]"Where We Are, Where We're Going!" at p. 5; Transcript of S. Linden's oral history interview, Osgoode Society, 1998 (used with permission).

Period II: 1968-1989 Notable Cases

The Viking Houses Cases: "Municipalities challenge orders of Family Court judges"

The Regional Municipality of Peel was not pleased to have paid more than $1.2 million over six years to the Viking Houses group homes.[1] And it was definitely not pleased with the judges of the Provincial Court (Family Division) who had ordered such payments to support the care of "juvenile delinquents." Eventually, Peel and the Municipality of Metropolitan Toronto became fed up. They challenged the judges' authority and, in two separate cases, the Supreme Court of Canada supported the municipal position.

The *Juvenile Delinquent's Act*

When judges of the Provincial Court (Family Division) declared a child to be a juvenile delinquent, they had to decide on a course of action. The available options were listed in section 20(1) of the *Juvenile Delinquents Act*, a federal statute that was replaced in the 1980s. During the 1970s, family judges used this section to place children in a rapidly expanding network of group homes. They also used their powers under section 20(2) to order municipalities to pay the cost of care.

"There was a strong desire to avoid placing children in training schools but the province directly funded only a relatively small number of family-like settings in the community," recalled former family judge George Thomson. "And Children's Aid Society resources were always stretched thin."

Many group homes benefited from this approach. Among these was "Viking Houses" (sometimes referred to as "Viking Homes"), a rural program based near Chatham and led by two charismatic individuals, David Aird and George Bullied.

Many children were placed with Viking Houses because of decisions made by Judge Warren Durham. "He was a passionate judge who spoke out when he felt the youth before him were not being well served", said former family judge Jim Karswick. "He became convinced that Viking Homes could meet the needs of many of the most difficult juvenile delinquents before him." Judge Durham and the Peel Children's Aid Society strongly disagreed on this point.

Not surprisingly, municipalities were alarmed by the financial burden being imposed on them as a result of orders made by Judge Durham and other judges. Two separate cases involving municipal challenges of Viking Houses placements were pursued all the way to the Supreme Court of Canada. Both involved Peel and one involved Metropolitan Toronto as well.

A Trying Time for the

Peel Children's Aid Society

The 1970s are remembered as a difficult time for the Peel Children's Aid Society. A history of the agency notes that it had "some major and highly publicized disagreements with a private group-home operator and with the judiciary."

The history refers to a 1975 report, *Children in Trouble*, which concluded that "a very serious state of affairs exists between the Court and the Children's Aid Society."

The history specifically mentions that Family Court Judge Warren Durham "was rarely receptive to CAS advice on the placement of juvenile delinquents. He often ruled that they be housed in Viking Homes at regional expense, despite arguments by the Society that they could be cared for much more effectively and less expensively in other settings."

(Source: *A Constant Friend: A History of the Peel Children's Aid Society 1912-2012.*)

The First Supreme Court of Canada Decision[2]

Exasperation at Calculating Payments

Justice Blair of the Court of Appeal referred to the "exasperation of the Family Court Judges at having to deal in great detail with financial matters." He noted that "[t]he essential task of the Family Court Judges is to consider the welfare of children and not to adjudicate upon complicated questions of cost accounting."

He quoted Provincial Court Judge Durham as having stated, in a juvenile delinquency case, "I will say clearly that I am not going to hear the matter of whether $43 [per day] is appropriate or not. That's already been determined, and I don't intend to go through that again."

(Source: *Attorney General (Ontario) and Viking Houses v. Peel*, 1977 CanLII 47 (ON CA); 16 OR (2d) 765; 36 CCC (2d) 337.)

In the first case, the Supreme Court ruled that Provincial Court (Family Division) judges did not have the jurisdiction to order placements to Viking Houses because these group homes did not clearly fit within any of the options specified in section 20(1) of the *Juvenile Delinquents Act*.

One of the options under the *Act* was to commit a child to the care or custody of a probation officer or "any other suitable person." Lawyers for Viking Houses advanced the argument, among others, that

their client should be considered such a "suitable person". However the three courts that heard the case – the Supreme Court of Ontario, the Ontario Court of Appeal, and the Supreme Court of Canada – did

not agree. Viking Houses was a business enterprise operated by a corporation. While corporations are legal "persons" for many purposes, they could not be considered to be persons in the context of caring for a child.

As a result, the committal orders of several Provincial Court family judges – including judges Durham, Langdon, Weisman and Felstiner – were set aside. This did not mean that the placements to Viking Houses were bad for the

children. It just meant that ordering such placements was not permissible under the legislation. In the Supreme Court of Ontario decision, Justice Holland made the following comment:

> *It is apparent from the reasons for judgment of Judge Felstiner and implied from those of the other Judges whose orders are in question here, that these Judges, who are undoubtedly experienced in the handling of juvenile delinquents, are of the view that placing juvenile delinquents in this type of setting is beneficial…. I accept the views of the Judges of the Family Court that they have found that this type of setting has proved to be beneficial in many cases.*[3]

This Supreme Court decision did not spell the end of group homes in Ontario. To survive, however, they would need to maintain good relationships with children's aid societies who could place children there.

The Second Decision of the Supreme Court of Canada[4]

Judge James Felstiner, 1970, Provincial Court (Family Division). (Courtesy: J. Felstiner).

With knowledge of the initial results of the first case, Judge Durham ordered a girl to be placed under the care and custody of Thomas MacKenzie, a supervisor working for Viking Houses. He also ordered Peel to pay MacKenzie, who would of course, turn the funds over to Viking Houses. The higher courts agreed that as an individual, MacKenzie qualified as a "suitable person." So this time the placement was not set aside.

However, there remained the issue of whether section 20(2) of the *Juvenile Delinquents Act* – which permitted Provincial Court judges to order municipalities to pay the

costs of care – was constitutionally valid. In the first case, since the committal orders were held to be invalid, the Supreme Court of Canada did not find it necessary to make a constitutional ruling about the payment provision. The Supreme Court of Ontario and the Court of Appeal, however, had ruled that section 20(2) was "a necessary part of the effective operation of the entire statute, and was validly enacted by Parliament under its powers in relation to criminal law."[5]

Warren Liddell Durham (Source: Online obituary, 2014.)

In the second case before the Supreme Court of Canada, section 20(2) was ruled to be invalid. Justice Martland, speaking for the panel of judges, determined there was no authority for the federal Parliament to "impose a financial burden upon an institution, such as a municipality, which is the creature of the Provincial Legislature, and whose powers, including the power to raise and spend money, are defined solely by provincial legislation."

Thus, the power of Provincial Court (Family Division) judges to order municipalities to fund the cost of care for juvenile delinquents had come to an end.

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[1]Regional Municipality of Peel v. Viking Houses, 1982 CanLII 2053 (ON SC); 38 OR (2d) 78. This was a case in which Peel brought an action to recover moneys paid to Viking Houses.
[2]**Supreme Court of Ontario**: Re Regional Municipality of Peel et al. and Viking Houses, 1977 CanLII 1411 (ON SC); 16 OR (2d) 632; 36 CCC (2d) 137. **Court of Appeal**: Attorney General (Ontario) and Viking Houses v. Peel, 1977 CanLII 47 (ON CA); 16 OR (2d) 765; 36 CCC (2d) 337. **Supreme Court of Canada**: Attorney General (Ontario) and Viking Houses v. Peel, [1979] 2 SCR 1134, 1979 CanLII 48 (SCC); 104 DLR (3d) 1; 49 CCC (2d) 103; 29 NR 244.
[3]Supreme Court of Ontario, cited in note 2, above.
[4]**Supreme Court of Ontario**: Unreported decision of Justice Van Camp, July 10, 1978. **Court of Appeal**: Regional Municipality of Peel v. MacKenzie et al., 1980 CanLII 64 (ON CA); 29 OR (2d) 439; 113 DLR (3d) 350; 54 CCC (2d) 244. **Supreme Court of Canada**: Regional Municipality of Peel v. Mackenzie et al., [1982] 2 SCR 9, 1982 CanLII 53 (SCC); 139 DLR (3d) 14; 68 CCC (2d) 289; 42 NR 572.
[5]Justice Arnup in Court of Appeal decision cited in note 3 above.

Period II: 1968-1989 Notable Cases

Re L.D.K. (An Infant): 12-year-old girl opposes blood transfusion

> *During the five days of this hearing, I have heard much about life and death. There is not one person in this room, and I imagine a great many others who are not in this room, who would want other than for L.D.K. to live.*[1]

These are the words of Provincial Court Judge David Main in a case involving a 12-year-old girl – L.D.K. – who suffered from a fatal disease known as acute myeloid leukemia. As Jehovah's Witnesses, L.D.K. and her parents were opposed, for religious reasons, to cancer treatment that would involve blood transfusions. L.D.K was also adamantly against chemotherapy and transfusions due to the pain and anguish she knew they would cause.

Judge Main found the young girl capable of forming a rational decision about her condition and the available treatment options. L.D.K chose not to take the treatment and died shortly after her court hearing in 1985.

A Child in Need of Protection?

The case began when the Children's Aid Society of Metropolitan Toronto applied to the Provincial Court (Family Division) for an order that L.D.K. was a child in need of protection. If the judge agreed, she would be removed from the care of her parents and made a ward of the Children's Aid Society – which would then have made treatment decisions for her.

A Hearing in the Hospital

Due to the child's weak condition, Judge Main did not conduct the hearing in a traditional courtroom. For five days – the length of the hearing – the Court sat in Toronto's Hospital for Sick Children, with L.D.K. wheeled down in her bed to listen and participate in the proceedings.

Wise Beyond Her Years

In denying the Children's Aid Society's request, Main made much of L.D.K.'s testimony. In his reasons for decision he said,

> *L.D.K. has told this court clearly and in a matter-of-fact way that if an attempt is made to transfuse her with blood, she will fight that transfusion with all the strength she can muster…. She has wisdom and maturity well beyond her years and …. a well thought out, firm and clear religious belief. In my view, no amount of counselling from whatever source or pressure from her parents or anyone else, including an order from this court, would shake or alter her religious beliefs. I believe that L.D.K. should be given the opportunity to fight this disease with dignity and peace of mind. That can only be achieved by acceptance of the plan put forward by her and her parents.*[2]

Justice David R. Main (From obituary posted in *The Standard*, St. Catharines, August 2014)

A Pivotal Decision

As a lawyer, Heather Katarynych appeared in cases involving children whose families would not consent to certain treatments due to their religious beliefs. Later she presided over such cases as a judge of the

Ontario Court of Justice. In her view, "David Main's decision was a turning point in the Court's approach to medical emergencies involving children. He focused on the capacity of the child – in this case a 12-year old – to make decisions about the treatment that the hospital and Children's Aid wanted for her."[3]

Judge Main made it clear that his was decision was based on the specific facts of the case. Those facts included a fatal disease which, even with the proposed treatment, had a 30% rate of cure and the prospect of extreme effects from "extremely toxic" chemotherapy drugs.[4]

The Children's Aid Society did not appeal the decision. A *Globe and Mail* article explained that, "Bruce Rivers, service director for the Toronto branch of the Children's Aid Society, said the society did not appeal the ruling because the girl was dying of leukemia in any case and had a short life expectancy."[5]

The Media Weighs In

Judge Main's decision garnered media attention. Here is how one journalist summarized the case.

Last fall, a Provincial Court judge in Toronto agreed that a 12-year old girl didn't have to take painful chemotherapy treatment for leukemia because it offended the tenets of her religion and because the treatment offered only a small chance of success. The girl died a few weeks later.

(Source: "Do we have dying rights?" by Rick Hallechuk, *Toronto Star*, April 19, 1986)

A Courageous Person

In his decision, Judge Main described L.D.K. as "a courageous person."[6] The judge can also be seen as courageous in deviating from the approach often taken by the courts. As stated in an article in the

Ottawa Citizen, just a few days after the L.D.K. decision, "In the past, courts have generally ordered the medical procedure be carried out on a child over the religious objections of the parents."[7]

Conclusion: The Challenge Continues

Judges of the Ontario Court of Justice continue to hear cases involving disputes over blood transfusions and other medical treatment for children, each case presenting an emotional as well as a legal challenge.[8]

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[1] *Re L.D.K. (An Infant)*, 1985 CanLII 2907 (ON CJ); *Children's Aid Society of Metropolitan Toronto v. L.D.K.* [1985] O.J. No. 803, para 27.
[2] *Re L.D.K.*, paras 18, 33 and 34.
[3] Interview of H. Katarynych for OCJ History Project, 2014.
[4] *Re L.D.K.*, paras 3, 22, and 14.
[5]Marina Strauss, "Blood transfusion violated rights of girl, judge says", *The Globe and Mail*, January 4, 1986.
[6] *Re L.D.K.*, para 33.
[7] "Dying girl's wish to avoid transfusions upheld by judge", Toronto (CP), *Ottawa Citizen*, November 7, 1985.
[8] See for example: *S.R. (Re),* [1983] O.J. No 732, 36 R.F.L. (2d) 70, 21 A.C.W.S. (2d) 452; *Children's Aid Society of Metropolitan Toronto and F. et al*. 66 O.R. (2d) 528 (1988); *T.H. v. Children's Aid Society of Metropolitan Toronto* [1996] O.J. No. 5607; *Children's Aid Society of Toronto v. M.L.* [2008] O.J. No. 4271, 2008 ONCJ 528, 59 R.F.L. (6th) 450, 2008, CarswellOnt 6358, 172 A.C.W.S. (3d) 676; *Children's Aid Society of Toronto v. L.P.* [2010] O.J. No 3508, 2010 ONCJ 320, 2010 CarswellOnt 5999, 192 A.C.W.S. (3d) 176; *Hamilton Health Sciences Corp., v. D.H.*, 2014 ONCJ 603.

Period II: 1968-1989 Profiles & Stories

Frederick Clair Hayes: A Pragmatic Progressive

Frederick C. Hayes in the 1990s. He served as Judge of the Ontario Court (General Division) from 1990 until his death in 1994. (Courtesy: Hayes Family)

Before and after snapshots of Fred Hayes' court could not be more different. During his 18-year tenure as Chief Judge of the Provincial Court (Criminal Division) – now part of the Ontario Court of Justice – a process of modernization began. The Court began its transformation from the "most neglected court in Ontario" to the respected face of justice for the people of the province it is today.

Frederick Clair Hayes was old school in an era of profound change – a stickler for protocol in a benighted court. This proud and dignified man took the helm of The Provincial Court (Criminal Division) in 1972. He used those traits and led by example to bring rigour and professionalism to the Criminal Court. Hayes did not seek out the many reforms that characterized his years as leader of the court, but he embraced them and worked tirelessly to implement them.

Hayes' Background: "Never Lost a Yard of Ground"

For Hayes, the commitment to public service ran deep.

Born in Arden, Ontario in 1924, Hayes was an only child, son of a family that moved around small-town eastern Ontario, settling in Tweed, where his father served as a police officer. "It wasn't a wealthy

family," said his daughter, Joanne Hayes. "And this was something he always remembered – he was able to move up in the world, not only due to his skill, but through opportunities given to him."

Fred Hayes (left) during his military service in the 1940s. (Courtesy: Hayes Family)

In 1942, Hayes volunteered to serve in the Stormont, Dundas and Glengarry Highlanders, a regiment that was known for "never failing to take an objective and never losing a yard of ground." He served overseas with the regiment in Holland. Though he maintained a military bearing throughout his life, "he never talked about the war," recalled Joanne Hayes. "But I believe that experience heightened his sense of public service and was one of the reasons he took the appointment to the Magistrates' Court in 1961."

Like many soldiers returning to Canada, Hayes benefitted from financial aid from the federal government to attend university, first at Queen's University and, then, Osgoode Hall Law School. "Both my parents were helped with their educations to attend university," explained Joanne Hayes, "and both were great advocates of education."

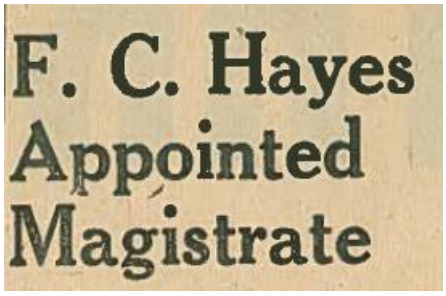
Upon Hayes' graduation from law school in 1953, he found a job in a general practice firm in Toronto. When he married Betty Monteith in 1954, the couple decided to

Hayes with his parents at his graduation from Osgoode Hall in 1953. (Courtesy: Hayes Family)

settle in the city.

"He was never sure why or how he was appointed – he didn't have any political connections. But when he was asked to become a magistrate, he took a pay cut and deemed it an honour to serve," said Joanne Hayes. "He was always very concerned about 'doing the right thing.' He'd tell us to 'never be in a position where someone would ask you for payback.' He hated to compromise. He was very hard working. He arrived home every night with a briefcase in hand and there was always a stack of Ontario Reports beside his bed."

Joanne Hayes laughed at one particular recollection. Hayes used to give his wife a break on Saturdays. He'd take their three children to court – where he'd be presiding – and sit them in the back of the courtroom, asking the court volunteers, often Salvation Army workers, to keep an eye on them.


F. C. Hayes
Appointed
Magistrate

In 1990 – following his tenure as Chief Judge – Hayes was appointed, by the federal government, to the Ontario Court, General Division. He worked until the end of his life – presiding in an attempted murder trial until the day of his death. He died in his sleep on October 24, 1994 at the age of 70.

The Court Hayes Inherited: "The Most Neglected Court in Ontario"

It is difficult to know where to begin when describing the Court back in the 1960s and early 1970s. As former Associate Chief Justice Peter Griffiths explained, "it was straight out of England of the 1850s." This anachronistic situation was about to change, propelled by two key reports: the *Royal Commission Inquiry into Civil Rights* (the "McRuer Report") of 1968 and the subsequent Ontario Law Reform Commission *Report on Administration of Ontario Courts* of 1973. The provincial government of the day

took the recommendations contained in those reports and translated them into significant changes to the court system in Ontario.

When he became Chief Judge of the Provincial Court (Criminal Division), Hayes moved into the office that had at one time been the Toronto mayor's office at Old City Hall.

Both reports detailed a court system, comprised of benches of approximately 100 provincial magistrates and more than 900 justices of the peace[1], in crisis.

- **Regional variations** – The Provincial Courts were decentralized amongst various municipalities, counties and districts, meaning justice looked very different depending on where one lived in Ontario,

- **Disorganized record keeping –** In 1968, for example, the record keeping of the Court was so disorganized that the number of justices of the peace in Ontario was unknown. "The names of 925 appear on incomplete records but we are informed that there is in addition an unknown number whose names are not officially recorded anywhere...this situation makes a mockery of judicial office and is bound to depreciate respect for law and order in the community."[2]

- **Appointments as political rewards –** Appointments to both benches were frankly political. In his report, McRuer condemned "without reservation and with all the emphasis at our command the appointment of justices of the peace as a political reward."[3]

- **Part-time magistrates –** Despite hearing the vast majority of criminal cases (some 95% of indictable offences were tried by magistrates in 1965), magistrates often served part time, were often engaged in the practice of law or other business at the same time, and often had no legal training.

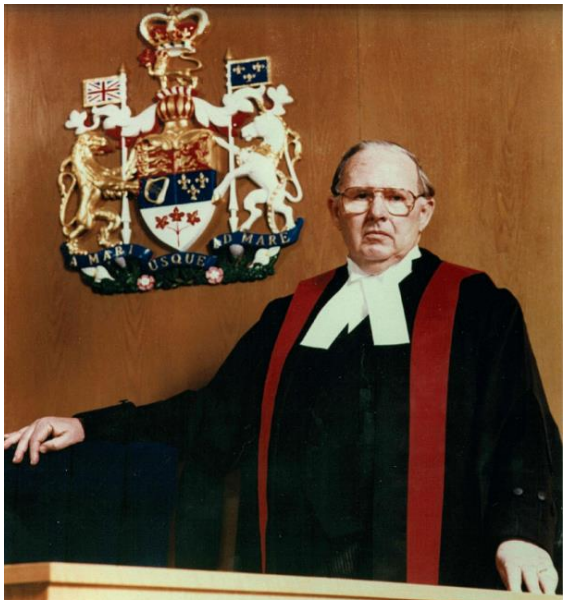
- **Lack of training –** Once appointed, neither magistrates nor justices of the peace received any training for their positions. In fact, one justice of the peace reported to the McRuer Commission: "I know of several (justices of the peace) who have no knowledge of the laws with which they have to deal and who cannot even draw an information or bail bond, and simply sign the various documents drawn by other persons such as police officers."[4]

- **Low salaries and fee for service –** Salaries for both benches were paltry. Justices of the peace were paid on a "fee for service" basis – a method criticized as "subversive to the administration of justices. The payment of judicial officers on a piece-work basis necessarily diminishes the public respect for law and order."[5] Salaries for magistrates were deemed inadequate – of an amount that would attract "older men who may regard (the position) as a form of semi-retirement,"[6]

- **"Police courts" --** The courts appeared to be dominated by the police – who often appeared, in uniform, as court staff. This had a significant impact on public confidence in the courts as a source of impartial adjudication. To further complicate this apprehension of bias, court proceedings were often conducted in police stations and jails. There were, simply, no other physical facilities to house the Court.

By the time Hayes took office as Chief Judge, some of the recommendations contained in the McRuer Commission Report had been implemented. In 1968, the Magistrates' Court's had become Provincial Courts. Two new divisions were created – the Provincial Courts (Criminal Division) and the Provincial Courts (Family Division). Magistrates became known as judges. During Hayes' tenure as Chief, minimum professional qualifications were specified for the exercise of certain powers or duties under the *Criminal Code.* A Judicial Council for provincial judges was created to advise the Attorney General, with respect

to new appointments and to investigate complaints about the conduct of judges. Judges' salaries began to increase to reflect responsibilities.[7]



Chief Judge Frederick C. Hayes in his Provincial Court robes. (Courtesy: Office of the Chief Justice, Ontario Court of Justice)

All were critically important changes but they took time to implement.

In 1973, the Ontario Law Reform Commission noted: "Despite the changes effected in 1968, the status of the Provincial Courts (Criminal Division) in Ontario remains low."[8]

This is the situation Hayes inherited in 1972 – things had begun to turn around, slowly and steadily.

The Power of Moral Suasion: "We Call Him Chief"

"The courts of justice, presided over by an independent judiciary, are the ultimate guardians of the civil rights of the individual." – The McRuer Report

An independent judiciary what makes the Canadian justice system the envy of the world. It does not, however, make a group of independent judicial officers easy to manage. It has been said that judges do not have a boss. That means the Chief Judge is simply the first among equals.

This management challenge was further complicated by the "somewhat loose structure" of the Court. The absence of a clear statement of the function and duties of the Chief Judge in the legislation establishing the courts was noted as a significant problem by the Ontario Law Reform Commission in 1973. Apart from general supervision and direction over arranging the sittings of his courts and

assigning judges for hearings, back in 1973, the Chief did not have much in the way of management power, particularly when the majority of administrative functions were handled by the government. The Chief was expected to develop and maintain a "special relationship" and work with a provincial Director of Court Administration who retained control in matters relating to funding, collection of statistical information, and all administrative systems.[9] Judicial independence was one thing, administrative independence was something else.

This "loose" situation was compounded by the approach to the role of Chief taken by Hayes' immediate predecessor in the role, Arthur O. Klein. Klein served as Chief Judge of the Magistrates' Court for four years, beginning in 1964. Allen Edgar, who joined the Court as Research Counsel in 1980, recalled hearing stories about the differences between the two Chief Judges: "With Klein, it was 'where does it say I have the power to do this?' and with Hayes, it was 'where does it say I can't do this?'" In other words, Klein took a hands-off approach to the role. Hayes, on the other hand, was a hands-on Chief.

Hayes' challenge was to become the first among equals – with very few real tools at his disposal.

Hayes – with his rigorous sense of protocol and imposing military bearing – understood that he was the face of the Court and that everyone was looking to him to represent the Court. It was his job to conduct himself – always – with honour and integrity.

Former Associate Chief Justice Peter Griffiths recalled his days as a Crown Attorney at Toronto's Old City Hall when Hayes was Chief. "He had a wonderful presence…At swearing-in ceremonies, there'd be a lot of chatter in a packed courtroom. Hayes would walk in and just stand there. He'd look around the room – no smile, no words – until the room calmed down and was completely quiet. He carried himself in a judicious way, with great dignity."

Hayes was known as a "one-man show." Edgar recalled him as a "reluctant delegator." Hayes worked tirelessly at centralizing the manner in which the Criminal Division and Provincial Offences Courts

(created in 1979) operated. He did this the old-fashioned way, visiting as many courthouses, judges, and justices of the peace as often as he could – driving and flying around the province, particularly its far northern reaches, bringing his message of improving the Court and its services.

As part of the centralization and professionalization of the Court, Hayes instituted a system of "senior" judges and actively pressed the government to eliminate all part-time judges. During his tenure, legislative change made it mandatory for all judges to be lawyers with at least 10 years' experience. Despite this requirement, he found many judges in his bench to be difficult to manage. Given the combination of the principles of judicial independence and the limited tools at his disposal, Hayes ascribed to the philosophy of "keeping your friends close and your enemies closer." To keep an eye on his "problems," he often moved judges whose abilities were in question to sit in Old City Hall – the courthouse in which Hayes had his office. This had the unfortunate result of creating a bad reputation for Old City Hall. Because of its central downtown location and large size, newspaper reporters were often in attendance for some of the less-than-impressive behaviour of certain judicial officers. It made for lively press coverage. Despite these tribulations, Hayes was able to improve the reputation of the Court in ways that made the governments of the day sit up and take notice – and slowly and steadily increase the jurisdiction of the Provincial Court (Criminal Division), by giving it more *Criminal Code* offences that the Provincial Court judges had jurisdiction to hear.[10]

Some recall Hayes as "moving the Courts out of the jails and police stations," an integral element of reinforcing the independence of the Court. Hayes did this – but only in part. He was also pushed along by his own justices of the peace and judges. Even in the late 1980s, weekend show-cause and bail hearings were often conducted in jails and police stations as opposed to courtrooms. The reason? The cost of keeping courtrooms open and staffed. The controversy? Court proceedings were being held in private, often without counsel, in places that were intimidating to the accused person and in rooms that Justice of the Peace Frank Devine described as "not conducive to conducting a proper court."[11] To

remedy this situation, a group of justices of the peace in Toronto began refusing to conduct bail hearings in police stations or jails, stating such practices infringed the accused person's right to an open trial with the public present and legal representation. After several such refusals, the decision was made to open weekend "WASH" (Weekends and Statutory Holidays) courts across the province – no more weekend bail hearings within jails or police stations.

It is interesting to talk to people, like Edgar, who worked with Hayes. The discussion always veers back to Hayes' presence and the fact that he was always the dignified and reliable face of his Courts – even in the early days, when the Court itself was pulling itself up from its trough of neglect. That dignity engendered deep respect amongst his colleagues. They didn't always like him, but they respected him.

Justice Judythe Little wrote a tribute to Hayes soon after his death, which was included in the Court's newsletter, *Benchmark*. "I think each of 'his' judges felt that we had his special support…Soon after my appointment, I was talking with Fred about something when we were joined by several other judges. In conversation, I referred to Fred by name. One judge asked me querulously why I was calling the Chief Judge 'Fred.' I replied immediately that I called him that because Fred was his name. Fred chuckled with delight. Later, I found out that most of the judges called him 'Chief.'"

Commitment to Education

Hayes was committed to elevating the professional level of the judges and the justices of the peace to ensure a fully competent Court. He wanted to create a criminal court of the finest reputation for Ontario.

Education was his primary tool. But he had a couple of big hurdles to overcome. First, educational programming was new for the court – neither judges nor justices of the peace had received any formal training for their positions before he became Chief. Second, he had to beg the provincial government

for the money to provide any educational programming. The purse strings were held by the government and if Hayes wanted to deliver a program, he had to ask – and, many times, he was turned down.

But, Hayes was a "make-it-work" guy, according to Doug Ewart, who worked for the Ministry of the Attorney General as legal counsel and, then, as director of the Policy Development Division of that Ministry.

Through his own efforts, Hayes used a simple practice to educate the judges. He would get copies of all of the reported Court of Appeal and Supreme Court of Canada cases. He'd go through them, mark them up and then distribute, to the bench, the portions that he felt his judges needed to see. He was always conversant with the leading cases. Justice Gerry Michel recalled the "excellent example" Hayes set for all to follow.

Another approach was his "on-the-job" education method, which many of those who worked with Hayes recall. Justice Michel remembered Hayes' open-door policy and natural teaching abilities. "He was the 'go-to' guy if you had any sort of legal question. He never actually told you what to do, but he would always spend the time with you to ask you questions that would lead you to the answer, or at least get you thinking about the issues you needed to consider."

Justice of the Peace Brian Hudson had a similar story to that recounted by Michel. Hudson began his career as a court clerk and met Hayes then. "He treated everybody with the same respect. He expected the same intellectual engagement from his clerks as he did from himself – and he spent time ensuring it." Hayes worked with his clerks to teach them the criminal law they needed to know in the courtroom. "He relied on you – as a clerk – to know the *Criminal Code*. And if you weren't up to snuff, you didn't work with him. We all respected him for his command of criminal law and his ability to work – he did the work of four people…And, he made you feel that working for him was like going to law school."

When Hayes could get funding, he provided formal programming for both judges and justices of the peace. He worked with the University of Western Ontario to create the "University Program" for the judges – a week-long intensive program in which a group of judges would return to law school, and a set of lectures by law professors. He also instituted the "Sentencing Seminars," in which judges would gather and consider cases and discuss what sentence they might hand down. Again, Hayes knew his crowd and had carefully considered his motives.

Hayes lecturing at an education seminar for judges in the 1980s. (Courtesy: Association of Ontario Judges)

Judging is, by its nature, a lonely occupation. These Sentencing Seminars not only encouraged a collegial attitude amongst the judges but they also served as a way of making decisions more consistent, without treading on the judicial independence of the judges. This, in turn, built public confidence in the Court. The governments of the day took notice.

By continuously strengthening the professionalism of his Criminal Division bench, Hayes built, day by day, issue by issue, the confidence that led defence counsel and Crown Attorneys to increasingly opt to have matters heard in his Court whenever the law gave them the choice. That, in turn, led legislators to regularly change legislation to increase the availability of that choice. In the result, the face of criminal justice in Ontario was changed forever and today the Ontario Court of Justice is known as the specialist court in criminal matters.

Women on the Bench

In 2014, women account for approximately 33 per cent of the judges and approximately 47per cent of justices of the peace in Ontario. Back in the early 1970s, women were a rarity on both benches. It was during Hayes' tenure that women began to be named to the Court. Judge June Bernhard, the first female judge, was appointed to the Criminal Division of the Provincial Court in 1979.

"Fred was one of the old guard," recalled Justice Mary Hogan, appointed to the Criminal Division of the Provincial Court in 1987. "He knew he was hamstrung by his old school ways and he worked at trying to move with the times." Hogan's early days on the bench speak volumes about Hayes' internal dilemma. Unbeknownst to Hayes, Hogan was pregnant with her third child when she was appointed to the bench.

She approached him soon after she became a judge. "I have something to tell you – I'm pregnant. You could see Fred thinking: 'What am I going to do now?' He sat quietly for a while, then he asked me when I was due. And that was that, we just carried on…Fred was nervous as I got bigger and bigger. He'd hang around my courtroom. And I'm sure he thought I'd breastfeed on the bench!" As it was, Hogan delivered her baby on Friday and was back in court on Monday. These were the days before maternity leave for judges. Hogan brought her daughter to work in a portable crib. Nobody commented. Shortly after Hogan's daughter was born, the judges' association, while negotiating salaries with the Attorney General, added maternity leave provisions to the list of items negotiated.

In the 1980s, women began to feel they might have a chance to become a judge or a justice of the peace. Hayes, in his way, encouraged that. Judythe Little, who sat in Kenora from 1986 until 2011, recalled Hayes telling her – before she was appointed – that he was looking forward to having more women appointed to the provincial bench and that there would soon be a number of women with the necessary 10 years' experience as a lawyer. "That day we began a relationship from which I drew a lot of strength in my work as a judge, she stated"

Both Hogan and Little told stories of the support they received from Hayes – but the support was not overt – again perhaps reflecting Hayes' conflicted approach. Little recalled an educational seminar in the 1980s, where "the 'guys' were busy testing the new 'lady judge's' approach to sentencing. I like to think that I held my own nicely. I remember Fred watching the exchanges with a great gleam in his eyes and a small smile on his face, as he sat back with his arms crossed."

Hogan recalled the "days she was finally accepted by the judges at Old City Hall." "I didn't believe in sending traffickers who were addicts to jail and I was being constantly overturned." The police weren't pleased with Hogan's approach and the media was carefully scrutinizing her sentencing decisions. Hayes' approach was to take Hogan out of Drug Court and reassign her. Hogan remembered it all came to a head in the lunch room where she and Hayes had a serious shouting match. "He wanted me out of Drug Court and I refused. He wasn't mean about it – and I held my ground. He respected that and so did the other judges."

As Hogan told it, this was a Court where you had to make it on your own merits. It was not always an easy line to walk but Hayes ensured that the climate at the Court was welcoming to all.

Embracing Social Change: Northern Justice

Many times, Hayes was pushed – willingly – into adopting a progressive approach. Many times, he pulled the court into new directions.

Joanne Hayes recalled that her father respected and understood First Nations, Inuit and Metis traditions. "He always said that there might be different ways of delivering justice." His commitment to the northern regions of the province was legendary. He travelled north often, bundled in parkas and boots. According to his daughter, "he felt responsible to the people there and the judges. They needed to see him."

Hayes personally led an enormously important initiative: Ontario's Native Justice of the Peace Program. At a time of widespread discrimination, and well before many Aboriginal people succeeded at law school and joined the legal profession, this program provided the first sustained and supportive program to bring Aboriginal people into presiding positions in Ontario's courts.

Hayes (left) in the 1980s during one of his journeys to Ontario's north. (Courtesy: G. Michel)

Remarkable in its grass-roots foundation and its audacity, the program worked with and within Aboriginal communities to identify people who, though lacking formal qualifications, clearly had the intelligence, integrity and judgment to become fine judicial officers. The program did not allow the lack of justice system knowledge or other formal qualifications to bar their accession to such positions. Rather, the program provided intensive, in-person pre-appointment training so that those gaps could be filled, and that fully qualified individuals could be considered for appointment as justices of the peace.

The personal commitment of Hayes to this initiative, long before others were doing anything like it, shows his understated and too-often unacknowledged dedication to the highest principles of justice. While Aboriginal people make up nearly 3 per cent of the Canadian population, more than seven per cent of the justices of the peace in Ontario in 2014 are Aboriginal.

And, in keeping with his "one-man operation" approach, when Hayes sent a judicial officer to the northern reaches of the province in winter, he'd personally approach the government and ask for funding to provide the requisite parka, insulated boots and sleeping bag.

Keeping Ahead of the Torrent

"Hayes' office was where he was," explained Griffiths. In the 1980s, Griffiths was a Crown Attorney in charge of scheduling all the Crowns in Toronto and assigning cases to them. In those days, he was watching the trial lists grow longer and longer (due in part to the introduction of the *Charter of Rights and Freedoms* in 1982). "I'd meet up with Hayes in the hallways of the courthouse. If it was the beginning of a month, he'd always take me aside and tell me he had 'good news,' despite his ever-growing number of cases. Then he'd pull a handwritten list out of his jacket pocket where he'd hand counted every case – thousands of them – in every court house in Ontario. It was right out of the 1800s. But he was always positive – he was always trying to reduce the backlogs." Hayes was stymied in this by the Court's lack of control over funding and, therefore, the ability to keep statistics and modernize record-keeping processes- and keep ahead of the growing backlog.

In so many ways, Hayes was the victim of the success of his Criminal Court. As its jurisdiction increased and criminal cases flooded in, the administrative structure simply wasn't there to process them effectively. Some of those necessary administrative changes would come later, with the Chiefs who followed Hayes.

By the time Hayes left office, the Criminal Division of the Provincial Court and the Provincial Offences Court were unrecognizable from the ones he had inherited. The judges were appointed through what is still the most neutral and independent process in the country. They had the jurisdiction to, and did, preside over almost all of the most serious criminal cases in the province. The justices of the peace had been brought under the wing of the Court and were on the road to professionalism and independence.

A view across Nathan Phillips Square at Toronto's Old City Hall. Fred Hayes' office as Chief Judge was located in the former mayor's office of Old City Hall.

[1] Prior to 1968, the provincial government appointed three different types of judicial officers: magistrates and family judges. At the time of the McRuer Commission, justices of the peace could exercise powers in taking informations, issuing warrants, granting bail and when presiding at the trial of summary offences. Magistrates had the jurisdiction to try, with the consent of the accused, all indictable offences, save only those few extremely serious offences which were tried in the Supreme Court of Ontario. Magistrates also presided at the trial of summary offences, including breaches of the Highway Traffic Act, the Liquor Control Act, and municipal by-laws. In1968, when the Provincial Courts (Criminal Division) was created, two Provincial Courts (Family Division) was also created. Its Chief Judge was Ted Andrews.

[2] McRuer Commission Report (Report No. 1, Vol. 2, 1968), p. 516, p. 518

[3] McRuer Report (Report No. 1, Vol. 2, 1968), p. 519

[4] McRuer Report (Report No. 1, Vol. 2, 1968), p. 520

[5] McRuer Report (Report No. 1, Vol. 2, 1968), p. 523

[6] McRuer Report (Report No. 1, Vol 2, 1968), p. 529

[7] *The Provincial Courts Act,* 1968, S.O. 1968, c. 103; Ontario Law Reform Commission, Report on Administration of Ontario Courts, (Part II, 1973), p. 3

[8] Ontario Law Reform Commission, Report on Administration of Ontario Courts, (Part II, 1973), p. 3

[9] Ontario Law Reform Commission, Report on Administration of Ontario Courts, (Part II, 1973), p. 20-21

[10] In the years since the McRuer Commission Report, numerous legislative and policy decisions have been made by the federal and provincial governments which have systematically increased the criminal jurisdiction of the court, reduced the exclusive jurisdiction and workload of the superior court in respect of criminal matters and made the Ontario Court of Justice, for all intents and purposes, the major and dominant criminal trial court for the province. Approximately 98% of the criminal case load in Ontario is finally disposed of in the Ontario Court of Justice. (Edgar, p. 9)

[11] All quotes of various individuals including J. Hayes, P. Griffiths, A. Edgar, F. Devine, B. Hudson, D. Ewart, M. Hogan, G. Michel, were from interviews conducted with them for the OCJ History Project in 2013-15.

Period II: 1968-1989 Profiles & Stories

Robert James Kerfoot Walmsley: Long and Fondly Remembered

NOTE: This profile was written by Justice George Brophy and Professor Peter Walmsley, "Bob" Walmsley's son and George Brophy's son-in-law. Professor Walmsley is a professor of English at McMaster University.

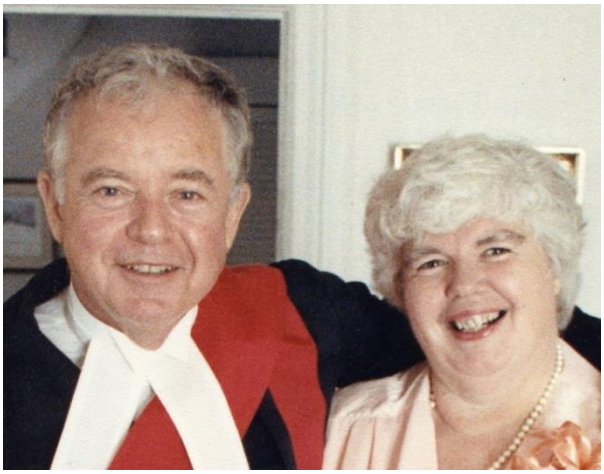
Robert James Kerfoot Walmsley was born on November 25, 1927 in Picton, Ontario, the county town for Prince Edward County. His mother, Helen Kerfoot, was a teacher and his father, Gordon T. Walmsley, was a lawyer. The Walmsley law firm had deep roots in Prince Edward County having been founded by Robert Walmsley's grandfather in 1889.

Robert Walmsley received his initial secondary school education at the University of Toronto Schools and then at Kingston Collegiate and Vocational School and the Picton Collegiate and Vocational Institute, graduating from Grade 13 with first-class honours. Robert Walmsley attended Trinity College at the University of Toronto from 1946 to 1950 and Osgoode Hall Law School from 1950 to 1954, after which he joined the Walmsley law firm. He practised in Picton with his father upon his call to the bar and was later joined in the firm by his younger brother Douglas in 1963.[1]

Robert Walmsley married Ruth Linell in 1952, whom he had met at the University of Toronto. Together they had four children: Ann, John, Peter and Benjamin.

As a local lawyer, Walmsley was actively involved in community life, sitting on Picton's town council as well as serving as a school trustee and on the library board. He also sang in community productions, much as he had done at university.

Walmsley was first appointed to the bench in 1965 as an acting family court judge. In 1967 and 1968, he served in the same capacity on a part-time basis for Prince Edward County. In 1968, he became the full-time magistrate and family court judge for Hastings, Lennox and Addington Counties and Prince Edward County, and then, in keeping with the changes in the structure of the courts, was appointed in 1968 as a full-time judge in the Provincial Court (Family Division).



Judge Robert Walmsley with a family friend, Marilyn Robins (Courtesy: Walmsley Family)

In June 1977, he was named Senior Judge for the eastern region of Ontario and, in September 1978, he became the Associate Chief Judge of the Family Court, a position he held until 1992, when he retired as a full-time judge. Thereafter, he sat as a per diem judge until he reached the age of 75.

During his career on the bench, Walmsley served in many different capacities. He was president of the Provincial Judges' Association (Family Division) from 1974 to 1975 and was a member of the board of that association from 1969 to 1978. He was also a member of the Canadian Council of Juvenile and Family Court Judges and participated in and contributed to many legal and community conferences, including lectures to students at Queen's University Law School, Loyalist College and Trent University.

Throughout his legal career, Robert Walmsley was a member of the International Commission of Jurists, having first joined in 1955. He was also a member, from time to time, of the Canadian Institute for the Administration of Justice and the Canadian Bar Association (where he served both as a member of the Council of the Ontario Branch and on the National Council).[2]

In the course of a judicial career that spanned over 37 years, Robert Walmsley wrote and delivered many judgments, 66 of which are still available on LexisNexis. He was a "judge's judge and a lawyer's judge," observed his long-time colleague and friend Justice James Felstiner. "His judgments were very well written, logical and sensible."[3]

Judge Walmsley performing a wedding. (Courtesy: Walmsley Family)

However, it was as an administrative judge that Associate Chief Judge Walmsley made his most lasting contribution. The Chief Judge of the Family Court, H. Tedford G. Andrews, asked him to oversee some of the most important developments in that Court. Those tasks included convincing the Attorney General of the day that appointees to the Court had to be legally trained, relocating family courts out of the basements of Ontario, figuratively and literally, and establishing continuing education programs for the judges.[4]

Robert Walmsley served as a special advisor on family law to the Chief Judge and provided substantial input into new legislation, including the *Young Offenders Act*, the *Family Law Reform Act* and the *Child and Family Services Act*. He was involved in the development of continuing education programs for Family Court judges and acted as a mentor and support for judges.

He also lobbied for an increased number of judges to deal with delays in the administration of justice on the family side. Walmsley, alongside Andrews, took what was then an unusual step for judges by publicly expressing their concern in the media about delays in the family courts. He told The Globe and Mail that "a young child's interest could very well be to stay where [the child] is, because [the child]

becomes psychologically attached. So you have decisions dictated to you by the passage of time. It is unfortunate to the parents, the foster parents and everyone involved."[5] This public relations effort made the case for a greater investment of resources into family law. Andrews maintained that Robert Walmsley's contribution to the evolution of family justice in Ontario cannot be overstated.[6]

Later in his career, Walmsley became involved in the process for appointing judges to the Provincial Courts. In 1988, he was asked to join a judicial appointments committee established for a three-year project by Attorney General Ian Scott. This committee was charged with seeking out qualified candidates from the legal profession, but particularly those from groups not then ordinarily represented on the bench – women, visible minorities and aboriginals. This eventually led to the establishment of the Judicial Appointments Advisory Committee (JAAC). In 1991, within a year of the merger of the Provincial Court (Criminal Division) and the Provincial Court (Family Division) into the Ontario Court of Justice (Provincial Division), Walmsley was asked to act as the chair of that committee.

The work on the JAAC committee was the highlight of Walmsley's career in that it allowed him to play a major role in the direction of the Court. He worked tirelessly to develop the process and procedures by which the committee functioned. Dozens of judges were interviewed by the committee as judicial applicants during his time as chair, and they universally remember him as a soft-spoken, kind and understanding man whose words of encouragement before and after their interviews helped ease the stress of the experience.[7]

A surprising issue that arose out of that role was the question of whether committee members were able to keep their notes and records private. This became an issue in the case of Walmsley v. Ontario (Attorney General).[8] Robert Walmsley was the named respondent in an application brought for discovery of those records. The Ontario Court of Appeal decided that the members of the committee were not employees or agents of the province and their records were not discoverable. This decision

enhanced the independence of the committee from the executive branch of government and thus supported judicial independence. Aside from the principle that was upheld, this decision was of considerable relief to Walmsley because of his habit of drawing portraits of people appearing in front of him – he used the sketches to help him in reviewing cases – and because he had a penchant for composing rhyming verses in his notebook. He certainly would not have wanted his sketches and poetry to meet the public eye in the glare of a lawsuit.

Not lost on Walmsley was the importance that attention to detail played in the JAAC committee process. Along with its efforts to attract well-qualified candidates from all parts of the society it served, the reformed appointment process was vastly different from that which was in place when Robert Walmsley was a young lawyer. He often remarked that the new and better appointment protocols would have made his own appointment to the bench far less certain.

Walmsley brought to the Judicial Appointments Advisory Committee the good humour and empathy that was his trademark characteristic. Justice Rosalie Abella of the Supreme Court of Canada, who met Walmsley in 1976 when she was appointed a Family Court judge in Ontario, said: "Bob was an extraordinarily warm, compassionate and wise man." She added that "he took care of all of us on the Court – intellectually, collegially and institutionally. … He was one of the most literate people I knew, his exceptional cerebral talents were matched by a fantastic sense of humour. He was funny, laughed easily and often, and never failed to find the right deflationary retort to any whiff of pomposity."[9]

Chief Judge Andrews remarked upon the personal adaptability of Walmsley, who had reinvented himself from a rural Family Court judge in a single-judge location, to one of the most popular and beloved management judges in the history of the Court. As remembered by Andrews, "Bob" – as he was known to his colleagues – was everyone's "grandfather, compassionate, understanding, incredibly supportive and always ready to soothe everyone's woes with a kind smile and a word of encouragement." Andrews

found him to be “a dear friend and colleague, an exemplary judge, a wonderful husband and father, and a model citizen.” [10]

Justice Felstiner remembered aspects of Walmsley’s retirement that illustrate his personality. They often met for lunch and he noted:

> *Bob had an insatiable curiosity about new places, food (were the olives Greek or Italian?), waitresses’ careers, city happenings, new neighbourhoods, old neighbourhoods – especially old Toronto neighbourhoods with their remaining substantial homes from the 19th century. We always drove slowly – peeking here, going down that alley, stopping to watch cranes lift things high onto new condos. A typical scene: at the end of lunch I would go get my car, park it illegally, smack dab in front of the restaurant to make it easier for Bob [as a youngster a severe infection in his hip left him with a pronounced limp for the rest of his life], and I’d go in to get him. Rarely was he alone; it was hard to pull him away from his conversations with the cashier or waiter, and then he always, always stopped to read the brochures available as we went out the door. Then on the street he would say, “Oh there’s a Korean bookstore, I’ll just look in the window.”*[11]

Judge Robert Walmsley (Courtesy: Walmsley Family)

In his retirement, Walmsley mentored elementary school students and read to young children in the school library. This love of reading was not unusual for him because he was “enamoured of words (he

memorized poetry and did cryptic crosswords from the Manchester Guardian for years) and so friendly to the whole world around him."[12]

He also loved spending time at the family cottage in Prince Edward County where he had spent so much of his life enjoying the opportunity to sail and canoe. "He had an absolutely flawless J-stroke with the paddle", his daughter Ann Walmsley reported.[13]

Robert James Kerfoot Walmsley died November 18, 2008, in his sleep at his Toronto home. He was 80 years old. He was survived by his wife, his children and 12 grandchildren.

In 2002, Chief Justice Brian Lennox wrote these words in a letter to Walmsley on the occasion of his 75th birthday:

> *The judges of the Ontario Court of Justice owe an immense debt to you in the various capacities which you have occupied in the course of the evolution of our Court. You have not only witnessed, but you have been a leading actor in the entire modern history of the provincial courts of Ontario. You have done so with dignity, grace, wisdom, humour, energy and enthusiasm. It is given to very few people in the course of their lives to have made such a significant contribution … When the history of the provincial courts of Ontario is written, you will be long and fondly remembered and will have a place of honour.*[14]

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[1] Indeed, the firm continued into the 21st century under the guidance of Justice Walmsley's brother, Douglas, who practiced law for 40 years and who died in 2007 at the age of 71.
[2] February 1982 Curriculum Vitae, Archives of the Chief Justice.
[3] *The Globe and Mail*, December 29, 2008.
[4] *Benchmark*, Vol.17, No.4 – Winter 2008, p. 2.
[5] *The Globe and Mail*, op. cit.
[6] *Benchmark*, op. cit. p 2.
[7] Letter dated August 11, 1993 from Chief Judge Sidney B. Linden to Associate Chief Judge R.J.K. Walmsley
[8] 34 O.R. (3d) 611, [1997] O.J. No. 2485
[9] *The Globe and Mail*, op. cit
[10] *Benchmark*, op. cit., p. 2.
[11] *Benchmark*, op. cit., p. 2-3.

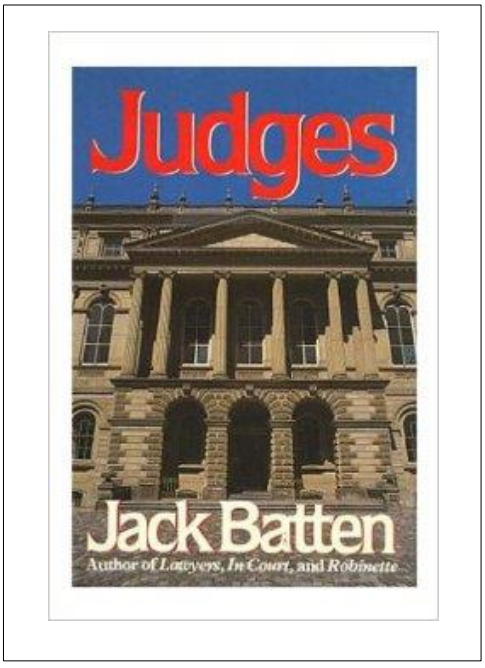
[12] *Benchmark*, op.cit., p. 2-3.
[13] *The Globe and Mail*, op. cit
[14] Letter dated November 25, 2002 from Chief Justice Brian W. Lennox to R.J.K. Walmsley.

Period II: 1968-1989 Profiles & Stories

Joe Addison and Robert Dnieper

Introduction

In 1986, Canadian author, Jack Batten published *Judges* – a collection of profiles which the author described as being "about Canadian judges at work."[1] He took several Provincial Court judges as subjects and concluded that Provincial Court was where the "scrappy, visceral stuff takes place." Batten observed that on any given day in court: "a judge is routinely called on to exhibit the tact of a diplomat, the wisdom of Solomon, the patience of a peace negotiator." He interviewed numerous judges who were presiding in Toronto's Old City Hall – a building Batten characterized as "everybody's blithe and eccentric aunt. It just misses dowdiness, but for quirkiness it's right on target."[2]



Several of the Old City Hall judges profiled were quirky in their own rights. In particular, Judge Robert Dnieper was possessed of a significant reputation when Batten chose to write about him. A judge for 25 years by 1986, Dnieper was routinely identified by the media, lawyers and others as one of "the worst" in the Provincial Court system.[3]

Batten also interviewed judges whom he unabashedly admired for being "courteous, bright, determined and industrious." "Gentleman Joe" Addison was placed squarely in that category by the author.

Author Jack Batten with Chief Justice Annemarie Bonkalo, January 2015 (Photo by Rudy Buksbaum. Courtesy: Ontario Court of Justice)

Jack Batten's profiles of Addison and Dnieper are excerpted in the following paragraphs.

Judge Joe Addison

As an introduction to the excerpt from Judges, Jack Batten has penned this postscript to his profile of Joe Addison:

"At Joe Addison's funeral on Sunday afternoon, September 6, 1986, the rabbi spoke first.

'Our friend Judge Joe Addison died a happy man,' the rabbi began.

Then he explained why Judge Joe Addison had been happy. It happened that a few days earlier, the judge had got his hands on an advance copy of the book published later that month with a simple title, Judges. *The book offered a series of thirteen profiles of judges at different level of Canadian jurisprudence. One chapter was all about the Chief Justice of the British Columbia Court of Appeal. Another told the story of Saskatchewan trial judge whose life might have been under threat from a man who had appeared before him. And another chapter tried to portray the entire Supreme Court of Canada.*

Then there was the chapter titled 'Joe Addison.' It told Judge Addison's story from the time he was appointed to Ontario's Provincial Court in 1958. On the bench, Judge Addison was fair, kind, well-versed

in the law, and often very funny. He treated everybody who appeared before him with grace. It was not for nothing that the nickname by which he become known around the courts was 'Gentleman Joe.'

Judge Addison took his advance copy of Judges *home to show his family. He was seventy-four at the time, still sitting on the bench, still counting on a few more years of life. That night, he gathered his family together, and read to them the chapter about him from the book. He was pleased with what he read. So was his family. It made him and them feel proud of the work he had done and was still doing.*

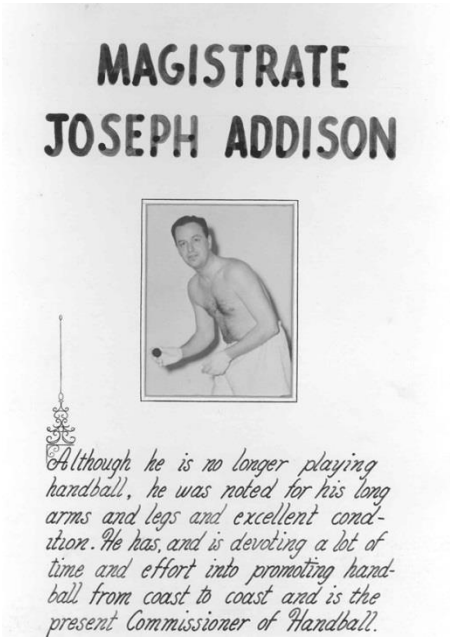
Joe Addison went to sleep that night a happy man. Since the judge never woke up from the sleep, since he died in the night, the rabbi at his funeral must surely have been right when he said Judge Addison died a happy man."

Thus, the words which so pleased Joe Addison in Jack Batten's *Judges* are excerpted below:

Addison has been a Provincial Court judge since 1958, sitting almost exclusively in Toronto's Old City Hall, and in all his years on the bench, he's taken a sort of bemused attitude toward the bizarre and terrible events that happen in front of him. He's a funny man, and he likes to laugh on the job. But there's nothing condescending or cruel about his wit. He doesn't score points off the people on the prisoners' box. He doesn't take advantage.

"I'm not gonna go out there resenting the guys who appear before me," he said one spring morning in 1985, sitting in his chambers at Old City Hall. "I don't shake my finger at them or give them a lecture. They know what's gonna happen to them anyway. In a lot of cases, most likely they're going to jail." There are a couple of other points about Addison. One is that he's a gracious man. He isn't known among defence counsel as "Gentleman Joe" for nothing. And the other is that he's got the art of judging down as fine and fair as it will go. Around Old City Hall, they say that Joe Addison has never been reversed on appeal. It's hyperbole, but it's a measure of the man's honestly won reputation.

"Everybody gets a good trial from me." Addison said. "The fella may not like the result, but he can't complain he wasn't treated right. I've always told my associates on the bench, if I was a person who wasn't guilty of something I was charged with, I'd rather appear before me than any of them….



Judge Joe Addison was an active member of the Y.M. – Y.W.H.A. and a handball enthusiast. (Photo courtesy of Ontario Jewish Archives)

In the catalogue of the thousands of cases he's heard, Addison looks back on the David Winchell hearing as one he got a special laugh out of. Several laughs. Winchell was a stock promoter around Toronto, and in the late 1970s he was peddling an unlisted oil stock to a number of the city's big shooters. Winchell's adviser in the deals was a lawyer named Sam Ciglen, who had had his own troubles with the law over the years. He had made many trips to court to defend himself against charges of stock fraud. But in the Winchell case he was mainly on the sidelines, which isn't to say he didn't reap a few benefits from the association. "The two of them, Winchell and Ciglen, used to go back and forth to Switzerland like I go downtown," Addison says. "Switzerland must've been where they had a bank account for the money from the issue of this crazy stock."

The money was substantial, about six hundred thousand dollars before the big shooters began to get nervous and called in the fraud squad. Charges were duly laid against Winchell, though not Ciglen, and the preliminary hearing in the case came before Addison.

"The fellas with the important names who lost money testified for the Crown," Addison says. "DelZotto. Rudy Bratty. First time I ever saw those fellas look unhappy."

A Crown witness named Sherkin, one of the other investors who'd dropped a bundle, took the stand.

Sherkin looked over from the witness-box to Addison. "Goodie sends his regards," he said.

Winchell's lawyer, an excellent counsel named Mike Moldaver, sprang to his feet and asked to see Addison in his chambers.

"What's the trouble, Mike?" Addison asked when they were alone.

"The witness, Sherkin," Moldaver said, concerned, "he's a close friend of yours?"

"Mike, I never saw the man before in my life."

"But what about this Goodie he's talking about?"

Addison explained.

"He's talking about Goodie Rosen, Sherkin is," he said. "Goodie's a wonderful guy. Used to play baseball for the old Brooklyn Dodgers in the 1940s. I grew up with him down by Bellwoods Park. Sherkin's a friend of Goodie's, I guess, and so am I. I got no control over what the witness says, but there's nothing wrong here."

Moldaver was mollified and returned to court.

Sherkin wasn't through.

"Winchell used to take us investors up to his summer cottage and ride us around in his boat," he testified. "That cottage, the Taj Mahal is smaller even, and his boat, you could float the *Queen Mary* inside it."

Sherkin said he'd invested so much money in Winchell's stock that his wife had worried herself into a heart condition.

Sherkin looked over at Winchell in the prisoners' box.

"So what are you selling today, David?" he said. "Cancer?"

As the preliminary hearing progressed and as the evidence accumulated against Winchell, Moldaver entered into plea-bargaining with the Crown. They worked out a deal and took it to Addison for his approval. Winchell would plead guilty and accept a fine of one million dollars and repay the investors to the tune of some six hundred thousand dollars.

"I agree," Addison said to the lawyers. "How would it help these investors get back their money if Winchell went to jail for three or four years? Wouldn't achieve a thing."

The bargain was struck, and a day later, a court official knocked on the door to Addison's chambers.

"You want to look at something amazing?" the official said.

"Show me."

The official held out a cheque.

"It's from Winchell." He said.

"One million bucks," Addison said. "Certified. How d'ya like that? He came back with it overnight."

"Ever seen one like that?" the official asked.

"Don't move in those circles," Addison answered…

Addison's chambers are in a large, gloomy room at the top of Old City Hall. They're furnished in pieces that might have come from a thrift store—a desk, a couple of armchairs, a sofa, and a coffee

table. On the coffee table on this day there rested two fat volumes with blue covers, each volume about an inch and a half thick.

"My judgment from the preliminary hearing on the Southam case," Addison said, gesturing at the blue volumes.

The Southam case is one of Addison's prides. The hearing stretched over several months in his court, and he estimates he read "probably twenty thousand pages of cases" before he wrote his long judgment. The case involved important issues and big names in Canada's corporate community, and it arose out of a series of transactions worked out by the country's three leading newspaper publishers. Over a short period of time in the late 1970s and the early 1980s, the three dealt in several big-city newspapers in ways that attracted the alarm of the federal Attorney General's Office. In Montreal, FP Publications closed down the *Star* and left the daily field to the *Gazette*, a Southam paper. In Winnipeg, it was a Southam paper, the *Tribune* that folded, leaving a Thomson paper, the *Free Press*, all alone. In Ottawa, the *Journal* ceased publication and turned the market over to a Southam paper, the *Citizen*. And in Vancouver, both newspapers continued operations, the *Sun* and the *Province*, but Thomson assigned its half-interest in the company that owned the two, Pacific Press, to Southam. The federal government regarded all of this manoeuvring as a form of hanky-panky and charged Southam, FP, and Thomson with offences under the Anti-Combines Act.

"I didn't know I was taking the preliminary hearing in the case until the morning I walked into Forty–two Court," Addison said in his chambers. "This was in the fall of 1981, and I looked at the counsel table and what I saw was the A-Team. I knew it was gonna be something very large."

The evidence was complex, and the issues were new to Addison. "I'd never been down that road before," he said. The hearing lasted through the winter until Easter of 1982 with a few weeks off from time to time while Addison and counsel tended to other cases and other trials. Addison did his

homework on anti-combines law, and, as the hearing progressed, it seemed to him that there would probably be enough evidence to commit the newspaper chains to trial on the charges.

Jake Howard, Southam's counsel, must have seen the writing on the wall. He elected to put in no defence on behalf of his client.

"Mr. Howard, do you have an argument?" Addison asked him in court.

"Your honour," Howard said, "I didn't have an argument in the beginning."

Addison laughed. It was his kind of answer.

When the hearing ended and Addison retired to write his judgment, he found himself with new problems. Who, for example, was going to type his judgment?

Writing the judgment was challenging enough. "Many a night I'd wake up at four in the morning with something on my mind," he said. "I'd get up, go to the den at home, and write until I got it all down." The writing took up several four–in–the–morning sessions and most of the rest of Addison's time. "I went to our chief judge, Fred Hayes," Addison said, "and I said to him, 'you may be wondering what I'm doing,' and then I said, 'I may be writing a novel.'"

Addison finished the judgment in longhand and went looking for someone to type it.

"The crazy problems you have in my business,' he said. "I had a secretary, but she also worked for four other judges. I gave her the judgment and three weeks later it was still sitting in the same place. So I told her to farm out parts of the judgment to other stenographers. That didn't work. Totally disjointed. Do guys in the Supreme Court of Canada have this kind of trouble? Next we brought in the good legal secretary who happened to be on the loose and got her to type it. At first there was a small difficulty. Her desk was beside the kid who delivered the mail. He smoked. That bothered the secretary. I

got her a new office. By then I'd already had to postpone the day I said I'd deliver the judgment. It's crazy, but that's life in the Provincial Court."

Addison's judgment added up to 477 typed pages and it took him three days in early May of 1982 to read his words to the lawyers and reporters assembled in Forty-two Court. "Regrettably," he began, "I have been unable to condense this judgment to other than gargantuan proportions." Then he proceeded to analyse the evidence and the law on combines in immaculate detail. He concluded that the newspaper chains must face trial on the Crown's charges.

Judge Joe Addison
(Source: Getty Images)

Much later, at the trial in the Supreme Court of Ontario, the presiding justice dismissed the charges against Southam, FP and Thomson. He based his judgment on fact rather than on law. As a finding of fact, the justice held that the newspaper executives had no intent to break the law, that they had arrived at no prior arrangement to give themselves or the others an advantage in the various newspaper markets. Since the finding was based on fact, not law, the Crown was not able to make an appeal of the decision to a higher court.

Addison wished that the case could have been proceeded to appeal. He would have liked to see his own conclusions thrashed around in the Ontario Court of Appeal and the Supreme Court of Canada. That was one disappointment the case left him with. And there was one other tiny, niggling regret.

"I wish I'd bought some Southam stock," he said in his chambers. "These guys had just created a gold mine. The stock was bound to go up, and after I'd finished my judgments, which of course was contrary to where my money would be going, I thought about investing. But then I figured, no, I better not touch it. The thing about being a judge is you can't do anything that wouldn't look right."[4]

To balance Batten's profile of Addison, it is interesting to consider the writings of one of Joe Addison's peers on the bench at the time. Judge David Vanek was appointed to Magistrates' Court a decade after Addison. Much had changed during those 10 years and Vanek had a different approach to judging than Addison. Vanek was more concerned with judicial independence than Addison who came from the culture of the "Police Magistrates' Court," where there had been a close relationship between police and magistrates.

According to Vanek, "Joe was infected by the magistrates' syndrome. I considered Joe too close and friendly with the police. While there was nothing wrongful in this relationship, I felt it was desirable to avoid even an appearance of influence over a judge by persons associated with the justice system. I recall sitting in court with Joe Addison as part of my initial orientation when, in the course of the day, an accused came before him and pleaded guilty to the possession of a concealed weapon. He was a black man, had come from Buffalo by car, and had been stopped by police who found a loaded pistol in the car. I believe it had been affixed to the engine. The accused made an elaborate plea for leniency on grounds that because of the incidence of crime in the United States, it was necessary and acceptable to be in possession of a firearm for personal protection. He was under the impression that the law and the need for protection were the same in Canada. Joe Addison listened impassively, then simply spoke two words: "six months!"[5] Vanek's comments clearly demonstrate the maturing professionalism of the bench, with a growing concern about judicial independence.

Judge Robert Dnieper

So, why is someone known for being – in Jack Batten's words – "a loose cannon" included in the Court's history? A profile like this one about Judge Robert Dnieper is a good reminder of where the Court came from, the serious challenges it faced in the past and a strong admonition of where the Court should not

tread again – thanks to much improved appointments, review and education processes now in place for all judicial officers.

Dnieper sat prior to the adoption of any of these updated processes. Before the Ontario Judicial Council was created, complaints about judges went directly to the Attorney General. Dnieper was, several times, publicly upbraided by the Attorney General – but not dismissed from the bench. Dnieper threatened a 16-year-old with "the lash," after the young man was charged with vagrancy in 1965. The charges against the young man had actually been dismissed but that didn't deter Dnieper from delivering a very threatening lecture. The then-Attorney General, Arthur Wishart, in an interview with *The Globe and Mail* stated: "[T]his type of commentary and the way it was done and the language used does not add to the (good) impression of the public and does not please this court and does not please me."[6] In the end, Dnieper far outlasted Wishart. Dnieper served 33 years on the bench until retirement in 1993.

Judge Robert Dnieper
(Source: *Now*, December 10-16, 1992)

Jack Batten's account of Dnieper is reproduced below:

"The man appearing before Judge Robert Dnieper in the first week of October 1985 didn't give off the feel of a student or a scholar. But, according to the evidence, he had in his possession 236 learned texts dealing with early Christian myths and history. The man's name was George Elia, he was forty-eight years old and he'd stolen all 236 books from libraries at the University of Toronto. It wasn't the first time Elia was caught swiping university books. He'd been nailed with a bag of texts in 1981, but since then he'd apparently gone in for thievery in a much more ambitious way. He'd enrolled in one non-credit course at the university, thereby acquiring a library card, and before librarians grabbed him in

April 1985, he'd managed to squirrel away the 236 books which were worth about thirteen thousand dollars. Elia was hardly the only library thief in the university's experience, just one of the most cagey, but as he stood before Judge Dnieper, he and the university knew that the other apprehended thieves had received nothing worse than a slap-on-the-wrist fine for their crimes.

Dnieper changed the old perceptions in a hurry.

"You have done incalculable harm to other students," Dnieper said to Elia. "And this is going to be the first time in Ontario, and possibly all of Canada, that someone is going to jail for what you have done."

He sentenced Elia to serve seven days in jail, put him on probation for three years, directed him to perform three hundred hours of community service, and ordered him to pay restitution for any of the 236 books that weren't returned to the university.

That was Judge Dnieper on what most lawyers who appear regularly in his court would call a good day. On Dnieper's other days, there's no counting on his decisions or his sentences, his attitude to counsel or the quality of his repartee. Dnieper is the loose cannon among judges at Old City Hall. He is bright and quick but unpredictable; he has a sound knowledge of the law but might bypass it on occasions when he decides justice is best served by making an end run around the Criminal Code; he is fast with a genuinely witty line, the Johnny Carson of the Courtroom, but his humour sometimes takes on an edge that may be black or sexist or patronizing.

Many of his qualities went on vintage display one day in May 1983 in Twenty-three Court when Dnieper had before him an old-time rounder named Carroll who was pleading guilty to one count of theft under two hundred dollars. Mr. Carroll had light-fingered a couple of bottles of aftershave lotion and been caught in the act.

“How are you feeling?” Dnieper began with Carroll.

“Fine,” Carroll answered.

“How long do you want on this one?” Dnieper asked.

“You mean you want me to tell you how much I want?” Carroll said, slightly amazed.

“Yeah,” Dnieper said. “How long do you want in jail?”

At that point, the Crown Attorney, a woman named Goebbels, decided to put in her oar.

“Your honour,” she said, “this is his fifty-third conviction on theft. In January he got three months, and in March he got thirty days.”

“I don’t have time to read his record,” Dnieper said. “This court has to quit at five o’clock.”

Dnieper turned back to Carroll.

“Give me an answer,” he said. “How long do you want?”

“Ten days?” Carroll tried.

“Why not?” Dnieper said. “Sounds fair to me.”

Dnieper swung back to Ms. Goebbels.

“You see, crown,” he said. “Mr. Carroll is neither a plague of locusts nor a national disaster. He is an irritation much like a mosquito or a black-fly in June. It is a judgment of God upon our society and something with which we have to live. He is neither a danger to society nor a danger to the individual members thereof. He is merely a pain in the neck.”

“Yes, your honour,” Goebbels said, “but with respect, one usually tries to swat the black-flies or mosquitoes so they don’t come back again.”

"You and I must be thinking of different black-flies," Dnieper answered. "Black-flies with which I've had anything to do defy swatting, and Carroll defies correction. So let's accept him and forget about it."

"Thank you, your honour," Goebbels said, tossing in the towel.

But Dnieper wasn't finished with Carroll.

"Listen," Dnieper said to the man, "if I get you again, I'm going to throw you on the street without sending you up to the jail at all."

Dnieper looked over at Ms. Goebbels.

"You see, crown," he said, "the great value of the English common law is its ability to adapt to the situation."

Dnieper has been either outraging or delighting his courtroom audiences since the day of his appointment to the bench in 1961. He is now in his mid-fifties, an imposing, forceful man… .

His hair is black and slicked back. His eyes are dark and constantly on the move in the courtroom. He checks out counsel, gives the accused a once-over, and scans the audience. He looks restless, like a judge who doesn't mind a little controversy to juice up his day.

He may often be hard to read in his responses in court, but in a couple of areas Dnieper is utterly consistent. Drug offences make up one area. Dnieper is death on drug users and worse on drug pushers. Almost all Provincial Court judges grant a discharge to kids caught with a small amount of marijuana on a first offence, but Dnieper usually hands out a sentence. Defence counsel are aware of this propensity and try to steer clear of him when he is sitting in the drug courts. What they want to avoid, apart from a criminal record for their clients, is the lecture that Dnieper frequently delivers along with the sentence.

It's The Dnieper Lecture to defence counsel. They know it by heart. It explains how the international commerce in drugs is related to the decline of the western world. Defence counsel are said to develop an automatic groan after too many exposures to The Lecture.

"The traffic in narcotics is an organized evil and a conspiratorial evil," Dnieper began in the course of a typical five minute version of The Lecture during the sentencing in 1979 of a young man charged with the possession of marijuana. "In supporting these men who have no heart to our nation, the accused became one of them, an enemy to our people, and I do not view it lightly."

And that wasn't all.

"I won't bore anyone with a recitation of the amount of Canadian dollars that flows outside the country for these drugs," Dnieper went on. "All this, of course, has to be paid for by the sale of our natural resources."

In the end, the young man's penalty was comparatively light in Dnieper's terms – a one-hundred-dollar fine or seven days in jail.

If Dnieper sounds like a patriot, he is. He emigrated to Canada from the Ukraine with his parents when he was a child, and though his early life was harsh – he was compelled to work in a factory as an eleven-year-old – he developed a love affair with his new home.

But his love does not necessarily extend to Canadian society's dissenters and activists. A twenty-eight-year-old man named Scott Marsden discovered that truth when he appeared before Dnieper on June 24, 1985. Marsden had taken part in a sitdown in the driveway at Litton Systems, the Toronto company that makes parts for Cruise missiles. Marsden was arrested and found himself in front of Dnieper, who convicted him of mischief, bringing Marsden's total to four mischief convictions during four demonstrations.

"The accused in the past has broken the law because he seeks to impose his will upon us all," Dnieper rumbled. "The views of Canadian society are represented in the House of Commons, and the accused cannot contravene the will of the people."

Then Dnieper hit Marsden with the toughest sentence for demonstrating that regulars around Old City Hall could recall.

Five days in jail, two hundred hours of community service, and prohibition from taking part in similar demonstrations for a year.

When something rouses Dnieper's anger, he holds nothing back. He pitches into the case. An unfortunate pornographer came before him on February 22, 1985. The man was sixty-three- years old and the proprietor of a hole-in-the-wall store in downtown Toronto where he sold comic books over the counter. Under the counter, he peddled sex magazines which were imported from Europe and the United States. The magazines were long on violence and bondage, and their price tag was hefty, about thirty dollars per magazine. Dnieper studied the man's product, pronounced it "disgusting," and sentenced him to eighteen months in prison. The Crown Attorney on the case, John Hansbridge, felt his jaw drop in disbelief. "The usual penalty on such conviction," Hansbridge said later, "is a fine and maybe a day in jail." Not in Judge Dnieper's court.

On the morning of October 16, 1985, sitting in Forty-two Court, Dnieper put on display another of the tendencies that set him apart from other Old City Hall judges – his blunt style of questioning. In a sense, his head-on directness is a reflection of his own quick mind. He can't abide counsel who don't get to the facts. Witnesses who dawdle over the case's point drive him to exasperation. Dnieper has already absorbed the point while everybody else is still circling it. The difference in speed makes Dnieper twitch with impatience, and he was beginning to squirm in Forty-two Court on October 16 during a preliminary hearing on a first-degree-murder charge.

The accused was a Canadian Indian in his late twenties. Was wraith thin and wore a Fu Manchu arrangement of moustache and goatee and long black hair which was parted in the middle and fell around his shoulders. He sat unnervingly still in the prisoners' box and gave off an aura of calm and peace.

According to the testimony of the crown witnesses, calm and peace may not have accurately described the Indian's habitual state of mind. One of his former girlfriends had been murdered in a way that spoke of suffering and violation, and evidence pointed to the Indian as a certain suspect. The woman's body had been found lying face down on the bed in her apartment. She was nude. Her hands were tied behind her back. Each of her buttocks showed a human bite mark. Her anus bore signs that something had been forced into it. And there were seven wounds on the back and sides of her head inflicted by blows from the traditional blunt instrument.

The police officers who investigated the case and the pathologist who performed the autopsy on the dead woman testified to the terrible facts of the killing with enormous restraint. They skirted around their descriptions of the body and its injuries, and the Crown Attorney needed dozens of questions to draw out their evidence. Each witness shied away from the horror of the events in the woman's bedroom, and Dnieper wasn't happy with the way the hearing was stretching through his morning. He shuffled the papers in front of him, chewed at the edges of his tie, and let out a couple of giant yawns.

The pathologist stood in the witness-box. He was presenting a list of the marks on the woman's body — rope burns on the wrists, bites to the buttocks, injured anus, blows to the head — and he was taking his painful time about it.

Dnieper made his move. He'd accepted the testimony in edgy silence through the morning. Now he spoke up, addressing himself to the pathologist.

"Your observation is that the dead woman was subjected to bondage, sadism, sodomy, and murder?" he said in a swift tumble of words. "Is that about the size of it?"

The pathologist mouth dropped open. The Crown Attorney stood rigid at the counsel table. Everyone in the courtroom fell as still and quiet as the Indian in the prisoners' box.

"Yes?" Dnieper said, still looking at the pathologist.

The courtroom turned instantly into a scene of purposeful action. The pathologist allowed that, yes, the judge's description had summed up the situation. The Crown Attorney picked up the pace in his examinations. Witnesses grew crisp and authoritative. And fifteen minutes later, almost as an anti-climax, Dnieper wound up the hearing by ordering that, pending a decision on committal for trial, the Indian would be dispatched to the proper facilities, in custody, for a lengthy mental examination.

Court stood adjourned.

Judge Robert Dnieper had struck again."[7]

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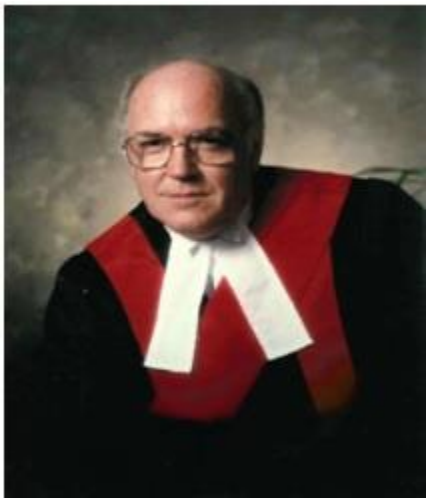
[1] Jack Batten, *Judges* (Toronto: Macmillan of Canada, 1986) p.XIV. Reproduced with the permission of the author.
[2] Batten, *Judges*, p. 77.
[3] Enzo Di Matteo, *Now*, December 10-16, 1992 p. 10
[4] Batten, *Judges,* pp.105-106, 109-111, 113-116.
[5] David Vanek*, Fulfilment: Memoirs of a Criminal Court Judge* (Toronto: The Osgoode Society for Canadian Legal History, 1999) p.222.
[6] *The Globe and Mail*, June 16, 1965.
[7] Batten, *Judges*, pp. 97-104.

Period II: 1968-1989 Profiles & Stories

Ted Andrews: Getting Family Courts "Out of the Basement"

When Ted Andrews became a judge in 1962, he was dismayed to realize that the Juvenile and Family Courts were generally treated like "poor cousins"[1] of the Magistrates' Courts that heard adult criminal cases.

He recognized the contribution Juvenile and Family Courts made to the community and justice system by resolving vital issues affecting families and children. Their work included cases concerning troubled youth ("juvenile delinquents"), children involved in the child welfare system, and orders for the financial support of spouses and children.



Chief Judge Ted Andrews served as Chief of the Family Division of the Provincial Court from 1968-1990. (Photo: Ashley and Crippen Photographers, Courtesy: Ontario Court of Justice)

Symbolic of the problem was the fact that these important Courts, often poorly funded by municipalities and counties, were "forced to operate out of basements in public buildings or low rental spaces with back door entrances."[2] As the first Chief Judge of the Provincial Court (Family Division), Ted Andrews was determined to bring them "out of the basement" both literally and figuratively.

Andrews served as Chief Judge for 22 years. Under his leadership, the Court created educational programming for family judges, worked closely with the community, and introduced innovations such as mediation. Andrews was a champion for the Unified Family Court – a court with jurisdiction to hear both federal and provincial family matters – and helped to launch the first "UFC" as a pilot project in

Hamilton. He was later disappointed when young offender cases were removed from the UFC while other issues affecting children remained.

"In Family Court, you have to care as much for the people as for the issues."

Andrews' advocacy was not always appreciated by the provincial government which had assumed responsibility for the Family Courts in 1968. And his relationship with one Attorney General was particularly strained. However, throughout his long judicial career, Andrews was motivated by a desire to improve the lives and prospects of children and families that came before the Court. "In Family Court," he said, "you have to care as much for the people as for the issues."[3]

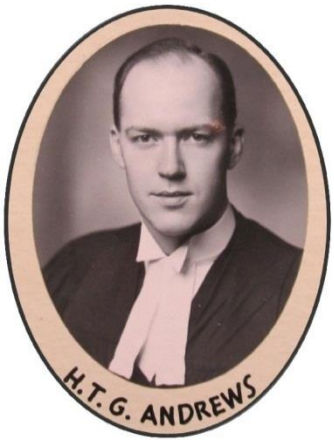
Early Life: Moving Around the Province

Harry Tedford Gee Andrews was born in the parsonage of John Street United Church in Sault Ste. Marie in 1927. His father was a minister and his mother played piano for the church choir. The minister's work caused the family to move to Newmarket when Andrews was three, to Brampton when he was 11, and to Toronto during his teens. Andrews did not resent having been "shunted around" in his youth. He said it helped to build social awareness as he was constantly exposed to new people, experiences and communities. Times were tough during the Great Depression but Andrews recalled that, "we always had enough to eat, we dressed warmly, and we made our own entertainment."

According to Andrews, his academic career began badly when he "flunked out of nursery school," allegedly for eating a saucer full of glue which he had mistaken for maple syrup. At high school in Brampton, he pitched hardball and played football, hockey and lacrosse – much preferring sports to academics. Andrews had wanted to be a doctor, but after moving to Toronto he had a difficult adjustment when finishing high school at Vaughan Road Collegiate. He passed, but without the marks to get into medical school. Instead, he studied arts at Victoria College, University of Toronto.

The Lure of the Law

Andrews decided to go into law because Charlie Bowyer, the father of his good friend Blaine, was a lawyer back in Brampton. It never occurred to Andrews to follow in his own father's footsteps and become a clergyman. "I have always felt that you don't have to be a church-goer to have an abiding faith and live by the principles in the Bible."



Ted Andrews, the 1954 Osgoode Hall Law School graduate. (Photo courtesy of the Law Society of Upper Canada)

Andrews began studying law at Osgoode Hall in 1949 at age 22. He paid for his education by working summers as a sleeping car conductor on the Canadian Pacific Railroad. Andrews was not initially enamoured with law school and had to write some supplementary exams. He took a year off to work at a large Bay Street practice, Sinclair, Goodenough. "At that time, a firm of 8 to 10 lawyers was considered big," he would recall. There, Andrews was exposed to litigation when assigned to accompany lawyers to court where he took notes. At this turning point, he decided he "liked the law" and returned to Osgoode with renewed enthusiasm.

Andrews also became enthusiastic about Eva Karrys, whom he married in 1953. Eva was a psychologist who continued working until 1956 when the first of their two sons was born. Although neither son followed their father into the law, Andrews' second wife, Judith Ryan, moved from a successful career as a social worker assisting children and families to become a well-known family law lawyer and mediator.

Back to Brampton

Andrews completed his articles in Toronto with two lawyers who shared office space on Bay Street. One had a family practice and the other worked in real estate. After being called to the bar, he returned to Brampton and joined Charlie Bowyer's general practice. A year later, Bowyer's son Blaine joined the

firm. The four-person firm became Bowyer, Beattie and Andrews; it was 1954. Andrews was not interested in the fast pace of a downtown Toronto practice: “Quality of life was more important to me than the big bucks, even if the big bucks were available.”

Brampton was still a small community then, primarily serving a large surrounding farm district. Andrews estimated there were probably six law firms in practice at the time, including the firm of Albert Davis. Davis’ son Bill – the future Premier of Ontario – had been a year or two behind Andrews in high school in Brampton. As a young lawyer in Brampton, Andrews became involved in community work. “I was probably the youngest president that the Rotary Club ever had.” He also served as president of the local branch of the Victorian Order of Nurses and as an elder at St. Bartholomew’s Church. The women of the community convinced him to become president of the local Red Cross.

When it became clear that Charlie Bowyer was not about to offer him a partnership, Andrews decided to go out on his own, in partnership with Johnny Webber. They practised together for two years until 1962 when Andrews was appointed to the provincial bench at age 35. Webber later became a federally appointed judge in Brampton.

A Two-Hatter

It was Bill Davis, then the local member of provincial parliament for Peel, who asked Andrews to consider a judicial appointment in that county. With a young family, Andrews wasn’t sure he could afford it. He negotiated a higher salary in exchange for being a “two hatter” – presiding over both criminal and family cases. “In those days, you bargained for your salary, which is amazing when we look at it now.” In later years, judicial salaries would be bargained as a group and subsequently became fixed, with no individual or collective bargaining.

As a two hatter, Andrews received two salaries. At that time, the provincial government paid the salaries of the magistrates (who heard adult criminal cases); the county or municipality provided remuneration for juvenile and family court judges. “I negotiated $9,000 as a magistrate plus $2,500 for Juvenile and Family Court for a grand total of $11,500!” This disparity clearly illustrated the “poor cousin” status of the juvenile and family courts.

Andrews’ appointment to the bench was no guarantee of a long judicial career. “In those days, you were appointed a deputy magistrate first, and then a year later, if you were good enough, you were made a magistrate. I know that one magistrate who displeased the government was kept a deputy magistrate for several years.” This would never meet later standards for an independent judiciary.

At the time of his appointment as a magistrate and Juvenile and Family Court judge, Andrews had been in practice for eight years. There was no requirement then to have practised for 10 years, and judges did not even need a legal background. Andrews’ predecessor in the criminal court (known as Magistrates’ Court) was a hardware merchant named Dick Blaine. His predecessor on the Family Court was Daisy Graydon, the widow of a deceased member of the federal parliament.

Dressing the Part

When Andrews’ judicial regalia arrived from the Harcourts tailor, he dressed up just to see that everything fit – wing collar, tabs, waistcoat, gown and striped trousers. His wife and son Robbie watched as he proudly paraded in his new outfit. Andrews recalled Robbie’s puzzled expression, (he was then around five years old) until he figured it out: “Daddy is a clown!” Years later Andrews reminisced, “You remember that and it keeps you humble.”

Getting Started

When Andrews was appointed in 1962, there was no Chief Magistrate or Chief Judge of the Juvenile and Family Court. Those positions were created by amendments to the *Magistrates Act* in 1964 and to the *Juvenile and Family Courts Act* in 1967. When the *Provincial Courts Act, 1968* was enacted, the two Courts became divisions of the new Provincial Court, each with its own Chief Judge. "Before the creation of the Chief Judge positions," said Andrews, "the Courts were basically run by the Ministry." And there was no training to speak of for new judges. Andrews spent one day in Family Court and one day in adult Criminal Court to observe the proceedings – then began hearing cases on his own.

Fortunately, Andrews had done quite a bit of Magistrates' Court work before his appointment and that helped considerably. "I don't know how anybody who has not done any court work at all can really get in there and do a proper job, from day one, without any sort of judicial education. I could not help but look good being a lawyer, having predecessors who were not trained lawyers. Counsel were just so eager to be able to quote some law to me, to somebody who would know what they were talking about. That gave me a sense of being much appreciated right off the bat."

Learning the Ropes

Andrews developed different styles for presiding in the two types of court. This was not just because of the different nature of the subject matter: lawyers typically appeared before him on criminal matters but it was rare to see lawyers in Family Court.

One embarrassing moment occurred early on when Andrews had two consecutive judgments to deliver. He was surprised to hear gasps in the courtroom as he began reading the first judgment to the parties, who were clearly puzzled. It turned out he was reading the wrong text!

In those days, Juvenile and Family Court hearings were held *in camera*, meaning the public and media were not permitted to observe. Andrews believed that this helped the parties. "I think you got to the

real issues much more readily. People don't like washing their dirty linen in public, and you have to get down and dirty sometimes to find out really what's wrong with a marriage."

Adjusting to Life on the Bench

After becoming a judge, Andrews learned that he had to be a model in the community. Public expectations were high, just as they had been for his father as a clergyman. "It is funny how your best friends suddenly don't know what to call you. 'Now, do I call you Ted, or Your Honour? ' I had that question put to me a number of times."

One advantage was Andrews saw more of his family, having stepped down from his community positions and no longer working at the courts on weekends, nights, and holidays. He would leave home around 9 am, arrive at court by 10, and finish between 4:30 and 6:00, occasionally earlier when the list of cases collapsed. He did not take the position for this reason but appreciated working hard and still being able to spend time with his family.

He was surprised to learn that, as a magistrate, he had financial responsibilities. "In Magistrates' Court, each magistrate was like the head of a fiefdom. We were personally responsible for fine revenues collected. I called in the provincial auditors because I was convinced a staff person was embezzling. Her husband paid the embezzled amount and the woman was dismissed."

Fire Stations and Empty Courtrooms

In Brampton, Ted sat in the old courthouse on Wellington Street. Often, although the major courtroom would be sitting unused, the federally appointed District Court judge would not allow the provincial judges to use it. "To go to the washroom I had to walk down the hall to the same washroom as the public was using, and sometimes stand beside the same person as had just appeared before me."

Andrews also held court in the Cooksville police station and over the fire station in Port Credit on occasion. “If a fire broke out, you just interrupted and held court down until the noise went away.”

Rifles and Parking Lot Scuffles

Not long after his appointment, Andrews learned that judging could be a potentially dangerous profession. One day a man came after him with a rifle. Actually, he was seeking Andrews’ predecessor for having sentenced him to prison. Toting a long brown-paper-wrapped parcel, he repeatedly inquired of the Brampton court counter staff: “Where is the magistrate?” The police were called and discovered the package contained a loaded rifle. They gave Andrews the weapon as a souvenir.

On another occasion, a fellow judge was threatened by a man of Asian descent who was known to be violent. That judge was put under 24-hour police protection. When an officer observed an Asian man exiting a car in the courthouse parking lot, “the officer slammed him up against the car, you know, ‘spread them,’ and checked him out.” It was actually fellow judge Kechin Wang, “such a gentle sweet man – it was shocking for him to be rousted like that.”

An Emerging Leader

Although he was a “two hatter,” Andrews felt a greater affinity for family law than adult criminal cases. He developed a keen interest in juvenile delinquency and the philosophy of treatment – as opposed to punishment – for youth. “Unlike adult criminal matters, with juveniles I always felt that you could do something, that you could be part of the treatment process and be an instrument for development and for improvement in the young person.” Andrews took courses to learn more from the National Center for State Courts in Nevada.

Andrews played a proactive role in the sentencing of juveniles. Wherever possible he enlisted the aid of community members, giving kids opportunities to cut the grass, pull weeds, tend gardens, clean the ice

at the arena, or wheel people around at a seniors' home – instead of spending time in a detention centre.

Andrews also developed an early form of diversion in Juvenile Court. "I would say, 'alright, young fellow, you have come and you have pleaded guilty. You come back here in three months' time, behave yourself in the meantime, and we will deal with this then.' So we would set a date. A few months later he would come back, and the Crown would withdraw the charge. So this was a form of 'diversion' at the time. The kid didn't get a criminal record."

Forming a National Organization

After a couple of years on the bench, Andrews set about to form a national organization of Canadian family court judges. In 1964, he visited senior judges in all provinces east of Ontario. The next year, he went west to visit judges in Manitoba, Saskatchewan, Alberta and British Columbia. He discovered there was strong interest in having a national gathering of family judges. Then he organized the first national conference, attended by approximately 80 family judges from across Canada. It took place in Ottawa in 1967 and led to the formation of a family judges' association, co-chaired by Andrews and Paul Lavallée from Quebec. Federal funding paid for the expense of judges to travel to national conferences, while each province picked up the tab for their judges' accommodation and meals.

Andrews recalled that "an association of magistrates came along pretty soon after." Eventually the two associations amalgamated into the Canadian Association of Provincial Court Judges (CAPCJ).

Becoming Chief Judge

In October 1968, at the age of 42, Andrews was appointed Chief Judge of the Juvenile and Family Courts. Two months later, he became Chief Judge of the Family Division of Ontario's new Provincial Court – a position he would hold for 22 years.

Andrews recalled an occasion when Rendall Dick, the Deputy Attorney General, asked him which of the two Chief Judge positions he would pick if given the choice: criminal or family. The answer was easy. Andrews was full of enthusiasm for Family Court work and keen to develop it further, especially in cases involving children and youth.

"I have always felt that if you can open an opportunity for a youth who is in trouble with the law, or for a child whose parents have mistreated or abandoned that child, or for a deserted wife whose husband has mistreated her, either physically but more commonly emotionally or financially, then I think you are doing something so important."

Defining the Role

The position of Chief Judge did not come with a job description, apart from a role in judicial scheduling, which Andrews preferred to delegate to judges at the local level.

Heads Family Court

TORONTO (CP) — Judge H. Tedford Andrews, 42, has been appointed chief of Ontario's juvenile and family courts. Since 1962, Judge Andrews served as a magistrate and juvenile and family court judge in Peel county, west of Toronto.

Ottawa Journal, October 26, 1968.

He felt that his primary mission was to encourage and support the judges, and to instil in them the importance of mobilizing their communities. In his view, a Family Court judge could only be as good as the available community resources. "If you have only got a training school to send kids to, that is where they go. But if you have a foster or group home where you can place them on probation, that is a great added resource." Andrews was particularly proud of the new resources his judges helped to develop, including observation and detention facilities, a network of Family Court clinics, diversion programs and conciliation services.

> When Ted was enthused, he let you run with things. He didn't have to be the sole spokesperson for the Court – he let judges take initiative. He encouraged us

to be active in the community so we would be more relevant. We worked with communities to develop detention centres, etc. There are facilities named after the judges, such as Genest and Goulden. Ted loved anything you did within reason that was community based as long as there wasn't a clear conflict.

Joe James, former family judge[4]

Andrews was well supported by a small and loyal staff team. Dee Prosser, a former court administrator, joined Andrews when he became Chief Judge, together with law clerk Roman Komar, a researcher and legal educator, who remained with the Court for over 40 years, was also part of Andrews' team.

Roman Komar (Photo courtesy of the Walmsley Family)

A Professional Bench

One of the first issues Andrews tackled as Chief Judge was the calibre of judicial appointments. Shortly after his appointment, Andrews was faced with the prospective appointment of another lay judge. "This was a very fine person who could have made a good judge, but he was not legally trained. And I felt that if we were going to upgrade this bench we had to have legally trained judges." So Andrews went to Roy McMurtry, who was not yet in government but was a friend of Premier Bill Davis. McMurtry interceded on Andrews' behalf and the person was not appointed. After that, all appointees were legally trained and eventually the law was changed to make this a requirement.

Andrews did his best to use tact and diplomacy when helping judges who were not legally trained, or who were experiencing difficulty on the bench, to make the decision to retire. His motivation was building the Family Division's reputation for excellence and independence and to position it well for what he hoped would become part of a Unified Family Court with full family law jurisdiction.

In the early 1970s, Andrews hired a team of law students to observe hearings in each court, interview judges and court staff, review personnel files, and assess each judge based on a questionnaire and grading system he'd approved. According to lawyer Leo Adler, who was one of the student assessors, "We were reviewing people who were there prior to the formation of the Provincial Court (Family Division) to understand the capacities of the judges he had inherited. Anyone who got appointed afterwards stayed. They were fine."[5]

Adler also learned about the process for appointing new family judges. "Ted would send names and the Attorney General would discuss them with him. It was a very political process but Ted knew how to get who he wanted on the bench. It seemed that Ted could pick whomever he wanted as long as they were Conservatives. But he was also successful in securing appointments of excellent judges who fell outside this requirement."[6]

Getting Out of the Basement

Andrews remained in the Brampton courthouse instead of relocating to Toronto, establishing his office in the "penthouse" of the Queen's Square Building. This enabled him to avoid a criticism levelled at his Criminal Division counterpart, Chief Judge Fred Hayes. Hayes lived in Toronto, had his office in Toronto, and was perceived to devote much of his attention to Toronto judges. Andrews decided to stay in Brampton so as not to be perceived to be "Toronto-centric."

Chief Judge Andrews made a point of visiting every Family Court in the province. He was appalled by the poor quality of some court locations. In many places, the Family Courts were relegated to damp, poorly lit basements. In Brampton, the Family Court occupied the basement of the registry office. Andrews made it his mission to "get the Family Courts out of the basement." It took a lot of "quiet nagging" with the Ministry of the Attorney General but eventually he succeeded. Fortunately, Andrews had good

relationship with Al Russell who was the executive in charge of courts administration. The last Family Court he "saved from the basement" was in Sarnia.

A Well-trained Bench

Andrews often said that the best protection society has is a well-trained bench. That is why, in the early 1970s, he instituted what was likely the first rigorous judicial education program for the family bench. The judges did not like the term 'training,' so Andrews referred to this as 'judicial development.' The Judicial Development Institute has remained a tradition at the Court, with courses presented annually to all Family Court judges.

The first program was in Toronto: Andrews brought in one-third of the judges at a time for a one-week course that included education on a full range of family issues. Over time, he built an expectation that judges would average two weeks of training per year. By the third year, the education program joined with the Canadian Association of Provincial Court Judges and included judges from across the country.

Ted Andrews in the 1990s. (Photo courtesy of the Andrews Family)

One objective was to provide judges with training in recent developments in the law: "I didn't want lawyers to put anything over on them." Another objective was educating judges in the social sciences. This helped them to learn about the stages in child development, how to read psychiatric and psychological reports, and to understand social work principles and policies. For example, is it acceptable to separate siblings when placing them in foster homes? An additional objective was judicial renewal. "Once you have been on the bench for a few years you kind of get stale so you need some encouragement and revitalizing."

The Chief Judge put a strong emphasis on ensuring his colleagues were aware of important decisions from their court and the appeal courts. Roman Komar would gather and circulate recent judgments, papers and reports. Andrews supported the work of Judge David Steinberg, Professor Jay McLeod and others to create *Reports of Family Law*, the first published law report dedicated to family law matters. The Chief's office also created a judicial library of family law materials.

Andrews obtained funding to start a training program for court administrators, something that had not been done before. The administrators were thrilled with the program which included discussion of management, legal and social science issues, and reviewing practical day-to-day operational matters such as how to fill out adoption papers. Dee Prosser was instrumental in designing and delivering this popular program.

Mediation Project

In the early 1970s, Andrews became interested in mediation after attending education programs in the United States. He obtained federal funding to conduct a mediation project in the downtown Toronto Court which had a high volume of backlogged cases. This was a controlled project to test the value of mediating cases rather than simply sending them directly to court. Approximately every fourth custody, access or maintenance dispute would go through a trained mediator. The project was designed by Howard Irving at the University of the Toronto School of Social Work. The board overseeing the project was led by Derek Mendes da Costa, a law professor, future Chair of the Ontario Law Reform Commission, and eventual appointee as judge of the Unified Family Court in Hamilton.

The mediation project was successful, although the federal funding ran out, after which the province supported it for a while. It served as the precursor of mediation programs that would become a fixture in many Family Courts. One began with federal funding in Kingston, and the Unified Family Court in Hamilton

had an extensive adjunct conciliation service. Eventually the provincial government provided more stable funding for mediation.

Statistics

As Chief Judge, Andrews saw the need to gather statistics to support judicial management. His office kept track of caseloads, sitting times, reserved judgments, and time lapses until final resolution. He also developed statistical information to include in an annual report. Prior to that, there were no available statistics on the number of cases, the types of cases, or even how many judges were sitting.

Automatic Enforcement

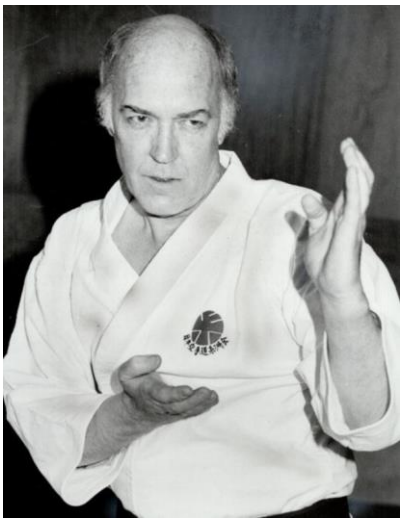
One of Andrews' innovations was the automatic enforcement of maintenance orders, a first in Canada. Automatic enforcement was intended to avoid protracted interventions to enforce a court order for child or spousal support from an ex-spouse. By intervening early with the debtor, there was a much greater chance that outstanding payments would be made and future defaults avoided. "We worked it out with the welfare people that separated or divorced women would get their full money and then the court would collect from the husband and remit what it collected to reimburse welfare. That way the family always got its proper amount of money, they could count on it."

Andrews' office set up systems for monitoring the accounts. When payments were not being made, the staff would call in the defaulting person. "If a fellow was off work for a month, he would come in and the staff would say: 'Well, Bill, what is your problem?' because the staff would know him. 'I am off work.' 'Well, what can you pay?' And he would say, 'I am getting unemployment insurance, so I can pay so and so.' 'Can you make up the rest of it when you are back to work?' 'I think I can.' 'Well, let's see how we get along.' And they would phone the wife and they would work things out. They would make a deal right there."

Andrews credits Dee Prosser for making the automatic enforcement of Family Court orders a reality starting in 1974. Andrews was less enamoured with the government-run systems that replaced it, as they operated with less court involvement.

"Graduation day for chief judge. Ted Andrews gets black belt after just five years."

This headline appeared in the *Toronto Star* in 1982. Years later, Andrews told the story for the Ontario Court of Justice History Project.



I had a black belt in karate. I was proud of that. I taught karate to boys at the National Ballet School. A psychiatrist had checked out the boys at the request of the school and it was decided they needed something macho. I was approached to teach them karate. They were great kids. They were used to following form and practice in their ballet training and that is what the art of karate is based on. They were very good at it – I had them breaking boards at their Christmas party! I also taught self-defence to women at the McGill Club in Toronto. I did this while I was Chief Judge, after hours of course.

(Photo: Michael Stuparyk/*Toronto Star* via Getty Images, April 24, 1982.)

Pushing for a Unified Family Court

In 1977, less than 10 years after becoming Chief Judge, Andrews participated in a historic milestone: passage of the *Unified Family Court Act*. He was one of the main drivers of the UFC after he saw strides being made in parts of the United States. Although a Superior Court can rule on divorce, custody and division of property, other matters such as child welfare rest with the Provincial Court. Initially established as a pilot project in Hamilton, the Unified Family Court was designed to hear all such

matters. The UFC also provides mediation to help people resolve their family disputes outside the formal court system. Attaining this historic achievement required the support of the Hamilton bar, Ontario Attorney General Roy McMurtry, and the Attorney General of Canada, Ron Basford.

Andrews played a role in recommending which Provincial Court judges would be appointed to the Unified Family Court pilot: David Steinberg and John VanDuzer from Hamilton and Patrick Gravely from Toronto. Andrews was offered a UFC judgeship himself but turned it down. He enjoyed being Chief Judge and "there was not a great a difference in salary at the time."

Andrews was disappointed when judges of the expanded UFC were reluctant to hear cases involving young offenders, which they saw as more of a criminal than family matter. By contrast, Andrews regarded this work as an essential part of the UFC mandate since it was so closely related to child welfare. As the UFC expanded to other locations, however, the young offender cases were dropped and picked up by the Provincial Court (Criminal Division).

> Ted was unhappy that, when the UFC was expanded, the judges were reluctant to do juvenile work, which is so closely related to child welfare. He felt that by alienating itself from juvenile cases, the UFC diverted from its mission. The UFC narrowed its own vision because the judges felt that the juvenile work was more like criminal than family.
>
> Roman Komar[7]

Blow-Up with Ian Scott over Judicial Salaries

During his long tenure as Chief Judge, Andrews worked with many Attorneys General. He worked well in concert with most of them, including Arthur Wishart and Roy McMurtry, with whom he enjoyed regular breakfast meetings. Ian Scott was another story. Scott's strong reform agenda and bulldog determination did not sit well with Andrews.

Andrews' relationship with Attorney General Scott went from bad to worse at an Opening of the Courts event in the late 1980s. The Chief Judge had been genuinely concerned about the low morale of provincial judges due, in part, to the disparity between federal and provincial judge remuneration.

ONTARIO ATTORNEYS GENERAL	
Progressive Conservative	• Arthur Wishart: 1964-1971 • Allan Lawrence: 1971-1972 • Dalton Bales: 1972-1974 • Robert Stanley Welch: 1974-1975 • John Clement: 1975 • Roy McMurtry: 1975-1985 • Robert Stanley Welch: 1985 • Alan Pope: 1985
Liberal	• Ian Scott: 1985-1990
New Democrat	• Howard Hampton: 1990-1993

In his speech, Andrews mentioned the morale issue and referred to the judges' salary concerns. He later recalled: "And Scott, being the kind of guy that goes right for the throat, he chose to interpret it that the judges would deliberately withhold services and would deliberately let it affect their judicial work. Scott said that any judge that permitted that would be dismissed. And of course he did not have any right to dismiss a judge, but it made great headlines."

This incident distanced Andrews further from Scott and from the court reform plans that ultimately abolished the family and criminal Chief Judge positions.

Recollections of the Opening of the Courts Incident

Ian went apoplectic over Ted's speech about pay during one Opening of the Courts. Ian Scott was outraged. Ian's relationship with Ted was not great before that but it went from bad to worse. Ted was pugnacious and never pulled his punches.

Ross Peebles, former Assistant Deputy Attorney General of Court Administration

Provincial Court judges had not had a raise in salary for a long time. They were significantly underpaid. Ted came on moderately strong about this issue, at the Opening of Courts, suggesting that some judges might have to leave their positions or could not do the job they wanted to do because of lack of money. Ian then responded – he had been blindsided by Ted's comments. "Well – they can always quit!" This was not normal Opening of Courts fare.

Patrick LeSage, former Chief Justice of the Superior Court of Ontario

I was forcefully reminded that provincial court judges deserved the same respect, and the same salary, as federally appointed judges. Ted Andrews, the chief judge of the provincial courts, surprised me by raising the issue at a public ceremony.

Former Attorney General Ian Scott in his memoir, *To Make A Difference* (Toronto: Stoddart Publishing, 2001), p. 177.

Naming an Associate Chief

Although Ted Andrews became Chief Judge in 1968, he did not take on an Associate Chief until 10 years later. By that time his work was building up, the complement of judges was growing, and "it meant that I could also get an extra judge to fill in here and there as needed." He requested the appointment of Robert ("Bob") Walmsley to the post and Roy McMurty made it happen. Andrews chose Walmsley "because he was well respected, quietly industrious, well intentioned and bright." He was also a fine example of an emerging judicial leader from a smaller Ontario community. Walmsley was delighted at the prospect. He and his family moved from Prince Edward County to Toronto to take up the new position.

As Associate Chief, Walmsley was instrumental in developing education programs. He also filled in for Family Court judges who were sick or on holiday. On Andrews' recommendation, he became chair of the Judicial Appointments Advisory Committee.

Conflict over Court Rules

Although the Chief Judge usually got along well with his fellow judges, he found himself in a conflict with members of the Family Rules Committee and with the policy people at the Ministry of the Attorney General who supported this work. Andrews wanted to keep the rules to a minimum, with a catch-all provision allowing parties to apply to a judge for directions, "rather than having a rule for every damn little thing that you could possibly have." As the rules kept getting more extensive and increasingly legalistic, Andrews decided to let Associate Chief Walmsley take over working with the committee.

Andrews pressed for a separate and specialized family bench.

1990: End of an Era

In 1990, legislation amalgamated the Criminal and Family Divisions into the Ontario Court (Provincial Division). Ted Andrews had opposed the merger of the two divisions. Over lunch with Justice Zuber, author of the *Report of the Ontario Courts Inquiry,*[8] he pressed for a separate and specialized family bench.

Andrews had hoped that Fred Hayes, his counterpart from the Criminal Division, would be made the Chief Judge of the amalgamated Court. However, that position went to Sidney Linden. Andrews and many of his colleagues were initially sceptical of Linden's ability to lead the Court because he had not previously served as a judge: "Sid was not a judge, he was an administrator." Andrews later

acknowledged Linden's success in, among other achievements, obtaining funding for additional judicial and staff positions.

> "An essential social objective must...be to sustain the unity and harmony of the family; to repair, where there is a breach; to reinforce the remainder of the unit where the breach is irreparable; to strengthen the inadequate; to control the weak; to guarantee individual rights; to enforce individual responsibilities."
>
> Chief Judge Ted Andrews

For several months in 1990, Andrews and Linden were both Chiefs. In April of that year, Hayes had moved to a federal judicial appointment and Linden became Chief Judge of the Criminal Division while Andrews was still Chief Judge of the Family Division. That changed on September 1, 1990 when the new Court was created with Linden as its single Chief Judge.

Shortly after Linden's appointment, the Ontario Liberal government was defeated and Howard Hampton became the Attorney General under the government of the New Democrats.

No longer a Chief Judge, Andrews "didn't want to do anything but family law and juvenile delinquency cases. I wanted to deal with kids. So I chose to be transferred out to Milton and also take on a part-time role at the National Judicial Institute."

Andrews became Associate Director of the National Judicial Institute, an organization providing leadership in the education of judges in Canada and internationally. His function was to enlist the interest of provincial court chief judges from across Canada in using the Institute to develop and implement education programs for their benches. He found it to be an uphill battle, particularly in the west "because the western division had a fine training program of its own." The Institute's links with the Quebec judiciary were also weak.

Legacy in the Family Court

During his 22 years as Chief Judge, Andrews made an indelible difference. His legacy includes the Unified Family Court pilot and expansion, improved court facilities, and a professional and well-educated bench. He was ahead of his time in promoting mediation and settlement, community partnerships, and judicial education. He focused much of his effort in promoting a Family Court that was proactive in mobilizing the community to ensure the best possible outcomes for families and children. He was a strong proponent of treatment as opposed to punishment, wherever possible, for young people in trouble with the law.

Andrews' belief in the importance of the Family Courts was unwavering. In 1973, he edited the book *Family Law in the Family Courts*. There he wrote about how society was in transition and turmoil and how the Family Court, with its distinct social purpose, could contribute to individuals and the larger community. "An essential social objective must... be to sustain the unity and harmony of the family; to repair, where there is a breach; to reinforce the remainder of the unit where the breach is irreparable; to strengthen the inadequate; to control the weak; to guarantee individual rights; to enforce individual responsibilities."[9] This objective guided him throughout his career in the Family Courts.

Upon reflection in later years, Andrews said that his time as Chief Judge was the highlight of his career. "Power and influence are exciting in a spirit where you are making a contribution to society and to your own sense of wellbeing."

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[1]W.W. Creighton referred to the Juvenile and Family Courts as "poor country cousins" in his introduction to Ted Andrews' book *Family Law in the Family Courts* (Toronto: Carswell Company Limited, 1973), p. 11.
[2]Creighton, in *Family Law in the Family Courts*, p. 11.
[3] Quotes from T. Andrews in this profile come from the transcript of his interview for the Oral History Project of the Osgoode Historical Society (used with permission) and interviews of T. Andrews for OCJ History Project, 2013 and 2014. Quotes from other individuals are specifically attributed to them.
[4]Interview of J. James for OCJ History Project, 2014.
[5]Interview of L. Adler for OCJ History Project, 2014.
[6]Interview of L. Adler for OCJ History Project, 2014.
[7]Interview of R. Komar for OCJ History Project, 2014.
[8]Zuber, T.G. *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987).

[9]Andrews, *Family Law in the Family Courts*, p. iii.

Period II: 1968-1989 Profiles & Stories

Gérald Michel – In His Own Words

> *The courts belong to the people. That is what the judiciary of the Northeast were taught and what they practiced. Unlike the superior courts, we went to the people where the numbers warranted it. We served our people and they respected us. That is what I want our court to be honoured and respected for.*
>
> Justice Gérald Michel[1]

Judge Gérald Michel in 1971. (Photo by *North Bay Nugget,* Courtesy: G. Michel)

Gérald Michel served as a judge in northeast Ontario for over 40 years. His colleagues have referred to him as "an institution," "a hero of our court," and "a mover and shaker in defining the bench as we know it today in the North."[2]

In 2014, at the request of the Ontario Court of Justice history project, Michel prepared a memoir in which he reflected on his experience in the 1960s, 1970s and some of the 1980s. He tells the story in his own words in the following excerpts.

Looking Back 50 Years Later

I'm writing about the provincial court in northern Ontario, mainly northeast Ontario, from my recollection and not from notes made at the time to record events. I never thought 50 years ago that I would be writing this. So if I missed events that others may recall, or I recall events differently from others' recollection, so be it. I can only record it now from my biased recollections.

Becoming a Judge

In the early 1960s, Magistrate Gould presided in North Bay and travelled to courts in Sturgeon Falls, Powasson and Mattawa. Then, in about 1967,he was appointed to the District Court in Sault Ste. Marie. In March of 1968, I was appointed to succeed Magistrate Gould in North Bay. In 2001, I was transferred to Sudbury and was succeeded in North Bay by Judge James Lunney.

It should be noted that in December 1968, the *Provincial Courts Act*[3] made all magistrates judges of the Provincial Court. Being a Provincial Court judge was full-time work. It required lots of travel in the northeast and if you included travel time, many ten-hour days.

Coastal Courts – First Trip to Attawapiskat

I wish to touch briefly on the coastal courts on the James and Hudson Bay Indian reserves.

In the early 1970s, my first trip to the coastal court was in January and as you would have it, it fell on the January thaw.

The court party was to depart from Timmins early morning but it was freezing rain. Discussions with the pilots led us to understand the rain was moving north and in a couple of hours we should be able to leave. The pilot was right and we left reaching Moosonee before we caught up to the freezing rain. After a short stop, we got to Fort Albany and then, after a delay there, we made it to Attawapiskat at about 6:00 p.m. Court was scheduled for 11:00 a.m. but that didn't matter, the people heard the plane come in and word spread that court had arrived.

Eventually, court commenced at 7:00 p.m. No problem. The whole community was jammed into this small community hall, curious to see what would happen. In those days, the Chief sat beside the judge and in some cases was permitted to speak as to penalty.

I presided over the court on the coast for the next 25 years and was commonly known as the "white-haired judge."

Elders' Justice

Someone pleaded guilty of impairment before Gerry Michel. It could have been a $300 fine because the guy had no prior convictions. The Elders discussed it. They wanted to put him away for six months because he was the biggest drug dealer in town. That was justice but not our way. He ended up with 15 days in jail.

(From Interviews of northern judicial officers for OCJ History Project, 2013)

Early, Practical Community Service Orders

Back in the 1970s, when I was covering the courts on the Wikwemikong Reserve on Manitoulin Island, I had discussions with a native probation officer Raymond Auger. I was having difficulties with the court premises. We didn't sit in a courthouse but in the community hall. For some reason, I couldn't get the community to clean the premises or set up the chairs and tables for court; we had to do it when we arrived.

So the probation officer and I concluded we should use what is now known as community service orders whereby I would place certain appropriate offenders on probation with a condition that for the next so many court days, they would clean the hall and set up the chairs and tables before court arrived. This worked very well and was appreciated, as constructive rehabilitation for a number of accused.

When a new community hall was built, I set a condition on a native artist's probation that he paint a mural on one wall in the new hall. This was before community service orders became recognized as a sentencing tool throughout the province.

French Trials in Ontario

In 1976, the Attorney General Roy McMurtry decided to initiate trials in the French language in Ontario. Chief Judge Fred Hayes, I understand, consulted with two bilingual areas, Ottawa and Sudbury. Sudbury was selected and Judge Gilles Matte and I (both bilingual judges) initiated the pilot project.

In order to gain some insight, we were sent to Moncton, New Brunswick for one week to observe their proceedings in the French language and then one week in Montreal where French trials or bilingual trials had existed forever.

With that experience, French trials were initiated in Sudbury. The population at that time in Sudbury consisted of about 35% of the region being of French background and whose mother tongue was French.

The biggest problem was that the French legalese is not a simple translation of the English. The French legalese is basically a language of its own and the judges and the bilingual members of the bar had all studied law in English.

Photos of Gérald Michel at a judicial conference in 1981 when he was president of the Ontario Judges Association. In the top photo, Michel is speaking with Fred Hayes, Chief Judge of the Provincial Court (Criminal Division). (Courtesy: Association of Ontario Judges)

Bilingual trials are now a fact in the Ontario Court of Justice. Even though there are not a great number of them in most communities, they are available where they are desired.

Court Practices: "Judge of All Trades"

Until sometime in the 1980s, the courts in the northeast did not have court clerks. The judges did the arraigning of the accused, gave the accused their election where they had one, asked the Crown of their election in hybrid offences and if no election was made, then the proceedings were deemed to be by summary conviction. The judge was responsible to record all entries on the information including recording the sentences, recording all remands and dates for trial.

One of the practices which may not be remembered is that until sometime in the late 1960s or early 1970s, the magistrate was responsible for the staff (including the bookkeeping staff) and had to sign the cheques issued by the office. The offices were subject to periodic, unannounced visits by the auditors from the Attorney General's office.

Evolution of Native Courts in Northern Ontario

Judge Gérald Michel together with Attorney General Roy McMurtry and Chief Judge Fred Hayes, Provincial Court (Civil Division) (left to right) pose during a tour of northern courts in the late 1980s. (Courtesy: G. Michel)

Interpreters

Originally interpreters were taken from the community because each community had a slightly different dialect. In one proceeding, an accused's husband acted as interpreter and falsely interpreted the testimony. After that, only pre-approved interpreters were employed and generally from outside the reserve community.

Aboriginal Issues Committee

The relationship between the courts and the native communities was a little strained. Chief Judge Hayes thought we should try and work on that. It was decided that a representative of the Attorney General and a

representative from the judiciary should initiate communications with the subject communities. Aboriginal communities of the North were asked to work with the Chief Judge's committee to discuss their problems.

Duty Counsel on Reserve

We requested that duty counsel or defence lawyers attend on the reserve one day prior to court to interview accused people.

Native Court Workers

The other innovation was to have native court workers attend in the community periodically and on court days to assist native accused.

Legal Services Corporation

The Nishnawbe Aski Nation Legal Services Corporation was formed. They hired and directed full-time and part-time court workers who had responsibilities in the Aboriginal communities in the northeast and northwest regions.

Separate Flights

Another complaint raised was that the judge, the Crown and defence counsel arrived together on the same chartered flight. As a result of discussions with Chief Judge Hayes, he directed that in the future, the judge would fly in a separate plane with the court reporter, court clerk and interpreters only.

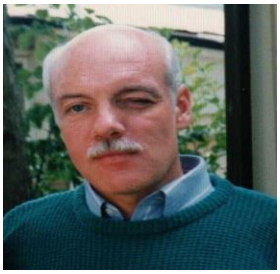
Justice in a Pick-Up Truck

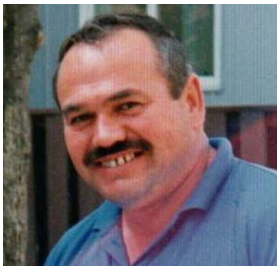
When Gerry Michel was a judge, someone picked us up from the airport in a pick-up truck and charged

us $10. At court, he was the accused and Michel fined him $50. Then he drove us back to the airport. We said, "How much do we owe you?" and he said "$50!"

(From Interviews of northern judicial officers for OCJ History Project, 2013)

Native Justices of the Peace





Stan Jolly (top) and Richard LeSarge, 1990. They worked with Judge Michel to develop the Native Justice of the Peace Program. (Courtesy: K. Cohl)

In the early 1980s, Chief Judge Fred Hayes initiated discussions with reference to having native justices of the peace as part of our Ontario Provincial Court system. The purpose was to better serve the Aboriginal peoples of Ontario, more particularly in Northern Ontario.

Discussions were undertaken with the Ministry of the Attorney General. Because I was involved in the native courts, I worked on the program with two individuals: Stan Jolly and Richard LeSarge.[4] The program began in 1985.

The aim was to have Aboriginal people working in the courts so they could feel part of the system in which they were so frequently involved, and to better serve the justice system in the isolated communities where people had no one to turn to for private complaints and the police had no one to go to for the issuance of process.

The aim was also to train justices of the peace who would preside over minor offences under the reserve band by-laws and to hear other provincial regulatory offences. It was expected that these justices of the peace would better administer the law in these communities where the culture was different from white man's culture and not always understood by non-Aboriginal people.

It was not easy to get applicants because natives who took on enforcement roles in the community had their families ostracized by their people. Once we had a group of applicants, Stan, Richard, a community native person and I would interview all the candidates and recommend the appropriate ones to participate in a pre-appointment program from which some were recommended for appointment and others were not.

Eventually, Ontario was served by a good number of excellent native justices of the peace in areas where there were accumulations of Aboriginal people such as Toronto and in areas where there were Indian reserves. These justices of the peace presided in regular Provincial Offences Court and dealt with all people before the Court, regardless of their origins.

Conclusion: A Final Trip to Attawapiskat

"Justice retires after nearly 42 years." This headline appeared in the *Sudbury Star* on December 26, 2009. Reporter Harold Carmichael wrote as follows.

As he approached his 65th birthday back in February, 2000, Ontario Court Justice Gérald Michel stepped down as regional senior justice in Greater Sudbury and took on a part-time role. On Thursday, with his 75th birthday coming up fast, he stepped back from the bench for good.

Handling the Christmas Eve list in youth court at 159 Cedar St., Michel wrapped up business about noon and was treated to an informal goodbye party by more than 30 fellow Ontario Court and Superior Court of Justice judges, lawyers and court staff….

Michel said he had a golden rule of conduct during his long career as a judge: treat others with respect in order to get it back….

Ontario Court Justice Randall Lalande, who was appointed to take the place of the retiring Michel in 2000… reminded Michel of his last visit to the isolated First Nation community of Attawapiskat.

After a goodbye meal prepared by the community following a full day of court proceedings, recalled Lalande, the plane was getting loaded on the runway when security allowed a young First Nation man to approach the plane and present Michel with a piece of artwork as a retirement gift.

That young man, noted Lalande, had just been sentenced by Michel earlier in the day following a plea of guilt. "He thought so much of you, he wanted to go ahead with his plan," said Lalande.

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[1]Michel, Gérald, Provincial Courts in Northern Ontario, prepared for the OCJ History Project, 2014
[2]Interviews of northern judicial officers for OCJ History Project, 2013.
[3]*Provincial Courts Act, R.S.O. 1970, chapter 969*
[4] Richard LeSarge was himself appointed a justice of the peace on September 15, 1994.

Period II: 1968-1989 Profiles & Stories

Stories from the North: Regional Senior Justice of the Peace Kathleen Bryant

Two Shots Across the Lake (1980s)

Regional Senior Justice of the Peace Kathleen Bryant has often heard this story from local police. She describes it as "northern folklore."

In the 1980's, a Justice of the Peace in northern Ontario had a cottage on an island near Hearst. There was no electricity, no telephone service, and you couldn't drive there. This posed a challenge for the local police: how would they gain access to him? They ended up developing a unique protocol. A police officer would drive to the nearest point closest to the island. He would fire off two shots over the lake. When the Justice of the Peace heard the shots, he knew that he was needed. He would get in his canoe and paddle across the lake to where the police officer was waiting. The officer would drive the Justice of the Peace to the detachment –to remand a prisoner, sign a search warrant, or conduct whatever service was needed – and then drive him back. This went on for years. It shows the lengths to which people were willing to go to provide service.

Period II: 1968-1989 Profiles & Stories

The "Boys" of Oshawa: Justices Dodds, Edmondson, Bark and Collins

Introduction

The history of the Provincial Court in the Region of Durham presents a perfect microcosm of the history of the Court province-wide, as the population of Ontario grew and increasingly moved from its rural roots to urban centres. The demographic and social shifts had profound impacts on the workings and workloads of the Provincial Court.

When Durham Region was formed in 1974, its population was approximately 200,000. By 1990, this figure had doubled. In 1974, two judges were assigned to the criminal court, situated in Oshawa, the region's largest city. By 1990, three judges were assigned to that location. Despite a population leap of 100%, the complement of judges increased by only 50%, resulting in a busy Provincial Court often wrestling with backlogs.

The "Boys," left to right: Justices Bark, Dodds, Collins and Edmondson in 2014.

Over the span of more than 20 years from 1968 to 1989, four judges sat regularly in the Oshawa courthouse or in courthouses in nearby towns:

- Donald Dodds (sat primarily in Oshawa, 1967-2001),
- Norman H. Edmondson (sat primarily in Oshawa, 1974-2009),
- John Bark (sat primarily in Cobourg, 1976-2003), and

- Ted Collins (sat primarily in Peterborough, 1971-2013).

Although all have retired, they maintain a connection to the Ontario Court of Justice judges now sitting in the region, still visiting the Oshawa courthouse regularly to share lunch and stories with their successors.

Recollections by Justice Katrina Mulligan

"I learned more about the law at that lunch table than I did at law school," stated Justice Katrina Mulligan, who sat in Oshawa from her appointment to the bench in 2007 until 2012, when she was assigned to Old City Hall in downtown Toronto.

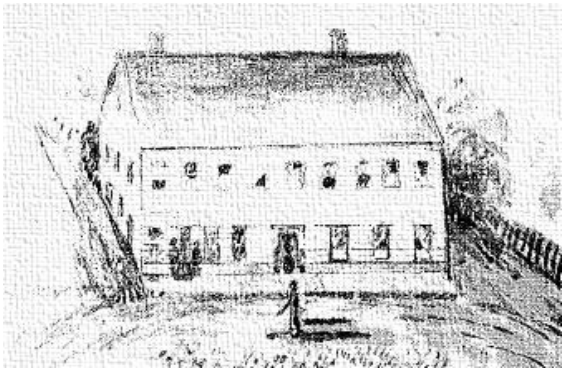
Justice Katrina Mulligan credits Justices Bark, Dodds, Collins and Edmondson with passing along "lessons learned" about judging in the Ontario Court of Justice. (Courtesy: K. Mulligan)

She fondly refers to the group of four retired judges as the "boys of Oshawa." In 2014, Justice Mulligan wrote of the "boys'" contribution to judging and justice in the Region of Durham.[1]

When Oshawa's modern consolidated courthouse opened in 2010, it was a far cry from the two former court buildings – one in Whitby, the other in Oshawa – which formed the Durham Region's Provincial Court for decades. The new courthouse brought together all 13 Ontario Court of Justice judges in one building. For the first time, we had a real lunchroom where we could all meet.

Because the lunch table could easily accommodate 20 people, we often held formal luncheons and invited others to attend. Quite often, borne of our collective respect and admiration for our senior colleagues, we invited the "boys" of Oshawa: Norm Edmondson, Donald Dodds, John Bark and Ted Collins. Collectively the "boys" boast 138 years of experience on the bench. Edmondson sat for 35 years, Bark for

A Sampling of the Various Locations of the Courthouses of Oshawa



Monroe's Hotel

Town Hall

Rundle Tower

27 years, Dodds for 34 years and Collins for 42 years. I always viewed the "boys" as the judges who started the whole "judging business" in the region many years back.

The "boys" spoke of a time when the Oshawa courthouse consisted of a room located on the second floor of the local two-storey police station. Justice Dodds told the story of working as a magistrate in that building. He would enter the police station, be greeted daily by the desk sergeant on duty, then proceed upstairs to the second floor where there were five offices. The first office was the utility room which doubled, when needed, as a consul ting room. The second office belonged to the Crown Attorney. The third office housed the police interrogation room. Next to that was the magistrate's office. On the other side of the magistrate's office was the police identification office.

As Justice Dodds often remarked, "Sounds and voices carried easily along the corridor. Indeed there were occasions when various noises from within the closed interrogation room raised issues relating to the voluntariness of statements and carried the suggestion that I should be elsewhere."

Durham Region Courthouse, Bond Street

The locations of Oshawa's courthouses over the years speak volumes about the history of the Court. Although there is no record, Justice Don Dodds believes the first Magistrate's Court in Oshawa was held in the 1850s in Monroe's Hotel, a local tavern. In the late 1800s, the Court had moved to the Town Hall, which also housed the fire and police stations. In 1970, the Court moved into the top two floors of the Rundle Tower. The Court was housed there for nearly 15 years. A new consolidated courthouse with 38 courtrooms opened on Bond Street in 2010. "We have travelled a long way over the years. Only 65 years ago, all the criminal cases in the City of Oshawa could be dealt with on Monday and Friday in a single courtroom. It's been a period of enormous change," recalled Don Dodds. (Sources: Interviews of D. Dodds for OCJ History Project, 2014; Photos: M. McIntyre Hood, Oshawa: The Crossing Between the Waters, (The Alger Press, Oshawa, 1968) and Courtesy of D. Dodds)

Justice Dodds was the last magistrate sworn into office in Oshawa. His swearing-in was held in the Crown Attorney's office on January15, 1967. He sat on the edge of the Crown's desk while the Crown administered the oath of office. Only the two of them were present. After the oath was administered, the two went out for lunch. At that time, criminal court was held in Oshawa on Mondays and Fridays only. The population of the city was approximately 60,000 at that time.

Historically, the areas the Oshawa court served were where public transportation was non-existent. We had many laughs during these "boys" luncheons listening to Justice Collins describe how he used to pick up hitchhikers every morning, collecting riders on his way to work until his truck could hold no more. The hitchhikers were almost always accused people who were on their way to court and who would appear before him later on that morning.

In order to get a ride, each person had to promise Justice Collins that they would not talk to

him about their case en route. As new hitchhikers were picked up, the ones who had already secured a spot in the truck would administer the "oath of silence" to those wanting to jump on board.

As unusual as this sounds in today's world, the oath worked and Justice Collins provided transportation to scores of people helping them to get from their homes to the court back in the day. As he was wont to say, "Return transportation was often arranged by the police who brought them to new lodgings provided for by Her Majesty the Queen."

It was always fun listening to the "boys" describe outgrowing their courthouses in Oshawa and Whitby and moving into new facilities. Initially, municipalities bore the responsibility and costs for providing each magistrate with a courtroom and associated offices. That all changed in 1968 when the province assumed responsibility for courts and court facilities. Municipal governments used to pride themselves on having a court in most of the cities, towns and villages across the province. The need for more effective cost efficiencies in the management of ever-increasing caseloads led to the centralization of courts in the larger population centres in the early 1970s.

For the Region of Durham, that meant the amalgamation of the Whitby and Oshawa courthouses and a move, in 1970, into a new courthouse consisting of two floors built onto an existing seven-story office building in the heart of Oshawa. The Rundle Tower, as the new courthouse came to be known, was described by the "boys" as modern and spacious with technology "so advanced that it permitted court reporters to change from taking shorthand to using dictation equipment." Imagine!

In 1968, the Ontario government designated magistrates as Provincial Court judges – doing away with the old Magistrates' Court. On July 25, 1974, Norm Edmondson was the first person sworn into office as a Provincial Court judge in Oshawa. The Oshawa courthouse moved one more time – in 1983 – before relocating to its current building in 2010.

What I always found most interesting is how, along the way, the "boys" developed policies and case management techniques that, as far as I can tell, provided the foundation for many of the best practices we observe today in the Ontario Court of Justice.

To highlight a few, they began to utilize formal "business plans," an idea borrowed from the corporate world, to support their requests to the Chief Judge and government to appoint more judges to the region, introduced the idea of diverting minor crimes to social agencies to reduce court lists and formalized the process of providing notice to an accused person of the case to be met long before that was legally required. Their ideas didn't always pan out but the stories of their attempts, successes and failures always resulted in amazement at their industry and creativity.

Dealing with limited resources, ensuring public accessibility, handling burgeoning case lists, incorporating technological advances, maintaining decorum, preserving public confidence and adjusting to changing times are examples of the numerous issues that have consumed the Provincial Courts over the past few decades and will likely continue to do so far into the future.

Listening to what our experienced colleagues did in their times to address these issues can sometimes provide a clearer understanding of possible ways to address these same problems now and into the future. Among the many things that the "boys" lunches taught me, as a judge, is that sometimes the best route to a productive future is via a long hard look through the rearview mirror.

Community Service Orders Come to Oshawa

Retired Justice Donald Dodds introduced the concept "community service orders" to the Region of Durham in the early 1980s, having read about the introduction of the novel sentencing option in British Columbia. A court, working with a probation officer, would order offenders to perform community service hours as a condition of their probation. The concept was appealing to many judges

in Ontario's Provincial Court, including Dodds.

A case came before Judge Dodds that appeared ripe for such an order. Two teen-aged boys had been caught stealing flags from a post office in the region. Working with probation services, a sentence was crafted for the two. They'd come into Oshawa from Whitby – about eight kilometres – every day for six months to raise the flag in front of Oshawa's post office. The sentence, recalled Dodds, appeared to be effective. One of the offenders told Dodds: "If I ever steal anything again, it won't be a flag."

This flag-raising sentence was the first of many such community-based activities that Dodds ordered over his judicial career. He believed it helped many to build confidence, skills and community awareness – while keeping people out of jail, when such a sentence would not serve the needs of either the offender or the community.

(Source: Interview of D. Dodds for OCJ History Project, 2014)

The Introduction of a Case Management System in the Oshawa Courthouse

Workload pressures were increasing in the Oshawa Provincial Court (Criminal Division) in the late 1980s – similar to those being experienced in Provincial Courts across Ontario.

The system had been built to handle a lighter case load with shorter hearings. But with a dramatic increase in the region's population, more criminal cases were being heard in the courtroom.

The introduction of the *Charter of Rights and Freedoms* in 1982 had increased the complexity of many criminal proceedings – lengthening trials. Cases involving young offenders, previously tried within the Family Court system, began coming into the criminal courts.

More and longer proceedings resulted in growing delays in the disposition of cases. Judges Dodds and

Edmondson could see "red flags going up." The *Charter* gave those charged with criminal offences the right to be tried within a reasonable time. As Dodds recalled, "we were afraid that because of the delays in bringing cases to trial – sometimes more than 18 months – they'd be thrown out."

In 1988, the Oshawa judges created the "Durham Delay Reduction Committee." Ultimately, they were responsible for bringing a more multifaceted group to the table – including local Crown Attorneys, justices of the peace, members of the defence bar, courts administration staff, legal aid, police, probation and correctional services staff – to prepare a study that resulted in numerous procedural changes, including the following initiatives:

Diversion of minor cases – such as minor thefts and assaults – outside of the normal trial process.

Full disclosure of the Crown's case to the accused person on the accused's first appearance – a process that would later be mandated by the Supreme Court of Canada in *R. v. Stinchcombe, [1991] 3 S.C.R. 326.*

A formal pre-trial process intended to narrow issues at trial and, possibly, resolve issues before trial.

Prioritizing the trials of people being held in custody.

These are all now standard procedures in the Ontario Court of Justice – but in the late 1980s, they were ground-breaking initiatives, well ahead of their time.

(Sources: Interview of D. Dodds for OCJ History Project, 2014; Katrina Mulligan, "Looking Forward Through the Rear View Mirror, Canadian Association of Provincial Court Judges Newsletter, Vol. 8, Issue 1, November 2014.)

[1]Justice Mulligan's article originally appeared in the Canadian Association of Provincial Court Judges newsletter, Volume 8, Issue 1, November 2014. It has been summarized and appears here with Justice Mulligan's permission.

Period III: 1990-1999 – Ontario Court (Provincial Division)

Overview – One Court: A New Structure, A New Focus

In my view, one of the main problems this Court has had over the years has been its relationship with the Ministry of the Attorney General…. [M]y objective is to give the Court more authority and control over its own budget and affairs. I am satisfied that we will soon have more administrative independence that recognizes the principle of 'judicial independence.'

Chief Judge Sidney B. Linden, 1991[1]

Introduction

On September 1, 1990, a sea change occurred in the history of Ontario's Provincial Court. Amendments to the *Courts of Justice Act* were proclaimed on that day and the Ontario Court (Provincial Division) was created – one Court with one Chief Judge, Sidney B. Linden. Two equally critical dates followed hot on the heels of September 1. On September 6, 1990, a new provincial government was elected. The Liberals were out, the NDP were in power. Then, on October 18, 1990, the decision in a landmark case – *R. v. Askov*[2] – was released by the Supreme Court of Canada. Together, these three key events served to shape the years 1990 to 1999.


32,000 charges stayed since Askov ruling

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

74 MPPs for Rae Tax reform likely Premier loses seat

NEW DEMOCRATS WIN

A number of external events combined and contributed to the evolution of the Provincial Court in the early 1990s, including the enactment of the *Charter of Rights and Freedoms* in 1982, the election of a new NDP provincial government on September 6, 1990, and the Supreme Court of Canada decision in *Askov*, released on October 18, 1990. (Sources: Gene Allen, "32,000 charges stayed since Askov ruling," *The Globe and Mail*, 1990; Richard Mackie, "New Democrats Win," *The Globe and Mail,* September 7, 1990.)

The Provincial Courts Pre-1990: Nature, Volume and Scope of Courts' Work Increases

The new Ontario Court (Provincial Division) had evolved, over many years, from a loose collection of magistrates, justices of the peace and family and juvenile court judges. In 1968, the Provincial Courts (Criminal Division) and (Family Division) were created. In 1980, the Provincial Court (Civil Division) – a Small Claims Court – joined the group. Each of these three Courts had its own Chief Judge.[3] When the Ontario Court (Provincial Division) was formed in 1990, the Civil Division was not included and its judges became part of the newly created Ontario Court (General Division).[4]

The two decades leading up to the creation of the Ontario Court (Provincial Division) were full of change, on societal, legal and practical levels. Reformers – particularly those within the government itself – championed a profound increase in the responsibilities of the Provincial Courts, lifting their reputations along the way.

The nature, volume and scope of work of the Courts increased significantly. Cases become more complex, and judges and justices of the peace became more capable of handling them. Examples of how and why the system changed in the 1970s and 1980s include the following.

- In 1982, the *Charter of Rights and Freedoms* heralded a much more sophisticated approach to judging on all aspects of the law, including substantive, procedural and evidentiary issues.
- Criminal Division judges began hearing an increasing volume of *Criminal Code* cases as the federal government continually increased that Court's jurisdiction to hear criminal matters during the 1970s and 1980s.
- A requirement that judges must be lawyers of 10-years standing to be eligible for appointment became law in 1985.

- A revamped appointment process for judges was introduced in 1988, designed to remove "any unwarranted political bias or patronage."[5]

- The Courts augmented and improved continuing education programming for both judges and justices of the peace.

- The judges' associations successfully asserted judicial independence[6] – and had that independence acknowledged by the Supreme Court of Canada.[7]

These – and many other changes – served to professionalize and reinforce confidence in the Provincial Courts.[8]

Yet, despite all these changes, the judiciary had very little responsibility for the administration, management and operation of these Courts.

When Linden became Chief Judge, he recalled:

"Despite the best efforts of former Chief Judges, there was little or no involvement of our judges in such areas as: financial management; operational decisions; the implementation of judicial support programs; the use of statistics and management information for assessing caseloads or judicial resource needs; or the day-to-day administrative needs of the judges and justices of the peace."[9]

Developing that administrative structure became Linden's primary objective during the entirety of his tenure as Chief Judge from 1990 to 1999.

Why the Provincial Courts Did Not Control Their Own Administration

In 1990, the fact that the new Ontario Court (Provincial Division) lacked administrative autonomy over its own processes was not at all surprising.

Courts in Canada had little to do with their own administration. “Judges and courts for the most part have not had a long experience with management or administration, and almost no experience with budgets. Historically, courts have not been widely known for their organizational expertise, and governments are accordingly cautious about transferring control over budget and personnel.”[10] But it wasn’t just governments that were nervous. Many judges, including chief judges, were concerned about taking on responsibilities that had never been theirs and were, for many, beyond their experience. Moreover, they worried that the government would transfer responsibilities to them without adequate resources to carry them out. They were judges, not managers. Judges, protective of their judicial independence, were concerned that a chief judge, with added administrative powers, might be tempted to micro-manage them.[11]

The result?

Until the 1990s, “the Provincial Division was managed as if it was a small branch or division within the Ministry of the Attorney General. Government officials provided the Provincial Division with necessary support services including financial monitoring, and the scant statistical information that existed was, at best, only intermittently shared with the Chief Judge’s office. Most contact between the Chief Judge’s office and the Ministry was at a fairly low level – at the Ministry’s Judicial Support Services Branch.”[12]

What Changed? A Combination of Events Leading up to September 1, 1990

Three key ingredients laid the groundwork for the introduction of the new Ontario Court (Provincial Division), with its focus on administrative autonomy.

1. Courts became busier, with more complex cases – and delays grew.

2. In 1985, the Supreme Court decision *R. v. Valente*[13] gave recognition – for the first time – to the concept that "administrative independence" was one of the conditions of judicial independence.

3. In the late 1980s, Attorney General Ian Scott laid the groundwork for two phases of court reform. His objective was a streamlining of the courts in Ontario which, if it had been fully implemented, would have seen all trial courts in Ontario – provincial and federal – integrated into a single trial court.

Ian Scott in the 1980s. (Source: Ian Scott with Neil McCormick, *To Make a Difference,* (Toronto: Stoddart Publishing Co. Limited, 2001.))

In the lead up to the introduction of the new Provincial Division, "scant attention [was] paid to the scheduling or management of cases (because they did not appear to require it) and the judge's role was simply to adjudicate the disputes that appeared on the court docket. Trial dockets were relatively short, as were the trials themselves, and there was no particular pressure or need to create more effective ways to deal with cases.

However, as cases became more numerous and more complex, particularly in the late 1970s and early 1980s, delays grew and the courts began to take a real interest in the administration and control of their own processes. Judges increasingly became involved in a series of pre-trial steps designed to encourage early resolution, to reduce delays, and to identify early in the process those cases that would actually proceed to trial. In this manner were born the pre-trial conference, case conference, settlement conference, and others, as well as the practices of case management and case-flow management."[14]

The judicial system was changing – the way it was administered and managed was not.

Judicial Independence and Court Reform

Then came the *Valente* decision in 1985 which determined that:

Judicial control over the matters [of] assignment of judges, sittings of the court, and court lists – as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence."[15]

That recognition of and push for enhanced administrative autonomy was continued through Ian Scott's proposals for court reform. Scott felt that major changes to the justice system and court structure were long overdue. The system could be made more effective, accessible and affordable.

His overall plan included two phases. Phase I of court reform – which commenced on September 1, 1990 – included a new regional structure for all of Ontario's courts. Further, this phase reduced several Ontario courts into two trial divisions – the General Division (the "superior" courts) and the Provincial Division – nominally united under the title "Ontario Court of Justice" – leaving the Court of Appeal as a separate Court. Phase II – which never came to pass – was intended to see the integration of the two trial divisions into a single trial court, with the objective of eliminating the confusion within and duplication of court services. There was some support for Phase II, especially within the Provincial Division, but in the larger justice and legal community, there was little consensus or support for that final integration to occur.[16]

Among Attorney General Ian Scott's stated goals were:

- a regional structure to ensure that people from all areas of the province would have local access to the courts – key to this was the appointment of Regional Senior Judges to work closely with the Chiefs within each of the two trial divisions; and

- an efficient and cooperative management system for all courts in Ontario.

September 1, 1990: The Stage is Set

Phase I of Ian Scott's plan began. The amendments to the *Courts of Justice Act* were proclaimed and came into effect on September 1, 1990. The Family and Criminal Divisions of the Provincial Courts became the Ontario Court (Provincial Division). Linden was Scott's choice for Chief Judge and, in the context of Scott's plans, an obvious choice. Earlier in his career, Linden had served as Ontario's first Information and Privacy Commissioner and first Police Complaints Commissioner. He'd created both of those commissions and, as a result, had acquired a great depth of administrative experience. He was ready to tackle restructuring the Provincial Division.

Chief Justice Sidney B. Linden (Courtesy: S. Linden.)

A few months earlier (in April 1990), Linden had been appointed to replace Fred Hayes as the Chief Judge of the Provincial Court (Criminal Division).[17] Linden spent the next few months, as he recalled, "floating around" the Courts and asking questions.[18] In fact, he was absorbing all he could about the workings of the Courts and becoming increasingly concerned that very few systems and policies were in place. "There was a system of some sort, only nobody could define it. There were people in entrenched positions but there were very few meetings of senior judges and there was no formal sort of organization or structure to manage the Courts. And, there was no budget. This meant the Chief Judge would have to contact somebody in the Ministry of the Attorney General to request money."[19]

Linden was regarded with suspicion. He did not have any experience as a judge. He was seen as Ian Scott's right-hand man in the delivery of Scott's vision of court reform. All this caused great

consternation amongst the judges and justices of the peace of the Provincial Division who saw Linden not only as an interloper but a bureaucratic interloper to boot. Some made it clear to Linden that he was not a welcome addition to the Court.[20]

"There's nothing to be alarmed about"

While Linden may have been nervous about the responsibilities of his new position as Chief Judge, he did not convey that sentiment in public. In an August 1990 interview with the *Law Times,* Linden adopted as reassuring tone.

It's not like Aug. 31 it's one thing and on Sept. 1, the whole world is going to change. It's not that dramatic at all… It's mostly administrative, organizational and structural – those kinds of things. We've got a lot of decentralizing to do and a lot of the work that has formerly been done in the chief judge's office has to now be done in the regional senior judges' offices and we have to get the process of amalgamating the family and criminal courts. But it's certainly not going to happen in one day.

Chief Judge Sidney Linden

COURT REFORM: *THE NEW SYSTEM*
Seminars to Explain Court Changes to Lawyers

(Sources: John Beaufoy, "New Chief Judge Advises Lawyers Not to Worry," *Law Times,* August 27-September 2, 1990, p. 11.; John Beaufoy and Jane Becker, "Court Reform: The New System," *Law Times,* August 27-September 2, 1990, p.10.; Photo courtesy: S. Linden.)

September 6, 1990: The Stage is Upset

Coincidentally, only five days after the proclamation of the *Courts of Justice Act*, there was a provincial election and a change in the government. According to Linden, the new NDP government did not share the previous Liberal government's agenda for court reform.[21] On October 1, 1990, Howard Hampton was appointed Attorney General, fully aware of the problems looming on the horizon. "Rae [Premier Bob Rae] wanted to know my interest in becoming Attorney General…. I said, 'AG is a hell of a mess and it's about to get bigger. You know that the *Askov* case had gone to the Supreme Court of Canada, and my sense is this thing is going to blow sky high…. It will take the first four or five years of any government to deal with it. And there are huge problems in family law and legal aid.'[22] Rae got back to Hampton to tell him, "By default, you get the job of AG."

Attorney General Howard Hampton in 1990. (Courtesy: S. Linden.)

Linden was now working with an Attorney General who had not appointed him and who didn't fully support the changes of which Linden was meant to be an integral part.

October 18, 1990: "The Bottom Falls Out"[23]

On October 18, 1990, the Supreme Court of Canada released its decision in *Askov.* The Court decided that a delay of almost two years in bringing Mr. Askov's criminal charge to trial violated the accused person's right to be tried within a reasonable time under s. 11(b) of the *Charter.* The charges were stayed as a result.

The Provincial Division and the Ministry of the Attorney General had known for years that a serious backlog of criminal cases was building. Attorney General Ian Scott, with the assistance of Chief Judge Hayes and senior judges, had begun a series of delay reduction projects in the mid-1980s in heavily

backlogged areas of the province. Despite this, the Provincial Division was unprepared for what was to come. *Askov* sparked a flood of *Charter* applications, resulting in thousands of criminal charges being stayed because a trial had not been held within a reasonable time. Court statistics showed that by April 1991 – six months after the decision in *Askov* – more than 34,000 criminal charges had been stayed or withdrawn.[24]

"Delay reduction" was set to become the banner cry – and the focus of the work of many of the criminal judges of the new Court for years to come as they conducted "blitz courts" and introduced new scheduling practices across the province to tackle the delays.

Special courtrooms urged to cut backlog of cases

By Rick Haliechuk
TORONTO STAR

Judges may have to sit in special courtrooms for impaired driving charges to cut down on the criminal case backlog, says Ontario's chief provincial judge.

"In the short term, we have to take some emergency measures," Sidney Linden, chief judge of the provincial division of the Ontario Court of Justice, said yesterday.

"You might be able to put a blitz on a particular kind of case or a particular area," Linden said in an interview.

But part of the problem is still the need for more judges and more court space, he said.

Linden heads the 230-judge provincial division, created in September through the amalgamation of the former criminal and family law wings of the old Provincial Court.

Last month, the Supreme Court of Canada gave trial judges the green light to dismiss criminal cases that have taken too long to get to trial.

There are long backlogs in provincial division courts in Etobicoke, North York, Scarborough, in areas just outside Metro and in other cities such as Ottawa.

But Linden said there are other areas without significant backlogs, and suggested the judges there could be temporarily reassigned to the problem districts.

SIDNEY LINDEN: Judge suggests reassigning judges from areas with less stress.

Deployment is the responsibility of the judiciary, but the judges haven't done a good job of scheduling their manpower, Linden said.

There may have to be separate lists for morning and afternoon sittings, while some courts may have to start holding evening sittings, he said.

A trial judge's day usually begins at 10 a.m., but if the cases aren't ready to proceed or must be adjourned, there is no way to quickly find other cases for the judge to hear.

This often results in a courtroom being empty for part of the day.

In the long term, Linden said, the provincial government must find the money to pay for more judges, more court staff and more courtrooms.

But there are things that can be done now to improve the judicial system, he said.

Besides courthouses, the province owns many other buildings, and rents space in others, for various government tribunals to conduct hearings.

These could now be used as short-term courtrooms, he said.

A specialized court could be set up in such a building to deal exclusively with impaired driving charges, Linden said.

Space in the office building at 180 Dundas St. W., for example, is rented by the government for use by the Ontario Municipal Board.

Linden stressed that his proposals are only "Band-Aid" solutions, and that the system needs a thorough overhaul to prevent the backlog problem from recurring.

(Source: Rick Haliechuk, "Special courtrooms urged to cut backlog of cases," *Toronto Star*, 1990.)

Linden's Dilemma and Decision

"There was a month or so during September and October when it was like we were in a free fall. It was like we had fallen into a huge black hole and we had nothing to grab onto," explained Linden.

Both Hampton and Linden recall that period as extremely difficult, as they both felt their way through their new roles and responsibilities. "I had a couple of dust-ups with Sid Linden," recalled Hampton.[25] "After that, we developed a good working relationship, but it started off frosty." Likewise, Linden remembered it as a time where both were figuring out where their respective responsibilities began and ended. "There were still lots of problems."[26]

"There is no doubt that I thought seriously about moving on," recalled Linden.[27] But he didn't. Rather, he focused on the new *Courts of Justice Act* and, aided by a team of eight Regional Senior Judges and two "Special Advisors," began building an administrative structure for the new Court.

The new collection of Regional Senior Judges and Senior Advisors in November 1990. Back row, left to right: G. Michel, G. Campbell, J. Evans, B. Lennox, D. August, G. Lapkin (Senior Advisor, Co-ordinator of Justices of the Peace). Front row, left to right: B. Walmsley (Senior Advisor, ACJ Family), M. Hogan, S. Linden (Chief Judge), H. Momotiuk. Missing: R. Walneck. (Courtesy: S. Linden.)

Regional Senior Judges, 1990 – 1999

Don August
Paul Belanger
Peter Bishop
Grant Campbell
Donald Ebbs
John Evans
L. Gauthier
Walter Gonet
Mary Hogan
Bernard Kelly
Brian Lennox
Gérald Michel
Harry Momotiuk
Raymond Taillon
R.J. Walneck
Anton Zuraw

Regional Senior Judges, 1995 – 1999

Brian Lennox
Marietta Roberts
David Wake

Building an Administrative Structure: The Creation of a Chief Judge's Executive Committee

The regional structure contemplated by the new *Act* involved the creation of the position of "Regional Senior Judge." The RSJ position was given the powers to perform the duties of the Chief Judge in his or her region.

The Chief Judge's Executive Committee (CJEC) was formed in 1990 comprised of the province's eight RSJs, and Linden had begun to meet with this group weekly beginning in August 1990. Two "Special Advisors" – family judge and former Associate Chief, Robert Walmsley, and Co-ordinator of Justices the Peace and Senior Judge, Gerald Lapkin – were added to the table for two specific reasons.[28]

1. The original complement of RSJs only included one Family Court judge, Grant Campbell, and the family bench was concerned that family law issues would be overlooked in a predominantly criminal court.

2. Lapkin had been appointed to his position by Ian Scott in 1988. Lapkin was in a similar position to Linden. The justices of the peace had been largely unmanaged prior to Lapkin's appointment and with changes to legislation, they were brought into the purview of the Ontario Court (Provincial Division). Lapkin was working to implement an administrative structure for the justices of the peace. By bringing Lapkin to the CJEC table, Linden ensured that the RSJs would fully understand their responsibilities for justice of the peace issues.[29]

The work of CJEC focused on dealing with issues on a province-wide basis to ensure uniformity in the Court's administrative approach – and to learn what was happening in each of the eight regions. CJEC was given the responsibility of setting the Court's policy direction on a wide variety of administrative matters, including delay reduction and scheduling issues, court security, communications, use of computers, education, finance, northern issues and negotiations with the government.

In keeping with Ian Scott's original plan for "judges as administrators," the RSJs were not expected to carry a full caseload – their first priority was administration of the Court.

Regional Senior Judges

s. 36 (2) A regional senior judge of the Ontario Court of Justice shall, subject to the authority of the Chief Justice of the Ontario Court of Justice, exercise the powers and perform the duties of the Chief Justice of the Ontario Court of Justice in his or her region.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 36 (2)

Twenty-seven New Judges!

Given all that had occurred in the autumn of 1990 – particularly concerning case backlog worries – many of the new RSJs told Linden they needed more judges. Not only were the RSJs' sitting times now reduced but some felt that Ian Scott had purposely left vacancies unfilled. And, *Askov* had arrived on the scene.[30]

The RSJs tallied their "wish list" for new appointments at 16. When Linden met with Hampton, he didn't have to time present his request for the 16 new appointments before he was told by Hampton that the Court would be receiving 27 new judges as a result of the *Askov*

Attorney General Howard Hampton's efforts to recruit judges to the Provincial Court attracted media attention, like this article in *Canadian Lawyer*, which included this illustration. (Source: Betsy Powell, "The Provincial Bench: Rough Justice," *Canadian Lawyer*, Vol. 15, No. 2., March 1991)

decision, plus eight new judges to replace the new RSJs, for a grand total of 35 judges – representing approximately 15% of the entire bench.

"The new government reacted to the *Askov* crisis by doing exactly what the previous government had said it would never do – appoint new judges," recalled Linden.[31]

How did that happen? Ian Scott had set aside a significant sum of money to effect his planned court reforms of merger and amalgamation, specifically destined for adding staff and introducing new technologies. After *Askov,* and with money in hand, the government calculated that approximately 54,000 more criminal charges had been received than disposed of in the previous year. Further, they estimated that a judge, on average, could dispose of approximately 2,000 charges per year. That meant 27 new judges.

It also meant that the new RSJs and Chief were scrambling to decide where to put those new judges and how they would be used.

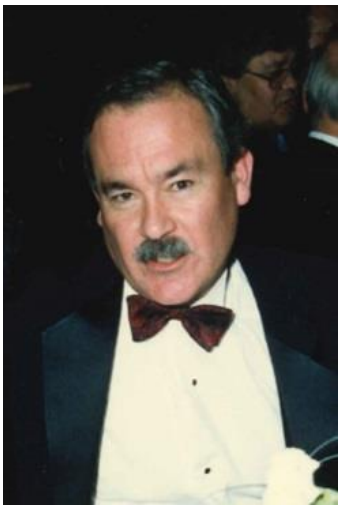
Seizing an Opportunity to Increase the Diversity of the Bench: Howard Hampton's Recollections

"*Askov* came in about two weeks after I was sworn in [as Attorney General]. The first round of [judicial] appointments came up towards the end of November. I made it known that we were going to appoint equal numbers of women and men. If we were appointing 10 judges, five would be women. I was very public about it. It caused a bit of a commotion. People said, 'The best qualified lawyers should be appointed.' I said, 'Then in the first round, they may all be women,' recalled Howard Hampton. By June 21, 1991, 27 judges had been appointed to the Court since the previous October – 16 were women."

(Source: Interview of H. Hampton for OCJ History Project, 2014.)

November 1, 1990: The Chief Speaks to the Court – and Keeps Speaking

"There are developments over the past couple of months that I would like to report to you." This understated sentence begins the first of many newsletters sent out by Chief Judge Linden, starting on November 1, 1990. Linden's newsletters were joined by *Benchmark* in January 1992, a more informal publication for the judges, noting appointments, retirements and the like. Judge Paul Reinhardt served as the first editor of *Benchmark* over 12 years.



Judge Paul Reinhardt in 1990. (Courtesy: S. Linden.)

For Linden, open communication with the judges and justices of the peace was essential in this time of profound change and upset. "I know how important two-way communication is and I can assure you, that is our objective."[32]

Reading Linden's first newsletter, it is clear he didn't shy away from the trouble spots on the Court. Given the suspicion with which he was regarded, it was perhaps disappointing but not surprising that the associations of the Family and Criminal Court judges took a dim view of his leadership at the outset.

In that newsletter, Linden wrote: "It is also important that the Office of the Chief Judge and the two Provincial Court Judges' Associations have a cooperative working relationship. There are some issues, of course, on which there may be disagreement, but there are many areas of common interest, e.g., judicial education, improvement of working conditions, etc. on which we will be able to work together."[33]

Throughout his tenure, Linden kept sending missives to the bench, alerting them to the many changes to the administrative structure of the Court and thanking them for their support.

The First Edition of *Benchmark*

Ontario Court of Justice (Provincial Division)

Benchmark

Vol. 1, No. 1 - January 1992

APPOINTMENTS:

Judges James Elliott Allen, Bruno Cavion, Ramez Khawly, Vibert Rosemay, Geraldine Waldman and Timothy Whetung were recently appointed to the Ontario Court of Justice, Provincial Division.

Her Honour Judge Janet Simmons, who served in the Provincial Division in Brampton from December 1990, was appointed to the General Division on September 16, 1991.

(Source: *Benchmark*, Vol. 1, No. 1, January 1992.)

"I am encouraged by recent developments…"

Linden did not shy away from talking with the judiciary about the problems the Court faced in the early 1990s.

It has taken years for some of the problems facing this Court to develop and no one expects us to come up with the solutions for them overnight, but I am encouraged by recent developments and I want to thank every one of you for your continued support.

S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), May 1991, p. 8.

Society Changes, the Court Changes

Issues that had previously been either invisible or ignored became increasingly obvious during the 1990s. During the 1990, shifts happening in the larger Canadian society were mirrored in changes occurring in the Court. A notable example was the increase of women in traditionally male-dominated professions and an emphasis on addressing workplace sexual harassment.

While a few women had served as Provincial Court judges in the years prior to the 1990s, a striking increase in their numbers on the bench occurred during the 1990s. This began when Attorney General Howard Hampton announced that increasing the diversity of the bench was his key objective. "My goal is that at least 50 percent of the new appointments be women," he wrote in a 1990 letter soliciting applications from lawyers across Ontario.

Further, the appointment process – through the creation of the Judicial Appointments Advisory Committee (JAAC) – had moved away from partisan political influence. As Hampton had written in that same letter: "a high standard of excellence" had become the main criterion for appointment to the bench. In turn, those appointed through the JAAC process became known as "merit" appointments.

It was a time of changing perceptions.

Transparency had become a hallmark of the appointments process and the bench became much more diverse, both in terms of women and other previously underrepresented groups. For some existing members of the bench, these changes were welcome and long overdue. For others, they were an implicit and uncomfortable criticism of the Court as it had existed before these changes.

As the work environment changed, the past tacit acceptance of what some called the "old boys' club" began to disappear, with important consequences for the Court. The *Hryciuk* case exemplified that change. Complaints were made to the Ontario Judicial Council involving Judge Walter Hryciuk's alleged sexual assault and harassment of female Crown Attorneys and court staff.

After the complaint was made, Hryciuk never sat again. The Ontario Judicial Council conducted an inquiry into the complaint and recommended the holding of a public inquiry. A commission of inquiry was established by the provincial government and the Commissioner issued her report in 1993, recommending that Hryciuk be removed from the bench. However, in 1996, the Ontario Court of Appeal quashed the inquiry Commissioner`s findings and recommendations, ruling that the Commissioner had unfairly allowed new misconduct complaints to be added to the original complaint once the inquiry had started. The provincial government did not establish a second commission of inquiry, no further proceedings took place and Hryciuk, who had presided at Toronto's Old City Hall, never returned to the bench. Walter Hryciuk retired in 1996.

This was an exceptional and unique case, but it affected the Court deeply.

First, on the personal front – for a variety of reasons – the *Hryciuk* proceedings divided the judges at Old City Hall. Many of them no longer felt comfortable in the judges' lounge after a judge revealed conversations from the lounge during the inquiry. Justice Ted Ormston recalled that time: "At Old City Hall, there was a huge judges' lounge and there would be 20 of us in there – all that changed after the Hryciuk situation."

Second, the Court took immediate action on the education front. Even before the inquiry decision was released in the *Hryciuk* case, the Court began providing judges with education on social context issues, including gender equity.

(Sources: Interview of T. Ormston for OCJ History Project, 2014; Justice Ted Ormston, Transcript of Interview for Oral History Project, Osgoode Society for Canadian Legal History, 2008; Interviews of A. Edgar and M. L. de Sousa for OCJ History Project, 2014.)

January 1, 1991: Regionalization of Administrative Duties

The formal shift from centralized to regional administration of a range of duties occurred on January 1, 1991. RSJs' responsibilities included: day-to-day operational management of the regions, scheduling of judges and justices of the peace, arranging for swearing-in ceremonies, approval of expense accounts and reporting of attendance, vacation and sick leave.

This was one of the most important changes in the structure of the Court. Instead of bringing every issue to the Chief Judge, judges were encouraged to deal with their RSJs, with the hope that issues would be resolved at the regional level.

With this new structure came many committees, chaired by the various RSJs. The list included: Communications, Computers (Research & Library), Court Reform, Judicial Conduct, Education, Finance, Judicial Resources, Northern Issues, Scheduling/Delay Reduction.

The judges' associations had representatives on every committee, which served as both a formal recognition by the Chief's Office of their role in the structure of the Court and an olive branch to smooth troubled relationships.

May 1991: The Chief's Office Moves House

Many of the changes that occurred in the first years of the 1990s were symbolic ones, with the effect of unifying the judges and justices of the peace, while clearly demonstrating the judicial independence of the new Court.

New gowns for judges were introduced in 1991, a basic black gown with a red sash "which is a remnant of the former Family Division's judicial gown," to be worn from the left shoulder to the right. All judges were asked to wear their gowns in court on criminal, family and young offender matters.[34]

The Court's letterhead was changed to reflect its independence from government. For years, the Provincial Division judges had used the letterhead of the Ministry of the Attorney General. As Linden noted: "This may seem trivial, but when the Attorney General is the chief prosecutor in the Court, judges having to routinely use the Ministry's letterhead does not contribute to the image of the judges being separate or independent from the government."[35]

The offices of the Court were brought into one space – 1 Queen Street East in Toronto – in May 1991. This meant that staff supporting the criminal and family judges and justices of the peace were finally amalgamated in one location.

Case Management in the Family Court

The advent of "judicial case management" in the Provincial Court can be traced to the late 1980s and early 1990s, when many courts, both criminal and family, were struggling with backlogs and delays. The rationale for judicial case management was a simple one: a shared need to provide better service at reduced cost to the public, by reducing delays and increasing the efficiency of the justice system.

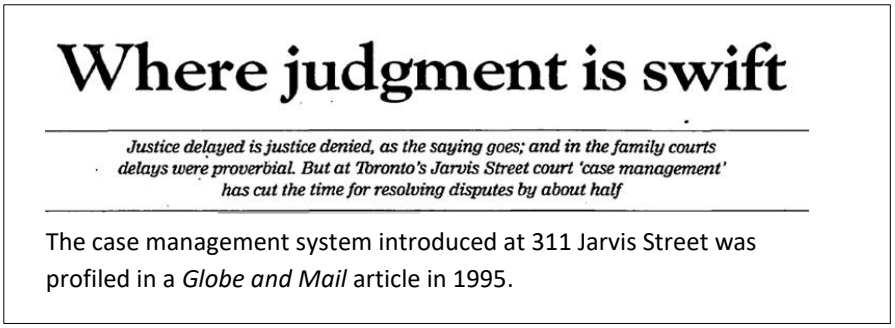
While there is no one definition for the term, it is generally accepted that case management exhibits four main features:

- Early and continuous judicial control over a case
- Time limits for each step in the process
- Monitoring to ensure compliance
- Firm dates for judicial proceedings

Traditionally, there was very little judicial control over a case at its early stages. It was assumed that a court would hear little or nothing from the parties until they appeared on the date set for a trial, plea or

preliminary inquiry. It was up to the parties to resolve the case or prepare for trial without any judicial assistance or oversight. Judicial case management was premised on judges becoming much more actively involved with individual cases than ever before. And the shift was not always easy for many existing judges who saw their job as only "judging" not "managing" cases.

In 1991, case management pilot projects were established in three locations of the Provincial Division: 311 Jarvis Street, Toronto; Windsor; and Sault Ste. Marie.



Where judgment is swift

Justice delayed is justice denied, as the saying goes; and in the family courts delays were proverbial. But at Toronto's Jarvis Street court 'case management' has cut the time for resolving disputes by about half

The case management system introduced at 311 Jarvis Street was profiled in a *Globe and Mail* article in 1995.

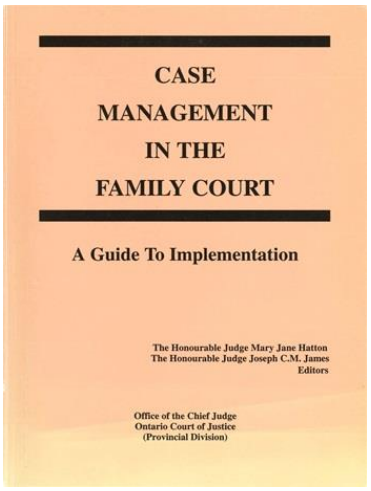
In May 1994, case management was fully and successfully implemented in the busy, multi-judge Toronto Family Court at 311 Jarvis Street. Two of the judges who had worked on the pilot project to bring this project to fruition – Judge Mary Jane Hatton and Judge Joseph James – set to writing a guide book containing the principles and processes of case management for use in all Family Courts in the province.

Published in 1995, *Case Management in the Family Court: A Guide to Implementation* proved to be a practical and useful tool. It garnered the public's attention. Mary Jane Hatton's experiences were detailed in *The Globe and Mail:*

On a recent day in court, Judge Mary Jane Hatton encouraged a couple in a support case to work on an amicable settlement, rather than immediately resorting to the court to settle things. She scheduled a 15-minute "case conference" – a kind of planning meeting – for two weeks later in case the couple couldn't agree. At that time she would identify issues with clients and lawyers and try to narrow down which ones would be argued. Knowing cases will come back before a judge who is familiar with the file cuts

down on game-playing or delay tactics. Judge Hatton says, in the past, lawyers might try several times for an adjournment until they got a judge they felt was sympathetic to their viewpoint.

(Sources: Mary Jane Hatton and Joseph James, *Case Management in the Family Court: A Guide to Implementation,* Office of the Chief Judge, Ontario Court (Provincial Division), May 1995; Patrick LeSage and Michael Code, *Report of the Review of Large and Complex Criminal Case Procedures, "Judicial Case Management, Especially at the Pre-trial Stage,"* November 2008; Margot Gibb-Clark, "Where judgment is swift," *The Globe and Mail,* February 28, 1995, p. B16.)



Case Management in the Family Court: A Guide to Implementation, published in 1995 by the Ontario Court (Provincial Division).

May 1991: The Formal Birth of the Centre for Judicial Research and Education

The law clerks from the former Criminal and Family Divisions, Allen Edgar and Roman Komar, respectively, together with Administrative Assistant Mirella Morello (of the former Family Division) were located in Toronto's Old City Hall – and that office was reorganized into the "Judicial Research Centre." The work of this group was led by a committee comprised of judges who were given responsibility for designing a

Allen Edgar (left) and Roman Komar in 1990. (Courtesy: S. Linden.)

research facility intended to be available to all judges of the Court. "New" technologies of the day – including faxing and computer links –made instantaneous, electronic communications possible.[36]

***R. v. Stinchcombe* – The *Charter* brings more changes and challenges**

On November 7, 1991, the Supreme Court of Canada held that an accused person has a right to full answer and defence under s. 7 of the *Charter,* and that, in order to implement that right, the Crown has a duty to disclose all relevant information in its possession to the accused.

This case changed the practice of criminal law – and, thus, the work of the judges hearing criminal cases – more than any other *Charter* decision. On the positive side, *Stinchcombe* enables the accused to prepare for the defence of cases and has invariably reduced the risks of wrongful conviction. Crown disclosure has added millions of dollars to the cost of prosecuting cases and contributed to a dramatic increase in the length of trials and in delays in getting cases tried.

Between *Askov* and *Stinchcombe*, the early 1990s saw cases become increasingly long, complicated and complex.

(Source: James Stribopoulos, *Top 10 Charter Cases: As Revealed at the Symposium on the 25th Anniversary of the Charger, A Tribute to Chief Justice Roy McMurtry,* Osgoode Hall Law School, April 12, 2007.)

Clearing up the Backlog: The "Special Project" in Brampton

Following the *Askov* decision, clearing the Provincial Division's backlog became of pre-eminent importance.

This excerpt from the Chief Judge's Newsletter of December 1991 provides a sense of that urgency.

A "special project" to deal specifically with the enormous backlog in Brampton Criminal Court was put in place at the end of September 1991 and, by all accounts, its impact has been significant. In the first two months a total of 1,542 accused people were dealt with in the two duty courts representing 3,203 charges. More than 4,000 witnesses have been released in the two months and assuming the police witnesses represent 70% of the total, there has been a savings of close to half a million dollars in police witness fees since the project began. The backlog which stood at 12,603 on September 30, 1991 is being reduced by approximately one thousand charges a month and is presently at 10,583. More importantly, all those connected with the project are satisfied that the high quality of justice in individual cases has been maintained.

S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), December 1991, p. 3.

1992-1993 – Years of New Administrative and Financial Arrangements

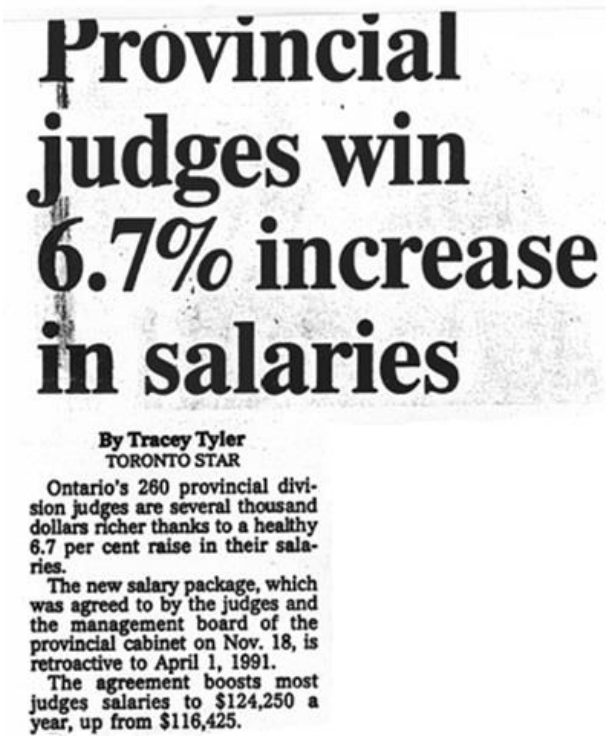
Following the whirlwind of change the Provincial Division experienced during 1990 and 1991, the Court began to negotiate and formalize many of the relationships it had cultivated in the first two years of the decade. However, this process took place during years of fiscal restraint – which coloured and shaped those relationships.

The following is a listing of some of those new administrative and financial arrangements undertaken in 1992 and 1993.

- **November 18, 1992 – Signing of the Framework Agreement**

  This agreement, signed by the provincial government and the judges of the Provincial Division (as represented by the Ontario Judges Association and the Ontario Family Law Judges

Association), created the Provincial Judges Remuneration Commission and introduced "binding arbitration" to the salary negotiations of the judges. In 1994, the Framework Agreement was incorporated to the *Courts of Justice Act*.[37]



Provincial judges win 6.7% increase in salaries

By Tracey Tyler
TORONTO STAR

Ontario's 260 provincial division judges are several thousand dollars richer thanks to a healthy 6.7 per cent raise in their salaries.

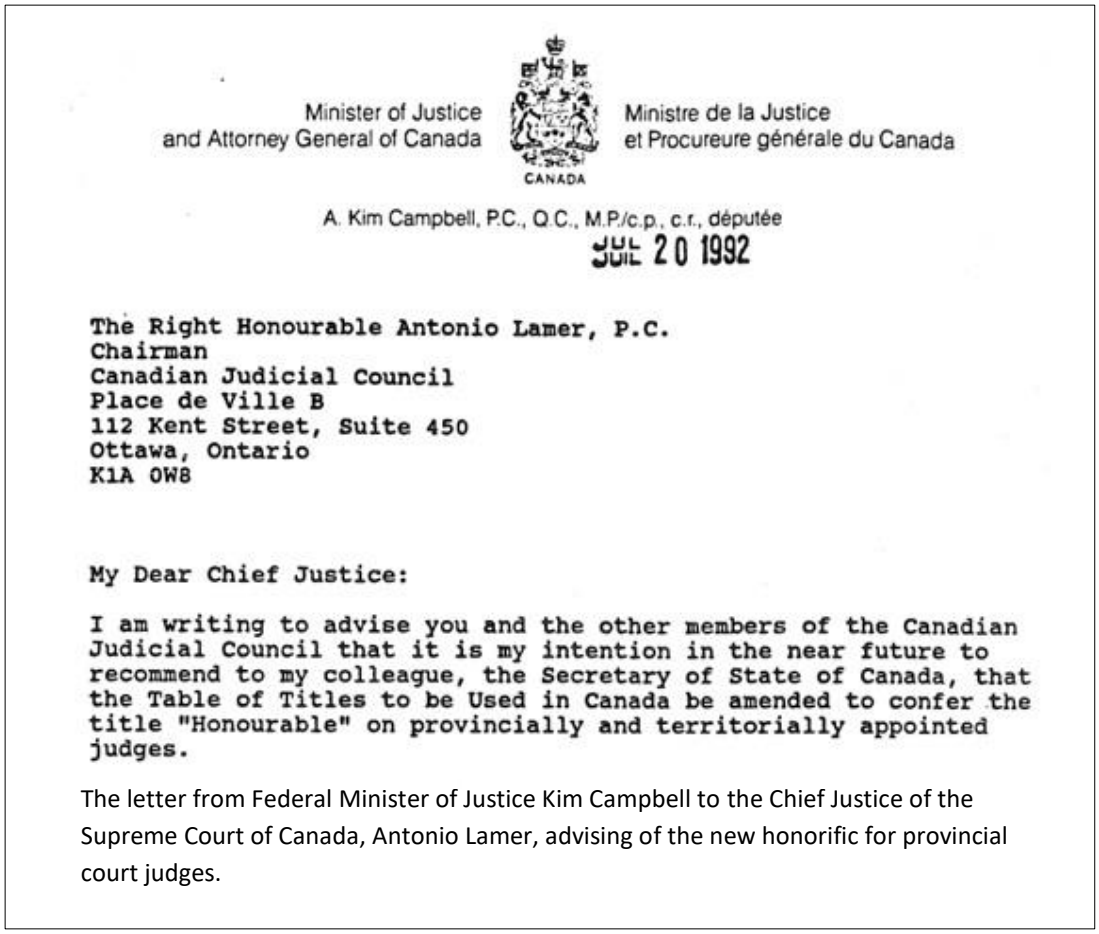
The new salary package, which was agreed to by the judges and the management board of the provincial cabinet on Nov. 18, is retroactive to April 1, 1991.

The agreement boosts most judges salaries to $124,250 a year, up from $116,425.

As a result of negotiations amongst the judges' associations and the provincial government, judges began to see their salaries rise in 1992. (Source: Tracey Tyler, "Provincial judges win 6.7% increase in salaries," *Toronto Star*, December 17, 1992.)

- **July 20, 1992 – "The Honourable" – Letter from Federal Minister of Justice to Chief Justice of the Supreme Court of Canada**

In this letter, Kim Campbell advised of her intention to recommend to that provincially appointed judges across Canada could use the title "Honourable." This change came after years of lobbying by judges across Canada, including Judge Charles Scullion of the Provincial Division.



Minister of Justice
and Attorney General of Canada

Ministre de la Justice
et Procureure générale du Canada

CANADA

A. Kim Campbell, P.C., Q.C., M.P./c.p., c.r., députée

JUL 20 1992

The Right Honourable Antonio Lamer, P.C.
Chairman
Canadian Judicial Council
Place de Ville B
112 Kent Street, Suite 450
Ottawa, Ontario
K1A 0W8

My Dear Chief Justice:

I am writing to advise you and the other members of the Canadian Judicial Council that it is my intention in the near future to recommend to my colleague, the Secretary of State of Canada, that the Table of Titles to be Used in Canada be amended to confer the title "Honourable" on provincially and territorially appointed judges.

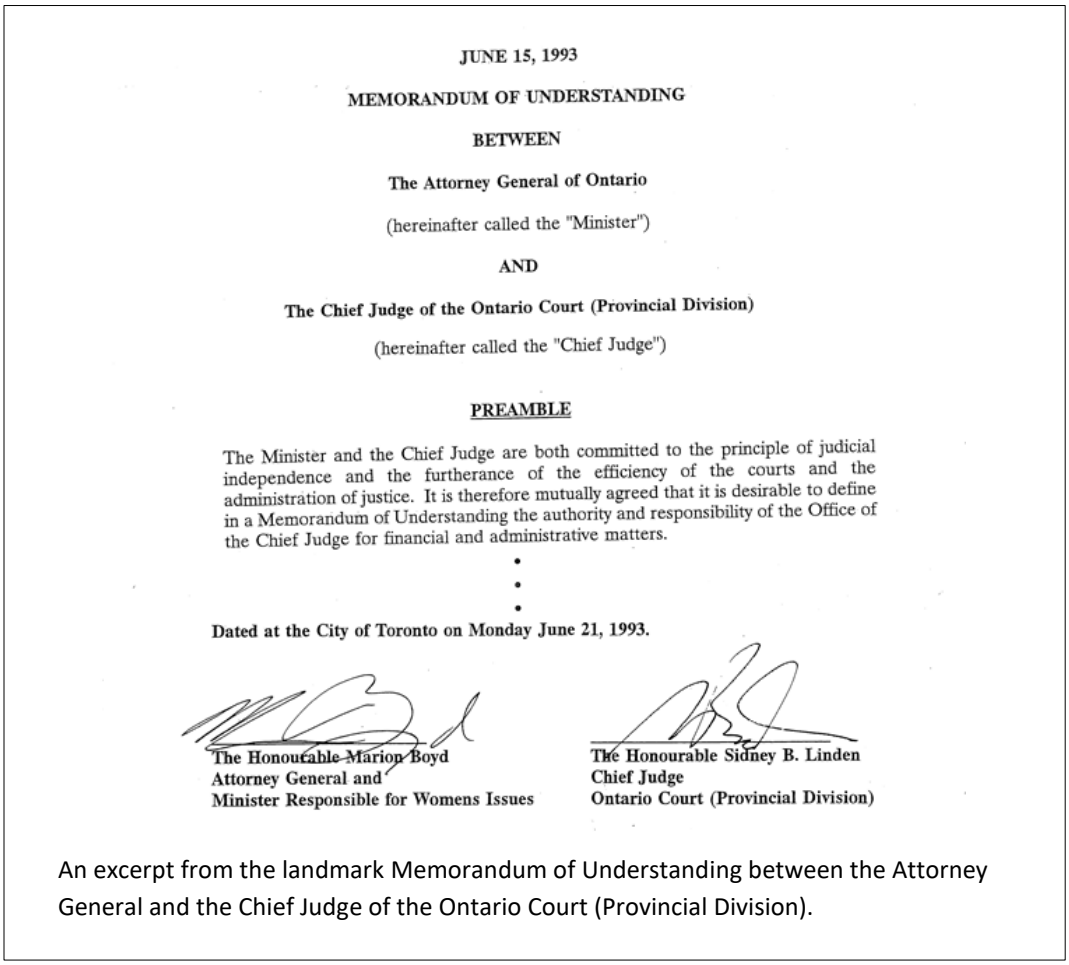
The letter from Federal Minister of Justice Kim Campbell to the Chief Justice of the Supreme Court of Canada, Antonio Lamer, advising of the new honorific for provincial court judges.

- **December 1992 – Education Secretariat**

Recognizing that the Court needed to improve the delivery of education to its judges, the Education Subcommittee of CJEC, chaired by Judge Brian Lennox, had been created in 1991. The "Education Secretariat" together with a formal education policy – both announced in December 1992 – were the products of that subcommittee. The innovative aspect of the Education Secretariat was its membership – it brought members of the judges' associations to the table. Further, the Education Secretariat was given control over the long-term "substantive and budgetary planning" for education policy and programming for the Court.[38] Judge Mary Hogan was the Secretariat's first chair.

- **June 21, 1993 – Signing of Memorandum of Understanding between the Ministry of the Attorney General and the Office of the Chief Judge**

A true first for any court in Canada, the Memorandum of Understanding signed by the Attorney General and the Chief Judge established clear and distinct responsibilities for the purposes of the administration of the Provincial Division. It served – and continues to serve – as the strong



JUNE 15, 1993

MEMORANDUM OF UNDERSTANDING

BETWEEN

The Attorney General of Ontario

(hereinafter called the "Minister")

AND

The Chief Judge of the Ontario Court (Provincial Division)

(hereinafter called the "Chief Judge")

PREAMBLE

The Minister and the Chief Judge are both committed to the principle of judicial independence and the furtherance of the efficiency of the courts and the administration of justice. It is therefore mutually agreed that it is desirable to define in a Memorandum of Understanding the authority and responsibility of the Office of the Chief Judge for financial and administrative matters.

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Dated at the City of Toronto on Monday June 21, 1993.

The Honourable Marion Boyd
Attorney General and
Minister Responsible for Womens Issues

The Honourable Sidney B. Linden
Chief Judge
Ontario Court (Provincial Division)

An excerpt from the landmark Memorandum of Understanding between the Attorney General and the Chief Judge of the Ontario Court (Provincial Division).

foundation of the Court's administrative independence. The Chief's Office, through the MOU, assumed control over budgets for the administration of the Office of the Chief Judge, the Regional Senior Judges, the Co-ordinator of the Justices of the Peace, and the judicial support budgets for the Provincial bench and all Justices of the Peace.

- **July 1993 –Assignment of Two New Associate Chief Judges and Appointment of an Executive Co-ordinator**

  Linden recalled he was still swimming in a deep and uncharted sea at this point. The position of RSJ had been statutorily recognized – and this group proved productive and useful to the administration of the Court.[39] Linden needed more help, however, particularly following the transfer of considerable administrative responsibility, authority and budgetary control to the Office of the Chief Judge through the new MOU with the Ministry of the Attorney General. Linden decided – on his own initiative and without statutory authority – to name two Associate Chief Justices to help build this new structure. His first appointments to those ACJ positions were Mary Hogan and Grant Campbell. The ACJ positions were not statutorily recognized until 1995 and, in early 1996, they were filled by Marietta Roberts and Brian Lennox. In addition, Linden appointed Tom Mitchinson as the Executive Co-ordinator in the Office of the Chief Judge. He likened this position to that of a CEO in a corporate structure, with the Executive Co-ordinator taking direction from the Chief.[40]

- **July 1993 – The "Social Contract" is Announced by the Provincial Government**

  In the early 1990s, Ontario was in the worst economic recession since the Great Depression. The government requested $2 billion in wage cuts within the civil service through forced unpaid leave – and the judiciary was not exempt from this request. By agreement amongst the Chief Judge and the judges' associations, the Court suggested a different approach to the government – one that would show a commitment to the concept of the Social Contract but would also respect the Court's judicial independence. Instead of cutting the number of days judges would work by taking unpaid leave, the Court committed to presiding up to 3,000 more days per year. Linden made it clear to the judges: "We are in control of what we do and how we do it." The

procedure for tracking the commitment of 3,000 extra days was designed by the Court, not the government and, according to Linden, "allowed us to take the high road regarding the social contract and at the same time to keep our hard-earned salary gains."[41]

- **December 8, 1993 – The "Investment Strategy" is Announced**

  The Ministry of the Attorney General's Investment Strategy was a direct response to the increasing caseloads and shrinking resources that the Provincial Division was facing. It was determined that "business as usual" could not continue and that the justice system needed an overhaul. Crown Attorneys and the police were given added responsibilities for screening charges and disclosure, with the aim, if possible, of reducing the number of charges coming into the system. For their part, judges had begun to schedule judicial pre-trials as well as to take firm control of their lists of cases and their courtrooms, ensuring that the Crowns, police and defence counsel were living up to their responsibilities.

The Importance of Information Sharing: Making the Investment Strategy a Success

While always respecting judicial independence and the Court's control over its administrative affairs, the concepts of collaboration and cooperation with all others in the justice system began to take on a new urgency for the Provincial Division in the early 1990s.

Valerie Sharp, the Executive Legal Officer in the Office of the Chief Justice, was the Court's representative on the committee established in 1993 to monitor and evaluate the success of the government's Investment Strategy. The Court saw Sharp's involvement as way for it to resolve issues that might arise with the implementation of the Strategy – but equally important – as a way of staying "plugged in" to what the Ministry was doing and, thus, allow the Court to evaluate the effectiveness of the Strategy vis-à-vis its work.

(Source: "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), December 1993, p. 4.)

The Critical Relationship between Computers, Court Statistics and the Court's Work

"Each Regional Senior Judge is now equipped with a personal computer." This was a very big announcement from the Chief's Office in May 1991. And, the announcement continued that the goal was to have the Chief's Office connected with all the Regional Senior Judges' offices with an "electronic mail system." It was stated that such "instantaneous communication will greatly facilitate (the Court's) administrative tasks."

In fact, the introduction of computers to all members of the Court did have a profound impact on the administration of the Court – particularly in terms of expanding the Court's ability to collect and maintain its own statistics in order to establish its workload and administer it accordingly. Further, computers began providing individual judges instant access to online research services such as Quicklaw.

Interestingly, it took years for judges to be electronically connected. A 1996 article in *Benchmark* concerning the distribution of "Items of Interest," a regular update from the Chief's Office to all judges on emerging case law and legislative changes, was "broadcast faxed" to 75 Court locations and emailed to the 30 email addresses the Court possessed. Once the document was received at individual courthouses, it was then photocopied for distribution to individual judges.

Telewarrant Centre: The Court's Telewarrant Centre is one early example of the move into the electronic age. Established in Newmarket in September 1997, the Centre received faxed applications to obtain search warrants. Justices of the peace reviewed those warrants and, thus, were able to provide service to police forces across the province, 24 hours a day, seven days a week.

Integrated Justice Project: In the late 1990s, the Ministry of the Attorney General and a consortium of private sector partners, headed by IBM, announced the creation of the Integrated Justice Project (IJP), a project designed to place the Ontario court system at the forefront of electronic technology worldwide.

IJP was touted as an electronic revolution that would result in a paperless justice system, by linking the correctional system, the courts, the judiciary, the prosecution service and the police into a "seamless network" through which civil and criminal cases could be filed and tracked.

Moving the civil justice system into the 21st century

A Civil Justice technology conference in 1996 showcased technology that would be used to modernize the justice system. Pictured at the conference (left to right) are Chief Justice of the Ontario Court (General Division) Patrick LeSage, Chief Judge Sidney B. Linden and Attorney General Charles Harnick.

An early indication of trouble was provided when IBM withdrew from the leadership of the project shortly after it began. IBM did, however, continue to participate in the consortium.

Despite the best of intentions and efforts as well as years of planning, IJP proved to be far too broad in scope. At its height, more than 200 people worked on the IJP and it was estimated that the capital investment by the consortium exceeded $200 million. The project ended in silence years later: the project partners sued for damages in litigation that was ultimately resolved by a confidential out-of-court settlement.

IJP was criticized as being "too ambitious," by experts in courts administration – and based on the incorrect assumption that the various corners of the justice system were essentially ready to be linked together. That turned out to be impossible, given the inability to create simple links amongst the members of the system.

While the Integrated Justice Project is generally viewed as an expensive, over-reaching failure, it did in fact greatly accelerate the introduction and use of computers and computer technology in the court system. In the long term, this has enabled the realization of a number of the benefits that formed part of the original project.

(Sources: *Benchmark*, Vol. 5, No. 4 – Fall (October 1996), p. 5; Kirk Makin, "Computer lawsuit costs Ontario $63-million," *The Globe and Mail,* June 1, 2005, updated April 7, 2009*;* Article headline and photo courtesy *Your MAG et vous*, Vol. 8, No. 3, p.1, June 1996).

1994 - 1998 – The Court's Internal Organization Continues to be Refined

By 1994, the foundation was firmly in place and the Court's new governance tools – particularly the MOU with the Ministry of the Attorney General – were yielding tangible benefits. During the years 1994 to 1998, the Court continued to refine various elements of its administration – and began to reap solid recognition from those outside the Court, including the governments of the day, of the ever-increasing reputation and strength of the Provincial Division.

- **May 27, 1994 – Memorandum of Understanding with Associations of Judges**

  Throughout the early 1990s, the relationship amongst the two judges' associations – family and criminal – was in the process of being worked out and respective areas of responsibility were

being determined. As Linden wrote in 1993, "no one could quarrel with the fact that the Associations have responsibility for collective bargaining on behalf of the judges…. By the same token, no one could quarrel with the fact that the Chief Judge is responsible for 'directing and supervising the sittings of the Provincial Division and the assignment of its judicial duties.'[42] Some of the other areas of responsibility are not as clear."[43] The MOU amongst the Ontario Judges Association, the Ontario Family Law Judges Association and the Chief Judge, signed on May 27, 1994, defined those responsibilities.

- **May 1994 – Conversion of Justices of the Peace and Appointment of Regional Senior Justices of the Peace**

  Although the "conversion" of justices of the peace had been in the works since the late 1980s, it received all the necessary approvals from the Chief's Office in May 1994 and implementation began in earnest. This daunting project involved, first, determining how many justices of the peace there were in the province and then changing the justice of the peace system to move justices of the peace from fee-for-service remuneration to salaried full-time positions. The conversion project – which progressed from region to region – took four years to complete. As part of the conversion program, eight Regional Senior Justices of the Peace were formally recognized and given management responsibility for regional operations.

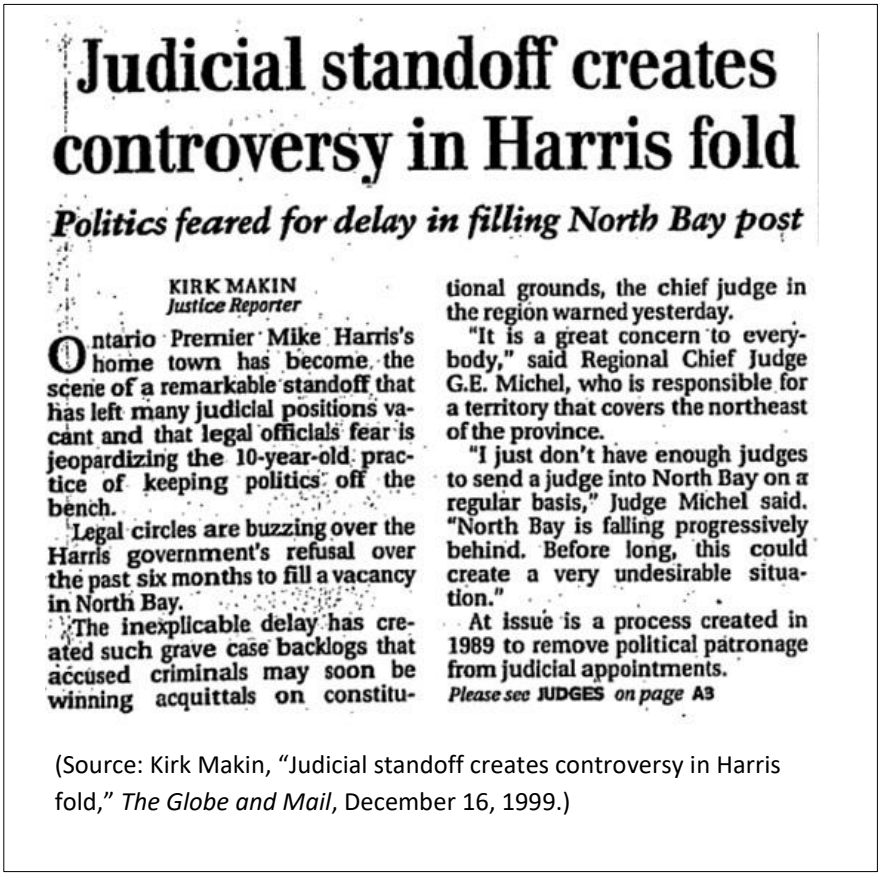
- **November 1994 – Release of Judges' Manual**

  Although it sounds simple, a complete "manual" for judges had never been assembled and distributed to all judges of the Court. Texts concerning the role of magistrates and judges had been written over the years but nothing as fulsome as this manual.[44] This document, which contained such basic information as a list of the judges' names and phone numbers, details of

administrative policies, information about the legislation that impacted their pensions, salaries and benefits, and various documents detailing the relationship of the Court with the provincial government, served to unify the judges of the Court – and professionalize the workings of the Provincial Division.

- **February 28, 1995 – Judicial Appointments Advisory Committee is Made Permanent**

The committee itself had a built-in affirmative-action edge; it was eager to have the courts represent the diversity of modern Canadian society. A short list of recommended candidates was made to the Attorney General, and appointees were selected from that list. This took old-style politics out of the process. The new appointments system was an important breakthrough. It helped to recruit many women judges, and it helped to make the bench more professional and competent.[45]



Judicial standoff creates controversy in Harris fold

Politics feared for delay in filling North Bay post

KIRK MAKIN
Justice Reporter

Ontario Premier Mike Harris's home town has become the scene of a remarkable standoff that has left many judicial positions vacant and that legal officials fear is jeopardizing the 10-year-old practice of keeping politics off the bench.

Legal circles are buzzing over the Harris government's refusal over the past six months to fill a vacancy in North Bay.

The inexplicable delay has created such grave case backlogs that accused criminals may soon be winning acquittals on constitutional grounds, the chief judge in the region warned yesterday.

"It is a great concern to everybody," said Regional Chief Judge G.E. Michel, who is responsible for a territory that covers the northeast of the province.

"I just don't have enough judges to send a judge into North Bay on a regular basis," Judge Michel said. "North Bay is falling progressively behind. Before long, this could create a very undesirable situation."

At issue is a process created in 1989 to remove political patronage from judicial appointments.

Please see **JUDGES** *on page* **A3**

(Source: Kirk Makin, "Judicial standoff creates controversy in Harris fold," *The Globe and Mail*, December 16, 1999.)

- **1995-1996 – Establishment of New Unified Family Courts**

  The Hamilton Family Court was the first "Unified Family Court" in Canada – beginning as a pilot project in 1977. A Unified Family Court replaced, with one judge in one court, a collection of courts that heard a variety of different family law disputes. In 1995, Unified Family Courts were established in 16 other locations across Ontario. Many of the judges appointed by the federal government to the Unified Family Court came from the family law judges of the Provincial Division. In fact, the federal Minister of Justice had committed to appointing 75 per cent of Unified Family Court judges from amongst existing Provincial Division judges. The Provincial Division was fully supportive of this commitment, and indicated that such appointments provided the Unified Family Court "with a cadre of experienced judges to form the nucleus of the new Court."[46] Not all judges were as supportive of these developments as the Court itself.

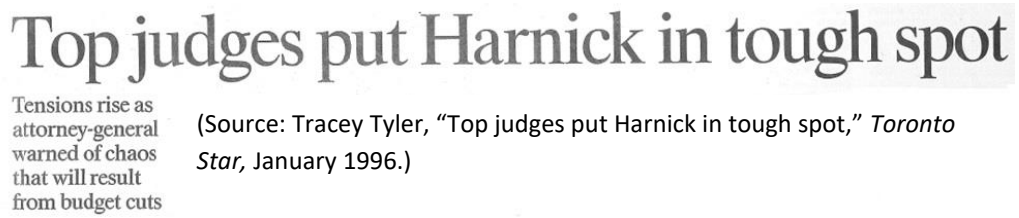
- **December 1, 1995 – New Robes for the Justices of the Peace**

  Justice of the Peace Frank Devine approached CJEC on April 6, 1995 with a proposal.[47] On behalf of all justices of the peace, he put forward the possibility of a distinctive robe for that bench. Traditionally, they had worn plain black robes. Their first choice was the addition of green piping on the collar and lapels of their current robes. Second choice was a green sash. CJEC approved their second choice and ACJ Roberts presented new sashes to all justices of the peace to be worn when presiding effective December 1, 1995.

- **January 17, 1996 – A Landmark Letter is Sent to the Provincial Government**

  Financial constraints continued throughout the 1990s. In December 1995, the Ministry of the Attorney General advised the Provincial Division, together with the Court of Appeal and the

General Division, that all three Courts would be facing budget cuts of approximately one third over two years. On January 17, 1996, the three Chiefs sent a strongly worded letter to Attorney General Charles Harnick urging him "to seek a moratorium on any cuts to the administration of justice until a proper analysis of any proposed cuts can be made. Unless this is done, we fear that the result may well be truly chaotic."[48] An interesting historical note – this letter was originally drafted by those in the Office of the Chief Justice of the Provincial Division and serves as a strong indication of the Court's commitment to judicial independence and its growing reputation. The cuts to the Courts were not implemented as the province originally planned. And, the coming together of the three Chiefs resulted in the creation of a "Heads of Court Committee," with the mandate of dealing in a "positive and principled way" with the challenges faced by the Courts and acting "in the best interests of the people of Ontario."


Top judges put Harnick in tough spot

Tensions rise as attorney-general warned of chaos that will result from budget cuts

(Source: Tracey Tyler, "Top judges put Harnick in tough spot," *Toronto Star,* January 1996.)

- **January 23, 1996 – Swearing-in Ceremony for Two New ACJ**

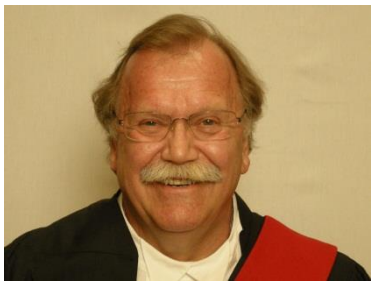
Following the legislative recognition of the two ACJ positions, Marietta Roberts and Brian Lennox were sworn in on January 23, 1996. Roberts' position had the extra responsibilities of "Co-ordinator of Justices of the Peace." At the swearing-in of the two new Associate Chief Justices – less than a week after receipt of that "landmark letter" – Attorney General Charles Harnick stated: "The Provincial Division in Ontario is one of the best, if not the best, managed court in the country."[49]

- **June 11, 1998 – The Transfer of the *Provincial Offences Act***

"One change that will have a significant impact on our Court is the transfer of the responsibility for the administration of the *Provincial Offences Act* from the provinces to the municipalities." This change was made by amendments to the *Act*, proclaimed on June 11, 1998. The Court worked closely with the Ministry of the Attorney General to ensure that appropriate standards were maintained for the facilities to be used by the municipalities. This was considered essential to ensure that the proceedings of the Provincial Division – conducted by justices of the peace – would continue to be conducted in a manner and a setting which preserved the dignity of the Court – and ensured appropriate levels of service to the public.[50]

- **May 11, 1998 and December 1, 1998 – First "Specialized Courts" in Ontario**

Specialized or "problem-solving" courts began in the 1990s in the United States to accommodate offenders with specific needs and problems that could not be adequately addressed in traditional courts. These specialized courts were developed to deal with an individual's particular issues, including drug abuse, mental illness, and domestic violence – and tend to be non-adversarial in nature. The first two such courts opened at Toronto's Old City Hall: Mental Health Court on May 11, 1998, and Drug Treatment Court on December 1, 1998 – both predicated on the assumed common goal of all parties to break the cycle of



Justice Paul Bentley (top) and Justice Ted Ormston. (Photo of Justice Bentley courtesy: Toronto Drug Treatment Court.)

repeated incarceration by providing appropriate support systems to these individuals.[51]

Effects of the Creation of Unified Family Court on the Provincial Division

The expansion of the Unified Family Court (UFC) in 1995 – while officially welcomed by the Provincial Division – was a source of some ongoing tension and debate within the Court for two reasons. The first related to the appointment process to the UFC and the concerns of those, from the Provincial Court, who were not appointed. The second related to which Court – the UFC or Provincial Court – would deal with Youth Court matters.

As George Thomson, who was federal Deputy Minister of Justice at the time, explained:

The move to expand the Unified Family Court was not all good news for the Court. There were the judges of the Provincial Division who weren't appointed to it. In some cases, they were judges who sat in the same Court as other Provincial Division judges who were appointed. As well, some communities, such as Belleville, were left out of the UFC expansion, even though they were surrounded by UFCs. Dealing with the disappointed judges was a major challenge for the Court. Further, there was a collective concern on the part of all of the family judges remaining in the Provincial Division that they would become marginalized and forgotten in a Court that was now even more overwhelmingly a Criminal Court.

There were also concerns amongst Provincial Division judges about the extent of the jurisdiction given to the UFC in 1995. The first UFC established in Hamilton in 1977 had been given jurisdiction over juvenile delinquency proceedings and this continued with the introduction of the *Young Offenders Act* of 1984 – at least for youth up to their 16th birthdays. With the expansion of the UFC in 1995, the issue became whether these cases should be in the UFC or whether the Provincial Court should deal with all young offenders, from 12 to 18.

Youth Court work had frequently (but not exclusively) been done by family law judges in the Provincial

Division prior to the establishment of the UFC. Some family judges, including many who were now part of the expanded UFC, thought they were better suited than their criminal law counterparts to deal with these young persons and argued that these cases and child protection cases should be in the same court. Their concern was that the restorative approach to youth criminal cases would otherwise be lost. Others stressed the greater accountability aspects of the *Young Offenders Act*, the benefit of having one court deal with all young offenders and the developing expertise of the criminal law judges of the Provincial Court in this area.

A number of Provincial Court judges, including Regional Senior Judges Don Ebbs and Ray Walneck, were strongly in favour of the Provincial Court reclaiming the Youth Court jurisdiction. Compounding the issue was the federal government's reluctance to appoint the number of judges to the UFC that would enable that Court to manage the caseload. The decision was made to transfer the full *Young Offenders Act* work from the UFCs to the Provincial Court.

(Sources: Interviews with G. Thomson and B. Lennox for OCJ History Project, 2013-15)

Conclusion: A Decade Concludes With a New Name – Ontario Court of Justice

On April 19, 1999, Part IV of the *Courts Improvement Act, 1996*, came into force. Among other provisions, the statute changed the name of the Courts. The General Division became the Superior Court of Justice and the Provincial Division became the Ontario Court of Justice. At the same time, the title of the Provincial Division judges was changed to "Justice." Over the decade, the Court that became the Ontario Court of Justice had navigated its course toward the modern era of judicial leadership and administrative independence.

[1]Sidney B. Linden, *Chief Judge's Newsletter*, February, 1991, p. 6.
[2][1990] 2 S.C.R. 1199.

[3]Ted Andrews served as Chief of the Family Division from 1968 onward. Fred Hayes took over as Chief Judge of the Criminal Division in 1972. Douglas Turner became Chief Judge of Small Claims Court in 1985, when that position was created.
[4]Today, Small Claims Court jurisdiction resides with Ontario's Superior Court of Justice.
[5]The Judicial Appointments Advisory Committee, *Interim Report*, September 1990, p. 2 ("JAAC, *Interim Report").*
[6]The judges' associations: The Provincial Court Judges Association (Criminal Division) and the Ontario Family Court Judges Association. (Note: The criminal judges association later became known as Association of Provincial Criminal Court Judges of Ontario. In later years, the associations became known as the Ontario Judges Association and the Ontario Family Law Judges Association. In 1999, the associations merged and became the Ontario Conference of Judges. In 2015, the association was renamed and became the Association of Ontario Judges.)
[7]*R. v. Valente,* [1985] 2 S.C.R. 673.
[8]JAAC, *Interim Report,* p. 2.
[9]Sidney B. Linden, "Where we are, where we're going," Notes for Luncheon Address to: Criminal Lawyers' Association Spring Education Program, April 20, 1996 ("Linden, 1996 speech").
[10]Brian W. Lennox, "Judicial Independence in Canada – The Evolution Continues," in Dodek, Adam and Sossin, Lorne, eds. *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010), p. 636.
[11]Lennox, "Judicial Independence in Canada," p. 636.
[12]Linden, 1996 speech.
[13][1985] 2 S.C.R. 673.
[14]Lennox, "Judicial Independence in Canada," p. 635.
[15][1985 2 S.C.R. 673, para. 49.
[16]T.G. Zuber, *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987) ("Zuber Report"); Linden, 1996 speech, p. 2; Association of Provincial Criminal Court Judges of Ontario, "Report of the Provincial Criminal Court Judges' Special Committee, 1987," ("Vanek Report").
[17]At the time Linden was appointed Chief Judge of the Provincial Court (Criminal Division), Ted Andrews was serving as Chief Judge of the Provincial Court (Family Division). Fred Hayes – Chief Judge of the Provincial Court (Criminal Division) was appointed to the Ontario Court (General Division).
[18]Interviews of S. Linden for OCJ History Project, 2013-15.
[19]Interviews of S. Linden for OCJ History Project, 2013-15.
[20]Interviews of T. Andrews, A. Edgar, and T. Ormston for OCJ History Project, 2013-2015.
[21]Linden, 1996 Speech, p. 3.
[22]Interview of H. Hampton for OCJ History Project, 2014.
[23]Interviews of S. Linden for OCJ History Project, 2013-15.
[24]Rick Haliechuk, "Justice system seeks fast track, Worst of backlog over, courts aim for trials within reasonable times," *The Toronto Star*, p. A27.
[25]Interview of H. Hampton for OCJ History Project, 2014.
[26]Interviews of S. Linden for OCJ History Project, 2013-15.
[27]Interviews of S. Linden for OCJ History Project, 2013-15.
[28]S. Linden, "Chief Judge's Newsletter," November 1, 1990, p. 1.
[29]Interviews of G. Lapkin and S. Linden for OCJ History Project, 2013-15.
[30]Interview of G. Michel for OCJ History Project, 2013.
[31]Interviews of S. Linden for OCJ History Project, 2013-15.
[32]S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), November 1, 1990, p. 2.
[33]S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), November 1, 1990, p. 2.
[34]S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), February 1991, p. 4.
[35]Linden, 1996 Speech, p. 5.

[36]Interviews of A. Edgar and R. Komar for OCJ History Project, 2013-15; S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), May 1991, p. 6.
[37]*Courts of Justice Act Statute Law Amendment Act, 1994*, S.O. 1994, c. 12, s. 51.13.
[38]S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), December 1992, p. 4.
[39]Interviews with B. Lennox, S. Linden and M. Roberts for OCJ History Project, 2013-15.
[40]Interviews with S. Linden for OCJ History Project, 2013-15.
[41]S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), December 1993, p. 4.
[42]*Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 5.
[43]S. Linden, "Chief Judge's Newsletter," Office of the Chief Judge, Ontario Court of Justice (Provincial Division), December 1993, p. 2.
[44]See for example: Ted Andrews, *Family Law in the Family Courts,* (Toronto: The Carswell Company Limited, 1973); S. Tupper Bigelow, *A Manual for Ontario Magistrates,* (Toronto: Frank Fogg, Queen's Printer, 1962).
[45]Ian Scott, *To Make a Difference,* pp. 138-139
[46]Sidney B. Linden, Opening of the Courts Speech, January 6, 1999.
[47]Interviews with F. Devine for OCJ History Project, 2013-15.
[48]Letter to Charles Harnick, signed by Charles Dubin, Chief Justice of Ontario, Roy McMurtry, Chief Justice, Ontario Court of Justice, General Division, and Sidney B. Linden, Chief Judge, Ontario Court of Justice, Provincial Division.
[49]*Benchmark,* Vol. 5, No. 1 – Winter (January 1996).
[50]Sidney B. Linden, Opening of the Courts Speech, January 6, 1999.
[51]Judge Ted Ormston led the Mental Health Court initiative; Judge Paul Bentley was responsible for the Drug Treatment Court Initiative.

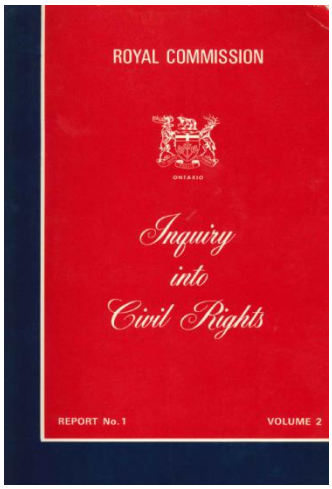
Period III: 1990-1999 Major Changes

Part 1: Judicial Appointments Advisory Committee

Introduction: Appointment of Judges

A radical change to the judicial appointment process occurred in 1988 with the creation of the Judicial Appointments Advisory Committee (JAAC) – a non-partisan, arm's-length body that evaluates and recommends candidates for appointment of judges to the provincial bench without political interference. The composition and reputation of the Court in the years since have been thoroughly transformed by the work of JAAC.

A History of Political Appointments



The McRuer Report (Royal Commission Inquiry into Civil Rights) published in 1968.

Historically, appointments to the provincial bench were often perceived to be the result of political patronage – and while there is no doubt some appointees were eminently qualified, there is equally no doubt that political connections played an important role. This was especially true when magistrates could be appointed without any requirement of legal training or experience. In the *Report of the Royal Commission Inquiry into Civil Rights*, Chief Justice McRuer made the following observation.

> *There has been a tradition in Ontario that there should be a strong political influence in the selection of magistrates…. There have been isolated cases where one who has not been a supporter of the party in power has been selected for the office, but such cases are unusual.*[1]

Sharply critical of patronage appointments, McRuer was of the opinion that "[t]he appointment of a magistrate on the basis of political qualifications cannot be justified on any ground. It is not consistent with the elementary concepts of justice that one who has attained office merely by political service should have the right to preside over the liberty of the subject."[2] At the same time, McRuer acknowledged that the process for appointing judges presented a challenge.

> *The task of selecting magistrates is an extremely difficult one and places a heavy responsibility on the Attorney General. There are no checks under our system such as the public hearings before the Senate Judiciary Committee of the U.S.A., which reviews the nomination of federal judges for appointment. Such procedure provides some safeguards against unsuitable appointments, but it is not desirable that such a procedure should be followed here.*
>
> *It has been suggested that the Attorney General should have a consultative committee of very responsible citizens to advise him on appointments. One of the advantages of such a committee would be to relieve him of political pressure.*[3]

Screening Committee Versus Nominating Committee

There are two main forms a "consultative committee of very responsible citizens" might take: a screening committee, and a nominating committee. The difference between the two is the stage at which the committee assesses candidates.

- In the screening or review committee model, the Attorney General decides on the candidate and refers him or her to the committee. If the committee approves, the government proceeds with the appointment.

- In the nominating committee model, this process is essentially reversed. The committee conducts the initial assessment, and presents the government with a list of approved nominees from which to choose.

Although the screening committee process does provide some oversight, it still allows for considerable political influence. The government is unrestricted in its initial choices, and the screening committee only has the power to approve or disapprove the government's nominee – not to assess whether he or she is the best qualified candidate among a pool of applicants.

With a nominating committee, the government is constrained and can usually only choose from among those who have been independently determined to be eligible candidates. The committee may be asked to consider all applicants and decide which are eligible for appointment, or it may have the power to select a small number deemed to be the best candidates; the government is then required to choose one of these – though it may have the power to go back to the committee if it feels none of the candidates would be suitable.[4] If the committee simply creates a long list of eligible candidates, the potential for politically influenced decisions remains; if it sends forward only those persons it considers the two or three best candidates, this possibility is essentially eliminated.

Judicial Council Role as a Screening Committee

Since 1968 – the year the McRuer Report was released – the Ontario Judicial Council had served as a screening committee for provincial court appointments, although its primary function was, and remains, to serve as a disciplinary body for provincial judges. The Attorney General would submit a list of names and the Judicial Council would provide advice and feedback on the individual nominees. The Judicial Council, composed of the Chief Justices and Chief Judges of all Ontario courts, members of the bar, and two non-lawyers, would generally be familiar with the nominees. It therefore typically relied on the

personal, first-hand knowledge that its members had of each nominee, augmented by a meeting with the nominee, rather than conducting a formal review or information gathering process.

Margaret Campbell Joins the Bench in 1970

Ted Andrews, former Chief Judge of the Provincial Court (Family Division) recalled the 1970 appointment of Toronto politician, Margaret Campbell. After serving many years as a municipal councillor, Campbell ran as mayor of Toronto in 1969, placing second to William Dennison. She was "pushed at me just before a provincial election," stated Andrews. He felt he had no reason to refuse her.

Campbell and Attorney General Allan Lawrence, a Liberal, were pictured in the Toronto Star, shaking hands at Campbell's swearing in ceremony in 1970. Campbell served on the bench for only two years, during which time Andrews found Campbell to be a "good judge," but very difficult for him to get along with because of her strong views.

Margaret Campbell at her swearing-in ceremony shown shaking hands with Attorney General Allan Lawrence. At rear is Senior Judge V.L. Stewart; in front, Ontario Chief Justice Dalton Wells. (Photo: Getty Images)

When Lawrence retired from politics, Campbell resigned her judgeship and ran as the Liberal candidate in Lawrence's riding. She won the seat and served as an MPP until 1981. Margaret Campbell died in 1999.

(Source: Interview of T. Andrews for the Oral History Project of the Osgoode Historical Society, used with permission.)

1988: Introduction of the JAAC Pilot

In 1988, some 20 years following release of the McRuer Report, then-Attorney General Ian Scott announced the establishment of the Judicial Appointments Advisory Committee (JAAC) as a three-year pilot project. JAAC was conceived and implemented as a fully-fledged nominating committee. Its mandate was twofold: "First, to develop and recommend comprehensive, sound and useful criteria for selection of appointments to the judiciary, ensuring that the best candidates are considered; and second, to interview applicants selected by it or referred to it by the Attorney General and make recommendations."[5]

Attorney General Ian Scott (Photo: Boris Spremo, Nov. 28, 1988, *Toronto Star* (Getty Images))

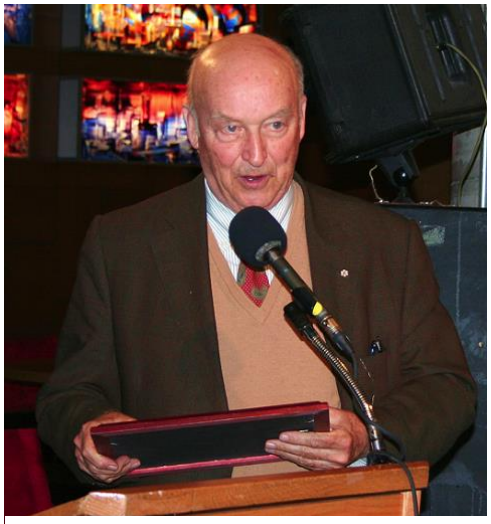
Initially, the JAAC process operated as a supplement to, rather than in the place of review by the Judicial Council. This meant that Ontario had both an independent nominating committee – JAAC – and an independent screening committee – the Judicial Council – providing comments and making recommendations on candidates proposed by JAAC.

Peter Russell, a Professor of Political Science at the University of Toronto and first chair of JAAC, describes how he became involved.

> *Roy McMurtry and I had attended the University of Toronto together and remained good friends. I would occasionally have lunch with him when he was the Attorney General in Bill Davis' government. I met him in his office one day, and just as we were about to go out he pointed to a whole bank of filing cabinets against a wall and said, "Do you know what is in there? Those are*

all files filled with information about candidates who want to be appointed to the Provincial Court. If you can figure out some way to improve this process I would love to hear about it."

I was getting to the appointment of judges chapter in the book I was writing, and had researched the U.S. nomination processes aimed at taking the politics out of the system of electing judges. In Missouri, they had committees to consider and screen candidates and produce a list from which only one name would go to the voters. So the election wasn't really an election; it was the confirmation of a selection by a professional nominating committee. I included the Missouri process in my book, The Judiciary in Canada*, which was published in 1986.*



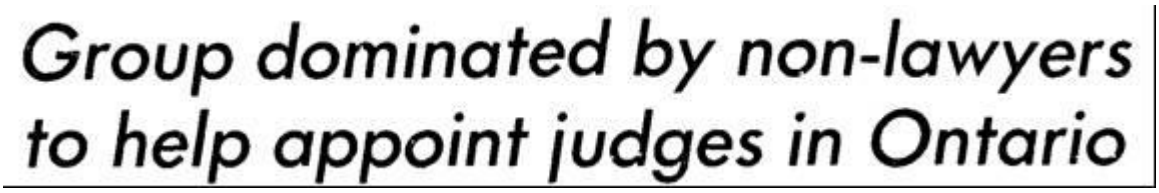
Professor Peter Russell. (Courtesy: Law Society of Upper Canada Archives, Paul Lawrence fonds, "Photographs of Professor Peter Russell and Harold F. Caley", 2001088-394.)

By that point, Ian Scott was Attorney General. He was an equally good friend who had also been at U of T with me, and he called me up and said "I like what you say in your book about a nominating committee. Put your body where your pen is. Draw something up for Ontario." So I did. There wasn't much written about this at the time, but I read everything I could get my hands on, typed up a proposal, and sent it to Ian.[6]

The Members of JAAC

JAAC was a significant departure from the Judicial Council model – not only in terms of its mandate but also its membership. Unlike the members of the Judicial Council, the majority of JAAC members were

neither lawyers nor judges. As originally constituted, the JAAC consisted of six non-lawyers, two lawyers, and a judge.


Group dominated by non-lawyers to help appoint judges in Ontario

This headline appeared on the front page of the *Globe and Mail* on December 16, 1988 above an article written by Duncan McMonagle.

The non-lawyers were Russell, who chaired the committee, Valerie Kasurak, Michele Landsburg, David McCord, Robert Muir and Ben Sennik. Judge Robert Walmsley, the Associate Chief Judge of the Provincial Court (Family Division) served as the judicial member, while Denise Korpan[7] and Clayton Ruby were the representatives of the bar. Ruby, a defence lawyer who had been appointed to the JAAC by the Law Society of Upper Canada, stepped down in February 1989 due to a concern that he appeared to show bias against Crown Attorneys. He was replaced by Tom Bastedo. In the autumn of 1989, Kay Sigurjonsson replaced Landsberg, who left to take up full-time duties at the *Toronto Star*, while a tenth member joined the JAAC, lawyer Donald Good.[8]

Finding Candidates

The JAAC's first task was to plan its basic procedures, including how to advertise vacancies and how to assess and recommend applicants. One of the first decisions the JAAC made was to advertise vacancies in national and local newspapers as well as the *Ontario Reports* and *Lawyers Weekly*.[9] Vacancies on the bench had not been widely publicized previously; those who wished to apply relied largely on word of mouth. The response to the advertisements was remarkable.

The first advertisement generated 167 applicants and the number of applications grew steadily, reaching 452 in response to the fourth advertisement. Some of those applications were from individuals

who had applied previously, but many were new candidates who told the JAAC that the advertisement "made them aware of the opportunity of being considered for judicial appointment even though they had no political connections."[10]

JAAC took active steps to diversify the candidate pool, reaching out to "legal aid clinics, women's organizations, Franco-Ontarians, West Indian and native lawyers' associations."[11] In addition, each advertisement stated that the committee was "seeking candidates who will reflect the diversity of Ontario's people."[12]

While the JAAC was at the time precluded from collecting information about applicants' racial or ethnic background, it was able to determine that 12 per cent of the applications had been submitted by women. When JAAC was established, only four per cent of provincial judges were women. Before too long, that percentage increased dramatically.

> *Mr Speaker, I am pleased to be able to tell you today that we have appointed 18 new provincial court judges, and in the upcoming weeks I expect to appoint the remaining nine. The 27 appointments will help us to achieve a more representative provincial bench. Of the 18 appointments to date, 11 of these judges are women, including Canada's first woman native Canadian judge.*
>
> Attorney General Howard Hampton, in a statement to the Ontario Legislature in March 1991, in the context of responding to court delays.[13]

LAW TIMES

Committee flooded with resumes from lawyers seeking appointments

by JIM MIDDLEMISS

An advertising campaign launched by the province's Judicial Appointments Advisory Committee has resulted in a flood of applications from lawyers yearning to be judges.

tions received for the 23 openings that have been available over the last year.

"The advertising response is "a big surprise," said Russell, who, for the past 30 years, has taught students about the Canadian judiciary.

Peter Russell

Photo by: Michael Randolph

The committee's chairman, University of Toronto political science Professor Peter Russell, said that he is "just astounded" at the more than 400 applica-

An advertising campaign launched by the Judicial Appointments Advisory Committee brought an astounding 400 applications. (Source: Jim Middlemiss, *Law Times*, January 29-February 4, 1990).

Selection Criteria

JAAC developed selection criteria that stressed the importance of a diverse and representative judiciary. JAAC took the view that a representative judiciary was essential for two reasons: first, because the perspectives of various racial and ethnic groups, and of women as well as men, ought to influence how justice was administered and judicial discretion exercised; and second, because the judiciary appears more credible and inspires greater confidence when significant sections of the community do not appear to be excluded from its membership. JAAC was clear, however, that while it was seeking outstanding candidates from under-represented groups, a candidate from an under-represented group would not be recommended ahead of a candidate who was clearly better qualified although not from such a group.

The selection criteria also focused on professional excellence, community awareness, and personal characteristics. Professional excellence was the most obvious criterion, and the easiest to describe. Community awareness, on the other hand, proved more challenging to capture.

The Best and Worst of the Provincial Court

The JAAC was not alone in voicing concerns about judicial temperament and conduct on the bench.

In a survey conducted by *Canadian Lawyer* magazine in 1991, lawyers spoke about "uncontrollable ranting, bullying and arrogance" on the part of some members of the provincial bench.

Five judges identified as "the worst" of the Ontario provincial court were variously described as "petty, abusive, arrogant," "arbitrary and capricious," "a sexist, nasty, eccentric bully," "cruel and inflexible with poor accused and young offenders," and a "professional embarrassment."

Those judges were criticized for treating litigants abusively, asking visible minorities if they spoke English, yelling at witnesses, delivering diatribes from the bench, and lacking compassion.

At the same time, the anonymous survey feedback about "the best" of the Ontario provincial court identified the personal characteristics that made judges trusted and effective: attentiveness, compassion, courage, courtesy, common sense, humour, and commitment to finding the right result.

The names of those singled out for praise were: William Sharpe, Brian Lennox, Mary Hogan, P.E.D. Baker, Sam Darragh, Brent Knazan, V.A.R. Lampkin, Donald MacMillan, H.D. Porter, H.A. Rice, John Smith, and Gérald Michel.

Source: *Canadian Lawyer*, March 1991, pp. 19-20.

Russell recalls that the committee was anxious to avoid defining community awareness as adherence to a particular viewpoint. "We wanted people not to be wedded to a particular position. We wanted people involved in the issues, both the pros and the cons." The community awareness criterion stressed a commitment to public service, interest in knowing more about the social problems that give rise to cases coming before the courts, and sensitivity to changes in social values relating to criminal and family matters.

Personal Characteristics

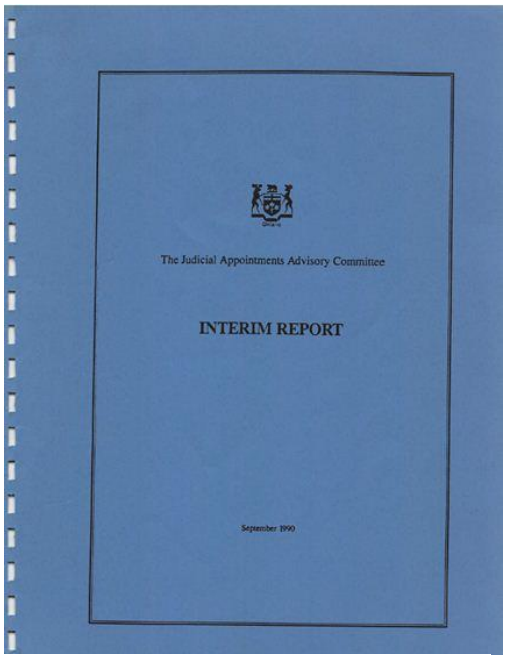
The "personal characteristics" requirement grew out of conversations with judges and JAAC's own courtroom observations, as described by Russell.

> *We watched some "not so good" judges performing, and oh my, that was an eye opener. What really struck us was the pomposity and rudeness and how off-putting that was. Someone would walk into the courtroom, the judge would look up, and the person would be shabbily dressed. The judge would say, "Who are you? You have no business here" and the person would slink out.*[14]

The personal characteristics sought by JAAC included an "absence of pomposity and authoritarian tendencies," "[r]espect for the essential dignity of all persons regardless of their circumstances," "[p]oliteness and consideration for others," "[m]oral courage," and "[p]atience and an ability to listen."[15] According to Russell, this was an area where the laypersons on the committee played "a pivotal role": "They may not have legal training, but they are 'very, very sensitive' to the way the candidates carry themselves and help determine who is or isn't personable."[16]

Vetting Candidates

Once JAAC had established its criteria, it then had to apply them. It designed a personal information form to be filled out by each candidate, copies of which were then provided to all JAAC members. The members had on average 10 to 14 days to read through all of the applications for each round of vacancies, and each developed his or her own short list of candidates. The short lists would then be sent to the chair, and any name that appeared on two or more lists – that is, any candidate who had been identified as excellent by two or more committee members – would be given further consideration.



In September 1990, JAAC issued an interim report on its progress.

At this stage, the Attorney General would also be invited to review the combined list and provide comments. JAAC members would then contact referees for each of the candidates on the combined list – typically 35 to 50 applicants. The members would also make discreet inquiries of judges and members of the bar whom they considered could furnish additional information on candidates' qualifications. JAAC would then meet again to discuss the candidates and review the information provided by referees. Then they would agree on a short list of candidates to interview.

Ranked Lists of Candidates

After interviewing the candidates, JAAC would meet to determine its recommendations. One of the questions JAAC initially struggled with was whether to recommend a single candidate for each vacancy or provide a short list. According to its Interim Report in September, 1990, JAAC ultimately decided to

provide a very short ranked list of applicants it considered best qualified for each vacancy.[17] JAAC took the view that if it were to submit just one name for each position, the Attorney General would be under great pressure to appoint that individual, and responsibility for judicial appointments would be too far removed from an accountable Minister.[18]

Although the ranked lists JAAC provided allowed for some Ministerial discretion, in all but one case in its first years as a pilot project the Attorney General appointed the person ranked highest by JAAC. The one exception occurred when the vacancy arose in Sault Ste. Marie, which serves an area with a significant Francophone population. None of the nominees on the list JAAC provided was Francophone or bilingual, and Attorney General Ian Scott asked if JAAC could recommend a strong bilingual candidate. JAAC conducted additional interviews and was able to recommend a fully bilingual lawyer with outstanding qualifications who was subsequently appointed.[19]

A Heady Experience: Getting JAAC Up and Running

The people involved at the beginning of JAAC were clearly excited about the prospect of a new and better way to select judges. The following are reminiscences provided by three of those involved – Michele Landsberg, Susan Dunn and Peter Russell – on the early days of JAAC.[20]

Michele Landsberg

Journalist Michele Landsberg was one of the lay (non-lawyer) members on the original JAAC.

> *I had just been back a year from New York and I got a call from Ian Scott, then the Attorney General in the Ontario government. As a life-long New Democrat, I wasn't used to speaking to Liberals! He wanted me to be part of new process for choosing judges. I had been extremely critical in my articles in the* Toronto Star *about a predominantly male bench and rulings that*

were damaging to women. I was constantly attacking judges and their sexism. There was lots of material to fuel my indignation.

I was intrigued but sceptical about the new process for choosing judges. I was cynical about meeting with Ian Scott but he immediately won me over. "You mean this panel would be free to choose anyone who is qualified?" I asked. "Anyone – go far and wide," he replied. I was floored and excited at the prospect that this would really be different. I agreed to serve.

Peter Russell convened our first meeting. He said we would invent an entirely new process: how we would find the candidates and how we would choose among them. At first, everything was contentious because we all had different viewpoints. Fortunately, the group came together quickly and well.

Ian Scott told us, "Give me a short list of three and I will choose from the three, guaranteed, I won't go outside the three you propose." That was a radical concept.

Traditionally, lawyers had applied through their MPP or local bar association to let it be known they wished to be appointed. That was so undemocratic. So many well qualified lawyers, particularly women and minorities, would not be part of the "in" group. So we decided to advertise. Some lawyers said, "How could you demean judges by advertising in the newspaper just like any other job!"

Then we decided to interview people face to face, though it was time consuming. We would reach out to find lawyers who would understand people in the community they would be serving. It was exciting and inspiring.

We decided early on that people given as references would obviously be favourable to the candidates. So we decided to do "discrete inquiries". Confidentially, we would inquire with our contacts in the applicant's community.

It was so onerous and we didn't get paid a cent. Gradually, word spread and the applications came pouring in; we had to get lawyers' briefcases on wheels to bring our documents to the meetings. And it was time-consuming to check phone references. But still, it was a heady experience. We felt privileged to be there and we took it very seriously.

We got really great people on the bench. It was an honour to help change the system.

Susan Dunn

Susan Dunn was a public servant assigned to work as JAAC's first Committee Secretary.

It was life changing for me to work with this group of individuals who were leaders in their own communities and had so much life experience.

It was an enormous amount of work for all of us. Hundreds of applications would come in the door – we had bankers' boxes full of application forms at the meetings. The judges checked the legal references and lay people did the community references.

Interviews were conducted by the full panel. I sat in on some interviews and was there when the Committee deliberated the first time. The meetings were long; some of them went from early in the morning to 11 o'clock at night. The first set of interviews went on for a few days straight. After the interviews were concluded, the Committee met to discuss each candidate and decide on the names to put forward to the Attorney General.

I always felt badly that this group of individuals never were paid. The per diem came along later. They were amazing individuals. They tried to recommend the best appointments they could. They worked tirelessly and worked well together. It was a highlight of my career to work with them.

Peter Russell

Peter Russell was the first chair of JAAC.

The Committee laboured over the three types of characteristics to look for in judicial candidates and what to look for in each one: professional, community and social awareness, and personal characteristics.

The list of personal characteristics came out of discussing with a number of judges, quietly, the characteristics of colleagues that worried them.

Community awareness skills was the most difficult to define. We didn't want to define it as left of centre. We wanted people not to be wedded to a particular position. Take joint custody in family members, which was becoming a big deal for family law practitioners. We weren't looking for people in favour of joint custody. We wanted people involved in the issues, and aware of the pros and cons. But if they hadn't even heard of it, they wouldn't do well with us.

Then we laboured over the process: how to advertise, how the committee would function, etc. We had no idea how many people would apply after we advertised. They just flooded in.

It was an issue to be doing this as volunteers because it started to eat up mountains of time. I had a wooden filing cabinet beside my desk and it was entirely JAAC, full of applications at various stages of processing.

It was a big job because we all pretty much read all applications, and then we had to agree as a committee who was the best.

We had a lot of fun – we had a good mix of people who really hit it off. We realized we were pioneering something that would be good for the country and the province.

Judicial Appointments Advisory Committee (1989/1990). Front (L to R): Denise Korpan, David McCord, Michele Landsberg, Valerie Kasurak. Back (L to R): Robert Muir, Peter Russell (Chair), Susan Dunn (Secretary), Ben Sennik. Absent: Tom Bastedo, Judge Robert Walmsley. (Courtesy: Susan Dunn)

Controversy: Role of Judicial Council

Controversy arose during the pilot project when, on several occasions, candidates recommended for appointment by JAAC were not approved by the Judicial Council. The Attorney General declined to appoint anyone about whom the Judicial Council commented negatively, so some of the candidates who were highly ranked by JAAC were passed over. In its Final Report on the pilot project, JAAC indicated it had "great difficulty accepting the Judicial Council's rejection of its recommended candidates on substantive grounds".

The Judicial Council does not issue reasons for its rejections, nor has it publicly stated its criteria. These criteria appear to differ, at least in part, from those of the committee. From what committee members have been able to gather through informal conversations, the Council often insists on relevant courtroom experience and attaches little value to professional experience outside of conventional legal practice as a preparation for judicial service. This is the committee's best guess as to why candidates highly regarded by the committee and selected by the Attorney General have been turned down by the Judicial Council.

It is distressing to the committee that candidates who are selected according to its published criteria are later assessed by another body applying different criteria. The committee's criteria were developed through public consultation in the first part of its mandate. They have been frequently published and a full explanation of them is contained in the Interim Report. These criteria, while placing a high value on a great deal of relevant courtroom experience, do not insist on it. The committee also attaches value to professional experience outside of a normal legal office in social agencies and policy development. In the opinion of this committee, it is unwise for Ontario to continue with two bodies screening and giving advice on judicial appointments. Whatever body performs this role should be accountable for its activities. Its procedures and its criteria should be known to the public.[21]

JAAC recommended that the Ontario Judicial Council should no longer have a role in the judicial appointments process, and that JAAC should be the *only* recommending body.[22]

A Permanent Body

Soon after taking office in the fall of 1990, Attorney General Howard Hampton informed JAAC that the government intended to introduce legislation to establish JAAC on a permanent basis. Amendments to the *Courts of Justice Act*, passed in 1994 and proclaimed on February 28, 1995, made JAAC permanent –

and the only independent body involved in the provincial court judicial appointment process. A compromise was struck by including a member of the Judicial Council, appointed by that body, on JAAC,[23] although the majority of JAAC members – seven of 13 – continue to be laypersons. The importance of the composition of the committee as a whole reflecting Ontario's linguistic duality and the diversity of its population, and of ensuring overall gender balance, are recognized in the selection of both lawyers and laypersons to serve on JAAC.

Standing the Test of Time

JAAC's policies and procedures have stood the test of time, changing little over the years since it was first instituted as a pilot project. The criteria for appointment have been restated slightly, but the substance of professional excellence, community awareness, and personal characteristics remains the same. JAAC continues to advertise vacancies through both general publications and giving notice to more than 200 legal and non-legal associations, and encourages applications from members of equality-seeking groups.

Another Controversy: Standoff with Government

Since it became a permanent body, JAAC has encountered only one major controversy: in 1999 finding itself at loggerheads with the Conservative government led by Premier Mike Harris. Its shortlist of candidates to fill a judicial vacancy in North Bay did not include a Conservative Party loyalist and friend of the Premier. An article at the time by *Globe and Mail* justice reporter Kirk Makin outlines the details.

> *Ontario Premier Mike Harris's home town has become the scene of a remarkable standoff that has left many judicial positions vacant and that legal officials fear is jeopardizing the 10-year-old practice of keeping politics off the bench.*

At issue is a process created in 1989 to remove political patronage from judicial appointments. Operating at arm's length from the government, the Judicial Appointments Advisory Committee examines all judicial applicants and forwards a list of the top candidates to the Attorney General.

In the past, the Attorney-General has always announced the winning candidate within two to four weeks. The government has been sitting on the committee's list of a half-dozen highly qualified lawyers for the North Bay position since June.

Judges and lawyers trace the delay in North Bay back to a name the government wanted to see on the short list: [a lawyer who is] a friend of the premier.

The number of judicial appointments in the province has recently dropped off dramatically, and many in the legal community say that the government provoked a standoff as part of a plan to wrest control of the selection process quietly.

Many judges and lawyers fear that the impasse signals a tug of war behind the scenes over the extent to which the government can control the naming of potential judges.[24]

The impasse between the Harris government and JAAC was of grave concern not only because of the apparent re-politicization of the judicial appointment process, but also because of the delays that were occurring while the vacancy went unfilled.

The inexplicable delay [in making an appointment] has created such grave backlogs that accused criminals may soon be winning acquittals on constitutional grounds, the chief judge in the region warned yesterday.

"It is a great concern to everybody," said Regional Chief Justice G.E. Michel, who is responsible for a territory that covers the northeast of the province.

"I just don't have enough judges to send a judge into North Bay on a regular basis," Judge Michel said. "North Bay is falling progressively behind. Before long, this could create a very undesirable situation."[25]

Government Backs Down

Faced with considerable public attention and political pressure, the government backed down and made appointments from the short lists JAAC had submitted. Since then, there has been no further attempt by any provincial government to interfere with the judicial appointment process, and JAAC has maintained its reputation for independence and transparency. In a 2015 interview with *The Globe and Mail*, William Trudell, chair of the Canadian Council of Criminal Defence Lawyers, described his five years as a member of JAAC as "probably one of the most remarkable experiences of my life. There was no politics in that room."[26]

Contrast with the Federal Appointments Process

In 2015, controversies surrounding federal appointments have cast the benefits of the JAAC process in particularly sharp relief. Under the federal process, an eight-person vetting committee in each region considers written applications and designates each candidate as either "recommended" or "not recommended". The vetting committee does not interview or rank candidates, thus leaving the government with considerable leeway to choose from among the scores of candidates on the "recommended" list.[27]

In a 2012 interview with *The Globe and Mail*, the chair of JAAC, Hanny Hassan, expressed the following with regard to the federal appointment process.

"When you include more people [on the list of candidates], it gives an attorney-general and cabinet a chance to make a political choice. …The smaller you make the list of candidates, the

harder it is for someone who might be able to do the job but is not on par with some of the others, to get on it."

While many federally appointed judges turn out to be fine choices, Mr. Hassan said, they are never able to shuck "the label of being a patronage appointment."

Patronage also works to reduce the complement of minority judges who apply for federal judgeships, said Mr. Hassan, an engineer and former president of the Ontario Advisory Council on Multiculturalism and Citizenship. He said that potential candidates from aboriginal or visible-minority communities are deterred because they believe they will be unable to line up the powerful political connections.[28]

The article further noted that a recent survey by the newspaper found that 98 of 100 new judges appointed to federal courts in the provinces were white.[29] Between 2006 and 2014, only 30 per cent of federally appointed judges were women, compared to 44 percent of the judges appointed to the Ontario Court of Justice through the JAAC process between 2006 and 2012.[30]

The JAAC Approach Spreads

Through the 1990s and beyond, JAAC significantly increased the diversity and strength of the provincial court bench and, consequently, the esteem in which the Court is held – both by the parties who appear before it and by lawyers and judges across Ontario. But JAAC's impact hasn't stopped there. The JAAC model has also influenced how judges are appointed in provinces such as British Columbia, Alberta, and Nova Scotia – and as well in post-Apartheid South Africa. Peter Russell explains how this came to pass.

While JAAC was being implemented I was working on and off in South Africa. Canada provided a great deal of support to the post-Apartheid government in developing a new constitution. One of

the questions the new government had to decide was how to appoint judges. I had a couple of colleagues who were part of the ANC, and we talked about the JAAC model.

They brought the idea forward: a neutral, non-partisan nominating process for all levels of court, including the Constitutional Court—the highest court in South Africa. They've taken the process further: when they interview their shortlisted candidates the interviews are public and the media are there. I'm not convinced that's a good thing—I think there's a great deal of value in confidentiality at the interview stage—but it's wonderful to see how far the JAAC model has travelled, and how adaptable it's proven to be.[31]

Conclusion: The Importance of JAAC

The Ontario Court bench has been transformed in three decades from one stocked largely with patronage appointees, to a very strong bench untainted by patronage.

Wayne MacKay, Professor of Law, Dalhousie University[32]

We are all the inheritors of a Court that has always contained a large number of excellent judges, working under conditions that we would never accept today, but our appointments are uniformly better than at any time in our history and are the envy of our colleagues in other courts.

Brian W. Lennox, former Chief Justice of the Ontario Court of Justice[33]

The appointment process first announced in 1988 has proven to be one of the most important factors in transforming the Ontario Court of Justice to its present state. As of December 2012, 273 of the 284 – 96 per cent – of judges sitting on the provincial court had been selected through the JAAC process. The calibre and diversity of the judges sitting on the Court enable it to serve the public with distinction and to heighten the respect with which it is held by the legal community.

Period III: 1990-1999 Major Changes

Part 2: Justices Of The Peace Advisory Committee

Introduction: Appointment of Justices of the Peace

Chief Justice McRuer, in his 1968 report, was as critical of the appointments process for justices of the peace as he had been for magistrates and judges. He condemned the appointment of justices of the peace as a political reward and recommended all previous commissions be cancelled and that the province should start anew.

In 1981, Professor Alan Mewett reported to the Attorney General on the office and function of justices of the peace. He reiterated McRuer's concerns, noting that nothing much had changed in the intervening years. Mewett emphasized the need to establish what it meant to be "qualified" to become a justice of the peace. "'Good character' is clearly essential but this means 'good' in the social sense. (A justice of the peace) must be reasonably intelligent and appreciate his duties, capable of making independent decisions and able to act impartially and fairly."[34]

Mewett went on to heartily criticize the "old-boy network" of appointing justices of the peace from "within the system – people with a pre-existing knowledge of court structure… this is not a desirable development. We should be looking for the best person available whether he is from within the system or not. A pre-existing familiarity with the system… should not, in itself, be any qualification for appointment."[35]

Justices of the Peace Appointments Advisory Committee

While legislation in 1989 empowered the Justices of the Peace Review Council to consider all appointments, the reforms that were necessary to give real substance to these changes were not fully in place until the *Access to Justice Act* was passed in 2006.[36]

Minimum qualifications of a justice of the peace were prescribed by statute for the first time in 2006, specifying that those seeking appointment as a justice of the peace must have a university degree, comparable community college diploma or equivalent and 10 years' experience in order to qualify.[37]

The 2006 legislation also established the Justices of the Peace Appointments Advisory Committee (JPAAC). JPAAC resembles the JAAC in many respects: its membership includes judges, justices of the peace, lawyers and lay persons. The criteria it has developed to evaluate applicants include interpersonal skills—such as courtesy, patience, moral courage, compassion, empathy and respect for the essential dignity of all persons—as well as decision-making, communication, and professional skills.

JPAAC differs from JAAC, however, it two important respects. First, it consists of both a core committee of seven members as well as seven regional committees, one for each of the regions of the Ontario Court of Justice. Second, rather than preparing a ranked short list of candidates as JAAC does, JPAAC classifies candidates as Not Qualified, Qualified, or Highly Qualified.

In this respect, JPAAC falls somewhere between the JAAC and the screening committees for federal judicial appointments. (The federal screening committees, following changes made in 2006, can only classify candidates as "recommended" or "not recommended.") Although the absence of a short list leaves government with somewhat greater latitude in making justice of the peace appointments, the "highly recommended" classification means that JPAAC can still make its view of the relative merits of various candidates known.

Conclusion: The Importance of JPAAC

John Gerretsen, who served as Ontario's Attorney General from 2011 to 2013 has summarized the improvements to the justice of the peace appointment process as follows. "We tightened up the process by only advertising positions in the various regions when vacancies occurred rather than advertising province wide twice a year regardless of whether or not there are any vacancies. While this is an improvement, the justice of the peace process still creates too large a list which may be subject to the potential of unwanted political influence. Although I was pleasantly surprised at the total lack of such influence during my term as Attorney General."[38]

Newly Appointed Justices of the Peace

Left to right: Thomas Glassford, Rizwan Khan, Karen Valentine, Lloyd Phillipps, Rosann Giulietti, Karen Baum, Raffaella Scarpato, Paula Konstantinidis, Holly Charyna, Veruschka Fisher-Grant, Jane Hawtin, Ginette Forgues, Audrey Greene Summers, Jane Moffat, Anna Blauveldt, Renée Rerup, Andrew Clark (Senior Advisory Justice of the Peace), Kathy-Lou Johnson (Senior Justice of the Peace), Paul Langlois, J. Gary McMahon, Ralph Cotter, Michele Thompson, Faith Finnestad (Associate Chief Justice). Absent: Helena Cassano.

In his 2014 decision concerning mandatory retirement of justices of the peace, Justice George Strathy (now Chief Justice of Ontario) commented upon the "judicialization" of the justice of the peace bench in recent years – and the improvements to the appointments process.

> *"The qualifications of the bench have been enhanced, the tenure of the justices (of the peace) has been made more secure and the processes and procedure surrounding the office have been*

made more professional, more formal and, in a word, more "judicial." This evolution reflects the important role played by justices of the peace in the administration of justice in the province and the significance attached to that role by the legislature. It demonstrates a desire to attract highly qualified applicants to the position and to provide a structure, compatible with their judicial independence, to support the performance of their responsibilities."[39]

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[1] J.C. McRuer, J.C. *Royal Commission into Civil Rights,* Vol. 2 (Toronto: Queen's Printer, 1968), p. 539. ("McRuer Report").
[2]McRuer Report. McRuer further expressed, "On the other hand, no one should be excluded from an appointment because he [or she] has taken an interest in public affairs, either by reason of having held or stood for public office or having supported a particular party." Indeed, McRuer himself had run, unsuccessfully, as the Liberal candidate for High Park in the 1935 federal election.
[3]McRuer Report, Vol. 2, pp. 539-40.
[4]On the differences between screening and nominating committees, see F.L. Morton, "Judicial Appointments in Post-Charter Canada" in Kate Malleson and Peter H. Russell, ed., *Appointing Judges In An Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006), p. 69.
[5]Hansard, 15 December 1988, p. 6835.
[6]Interview with Peter Russell for OCJ History Project, 2014.
[7]Appointed to the Superior Court of Justice in 2012.
[8]Judicial Appointments Advisory Committee, *Interim Report*, September 1990, p. 5 ("Interim Report").
[9]Interim Report, p. 10.
[10]Interim Report, p. 10.
[11]Interim Report, p. 10.
[12]Interim Report, p. 32.
[13]Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 35 (26 March 1991) "Court System" (Hon. Howard Hampton).
[14] Interview with Peter Russell for OCJ History Project, 2014.
[15]Interim Report, p. 18.
[16]Jim Middlemiss, "Committee flooded with resumes from layers seeking appointments," *Law Times* January 29 – February 4, 1990.
[17]Interim Report, p. 7
[18]Final Report, p. 17.
[19]Interim Report, p. 16; Interview with P. Russell for OCJ History Project, 2014.
[20]Source: Interviews of M. Landsberg, S. Dunn, P. Russell and H. Hampton for OCJ History Project, 2014.
[21]Final Report, pp. 6-7.
[22]Final Report, p. 11
[23]*Courts of Justice Act*, s. 43(2)(d).
[24]Kirk Makin, "Judicial standoff creates controversy in Harris fold: Politics feared for delay in filling North Bay post," *The Globe and Mail*, December 16, 1999.
[25]Makin, "Judicial standoff."
[26]Sean Fine, "Legal observers urge Ottawa to revamp judicial appointment process," *The Globe and Mail,* July 26, 2015.
[27]Kirk Makin, "Ontario system eliminates patronage in choosing judges, proponent says" *The Globe and Mail*, April 27, 2012.
[28]Makin, "Ontario system."

[29]Makin, "Ontario system."
[30]Stephen Lautens, "Cracking the system: How do we get more diversity on the bench when there's no transparency in the appointments process?" *Canadian Lawyer,* September 2014.
[31]Interview with P. Russell for OCJ History Project, 2014.
[32]Makin, "Ontario system."
[33]Brian W. Lennox, "Judicial Independence: Past, Present and Future – Judicial Independence and the Justice System," Remarks to Central West Regional Meeting Judges, November 25, 2014, p. 5.
[34]Alan W. Mewett, Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario, Part 1, ("Mewett Report"), 1981, p. 68.
[35]Mewett Report, p. 68.
[36]*Access to Justice Act,* S.O. 2006, c. 21, schedule B, Amendments to the Justices of the Peace Act and the Public Authorities Protection Act.
[37]*Access to Justice Act,* 2006, s. 2.1 (15)-(17).
[38]Interview of J. Gerretsen for OCJ History Project, 2015.
[39]*Association of Justices of the Peace of Ontario v. Ontario (Attorney General),* 2008 CanLII 26258 (ON SC), para. 32.

Period III: 1990-1999 Major Changes

Conversion of Justices of the Peace

The 1990s brought significant change to the governance and administration of the justice of the peace system – change that had been a long time coming and, according to many, was long overdue. "Conversion" was unquestionably the major initiative undertaken by the Ontario Court (Provincial Division) with regard to justices of the peace during this period.

It sounds simple. Conversion entailed eliminating "fee-for-service" reimbursement, thus making all justices of the peace in the province salaried. Another element was reducing five different categories of justices of the peace into two – "presiding" and "non-presiding."

However, when the conversion process was started in 1988, it was immediately hampered by the fact that no one actually knew how many justices of the peace there were in Ontario. Some who were acting as justices of the peace had never been properly appointed. Others, whose names were on the rolls, were dead. A few had surpassed age 90. Some had never claimed fees. Others were collecting well over $100,000 a year in fees – often by cultivating an overly close relationship with local police.[1]

For years, alarms had been raised – in media articles and academic studies – about the disorganized state of the justice of the peace system.[2]

A System in Need of Clarification

Since the 1930s, justices of the peace had been under the "direction" of a magistrate and, subsequently, a Provincial Court judge.[3] But no one really knew what that meant – and those "directions" varied significantly from one county or district to the next.

In 1973, the Ontario Law Reform Commission summarized the situation this way: "The relationship of justices of the peace to the provincial judges and the Provincial Court system as a whole is a somewhat loose one and in urgent need of clarification."[4] The Commission was highly critical of the fee-for-service system of paying justices of the peace: "The potential for abuse in a system which depends on justices of the peace remaining on good terms with the police in order to promote and maintain 'business' is obvious."

In 1973, the process of bringing justices of the peace under the central control and supervision of the Chief Judges of the Provincial Courts (Criminal and Family Division) began.[5] This control was not firmly exercised, however.

Examining the Justice of the Peace System: The Mewett Report

In 1981, Professor Alan Mewett produced a landmark report on justices of the peace and their role in the justice system. Attorney General Roy McMurtry had commissioned the report following calls emphasizing the "urgent need to establish order and organization for the office."[6]

In his report, Mewett characterized the justice of the peace system as "chaotic," "hopelessly confused and unnecessarily complex"[7] and he detailed the specific flaws in the system. Work assignments were governed by a system of "directions" classifying justices of the peace into one of five designations which determined the functions each could undertake.[8]

The system of directions was hierarchical in nature. These ranged "from the limited one of receiving information relating to the commission of an alleged offence and issuing process thereon and adjourning cases in the absence of the trial judge, up through various stages to a justice (of the peace) with power to hear and determine various offences, to conduct bail hearings, to issues search warrants, to issues process and so on."[9]

The "higher" directions assigning additional responsibilities were treated as a badge of prestige, and were often granted as a "kind of reward." The system resulted in workloads that were irregular and uneven. This situation was reinforced by the fee-for-service remuneration practices – which Mewett considered "an invitation to a justice of the peace to abdicate his responsibility," with the result that "some justices (of the peace) are perceived both by the police and the public as police justices of the peace while others pay for their rectitude by receiving little in the way of fees."[10]

Despite the readily apparent disorganization plaguing this system, additional functions were being assigned to justices of the peace. For example, judges generally presided over bail and by-law courts until the 1970s. By the 1980s, those duties had been largely turned over to the justice of the peace bench.[11] The establishment of the Provincial Offences Court in 1979 had, in particular, substantially increased the responsibilities of the justices of the peace.

"Convenience Justices of the Peace"

"Convenience Justices of the Peace" were another example that the justice of the peace system, pre-conversion, suffered from a lack of governance – resulting in significant judicial independence concerns. Justice of the Peace Frank Devine recalled those days of "convenience justices of the peace."

"Throughout the Province there were many court administrators or supervisors who were also appointed justices of the peace. Some referred to them as "convenience justices of the peace." They did not carry out the normal duties of justices of the peace. However, if a judge had left the building without signing a warrant or committal document, they could sign for that judges as a justice of the peace. In some small jurisdictions, if a judge took sick, they could just remand cases until another date. The concern of course was judicial

independence. These people were directly employed and worked under the direction of the Attorney General. Conversion solved the problem. Court administrators or supervisors were given a choice of giving up their justice of the peace commission or giving up their administration position and becoming a salaried justice of the peace."

(Source: Interview of F. Devine for OCJ History Project, 2015.)

Streamlining the Administration of the Justice of the Peace System

Despite all these changes, the system was allowed to limp along in an administratively disorganized fashion until 1988, when Attorney General Ian Scott appointed Judge Gerald Lapkin to a new position with the title "Senior Judge, Co-ordinator of Justices of the Peace," having responsibility for the supervision and direction over sittings and assignments of justices of the peace.[12]

Lapkin recalled embarking on the journey of locating each and every justice of the peace in Ontario.

The idea was to convert the fee-for-service system into a full-time, salaried, presiding justice of the peace system. The government wanted me to identify how this would happen. The first thing was to find out how many justices of the peace there were. There were very few records! We went back to order-in-council records from the 1920s. But we found some people who were acting as justices of the peace who never had an order-in-council. It took us over a year to identify what we felt was a list of most of the justices of the peace in the province – approximately 650. We sent out letters to everyone involved in the legal system – lawyers, police, court offices – to tell us of anyone they knew who was acting as a justice of the peace. We needed to know who there was, where they were, how old they were, and what services they were providing.

We spent approximately two years analyzing what we had and I realized there was no way you could convert the entire province to a system of full-time justices of the peace on one day…. We went region by region and the process was completely finished by 1998."

The members of the Office of the Co-ordinator of Justices of the Peace in the early 1990s – during the "conversion process." Back row, left to right: Rudy Buksbaum, Anatol Sywak, unknown, Inderpaul Chandhoke, Joan Romao. Middle row, left to right: Guillermo Lopez, Richard Le Sarge, Shelley Howell, Teen Huang. Front row, left to right: Kimberley Wahamma, Sonya Righi-Conlin, Rhonda Jeffrey. (Source: G. Lapkin)

The goal of conversion was to achieve professionalization of a bench that had been assigned increasingly expanded responsibilities. It was made clear to all justices of the peace that administration was being centralized – with explicit expectations established for sitting times and assignments.

As part of the conversion process, the decision was made to designate justices of the peace as either "presiding" or "non-presiding" on a full or part-time basis. All became salaried – no more fee-for-service arrangements.

The duties of a "non-presiding" justice of the peace include considering search warrant applications and presiding over bail hearings. A "presiding" justice of the peace has the same powers, with the added capacity to preside over a trial under the *Provincial Offences Act.*[13]

Maintaining Distance from Police

Kathleen Bryant became a justice of the peace in 1994. She watched as some of her experienced colleagues struggled to make the shift to a more independent and professional bench. For many years, they had enjoyed informal relationships with police and conservation officers. Simple things changed. No longer could they drop by the police station to share a coffee and shoot the breeze, for example.

(Source: Interview of K. Bryant for the OCJ History Project, 2013.)

Professionalization of the Bench

It was not enough to simply re-order governance of the system, however. According to Lapkin, to truly professionalize the bench other issues needed to be addressed. Instituting a formal education program for justices of the peace became a priority. In addition, the disciplinary and appointments processes were reviewed and refined to apply standards similar to those observed for the judges of the Court.

The justices of the peace themselves, recognizing that their status was being lifted by the conversion process,[14] began advocating through their associations with both the Ministry of the Attorney General and the Office of the Chief Judge for recognition in terms of increased remuneration. With the full

support of the Office of the Chief Judge, the associations worked with the Ministry of the Attorney General to establish a remuneration commission in 1995.[15]

In the midst of the conversion process, the new position of Associate Chief Judge – Co-ordinator of Justices of the Peace was created. In February 1995, Judge Marietta Roberts took on that role. She called the conversion process "unbelievable," remembering her extensive travels around the province to swear-in justices of the peace to their new positions.[16] At each ceremony she would give a "pep" talk, detailing what was expected of the newly converted justices of the peace and the now-professionalized bench.

Associate Chief Judge – Co-ordinator of Justices of the Peace Marietta Roberts in the mid-1990s. (Courtesy: C. Zawadzki)

While the vast majority of the conversion process was completed by the late 1990s, it could be argued that "true" conversion was not achieved until 2006 when the *Access to Justice Act* was passed. This legislation introduced important provisions dealing with the designation of justices of the peace, their qualifications and the appointments process.

The 2006 statute abandoned the presiding/non-presiding distinction; today, all appointments are full-time presiding justices of the peace. The pre-2006 appointments were "grandfathered," with four non-presiding justices of the peace remaining as of September 2015. The 2006 legislation also set out minimum qualifications for those seeking a justice of the peace appointment.

The inaugural group of Regional Senior Justices of the Peace. Back row, left to right: Ralph E. Faulkner, Ronald R. Griffiths, Patrick D. Daub. Front row, left to right: Anita C. Grassi-Blais, Carolyn A. Robson, Lynn Coulter, Carollyn A. Straughan, Opal M. Rosamond. Seated: Gerald S. Lapkin. (Source: G. Lapkin)

The Results of Conversion

By 2008, 20 years after "conversion" was completed, the office of the justice of the peace was assayed by Justice George Strathy (as he was then; now he is Chief Justice of Ontario) in *Association of Justices of the Peace of Ontario v. Ontario (Attorney General)* as follows.[17]

…the qualifications of the bench have been enhanced, the tenure of the justices has been made more secure and the processes and procedures surrounding the office have been made more professional, more formal and, in a word, more "judicial." This evolution reflects the important role played by justices of the peace in the administration of justice in the province and the significance attached to that role by the legislature. It shows a desire to attract highly qualified applicants to the position and to provide a

structure, compatible with their judicial independence, to support the performance of their responsibilities.[18]

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[1]Interview of G. Lapkin for OCJ History Project, 2014.
[2]See for example: Warson, Albert. "The JP's awesome power," *The Globe Magazine,* February 1, 1966; Mewett, Alan W., Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario, Part 1, ("Mewett Report"), 1981; OLRC Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part II,* Ministry of the Attorney General, 1973.
[3]See for example: *Justices of the Peace Act,* S.O. 1936, c. 33, s. 2.
[4]Ontario Law Reform Commission, *Report on Administration of Ontario Courts, Part II,* Ministry of the Attorney General, 1973, p.17. ("OLRC Report")
[5]*Justices of the Peace Act,* S.O. 1973, c. 149, s. 6.
[6]OLRC Report, p. 16.
[7]Mewett Report, p. 14.
[8]Jamie Cameron, "A Context of Justice: Ontario's Justices of the Peace – From the Mewett Report to the Present," *Comparative Research in Law & Political Economy, Research Paper No. 44/2013,* p. 7.
[9]Mewett Report, p. 12.
[10]Mewett Report, p. 23, Cameron, "A Context of Justice," pp. 7-8.
[11]Interviews of F. Devine for OCJ History Project, 2014-15.
[12]This position was statutorily recognized in 1989 in *An Act to revise the Justices of the Peace Act,* S.O. 1989, c. 46 which came into effect in 1990.
[13]*An Act to revise the Justices of the Peace Act,* S.O. 1989, c. 46.
[14]Until merged in 2000, two associations represented justices of the peace: Justices of the Peace Association of Metropolitan Toronto and the Justices of the Peace Association. The merged body is known as the Association of Justices of the Peace of Ontario (AJPO).
[15]Letter from Senior Judge G.S. Lapkin to His Worship Frank Devine, President, Justices of the Peace Association of Metropolitan Toronto, June 2, 1992.
[16]Interview of M. Roberts for OCJ History Project, 2014.
[17]2008 CanLII 26258 (ON SC).
[18]2008 CanLII 26258 (ON SC), para. 32.

Period III: 1990-1999 Notable Cases

R. v. Parker[1]: Medical Marijuana

It has been known for centuries that, in addition to its intoxicating or psychoactive effect, marihuana has medicinal value.

Justice Marc Rosenberg, Ontario Court of Appeal, *R. v. Parker,* 49 O.R. (3d) 481

Terry Parker was no stranger to the courts of Ontario. His involvement in many legal proceedings related to marijuana, an illegal drug which helped to control his epileptic seizures.

(Source: all-free-download.com)

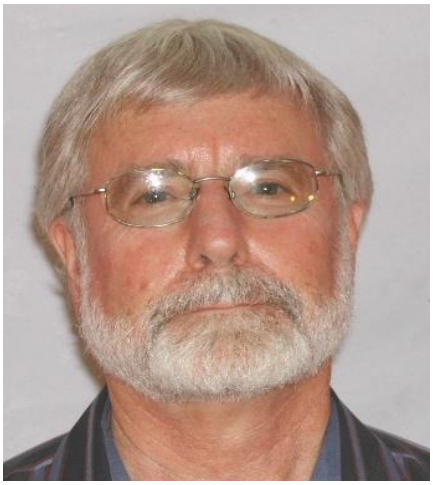
Parker achieved some success in 1987. During a criminal trial at the Provincial Court in Brampton, evidence was presented to establish that Parker's use of marijuana was medically necessary. As a result, Judge Kenneth Langdon acquitted him of marijuana possession due to the common law defence of "necessity." That decision was upheld on appeal.

Parker's main claim to fame, however, arose from a trial that took place 10 years later. In that case, both the trial judge and the appeal court found the federal drug law to violate Parker's rights under Section 7 of the *Charter of Rights and Freedoms*. In response, the federal government issued regulations for the medical use of marijuana. Pending the federal changes, a personal exemption in the Court of Appeal's decision meant that Parker became legally authorized to use marijuana in Canada.

The Trial

Health is fundamental to life and the security of each person. ... It does not accord with fundamental justice to criminalize a person suffering a serious chronic medical disability for possessing a vitally helpful substance not legally available to him in Canada.

Judge Patrick Sheppard, Ontario Court of Justice (Provincial Division), [1997] O.J. No. 4923



Justice Patrick Sheppard, 2009. (Photo courtesy of Office of the Chief Justice, Ontario Court of Justice).

Parker's case came before Judge Patrick Sheppard of the Ontario Court of Justice (Provincial Division) in 1997.[2] The charges were simple possession of marijuana, possession for the purpose of trafficking, and cultivation of marijuana. Both the Crown and defence counsel called expert witnesses.

Parker was found guilty of the trafficking charge because he admitted that he gave some marijuana to people who needed it.

The other charges against him were stayed because Sheppard found that the broad legal prohibition against marijuana infringed Parker's rights under Section 7 of the *Charter.* Sheppard decided to "read into" the legislation an exemption for medically approved marijuana use.

Sheppard also ordered the return of three marijuana plants that the police had seized from Parker's apartment.[3]

Section from the Charter of Rights and Freedoms considered in *R. v. Parker*

Life, liberty and security of the person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The Appeal

The decision to stay the charge against Parker for possession of marijuana was appealed by the Crown. On July 31, 2000, a panel of three Ontario Court of Appeal judges – Justices Catzman, Charron and Rosenberg – released their historic decision.

The panel agreed with Sheppard's decision to stay the charge on the basis of Section 7 of the *Charter.* However, it disagreed with the remedy of "reading in" an exemption. Instead, the Court declared that the prohibition of marijuana possession in the *Controlled Drugs and Substances Act* was invalid. It suspended this declaration for one year -- to give Parliament time to "craft satisfactory medical exemptions."[4] Terry Parker was given a personal one-year exemption to possess marijuana for his medical needs.

The Court of Appeal also disagreed with Sheppard's decision to require the police to return the plants "as there was no evidence that these perishable items were still available."[5]

The Government Response

The clock was ticking. Parliament had one year to revise the marijuana prohibition before the Court of Appeal's ruling would render the law invalid. Parliament did not act during the one-year period. However, the executive branch of government did – one day before the deadline.

The *Medical Marihuana Access Regulations* came into force on July 30, 2001.[6] The regulations created a process for individuals to obtain a permit to possess and produce marijuana for personal medical use.

This is an example of court decisions resulting in government legal and policy changes, even though the matter was not part of the government's public policy platform.

> *"The Government of Canada does not endorse the use of marijuana, but the courts have required reasonable access to a legal source of marijuana when authorized by a physician."*
>
> Health Canada website (accessed November 2014)

Postscript – Another Trip to Provincial Court

In December 2007 – 20 years after the trial where Terry Parker claimed that marijuana was a medical necessity, and 10 years after claiming a breach of *Charter* rights – he appeared before Justice S. Ford Clements of the Ontario Court of Justice.[7] Parker was not facing criminal charges. This time he was in court asking for the return of marijuana that Canada Post had seized and turned over to the Peel Regional Police.

Clements dismissed the application. Parker appealed twice – first to the Superior Court of Justice[8] and subsequently to the Ontario Court of Appeal.[9] Both appeals were dismissed.

The main reason Parker did not succeed was his lawful entitlement to possession of marijuana was not established – he simply had not sought or received a permit for medical use under the federal regulations. The man whose landmark case resulted in the very existence of Canada's medical marijuana rules had failed to take advantage of them.

Terry Parker in the Courts Three medical marijuana cases that began in the provincial court			
Provincial Court	**1987** Parker is acquitted of marijuana possession due to the defence of "medical necessity."	**1997** The legal prohibition against possessing marijuana is found to breach Parker's *Charter* right to life liberty and security of the person.	**2007** Parker's application for the return of seized marijuana is dismissed because he never obtained a permit for legal medical use.
Appeal	**1988** Parker's acquittal is upheld by the District Court.	**2000** The Ontario Court of Appeal declares the law to be invalid, but suspends the declaration for one year.	**2009 & 2011** The Superior Court and Ontario Court of Appeal agree with the dismissal.

[1] *R*. v. *Parker*, [1997] O.J. No. 4923; 12 C.R. (5th) 251; 48 C.R.R. (2d) 352 – Trial Decision, December 10, 1997, Judge Patrick Sheppard. *R*. v. *Parker*, [1997] O.J. No. 4550 – Trial Motion, October 30, 1997. *R*. v. *Parker*, [2000] O.J. No. 2787; 49 O.R. (3d) 481; 188 D.L.R. (4th) 385; 135 O.A.C. 1; 146 C.C.C. (3d) 193; 37 C.R. (5th) 97 – Court of Appeal Decision, July 31, 2000.

[2] Due to restructuring of the Court in 1990, the Ontario Court of Justice (Provincial Division) had replaced the former Provincial Court (Criminal Division).

[3] Sheppard, *R.* v. *Parker, [1997],* Trial Decision, para. 70.

[4] Court of Appeal, *R.* v. *Parker, [2000],* para. 198.

[5] Court of Appeal, *R.* v. *Parker, [2000],* para. 196.

[6] S.O.R./2001-227.

[7] Due to further restructuring in 1990, the Ontario Court of Justice (Provincial Division) became known simply as the Ontario Court of Justice.

[8] *R.* v. *Parker*, [2009] Canlii 51515 (ON SC) (Tulloch, J.). In his reasons, Justice Tulloch referred to Justice Clements as having dismissed the application "in a very thorough and reasoned decision." The reasons of Justice Clements appear to be unreported.

[9] *R.* v. *Parker,* (2011), 286 O.A.C. 219 (CA); 2011 ONCA 819.

Period III: 1990-1999 Notable Cases

R. v. M. (S.): "Justice Dunn Raises A Danger Signal[1]"

> "When first presented, the Crown's case appeared quite plausible. But after the evidence of the defence experts, it is riddled with reasonable doubts."
>
> *Justice Patrick Dunn*[2]

The parents of a twelve-year-old babysitter were shocked when their daughter was accused of shaking a toddler to death. They believed her explanation that the child had accidentally fallen down a few steps. The coroner initially ruled that death had resulted from a head injury caused by an accidental fall. Doctors at the Toronto's Hospital for Sick Children (SickKids) – where the child was transferred after initial treatment at St. Mary's Hospital in Timmins – thought otherwise. Leading the charge was Dr. Charles Smith, a pathologist who would later be disgraced in a public inquiry. The child's body was exhumed, Smith performed an autopsy, and the babysitter was charged with manslaughter.

Timmins Courthouse (Courtesy of the Ontario Court of Justice)

The trial, heard by Justice Patrick Dunn in the youth court of the Provincial Court (Family Division) entailed 30 days of hearings between October 2, 1989 and November 6, 1990. A judgment was issued on July 25, 1991.

The prosecutors relied heavily on testimony from Smith and others from SickKids. While this evidence at first appeared to be plausible, it was strongly discredited by expert witnesses presented by the defence.

Had the expert evidence not been available, it is very possible that the babysitter – referred to in the judgment as "Shelly M." – would have joined the ranks of persons wrongfully convicted due to flawed pediatric pathology. Instead, she was acquitted.

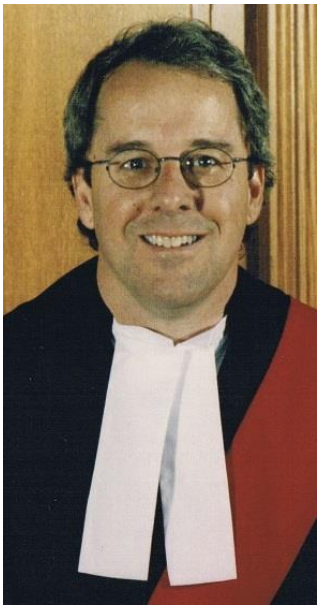
Several participants played a part in achieving a fair and just result in this case, as opposed to other trials that had involved Smith.

The Babysitter

Justice Dunn found Shelly M. to be a credible witness.

The Babysitter's Father

Shelly M.'s father had a research and science background. He devoted himself to learning everything he could about medical theories regarding shaken baby syndrome, falls, and head trauma. He contacted leading experts from across North America and paid for nine of them to come to Timmins to testify at the trial.[3] The family endured financial hardship to pay for the legal defence.



Justice Gilles Renaud
(Courtesy: G. Renaud)

The Defence Counsel

The defence counsel was Gilles Renaud, who was later appointed as a judge of the Ontario Court of Justice. His presentation of the expert evidence and cross-examination of the prosecution witnesses was compelling. During his 1995 swearing-in ceremony, Renaud graciously acknowledged the role played by Shelly M.'s father, lauding him for being the best assistant a courtroom lawyer could have.[4]

The Experts

Leading experts in pediatric neuropathology, biomechanics, neurosurgery, pediatrics, and radiology brought into sharp focus the deficiencies in the autopsy and the opinions of the prosecution's main witness. They were also able to show that serious head injuries to a child can occur from a short fall with minimal visible indication of trauma.

The Judge

Justice Dunn carefully considered a large quantity of technical medical and scientific evidence. He then prepared detailed reasons for judgment that explain why he favoured the defence experts as opposed to those led by the prosecution. Years later, when releasing his report for the Inquiry into Pediatric Forensic Pathology in Ontario, Justice Steven Goudge stated, "I also address the important role the judiciary has to play in screening out unreliable forensic pathology evidence." Justice Dunn did just that.

Judge Patrick Dunn in 1990. (Courtersy: S. Linden)

Justice Patrick Dunn in 2015. (Courtesy: P. Dunn)

What Went Wrong?

> *I am not inclined to put much weight on Dr. Smith's opinion, that shaking caused death….I find that the injuries are consistent with a fall.*
>
> Justice Patrick Dunn[5]

Justice Dunn's decision included numerous criticisms of Dr. Smith's methodology, practice and theories, among them the following.

- Dr. Smith did not seriously considering possibilities other than shaking.
- He viewed the purpose of an autopsy as trying to find another cause of death.
- He assumed that certain bruises predated the collapse, without sufficient knowledge of the case.
- Dr. Smith formed his diagnosis of shaking before he knew the weight and size of the child.
- He provided very little detail in his autopsy report.
- He did not consult with the relevant physicians before conducting the autopsy.
- He appeared to have reached a conclusion before the autopsy was complete.
- Dr. Smith was not familiar with the latest medical literature.

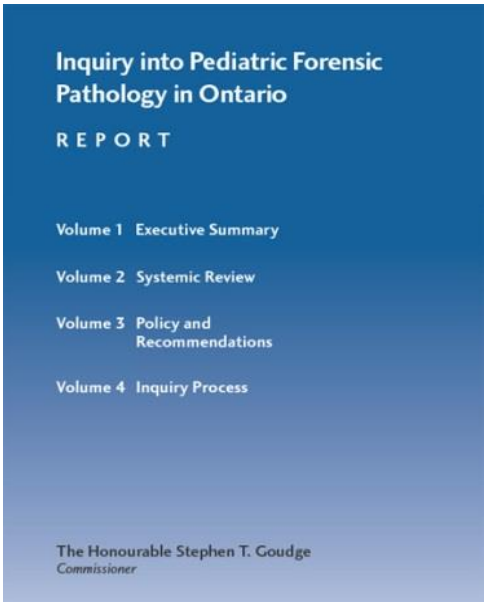
Justice Dunn further wrote: "I cannot explain how doctors from Ottawa, Winnipeg, Bethesda, Maryland, Philadelphia, Chicago, Los Angeles and even Dr. Sullivan from Timmins can come to this court and say they are not surprised by serious head injuries in children from low falls, while four specialists from Toronto say it is out of their experience. Dr. Smith even said it could not happen."[6]

The Goudge Inquiry

> *The decision by Patrick Dunn in R. v. M.(S.) was ignored at the time until the Goudge Inquiry at which it figured rather prominently. This case was a bright light in the otherwise dismal record of the Ontario Courts in dealing with cases involving Charles Smith."*
>
> Former Chief Justice Brian Lennox.[7]

On April 25, 2007, sixteen years after Justice Dunn's decision, the provincial government established the Inquiry into Pediatric Forensic Pathology in Ontario. The mandate was to determine "what went so

badly wrong in the practice and oversight of pediatric forensic pathology in Ontario" and to make recommendations to restore public confidence.[8]



Led by the Honourable Steven T. Goudge of the Court of Appeal for Ontario, the Inquiry reviewed 20 cases about which the Chief Coroner's Review had expressed serious concerns arising from Dr. Smith's work. This included the case of "Amber", the toddler whose death resulted in the charges against Shelly M.

Justice Goudge's report describes the career of Dr. Smith as follows.

> From 1981 to 2005, Dr. Smith worked as a pediatric pathologist at Toronto's world-renowned Hospital for Sick Children (SickKids). Although he had no formal training or certification in forensic pathology, as the 1980s came to an end he started to become involved in pediatric cases that engaged the criminal justice system. Then, in 1992, he was appointed director of the newly established Ontario Pediatric Forensic Pathology Unit (OPFPU) at SickKids. He soon came to dominate pediatric forensic pathology in Ontario.[9]

Given his position and assumed qualifications, Dr. Smith's courtroom testimony could no doubt be persuasive if his methodology, knowledge and conclusions went unchallenged by actual expert witnesses.

A Missed Opportunity

The Goudge Report cites Justice Dunn's *R. v. M.(S.)* decision in favourable terms and expresses frustration that health care regulators and overseers did not take it seriously. Had they done so, subsequent wrongful convictions might never have occurred.

> Almost all of Justice Dunn's criticisms have stood the test of time. Most of the weaknesses that Justice Dunn identified in Dr. Smith's forensic pathology reappeared in Dr. Smith's work in criminally suspicious cases over the next decade. Justice Dunn's judgment proved to be prophetic.
>
> …Justice Dunn's decision raised a danger signal about Dr. Smith's competence and professionalism. Unfortunately that signal was ignored and any opportunity for re-evaluation of Dr. Smith's work was lost.[10]
>
> Justice Dunn strongly criticized Dr. Smith in detailed reasons for judgment, which expert witnesses at the Inquiry described as a "masterful analysis" of the forensic pathology issues raised in the case.[11]

Blaming the Judge

While the College of Physicians and Surgeons and the Office of the Chief Coroner of Ontario eventually took action, for a long time they took Smith's comments at face value. As an example, Smith falsely asserted that "Justice Dunn had a change of heart and admitted...that, had he fully understood the medical evidence presented at the trial, he would have convicted S.M. of the manslaughter charge."[12]

The Amber case was featured in an episode of The Fifth Estate, televised in November 1999. In his interview for the program, Dr. James Cairns (Deputy Chief Coroner from 1991 to 2008) referred to Smith as "top notch" and made the following comment about Justice Dunn's decision: "I, with due respect, feel that the medical evidence was confusing and that the judge may not have clearly understood all the

evidence that was being given."[13]A few years later, in an interview with Maclean's Magazine for an article entitled "Dead Wrong", Dr. Cairns referred to Smith as a "wonderful asset".[14]

The Judge's Affidavit

> One of the most fascinating documents to emerge during the Goudge inquiry is an affidavit from a judge denying statements by Dr. Charles Smith to a reporter. To say the least, it is highly unusual for a judge to swear an affidavit for consideration in a public inquiry. This is the first time that I have ever seen it happen.
>
> *Lawyer Harold Levy in "The Charles Smith Blog" (January 27, 2008)*

In December 2007, Justice Dunn provided an affidavit for the Goudge Inquiry to counter statements made about him by Dr. Smith. The contents of the affidavit went undisputed by Dr. Smith. The Goudge Report makes reference to this document as follows. "In his affidavit, Justice Dunn wrote that, although he and Dr. Smith were on the same flight during the trial, they simply exchanged pleasantries and did not discuss the case. While he did not have a specific recollection of his conversation with Dr. Smith, Justice Dunn swore: "I am certain that I did not discuss the merits of the case or the evidence with Dr. Smith. I may have commented on the Susan Nelles case because I understood Dr. Smith had some involvement in that case." According to Justice Dunn, "[a]t no point during the course of the trial did I discuss Dr. Smith's evidence with him or indicate to Dr. Smith that I believed [S.M.] to be guilty."[15]

Pathologist Dr. Charles Smith arrives with his legal team at the Goudge inquiry in Toronto on Jan. 28, 2008. (Source: *Toronto Star*, April 4, 2008)

Conclusion

Judges make findings based on the evidence in front of them. In the case against Shelly M., her defence counsel and family ensured that leading North American experts were present to provide a compelling array of evidence which the trial judge found to be highly credible. Other people charged with having killed children based on pathology evidence from Dr. Charles Smith were not as fortunate. Although the world of a twelve-year-old babysitter and her family were shaken for years, when the matter came to trial in a Timmins courtroom, justice was served.

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[1] *R. v. M. (S.)* [1991] O.J. No. 1383, p. 32. It is to be noted that until 1999, judges of the Provincial Court used the honorific "Judge." From 1999 onwards, judges of the Ontario Court of Justice are referred to as "Justice." This explains the references to "Judge Dunn" and subsequently "Justice Dunn."
[2] *R. v. M.(*S.), p.32
[3] Boyle, Theresa Father credited with acquittal in baby's death, *Toronto Star*, Theresa Boyle, Friday April 4, 2008
[4] Interview of G. Renaud for OCJ History Project, 2015.
[5] *R. v. M.(S.)*, p. 21, 25.
[6] *R. v. M.(S.)*, p. 25.
[7] Interview of former Chief Justice Brian Lennox for OCJ History, 2014
[8] Ontario Report of Inquiry into Pediatric Forensic Pathology in Ontario, Volume 1, pp. 5-6 ("Goudge Inquiry")
[9] Goudge Inquiry, Volume 1, p. 6.
[10] Goudge Inquiry, Volume 2, p. 13.
[11] Goudge Inquiry, Volume 2, p. 208.
[12] Goudge Inquiry, Volume 2, p. 13.
[13] Goudge Inquiry, Volume 2, p. 229.
[14] Goudge Inquiry, Volume 2, p. 238.
[15] Goudge Inquiry, Volume 2, p. 194.

Period III: 1990-1999 Notable Cases

R. v. Hollinsky: A Case That "Broke New Ground"

Early in the morning of July 30, 1994, 19-year-old Kevin Hollinsky was behind the wheel in a car with three of his friends, Joseph Camlis, Andrew Thompson, and Todd Giles, as passengers. Hollinsky was driving fast – above the speed limit – and aggressively, overtaking and cutting in front of one car, then closely following another before pulling out to overtake it as well. While passing the second car, Hollinsky's vehicle skidded out of control, struck two hydro poles, and came to rest on a residential front lawn. Camlis and Thompson died as a result of injuries sustained, while Giles suffered non-critical injuries to his mouth and punctured a lung. Hollinsky escaped uninjured.

Hollinsky Accepts Responsibility, Pleads Guilty

The criminal trial against Hollinsky was heard at the Ontario Court of Justice in Windsor before Justice Saul Nosanchuk.

Although the young men – including Hollinsky – had been consuming alcoholic beverages, the Crown Attorney withdrew impaired driving charges, stating that it could not be established that the accident was the result of impairment. Instead, the Crown proceeded with two counts of driving a motor vehicle in a manner that was dangerous to the public, thereby causing death. Hollinsky accepted responsibility and pleaded guilty before the commencement of the preliminary hearing.

At sentencing, the Crown and defence agreed that there was no need to deter Hollinsky from reoffending in this manner. As Justice Nosanchuk observed, the victims "were his very best friends and the enormity of the loss will unquestionably deter him from committing a similar offence in the future."[1] The question for Nosanchuk was how best to achieve the sentencing objective of general deterrence –

deterring the public at large from driving dangerously and risking similar tragedies. The Crown argued that Nosanchuk should impose a prison term of eight-to-twelve months. Defence counsel argued that rather than sentencing Hollinsky to prison, Nosanchuk should require him to perform community service instead.

Support from the Victims' Families

Hollinsky had the "overwhelming and unqualified support" of both victims' families.

> *There was a recognition by them of the obvious guilt that would be suffered by Kevin Hollinsky for many years, if not for the rest of his life, as a result of the commission of the offence. There was a recognition of the torment that he has gone through and will continue to go through. There was an absence of bitterness and a desire to take positive and healing steps. There was a determination to participate in a program of public education to prevent such a tragedy from recurring as a tribute to the memories of Joseph Camlis and Andrew Thompson.*[2]

Specifically, the families of the two victims proposed that Hollinsky join them in speaking to high school students about the imperative to drive responsibly.

Sentencing Hollinsky: "Incredibly Difficult"

Nosanchuk described the task of sentencing Hollinsky as "incredibly difficult."[3] The judge had "no doubt that Kevin Hollinsky would gladly serve any amount of time in prison in exchange for the return of his deceased friends" who were "like brothers to him."[4] But a custodial sentence would not bring the victims back – nor, in Nosanchuk's view, would it achieve the objective of general deterrence nearly as well as the community service plan proposed by Hollinsky's counsel and the families of the deceased young men. Although there were few precedents for a non-custodial sentence for dangerous driving

offences at that time, Nosanchuk took the bold step of sentencing Hollinsky to three years' probation and 750 hours of community service.

Saul Nosanchuk in the 1980s. (Courtesy: Association of Ontario Judges)

The sentence attracted a great deal of public interest and controversy. Some praised the sentence Nosanchuk imposed as meaningful, constructive, effective, and less costly to taxpayers.[5] Others saw it as unduly lenient, at least initially. Those opinions changed as Hollinsky served his sentence. By November 1995, Hollinsky had spoken to 8,300 high school students in the Windsor area. At each appearance he was accompanied by Andrew Thompson's father, and by the Pontiac Sunbird he'd been driving that night, now a crumpled, blood-stained wreck.

These talks were coordinated by Staff Sergeant Lloyd Graham, the Windsor Police officer in charge of community policing. A 30-year veteran of the police force and self-described "law and order kind of guy", Graham was surprised by the sentence Nosanchuk imposed. Based on his experience and the fact that two people had been killed, Graham expected a jail term would be imposed. Community service would be "a walk in the park; he's not going to jail – he's getting off scot free. It looks like a slap on the wrist." Graham "didn't agree at first [with the sentence]… and there were a lot of people around this police service that didn't agree. They thought it was wrong, basically wrong, a young man takes two lives, he shouldn't be allowed to just walk free."[6] But after watching Hollinsky speak, Graham changed his mind. Graham saw the incredible emotional toll of re-living the collision over and over again, ultimately referring Hollinsky to a psychologist to be treated for post-traumatic stress disorder. Graham also saw the profound benefit to the community.

> *Every summer we lose kids in this community, in this county. I asked someone to call the schools [that we did talks at] and check to see if there had been any tragedies over the summer. It was reported back to me that not one school reports any tragedies involving any of their students, tragedies such as drinking [and] driving fatalities. I think the community has won big-time here. If you put him in jail, sure, we get our pound of flesh, Kevin goes to jail. Who wins out of that? How does the community benefit from that? Kevin would be in jail and there would be 8,300 kids out there who wouldn't get the specific message. I think he deterred a great percentage of those kids from drinking and driving.*[7]

Fresh Evidence at the Court of Appeal

The Crown appealed the sentence, but it was upheld by the Court of Appeal, which had before it fresh evidence about the community service Hollinsky had performed. A brief endorsement was included in the dismissal of the Crown's appeal.

> *We have had the benefit of viewing the results of this performance by the respondent of the community services required from him as part of his sentence and in particular his participation in appearing before more than 8,300 students on 14 occasions emphasizing the terrible consequences of dangerous driving while drinking. The fresh evidence filed on behalf of the respondent is indicative of the powerful deterrent effect of this type of program as projected by the trial judge.*[8]

Breaking New Ground

Years later, Nosanchuk's decision was celebrated for breaking new ground, and for exemplifying the judge's courageous and compassionate approach to the task of judging. When Nosanchuk retired in 2006, renowned criminal lawyer Eddie Greenspan, who represented Hollinsky on appeal, said that the

case “best defined” Nosanchuk as a judge. “The judgment was highly controversial,” Greenspan said. “It took guts, determination, and most of all a tremendous heart.”[9] Patrick Ducharme, who had represented Hollinsky at the sentencing hearing, recalled the impact of the deceased youths’ parents’ expressions of anguish: “I couldn’t help but notice tears, big teardrops, streaming down Saul’s glistening cheeks as he listened to this testimony and as he [Nosanchuk] fashioned that unique and interesting and brave sentence.”[10]

In his reasons for sentence, Nosanchuk praised the conduct and attitude of the parents of the victims, describing them as a “tribute to the capacity of the human spirit to respond affirmatively and with profound compassion to an awful tragedy.”[11] The sentence imposed – one that has been replicated many times since by judges throughout the provincial courts across Canada – demonstrated the Court’s capacity to do the same.

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[1]R. v. Hollinsky, [1995] O.J. No. 4126 (CJ (Prov. Div.)) at para 6.
[2]*Ibid*. at para 7.
[3]*Ibid*. at para 11.
[4]*Ibid*. at paras 26, 25.
[5]See, *e.g.* Rick Prashaw, Coordinator, Communications, Church Council on Justice and Corrections, Presentation to the Parliamentary Standing Committee on Justice and Legal Affairs, Thursday, April 18, 1996.
[6]Bob Carty, Producer, “Kevin’s Sentence,” CBC Radio *Sunday Edition*, 1995.
[7]*Ibid.*
[8]*R. v. Hollinsky*, [1995] O.J. No. 3521 (C.A.)
[9]Ron Stang, “Nosanchuk always ready to take a chance for justice,” *Law Times*, April 10, 2006.
[10]*Ibid*.
[11][1995] O.J. No. 4126 at para 9.

Period III: 1990-1999 Notable Cases

Re K.: "Same-Sex Adoption"

This article is excerpted from "Celebrating equality and the rule of law," an article published in the *Ontario Lawyers Gazette* (The Law Society of Upper Canada, Summer 2011, Vol 15, No.2., pp.5-6). Reprinted with permission of the Law Society of Upper Canada.
Note: Janet Minor is referred to throughout this article as a Bencher. She was elected Treasurer of the Law Society in June 2014.

In the mid-1980s, a lesbian couple, Miriam Kaufman, a doctor, and Roberta Benson, a lawyer, decided that they would raise a family together. Miriam gave birth to two children: a son, Jacob and a daughter, Aviva.

Despite the fact that they were clearly a family, the law did not recognize Roberta as the legal parent of the two children. The obvious answer was for Roberta to adopt Jacob and Aviva. However, at that time, the adoption legislation only allowed opposite sex couples to adopt their partner's children.

In 1994, Ontario's first female Attorney General, Marion Boyd, introduced legislation to amend all Ontario laws, so same-sex couples would have the same rights as opposite-sex couples. Ms. Boyd believed that, otherwise, Ontario's laws infringed the equality provisions of the *Charter of Rights and Freedoms*.

There was a great deal of controversy over this bill. Ultimately, a free vote was held in the legislature. Some of the members of government voted against the bill, and it was defeated on second reading. In

the provincial election that followed, the issue of same sex benefits was a major campaign issue. Miriam, Roberta, Jacob and Aviva, were left legally vulnerable.

After the bill's defeat, with three other lesbian families, Miriam and Roberta decided to take action. They retained the now Treasurer, Laurie H. Pawlitza, to bring a *Charter* challenge to the adoption legislation that prevented them from both being the legal parents of their children. When the challenge was launched, Attorney General Boyd intervened in the adoption case, and asked her lawyer, Crown Attorney and now Law Society Bencher, Janet Minor, to make arguments both for and against the validity of the adoption legislation. The Attorney General also conceded that the legislation was unconstitutional.

The case came before the Honourable Justice James Nevins of the Ontario Court of Justice. Justice Nevins found that the law precluding the adoptions was unconstitutional. In May 1995, he granted adoption orders to four non-biological mothers who were co-parenting their partners' children.[1] The children, son, Jacob and daughter, Aviva, were part of that group.

Jacob Kaufman was called to the Bar at the June 16 ceremony. Together at the call were former Attorney General and Lay Bencher Marion Boyd, Bencher Janet Minor and the Honourable Justice Nevins. Treasurer Laurie H. Pawlitza, the Benson-Kaufman's lawyer in the adoption case, presided over the call.

Call to the Bar, June 16, 2011. Back row, left to right: Law Society Treasurer Laurie H. Pawlitza, Roberta Benson, Miriam Kaufman, Law Society Bencher Janet Minor. Front row, left to right: The Honourable Justice James Nevins, new lawyer Jacob Kaufman, Former Attorney General and Law Society Lay Bencher Marion Boyd. (Courtesy: The Law Society of Upper Canada)

[1] *Re K.* [1995] OJ 1425.

Period III: 1990-1999 Notable Cases

R. v. Deane: The Trial of Kenneth Deane

Although *R. v. Deane* was decided in 1997, the events giving rise to it stretched back at least 170 years. In 1827, the Chippewas signed the Huron Tract Treaty, ceding 2.1 million acres – 99 percent of their traditional territory – to the Crown. Four reserves were created out of the unceded territory, two of which were located at Kettle Point and Stoney Point, on the shores of Lake Huron not far from present-day Sarnia.

The History of Expropriation and Surrendering of Portions of Reserves

Beginning in the early 1900s, the Kettle and Stoney Point First Nations were pressured to surrender part of their reserves. In 1927, 27 of the 39 eligible First Nations voters voted to approve the surrender of much of the Kettle Point beachfront. Despite protests that the approval had been obtained through bribery and fraud, the federal Department of Indian Affairs proceeded with the surrender. The next year, 377 acres of the Stoney Point Reserve – 14 per cent of the total land and the entire beachfront – were surrendered following "extreme pressure"[1] exerted by the local Indian Agent.

In 1932, local residents began petitioning for the creation of a park at Stoney Point in order to preserve a public beach and waterfront access. In 1936, the Ontario government purchased one of the lots that had been sold to private developers following the 1928 surrender. That lot became Ipperwash Provincial Park. The following year, the Chief and Council of the Kettle and Stoney Point First Nation advised that there was a burial ground located in the park and asked that it be protected. The Ontario government took no steps to do so.

During World War II, the federal Department of Nation Defence (DND) decided it wanted to establish a training camp on what remained of the Stoney Point Reserve. Despite protests by the Kettle and Stoney Point First Nation, the Indian Agent, the individual authorized to act on behalf of the federal government with the people of the First Nation, called a surrender vote. Of the 72 eligible voters who attended the meeting, 59 voted against the surrender. The DND nevertheless expropriated the Reserve using the powers under the *War Measures Act*. The Order-in-Council giving effect to the surrender acknowledged that the First Nation had voted against the government proposal, and stated that if the DND ceased to require the land after the war it would negotiate to return the land to the First Nation at a fair price.

Calls for the Return of the Land

Residents of Stoney Point were evicted from their land and forcibly relocated to Kettle Point. First Nations soldiers from the Stoney Point Reserve returned from serving overseas in the Canadian military to find their homes bulldozed and their community fractured. The discovery that gravesites and burial grounds had been desecrated was particularly devastating. The Kettle and Stoney Point First Nation repeatedly sought the return of the land the DND called Camp Ipperwash, but to no avail. Finally, in May 1993 – more than 50 years after the land was appropriated – a group from Stoney Point peacefully occupied the military ranges at Camp Ipperwash. Still the land was not returned.

The Backdrop, The Protest

It was against this backdrop of appropriation and decades of inaction on the government's promise to return the Stoney Point Reserve that the protest intensified. In late July 1995, First Nations protesters entered the military camp itself. Although there were "mini confrontations" the commanding officer made it clear he did not wish to be involved in a physical confrontation with First Nations people. Military personnel left without incident later that night. On September 4, 1995, protesters entered

Ipperwash Provincial Park, where the First Nation had long maintained there were burial grounds. It was Labour Day Monday – the end of the long weekend and the beginning of a new school year – and protesters waited until the park had closed for the day before beginning their occupation.[2]

By the evening of September 6, the Ontario Provincial Police (OPP) had established a tactical operation centre about half a kilometre west of the Park.[3] At approximately 10:45 p.m., the OPP's Crowd Management Unit marched toward the fence bordering the park. When they arrived at the fence, they ordered the occupiers to get out of the park. A confrontation ensued. At least 15 of the occupiers came over the fence to attempt to rescue a protester who was allegedly being beaten by police. At the same time, a large yellow school bus left the park and drove in the direction of the officers, forcing them to scatter and retreat. A car followed the bus, and then both vehicles reversed. Police opened fire as the vehicles were reversing.[4] Three distinct gunshots were heard, followed by a brief lull and then a rapid burst of gunfire.[5]

Dudley George is Shot

Dudley George, one of the First Nations occupiers on the ground, exclaimed "I think I'm hit" before collapsing.[6] With no time to wait for an ambulance, his brother and sister drove him to Strathroy General Hospital, where he was pronounced dead at 2:00 a.m. on September 7, 1995.[7] George was "the only Aboriginal person killed by a police officer in a land claims dispute in Canada in the twentieth century."[8]

That officer was Kenneth Deane, a veteran member of the OPP's paramilitary Tactics and Rescue Unit deployed to support the Crowd Management Unit. There was no dispute that Deane fired the fatal shot. The only question was whether he was acting in self-defence at the time he did so.

The Trial of Kenneth Deane

Deane was charged with criminal negligence causing death. His trial was heard at the Ontario Court of Justice in Sarnia by Justice Hugh Fraser.

At the trial, Deane testified he'd seen muzzle flashes coming from inside the school bus, and then saw George run out from the bushes onto the road, shouldering a rifle. Deane said he shot George to "stop the threat of being shot at."[9] According to Deane, George threw his rifle into a nearby ditch after being hit.

Despite the presence of other officers in the area where Deane had claimed George disposed of a rifle, he had not alerted them to the presence of a weapon. No rifle was ever recovered and Deane's evidence was contradicted by that of other officers. Notably, Sergeant George Hebblethwaite, a20-year veteran of the OPP, testified that he had seen George "holding an object which I perceived to be a pole or a stick" – not a rifle as Deane claimed.[10] Hebblethwaite did not perceive the pole or stick George held to be a threat. [11] He confirmed that no police-issue equipment appeared to have been damaged by bullets, and that he never saw a firearm in the hands of any of the First Nations occupiers that night.[12]

Judge Hugh Fraser (in black suit) at the site of the shooting of Dudley George at Ipperwash Park. (Source: Peter Edwards, Getty Images.)

The Court Rejects Deane's Account

Justice Hugh Fraser, who presided over Deane's trial, rejected the accused's account of the events. He noted that Hebblethwaite, whom he characterized as a helpful and credible witness, was standing behind Deane and thus further away from George at the time he was shot, but had no difficulty identifying the object

George held as a pole or a stick. Fraser also noted that there were "no Crown witnesses or defence witnesses that saw any weapons in the hands of the First Nations people" except for Deane and OPP Constable Chris Cossett – a witness whose testimony Fraser described as "clearly fabricated and implausible."[13] Fraser found the same to be true of Deane's evidence.

> *In the Court's view this is not a situation of honest but mistaken belief. The accused has maintained throughout that Dudley George was armed. And the accused was able to even describe some of the features of the rifle that he saw Dudley George holding.*
>
> *I find that Anthony O'Brien (Dudley) George did not have any firearms on his person when he was shot. I find that the accused Kenneth Deane knew that Anthony O'Brien Dudley George did not have any firearms on his person when he shot him. That the story of the rifle and the muzzle flash was concocted ex post facto in an ill-fated attempt to disguise the fact that an unarmed man had been shot.*[14]

Fraser concluded by addressing Deane directly.

> *I find sir that you were not honest in presenting this version of events to the Ontario Provincial Police investigators. You were not honest in presenting this version of events to the Special Investigations Unit of the Province of Ontario. You were not honest in maintaining this ruse while testifying before this Court. I have considered all of the evidence presented in this case, and on the basis of the evidence that I have accepted, I find you Kenneth Deane guilty as charged.*[15]

The verdict, although welcomed by George's family and community, offered them little in the way of closure – especially after Deane was given a conditional sentence of two years less a day to be served in the community. Too many questions remained about how a peaceful protest could have escalated to result in a violent death so quickly, and why the OPP moved in so abruptly, at night, to remove the

protesters from the Park. Finally, after years of pressure from the George family, repeated questions raised in the Ontario Legislature, and continued investigation by journalists, a public inquiry was established in November 2003 by the newly elected Liberal government.

The Ipperwash Inquiry is Called

The Ipperwash Inquiry was mandated to investigate and report on the events surrounding George's death, as well as to make recommendations that would avoid violence under similar circumstances in the future. Sidney Linden, a judge and former Chief Justice of the Ontario Court of Justice, was appointed Commissioner. Hearings were held over a number of days between July 2004 and November 2005. Deane was scheduled to testify at the inquiry, but was killed in a traffic accident just weeks before he was to appear.

The four-volume Ipperwash Inquiry Report was released on May 30, 2007. Linden found that the OPP, the provincial government led by Premier Mike Harris, and the federal government all bore responsibility for the events that led to George's death. Linden also called on the federal government to issue a public apology and return Camp Ipperwash – along with compensation – to the Kettle and Stoney Point First Nation. The Ontario government responded to Linden's recommendations by creating a dedicated Ministry of Aboriginal Affairs. It also agreed to return the Ipperwash Provincial Park lands purchased in 1936 to the Kettle and Stoney Point First Nation. A 2010 announcement confirmed transfer the land to the federal government, which alone has the power to designate reserve territory. However, while the federal government subsequently engaged in negotiations about the return of Camp Ipperwash, as of 2015 – 20 years after Dudley George was killed – the land still had not been returned.[16]

Conclusion

The Ipperwash protest and its aftermath were memorable and controversial developments in Ontario's history. The Ontario Court of Justice played two roles in attempting to resolve some of the issues. The first occurred when Justice Hugh Fraser presided over the criminal trial of the officer accused of killing Dudley George. The second was when Sidney Linden, a judge and former Chief Justice of the Court, chaired the Ipperwash Inquiry.

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[1]Ipperwash Inquiry Report, Volume 4, Executive Summary, p. 4.
[2]The background information in this and the preceding paragraphs is based on information contained in from the Report of the Ipperwash Inquiry, Vol. 4, "Executive Summary" at pp. 1-19.
[3]*R. v. Deane*, [1997] O.J. No 3057 (Ct J (ProvDiv)) at para 4.
[4]*Ibid*. at paras 6-9.
[5]*Ibid*. at para 22.
[6]*Ibid*. at para 31.
[7]*Ibid*. at para 10; Ipperwash Inquiry Report, Vol. 4, p. 73.
[8]Peter Edwards, *One Dead Indian,* p. 16.
[9]R. v. Deane at paras 38-41.
[10]Para 232.
[11]Para 259.
[12]Para. 261.
[13]Para 406.
[14]Paras 408-409.
[15]Para 411.
[16]Michael Bryant, "Twenty years after Dudley George's death, land still in federal hands" *Toronto Star*, January 22, 2015.

Period III: 1990-1999 Notable Cases

R. v. Munro[1]: A Corruption Case Against a Former Federal Cabinet Minister

The trial of former federal Liberal cabinet minister John Munro, and six others, commenced in an Ottawa courtroom in 1990, has come to be regarded as a landmark case. It was considered to be Canada's "first computer trial," and culminated notably with strongly worded decisions issued by presiding Provincial Division judge, Jack Nadelle, dismissing the charges

"The *Munro* case was a significant catch for this Court," recalled Nadelle.[2] The trial stemmed from corruption charges related to John Munro's failed bid to win the leadership of the Liberal party in 1984. This was precisely the type of "big" case that traditionally would have been heard in a superior court. In fact, all of those charged had the right to a preliminary hearing and subsequent trial by a General Division (a superior court) judge and jury. Nevertheless, all elected trial by a Provincial Division judge.

Becoming a "Specialist" Court

Reflecting on the case, Nadelle attributed the decision to proceed in Provincial Division to its growing reputation as a "specialist" Criminal Court – a court where the trial would be heard by a judge with a deep understanding of criminal law. Plus, given the magnitude and projected duration of the proceedings, the defence lawyers decided to proceed straight to trial, bypassing the preliminary inquiry stage. A preliminary inquiry, which would have been heard by a Provincial Division judge, could have lasted as long as the trial itself and resulted in considerable legal fees.

John Carr Munro was appointed Minister of Indian Affairs and Northern Development (DIAND) in 1980. After the 1984 resignation of Prime Minister Pierre Trudeau, Munro made an unsuccessful bid for the leadership of the federal Liberal Party. After Munro's defeat in the September 1984 federal election,

allegations of mismanagement of funds under the control of the Assembly of First Nations (AFN) – funds which had been granted to the AFN by DIAND when Munro was Minister – led to an RCMP investigation of potentially illegal kickbacks into Munro's 1984 leadership campaign.

In November 1989, charges of corruption, conspiracy, fraud, breach of trust, theft and other related offences were laid against Munro and several others, including the former leaders of several Aboriginal organizations. Of the 77 charges, 34 were laid against Munro. These charges were subsequently dismissed in the decisions released by Nadelle in November 1991.

The Courtroom as Computer Centre

Computers in the courtroom were a novelty at that time. "The corruption trial of…Munro begins today in a courtroom that will look more like a computer centre," wrote Stephen Bindman in the *Ottawa Citizen* on January 14, 1991.[3] "The mountain of documents the Crown will submit as evidence has turned the hearing – which could last as long as a year – into Canada's first computer trial. The judge and Crown attorneys will have computer screens on their desks to give them quick and easy access to the more than 15,000 sheets of paper in the complicated case….Munro's lawyer, John Nelligan, who will work with a laptop computer in the courtroom, said he is 'a little nervous' about the experiment."[4]

Nadelle Dismisses All Charges

In his judgment, Nadelle briefly summarized the Crown's theory: *"Mr. Munro knew that his leadership bid campaign would require more funding than they could raise from usual sources….Mr. Munro then used his influence as DIAND Minister to improperly fund the AFN, knowing the AFN would use this money to contract with third parties. They would in turn give this money or part of it back to Mr. Munro in the form of donations to the Munro for Leadership campaign."*[5]

Nadelle made quick work of this theory: *"I have concluded that there is no evidence that there was anything wrong, devious or criminal in the whole process…nor is there any evidence upon which one might infer that the funding was in some way tainted."*

Justice Jack Nadelle

He went on to state that it was not surprising that the Aboriginal leaders and Munro were in frequent contact because of a flurry of government activity at the time over native self-government issues: *"The Crown has in my view strung together a series of routine and entirely normal-for-the-time series of meetings, funding requests, funding negotiations and bureaucratic memos, together with a group of witnesses who gave, when all was said and done, irrelevant testimony….It is true that the situation looks suspicious, primarily because of the fact Indian bands, for some time, had gotten involved in the…political process and because of the size of the donations….But there…never had been a Minister who had gained the trust and respect of the Indian groups in the manner Mr. Munro had. Naturally they hoped his political career would flourish."*[6]

Nadelle's November 1991 decisions dismissed all charges without hearing from the defence.

His decisions in the *Munro* case garnered significant media attention. In particular, the media jumped on what they called the racism of the RCMP: "The whole sorry case was a punitive RCMP expedition against the native leadership and native people."[7]

An embittered Munro – whose reputation was tarnished by the charges – spent years suing the federal government for compensation over being wrongfully charged. The government ultimately agreed to an out-of-court settlement of $1.4 million, of which $1.2 million went to Munro's lawyers and other creditors.[8]

Munro's corruption trial expected to be longest held at courthouse

Corruption trial of Liberal ex-minister becomes experiment in data processing

By Stephen Bindman
Southam News for the Citizen

The corruption trial of former Liberal cabinet minister John Munro begins today in a courtroom that will look more like a computer centre.

The mountain of documents the Crown will submit as evidence has turned the hearing — which could last as long as a year — into Canada's first computer trial.

The judge and Crown attorneys will have computer screens on their desks to give them quick and easy access to the more than 15,000 sheets of paper in the complicated case.

John Munro
15,000 pages of evidence

Key charges against Munro dismissed

By Stephen Bindman
SPECIAL TO THE STAR

OTTAWA — Former Liberal cabinet minister John Munro has been cleared of the key corruption charges laid by the RCMP in connection with his failed 1984 bid for the party leadership.

Judge Jack Nadelle of Ontario Court, provincial division, ruled yesterday there was no evidence that "there was anything wrong, devious or criminal" in 24 of the 35 fraud, theft and breach of trust allegations against Munro.

The *Munro* case was regularly in the headlines during the years it was before the Provincial Division in Ottawa.

Top to bottom: Sean Upton, "Munro's corruption trial expected to be longest held at courthouse," *Ottawa Citizen,* August 25, 1990; Stephen Bindman, "Corruption trial of Liberal ex-minister becomes experiment in data processing," *Ottawa Citizen,* January 14, 1991; Stephen Bindman, "Key charges against Munro dismissed," *Toronto Star,* November 19, 1991.

[1] *R. v. Munro,* 1991 CarswellOnt 3290, 14 W.C.B. (2d) 636; *R. v. Munro,* 1991 CarswellOnt 2137.
[2] Interview of J. Nadelle for OCJ History Project, 2015.
[3] Stephen Bindman, "Corruption trial of Liberal ex-minister becomes experiment in data processing," *Ottawa Citizen,* January 14, 1991, p. A-3.
[4] Bindman, "Corruption trial."
[5] *R. v. Munro,* 1991 CarswellOnt 3290, 14 W.C.B. (2d) 636, para. 74.
[6] *R. v. Munro,* 1991 CarswellOnt 3290, 14 W.C.B. (2d) 636.
[7] Michael Davison, "Behind Munro's legal Hell was an attack on native leadership," *Hamilton Spectator,* November 22, 1991, p. A-7.
[8] *Munro v. Canada*, 11 O.R. (3d) 1; Gloria Galloway, "Munro legal tab hit $1.4M; Taxpayers on hook for $600,000 in extra interest, fees," *Hamilton Spectator,* July 27, 1999, p. A1.

Period III: 1990-1999 Profiles & Stories

Sidney B. Linden: The Institution Builder

"He's like an architect. But instead of buildings, he builds institutions." That was Cary Linden, the architect son of Sidney Bryan Linden, speaking about his father. Sidney Linden has a vast portfolio of institutions he's created, fostered, revived or transformed during his long career in the law. Building is the one constant of his life's work.

"The founder of the modern Ontario Court of Justice." That's the title bestowed on Linden by his successor as Chief Justice, Brian W. Lennox. Linden entered the Court at a transitional time, appointed to the Provincial Court (Criminal Division) in April 1990. From the beginning of his tenure as Chief Judge, Linden took full advantage of the connections he had built over the years within government and the legal community. He drew upon the talents and abilities of the judges and justices of the peace of the Court and used the skills he had honed as an administrator to transform the Court. When he left the Court in 1999 as Chief Justice of the Ontario Court of Justice, it was a changed institution – in more than name alone.

That change, however, did not come easily. In the early years of Linden's tenure as Chief Judge, there were many opponents to the foundation he had chosen to build in order to support the new Court.

Early Years

As a child, growing up in downtown Toronto, Linden and his older brother, Allen, were always cooking up schemes. "We were constantly planning something, constantly doing something. We were street kids," he recalled. "We never let the absence of money interfere with whatever it was we wanted to do." At one point, the brothers made paper flowers and then took to the streets to sell them. They'd

cut grass, shovel snow – and use that pocket money to ride the streetcar to the Sunnyside swimming pool or to the Humber River to canoe.[1]

Linden, born in Toronto in 1938, as Canada was emerging from the Great Depression, was the child of Jewish immigrants from Poland. His father was a tailor, his mother sold women's clothing. The middle child of the family (he has a younger sister, Sandra), Linden regarded Allen – four years older – as his mentor. A brilliant student, Allen, who started his career as an Osgoode Hall law professor and finished as a judge of the Federal Court of Appeal, always encouraged his younger brother. They stuck close together.

"Cooking up schemes" – Sidney Linden (right) with his older brother, Allen, in Toronto in the early 1950s. (Courtesy: S. Linden).

As Linden told it, he didn't see himself as an academic like Allen, rather he had his own gifts – specifically, athleticism, determination, energy and an abundance of curiosity.

That athleticism, combined with determination, put him centre stage early in life – the stage at the Canadian National Exhibition. Determined to win a bicycle which his family could not afford to buy him, young Linden taught himself how to yo-yo with one goal in mind – to become the City of Toronto champion. The competition took place at the CNE bandstand and Linden left with the title and a bike. The next year, he was back at the CNE – this time with a bolo bat – and he won another championship and another bike.

In high school, his athletic skills took him to the basketball court. He captained his high school basketball team, leading the squad to a City of Toronto championship in 1955. He subsequently became

a referee and these skills transformed into a lifelong love of the game, together with a source of much-needed funds used to pay for his university tuition.

Filling his in-basket?

Sidney Linden masters many courts. A top criminal lawyer and expert arbitrator/mediator, Ontario's first information and privacy commissioner keeps a mini-ball and hoop at his office so he can unwind at day's end by playing his favorite sport. Sometimes his sons drop by to help him fill the basket. A big, agile man, he looks comfortable making a dunk shot in a suit. The commissioner is profiled on page 6.

Linden's love of basketball began early and has continued throughout his career. Here he is in his role as Information and Privacy Commissioner in 1988, shooting hoops in his office. (Source: "Topical," Human Resources Secretariat, 20/7 April 8, 1988, p.1.)

While Linden was still in high school, Allen, who was then studying at University of Toronto, started taking his younger brother to Hart House, the student centre of that university. "When I was in grade 11 or 12, Allen would drag me along with him, so I would get introduced to Hart House. By the time I became a student at UofT – I started studying political science at University College in 1957, then went to law school there – Hart House had become a very important part of my life. I would say that I spent more time in Hart House than anywhere else. I practically lived there. The only thing I didn't do was sleep there. Hart House was a dream come true for me."

At university, Linden's curiosity and energy were at the fore. He'd discovered the reading room at Hart House. He picked books at random, reading whatever came into his hands. That experiment "exploded my mind," he recalled. He attended all manner of debates and lectures there – including one by John F. Kennedy**.** But, there was never quite enough money. He was always carrying two, three or four jobs during his late high school and university years – driving trucks for a butcher and the Canadian National Railroad, taking tickets at the Canadian National Exhibition, working in a liquor store, the post office and factories, serving in a restaurant as a "fountain boy," and refereeing basketball games across Toronto.

In the summer of 1960, he was the water ski instructor at Camp New Moon, a children's camp – and that turned out to be a fruitful position. Beverley Hirschberg was also working at that camp that summer. They have never been apart since, marrying in 1963 when Bev graduated as a nurse and began her career. Linden was in his final year of law school, graduating in 1964.

A Legal Education

Linden decided to attend University of Toronto's Law School on the practical advice of his brother, Allen. Osgoode Hall Law School, also in Toronto, was the younger Linden's only other choice because he couldn't afford to live away from home. "I couldn't decide where to go," he said. Allen had just started teaching at Osgoode after finishing graduate school at Berkeley in California. "Allen said to me: 'If you go to UofT, you'll have Caesar Wright and Bora Laskin, the giants of the profession. If you come to Osgoode, you'll have me. So, where will you go?'"

A Mixed Bag: Early Years Practising Law

Linden loved the intellectual stimulation of law school but graduated with no firm sense of what area of the law to pursue. That uncertainty served him well, as he spent the next few years knocking about the

profession, meeting some of the great personalities of the Canadian legal world along the way – and being exposed to narrow legal issues and greater societal ones.

A couple of examples of such interactions are particularly notable.

First, a UofT colleague told him about an articling position with a particularly challenging lawyer. That lawyer was Willard Estey, who achieved subsequent fame as a Supreme Court of Canada judge. Linden ended up articling for Estey and landed a role on a labour arbitration involving strikes by typesetters and lithographers, who were being pushed out of their jobs by new technologies. Linden found himself working with several counsel, representing other parties, in the arbitration. David Lewis was soon to be leader of the New Democrats. Ian Scott was headed to become a Liberal politician and the Attorney General of Ontario – and set to become an influential force in Linden's future career. Estey taught Linden important lessons about working professionally and collegially – he encouraged Linden to share his research work with both Lewis and Scott and to respect the intelligence of others, despite the differences in political leanings and backgrounds.

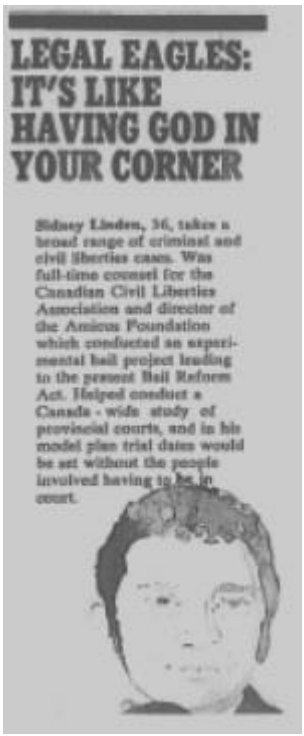
A second example involved a passion for art shared by Linden and his wife. Linden's first position as a full-fledged lawyer was in a corporate law firm. He was finally making a good salary but he hated the work. "Almost within hours after showing up for my first day, I knew that I had made a mistake," he recalled. He had, however, an experience at a local art gallery that served to bring his legal career and personal principles into sharp focus.

In May 1965, he and his wife were at the Dorothy Cameron Gallery for an exhibition opening – both were interested in Toronto's art scene in those days. The paintings on exhibit were abstract but clearly of nude forms. During the opening, the gallery was raided by police and some of the paintings were carted away. Linden was appalled by the experience and the approach the police had taken. Cameron was charged – and later convicted – of exhibiting obscene works in her gallery.

The Canadian Civil Liberties Association (CCLA) acted on Cameron's appeals from her conviction in the Magistrates' Court.[2] Linden learned the CCLA was looking for a full-time counsel. By 1966, Linden was running the organization, fund-raising, and managing a small staff and dealing with lawyers who were representing the CCLA in various cases – and learning that he liked the administrative elements of the position almost as much as the legal ones. He began teaching himself how to manage and administer organizations. Not able to afford further studies, he started buying and reading texts on business skills – keen to learn how to build an institution from the ground up.

The Move into Criminal Law

Long on principles, the CCLA was always short of funds. To supplement his income, Linden started building his own criminal law practice in 1967. This was before the introduction of Ontario's Legal Aid Program and Linden found it a challenge to make a living, despite appearing in all levels of court and representing people accused of every type of criminal offence, including the defence of several people charged with murder.


LEGAL EAGLES: IT'S LIKE HAVING GOD IN YOUR CORNER

Sidney Linden, 36, takes a broad range of criminal and civil liberties cases. Was full-time counsel for the Canadian Civil Liberties Association and director of the Amicus Foundation which conducted an experimental bail project leading to the present Bail Reform Act. Helped conduct a Canada - wide study of provincial courts, and in his model plea trial dates would be set without the people involved having to be in court.

In 1975, *MacLean's* magazine profiled 14 lawyers considered the best in Ontario – Linden was one of the "Legal Eagles." (Source: "Legal Eagles: It's Like Having God in Your Corner," *MacLean's* magazine, June 1975.)

When the Legal Aid Program was introduced in Ontario in 1967, Linden found it nearly unbelievable: "We were doing all this work for nothing, and suddenly we were going to get paid for it. I was making enough money to pay my bills and keep myself going, and I was getting increasingly more significant criminal work to do." He has only praise for the introduction of legal aid: "Prior to legal

aid, there were only a few people who could make a living doing criminal work. But as legal aid became more entrenched, more and more young lawyers started doing it. The result over the years has been the development of the Criminal Lawyers' Association and a healthy criminal bar, which I think is a good thing for not only the legal community but for society generally."

During the late 1960s and throughout the 1970s, Linden was becoming more engaged in serving on organizations devoted to changing the way law was practised in Ontario. He served as a founding member of the Criminal Lawyers' Association. He was the criminal lawyers' representative on the Legal Aid Committee of the Law Society. In 1977, he was the Chair of the "Delivery of Legal Services" subcommittee, which recommended major reforms to the Legal Aid Plan, most of which were subsequently implemented, including the establishment of a salaried Duty Counsel Office and the introduction of a research facility to support criminal lawyers. He was a contributing editor and writing columns for *Maclean's* magazine on justice issues. He also developed an educational television series entitled "The Law and Where It's At" for TVOntario.

A New Venue: Labour Arbitration

At the same time, he was coming to a stark realization about his criminal law practice – to become a pre-eminent practitioner, he knew he would have to invest all of his time in his work, sacrificing his home life. By the mid-1970s, with three young sons at home, he started to "look around." Again, his brother figured into what came next.

Allen had recommended him to John Munro, who was then federal Minister of Labour in the Trudeau government. Through his work for Munro, Linden built connections in the labour law world and launched a new career as an arbitrator, acting as chair on a variety of boards of arbitration throughout the province, including various public sector disputes such as hospital and education matters, as well as traditional collective agreement labour disputes. He saw this work as an excellent personal learning

experience: "I was always listening to management and employees discuss how workplaces were organized – and I learned so much about management techniques and how to operate a well-run organization. I took all of this information into my subsequent positions. When I look back, I see this was my self-taught MBA program."

A New Role – Public Complaints Commissioner

All of these activities brought Linden to the attention of Roy McMurtry, then Ontario's Attorney General. As Linden recalled: "In 1978, McMurtry phoned me out of the blue and asked to see me. I went to his office and the first thing he asked me was: 'How old are you?' I thought that was a kind of funny question, for starters. Because I had no idea why I was there." Linden – who was then 40 years old – soon learned that McMurtry wanted him to research the way in which police complaints were handled.

Sid the 'softy' is talking tough

By Christie Blatchford
Toronto Star

There's no way around it. Sidney Bryan Linden, Metro's first-ever police complaints commissioner, is a sheep in wolf's clothing.

Here he is about to plunge into one of the dirtiest and most politically sensitive jobs in Ontario and already he's talking tough — about the "blanket mentality" that affects police forces and how he hopes to change it, about the public probes into alleged police brutality he expects to call in his first year in office, about standards of "acceptable police behavior" and how he wants to help set them.

But Sid Linden is the same guy who wrote a children's story called The Kiss Box, an affectionate little book about parents who put away their wee extra kisses in a special box so that when the boys grow older and are too shy to kiss, the parents will still be able to get their kiss fix.

Sidney Linden has written a book for children and practises basketball in his office. He's also about to take on one of the dirtiest and toughest jobs around — policing Metro's police.

Linden's appointment as Metro Toronto's "first ever Police Complaints Commissioner" was big news in 1981. (Source: Christie Blatchford, "Sid the 'softy' is talking tough," *Toronto Star*, November 17, 1981, p. A10.)

During the late 1970s, there had been a number of incidents in which people were brutally mistreated or even shot by police during arrests. Communities were outraged that no system involving civilian oversight was in place to investigate these incidents. McMurtry wanted to do something about the situation. Enter Linden, who was appointed "Special Counsel." Linden set off – travelling from the F.B.I. in Washington to Scotland Yard in London – researching and proposing a

system to hear these complaints. He crafted a proposal for an agency that would be independent of police and composed of civilians. It would have a commissioner and a board to support it. McMurtry liked what he saw, and promptly appointed Linden to serve in 1981– in a pilot project – as the first Public Complaints Commissioner for Metropolitan Toronto and Chairman of the Police Complaints Board.[3]

"When they announced that it was beginning, we didn't even have an office. The next day after McMurtry announced it, people were coming to my law office, wanting to make complaints about the police." This was a trial-by-fire, learning period for Linden. Not only was he building an organization from the ground up, the entire project was surrounded by controversy, with an overarching concern that the agency would not be truly independent of either the police or the government. Linden learned how to build a credible, independent organization – one that was trusted and accountable. The first lessons – hire good people, train them well and institute solid, fair, open, and reliable procedures**.**

Throwing Linden into the "Deep End" as First Public Complaints Commissioner

In his memoir, former Attorney General Roy McMurtry recounted the establishment of the Public Complaints Commission and the naming of Sidney Linden as its first Commissioner:

Attorney General Roy McMurty (right) with Public Complaints Commissioner Sidney Linden. (Courtesy: S. Linden.)

In the spring of 1981, I introduced the Metropolitan Toronto Police Force Complaints Project Act, *which passed into law later in the year….The legislation was controversial in many quarters. Some community groups did not think it went far enough in civilian involvement, while most law-enforcement leaders felt that the new system went too far with respect to civilian oversight and that it would hinder*

their ability to perform police responsibilities.

I appointed Sidney Linden to the position of complaints commissioner, but, unfortunately, there were delays in the passage of the legislation. Linden was thrown into the "deep end" without an adequate infrastructure, but he persevered and, ultimately, his intelligence and commitment produced impressive early reports. The changes he recommended to many police procedures were accepted….

McMurtry recalled that the work that Linden produced in developing the complaints process was used as a model in jurisdictions around the world.

(Source: Roy McMurtry, *Memoirs and Reflections,* (Toronto: The Osgoode Society for Canadian Legal History by University of Toronto Press, 2013), p. 211.)

Back to the Private Sector with the Canadian Auto Workers

Linden served as Public Complaints Commissioner until 1985, until he put his labour law skills back to use, and became the first Executive Director of the Canadian Auto Workers (C.A.W.) Prepaid Legal Services Plan. On behalf of the C.A.W. and the major auto companies (Ford, General Motors and Chrysler) he was responsible for starting up and operating the first privately funded national prepaid legal services plan in Canada. Thirty years later, that plan continues to operate for C.A.W. members across the country.[4] His experience as an architect of legal institutions was growing.

The First Information and Privacy Commissioner in Ontario

In 1987, he was nominated by the Attorney General Ian Scott and subsequently appointed by the Ontario Legislature, as the province's first Information and Privacy Commissioner. As Commissioner, Linden reviewed situations where access to information had been denied by government institutions to

a member of the public. As part of those reviews, he wrote more than 100 decisions in his first years on the job, many of which continue to form an integral part of the jurisprudence in this area of the law.

Once again, he was responsible for starting up an office, and building and implementing a system. He served as the first Commissioner until April 1990. This was a job Linden loved: "It had everything I wanted, the organizational, the administrative, the managerial, the adjudicative, the legal, the independence, our own budget, our own functioning," he recalled. During this time, Linden continued his self-study of management techniques – refining his approach to "MBWA" – management by walking around. He was always present, always talking to whomever would chat with him, always interested in what was going on in whatever organization he was managing, always learning.

He was given extensive powers to organize the Information and Privacy Commission. In his role as Commissioner, Linden was an independent legislative officer, accountable only to the provincial legislature and not to a deputy minister or other member of the public service. This gave the agency significant administrative independence, which he was surprised to learn he did not possess in his next job as Chief Judge.

A Phone Call from Ian Scott: Plans for a Unified Trial Court

In November 1989, Linden received a phone call from Attorney General Ian Scott asking him to become involved in Scott's plans for Ontario's justice system. Linden knew that Scott was contemplating a radical change in the structure of the courts. In broad strokes, Scott was considering amalgamating Ontario's many trial courts into a single court. One of the steps in the first phase of that process was the amalgamation of the County and District Courts with the High Court of Justice to form the Ontario Court (General Division). The judges of these courts were federally appointed. At the same time the existing Provincial Court (Criminal Division) and the Provincial Court (Family Division) would be combined into a single court – the Ontario Court (Provincial Division).

The third of the Provincial Courts, the Provincial Court (Civil Division), was to be moved with its judges and its Small Claims Court jurisdiction to be administered as part of the Ontario Court (General Division). Although the judges on these three Courts were all provincial appointments, the Criminal, Family and Civil Divisions of the Provincial Courts had led completely separate existences: each had its own Chief Judge and the Courts rarely interacted.

Finally, in Scott's vision of the first phase of court reform, responsibility for the administration of the province's justices of the peace would be clarified and clearly brought under the purview of the new Provincial Division. In Scott's plan, the second phase of court reform would see the Ontario Court (General Division) and the Ontario Court (Provincial Division) amalgamate into a single trial court.

As Scott outlined it, the plan would take years to fully execute, but the first phase of the process had been introduced via the *Courts of Justice Act*, which was still in bill form when Scott first approached Linden in 1989. In September 1990, when the legislation was set to be proclaimed, the two provincial courts would become one – the Ontario Court (Provincial Division). Scott wanted Linden to become Chief Judge of that unified court.

Word of Scott's long-range plans had leaked out and the proposed reforms were meeting with mixed reviews and considerable opposition, both among the judges and some members of the legal community.

Attorney General Ian Scott (left) with Sidney Linden in 1990.
(Courtesy: S. Linden)

Many issues that revealed themselves during the 1980s betrayed cracks in the judicial system and strained the relationships among the Provincial Courts, its judges and the Ontario government. The administration of the Provincial Courts was, if anything, neglected. The Courts themselves had very little in the way of administrative structure, despite having Chief Judges and a collection of local senior judges. Chief Judge Hayes of the Provincial Court (Criminal Division) had an executive assistant – with minimal administrative support. There were few formal systems or processes in place to keep track of court statistics, either within the Courts or the government. As Linden recalled when he became Chief: "I didn't realize how undeveloped the administrative structure was in the Court. I was used to other organizations where there was at least some administrative structure in place." Add to this, everyone knew that cases were taking longer and longer to come to trial. By the late 1980s, people were coming to Provincial Court (Criminal Division) and getting trial dates set two years into the future – with very little effective administrative structure to deal with this serious issue of delay.

Because the Provincial Courts had so few systems in place, the only solution to the pending crisis was to keep asking the government for more judges. Scott balked at this appointing ever-more judges and released data and reports indicating that the judges were working inefficiently. The judiciary, in turn, accused the government of not respecting the principles of judicial independence.

Linden Becomes Chief Judge

Into this bubbling cauldron of discontent, Sidney Linden was appointed – by Ian Scott – but only after Linden had applied to the bench and "gone through the Judicial Appointments Advisory Committee in the normal way," he recalled. Not surprisingly, Linden was seen as Scott's "man," brought in to replace Chief Judges who were deeply experienced and well-respected by their judges and justices of the peace. Linden's task of instituting a new system gave rise to a deep-seated suspicion amongst the profession and members of the judiciary. At the outset of his tenure as Chief, Linden spent considerable time introducing himself to judges and lawyers. He'd left his practice in the criminal courts years before in 1979. As Linden told the *Globe and Mail* in May 1990: "There's a lot of lawyers who've

On June 27, 1990, Sidney Linden was sworn in as both Chief Judge of the Provincial Court (Criminal Division) and Chief Judge of the Ontario Court (Provincial Division). Here he is pictured swearing his oath of office in the presence of Lincoln M. Alexander, Lieutenant Governor of Ontario. (Courtesy: S. Linden).

been called to the bar since '79. There's a lot of Crown attorneys and defence lawyers out there and I know that they're probably saying 'Who is this Linden guy?'"

New Chief Judge Advises Lawyers Not to Worry

by JOHN BEAUFOY
Special to Law Times

Sidney Linden, the newly appointed chief judge of the Provincial Division of the Ontario Court of Justice, says criminal and family law lawyers won't notice any dramatic changes when court reform takes effect on Sept. 1.

"It's not like Aug. 31 it's one thing and on Sept. 1, the whole world is going to change. It's not that dramatic at all," he told *Law Times* in an interview.

Chief Judge Sidney Linden
Reform won't happen in a day

(Source: John Beaufoy, "New Chief Judge Advises Lawyers Not to Worry," *Law Times*, August 27 – September, 1990, p.11.)

The situation became further complicated when, five days after Linden's appointment as Chief Judge of the Ontario Court (Provincial Division) on September 1, 1990, the Liberal government was defeated in a provincial general election.[5] Scott was no longer the Attorney General. Forty-five days later, the Supreme Court of Canada released its decision in the case of *R. v. Askov*, a decision that precipitated the most serious criminal justice crisis Ontario has ever known.

This left Linden – who had never been a judge – suddenly in the position of Chief Judge of a Court which largely saw him as an outsider and Scott's acolyte. Many judges openly voiced their serious concern about Linden's appointment, feeling their Court was now led by a bureaucrat rather than by an experienced judge. Further, Linden had been appointed to effect a reform that had lost its principal architect and legislative support. Linden seriously contemplated resigning during that fall of 1990. "There was a month or so during September and early October when it was like we were in free fall. It was like we had fallen into a huge black hole and we had nothing to grab on to…There is no doubt that I thought seriously about moving on," Linden admitted.

"It Started Off Frosty"

On October 1, 1990, Howard Hampton was appointed Attorney General in the newly elected NDP provincial government and began meeting with Chief Judge Linden.

Attorney General Howard Hampton and Chief Judge Sidney Linden in November 1990. (Courtesy: S. Linden).

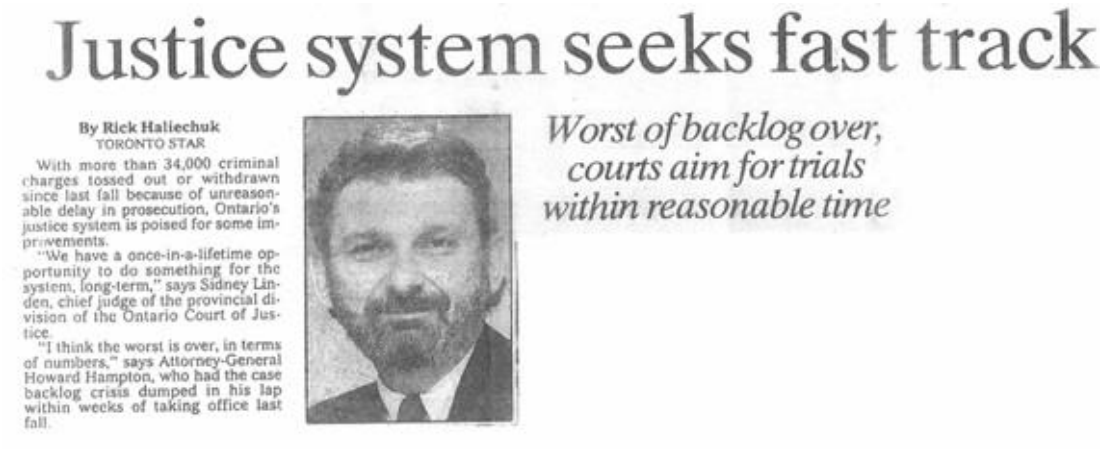
"I had a couple of dust-ups with Sid Linden," recalled Hampton. According to Hampton, a clash of cultures was part of the challenge: Linden was a downtown Toronto lawyer and Hampton was a working class lawyer from Northern Ontario.

"We developed a good working relationship, but it started off frosty….We talked a lot with Sid about case management." This meant some "tense meetings" about how judicial resources were managed – and the ways the Court was assigning and administering the time judges spent in the courtroom.

Over time, it became obvious to both Linden and Hampton that they were interested in achieving the same goals – a better-administered Provincial Court.

"To Sid's credit, he moved mountains," concluded Hampton.

(Source: Interview of H. Hampton for OCJ History Project, 2014.)



Justice system seeks fast track

By Rick Haliechuk
TORONTO STAR

With more than 34,000 criminal charges tossed out or withdrawn since last fall because of unreasonable delay in prosecution, Ontario's justice system is poised for some improvements.

"We have a once-in-a-lifetime opportunity to do something for the system, long-term," says Sidney Linden, chief judge of the provincial division of the Ontario Court of Justice.

"I think the worst is over, in terms of numbers," says Attorney-General Howard Hampton, who had the case backlog crisis dumped in his lap within weeks of taking office last fall.

Worst of backlog over, courts aim for trials within reasonable time

(Source: Rick Haliechuk, "Justice system seeks fast track," *Toronto Star*, April 25, 1991, p. 427.)

Building an Administrative Structure to Support the Ontario Court (Provincial Division)

But Linden waited to see what the next government would do and, in the meantime, he started – tentatively – building an administrative structure. Even that approach was seen as suspect by many of his judges. In those days a judge was meant to judge, not muck about in judicial administration. As Linden recalled: "The thinking was that a judge's mind should be on the law and that was it."

"When I became Chief Judge in 1990, the term 'judicial administration' was an oxymoron," recalled Linden. "Very early in my tenure, I learned that I was the Chief Judge in name, and that was about it. The office of Chief Judge had – really – no independent administrative powers at that time. Those powers resided at the Ministry of the Attorney General. Just after my appointment, I wanted to send a half-dozen, bilingual judges to an education program in Quebec. It was a great program – very practical stuff – and I assumed it was just a matter of informing the Ministry and off our judges would go to the program. How wrong I was. I received a call from the deputy minister himself: 'Oh, no, no, no. We can't send your judges off to Quebec. Can't be done. Far too extravagant. No money. We might be able to afford to send one judge. But that's absolutely the limit. And, by the way, this is not your

decision to make.' I hung up the phone and asked myself: 'Am I the Chief Judge or is the deputy minister?' The answer was clear – at that point in time, the deputy minister was the boss."

"Nobody Knew Him"

Justice Ted Ormston was active in the criminal judges' association when Sidney Linden became Chief Judge. Ormston called the appointment "the big change."

"Nobody knew him. It was just all of a sudden… (Linden) has had an interview and he's appointed in 1990. And at this time, I was active in the judges' association…I can recall Sid coming in and him saying to us, 'I have never been a Chief Judge before, we are starting from new, what do you think my role should be?" And everybody was hesitant because we were used to (former Chief Judge) Fred Hayes who said 'This is the way it is…' We decided we would trust (Linden), and started talking to him about what we thought our system should look like. And what his responsibilities were, and what the judges' responsibilities were, because technically we are all equal….Sid Linden was a very open and liberal man, and interested in changes, but carefully. And he agonized, agonized about them."

(Source: Interview of T. Ormston for OCJ History Project, 2014; Ted Ormston, Transcript of Interview for Oral History Project, Osgoode Society for Canadian Legal History, 2008.)

Linden decided to draw on his experience of being an independent legislative officer – which is what he had been as Information and Privacy Commissioner – to recast his role from a Chief Judge who was "accountable" to the deputy minister. He knew early on that achieving administrative independence would be the key objective of his tenure as Chief. In keeping with his prior experience as an administrator, it was his firm opinion that "administrative independence" was a necessary precondition for the Court to ensure its substantive independence from government – and the only way to achieve full judicial independence.

The Introduction of the Position of "Regional Senior Judge"

One of Linden's first tasks was to establish eight new Regional Senior Judge positions, despite the fact that he had no additional structural funding or administrative supports. Four of the new RSJs had no experience with judicial administration and the other four functioned in a completely different context under the previous Chief Judges – and some didn't look too kindly on Linden, the interloper.

Creation of Position of Executive Coordinator and the Chief Judge's Executive Committee

He then turned to staffing the Office of the Chief Judge. He created the position of Executive Coordinator – a position designed to manage the work of the Office. He recognized the need for additional administrative supports within the structure of the Court and persuaded the Ministry of the necessity of their existence. He then proceeded to form the Regional Senior Judges into an effective management team – the Chief Judge's Executive Committee (CJEC). Allen Edgar, research counsel at Ontario Court of Justice, was working at the Court when Linden became Chief Judge. He recalled the "quantum changes" that occurred in the early 1990s, pointing specifically at the creation of CJEC. "Instead of making big decisions by himself as Chief Judge, Linden discussed issues with RSJs who were all on CJEC. This brought more perspectives to bear on decisions and more ownership of decisions once made."[6]

Linden saw CJEC – which continues to exist – as the equivalent of a board of directors, making policy decisions. "The RSJs brought their local issues from across the province to the CJEC table. This was where we ensured consistencies of policies across the province. CJEC was the vehicle. This meant that all judges knew that policies coming from the Chief's Office were informed by solid regional input," Linden stated.

Chief Judge, Regional Senior Judges and Senior Advisors in 1990. Back row, left to right: RSJ John Evans, RSJ Raymond Walneck, RSJ Brian Lennox, RSJ Donald August. On the dais, left to right: Senior Advisor/ACJ Robert Walmsley, RSJ Mary Hogan, CJ Sidney Linden. Front row, left to right: RSJ Gerald Michel, RSJ Grant Campbell, Senior Advisor/Co-ordinator of Justices of the Peace Gerald Lapkin, RSJ Harry Momotiuk. (Courtesy: S. Linden).

Concerned that he didn't have adequate skills to lead a court, Linden sought training at the U.S.-based National Center for State Courts, charged with improving judicial administration. He then instituted an ongoing series of programs within the Court, designed to educate judges to take on leadership and other administrative roles within the Court.

"He Asked the Blunt Questions"

Lynn Norris, now the Executive Lead, Modernization, in the Court Services Division at the Ministry of the Attorney General, was a young policy analyst at the Ministry of the Attorney General, at the outset of her career when she first met Sid Linden in 1990.

"I was really taken with his vision. He wanted to transform the Court and the Office of Chief – and make it a force to be reckoned with. I thought of Justice Linden as the one of the first judicial officials to take a professional management view to operating a court as opposed to a purely legal view. He was very progressive in his thinking about the role of the Court and he had good business chops. He expanded the potential of the Court in how it was administered. He did that in several ways. First, he restructured the Court to rely on Associate Chief Judges by adding to and shifting their responsibilities. Second, he implemented a regional structure through Regional Senior Judges. This reflected a shift – judges across the province were taking on more active roles in focusing the direction of the Court.

It's my recollection that he asked the blunt questions. He wasn't afraid to call out the issues and challenges as he saw them."

(Source: Interview of Lynn Norris for OCJ History Project, 2015.)

Relationship with the Ministry of the Attorney General

Linden focused on building institutional links to the Courts Administration Division of the Ministry of the Attorney General and to the Office of the Deputy Minister. He worked at creating ongoing dialogues with successive Attorneys General. He began to collect the information and data needed to create what he viewed as an independent court. To ensure that independence, in 1993, he negotiated a Memorandum of Understanding with the Deputy Attorney General George Thomson and then signed it with Attorney General Marion Boyd. This MOU gave the Court a degree of

Attorney General Marion Boyd was one of the signatories to the 1993 Memorandum of Understanding. (Courtesy: The Law Society of Upper Canada.)

administrative autonomy that was unparalleled among trial courts in Canada. This document continues to serve as an example to other courts.

Ontario Judicial Council

Linden had a strong voice in the reorganization of the Ontario Judicial Council – the body which investigates complaints by the public about the conduct of provincially appointed judges – giving it a form, structure, organization and operations that had been omitted from the legislative enactment creating it. "Since the time of the inception of the Ontario Judicial Council back in the 1960s, it had been run out of Osgoode Hall by the Chief Justice of Ontario. When I was appointed Chief, I discovered that I was the only provincially appointed judge on the Council – that was making decisions about the judges of our Court. Complaints were made to the Chief Justice of Ontario, and his executive officer would call a meeting, as needed, of the members of the Council and they would deal with the complaints very informally. The Council continued along like that for years. The judges on our Court were very upset. They felt they weren't adequately represented on their own Council. We began making submissions to the government that they ought to reconstitute the Council to make proceedings more open, with clear procedures set out and to give provincially appointed judges a fairer representation on the Council. By 1995, the entire system was redesigned – with two co-Chairs, the Chief Justice of the Ontario Court of Justice and the Chief Justice of Ontario – and comprehensive annual reports."[7]

Attention to Judicial Education

Understanding the need for well-funded and well-planned continuing judicial education, Linden created an Education Secretariat, composed of judges, with its own budget and the mandate to develop, coordinate and deliver an effective education curriculum for the judges of the Court. The creation of the Education Secretariat was confirmed by another Memorandum of Understanding – this one signed in

1997 by Linden and representatives of the Ontario Judges Association and the Ontario Family Law Judges Association.[8] That MOU gave the responsibility for development of the content of core education programs to the Associations and the administration of the budgets for education to the Office of the Chief Judge, while recognizing that judicial education and training was clearly a shared responsibility. At the same time, Linden also increased educational programming for the justices of the peace.

"Small" Details Matter Too

Linden also took the time to turn his attention to a collection of smaller things that, when considered, are really not small at all and have real significance for people working within a system. For example, the Provincial Courts had always used letterhead with the Ontario government crest atop it. Linden had a special letterhead designed for the new Court that belonged to it alone. The justices of the peace did not have robes of their own design. Linden had a robe with a distinctive green sash designed for the justices of the peace.

When the Sunshine List of Ontario government employees earning more than $100,000 was published in 1996, judges were lumped in with Crown Attorneys and other staff from the Ministry of the Attorney General. "I saw this as a judicial independence issue. The original list made it look like judges were employees of the Attorney General. We got that changed immediately," recalled Linden. Judges were off the Attorney General's list and were listed separately as members of the judiciary.

Relationship with Other Courts

He worked closely with the Chief Justices of the Ontario Court (General Division) and the Court of Appeal on issues of common interest.

That work was – particularly at the outset of Linden's tenure – acrimonious.

The changes made to gowns worn by the judges of the Provincial Division were particularly challenging. "When Ian Scott's plan called for a single trial court, part of that plan was that all judges would wear the same gown. One of CJEC's first decisions in 1990 was that our judges should wear the same gowns as the General Division – the superior court. Frank Callaghan (then Chief Judge of the General Division) went ballistic. We finally agreed that the judges of both Courts would wear red sashes, but our sashes would be worn over different shoulders," recalled Linden.

Linden with Attorney General Charles Harnick in June 1996. (Source: *Your MAG et vous*, Vol 8, No. 3, June 1996, p.1.)

By the mid-1990s, the relationship amongst the Provincial Division, General Division and the Court of Appeal had become a productive one. In particular, in 1996, the three Courts were able to come together to send a joint letter (signed by Linden and Charles Dubin, Chief Justice of Ontario, and Roy McMurtry, Chief Justice of the General Division) to Attorney General Charles Harnick urging Harnick to put an immediate stop to budget cuts to the justice system. And the government listened to them.

Cuts mean justice chaos top judges warn

By Tracey Tyler
Legal Affairs Reporter

Ontario's top three judges are urging Attorney-General Charles Harnick to put an immediate stop to cuts to the justice system, predicting chaos and the infringement of individual rights if the plans are hurried through.

In an unprecedented move, the three judges made clear in a letter to Harnick their "grave concerns" about the speed with which cuts may be made – and the apparent disregard for the effect they would have.

Sweeping changes that have been discussed by officials in Harnick's ministry include laying off crown attorneys, closing courthouses and privatizing government legal departments.

They have also discussed seeking alternatives to the concept of having private defence lawyers represent people on legal aid.

Chief Justice Charles Dubin of the Court of Appeal, Chief Justice Roy McMurtry of Ontario Court, general division, and Chief Judge Sidney Linden of Ontario Court, provincial division, sent Harnick a joint letter dated Jan. 17. Interestingly, McMurtry was an Ontario attorney-general in a Progressive Conservative government.

Without mentioning any cuts specifically, the judges warn that the government's plans

Please see Don't, A3

The Chiefs of Ontario's three Courts signed a letter in 1996 warning the provincial government of the inadvisability of proposed budget cuts to the justice system. That letter made the front page of the *Toronto Star.* (Source: Tracey Tyler, "Cuts mean justice chaos top judges warn," *Toronto Star*, January 31, 1996, p.1.)

The Conclusion of Chief Justice Linden's Tenure

Chief Justice Sidney Bryan Linden in 1999. (Photo: Gilbert Studio. Courtesy: S. Linden.)

Linden's term as Chief of the Court ended in 1999 – nine years after it had begun, and four years after it **should** have ended. Linden was initially appointed by a Liberal government (AG Ian Scott) in 1990. At that time, the legislation prescribed a five-year term for the Chief Judge. That term was extended by an NDP government (AG Marion Boyd) to six years and then for an additional two years, with a provision for one additional year if a successor hadn't been appointed on the day the term expires, by a Conservative government (AG Charles Harnick).

As Linden recalled: "It was like being appointed three times over, by three different Attorneys General!"

A Move to Legal Aid Ontario

On April 19, 1999, by virtue of the *Courts Improvement Act, 1996,* the Ontario Court (Provincial Division) was renamed the Ontario Court of Justice. On April 1, 1999, Linden was appointed to be the first chair of the Transitional Board of Legal Aid Ontario – he did, however, retain his status as a judge of the Court. On May 3, 1999, Brian Lennox was appointed to replace Linden as Chief Justice of the Ontario Court of Justice.

Under Linden's direction, Legal Aid Ontario moved toward bringing the former Ontario Legal Aid Plan and the Community Clinic Program, each of which were governed separately by the Law Society of Upper Canada, into a cohesive entity with the common purpose of providing legal services to low-income Ontarians. Once again, Linden faced another administrative challenge: transforming Legal Aid

Ontario from a committee of the Law Society of Upper Canada into an independent, publicly funded, non-profit corporation. This included expanding community legal clinic coverage, replacing outdated technology systems, expanding duty counsel services, and establishing new governance structures and policies.[9]

Linden Serves as Commissioner of the Ipperwash Inquiry

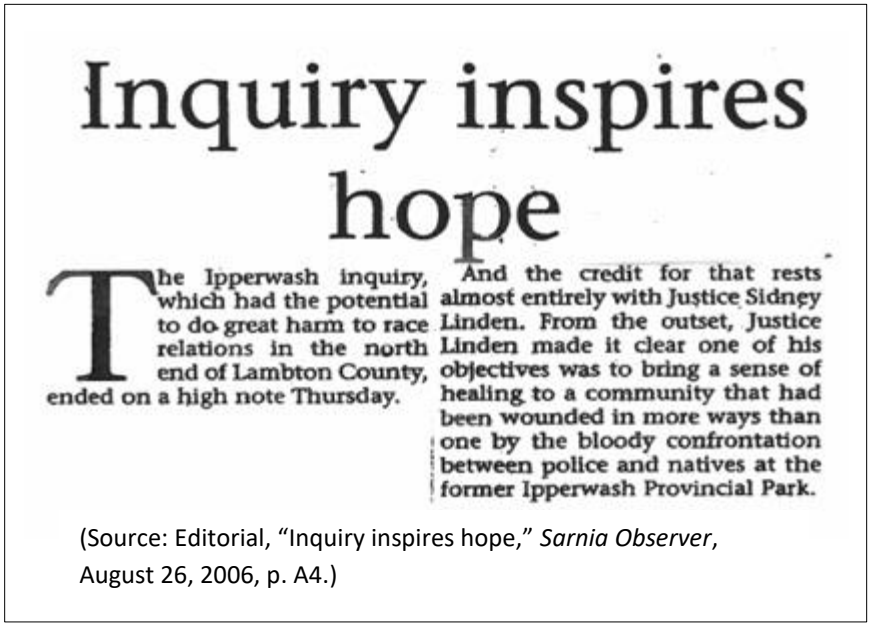
Attorney General Michael Bryant receives the final report of the Ipperwash Inquiry from Commissioner Justice Sidney Linden. (Source: Ministry of the Attorney General. May 31, 2007.)

In November 2003, Attorney General Michael Bryant nominated Linden to be the Commissioner of the Ipperwash Inquiry. The inquiry had the dual mandate of investigating the shooting death of Dudley George at Ipperwash Park in 1995 and recommending ways to avoid future violence in similar circumstances. Linden spent two years listening to 139 witnesses, 229 days of testimony and was presented with 23,000 documents.

Linden's appointment was particularly significant for the Ontario Court of Justice, recalled Brian Lennox – who was Chief Justice of the Court at the time of his appointment: "Traditionally, federally appointed judges had been appointed to serve as chairs of public inquiries. The choice of Sid Linden, a provincial judge, as Commissioner for the Ipperwash Inquiry, a contentious and difficult inquiry with important policy ramifications, was a significant departure from previous practice and a precedent for future

inquiries. The wisdom of that choice was more than amply demonstrated by his thoughtful and sensitive conduct of the inquiry as well as by the high quality of his report and recommendations."[10]

In his role as Commissioner, Linden balanced countless challenging issues. The proceedings were broadcast on a live webcast for all to watch. Linden had to ensure that each of the 27 parties had an opportunity to speak and to be treated respectfully. Ordinary public inquiry symbols such as the provincial coat of arms and ceremonial flags were very obvious and visible. Linden decided to introduce a number of aboriginal symbols and customs as well, such as smudging, drums, eagle feathers, talking sticks, elder prayers, and other ceremonies to which all of the parties were invited. By incorporating these customs in such a visible way, he demonstrated that not only were impartiality and fairness going to be part of the inquiry, but also that it could easily be seen and perceived as such by the many people who watched the proceedings in the hearing room and on the live webcast.



Inquiry inspires hope

The Ipperwash inquiry, which had the potential to do great harm to race relations in the north end of Lambton County, ended on a high note Thursday.

And the credit for that rests almost entirely with Justice Sidney Linden. From the outset, Justice Linden made it clear one of his objectives was to bring a sense of healing to a community that had been wounded in more ways than one by the bloody confrontation between police and natives at the former Ipperwash Provincial Park.

(Source: Editorial, "Inquiry inspires hope," *Sarnia Observer*, August 26, 2006, p. A4.)

According to the *Toronto Star*, "he ended his work by issuing a four-volume, 1,533-page report and an eloquent half-hour speech that all sides believed to be fair and reasonable."[11] Linden's report was hailed as a landmark contribution to aboriginal, police and government relations.[12] Many of the

report's 100 recommendations were adopted, including the return of the Ipperwash Park to the First Nations and the establishment of a Ministry of Aboriginal Affairs.

Linden Appointed Conflict of Interest Commissioner

In 2007, Linden was appointed as Ontario's Conflict of Interest Commissioner. In this position, he provides clarity and guidance to Ontario government employees about matters of possible conflict. He is also responsible for ensuring consistent conflict of interest rules for Ontario public servants in about 350 public bodies and reinforcing strong ethical culture within the Ontario public service.

A Life Devoted to Public Service

On November 9, 2013, Linden turned 75 and, as provided by the *Courts of Justice Act,* retired as a judge of the Ontario Court of Justice. In summing up his career, which involved many pivotal roles in the justice system, Linden simply and succinctly said: "I've done lots of things over the years." On February 3, 2015, Sidney Bryan Linden was awarded the Order of Ontario – recognition of his long and storied commitment to public service**.**

R.* v. *Harding: A Strong Message to Racists Across the Country

Linden often commented that he wished he'd had more time to devote to sitting in the courtroom and deciding cases. *R. v. Harding* is one of the important cases he did decide during his time as Chief Judge.

In 1997, Mark Jan Harding, a self-described Christian pastor, was criminally charged with the offence of wilfully promoting hatred against an identifiable group. In this case, that group consisted of all Muslims.

Harding had written pamphlets and set up a recorded phone message that attacked Muslims. He distributed these pamphlets to, among others, Toronto high school students.

Chief Judge Sidney Linden presided at Harding's trial and convicted him of promoting hatred against Muslims. One of the key issues at that proceeding was whether Harding "wilfully" promoted hatred.

Harding acknowledged he'd written the pamphlets and recorded the phone messages, but he argued that he didn't realize that Muslims would see his "evangelizing" as hatred.

In his reasons for judgment, Linden explained why he found Harding's actions to be wilful.

"People who promote hatred rarely explicitly admit that such is their intention….Mr. Harding's goal may well have been to rouse Christians to defend and propagate their religion. That, in itself is neither an unworthy nor an illegal goal….However, the means chosen to attain that goal are found by this court to be the unworthy and illegal means of engendering fear of, and hatred towards Muslims. Although Mr. Harding denies having the intent to promote hatred when disseminating his message, he was <u>at best</u> wilfully blind….the promotion of hatred by Mr. Harding's messages cannot have been accidental." According to Linden, Harding possessed "an overwhelming case of guilty intent."

Linden's judgment was reported prominently in the media – particularly because it was only the third time in Canada that a conviction was registered in a case in which someone pleaded not guilty to wilfully promoting hatred.

Lincoln Alexander, Chair, Canadian Race Relations Foundation, wrote in the *Toronto Star: "The conviction of Mark Jan Harding sends a strong message to racists across the country that they can be held criminally liable if they wilfully promote hatred against an identifiable group. It also sends a message to minority groups that the state will take steps to protect them against hate propaganda. Most importantly, it may deter young people from joining hate groups."*

(Sources: *R. v. Harding,* 45 O.R. (3d) 207. Chief Judge Linden's 1998 judgment was appealed to the Summary Conviction Appeal Court where it was heard by Justice Dambrot who dismissed the appeal (52

O.R. (3d) 714). Justice Dambrot's judgment was appealed to the Court of Appeal for Ontario where it was again dismissed (57 O.R. (3d) 333). Lincoln Alexander, Chair, Canadian Race Relations Foundation in "Mandela, and the fight against racism," *Toronto Star*, September 26, 1998.)

[1] All S. Linden's quotes and commentary come from a collection of interviews with S. Linden for the OCJ History, conducted from 2013 to 2015.
[2] To act for Cameron on her appeals, the CCLA had retained lawyers Walter Williston and Julian Porter. Linden recalled how much he learned watching these two star litigators during the trial. "That was a big deal for me," he recalled. Cameron's conviction was upheld on appeal.
[3] The name of the office of "Public Complaints Commissioner" was officially changed to "Police Complaints Commissioner" with the introduction of legislation to make the system province wide in 1990.
[4] In 2013, C.A.W. merged with the Communications, Energy and Paperworkers Union of Canada to become Unifor.
[5] The legislation merging the Provincial Court (Criminal Division) and Provincial Court (Family Division) was proclaimed on September 1, 1990. Linden's appointment as Chief Judge of the Provincial Court (Criminal Division) was announced on April 25, 1990. On that date, Attorney General Ian Scott also announced that, upon the merger of the Provincial Courts, Linden would become Chief of the newly merged Court – the Ontario Court (Provincial Division). On June 27, 1990, Linden was sworn in as both Chief Judge of the Provincial Court (Criminal Division) and Chief Judge of the Ontario Court (Provincial Division).
[6] Interview of A. Edgar for OCJ History Project, 2014.
[7] See *Courts of Justice Act Statute Law Amendment Act, 1994,* SO 1994, c. 12, ss. 49-51.12. This legislation was proclaimed in force on September 1, 1995.
[8] In 1999, the two Associations – representing criminal and family judges – merged and became the Conference of Judges. In May 2015, the name of conference was changed to the Association of Ontario Judges.
[9] "Legal Aid Ontario 1999-2004: Moving towards completing the client service journey," Legal Aid Ontario, February 2004.
[10] Interview of B. Lennox for the OCJ History Project, 2015.
[11] *Toronto Star,* June 1, 2007.
[12] "Inquiry inspires hope," *The Observer* (Sarnia), August 26, 2006, p. A4.

Period III: 1990-1999 Profiles & Stories

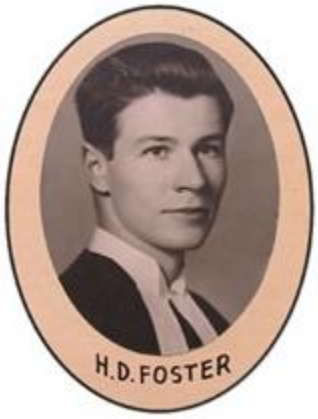
Hugh Derek Foster

Hugh Derek Foster was one of many war veterans who became magistrates, judges or justices of the peace in Ontario. His approach to judging reflected the rigour and decorum of a military background and the will to succeed despite the injuries he sustained.

The Fosters were a family committed to military service. The father, H.W.A. Foster, had served in the First World War, while Hugh and his two brothers fought in France during the Second World War. One of the brothers was killed at Dieppe; Hugh Foster survived but as an amputee after shell fragments struck his left leg during action in Normandy. He was 24 years old.[1]

Lieut. Hugh Foster with his father, Lieut.-Col. H. W. A. Foster, D.S.O., M.C., and mother. They live at 100 Bedford road.

This photo of Hugh Foster with his father (Harold William Foster) and mother (Anna "Queenie" Strathy Foster) was taken after his discharge from the army. (Courtesy: Strathy Family)



Osgoode Hall Law School class of 1947. (Courtesy: Law Society of Upper Canada Archives.)

Following discharge, Foster attended Osgoode Hall Law School – on crutches as he had not yet been fitted with a prosthetic. He made the mistake of taking a course in real estate law that was taught by his father, lawyer H.W.A. Foster. That was the only course in which Hugh Derek Foster received a failing grade. Nonetheless, he graduated in 1947.[2]

Foster worked in private practice before joining the Ontario Securities Commission as a solicitor. In 1958 he was named a magistrate, at the age of 38. Although magistrates were not required to be lawyers, Foster's legal background was an asset and he enjoyed researching the law. He was often assigned cases that required an understanding of specialized areas such as corporate fraud. The only part of his work that he grumbled about was being assigned to perform Saturday weddings.[3]

At this stage of his life, Foster began a relationship with Patricia Newman and they remained a couple for 40 years until Newman's death. Although they didn't live together, Foster was a father to Newman's daughter Laureen from the time she was five years old.

Laureen Newman did not grow up hearing typical children's bedtime stories. Instead, her father thrilled her with stories about his court cases and war experiences. One of her favourites involved the case of a woman whom Foster had sentenced to six months in prison. The woman's friend was sitting in the courtroom. "The other lady was enraged with my dad. She threw her purse at him and it went flying past his head, hitting the Canadian flag behind him. My dad charged her with contempt of court and so both women ended up going to prison together."[4]

In 1968, Foster became a judge when the new Provincial Courts replaced the Magistrates Courts. He continued to work primarily in Toronto's Old City Hall courthouse. Despite the change in name from 'magistrate' to 'judge', he didn't notice much of a change.[5]

Foster had his share of topical issues to adjudicate when presiding over criminal cases. Newspaper articles from the 1960s and 1970s report that Foster heard cases involving armed robbery, confiscated guns, impaired driving, sit-ins in Toronto's "Yorkville hippie district," the alleged obscenity of a magazine called "Satyrday", false tax returns, and a conspiracy to traffic in a half ton of marijuana.[6] In 1972 – 10 years before the introduction of the *Charter of Rights and Freedoms* – he refused to admit evidence the police had obtained after searching a person without reasonable grounds.[7]

Hugh Foster is a relative of the Honourable George R. Strathy, who was appointed Chief Justice of Ontario on June 13, 2014. As a child, Strathy was inclined to feel sorry for his father's cousin, an unmarried man with a prosthetic leg. But he came to realize that Hugh was living a full life, having become a skilled golfer despite his disability, travelling widely, and attracting many female admirers until he settled down with Patricia Newman.[8]

As a young lawyer, Strathy appeared before Foster in a preliminary hearing for a fraud case only after being assured that the Crown Attorney had no objection in light of the family connection. "He was not an interventionist judge", recalled Strathy. "He was dignified, proper and precise, with a military bearing."[9]

That dignity was evident many years later when Hugh Foster put down his cane and walked into a room to meet with the Ontario Judicial Council. The purpose was to secure approval to continue sitting as a judge beyond the age of 70 years.[10] Forcing someone to personally demonstrate fitness didn't sit well with Sidney Linden, Chief Judge of the newly created Ontario Court (Provincial Division). When the authority to make such decisions was transferred from the Judicial Council to the Chief Judge, Linden was quick to change the policy so that, in most cases, a medical certificate would suffice.[11]

> *I remember Hugh well from when I was a lawyer. I had good trials when he presided and I appreciated the fact that he was always a gentleman. I had a great regard for him. Later, in the early 90s, I remember him standing with his cane outside a room full of members of the Judicial Council at Osgoode Hall. When his name was called, he puffed himself up and walked in without the cane. That was the catalyst that made me realize that the system needed to change. He was perfectly competent but he felt he was at the whim of the Council. He worried that, because of his missing limb, he might be deemed not healthy enough to continue to serve.*
>
> Sidney Linden, Former Chief Justice of the Ontario Court of Justice[12]

Hugh Derek Foster at age 75 upon retirement from the Court in 1995. (Courtesy: Laureen Fisher)

Hugh Foster retired from the bench on his 75th birthday. Twenty years later, interviewed for the Ontario Court of Justice history project, he reflected on his time as a magistrate and judge, recalling: "The thing I liked best was feeling that I could do something worthwhile."[13]

[1]Newspaper clippings from Strathy/Foster Family scrapbook.
[2]Interview of Laureen Fisher for the OCJ History Project, 2015.
[3]Interviews of Laureen Fisher and Hugh Foster for the OCJ History Project, 2015.
[4]Interview of Laureen Fisher for the OCJ History Project, 2015.
[5]Interview of Hugh Foster for the OCJ History Project, 2015.
[6]Ottawa Journal articles, 1962 to 1976.
[7]Ottawa Journal, *Pot charge dismissed, police search illegal*, May 5, 1972.
[8]Interview of G. Strathy for the OCJ History Project, 2015.
[9]Interview of G. Strathy for the OCJ History Project, 2015.
[10]Section 54(4) of the *Courts of Justice Act, 1984* provided that, in order to continue in office on a full-time or part-time basis, judges reaching the age of seventy had to obtain approval annually from the Judicial Council.
[11]The policy was further revised in October 2011 by subsequent Chief Justice Annemarie Bonkalo. Under her protocol, annual medical certificates were no longer automatically required for judges over 65. The Chief Justice could, however, request a medical certificate if there was a reasonable basis to believe that a judge had become incapacitated or disabled due to inability, because of a disability, to perform the essential duties of office.
[12]Interview of S. Linden for the OCJ History Project, 2015.
[13]Interview of H. Foster for the OCJ History Project, 2015.

Period III: 1990-1999 Profiles & Stories

Stories from the North: Regional Senior Justice of the Peace Kathleen Bryant

A Bible and a Briefcase (Mid-1994)

Kathleen Bryant saw an ad in the Thunder Bay Chronicle Journal for a part-time non-presiding Justice of the Peace. She sent in an application and found herself at a grueling interview before a panel of eight people, including an aggressive lawyer who asked a series of tough questions. Bryant went back to her job as a social service administrator (aka the Welfare Lady) for the Township of Ignace. She was surprised to get a call, many months later, to say that she was the successful candidate. Bryant was given a Bible, a tape recorder, the Criminal Code, and a briefcase. Armed with these essential items and not much in the way of training, Bryant began what was to be a long career in the Ontario justice system.

English River (1994–1995)

A lonely stretch of Highway 17 at English River

As a Justice of the Peace in northern Ontario, Kathleen Bryant covered a large area: east to Upsula, west to Dryden, north to Pickle Lake, and South to Atikokan. In the north, police officers often work alone. A long drive to meet a Justice of the Peace meant that their community was left unprotected. Long drives were also precarious due to harsh weather conditions. So Bryant used to meet one officer in English River Ontario, about half way between Ignace and Upsula, to save driving time for both of them.

The English River Motel – A makeshift Intake Court

Bryant approached the proprietor of the English River Motel and restaurant on the north side of Highway 17 across from the gas station. He agreed to turn a tiny back room into a makeshift office for them. It had just enough room for an old desk and a couple of chairs. “My colleagues in urban centres couldn’t believe that we would conduct business in such locations”, says Bryant. “They didn’t understand the realities of northern distances, weather, highway closures, and the scarcity of court houses. We tried our best to maintain decorum and professionalism no matter where we were.”

Winter in The North – To save driving long distances in harsh weather, courts are often conducted in unorthodox settings – including motels!

An Education in Northern Wildlife

Kathleen Bryant's experience with search warrants turned out to be more than she had expected. In the early days after signing a search warrant for an enforcement officer, she would look forward to the officer's return after executing it. This is because the officers would show her whatever they had seized as a result of the search warrant. Sometimes Bryant would find herself looking at the back end of a moose, the odd bear, and various other endangered species that the officer had seized. She hadn't bargained on receiving a first-hand education about northern Ontario wildlife.

Clearing the Bar – 1994-1999

Kathleen Bryant and her husband walked in to a local restaurant and bar in their home town of Ignace. This was a small community where everyone knew each other. At least everyone knew Bryant, who was a part-time Justice of the Peace and "the welfare lady". When she walked in, everyone else walked out. Apparently they did not want her to see them drinking or carousing. Her husband used to joke, "No one can clear out a bar like Kathleen". Actually it was a lonely life, but at least Bryant and her husband got excellent service since they were often the only customers in the place! Eventually they just stopped going out. This was another example of challenges faced by judicial officers in small northern communities that did not arise in large urban centres.

Adjusting to Conversion (August 1995)

At the time of Kathleen Bryant's appointment, she didn't realize that she was on the cusp of a sea change for the Justice of the Peace bench in Ontario. The "conversion" of Justices of the Peace in August 1995 meant a transition from an often casual way of conducting business to one that was much more professional and independent from police and other enforcement officers. The transition was easier for Bryant because the old ways were not too entrenched. But she watched as colleagues struggled to make

the shift. They had enjoyed their informal relationships with police and conservation officers. No longer could they drop by the police station to share a coffee and shoot the breeze.

Before conversion, Justices of the Peace were paid on a fee for service basis. As Bryant recalls, she had to submit an invoice once a month to indicate how many items she had issued. “I think it was 25 cents to sign a summons. Informations were a dollar and a quarter. If I did a wedding I got $15!”

Period III: 1990-1999 Profiles & Stories

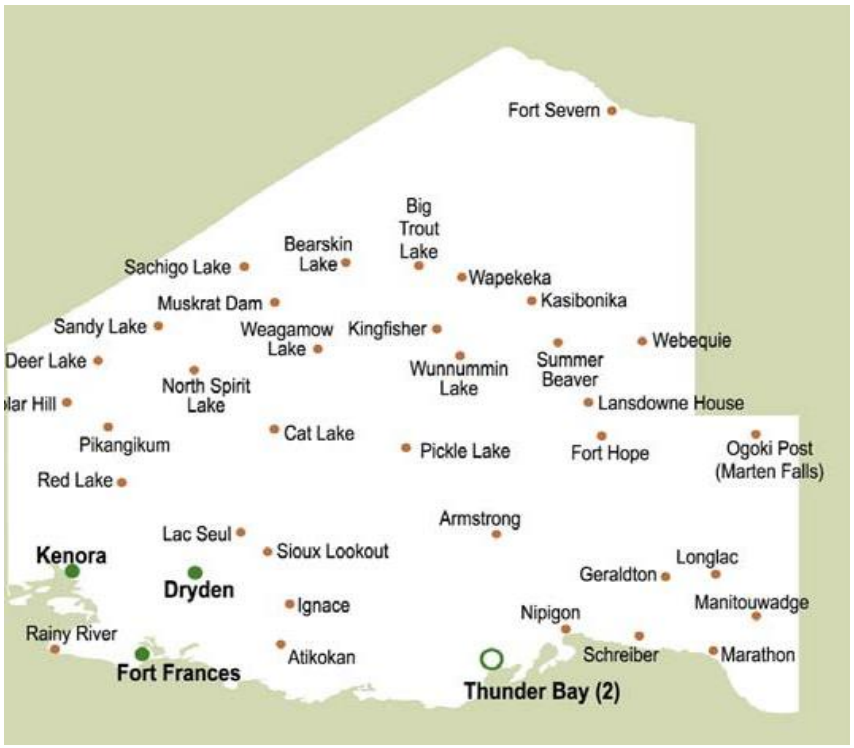
Stories from the North: Judge Peter Bishop

Court Prayer (1994)

When Peter Bishop first sat as a judge in northwestern Ontario, he noticed a woman in traditional dress who came to court almost every day. He soon learned that she was Marion Anderson, an Oji-Cree elder from Big Trout Lake. In 1950 Marion had become the first woman to serve as a First Nations band councillor in Ontario. She was later inducted into the Order of Ontario.

Peter spoke with Marion through an interpreter. Marion made two requests. The first request was to speak on some sentencing matters, and Peter was happy to oblige. The second request was to say a prayer at the beginning of court, in Oji-Cree, to bless the court, provide guidance to the judge, and encourage the people of her community to be good citizens – to which Peter also agreed. Marion's opening prayer became a standard feature in his courtroom.

Years later, Peter took several Court of Appeal judges on a tour of northern fly-in court locations. During the tour, Big Trout Lake Chief Donny Morris said that he hadn't always supported the court coming to his community, but he supported Peter Bishop. The reason? Marion Anderson was the Chief's grandmother and she had said, "Peter Bishop is a good guy and you should listen to him." Peter had respected Aboriginal ways and they respected him in return.



Northwest Region

Pickle Lake (1996)

Justice Peter Bishop

Judge Peter Bishop had been waiting at the Red Lake airport since 7:30 in the morning. The weather in Red Lake was beautiful on that March day – it felt just like spring. But there was heavy fog in Dryden, Sioux Lookout and Kenora. As a result, the plane booked to take Peter and court staff to Pickle Lake didn't arrive until noon – four and a half hours late. Peter was determined to make it to Pickle Lake that

day. He knew that one lawyer had driven four hours from Dryden to make it to court for 10:00 a.m. Two duty counsel from Thunder Bay were there to deal with 51 charges on the criminal and youth court list. And a child custody trial had been waiting for three months to be heard.

Lawyer Cathy Beamish

Lawyer Cathy Beamish was also waiting for a plane to get her to court in Pickle Lake that Friday morning. Standing in the fog at the Sioux Lookout airport, she doubted that the plane would make it in time. She fully expected court to be cancelled due to the weather, a frequent experience, particularly in the spring and autumn.

Pickle Lake is a northern Ontario town, just 20 kilometres north of the Osnaburgh First Nation. When the small plane landed, an OPP van picked up and drove Peter, his clerk, monitor, and interpreter to the community hall where court would be held. The Pickle Lake Community Hall is next to the bowling alley and the liquor store. The proximity to a source of alcohol was a problem, since many people waiting for court had substance abuse issues. With several hours to kill, they went to the liquor store. As a young Duty Counsel commented, "We had a late start today and consequently almost everybody there is now drunk."

Peter made his way to the community hall's cluttered library which served as his judicial chambers. He put on his robe with no mirror to guide him as he adjusted his tabs and sash. With no court security, Peter worried that a court participant would come through the door while he was only partially dressed – it had happened before!

Justice Peter Bishop in the community hall's library.

Justice Peter Bishop swearing an Information.

Because justices of the peace were not assigned to remote satellite courts on criminal or family days, the first thing Peter did after donning his robes was to swear an Information for an OPP officer. This also occurred in the library. Then Peter proceeded to the main room of the community hall. Long, narrow tables had been pushed together to form places for the judge, court staff, and counsel. Everyone else sat in blue stacking chairs aligned in rows.

It was 3:00 p.m. when court began. Most participants had been there since 10:00 a.m. All matters were adjudicated. Some guilty pleas were entered and adjournments granted. Most importantly, the child custody trial

Justice Peter Bishop presiding.

proceeded. Justice was served despite the "cold hard facts of northern justice."

Big Trout Lake (1996)

Justice Peter Bishop – Set to fly in to a northern community

Once a month, Judge Peter Bishop would take an hour-long flight from Red Lake to preside in court at Big Trout Lake. One morning he arrived to convene the court, which was to be held in the community hall. The only problem was that the community hall wasn't there. It had been torn down with no advance warning. An hour later, several pick-up trucks arrived. The trucks were loaded with chairs and tables to set up the court in a nearby hotel. This was preferable to the local nursing home, which had served as a court venue on previous occasions. Eventually a new community hall was built and it became the regular court location in Big Trout Lake.

(All photos courtesy of Peter Bishop).

Period IV: 2000-beyond: Ontario Court of Justice

Overview

Introduction

"The sheer volume of cases with which the Court deals each year and the large number of people who appear in varying capacities before the Ontario Court of Justice mean that, for many of the citizens of Ontario, the Ontario Court of Justice represents the face of justice within the province."

Annual Report 2005, Ontario Court of Justice

By 2000, following many years of change – in jurisdiction, structure and organization – the Ontario Court of Justice entered a period of stability. That stability, fostered under an established governance and administrative structure, allowed the Court to continue its growth. This expansion took several forms – the volume and complexity of matters handled and the number of people appearing in the Court, the complement of judges and justices of the peace, and the diversity of backgrounds of those judicial officers, to name a few.

A Different Type of Historical Overview

The Ontario Court of Justice History contains overviews of four time periods.

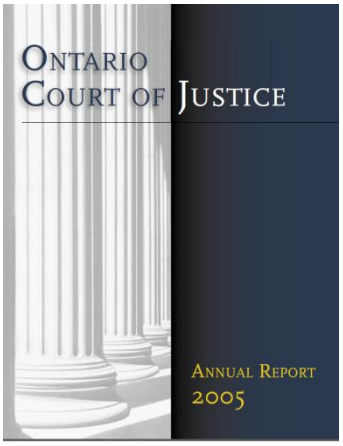
1867 to 1967
Magistrates', Juvenile and Family Courts
1968 to 1989
Provincial Courts
1990 to 1999
Ontario Court (Provincial Division)
2000 to 2015
Ontario Court of Justice

The fourth overview (2000 to 2015) is comprised almost entirely of excerpts from three reports published by the Court:

- Annual Report 2005
- Biennial Report 2006-2007
- Biennial Report 2008-2009

This information is updated with information contained in speeches delivered by the Court's Chief Justices at Opening of Courts ceremonies during these years.

Through this information, we begin to tell the story of the Court in the post-millennial era.



This overview differs from those prepared for the previous three time periods that make up the Ontario Court of Justice History – for two critical reasons.

First, more information documenting the workings of the Court exists from 2000 onwards, than for previous periods. Second, at the time of writing, the period from 2000 to 2015 continues to be part of the Court's "present," as opposed to its historical past. The writing of history, it has been said, requires a certain distance exist between events and analyses before a significant assessment can be conducted.[1] Therefore, instead of providing detailed accounts and stories as were prepared for the three previous overviews, this overview highlights events and developments as recorded in the Court's Annual and Biennial Reports and other documents issued by the Court in recent years.

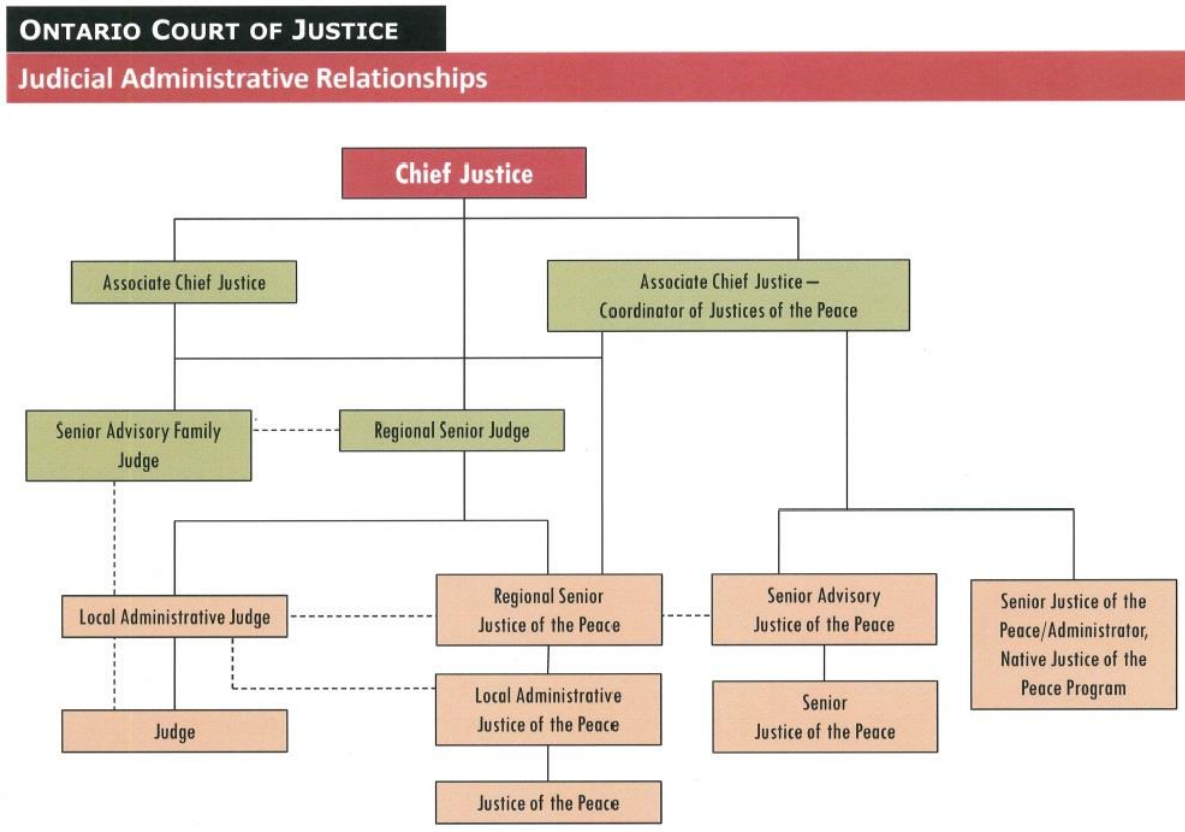
Reports of the Court's Activities – Past and Present

Maintaining detailed records of the Court's activities and initiatives has been one of the by-products functioning under a more established administrative structure. This began in the early 1990s when Chief Judge Sidney Linden began writing and circulating his Chief Judge's Newsletters and *Benchmark*, a collection of information about the Court and its judges[2] – both were circulated only within the Court.

In 2006, Chief Justice Brian Lennox introduced an "Annual Report 2005" – a publicly available document designed to serve a broader purpose than previous Court publications. "This Report is intended to be of interest both to those who already know the Court as well as to a broader public who may as yet be unfamiliar with it," wrote Lennox in the introduction. Chief Justice Annemarie Bonkalo, who succeeded Lennox in 2007, continued the tradition, publishing "Biennial Reports" for 2006-2007 and 2008-2009.

Although printed for distribution, these Reports – as Lennox explained in the 2005 Report – were "intended to be essentially web-based in order to make them as accessible as possible to the largest number of readers."

In addition to these public Reports, there has long been a tradition in Ontario – modelled on the English tradition, dating from medieval times – of celebrating the "Opening of Courts" each autumn. This public ceremony, at which the Chiefs of the Court of Appeal, Superior Court and Ontario Court of Justice each deliver a speech, presents an opportunity for the Courts to give a public accounting of their operations – to talk about their challenges, their accomplishments and their aspirations. As such, these speeches serve as an annual record of the "story" of the Courts.



The Court entered the 2000s with a well-structured judicial administration in place. This organizational chart presents the administrative relationships as of 2015. (Source: Ontario Court of Justice).

Going forward, the Court is planning to replace the Annual and Biennial Reports of the Court's activities with an internet-based annual update to supplement the information currently provided on the Ontario Court of Justice website.

Reviewing the Court's Reports – A Story Emerges

On review of the Court's Annual Report 2005, the Biennial Reports 2006-2007 and 2008-2009 and a collection of Opening of Courts speeches, several trends, initiatives and developments warrant attention in this overview:

- The justice of the peace system was transformed.
- Principles of Judicial Office were established for judges and justices of the peace.
- Policies were developed to meet the growing volume and complexity of criminal and family cases.
- The work of the Criminal and Family Courts became more integrated.
- The Court explored new and more modern ways to serve the public, including Aboriginal communities and unrepresented parties.
- The Court took an interest in its history which it began to formally document for the first time.

Unlike the previous overviews, this one consists almost entirely of content drawn from the Court's Reports and Opening of Courts speeches to begin to tell a still-emerging and evolving story.

Transforming the Justice of the Peace System

In previous decades, numerous changes were made to transform the system surrounding the judges, including judicial appointments, remuneration, and discipline. Similarly, measures were taken to transform and "professionalize" the justice of the peace system during the early 2000s. The groundwork for this evolution began in the 1990s under the auspices of Associate Chief Justice of the Ontario Court of Justice-Co-ordinator of Justices of the Peace Marietta Roberts and Co-ordinator of Justices the Peace

and Senior Judge Gerald Lapkin. In 2001, when Donald Ebbs' term of Associate Chief Justice of the Ontario Court of Justice-Co-ordinator of Justices of the Peace began, he continued to coordinate the transformation.

Donald Ebbs served as Associate Chief Justice-Co-ordinator of Justices of the Peace from 2001 to 2007.

Marietta Roberts served as Associate Chief Justice-Co-ordinator of Justices of the Peace from 1995 to 2001.

1999: Establishment of the Justices of the Peace Remuneration Commission

The 1997 decision of the Supreme Court of Canada in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island (*the *PEI Reference),* held that the constitutional requirement of judicial independence meant that provincial governments must create independent remuneration commissions to deal with issues of judicial compensation. As a result of this decision, Ontario's *Justice of the Peace Act* was amended in 1999 to require the Lieutenant Governor in Council to establish the "Justices of the Peace Remuneration Commission" consisting of three appointees: one selected by the Association of Justices of the Peace of Ontario (which represents the justices of the peace), one selected by the chair of the Management Board of Cabinet, and the chair of the Commission, selected jointly by these two parties. Commencing in 2002, the Commission has conducted an inquiry into the appropriate

levels of salaries, pensions, and benefits for justices of the peace every third year. (Note: Since 1992, a Remuneration Commission has made recommendations about judges' salaries and benefits which are binding on the government.)

2000: Creation of a Professional Association for Justices of the Peace

The Association of Justices of the Peace of Ontario is the professional association representing the interests of the justices of the peace of the Ontario Court of Justice. It was formed in 2000 as a result of the merger of the Ontario-wide Justices of the Peace Association and the Justices of the Peace Association of Metropolitan Toronto, which had represented their respective memberships for over 20 years.

The Association of Justices of the Peace logo. (Source: ajpo.org).

2006: Passage of the *Access to Justice Act*

In the autumn of 2005, the Attorney General of Ontario introduced Bill 14, the *Access to Justice Act, 2005* proposing a number of fundamental changes to the justice of the peace system in Ontario, including:

- A move to a completely full-time bench,
- The establishment of formalized qualifications for appointment,
- An independent and objective appointment process,
- A new disciplinary process through the Justices of the Peace Review Council,
- Formal recognition of the office of regional senior justice of the peace,
- The creation of a part-time *(per diem)* justice of the peace bench – consisting of retired justices of the peace who remain available for assignment.

The *Access to Justice Act* came into force in October 2006.

A "Significant Reform"

In his Opening of Court speech for 2007, Chief Justice Brian Lennox made the following comments concerning the *Access to Justice Act, 2006.*

"The passage of the *Access to Justice Act, 2006* may well represent the most significant reform of the justice of the peace system in Ontario since 1360, the year in which Edward III enacted a statute entitled *What sort of person shall be Justices of the Peace; and what authority shall they have.* The *Access to Justice Act* significantly improves our ability to serve the public and to enhance access to justice of the peace services. "

2006: Phasing Out of Non-presiding Justices of the Peace

Prior to the passage of the *Access to Justice Act*, justices of the peace were appointed in either a non-presiding or presiding capacity. Some of the duties of a non-presiding justice of the peace included considering search warrants and presiding over bail hearings. A presiding justice of the peace had the same duties but could also be assigned to preside over a trial under the *Provincial Offences Act.*

The *Access to Justice Act* amended the *Justices of the Peace Act* in order to phase out this distinction, so that all newly appointed justices of the peace are appointed as presiding justices of the peace.

2006: Qualifications to Become a Justice of the Peace

JUSTICES OF THE PEACE
Ontario Court of Justice

(i) Central West Region

(ii) West Region

The Justices of the Peace Appointments Advisory Committee invites applications for full-time justice of the peace appointments to the Ontario Court of Justice.

For a detailed description of the position and the application form, please visit the Ontario Courts website at **www.ontariocourts.on.ca** or contact:

Janice Cheong, Coordinator, Justices of the Peace Appointments Advisory Committee
720 Bay Street, 3rd Floor, Toronto, Ontario M5G 2K1
Telephone: 416-326-4957

Applications must be received by 4:30 p.m. on Friday, November 23, 2007. If applying for both regions, you must submit separate applications.

Justices of the peace should be reasonably representative of the population they serve.

Advertisement for Justice of the Peace appointments. From the first Annual Report of the Justices of the Peace Appointments Advisory Committee, for the period from January 1, 2007 to December 31, 2007.

Amendments to the Justices of the Peace Act set forth the qualifications to become a justice of the peace. A candidate for the position of justice of the peace must have the minimum requirement of at least 10 years of full-time work experience—either paid or volunteer—and a university degree or college diploma. If the education requirement is not met, an exception can be made if the candidate demonstrates exceptional qualifications, such as relevant life experience.

2006: New Appointment Process for Justices of the Peace

The Justices of the Peace Appointments Advisory Committee (JPAAC) was established by the *Access to Justice* Act in 2006 to make the appointments process more open and transparent, while including more community and regional input.

The JPAAC advertises annually to seek applications for justice of the peace positions in each region, interviews the candidates and develops the application procedure and the general selection criteria, as well as ensuring this information is made available to the public. Only a candidate whom the JPAAC has classified as "Qualified" or "Highly Qualified" is recommended by the Attorney General to the Lieutenant Governor in Council for appointment. (Note: A Judicial Appointments Advisory Committee, for the appointment of judges, has been in existence since 1988.)

2006: Modification to the Justices of the Peace Review Council

The *Access to Justice Act, 2006* made other important amendments to the *Justices of the Peace Act*, including modifications to the structure, powers, and functioning of the Justices of the Peace Review Council. Effective January 1, 2007, the reconstituted Council deals only with complaints and is no longer involved in the appointments process.

In order to make the Justices of the Peace Review Council's complaint and discipline process more effective, it was given the power to conduct hearings and make dispositions. This includes the power to recommend removal of a justice of the peace to the Attorney General.

2006: Sitting on a *Per Diem* Basis

The amendments to the *Justices of the Peace Act* also allowed retired justices of the peace under the age of 70 years to sit on a *per diem* (part-time) basis. By the end of 2009, the Ontario Court of Justice had 44 *per diem* justices of the peace. (As of October 2015, that complement is 345 full-time justices of the peace.) Judges have had a *per diem* system in place since 1990 and that system is recognized in the *Courts of Justice Act.* Generally, *per diem* judges and justices of the peace are assigned in cases of a vacancy or of the illness of a full-time judge or justice of the peace and are also used extensively in dealing with backlog reduction initiatives and special projects.

2008: Change to Retirement Age for Justices of the Peace

As a result of Justice George Strathy's decision in *Association of Justices of the Peace of Ontario v. Ontario* (Superior Court of Justice)[3], the mandatory retirement age for justices of the peace was raised to 75. In his judgment, released on June 2, 2008, Justice Strathy stated:

> Every justice of the peace in Ontario shall be required to retire upon attaining the age of 65 years, but a justice of the peace who has attained retirement age may, subject to the annual approval of the Chief Justice of the Ontario Court of Justice, continue in office until he or she attains the age of 75 years.

This decision applies to all full-time, part-time and *per diem* justices of the peace. As a result of the decision, six full-time, one part-time and six *per diem* justices of the peace who had reached the previous mandatory retirement age of 70 years returned to the Court.

On November 28, 2008 the Justices of the Peace Review Council approved criteria to allow for the continuation in office of justices of the peace until age 75. (Note: The mandatory retirement age for judges is also 75.)

2008: Senior Justice of the Peace

The position of Senior Justice of the Peace was created in the Office of the Chief Justice, effective September 1, 2008. The Senior Justice of the Peace advises and assists the Senior Advisory Justice of the Peace and the Associate Chief Justice-Co-ordinator of Justices of the Peace on all issues pertaining to the education of justices of the peace. The appointment to this position is made by the Chief Justice and has a three-year term which is renewable at his or her discretion.

Justice John Payne served as Associate Chief Justice-Co-ordinator of Justices of the Peace from 2007 to 2013. He was in that position when the Principles of Judicial Office for Justices of the Peace were approved by the Justices of the Peace Review Council. (Courtesy: Ontario Court of Justice).

Justice of the Peace Cornelia Mews served as Senior Justice of the Peace from 2008 to 2013. (Courtesy: Ontario Court of Justice).

Ontario Court of Justice, 2000 to 2015
Three Chief Justices at the Swearing-in Ceremony of Chief Justice Lise Maisonneuve, May 14, 2015

Brian Lennox (centre) served as Chief Justice from 1999 to 2007. He was followed by Annemarie Bonkalo (left) who served from 2007 to 2015 and Lise Maisonneuve (right) who began her eight-year term in 2015. (Courtesy: Office of the Chief Justice, Ontario Court of Justice)

Establishing Principles of Judicial Office

1997: Principles of Judicial Office for Judges

The *Courts of Justice Act 1994* authorized the Chief Judge to establish "standards of conduct for provincial judges." In that context, Chief Judge Sidney B. Linden created a Judicial Conduct Subcommittee which prepared a document entitled *Principles of Judicial Office* in consultation with the judges' associations and judges of the Court. The Ontario Judicial Council adopted the *Principles of Judicial Office* in 1997 as the standard to govern judicial conduct and ethics in Ontario.

2003: Judicial Ethics Advisory Committee

In order to assist judges in dealing with ethical questions, the Ontario Court of Justice created the Judicial Ethics Advisory Committee in 2003 to provide confidential advice to judges and justices of the peace on potential ethical issues.

2005: Ethical Principles for Judges

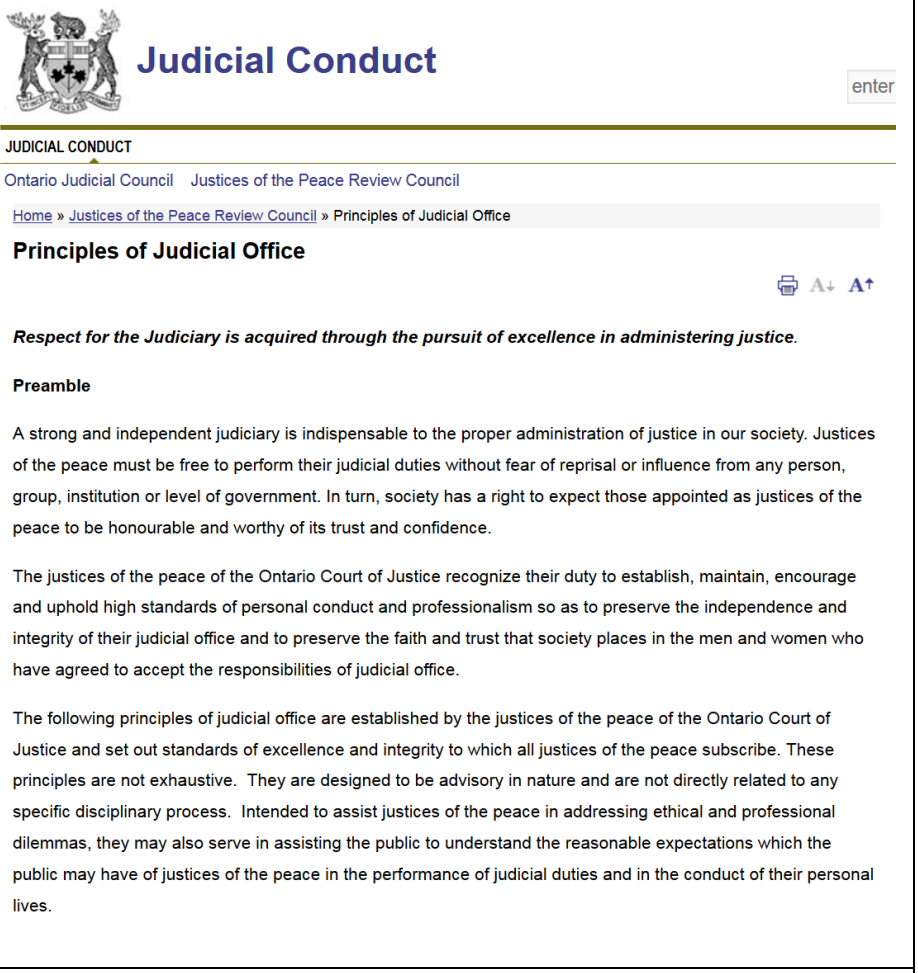
Among other duties, the Canadian Judicial Council investigates complaints of alleged misconduct involving federally appointed judges. In 1998, it published *Ethical Principles for Judges* as an ethical frame of reference for the Canadian judiciary.

Upon the recommendation of the Ontario Conference of Judges and of the Chief Justice's Executive Committee, *Ethical Principles for Judges* was approved by the Ontario Judicial Council and adopted by the Ontario Court of Justice in early 2005, and now also forms part of the ethical standards for judges of the Ontario Court of Justice.

2007: Principles of Judicial Office for Justices of the Peace

Under the *Justices of the Peace Act,* the Associate Chief Justice-Co-ordinator of Justices of the Peace may establish standards of conduct for all justices of the peace in Ontario. This includes the authority to create a plan for bringing those standards into effect once they have been reviewed and approved by the Justices of the Peace Review Council.

In 2007, the Associate Chief Justice-Co-ordinator of Justices of the Peace initiated the development of judicial standards for justices of the peace. The standards were approved by the Justices of the Peace Review Council in November 2007.



Judicial Conduct

enter

JUDICIAL CONDUCT

Ontario Judicial Council Justices of the Peace Review Council

Home » Justices of the Peace Review Council » Principles of Judicial Office

Principles of Judicial Office

Respect for the Judiciary is acquired through the pursuit of excellence in administering justice.

Preamble

A strong and independent judiciary is indispensable to the proper administration of justice in our society. Justices of the peace must be free to perform their judicial duties without fear of reprisal or influence from any person, group, institution or level of government. In turn, society has a right to expect those appointed as justices of the peace to be honourable and worthy of its trust and confidence.

The justices of the peace of the Ontario Court of Justice recognize their duty to establish, maintain, encourage and uphold high standards of personal conduct and professionalism so as to preserve the independence and integrity of their judicial office and to preserve the faith and trust that society places in the men and women who have agreed to accept the responsibilities of judicial office.

The following principles of judicial office are established by the justices of the peace of the Ontario Court of Justice and set out standards of excellence and integrity to which all justices of the peace subscribe. These principles are not exhaustive. They are designed to be advisory in nature and are not directly related to any specific disciplinary process. Intended to assist justices of the peace in addressing ethical and professional dilemmas, they may also serve in assisting the public to understand the reasonable expectations which the public may have of justices of the peace in the performance of judicial duties and in the conduct of their personal lives.

Preamble from "Principles of Judicial Office" for Justices of the Peace, published on the Ontario Court of Justice website. The judges have had a similar set of principles in place since 1997 – and it too can be found on the Ontario Court of Justice website.

Criminal Law Developments

The following is a collection of developments, highlighting the work of the Ontario Court of Justice in its jurisdiction over criminal matters in Ontario.

Introduction of Specialized Courts

Most courts of the Ontario Court of Justice function in the traditional manner. They focus on arriving at findings after applying the law to the evidence and making decisions in a fair and expeditious manner. A variety of "specialized" courts were created across the province in the 2000s with different orientations or accommodations to suit the needs of particular kinds of cases, accused persons, or witnesses. These specialized courts include:

- Mental Health Courts
- Drug Treatment Courts
- Child-friendly Courts
- Domestic Violence Courts
- Aboriginal Persons (*Gladue)* Courts

Justice Paul Bentley, standing on the dais in a Drug Treatment Court at Toronto's Old City Hall. Bentley was a pioneer in the field of problem-solving courts. Here he is shown with Crown Attorney Kofi Barnes (left). Barnes is now a judge of the Ontario Superior Court. Shelley Addley (right) was duty counsel. Bentley died in 2011. (Photo source: Sheldon Gordon, "Falling Through the Cracks," Canadian Bar Association *National*, November 2003).

1999: Delay Reduction Initiatives

In 1999, at the suggestion of the Court, a Delay Reduction Committee was created as a backlog-

reduction initiative. This Committee included members of the Court and government officials. It worked throughout the 2000s reducing backlog by using short-term additional resources and by making adjustments to the system and identifying court locations that needed more significant and permanent changes.

2008: Launch of Justice on Target

In June 2008, the Ministry of the Attorney General launched the *Justice on Target* strategy, a province-wide initiative to reduce delay in the Ontario Court of Justice. An Expert Advisory Panel was struck by the government so that justice participants could provide advice in their field of expertise to help the *Justice on Target* strategy leaders and their team meet the targets. Justice Peter Griffiths, then Associate Chief Justice, was the Court's member on the panel.

The *Justice on Target* strategy unfolded at the local level, in individual court locations. Judges and justices of the peace were engaged with other justice sector participants to identify new solutions to the pressing issues of delay.

2012: New Criminal Rules

The new *Criminal Rules of the Ontario Court of Justice* came into effect on July 1, 2012. The Criminal Rules govern procedures in all criminal proceedings at the Ontario Court of Justice. The previous Criminal Rules were enacted in 1997. In the intervening years, many changes had occurred – in criminal law and practice, court administration, and technology. The new rules are very brief – only five in number – compared to the former 32 rules. Further, the rules are written in plain language with extensive commentary regarding their interpretation and application. This reflects the reality that many accused persons do not have legal counsel or are unrepresented.

The Fundamental Objective of the *Criminal Rules of the Ontario Court of Justice*

Rule 1 of the *Criminal Rules* sets out the fundamental objective and describes what is meant by dealing with proceedings "justly and efficiently."

RULE 1 — GENERAL
Fundamental objective
1.1 (1) The fundamental objective of these rules is to ensure that proceedings in the Ontario Court of Justice are dealt with justly and efficiently.

(2) Dealing with proceedings justly and efficiently includes

(***a***) dealing with the prosecution and the defence fairly;

(***b***) recognizing the rights of the accused;

(***c***) recognizing the interests of witnesses; and

(***d***) scheduling court time and deciding other matters in ways that take into account

(i) the gravity of the alleged offence,

(ii) the complexity of what is in issue,

(iii) the severity of the consequences for the accused and for others affected, and

(iv) the requirements of other proceedings.

2013: The Ontario Court of Justice Participates in the Cross-Over Youth Project

As part of the Court's commitment to work with justice partners to help youth avoid a life of high-risk, criminal behaviour, judges and justices of the peace joined the Cross-Over Youth Project that brought together representatives from a variety of sectors involved in youth criminal justice. The project was aimed at reducing the high rate of incarcerated youth in Ontario's welfare system. In October 2015, a pilot project was launched – in part due to efforts of Justice Brian Scully and Ryerson University professor Judy Finlay – to develop individual and system-wide responses to improve outcomes for these youth.

2015: Launch of Ontario Court of Justice Criminal Justice Modernization Committee

In early 2015, the Court announced a cross-sector committee of senior officials drawn from the Court, the government, the Criminal Lawyers' Association, Legal Aid Ontario and the Ontario Association of Chiefs of Police.

The goal of the Committee is to modernize the Ontario Court of Justice by simplifying Court processes and providing practical operational solutions to better serve the public. It is working to achieve:

- Effective and timely intake and release practices, and meaningful remand appearances,
- Effective pretrial and trial management, and meaningful and timely court appearances, and
- Streamlined and timely processes for in-custody accused, such as better access for defence counsel to in-custody clients and remote appearances.

Introduction of a Skills Seminar for Newly Appointed Judges

Judicial education is one of the primary activities of the Association of Ontario Judges. Together with the Court's Education Secretariat (the body that sets education policy and coordinates education within the Court), the Association is involved in presenting approximately 50 days of education programming for judges in varying formats each year.

Justice David Wake served as Associate Chief Justice from 1999 to 2005. (Courtesy: Ontario Court of Justice).

One of the most innovative programs was launched in 2004, under the leadership of Justice David Wake, then Chair of the Education Secretariat and Associate Chief Justice. That week-long program – Newly Appointed Provincial and Territorial Judges Skills Seminar – has become a staple for judges from provincial and territorial courts across Canada.

Developed by the Court in partnership with the National Judicial Institute and the Canadian Association of Provincial Court Judges (CAPCJ), the program was designed to complement the substantive law

program presented to new appointees from across Canada by CAPCJ. The Skills Seminar develops and enhances skills in a variety of areas, including delivering oral judgments, managing lawyers and lawyer conflict, dealing with self-represented litigants and recognizing ethical challenges that can arise in court.

The Skills Seminar has run in November of each year since its introduction, with many of the faculty members drawn from the Ontario Court of Justice.

Family Law Developments

The following is a collection of developments, highlighting the work of the Ontario Court of Justice in its jurisdiction over family matters in Ontario.

2005: A Year of Adjustments in the Court's Approach to Family Law

In 2005, the Court readjusted its long-term approach to family law. In 1995, the Family Court Branch of the Superior Court of Justice was created – and, at that time, it appeared that this "unified family court" model would expand rapidly through Ontario. This unified family court model had been piloted in Hamilton in 1977.

By 2005, however, it became clear that the pace of expansion would not be as rapid as first thought and that the Ontario Court of Justice would retain its family law jurisdiction in approximately 60% of the province. The Court either shares that jurisdiction concurrently with the Superior Court of Justice or exercises it exclusively in the area of child protection.

To deal with this new reality, the Court reinforced its internal Advisory Committee on Family Law and also created a permanent advisory position of Family Law Counsel within the Court, and began a consultation with the judges of the Court to define a five-year vision for family law work.

2006: Child Protection Backlog Reports

In 2006, the Ministry of the Attorney General and the Ontario Court of Justice jointly established pilot court and community liaison committees at six family court sites in Ontario. The committees' goal was to identify and address child protection backlog issues and to promote dialogue and issue resolution at the local level. The final reports were submitted to the Ministry of the Attorney General later that year.

The committees were chaired by judges of the Ontario Court of Justice and consisted of local parents' counsel, Children's Aid Societies, the Ministry of the Attorney General, the Ministry of Children and Youth Services, the Office of the Children's Lawyer, Legal Aid Ontario, Crown Attorneys, Aboriginal representatives, and individuals from other community resources.

The sites of the committees were Brantford, Kitchener/Cambridge/Guelph, the Northeast Region (Sault Ste. Marie and Sudbury), the Northwest Region (Fort Frances and Kenora), Toronto, and Windsor.

2007: Amendments re Child Protection Assessments

The Assessments Working Group, chaired by a Regional Senior Justice of the Ontario Court of Justice, examined issues associated with assessments in child protection proceedings. The final report of the working group was researched and written by Professor Nick Bala and Dr. Alan Leschied.

The recommendations were presented at the 2006 Justice Summit, and the key short-term recommendations became part of Bill 210, which amended the *Child and Family Services Act*. The amendments came into force on February 28, 2007.

2007: Family Law Vision Statement

Beginning in 2005, the Court's internal Advisory Committee on Family Law conducted a round of consultations with the family judges of the Ontario Court of Justice to define a long-term vision for family law. This culminated in a vision statement released by the Chief Justice in July 2007.

2008 – 2009: Best Practices for Family Programs and Services

The Advisory Committee on Family Law developed Best Practices for the Ontario Court of Justice Family Courts after consulting with family judges as to the services and resources available at each Court. The document recommended that all Courts have a First Appearance Court, Legal Aid Ontario advice and duty counsel, Parent Information Programs, Family Law Information Centres, access to assessments where required, mediators, and designated Family Court staff.

2009: Scheduling Guidelines and Best Practices

In 2009, the Ontario Court of Justice released its Family Court scheduling guidelines and practices. This document was a culmination of work done by the Family Scheduling Guidelines Working Group of the Advisory Committee on Family Law. It sets out guiding principles and best practices when scheduling family matters in the Ontario Court of Justice.

Justice Debra Paulseth was appointed Senior Advisory Family Judge in 2014. (Courtesy: Ontario Court of Justice).

2010: A New Child Protection Training Program for Lawyers

In response to the growing shortage in Ontario of child protection lawyers, Justice Stanley Sherr and the Office of the Chief Justice developed a Child Protection Training Program for lawyers. The first program was held in Toronto in October 2010.

2014: A New Position: Senior Advisory Family Judge

Recognizing the need to support and assist families appearing in the Court, the position of Senior Advisory Family Judge was created. Justice Debra Paulseth was appointed to fill that new position.

Becoming a More Integrated Court

2006: Family and Child Protection Law Education for Criminal Court Judges

To improve its ability to deal with the family caseload, the Court organized the Family Law Primer, an intensive education program on family and child protection law for criminal law judges interested in hearing family law cases.

Held in 2006, the Family Law Primer covered family, child protection, domestic, and enforcement law.

2008 – 2009: Criminal – Family Intersection Working Group

The Ontario Court of Justice began discussions between judges, Children's Aid Societies, Crowns, defence lawyers, Legal Aid Ontario, Ministry of the Attorney General personnel, the police, probation and parole officials, and community resources organizations to develop protocols that would assist with the intersection of family and criminal matters.

Subcommittees examined various issues, including order-sharing between the criminal and the family courts and the establishment of an integrated domestic violence court pilot project.

The Court also created a committee to develop better communication between the Criminal and Family Courts for proceedings involving the same family.

2011: Launch of Integrated Domestic Violence Court

Discussions about the potential for an integrated Domestic Violence Court in Toronto started at the Ontario Court of Justice in 2009. A planning team of judges, defence lawyers, Crowns, Legal Aid Ontario, Ministry of the Attorney General personnel, the police, probation and parole officials, Victim Witness Assistance Program personnel, and community resources organizations met to discuss the possible implementation of the pilot Court.

The First Integrated Domestic Violence Court

The Integrated Domestic Violence Court in Toronto, the first of its kind in Canada, was set up in 2011 to resolve the lack of communication between family and criminal courts. It's an issue that was flagged as a serious problem by the province's Domestic Violence Death Review Committee in 2004.

(Source: Editorial, *Toronto Star*, February 2015.)

In June 2011, the Integrated Domestic Violence Court opened its doors at the 311 Jarvis Street courthouse. In this pilot project, a single judge hears both the criminal and family law cases that relate to one family (excluding divorce, family property and child protection matters) where there has been a charge of domestic violence.

The Court's Commitment to Continuing Education

"We provide continuing and career-long education to our judiciary. We invest significantly, in time and resources, to regularly updating the curriculum, teaching methods and materials we provide to the judiciary in our more than 50 educational programs held each year. "

These are the words of Chief Justice Annemarie Bonkalo in the 2013 Opening of the Courts speech. The innovative educational programming provided by the Court is often delivered by members of the judiciary. Justice David Paciocco is pictured (left) delivering a presentation to the 2015 Annual General Meeting of the Court's judges. Pictured below is the assembled group of judges at an educational seminar at the 2014 Annual General Meeting. (Photos courtesy: Antonio Di Zio).

New and Modern Ways of Serving the Public

In her Opening of Court speech in 2015, Chief Justice Lise Maisonneuve explained that the Court has committed itself to "modernization" and, thus, change. "We have identified, and will continue to identify, innovation and modernization as hallmarks of our judicial leadership." A few examples of the steps taken since 2000 are enumerated as follows:

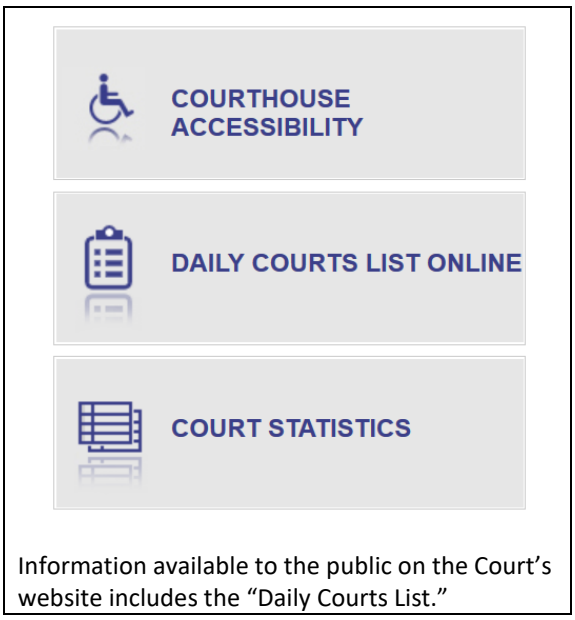
2008: Judicial Information Technology Office

In February 2008, the three courts in Ontario established a new information technology organization known as the Judicial Information Technology Office. The office was established to manage and deliver technology services to the judiciary and oversee technology services on the judiciary's behalf. It is accountable to the executive leads of each of the Offices of the Chief Justice of the three courts in Ontario.

2013: Making Court Statistics Publicly Available

The Court has taken a variety of measures to make information about it more transparent and available to the public.

In April 2013, the Court began posting quarterly Criminal Court data. The Family and Provincial Offences Court data was posted as of July 2013.



Information available to the public on the Court's website includes the "Daily Courts List."

In March 2013, the Court issued a "Protocol Regarding the Use of Electronic Communication Devices in Court Proceedings" which permitted electronic recording devices in the courtroom, unless a contrary court order existed in particular case.

In April 2014, the Court introduced a policy regarding access to digital recordings that permitted the media to obtain copies of court recordings without first being required to obtain a court order.

2014: Electronic Orders and Scheduling

In partnership with Court Services Division of the Ministry of the Attorney General, the Court completed the implementation of criminal electronic orders in courtrooms across Ontario. This ensures that the

most common criminal orders are available to accused persons, offenders, sureties and justice service providers in simple, plain language.

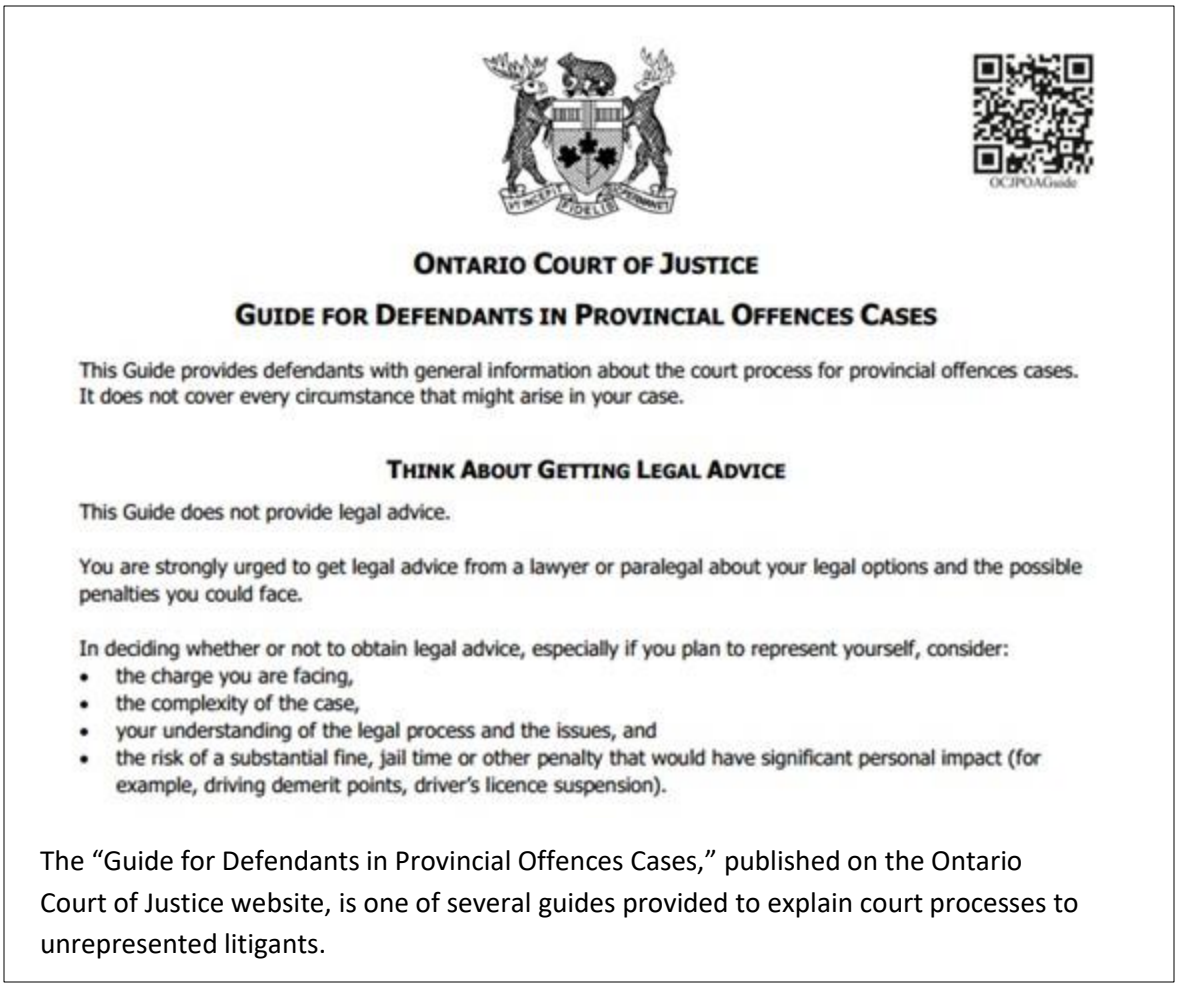
The justice of the peace bench introduced a new electronic scheduling tool to promote province-wide consistency in scheduling practices. Work began to develop an electronic scheduling tool for the judges.

2014: Posting Court Lists Online

Together with the Court Services Division and the Superior Court of Justice, the Court began to post daily court lists online.

2013-2014: Supporting Unrepresented Litigants

To support the many unrepresented litigants who appear in Criminal, Family and Provincial Offences Courts, the Court published several guides containing basic information aimed at demystifying and explaining Court processes.



ONTARIO COURT OF JUSTICE

GUIDE FOR DEFENDANTS IN PROVINCIAL OFFENCES CASES

This Guide provides defendants with general information about the court process for provincial offences cases. It does not cover every circumstance that might arise in your case.

THINK ABOUT GETTING LEGAL ADVICE

This Guide does not provide legal advice.

You are strongly urged to get legal advice from a lawyer or paralegal about your legal options and the possible penalties you could face.

In deciding whether or not to obtain legal advice, especially if you plan to represent yourself, consider:

- the charge you are facing,
- the complexity of the case,
- your understanding of the legal process and the issues, and
- the risk of a substantial fine, jail time or other penalty that would have significant personal impact (for example, driving demerit points, driver's licence suspension).

The "Guide for Defendants in Provincial Offences Cases," published on the Ontario Court of Justice website, is one of several guides provided to explain court processes to unrepresented litigants.

Unrepresented Parties

In all cases, the Court strives to ensure that justice is done and that proceedings are fair to both parties. But that task is especially complicated when parties are unrepresented, whether in family or criminal matters. Justice William Horkins of the Ontario Court of Justice describes the challenges in the context of criminal proceedings.

> *Historically, many judges saw their role as hearing and deciding on the evidence and arguments the parties put before them. Litigants have a fair degree of latitude in deciding what they consider to be relevant and what positions and arguments they want to advance, and it's usually*

not the judge's role to question the choices they make. But when you're faced with an unrepresented litigant, especially an unrepresented defendant, the court has to take a more interventionist approach.

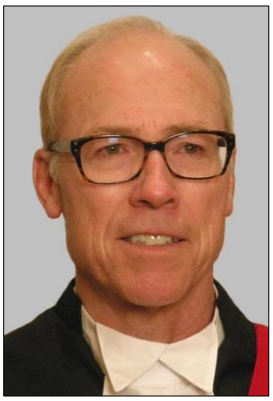
For example, unrepresented defendants often want to tell their side of the story, and attempt to do so simply by standing up and addressing the court directly. Obviously the judge has to inform them that if they want to give evidence they'll have to take the stand. But the judge also has to make sure that they're aware of the possible consequences of that decision: the Crown will cross-examine them, including their character if they choose to put it in issue, and any prior statements they may have made.

It's a difficult line for a judge to walk. On the one hand, you want to make sure that the defendant understands the proceedings and is making informed choices. At the same time, you have to remain mindful of the fact that you're there to be a referee—not a coach. In the abstract, the difference between explaining how the system works and giving legal advice seems clear, but it can become much more blurry when you're confronted with a direct and practical question like "Should I testify?"

Trial judges are always conscious of the dangers of erring too far on one side or the other. No one wants to see a verdict overturned on appeal—either on the basis that you went too far or didn't go far enough in ensuring that the defendant understood the consequences of what they were doing – and require everyone to go through another trial.

Even in simple cases, dealing with an unrepresented defendant can be time-consuming – and of course, some cases are far from simple. I've had trials where we've reached the end of the Crown's case and it has seemed to me that I should at least be considering a directed verdict. If I think there's an issue of that magnitude, I'll encourage the defendant to go visit duty counsel

and get at least summary advice.



Justice William Horkins (Courtesy: Ontario Court of Justice).

Justice Horkins has developed a checklist for judges and justices of the peace dealing with unrepresented accused, as well as a more comprehensive judicial education program.

There's a real thirst for guidance in this area. This Court is highly attuned to the need to respond fairly and effectively to unrepresented defendants, and judges are eager to develop their skills and resources.

(Note: A "directed verdict" is a decision by the judge to dismiss a case before the defence has called any evidence because the Crown has not made out the essential elements of the offence.)

(Source: Interview with W. Horkins for OCJ History Project, 2015.)

Serving Aboriginal Communities

2001: Gladue (Aboriginal Persons) Court Created in Toronto

In 1999, the Supreme Court of Canada, in the decision *R. v. Gladue,* established criteria for the application of paragraph 718.2(e) of the *Criminal Code* in the sentencing of Aboriginal offenders. The Court recognized and underlined the need for sensitivity to the particular needs of Canada's Aboriginal communities within the court system. It recognized that courts and Aboriginal communities must work to design and administer a judicial process with courts equipped to apply the *Gladue* guidelines.

A *Gladue* (Aboriginal Persons) Court was established in 2001 at the Old City Hall courthouse in Toronto. (Courtesy: Office of the Chief Justice, Ontario Court of Justice)

In 2001, a *Gladue* Court was established in Toronto at the Old City Hall courthouse. [At the time there were] over 25,000 First Nations persons living in the City of Toronto. The Court was established as a result of discussions between the judges of the Ontario Court of Justice and the Legal Aid Clinic for Aboriginal Legal Services of Toronto. The Aboriginal Legal Services of Toronto employed three *Gladue* caseworkers, to write reports on the life circumstances of Aboriginal offenders at the request of defence counsel, the Crown Attorney, or the judge.

These reports (known as *Gladue* reports) contain recommendations that the Court may consider in sentencing and can be prepared for Aboriginal offenders in any Court in Toronto, as well as for Aboriginal offenders in other regions.

The *Gladue C*ourt takes into account the particular circumstances of Aboriginal offenders and takes a restorative approach to sentencing in the event of conviction.

(Note: Since 2001, a variety of *Gladue C*ourts have opened in regions across Ontario.)

The seven regions of the Court. (Source: Ontario Court of Justice).

2014: Implementing Recommendations of the "Fly-in Court Working Group"

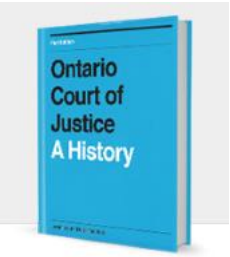
The Court has long had judges fly into remote communities to conduct criminal and family proceedings. As reported in 2013, the Court co-chaired a Fly-in Court Working Group to identify practical ways to improve justice services in the Far North. Many of the Working Group's recommendations were implemented in 2014. For example, the Court began scheduling more dedicated Youth Court days in Pikangikum and dedicated one judge to hear family and child protection cases during the Court's Attawapiskat sittings.

An Interest in the Court's History

Recording the Story of the Court

In 2005, the Ontario Court of Justice issued its first Annual Report. One feature of the report was "*A Selective History of the Ontario Court of Justice*." This marked a growing interest in recording the Court's history which had, until then, largely remained undocumented.

That first history was prepared under the leadership of Chief Justice Brian Lennox. His successor, Chief Justice Annemarie Bonkalo, expanded on the concept by commissioning a team of authors to create *Ontario Court of Justice: A History* ("OCJ History").



The OCJ History, completed in 2015, presents the Court's history in an online format through a series of essays, overviews of four time periods, descriptions of major changes, and selected profiles, stories and notable cases.

Historical Exhibit in Windsor Courthouse

Over a 12-year period, Justice Douglas Phillips created a permanent historical exhibit for the Windsor courthouse. He has amassed a display of newspaper articles, judicial photos and other historical items relating not just to the Ontario Court of Justice but to all levels of Court.

The final phase of his work is a display of robes worn by lawyers and members of the judiciary in Ontario over the past 75 years. The robes are fitted to mannequins by a seamstress and each set of robes must be fitted with long underwear (per Smithsonian Institution standards) to prevent damage to the historical fabric caused by the polyurethane mannequins.

As of 2015, Justice Phillips' goal is to have a floor-to-ceiling temperature and humidity-controlled glass

Mannequin wearing justice of the peace gown from historical exhibit in the Windsor courthouse, 2015. (Courtesy: D. Phillips)

case constructed at the Windsor courthouse to display 12 mannequins, along with the 41 wooden cabinets and 430 historical items already displayed.

Justice Phillips was aided in his work by colleagues from the Ontario Court of Justice, including Justice Gregory Campbell and Justice of the Peace Susan Whelan.

(Source: Adapted from D. Phillips, "Preserving Our Past, With Your Help", published in "Benchmark," the internal newsletter of the Ontario Court of Justice)

The Court in 2015

A New Chief Justice: Lise Maisonneuve

> I learned – coming from a small town in Ontario's north – that this is a large, diverse province, with many distinct regions and voices, facing many different issues and challenges. And yet, we are one Court, in one province – striving to provide fair, open and modern justice to all.
>
> *Lise Maisonneuve, on being sworn in as Chief Justice of the Ontario Court of Justice, May 14, 2015.*

When Lise Maisonneuve was sworn in as the Chief Justice of the Ontario Court of Justice, she represented two "firsts." She was the first francophone Chief Justice and the first from northern

Ontario, having grown up in Timmins. Prior to becoming Chief Justice in 2015, Maisonneuve served as the Regional Senior Justice of the East Region and then as Associate Chief Justice.

Swearing in of Lise Maisonneuve as Chief Justice of the Ontario Court of Justice, May 14, 2015

Making it official: Lise Maisonneuve signs her oath of office as Chief Justice.

Outgoing Chief Justice Annemarie Bonkalo (right) congratulates new Chief Justice Lise Maisonneuve (left), with Chief Justice of Ontario George Strathy (centre). (Courtesy: Office of the Chief Justice, Ontario Court of Justice)

Associate Chief Justices

The Chief Justice of the Ontario Court of Justice is supported by two Associate Chief Justices. As of 2015, these positions were filled by Faith M. Finnestad (whose role includes serving as Co-ordinator of Justices of the Peace) and Peter DeFreitas. Like Chief Justice Maisonneuve, DeFreitas was sworn into his leadership position in 2015.

Swearing in of Peter DeFreitas as Associate Chief Justice, June 24, 2015

Front row: Justice Mary Teresa Devlin; Justice Donald Dodds (retired); Associate Chief Justice Peter DeFreitas; Regional Senior Justice of the Peace Linda J. Kay; Justice Ferhan Javed. Second row: Justice David Stone, Justice Esther Rosenberg; Justice Michael Block; Justice Joseph De Filippis. Third Row: Justice Graham Wakefield; Justice Ronald Richards; Justice of the Peace Allison Forestall; Justice Katrina Mulligan; Justice of the Peace Dolly V. Mecoy; Justice Gregory Regis; Justice John Adamson.

(Courtesy: Ontario Court of Justice)

Associate Chief Justice Faith M. Finnestad, Associate Chief Justice Peter DeFreitas and Chief Justice Lise Maisonneuve. (Courtesy: Ontario Court of Justice).

Conclusion

In one sense, the modern history of the Court is better documented than previous periods, in part due to the Court's relatively recent practice of publishing Annual and Biennial Reports. However, at the time of writing the OCJ History, the events of the previous 15 years (2000 – 2015) were so recent that it would be difficult to analyse their impact and significance. Future historians can look back upon them with the benefit of in-depth research and the perspective afforded by the passage of time.

Ontario Court of Justice – 2015 Snapshot.

List of judges and justices of the peace (full-time and per diem) as of October 2015.

Judges

Full-time

Adams, Peter Ralph	Caldwell, Kathleen J.	Dunn, Melanie D.	Hearn, Gary F.
Adamson, John F.	Cameron, Lisa M.	Dunn, Patrick W.	Hoffman, Mitchell S.
Agro, P.H. Marjoh	Campbell, Gregory A.	Dwyer, Nyron	Hogan, Mary L.
Alder, Ann	Campling, Frederic M.	Edward, Gethin B.	Horkins, William B.
Allen, J. Elliott	Carr, Ralph E.W.	Elder, Joyce	Hornblower, G. Mark
Armstrong, Simon C.	Caspers, Jane E.	Epstein, Michael J.	Hoshizaki, Jennifer Ruth
Austin, Deborah J.	Chaffe, James R.	Evans, John D.D.	Humphrey, Richard A.
Bacchus, Sandra	Chapin, Leslie	Favret, Lucia Piera	Hunter, Stephen J.
Baig, Dianne Pettit	Chisvin, Howard I.	Feldman, Lawrence T.	Javed, Ferhan
Baker, Kathleen	Clark, Steven R.	Felix, Marquis S.V.	Jennis, Richard E.
Baldwin, Lesley M.	Clay, Philip	Finnestad, Faith M.	Johnston, Cynthia
Band, Patrice F.	Cleary, Thomas P.	Fraser, Hugh L.	Jones, Carolyn J.
Beatty, George	Cleghorn, Sarah	French, Paul	Jones, Penny J.
Beninger, Robert	Clements, S. Ford	Fuerth, Stephen J.	Kastner, Nancy S.
Bhabha, Feroza	Cohen, Marion L.	Gage, George S.	Keaney, James J.
Bigelow, Robert G.	Cole, David P.	Gee, Robert	Keast, John D.
Bishop, Peter T.	Colvin, J.A. Tory	George, Jonathon	Kehoe, Catherine Ann
Blacklock, W. James	Condon, John Paul	Ghosh, Amit	Kelly, Edward
Block, Michael	Cooper, Alan D.	Giamberardino, Franco	Kelly, Robert
Bloomenfeld, Miriam	Copeland, Jill M.	Gibson, David	Kenkel, Joseph F.
Blouin, Richard	Crewe, Frank	Glaude, G. Normand	Khawly, Ramez
Bode, Marc	Culver, Timothy A.	Glenn, Lucy C.	Khemani, Sonia
Boivin, Ronald Dennis Joseph	Currie, Paul R.	Gorewich, William A.	Klein, Lawrence
Bondy, Sharman S.	Curtis, Carole	Graham, M. Edward	Knazan, Brent
Borenstein, Howard Joseph A.	Dawson, Nancy A.	Graydon, Robert	Knott, Richard T.
Borghesan, Pamela	De Filippis, Joseph A.	Green, Melvyn	Konyer, Stuart
Botham, Louise	Dean, Lloyd C.	Greene, Mara	Kowalyshyn, Paul J.S.
Boucher, Patrick	DeFreitas, Peter	Gregson, Nathalie	Kozloff, Neil
Bourgeois, Julie	Deluzio, Elaine	Griffin, Geoffrey James	Krelove, Glenn D.
Bourque, Peter Nicholas	Devlin, Mary Teresa E.	Grossman, Jack M.	Kwolek, Romuald F.
Bovard, Joseph W.	Di Zio, Antonio	Guay, André L.	Lahaie, Diane
Brewer, Carol Anne R.	DiGiuseppe, Dino	Hall, Aston J.	Lalande, Randall W.
Brophy, George J.	Dobney, S. Gail	Hardman, Paddy A.	Lambert, Martin P.
Brown, Beverly A.	Doorly, Kate	Harpur, C. Michael	Lapkin, Gerald S.
Brown, Stephen D.	Dorval, Célynne S.	Harris, C. Roland	LeDressay, Richard J.
Brownstone, Harvey P.	Douglas, Jon-Jo A.	Harris, David	Legault, Jean
Brunet, Jonathan	Douglas, Norman S.	Harris, Peter A.J.	LeRoy, Jeanine
Budzinski, Lloyd M.	Downes, Philip	Harrison, Steven P.	Letourneau, Allan Gary
Buttazzoni, Andrew	Duncan, Bruce W.	Hawke, Kathryn L.	Libman, Rick N.

Judges			
Full-time			
Lipson, Timothy R.	Nicklas, Sharon M.	Scully, Brian M.	Zabel, Bernd E.
Lische, Karen L.	O'Brien, Larry B.	Selkirk, Robert	Zisman, Roselyn
Loignon, Jacqueline	O'Connell, Sheilagh	Serré, Louise	Zivolak, Martha B.
Lynch, John T.	O'Dea, Michael P.	Shamai, S. Rebecca	Zuker, Marvin A.
MacLean, Susan C.	ODonnell, Fergus	Shandler, Riun	
Maclure, Allan S.	Oleskiw, Diane	Sherr, Stanley B.	
MacPhee, Bruce E.	Otter, Russell J.	Sherwood, Kevin	
Maille, Gilbert R.	Paciocco, David	Skowronski, John S.	
Maisonneuve, Lise	Parent, Lise S.	Sopinka, Melanie A.	
Malcolm, Wendy	Parry, Craig A.	Sparrow, Geraldine N.	
Maresca, June	Paulseth, Debra A. W.	Spence, Robert J.	
Marin, Sally E.	Pawagi, Manjusha	Speyer, Maria	
Marion, Ronald A.	Payne, John A.	Starr, Victoria	
Martin, Eileen	Pelletier, Joyce L.	Stribopoulos, James	
Mathias McDonald, Catherine	Perkins-McVey, Heather	Sullivan, William J.	
Maund, Douglas B.	Perron, Alain H.	Takach, John D.	
McArthur, Heather	Phillips, Douglas W.	Tetley, Peter	
McFadyen, Anne E.E.	Pringle, Leslie C.	Tobin, Barry M.	
McHugh, Kevin G.	Pugsley, Bruce E.	Tuck-Jackson, Andrea Edna E.	
McKay, A. Thomas	Rabley, Wayne G.	Vaillancourt, Charles H.	
McKerlie, Kathryn L.	Radley-Walters, S. Grant	Valente, Frank	
McLeod, Donald	Rawlins, Micheline A.	Villeneuve, Robert P.	
McLeod, Katherine L.	Ray, Sheila	Vyse, D. Terry	
McLeod, Malcolm	Ready, Elinore A.	Wadden, Robert	
Meijers, Enno	Renaud, Gilles	Wakefield, Graham	
Merenda, Salvatore	Richards, Ronald J.	Watson, Ann Jane	
Minard, Ronald A.	Ritchie, John M.	Weagant, Brian	
Misener, Mary E.	Robertson, Paul	Webber, Matthew C.	
Mocha, Cathy	Rocheleau, Michelle	Weinper, Fern M.	
Monahan, Paul F.	Rodgers, Gregory P.	West, Peter Caldwell	
Moore, John C.	Rogers, Lynda J.	Westman, Colin R.	
Moore, Kimberly	Rogerson, Robert W.	Whetung, Timothy C.	
Morneau, Julia A.	Rose, David S.	Wilkie, Peter H.	
Mulligan, Katrina	Rosenberg, Esther	Wilson, Joseph B.	
Murray, Ellen B.	Ross, Lynda S.	Wilson, N. Jane	
Nadel, Joseph	Rutherford, Rebecca	Wolski, William R.	
Nadelle, Jack D.	Sager, Melanie	Wong, Gerri Lynn	
Nakatsuru, Shaun Shungi	Schnall, Eleanor M.	Wong, Mavin	
Neill, K. Stacy	Schneider, Richard	Wright, J. Peter	
Nelson, C. Ann	Schreck, P. Andras	Wright, Peter Jeffrey	
Newton, Petra E.	Schwarzl, Richard	Young, Bruce J.	

Judges		Justices of the peace	
Per diem		Full-time	
Anderson, Charles D.	March, Stephen A.J.	Agnew, Wendy	Child, Arthur (Jim)
Atwood, Hugh K.	Marshall, Lauren E.	Aharan, Peter	Churley, Marilyn
Beaman, Judith C.	Masse, Rommel G.	Aleong, Sonia	Clare, James H.
Bélanger, Paul R.	McGowan, Kathleen E.	Allison, Carol Ann	Clark, Andrew C.
Bellefontaine, Paul L.	McGrath, Edward J.	Altobello, Gerry	Clark, Douglas W.
Bennett, Norman	Morgan, J. Rhys	Amenta, Angelo	Clysdale-Cornell, Pat
Bonkalo, Annemarie E.	Morrison, Wayne D.	Anand, Jeannie	Conacher, Mark
Bradley, William W.	Nevins, James P.	Anderson, Charles	Coopersmith, Maxine
Carr, David G.	Omatsu, Maryka	Anstey, Sandra	Costa, Ana
Casey, Jeff	Ormston, Edward F.	Avrich-Skapinker, Mindy B.	Cotter, Ralph
Cavion, Bruno	Palmer, Gary V.	Baas, Edith	Cottrell, John R.J.
Chester, Lorne E.	Pockele, Gregory A.	Baker, Mitchell H.	Coulas, Claudette
Cooper, Donald S.	Regis, Gregory	Ballam, Dianne J.	Crawford, Lena
Cowan, Ian B.	Reinhardt, Paul H.	Barnes, Michael	Creelman, John E.
Crawford, James C.	Roberts, Marietta L.D.	Baum, Karen	Cremisio, Angelo
DeMarco, Guy F.	Stone, David M.	Beck, Ruby Y. A.	Cruz, Lurdes
Ebbs, Donald A.	Taylor, Paul M.	Billich, Samuel W.	Cureatz, Sam L.
Fairgrieve, David A.	Thibideau, Lawrence P.	Bisson, Richard E.	Currie, Donald
Forsyth, Frederick L.	Wake, J. David	Blauveldt, Anna	Curtis, Mark
Fournier, Robert N.	Waugh, John D.G.	Blier, Jean-Marie	Cuthbertson, Michael A.
Frazer, Bruce J.	Webster, A. Ross	Bourbonnais, Sylvie-Émanuelle	D'Ignazio, Daniele
Griffiths, Peter D.	Weseloh, Robert T.	Boychyn, Robert G.	Danbrook, William S.
Hackett, Donna G.	Wolder, Theo	Brecher, Paulina	Daniel, Esther
Halikowski, Donald J.	Woolcott, Margaret F.	Bremner, Melanie	De Gannes, Martha
Hogg, Derek T.	Zuraw, Anton	Brihmi, Mohammed	Debacker, Holly R.
Hryn, Peter		Brown, Hugh J.	Debartolo, Ermelinda
Hunter, R.G.E.		Bryant, Kathleen M.	Dechert, Kenneth W.
Katarynych, Heather L.		Bubba, James V. N.	Desjardins, Jacques
Kerrigan Brownridge, Jane		Bubrin, Vladimir	Di Lorenzo, Dan
Kirkland, D. Kent		Buchanan, Donald W.	Diaz, Kristine
Kukurin, John		Budaci, Stephen	Doelman, Donna I.
Kunnas, Gary R.		Burton, Samantha	Dombrowsky, Leona
Lacavera, Alphonse T.		Camposano, Felicitas	Donio, Marcel
Lebel, Jean-Gilles		Caron, Bernard	Doran, John
Lennox, Brian W.		Cassano, Helena	Dresher, Karin
Lenz, Kenneth G.		Chahbar, Abdul	Dube, Chantal J.
Lévesque, J.F. Réginald		Chang Alloy, Vernon A.	Dudani, Shailesh
Livingstone, Deborah K.		Chapelle, Deanne	Dudar, Donald
MacKenzie, Robert S.G.		Charyna, Holly	Duggal, Mangesh
Mahaffy, Guy		Chernish, Carol	Edwards, Clement
Main, Robert P.		Chiang, Jack	Emrich, Cheri

Justices of the peace			
Full-time			
Europa, Delano V.	Hoffman, Susan	Legault, Serge	Murphy, Karen
Eustaquio-Syme, Milagros	Hong, Jay	Lewis, Mathilda	Mutuma, Chimbo
Evans, Susan D.	Hoppe, Daisy	Logue, Louise	Neilson, Elizabeth M.
Fallon, Sally A.	Hudson, Sylvia	Longe, Cledwyn	Nelson, Deborah
Fantino, Gregory	Humeniuk, Carolyn	MacDonald, John	Nestico, Sam
Farnand, Marsha	Hundal, Bobby	MacEachern, Lauchlin J.	Ng, Sunny
Farnum, John B.	Hunt, David J.	Mackey, Brian	Nichols, Paula J.
Fatsis, Vasilio	Hurst, Calvin V.	MacKinnon, Danalyn	Norton, Brian O.
Fisher-Grant, Veruschka	Hurst, Michael	Macphail, Paul	Opalinski, Joanna T.
Florence, Darlene	Huston, Debra	Madigan, Kevin V.	Parsons, Ernie
Forestall, T. Allison	Jafar, Salma	Magoulas, Adriana	Peace, Glen
Forfar, Ann C.	John, G. Sunit	Malik, Abdul	Pearson, Linda
Forgues, Ginette	Johnson, Ann	Malik, Asad	Peltzer, Christopher
Forrest, Grainne M. K.	Johnson, Kathy-Lou	Mankovsky, Sheine	Phillipps, Lloyd
Foulds, Tom L.	Johnston, Alfred (Budd)	Manno, D. Gerald	Phillips, Bruce I.
Frederick, H. Jane	Johnston, Ronald J.	Marchand, Basile V.	Pilon, Francois J.
Frederiksen, Michael	Jolicoeur, Michel F.	Mariasine, Jason	Premji, Karim
Froese, Thomas Pl	Kay, Linda J.	Marquette, Andrew C.	Prestage, Ronald
Gale, Helen M.	Keilty, David R.	Marum, Patrick	Puusaari, Anne-Marie
Gettlich, Peter M.	Kelly, Brett	McAleer, Diane M.	Quamina, Odida T.
Gibbon, Anna	Kerbel, Ruth	McCraw, Roger Jr.	Quinn, Clifford (Barry)
Gilani, Maimun	Khan, Rizwan	McIlwain, Constance	Quon, Richard
Girault, Louisette	Kirke, Leslie	McKeogh, Thomas	Radtke, Herbert H.
Giulietti, Rosanne	Kitlar, Michael G.	McLeod, Margot	Radulovic, Zeljana
Glassford, Thomas	Konstantinidis, Paula	McMahon, F. Michael	Ralph, Warren G.
Glover, Joni E.	Kowarsky, Paul H.	McMahon, Gary W.	Renaud, Angela
Greene Summers, Audrey	Kreling, Herbert H.	McMahon, J. Gary	Rerup, Renee
Grewal, Ajit (Jiti)	La Caprara, Dan	McNally, Robert H.	Ritchie, Liisa
Griffith, George	Lafleur, Diane	Mechefske, Monique	Roberson, Sharon B.
Gunness, Alston	Lall, Esme	Mecoy, Dolly V.	Robinson, Donovan
Guthrie, John	Lancaster, Stephen	Mews, Cornelia	Roffey, Rhonda
Hampson, Anna	Langlois, Paul	Mills, Lina M.	Rogers, Malcolm S. W.
Hartt, Constance	Lau, Grace P. K.	Miskokomon, Marsha L.	Rogers-Bain, Nancy
Hawtin, Jane	Lauzon, Julie	Mitchell, Nancy	Rohan, Noel R.
Hayden, Darlene	Lavallee, Patricia	Moffatt, Jane	Rojek, Walter W.
Hefkey, A. Lis	Le Blanc, Roger J.	Mora, Felix	Romagnoli, Adele
Henderson, Catherine	Leaman, Bruce I.	Moreau, Michel J.	Rosenfield, Joseph
Hickling, Catharine E.	Leblanc, Linda	Morin, Karine	Ross, Lillian D.
Hiscox, Peter J.A.	Leclerc, Pierre O.	Morris, Jill	Ross, Norman E.
Hodgins, Patricia	Lee, Denis	Moses, Moira M.	Ross Hendriks, Mary
Hodgins, Theodore A.	Legate Exon, Ruth	Muraca, Luigi J.	Rotondi, Santina (Tina)

Justices of the peace		Justices of the peace	
Full-time		**Per diem**	
Ryan, Gerald	Walker, Karen R.	Akkanen, John A.	Kivell, Richard
Ryan-Brode, Maureen	Walton, Bonnie C.	Avery, Lawrence W. J.	Le Sarge, Richard M.
Santos, Cristina	Wassenaar, Tina	Babcock, Elaine	Lecouteur, Gilles
Scarlett, Deborah	Watson, Lorraine A.	Baldelli, Ivana	Levitt, Janice
Scarpato, Raffaella	Waugh, Barbara J.	Bannon, Gene A.	Lewin, Robert H.
Scully, Lauren	Weiss, Hilda	Beck, Ronald	Lippingwell, David R.
Seglins, Carol	Welsh, Paul A.	Begley, Donald L.	Logan, Tom
Seguin, Monique	Whelan, Susan	Benn-Ireland, Tessa	MacDonald, Dan M.
Seneshen, Robert	White, Dennis D.	Bonas, Prior N.	McHenry, Patricia E.
Shelley, Mary	Williams, Mary Jane	Boon, Kerry	McKechnie, Clayton
Shoniker, Catherine	Wilson, Dennis A.	Boyuk, Dolores M.	Miller, Kathleen A.
Shortell, Robert D.	Wilson, Peter W.	Brown, Leslie	Moran, Barry J.
Shortt, Jamie	Winchester, Claire	Bruinewood, Jacob W.	Mulloy, Norman W.
Shousterman, Rhonda	Woldemichael, Sisay	Burgess, Neil	Napier, Alice
Smythe, Marie-Christine	Woloschuk, Jerry S.	Campbell, Charles R.	Oates, James E.
Solomon, Philip (Phil)	Wong, Ruby	Carmichael, Veronica	Obokata, Leonard
Solursh, Gerald	Worku, Habte	Carroll, Jack	Pallett, Laurie K.
Souliere, Beverly	Woron, Catherine G.	Casey, Wendy	Pasch, Terry
Spence, Alex	Yamanaka, Ronald M. (Ron)	Chandhoke, Inderpaul S.	Quinn, Marielle
Steenson, Terence	Young, J. Carl	Chaput, Gordon	Read, Duncan
Stethem, Lynette A.	Ziegler, James J.	De Jong, Jeannette	Redmond, L. Jerome
Stewart, G. Susan	Zito, Roberto	Deacon, Patrick	Rodney, Avis M.
Stiff, Janice	Zuliani, Raymond	Devellano, Linda	Ross, William S.
Stinson, Thomas		Devine, Frank	Rozon, Louise E.
Swords, Bernard		Faulkner, Ralph	Saab, Lorraine P.
Symons, Allan		Fayolle, Leon	Sculthorpe, Richard C. P.
Tahiri, Najib		Fletcher, C. Jill	Squires, Frank
Taylor, Stewart A.		Forster, Bridget I.	Stafford, David S.
Tennant, Patricia D.		Gay, Robert T.	Stanghetta, Philip M.
Then, Milan		Guindon, Luc	Stevely, Donald M.
Thompson, Michele		Haddad, Suzanne	Stewart, William H.
Tivey, Lynn E.		Hepburn, Wilmer	Straughan, Carollyn
Toulouse, Lori-Ann		Hilton, Susan	Tatangelo, Lorenzo
Triantafilopoulos, Chris		Holmes, Claudette L.	Turtle, William G.
Valentine, Karen		Hudson, Brian	Walton, Anthony
Valeriano, Patrice		Hudson, Maurice G.	Whalen, Ronald
Vaughan, Jan M.		Hunter, Liette	Wiley, Jack
Visser, Kelly		Jackson, Diane L.	Woodworth, Sharon M.
Vu, Latly		Jadis, Carole	
Waisberg, Stephen L.		Jensen, Karen	
Walker, Eileen		Jewitt, Teresa	

(Source: Office of the Chief Justice, Ontario Court of Justice)

[1] Matt Elton, "When does history end?", *BBC History Magazine,* October 2009. In this article, the author quotes Professor Paul Fouracre, University of Manchester and that quote is paraphrased here.
[2] In 2011, *Benchmark* was expanded to include information about justices of the peace.
[3] *Association of Justices of the Peace of Ontario v. Ontario (Attorney General) [2008] O.J. No. 2131*(Superior Court of Justice).

Period IV: 2000-beyond Major Changes

Problem-Solving Courts

Introduction

The Ontario Court of Justice led the way, establishing the first problem-solving court in Canada. Toronto's Mental Health Court opened its doors in Courtroom 102 in Old City Hall in May 1998. Since then, more than 50 problem-solving courts have been established across Ontario, including those specializing in drug treatment, alcohol treatment, domestic violence, *Gladue* and Aboriginal persons, community treatment and mental health issues.

What distinguishes a "problem-solving" court from a "traditional" court? In a traditional court, the focus is on applying the law to the evidence presented, and making a decision. A problem-solving court – also referred to as a "specialty" court – includes different types of accommodations to suit the needs of particular kinds of cases, accused persons or witnesses. These courts are also intended to offer a broad range of programs and supports to help the people who come before them.

Considered revolutionary when they were first introduced in Ontario, problem-solving courts were a response to the growing concern about the over-representation in the criminal justice system of people from marginalized and disadvantaged communities – including persons with mental health challenges and those with drug dependencies, for example.

"These courts were a practical response to a real need," recalled Justice Richard Schneider who sat in Mental Health Court in Old City Hall from 2000 to 2012. "The mentally ill were getting lost in the criminal justice system, spending huge amounts of time in custody on minor matters."[1]

Justice Judith Beaman sat in Ottawa's Drug Treatment Court from 2006 to 2012 and subsequently led the initiative to create Kingston's Drug Treatment Court which opened in 2012. Judging in a problem-solving court gave her a "better understanding of why people who have stumbled in life can't lift themselves above the fray." When dealing with offenders with addiction issues, she felt she "wasn't effecting any change in their lives." Sitting in Drug Treatment Court, Beaman was afforded the opportunity to learn more about the background of those appearing before her. Court supervision, along with the supports that could be provided to these people in this Court, Beaman witnessed people struggling with addictions "become stabilized, productive and able to make massive changes in their lives."[2]

Justice Judith Beaman (Photo courtesy of J. Beaman)

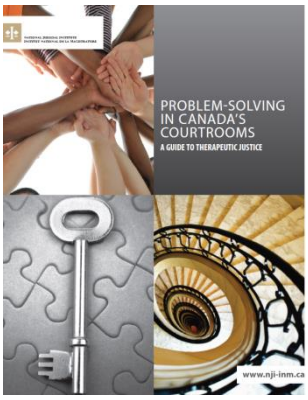
Justice Heather Perkins-McVey, as defence counsel in Ottawa, was involved in the creation of Ottawa's Mental Health Court in 2007. Now sitting as judge in that Court following her appointment to the bench in 2009, she recalled the lessons she has learned from this experience and how she has applied them in "traditional courts." "It has given me a better understanding of the important role a judge can play in people's lives. The judge can take a real leadership approach when they listen and support those who appear before them. That can positively influence the outcomes for people when they know judges are interested in and encouraging to them."

A Look at How These Courts Work

Variations in approach and procedure may be observed in the operation of the various problem-solving courts, reflecting their essentially specialized nature. However, all typically incorporate:

"…a problem-solving focus; a team approach to decision-making; integration of social services (with) judicial supervision of the treatment process; direct interaction between the defendants and the judge; community outreach; and a proactive role for the judge inside and outside of the courtroom."[3]

Therapeutic Jurisprudence and Problem-solving Courts



The concept of "therapeutic jurisprudence" was introduced in the 1980s. Therapeutic jurisprudence says the processes used by courts, judges, lawyers and others in the justice system can affect the well-being and outcomes for those who come before the courts. It asks all judges to recognize that they can be important agents of change – that their words, actions and demeanour will invariably affect the people who appear in their courtrooms. Empathy is one of the key foundations of therapeutic jurisprudence. According to the concept of therapeutic jurisprudence, all judges in all courtrooms can use problem-solving strategies to make their courts and their decisions more relevant, collaborative and effective.

(Source: Susan Goldberg, "Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice" National Judicial Institute, 2011, pp. 3-4.)

Mental Health Courts

By the mid-1990s, the Ontario Court (Provincial Division)[4] at Old City Hall was contending with a significant increase in the number of mentally disordered persons charged with relatively minor offences. During the previous decades, many of the institutions that housed people with mental health issues had closed, with the goal of transitioning them into the community. The results of "deinstitutionalizing" were not all positive. Community treatment programs and facilities did not replace

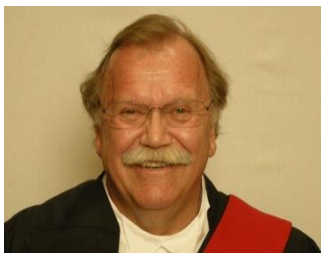
the institutions in adequate numbers and this lack of support led to increased contact with police and the criminal justice system.

For many people, the entrance to the courthouse was effectively a revolving door. Without treatment, assistance, or support, they found themselves back before the Court almost as soon as they were released. And when people came back to Court, there were often considerable delays and inefficiencies in addressing their mental fitness to stand trial.

In August 1997, Chief Judge Sidney Linden and Regional Senior Judge Walter S. Gonet endorsed a plan to establish a specialized "Mental Health Court" in Courtroom 102 at Old City Hall with two objectives:

1. to quickly address the mental fitness of an accused person to stand trial; and

2. to stop – or at least slow – the "revolving door."



Justices Richard Schneider (top) and Ted Ormston were instrumental in the development of Toronto's Mental Health Court at Old City Hall.

In part, these objectives are achieved in the Toronto Mental Health Court by "diverting" eligible offenders out of the criminal justice system and into alternatives. Diversion is generally available for minor offences – including property offences such as theft or mischief; minor non-spouse/partner assaults without injuries or weapons; causing a disturbance – and especially for first offenders. For slightly more serious offences, the Crown Attorney has discretion whether to divert charges, having regard to the circumstances of the offence, the circumstances of the accused, and the needs of the community, including the victim. Serious offences, including any offence causing death or serious bodily harm, sexual offences, spouse/partner offences, child abuse, and home invasions, are not

eligible for diversion.

Eligibility also depends on the circumstances of the accused person. The person's mental condition must be amenable to treatment through programs and resources that are available in the community, and the accused must be interested in pursuing diversion. Diversion can take a variety of forms. Depending on his or her circumstances and needs and the nature of the offence, an accused person may be admitted to hospital for assessment, required to attend counselling sessions, perform community service, offer an apology to the victim, or make restitution or pay compensation for the victim's loss.

It is important to note that diversion for mentally ill offenders is available in ordinary criminal courts as well as dedicated Mental Health Courts. In fact, Ottawa's Mental Health Court opened in 2007 is not a "diversion" court – charges do not need to be diverted for a person with mental health issues to appear in that Court.

What are the advantages of a specialized court when dealing with this type of offender? Unlike ordinary criminal courts, Mental Health Courts are staffed by mental health workers and psychiatrists as well as a judge, Crown Attorney, and duty counsel. Court staff perform different roles but ultimately take a "team" approach to addressing and resolving cases. Court support workers play a vital role in connecting the accused with community resources – not only to provide treatment and counselling, but also to assist in securing stable housing, training and employment, and recreational and cultural programming.

The presence and involvement of psychiatrists within the courts means that assessments of mental fitness can be performed promptly, without the accused having to leave the courthouse. Prompt assessments mean that a person's fitness to stand trial can be determined on his or her first court appearance, rather than over a period of weeks. This in turn means more immediate access to treatment in a hospital setting instead of continued detention in a remand facility.

Justice Heather Perkins-McVey began her involvement with Ottawa's Mental Health Court when she was a criminal law practitioner, serving on the Mental Health Court Planning Committee. Since her appointment to the bench in 2009, she has continued her involvement with problem solving courts in Ottawa.

An estimated 3,000 to 5,000 accused persons pass through Mental Health Court in Toronto each year. Many other Ontario Court of Justice locations have either designated Mental Health Courts or have utilized special procedures in traditional courts for this vulnerable population. Justice Perkins-McVey offered an example of one such procedure in Ottawa's Mental Health Court – the use of video technology. "Bringing people with mental health issues into the courtroom can sometimes be traumatizing for them. So we have developed a protocol which allows them to remain where they are – in hospital or possibly in jail – and hook up with the courtroom via a video link. This has two positive benefits. It alleviates stress on the person and is often a cost savings for the Court. We are, however, a victim of our own success. We don't have enough video feeds across the jurisdiction to offer this to everyone appearing in our Mental Health Court."

Reflections on Serving in Toronto's First Mental Health Court

In 2003 – six years after Toronto's Mental Health Court was established and while it was still the only court of its kind in Canada – a judge, Crown attorney, and defence lawyer offered the following insights on the pioneering effort.

"What is the purpose of the courts of law?" asks Judge Ted Ormston of the Ontario Court of Justice. "It used to be to punish, to deter, to rehabilitate. Now, therapeutic jurisprudence realizes that an element of healing can also be involved. Often, it's the first time people realize that their sickness has brought them before the courts. They have to deal with it, and the [Mental Health] Court can help in that

process."

In the past two years alone, an estimated 3,000 to 5,000 accused persons, afflicted with a variety of mental illnesses, have appeared before the Toronto court. (The number on any given day ranges from two to 20.) "They may be depressed or psychotic, have Tourette's Syndrome or engage in manic behaviour," says senior Crown Attorney Paul Culver. "We see pretty well everything."

"These are usually people who have gone off their medications or don't follow their treatment plans," says Culver. "They are usually charged with nuisance offences, such as breaking windows or stealing from stores." Violent offenders who are mentally ill are still processed through traditional criminal court.

The Toronto Mental Health Court has rarely, if ever, been the setting for a trial. Rather, it operates in the early stages of the criminal justice process when the accused has a bail hearing. "It was frustrating to see the same people keep coming back in," says Culver. "One of the few alternatives was not giving them bail. But little could be done with them except lock them up for short periods.

"Now, psychiatrists attend at the courthouse prior to a decision being made on bail. It's better than the system we had before." Ted Kelly, who has represented hundreds of clients in Toronto's Mental Health Court, calls the tribunal "an unqualified success," praising "the speed with which matters are dealt with when people are ill, the support that they get."

When mentally ill persons are arrested, they have to be assessed to determine if they are fit to stand trial. Before the Mental Health Court was created, a judge would see them first, then remand them back to the Don Jail; from there, they would go to the hospital about three days later. There they would be seen by a psychiatrist for about 25 minutes, be returned to the Don Jail for another three days and then finally appear in court.

"The round trip took anywhere between 10 and 15 days," recalls Judge Ormston. "Now, we do that in

five or six hours," because the Centre for Addiction and Mental Health has moved its Brief Assessment Unit to the courthouse, making early assessments possible.

"If they are unfit and need to be assessed for a longer period, or can benefit from treatment, the process whereby they get into the hospital is just far faster," says Kelly. "And those who are found fit can sometimes be released on [bail] the same day, or the next day, while their charge is before the courts.

"Why is it easier for people to get released? Because there are mental health support workers right there who can assist people and provide them with basic things, like clothing and referrals to community support programs and to shelter."

While free on bail, the mentally ill offender is required to report back to the court weekly for an extended period. "We encourage them to keep on their programs," Judge Ormston says. "Then they come back to court monthly. About six months later, when they're stabilized on their meds and doing well, the Crown Attorney usually withdraws the charges against them. So they're not criminalized by the process."

Of course, not everyone who passes through Mental Health Court is able to regain a normal life. "We have our 'frequent fliers,'" says the judge, referring to the court's repeat offenders. But he estimates that fewer than 10% of the accused fall into that category. "It's far fewer than it was previously," he says, "and we're finding that their appearances in court are becoming further apart."

The Mental Health Court, he says, deals with a segment of society that "was formerly slipping through the cracks, as provincial criminal courts are asked to deal with more and more social problems, mental illness being one. They aren't well treated in the regular adversarial court processes.

"Mental Health Court allows us to step back, close the book and open your heart."

Since this article was published in 2003, Ted Kelly was appointed to the Ontario Court of Justice in 2013.

(Source: Sheldon Gordon, "Falling through the cracks" Canadian Bar Association *National*, November 2003.)

Youth Mental Health Courts

As is the case with adults, young people with mental illnesses are significantly over-represented in the criminal justice system. Youth Mental Health Courts were established as part of a pilot project in 2008 at locations including Ottawa and London. A Youth Mental Health Court, called the Community Youth Court, was launched in Toronto in June 2011. The goal of these is to better identify and address the mental health needs of young people charged under the *Youth Criminal Justice Act.*

The Scope of the Problem: Mental Health Needs of Young People in the Justice System

Statistics demonstrate that young people with mental illnesses are significantly over-represented in the criminal justice system.

Diagnosis	**Youth in Custody**	**Youth in General Population**
Depression (current)	18-31%	4-8%
Anxiety Disorder	30%	4%
Post-Traumatic Stress Disorder	25-50%	less than 1%
Attention Deficit Hyperactivity Disorder	20-33% estimated	5-10% estimated
Conduct Disorder	30-70%	4-8%

(Source: Krista Davis, Michele Peterson-Badali, Tracey Skilling, and The Honourable Justice Weagant, "A Process Evaluation of Toronto's Mental Health Court for Youth: Preliminary Findings" (summarizing data from BC and Ontario studies of youth in custody))

Like many of the Mental Health Courts for adult offenders, Youth Mental Health Courts divert young people with serious mental health issues out of the ordinary youth criminal justice system and toward treatment and community and social supports. Crown Attorneys and duty counsel, as well as court workers, conduct assessments and develop treatment plans. Eligibility is assessed based on the circumstances of the young person – in particular his or her likelihood to benefit from participation in the Youth Mental Health Court – and the nature of the offence. Participation is voluntary and the young person may elect to return to ordinary Youth Court at any time.

Indications of Success of Youth Mental Health Courts

Interviews conducted with 34 youth and 11 parent participants in the Toronto Community Youth Court indicated that the majority (78.5%) found the court somewhat or very helpful, and an even greater number (94.8%) found the treatment services to be somewhat or very helpful.

> Youth and parents specifically highlighted that in comparison to typical courts the Mental Health Court was less intimidating, more focused on success, provided young people the opportunity to share their story, and was more focused on parent involvement. For example, one youth reported, "they look at who you are, not just what you did." Another parent reported, "someone finally cared about us as people…the court encouraged and acknowledged his hard work. The judge said 'I believe in you' and congratulated him." These findings suggest that the court has successfully been able to produce an environment of understanding, support, and

respect.

(Source: Kristen Davis, *A Program Evaluation of Toronto's Mental Health Court for Youth* (Doctoral Dissertation, Graduate Program in Psychology, York University, June 2014), at pp. 51-54.)

Criticisms of Mental Health Courts

Much of the criticism aimed at Mental Health Courts for both youth and adults is indirectly aimed at deinstitutionalization and the resultant criminalization of mentally disordered offenders. According to Justice Richard Schneider and colleagues, Mental Health Courts "attempt to redirect the misplaced responsibility they have for the provision of mental health-care services back to the mental health-care system, where it belongs." When scarce mental health services are redirected to those who have come into contact with the criminal justice system, it is argued that this creates a perversion in the system where a person's best bet for obtaining services is to get arrested. These criticisms are equally levelled at other problem-solving courts, including Drug Treatment Courts. Individuals struggling with mental illness, drug abuse and addiction face numerous challenges in accessing scarce treatment resources – resources that, had they been available sooner, might have prevented criminal activity from occurring in the first place.

(Sources: Richard D. Schneider, Hy Bloom, Mark Heerema, *Mental Health Courts: Decriminalizing the Mentally Ill* (Toronto: Irwin Law, 2007), p. 2, and Canadian HIV/AIDS Legal Network, *Impaired Judgment: Assessing the Appropriateness of Drug Treatment Courts as a Response to Drug Use in Canada,* October 2011.)

The Building of London's Therapeutic Court

Justice Deborah Livingstone

In May 2015, Justice Deborah Livingstone delivered the keynote address at a conference, "Law: Helping Hand or Iron Fist," held at Western Law School. She focused her remarks on the formation of London's Mental Health Court:

The daily dockets in Criminal Court, relentlessly long and arduous when I started my judicial career (in 1989), were increasingly filled with people who were sick and sad, because of mental illness. The lawyers and judges whom I worked with every day are not, generally, medically trained. We knew a lot about the Criminal Code*, about the* Controlled Drugs and Substances Act*, about the* Youth Criminal Justice Act*, but little about diagnosing and treating mental health issues. As my years as a judge ticked by, I became more and more horrified seeing the rise in the number of alleged offenders who were truly sick with mental health issues, who remained in custody detained for weeks, or months, before a fitness assessment was ordered, before a psychiatrist was sent to see them, before a diagnosis could be made.*

The dedicated criminal lawyers were observing this too. We started to have meetings about our concerns and we were not the only ones in the justice system who were appalled. Our attempts to appreciate and act upon these phenomena carried us along an interlocking chain of the administration of justice. The Crown lawyers who were attempting to prosecute individuals with mental illness were frustrated. They opened a dialogue for us with London Police Services.

The police, our "front line" on the "war on crime," were as shocked and saddened as we. If the goal of the criminal justice system is to put "bad guys in jail," we were failing abysmally. We were putting sick people in jail, more and more of them, for longer and longer periods of time.

What resulted from our collective revulsion at the dissonance in the service we were providing was the creation in London, as in many other jurisdictions, of special "Mental Health Courts." While the nuts and bolts of Mental Health Courts will vary, integral to the functioning of such a court is a multi-disciplinary team approach. The operation of a Mental Health Court is a collaborative process. We all have our jobs to do, but we do them as a team.

The naming of these courts has been an interesting conundrum. In many jurisdictions they are defined as "problem-solving courts," which, in theory, promote holistic approaches to sentencing and treatment.

However, as our Court opened, we heard, appropriately, from the participants, the accused, that they did not like to be described as "problems." And as a judge in that court, I knew I could never "solve" anything – only adjudicate a result.

Referring to the court as a "Mental Health Court" has also been problematic. Offenders, particularly young persons, told us they felt stigmatized if their mental health issues were in the forefront of the description of the courtroom, if they were labeled "mental," before they could even get in the door. Lawyers wanted to steer their ill clients into the new type of court setting, but very often their clients were uneasy or unable to recognize that mental health issues were the very reason they had ended up charged with a criminal offence.

Consequently, we changed the name of our London Court from Mental Health Court to Therapeutic Court. It's not a perfect name but it's the most descriptive of our process.

The London Courthouse – site of that city's Therapeutic Court (Photo: Ministry of the Attorney General)

Rather than exercising a traditional adversarial approach, the goal of the criminal prosecutions in the Therapeutic Court is to improve the lives, not to

punish, those individuals with special needs, as well as enhance public safety by identifying the special needs individuals facing criminal prosecution who may be safely diverted from detention or potential incarceration, placing them in appropriate community based mental health and/or other special needs services. This includes ongoing monitoring of their care and their participation without the clinical setting.

The team approach in achieving these goals became one of the hallmarks of the London Therapeutic Court – not simply because we were team, but a consistent team. I was the consistent judge in the court for four years.

Since its inception here in June 2007, the Therapeutic Court presides only one day a week. Every Wednesday. It is generally a very busy day, 49 accused on the list last Wednesday for example. It can be an intense day as it addresses a panoply of issues – mental health diversion out of the justice system, bail orders, to get the accused out of custody as quickly as possible and into safe supervised housing, NCR (Not Criminally Responsible) assessments and hearings, treatment orders, guilty pleas and sentencing, plan of care meetings and the inevitable hunt for the illusive hospital bed where a special needs accused belongs in the first place.

No trials take place there. Trials occur in the regular courts. But it is busy for all involved, court staff, cell staff, the lawyers and the therapeutic team, because we will address a number of possible outcomes for the individuals who are directed there. The paramount goal is always to get the individual with mental health issues out of custody as soon as possible if they are fit to be released to stand trial, then to either get them out of the criminal law system into a mental health diversion program if the offences with which they are charged meet the Crown's criteria, or alternatively, get them connected with the resources they need for a treatment plan which can be part of the Criminal Court sentence which the judge can ultimately impose.

In the Therapeutic Court, the judge and lawyers are supplemented by psychiatrists, psychologists, case workers, social workers, probation officers, to name a few, who collaborate on how the particular needs of an accused person can be met. The needs of the accused are diverse – serious mental illness, developmental disabilities, dual diagnoses (serious mental illness combined with developmental disability) concurrent disorders (serious mental illness combined with co-existing substance addictions), acquired brain injury, dementia and those suffering with the effects of fetal alcohol spectrum disorder.

The benefit of a multidisciplinary team, consistently present and available in Court every week, is that the treatment plan devised can take a variety of forms, and is not limited to simply getting an offender back on his meds. The treatment plan can also include:

- *Psychological therapies,*
- *Educational training,*
- *Occupational training,*
- *Access to social services,*
- *Budgetary counselling, and*
- *and the "biggie" – housing.*

An extremely significant aspect of the Court is our now-realized goal of expediting the process of psychiatric assessments for the offenders who come into the Court, and more frequently, into custody, and then to our Court, who are acutely ill. Because of the presence of the Therapeutic Court in London, there is now a distinct time and place where such acutely ill offenders can be directed and where the professionals are present to efficiently and knowledgeably deal with the legal issues relating to fitness to stand trial or not criminally responsible on account of a mental disorder. The London Court professionals on the team include not only consistent representation from Canadian Mental Health Association, Dale

Brain Injury, London Cares, St. Leonard's, Streetscape, but also a psychiatric nurse as well as a psychiatrist from the Southwest Centre for Forensic Mental Health Care. Now, the Court can determine fitness to stand trial on the day of appearance, as opposed to the usual five-to-seven-day remand in custody, to find a psychiatrist to attend the jail to make the assessment. Before the Court existed, those days in detention, while an assessment was being arranged, were excruciatingly difficult for both the jailers and the prisoner who was usually extremely ill, delusional, paranoid, off his meds, and getting unhealthier by the hour. Having a doctor present at the courthouse to complete the fitness assessment – then and there – is a great step forward.

If a forensic treatment bed is required to get someone back to fitness, until our Court was created, the wait for an available bed often extended for weeks or months. Now, because of the continuing presence and involvement of the medical personal, even though the Court only sits once a week, the team is on top of the psychiatric needs of persons in custody. Consequently there is more readily accessible bed availability – forensic beds are routinely open the day of the next court appearance or, at worse, within a day or two. For the members of our team who work at the jail, or in the cells at the courthouse, who have to house and transport truly sick individuals in custody and who now are part of the Therapeutic Court team because they care so deeply about these ill folks, these changes are nothing less than stellar. And most importantly for the mentally challenged accused, and their loved ones, the creation and continual evolution of Mental Health Courts is a truly remarkable helping hand.

And the progress continues. As a judge of the Ontario Court of Justice, I preside over cases involving young offenders, kids between 12 and 17. As a Youth Court judge, I learned, unhappily, that one in five young people in the justice system had a diagnosable mental health disorder. For years, we would see young people and their desperate parents, once a young offender charge was laid, attempting to advocate for themselves to have the young person's mental health needs met while the legal issues held centre stage. Once our adult Therapeutic Court took flight, we were inspired and energized to take what

we had learned to a whole new level. A new team was developed and we created the first Youth Therapeutic Court in Ontario. The therapeutic team in our Youth Court includes a clinician from the well-respected Centre for Children and Families in the Justice system, otherwise known as the Family Court Clinic, as well as a representative from the Board of Education, and experienced youth probation officers, among others.

Drug Treatment Court

Drug Treatment Courts were developed to address the root cause of many criminal offences, namely drug addiction. The first such court in Canada was established in Toronto on December 1, 1998, several months after the first Mental Health Court began operating. Judge Paul Bentley presided at the first sitting. Drug Treatment Courts opened in other jurisdictions over the next decade, including Ottawa in March 2006. Both the Toronto and Ottawa Drug Treatment Courts received federal funding. There are also a handful of smaller Drug Treatment Courts in Ontario – including in Durham Region, London, Kitchener-Waterloo, Kingston, Windsor and Peterborough – that operate through community partnerships.

Originally, the program was limited to non-violent offenders charged with drug-related offences. In 2004, the Ministry of the Attorney General approved the participation of non-violent drug-dependent offenders charged with non-drug-related offences.[5] Addiction must be the primary reason for offending.[6]

As with Mental Health Courts, participation in the Drug Treatment Court program is voluntary, and individuals who wish to participate must apply for admission. If the Crown determines that the applicant is an appropriate candidate, the application is then assessed by the Treatment/Community Court Liaison, who meets with the applicant to determine his or her substance-use history, previous treatment involvement, family history, community supports and needs, and any possible risk factors.

Prior to the applicant's first appearance in court, the Drug Treatment Court judge is presented with the assessment information and recommendations from the Crown and defence counsel as well as the court liaison and bail program. The applicant is then brought into court and has an informal, in-court interview with the judge concerning the applicant's history, motivation for seeking to participate in the program, and understanding of the program requirements and expectations. Because the applicant must plead guilty before entering the program, the Drug Treatment Court judge also confirms that the applicant's decision to enter the program and plead guilty is voluntary and made with the benefit of legal advice. "If the person signals their willingness and need to bring about change in his or her life, then our Court can have a very big role to play," stated Justice Beaman.[7]

Once an individual is approved for participation in the Drug Treatment Court program, he or she is required to comply with bail conditions set by the court. These typically include abstaining from drug and alcohol consumption, actively participating in treatment, attending for urine testing as required and attending court as required, and can also include additional conditions tailored to the individual. Participants must report honestly at each court attendance whether they have been compliant with their conditions or "fallen off the wagon."

Compliance is rewarded with commendations from the bench, increasingly relaxed attendance requirements, and incentives such as movie passes or coffee cards. Dishonesty is met with sanctions including admonishments from the bench, requirements for more frequent court appearances and urine testing, and/or community service orders. Although slip-ups are tolerated so long as the participant remains sincerely committed to achieving abstinence and continues to work toward that goal, repeated or serious non-compliance will eventually result in the individual being removed from the program and his or her matter being transferred back to ordinary criminal court.

Toronto's Drug Treatment Court in 2003

Justice Paul Bentley is pictured in 2003 in a photograph accompanying an article about problem-solving courts in the *National*, a publication of the Canadian Bar Association. He is standing on the dais in a Drug Treatment Court at Toronto's Old City Hall. According to former Chief Justice Annemarie Bonkalo, Bentley was "a pioneer."

"Facing significant hurdles, and treading in territory then largely unknown to Canada's justice system, Justice Bentley led the establishment of the Toronto Drug Treatment Court in 1998. This was, however, only a starting point in his efforts to diminish the cycles of reoffending he saw in his courtroom. He advocated the concept of problem-solving courts: multidisciplinary partnerships between the justice system and the community to promote offender accountability, and to address the underlying issues behind an offender's appearance before the court. Today, problem-solving practices are now common in Canada's courts. I am confident that this is due, in large part, to the visionary work of Justice Bentley," she stated.

Standing to Bentley's right is former Crown Attorney Kofi Barnes, who was, in 2003, the most active Crown in that Court. (Barnes was appointed as a judge to the Ontario Court of Justice in 2004 and then to the Ontario Superior Court in 2013). On Bentley's left is Shelley Addley, the duty counsel who was representing most of the accused at Toronto's Drug Treatment Court in 2003. The article, entitled "Falling Through the Cracks," detailed the positive response to Toronto's Drug Treatment Court:

"Judge Bentley cites strong support for the program among community groups, on the one hand,

and the police service, on the other. 'We must be doing something right,' he observes, 'because politically, they're at opposite ends of the spectrum quite often.'"

(Source: Sheldon Gordon, "Falling Through the Cracks," Canadian Bar Association *National*, November 2003.)

Completing the Drug Treatment Court program can be a lengthy process. By the time a participant is eligible to "graduate," he or she will typically have been in the program for at least 10 months and often much longer. Criteria for graduation vary somewhat but generally include completion of all phases of treatment, abstaining from all drug use for a period not less than three months, securing appropriate housing, and engaging in work, school, or volunteer activities. Far from being a "get out of jail free" card, completing the Drug Treatment Court program often takes much longer than serving the sentence a "traditional" court would impose and requires meeting more stringent conditions. Perhaps not surprisingly, more than half of those admitted into the program fail to complete it. "But even those who don't graduate have learned important life skills that they can apply in their lives," explained Beaman. "I feel it is the role of our Court to do this work. The old model of a court as a distant and untouchable entity is no longer appropriate in today's society."[8]

Concerns About Drug Treatment Courts

No one disputes the value of seeking to address the root cause of drug-related petty crime. And few would quarrel with the proposition that traditional approaches have proven inadequate. Still, questions remain whether Drug Treatment Court is the best alternative. Some critics see the Court as a drain on resources given the relatively small number of participants – and the even smaller number who complete the program. Others challenge the requirement for total abstinence. They argue that harm-reduction and health-centred approaches ought to be prioritized over participation in Drug Treatment

Court. Concerns have also been raised about the erosion of the due process protections that are guaranteed to accused persons in ordinary criminal courts. In particular, critics have objected to the requirement that participants plead guilty at an early stage – possibly before they get full disclosure of the Crown's case and fully informed legal advice – as well as the fact that defence counsel and the Crown work as part of the same "team," alongside the judge and treatment providers, rather than in a traditional adversarial relationship.

Judges who sit in Drug Treatment Court grapple with such questions every day, as evoked in a 2010 *Ottawa Citizen* article on the Ottawa Drug Treatment Court.

> Not everyone is sold [on Drug Treatment Court]. Some critics have a problem with the prerequisite guilty plea. Others wonder if there's not a better way to spend the million dollars in federal cash and court resources that it takes to run the Ottawa program each year.
>
> Justices Judith Beaman and Peter Wright have been with Ottawa's drug court since its inception four years ago. They are well aware of the tension. "You are using limited resources on a few people who have a dubious track record of success," says Beaman.
>
> In regular criminal court, petty offenders are kept at a distance. In drug court, judges, prosecutors and defence lawyers get to know the regulars who are required make a weekly appearance. "Most judges aren't comfortable with that degree of connection or intimacy," Beaman explains. "They feel they have more authority if they keep their distance. It's not everybody's cup of tea and we're not trained for it."
>
> It doesn't help that there are no one-size-fits-all solutions. "I had an expectation that it would be easier to cure addictions," says Wright. "I had an expectation that success would be measured by graduations. Never having been an addict, I underestimated the degree of difficulty in overcoming addiction."

He says he's come to recognize the value of the program – even to those who don't graduate.

"They may have gone from using crack every day to some lesser drug occasionally. Before we started, I wouldn't have viewed that as a success," he says. "I do now."

Beaman agrees that small steps are worth celebrating.

"Just getting people clean of drugs for however long they can – two weeks or three weeks – is something," she says. "If they have had a period of abstinence, they are more likely to return to treatment and are more likely to give another program a try. When they are in a program, they aren't committing crime, which means the saving of thousands of taxpayers' dollars."

Beaman says it takes more than a residential treatment program to wrestle free from crack. "There are so many other aspects to an individual's life – their family, their housing, their work, their health. So many people come with mental health difficulties and it's hard to say whether it predated the drug problem or whether it's a consequence of the drugs."

She dismisses the notion that the prerequisite guilty plea stigmatizes addicts. "Some people call it coercive, but I've come to grips with that," she says. "People coming into the program already have lengthy criminal records. We're not taking anyone with a clean slate by any stretch. It's also harder than staying in the regular system and people absolutely don't have to do it."

Addicts in the program get fast-track access to top-class treatment, she says. "It's been shown that having the stick of the court system and the close supervision of someone in authority helps. Even if they don't graduate, we take a look at what they did in the program and it can mitigate the sentence."

There's no denying the tension: Crown prosecutors feel the court is too lenient. Defence lawyers think the opposite. "We can't step outside of our roles completely," Beaman says.

First Graduate of Hamilton's Drug Treatment Court Shares his Experience

In June 2015, Carmelo Tinebra wrote about his experiences as the first graduate from Hamilton's Drug Treatment Court at the Ontario Court of Justice.

I want to express my gratitude to everyone who made this new court program a reality. Thanks to them, I have the chance to live a healthy life free from drugs for the first time since I was 12.

To be honest, when my lawyer mentioned there was a new diversion program that I might qualify for, where if I was accepted I would go through recovery rather than face jail time, I wasn't thinking about ending my addiction. I just didn't want to go to jail.

In Drug Treatment Court you have to meet with your case worker every single day and go before a judge every week. Initially, it felt very tedious, but after time passes it becomes easier.

The program was a good motivation, too. You can't graduate – and stop going to court every week – until you've been clean for six months. If you use you have to start the clock all over again.

Drug Treatment Court gives people a shot if they show an interest in changing. Everyone involved with the program – the case workers at Mission Services, the judge, all of the people you'll meet along the way – they will help you change if you want to. You'll have an opportunity to straighten out your life plain and simple.

(Source: Carmelo Tinebra, *Hamilton Spectator,* June 25, 2015, p. A13.)

Community Treatment Court

Several "Community Treatment Courts" have opened across Ontario in recent years. Like Mental Health and Drug Treatment Courts, these are also designed to be therapeutic courts. The emphasis in

Community Treatment Court is on people suffering from mental illness or drug addictions or both. The Halton Community Treatment Court is one example. Launched in 2012, it was developed through the cooperation of local Crown Attorneys (both provincial and federal), the defence bar, local police, mental health treatment providers. Aiming to provide early intervention, the Court integrates mental health workers into the system to improve access to services for people appearing before it. Acknowledging that the legal system can be confusing and intimidating, the Court aims to be less formal than a traditional court. Accused persons deal with only one judge during their visits to Halton's Community Treatment Court in order to establish a degree of familiarity between judge and that person. "Familiarity often engenders trust, which is a first step to understanding and rehabilitation."[9]

Justice Paul Bentley: A Problem-Solving Pioneer

Justice Paul Bentley was the first judge to sit in the Toronto Drug Treatment Court (TDTC) in 1998, and continued to advocate for increased and innovative partnerships between the justice system and the community until his death in 2011. In 2009, Bentley described the experiences that led him to embrace a problem-solving approach.

> *Before the [Toronto Drug Treatment Court] started, I sat as a judge at the Old City Hall courthouse in Toronto, where wave after wave of sad and homeless persons paraded before me, many with severe drug addictions. As part of my sentences, I routinely imposed counselling for substance abuse as a component of a probation order. Invariably, weeks or months later, I would see the same offenders back before me on new charges. When I asked them about the effectiveness of the drug counselling they had received, I would be met with blank stares and comments to the effect that after serving sentence, they had received no counselling. I grew more and more frustrated with the recycling of criminally addicted offenders through our courts and jails and began looking for alternatives. The Drug Treatment Court model was the*

alternative that seemed to hold the most promise.

Those words were reprinted in a National Judicial Institute publication on Problem-Solving in Canada's Courtrooms, along with a memorial by then-Chief Justice Annemarie Bonkalo, who paid tribute to Bentley's "belief in dignity and kindness, his confidence that those brought before the justice system could change their lives for the better, and his highly-respected efforts in advancing problem-solving practices in Canada's courtroom and beyond." Bonkalo wrote, "Today, problem-solving practices are now common in Canada's courts. I am confident this is due, in large part, to the visionary work of Justice Bentley."

(Source: Susan Goldberg, "Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice" National Judicial Institute, 2011, pp. v-vii.)

Gladue and Aboriginal Persons Courts

In 1999, the Supreme Court of Canada heard a case about the sentence imposed on an Aboriginal woman who pleaded guilty to manslaughter after stabbing her common-law husband. That case – *R. v. Gladue*[10] – noted that Aboriginal people are drastically over-represented in the Canadian prison population, calling this "a crisis in the Canadian criminal justice system." *Gladue* Courts were created as one element of the Ontario Court of Justice response to the Supreme Court of Canada decision.[11]

"In the *Gladue* decision, the Supreme Court considered section 718.2 of the *Criminal Code*, which directs that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." In coming to this decision, the Supreme Court considered the "circumstances of aboriginal offenders" which often include systemic and background factors that may have played a role in bringing the

particular offender before the courts. Further, the Supreme Court considered the types of sentencing procedures and sanctions that would be appropriate for Aboriginal offenders.[12]

The implementation of these goals has varied in courts across Canada and within the Ontario Court of Justice. Specialized *Gladue* Courts, which are intended to facilitate the judge's ability to consider the circumstances of Aboriginal offenders, were created in some larger urban centres in southern Ontario. In these communities, the Aboriginal population, while significant in absolute terms, made up a relatively small percentage of the entire population of the wider community. In these communities, *Gladue* Courts made it easier for the justice system to ensure necessary *Gladue* information was gathered and placed before a sentencing judge. These courts also allowed a number of justice system participants to concentrate the resources needed to produce appropriate *Gladue* outcomes in one, specialized court.

Justice Rebecca Shamai was one of the Ontario Court of Justice judges involved in the 2001 launch of the first *Gladue* Court in Ontario at Old City Hall in Toronto. She terms the work of these Courts both "collaborative and restorative," having written extensively about her experiences.

Justice Rebecca Shamai. (Courtesy: Ontario Court of Justice)

In 2001, the Gladue *[Aboriginal Persons] Court opened in downtown Toronto, sitting half a day a week. [in 2014], the Court is in session two full days every week, and there are four other such courts across Toronto, including an Aboriginal Youth Court. Other similar courts operate in other locations in Ontario. The first step in the Court has been to identify the Aboriginal persons coming before the Court. In a diverse city like Toronto, identification is not an easy matter. Given the devastation done to family and cultural structures through previous government initiatives, many*

have been unsure of their identity…. Second, the Gladue *principles are applied to bail, as well as to sentencing…. The most difficult aspect is implementing restorative justice. Restorative justice may mean providing substance abuse counselling or treatment, housing, family reconciliation, job skills or education upgrading…. In Toronto's* Gladue *Courts, the agreement between Crown prosecutors and Native Court workers facilitates the diversion of certain offences and offenders to a Community Council, with a stay of criminal charges entered in court…. The availability of resources to address substance abuse and poverty issues is often at the core of the success of the court."*[13]

As with other problem-solving courts, participation is voluntary and an Aboriginal accused always has the option to have his or her matter dealt with in an ordinary criminal court.

Different approaches have been adopted in Ontario's two northern regions to ensure the decision in *R.* v. *Gladue* is properly implemented. In these regions, Aboriginal people make up a very significant percentage of the population. Many of the region's smaller communities have a primarily Aboriginal population. "In the north, every sitting of the Court has to be a *Gladue* court sitting," explained Justice Marc Bode, who sits in Thunder Bay.

Justice Marc Bode. (Courtesy: Ontario Court of Justice)

Since the release of the *Gladue* decision, the Court has worked with the Aboriginal leadership and others in the justice system to tailor the court process so it properly serves the needs of Aboriginal people. "In many northern communities, judges meet regularly with First Nation Elders, chiefs and council members, seeking their input on how the justice system can better meet the needs of their community. In some cases judges seek input from Elders on how best to fashion a sentence that promotes a reconciliation between the accused, the victims of crime and the

community as a whole. In many northern urban communities the Court has supported the development of better, more frequently used, diversion options for aboriginal offenders, particularly youths charged under the *Youth Criminal Justice Act,"* explained Bode.

In the north, the Court has also worked with the defence bar, Legal Aid Ontario, probation and parole services, a number of Aboriginal organizations, with bands and with treaty councils to ensure the *Gladue* information placed before a sentencing judge is sufficient to give the judge a proper understanding of the circumstances of the accused and a good sense of all the sentencing options available. "On this front, much has been accomplished since the *Gladue* decision was released. At the same time, the Court recognizes that much more still needs to be accomplished, particularly in terms of developing better non-custodial sentencing options that promote healing and reconciliation," concluded Bode.

Communicating Effectively – An Example from a *Gladue* Court

When judges speak directly to court participants – and, in turn, listen to them – they can inspire trust, motivate change, give people a sense of voice and dignity, enhance healing and make court procedures more meaningful to those before them.

But what does all of this really mean? The following account describes a case which exemplifies the problem-solving approach.

In 2014, Justice Shaun Nakatsuru released written reasons for a sentencing decision he had made as a judge sitting in *Gladue* Court. The decision directly addresses the intractability of the many of the problems that both an accused person and the Court face. The reasons also demonstrate a determination to continue to innovate, to listen, and to try again – which exemplify the approach taken by all problem-solving courts.

Nakatsuru's decision in *R. v. Armitage* was written in plain language and addressed directly to the accused, Jesse Armitage, a 29-year-old Aboriginal man who had been engaged in minor but repetitive criminal offences, primarily property crimes and breaches of court orders. Nakatsuru frankly admitted that he found Armitage's case to be challenging.

> *If I could describe Mr. Armitage as a tree, his roots remain hidden beneath the ground. I can see what he is now. I can see the trunk. I can see the leaves. But much of what he is and what has brought him before me, I cannot see. They are still buried. But I am sure that some of those roots involve his aboriginal heritage and ancestry. They help define who he is. They have been a factor in his offending. They must be taken into account in his sentencing.*
>
> *It is also obvious that this tree is not healthy. The leaves droop and appear sickly. It does not flourish regardless of the attention paid upon it. The tree needs healing.*
>
> *A part of any sentencing for an Aboriginal offender is to see if there is a way to further that healing. Of the offender and of the community he lives in.*

Nakatsuru imposed a conditional sentence that allowed Armitage to serve his jail time in the community.

Justice Nakatsuru's judgment in *Armitage* attracted considerable attention from media and commentators such as Adam Dodek, an associate professor, Faculty of Law, University of Ottawa, who praised it for its clarity and use of plain language. In Dodek's words, "It demonstrates the importance of humility for judges; of empathy with those who appear before the judge; and of the virtue of simplicity in judgment writing." Those values are, of course, not confined to specialized problem-solving courts, but ideally inform the work of judges throughout the Ontario Court of Justice.

(Sources: *R. v. Armitage,* 2015 ONCJ 64 (Can LII), and Adam Dodek, "In Praise of Judicial Empathy,

Humility and Simplicity," *Slaw: Canada's online legal magazine* (16 April 2015).)

Integrated Domestic Violence Court

Integrated Domestic Violence Court, launched as a pilot project in Toronto in 2011, is somewhat different in nature from the other problem-solving courts. While endeavouring to respond effectively to the problem of domestic violence, Integrated Domestic Violence Court also seeks to correct a challenge inherent within the justice system: the fact that criminal and family law cases are ordinarily heard separately – by different judges, in different courtrooms – even if the issues and people overlap. Integrated Domestic Violence Court is thus intended to address both the social and the administrative problem.

Before Toronto's Integrated Domestic Violence Court opened, cases involving domestic violence were frequently spread among three different courts, with criminal judges of the Ontario Court of Justice hearing assault charges, family judges of the Ontario Court of Justice addressing child welfare issues, and Superior Court judges dealing with divorce and property settlement matters.[14] Families dealing with domestic violence would therefore have to attend at multiple courts on multiple days in the process of having their issues heard. In addition to being difficult to navigate, this approach was fraught with delay and – because information was not shared among the various courts – with inconsistent orders and outcomes. For example, bail conditions and access arrangements prescribed in different judgements might conflict, requiring return visits to court for resolution – or, in a worst case scenario, exposing vulnerable family members to further harm.

In an interview conducted when the Integrated Domestic Violence Court opened in June 2011, Justice Geraldine Waldman, who had spearheaded efforts to establish the Court, described the prevailing situation in the *Law Times*.

> "What's interesting is the fact that notwithstanding that we're dealing with the same litigants and the same situations, we have these two systems that overwhelmingly operate as silos independent of each other without cross-referencing one to the other."
>
> For example, bail orders affect access arrangements, leaving judges like Waldman trying to decipher them and how they might be a factor in family law rulings.
>
> She also found she was often dealing in an "information vacuum" in which none of the parties knew the parameters of such bail orders. In other cases, bail terms were overly restrictive and difficult and created further complications on the family law rulings.
>
> "On the other hand, I often felt that I had information that the criminal-side judge would really like to have in terms of understanding more fully and robustly what was going on with this family," says Waldman.
>
> So while both family and criminal law judges were individually doing their job adequately, Waldman feels there were untapped opportunities to work together for families.
>
> "That was no one's fault; it's just that the system was created in a way that made it difficult for us to work together," she says.[15]

In Integrated Domestic Violence Court, a family experiencing domestic violence will appear before a single dedicated judge for both the domestic violence criminal charge and family matters – including custody, access and support – which will be heard on the same day.[16] The Integrated Domestic Violence Court judge will therefore have more complete information about the family and be able to make consistent criminal and family court orders. The family will also have access to various supports and services within the justice system, including the Family Law Information Centre, the Victim/Witness Assistance Program, and Partner Assault Response.

The launch of the Integrated Domestic Violence Court at the 311 Jarvis Street courthouse in Toronto was greeted with enthusiasm by a variety of justice system participants.

> "We think that [a one-case, one-judge structure] will lead to a more integrated, holistic approach, a greater understanding of what the issues are in the family and more consistent orders, " said Peter Griffiths, the associate chief justice of the Ontario Court of Justice.
>
> In the existing system, families dealing both with issues in family court and with a domestic-violence-related charge must navigate two different processes, going at different speeds and with the potential for conflicting orders. If one spouse is charged with domestic violence and the other is seeking custody of children, for example, the two courts could be issuing conflicting orders.
>
> "The concept of an integrated court is wonderful because that really meets the needs of women, " said Lisa Manuel, the director of the family violence program at Family Service Toronto.
>
> It can be a challenge to physically navigate between the two courts because in some cities they're not even in the same building, let alone trying to deal with the stress of such situations, she said.
>
> Ms. Manuel said she has heard of instances where, to comply with both a custody order and a restraining order, one parent takes a child to a parking lot and the other parent is waiting at the far end. The child then has to walk from one end to the other so neither of the orders are violated, she said.[17]

The Integrated Domestic Violence Court got off to a slow start, hearing only a handful of cases in its first sittings, although Justice Joseph Bovard, one of the judges assigned to the Court, indicated in an August 2011 interview that this was not surprising.

> "We only sat once before, and we had to cancel the court the other times because there were no available cases. But we expected it to start slow," he said. "We haven't been deluged with cases, because it is such as novel concept to Canada."
>
> "It will take some education before people get up to speed," he said. "There is definitely some confusion about how the court is going to run, but we will get there."[18]

Justice Ellen Murray sits regularly in Toronto's Integrated Domestic Violence Court.

In July 2015, Justice Ellen Murray, who sits in Integrated Domestic Violence Court, reflected on her work in that Court.

"I have heard lawyers say that their clients feel safer in the process (in Integrated Domestic Violence Court) than they otherwise would be. It is helpful for a judge to be more informed rather than less informed. Because I have so much more information, I feel we can provide a tighter safety net for people. I can be much more responsive because I know so much more about all the dealings the people before me are having within the justice system. For example, I control bail variations and I'm also responsive to parents who are accused in criminal cases when it comes to making access decisions concerning the safety of their children."[19]

As the Integrated Domestic Violence Court continues to be evaluated, a February 2015 editorial in the *Toronto Star* provided the following perspective.

The Integrated Domestic Violence Court in Toronto, the first of its kind in Canada, was set up in 2011 to resolve the lack of communication between family and criminal courts. It's an issue that was flagged as a serious problem by the province's Domestic Violence Death Review Committee in 2004.

As Dr. Peter Jaffe, a member of the committee, explains: "You shouldn't put a family in five or six different proceedings with multiple judges. Not only is it ineffective, it's also dangerous."

More study is needed to ensure that having one judge handling both criminal and family proceedings, with their different standards of proof, is not prejudicial to the accused. But so far the court is receiving positive reviews.

The integrated court in Toronto has not been around long enough or handled enough cases for final conclusions to be drawn.

Still, a study of a similar joint court in Buffalo, N.Y., found that many of the benefits that were hoped for actually happened, "making victims safer and holding the defendant more accountable."[20]

Problem-Solving Approaches Beyond Problem-Solving Courts

The values of specialized problem-solving courts are not confined to these courts. Almost all of the judges who preside over specialized courts also spend part of their time sitting in "traditional" court as well, and carry the lessons of problem-solving courts into their work more generally.

Justice Peter Hryn, who presides over both Drug Treatment Court and traditional criminal court in Toronto, describes the changes he's made as a result of his exposure to Drug Treatment Court.

> The *Criminal Code* states that before imposing sentence I'm required to ask the offender if he or she has anything to say. That conversation is now different after my experience in the Toronto Drug Treatment Court. I ask more questions and get more information. If the offender has a gap in his or her record, I ask about that. "Why were you clean and out of trouble for five years? What do you need to do to get back to that state now?" Or, I look at the offences on the record: if there is a telltale pattern of addiction, I will wonder out loud if there's a problem with drugs or alcohol. Often, the offender will say there is.[21]

Judges Judith Beaman and Ellen Murray explain that the lessons they learned while judging in problem-solving courts have helped them by bringing a "wider range of skills to their work" in traditional courts.[22]

Justice Heather Perkins-McVey points to the many benefits that have arisen stemming from the collaborative approach adopted by the many community partners – organizations providing housing, treatment and community recreational programming, for example – as a result of the introduction of problem-solving courts throughout Ontario. "They have learned to work together, and we, as a Court, have learned to work with all of them to support those who appear before us."[23]

Problem-Solving Strategies That Can be Transferred to the Traditional Courtroom

1. **A proactive, problem-solving orientation** that treats court participants as individuals and seeks creative solutions to problems.
2. **Direct engagement with participants** through eye contact and clear communication, including providing opportunities to ask questions and seek clarification.
3. **Individualized screening and assessment** to identify issues such as substance abuse, mental illness, and literacy and language difficulties.

4. **Therapeutic sentencing** that includes risk-management strategies and relapse-prevention plans.
5. **Ongoing judicial supervision** that keeps judges informed and offenders and litigants accountable.
6. **Establishing connections and partnerships with social service agencies** to more effectively refer offenders to appropriate resources and supports.
7. **Monitoring compliance** to evaluate the effectiveness of various interventions.
8. **Prompt information sharing** to ensure that litigants and family members understand court processes and are able to prepare and file any necessary paperwork.
9. **A team-based, non-adversarial approach**.
10. **Courthouse training and education** to enhance awareness about both the systemic factors that often underlie criminal behaviour and problem-solving responses.
11. **Community outreach** to provide information about and enhance public understanding of court processes.

While some of these strategies can only be put in place through policy changes and co-ordinated efforts, many others can be easily integrated into the existing, day-to-day work of the traditional courtroom.

(Source: Adapted from Susan Goldberg, "Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice" National Judicial Institute, 2011, pp. 23-24, citing Porter, R., M. Rempel, and Mansky, A. (2010). What makes a court problem-solving? *Universal performance indicators for problem-solving justice*. New York, Center for Court Innovation.)

Conclusion

Many would argue that problem-solving has been an explicit part of the work of the provincial court for over a century. Juvenile courts created under the *Juvenile Delinquents Act* and the Toronto Women's Court could be seen as early examples of specialized courts that took an explicitly problem-solving approach to cases, and sought to understand and respond to the persons who appeared before them not simply as isolated individuals but in their broader social context. And while enthusiasm for specialized courts has waxed and waned over the years, problem-solving has always been an aspect of the day-to-day work of the court.

Whether specialized problem-solving courts will continue to be established and expanded remains to be seen. Given the relatively recent introduction of these courts, analysis of their long-term effectiveness awaits – along with a thorough examination of what works and why. There is no doubt, however, that a desire to address the underlying causes and symptoms of criminal behaviour and family breakdown will continue to animate the work of judges and to drive innovation in the court processes and administration of the Ontario Court of Justice.

Traditional Versus Problem-Solving Courts

Traditional Approach	**Problem-Solving Approach**
Goal is resolving the dispute	Goal is resolving the underlying problem
Uses an adversarial process	Uses a collaborative process
Judge acts as an arbiter	Judge acts as a coach
Backward-looking	Forward-looking
Few participants and stakeholders	Many participants and stakeholders
Legalistic	Commonsensical
Formal	Informal
Success is measured by compliance	Success is measure by remediation of underlying problem
(Source: Susan Goldberg, "Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice" National Judicial Institute, 2011, p. 4.)	

[1]Interview of R. Schneider for OCJ History Project, 2015.
[2]Interview of J. Beaman for OCJ History Project, 2015.
[3]D.J. Farole, Jr., N. Puffett, M. Remple, & F. Byrne, Applying Problem-Solving Principles in Mainstream Courts : Lessons for State Courts, *The Justice System Journal,* Vol. 26, Number 1 [2005].
[4]The Ontario Court (Provincial Division) became the Ontario Court of Justice in 1999.
[5]TDTCP Policy and Procedures Manual, August 13, 2008, pp.3-4.
[6]TDTCP Policy and Procedures Manual, p. 7.
[7]Interview of J. Beaman for OCJ History Project, 2015.
[8]Interview of J. Beaman for OCJ History Project, 2015.
[9]Stephen D. Brown, "Halton Community Treatment Court Background," April 12, 2012.
[10][1999] 1 S.C.R. 688.
[11][1999] 1 S.C.R. 688.
[12]*R. v. Gladue* at para 66.
[13]Rebecca Shamai, "*Gladue* Courts," *Provincial Judges' Journal,* Summer 2014, pp. 47-49.

[14]Family law matters are heard in the Ontario Court of Justice, the Superior Court of Justice, or the Family Court branch of the Superior Court of Justice, depending on the issue in dispute and location in the province. Where the Family Court branch exists (also known as Unified Family Court), the Court hears all family law matters, including divorce, division of property, child and spousal support, custody and access, adoption, and child protection applications. In all other sites across the province, family law matters are divided between the Ontario Court of Justice and the Superior Court of Justice. The Ontario Court of Justice hears family law disputes that fall under most Ontario legislation. Issues include: custody, access, child and spousal support, adoption and child protection applications. The Ontario Court of Justice does not decide divorce or division of property matters. The Superior Court of Justice can decide family law disputes involving divorce, division of property, child and spousal support, and custody and access. The Court does not hear adoption and child protection matters, except on appeal.
[15]Robert Todd, "Domestic violence court opens" *Law Times* (20 June 2011).
[16]Divorce and property matters will still have to be heard by the Superior Court of Justice.
[17]Allison Jones, "Court integrating domestic violence, family court cases opens in Toronto" *The Globe and Mail* (10 June 2011).
[18]Tamara Baluja, "A bumpy start for a new style of family court" *The Globe and Mail* (1 August 2011).
[19]Interview of E. Murray for OCJ History Project, 2015.
[20]"Integrated domestic violence court can help families: Editorial" *Toronto Star* (4 February 2015).
[21]Susan Goldberg, "Problem-Solving in Canada's Courtrooms: A Guide to Therapeutic Justice" National Judicial Institute, 2011, p. 28.
[22]Interview of J. Beaman for OCJ History Project, 2015.
[23]Interview of H. Perkins-McVey for OCJ History Project, 2015.

Period IV: 2000-beyond Notable Cases

R. v. Chen et al.[1] : Vigilante Grocer

"From my perspective, relative to the serious criminal cases that stream through this courthouse, this one is a relatively mundane matter." Justice Ramez Khawly[2]

On May 23, 2009, Wang "David" Chen, owner of the Lucky Moose Food Mart, in Toronto's Chinatown community was reviewing security video footage and saw a man loading his bike with plants from the store and leaving without paying. An hour later, the man returned to the Lucky Moose. Chen chased him and, assisted by two employees, tied the man up and placed him in the back of a van. The police charged all three of the Lucky Moose staff with assault and forcible confinement. The Crown proceeded by way of summary conviction. This meant the trial was held in the Ontario Court of Justice.

Online footage of the chase.

The case against David Chen became a media sensation. It also led to changes in the *Criminal Code* concerning a "citizen's arrest." These responses are not typical for a case referred to by trial judge Ramez Khawly as "a relatively mundane matter."

What was it about this case that generated so much media attention and captured the public imagination?

In his reasons for judgment, Justice Khawly observed that Chen's public persona resembled old-time movie star, Jimmy Stewart, while the alleged victim, Anthony Bennett, had a bad boy image like Jimmy

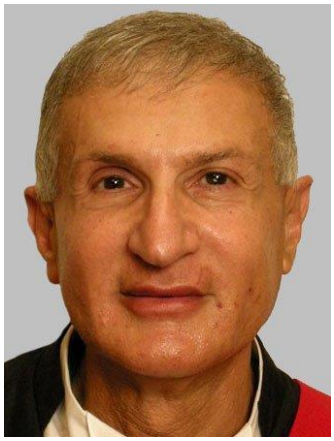
Cagney in the movie, "The Public Enemy."[3] The film metaphors continued when Khawly likened the facts of the case to a screenplay which, in the public's mind, went something like this:

> *"A hard working, relatively newly arrived immigrant to our shores toils relentlessly to eke out a living for his family only to find himself preyed upon by one of the undesirables of our community. The big, cumbersome, ham fisted, sometime mean machine of the state swoops down to protectively cradle into its bosom this most despicable of thieves while lashing out in fury against this poor man whose only sin is attempting to protect his hard earned labour."*[4]

The pervasiveness of this narrative was evident when "[o]ne of the most read Toronto newspapers – in the midst of the trial – monopolized its whole front page with the words: DROP THE CHARGES."[5]

The Charges

The police had received intense public criticism for the arrest, treatment and charges against the three men. Justice Khawly found this criticism to be undeserved. After being dispatched to deal with a "potentially dangerous situation with a likely hostage in the back of a van," officers did "indeed find someone in the back of the van tied up and in apparent distress."[6]



Justice Ramez Khawly.

The judge was blunt about the racial element at play:

> *"Let us not beat around the bush. This is not the forum for political correctness. Mr. Bennett is black and the other three are Asians. In an urban multicultural environment such as ours one must live under a rock to assume that we all live in perfect harmony or that there are no elements of*

> *any ethnic groups, Caucasian or otherwise not dealing in drugs and violence. Toronto the Good like any other large city has an underbelly that does not lend itself to a tourism marketing jingle."*[7]

Justice Khawly also did not agree with public criticism of the Crown Attorney for failing to withdraw the charges, especially in light of the evidence and the potential argument about the use of excessive force.[8]

The Evidence

Although Chen became the subject of much public admiration and sympathy, Justice Khawly was not impressed with the testimony he gave in the courtroom at Toronto's Old City Hall. Khawly found Chen's testimony to be evasive and contradictory. That was better than the testimony of one of the co-accused, which was found to be an "outright fictionalized account."[9]

Nor did Khawly find the testimony of the alleged victim, Anthony Bennett, to be credible. For example, some of Bennett's original statements to the police were clearly discredited by Chen's security video. One of Bennett's statements, however, did resonate with the judge:

> "Yeah I stole from them but they didn't have to frigging tie me up and throw me into a van."[10]

Justice Khawly also expressed a concern about the conduct of police witnesses in the courtroom. He observed that "most seemed worried about being tagged for 'ethnic profiling' or insensitivity and as a result, in my view, pulled their punches." [11]

Suggestions were made that shopkeepers such as Chen had lost faith in the police due to slow response times for shoplifting incidents and were therefore tempted to take the law into their own hands. The Crown prosecutor had intended to present evidence to counter the allegation of slow police response times but he ultimately declined to do so.[12]

Language Interpretation and Delay

Khawly's decision noted that the trial "nearly aborted when a well-regarded court interpreter's qualifications were disputed by the defence," even though defence counsel had willingly used the interpreter on a prior occasion, with full knowledge of the person's qualifications. Khawly took defence counsel to task for his misrepresentation to the court which resulted in the loss of "two valuable days of court time."[13]

The Issue: Use of Excessive Force

Section 494 of the *Criminal Code* provided that "Anyone may arrest without warrant…a person whom he finds committing an indictable offence." An hour had passed between the time when Chen had viewed the security video and Bennett's return to the store. In light of the time delay, could it be said that Chen had found Bennett committing the offence? Justice Khawly said "yes," because Bennett had clearly returned to resume his illegal activity: "This was a continuing theft, pure and simple."[14]

This finding meant that the three men had made an arrest sanctioned by section 494. The main question became: Did they use excessive force? The prosecution contended that it was excessive to hit the victim, bind him by the ankles and wrists, throw him into the back of a van, and drive off.[15]

Ultimately, the judge had a reasonable doubt about what actually transpired, due to the unreliability of evidence given by the three accused persons and by the alleged victim. All three men were acquitted.

The "Lucky Moose Bill"

David Chen's case was the impetus for federal legislation that came into force on March 11, 2013. Its official title was the "*Citizen's Arrest and Self-defence Act*."[16] However politicians referred to it as the "Lucky Moose Bill" after Chen's grocery store.

The legislation amended the *Criminal Code* to allow for a citizen's arrest if made "within a reasonable time after the offence is committed" and if the person believes "on reasonable grounds that it is not feasible in the circumstances for a peace officer to make the arrest." Since the terms "reasonable" and "feasible" are not defined, it is not clear how this would affect people in the circumstances of David Chen or Anthony Bennett.[17]

Source: Yelp website.

Some commentators were quick to criticize the new law. "New citizen's-arrest law greeted with applause, criticism," read the headline in a *Globe and Mail* article which was largely critical about the ambiguity the changes brought to the law.[18] The *National Post* questioned the federal government's impetus for the new law. "The government has been more than happy to frame it as a sort of retroactive justice for Mr. Chen's ordeal. But we have no idea if the courts would consider the one-hour time frame in his case "reasonable" or not. Conceivably, Mr. Chen could just as easily be charged under the revised law."[19]


David Chen in media scrum.

Conclusion

David Chen emerged as a folk hero and media darling, known as the "vigilante grocer." Although Chen experienced hardship from his arrest and prosecution, community fundraising helped cover his legal costs. His grocery business received a hearty helping of positive publicity. Chen's case was championed by Olivia Chow, then a federal Member of Parliament. He was visited by Prime Minister Steven Harper in connection with the new legislation. Not the typical outcomes for a person charged with committing a criminal offence!

Justice Khawly did his best not to be swayed by media attention and public opinion. Conscious of judicial independence, he wrote, "It is a given that my decision – whatever it is – will likely not please anyone and that my comments will infuriate many others but that is why the public has given me the security of tenure. They expect me – despite my ordinariness – to render a judgment devoid of fear or favour."[20]

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[1] *R. v. Chen et al*., 2010 ONCJ 641 (CanLII).
[2] *R. v. Chen et al*., 2010 ONCJ 641, par 7, p.2.
[3] *R. v. Chen et al*., par 60, p.13; par 75, p.17; par 77, p.18.
[4] R. v. Chen et al., par 91, p.20.
[5] *R. v. Chen et al.,* par 27, p.6.
[6] *R. v. Chen et al.,* par 22 p.5.
[7] R. v. Chen et al., par 22, p.5.
[8] *R. v. Chen et al.,* par 28, pp.6-7.
[9] *R. v. Chen et al*., par 67, p.15.
[10] *R. v. Chen et al*., par 79, p.18.
[11] R. v. Chen et al., par 18, p.4.
[12] *R. v. Chen et al*., pars 93-100, p.21.
[13] *R. v. Chen et al*., par 15, p.3 and pars 33-35, p.8.
[14] *R. v. Chen et al*., par 4, p.11.
[15] *R. v. Chen et al.,* par 57, p.13.
[16] S.C. 2012, c. 9.
[17] Bill C-26,Chapter 9, 2012.
[18] Appleby, Timothy and Mahoney, Jill, *The Globe and Mail,* March 11, 2013.
[19] Selley, Chris, *National Post*, June 29, 2012.
[20] *R. v. Chen et al.,* par 41, p.9.

Period IV: 2000-beyond Notable Cases

R. v. Grant[1]: "A Gun is Admitted into Evidence"

An inner-city Toronto neighbourhood – the Greenwood and Danforth area, with four high schools in close proximity – had a problem with youth crime, including lunch-hour drug deals, swarmings and robberies. This neighbourhood was not alone with its experience of youth violence. In the early 2000s, youth crime was increasing across Canada, with violent crimes making up an ever-larger share.[2] Communities were concerned. In the Greenwood and Danforth area, a community policing effort was introduced to respond to those concerns, with officers regularly patrolling the area.

A "Chat" With the Police

On November 17, 2003, as part of the community policing efforts, two plainclothes officers were patrolling the Greenwood and Danforth area. Around lunchtime, the two officers observed 18-year-old Donnohue Grant walking on the sidewalk. Acting on a hunch that something was amiss – by the way the young black man stared at them and fidgeted with his coat and pants – they called in a uniformed colleague, Officer Gomes, to have a chat with Grant. Gomes stood in front of Grant on the sidewalk and began to speak with him. Shortly afterwards, the plainclothes officers identified themselves and stood behind Gomes, blocking Grant's way forward.

Gomes asked Grant if he had anything in his possession that he should not have. Grant replied that he had a "small bag of weed" and a firearm. He was then arrested on marijuana and weapon charges. The police seized the marijuana from Grant's pocket and removed a loaded gun from the pouch he was

wearing on his belt. They advised him of his right to counsel and took him to the police station. Grant was charged with five firearms offences.

The Significance of R. v. Grant

R. v. Grant, first heard at the Ontario Court of Justice, was appealed to the Ontario Court of Appeal. In a further appeal to the Supreme Court of Canada, the case made new law and now guides judges across the county in deciding when evidence obtained in breach of *Charter* rights must be excluded.

While the *Grant* case has had a significant legal impact, it also tells an important story about the social context surrounding the facts of the case and the community in which it occurred. All three decisions – from the Ontario Court of Justice to the Supreme Court of Canada – made pointed comments about the community through which Donnohue Grant walked on November 17, 2003.

The Charter Arguments

The Crown elected trial by way of indictment and Grant chose to be tried in the Ontario Court of Justice. The trial was heard by Justice Monte Harris.

At trial, Grant claimed that his *Charter* rights had been breached. Specifically, he argued that he had been arbitrarily detained by the police officers in violation of his Section 9 *Charter* rights and, further, that police had violated his right to retain counsel and to be informed of that right under Section 10(b) of the *Charter.* If Grant's right had been violated, the next question to answer: Should the evidence (specifically, relating to the loaded gun Grant was carrying) be excluded at the trial under Section 24(2) of the *Charter?*

Sections from the *Charter of Rights and Freedoms* Considered in *R. v. Grant*

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Was he Arbitrarily Detained?

At trial, Justice Harris found that the police had not violated Grant's rights under the *Charter*, including the right under Section 9 not to be arbitrarily detained. Therefore, he had no difficulty admitting the gun into evidence and he convicted Grant of five weapons offences.

Harris went on to consider whether the gun should have been excluded if he had found a *Charter* breach. "The short answer is 'No.'"[3] Harris explained: "The evidence existed irrespective of an assumed *Charter* violation and its admission would not render the trial unfair." [4]

The Court of Appeal disagreed with Harris about arbitrary detention – they said it had taken place – but nonetheless approved the admission of evidence and the resulting convictions.

The Supreme Court found that Grant had been arbitrarily detained and, upon detention, he had not been advised of his right to counsel "without delay" as required by Section 10. The detention began when Officer Gomes told Grant to keep his hands in front of him and when the other two officers moved to prevent him from walking forward. The majority decision articulates factors to consider where detention is "psychological," not involving physical restraint or legal obligations.

Should the Gun Have Been Excluded?

> "Debate rages in legal circles over one man's Supreme Court appeal that could revolutionize the mandate for tossing out evidence." --Globe and Mail[5]

Section 24(2) of the *Charter* states that evidence obtained in a way that violates a person's *Charter* rights shall be excluded if "having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

All three levels of court found that the admission of the gun into evidence would not bring the administration of justice into disrepute.

In reaching its conclusion, the majority of the Supreme Court formulated a new three-part test that considers:

> (1) the seriousness of state conduct in violating the *Charter*,

(2) the impact of the conduct on the accused person, and

(3) society's interest in the adjudication of the case on its merits.

Under the third prong of the test, the reliability of the evidence is an important factor:

> [E]xclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute." [6]

The majority found the gun to be "highly reliable evidence" that was "essential to a determination on the merits".[7] Further, the majority found that the police conduct was not "egregious." While the impact of the *Charter* breach was significant, the Supreme Court ruled it was not "at the most serious end of the scale." Finally, they concluded the value of the evidence – the loaded gun – to be "considerable." Although it was a "close case" when considering – and balancing – all the circumstances, they ruled the gun to be admissible.[8]

The End Result

The Supreme Court upheld Grant's convictions on four of the five counts of firearms offences. He was acquitted of the "weapons trafficking" charge because his plan to transport the gun to another location did not meet the legal definition of trafficking.

Impact on Judging Criminal Trials

Judges of the Ontario Court of Justice are often called upon to hear *Charter* arguments in criminal cases and to rule on whether evidence obtained through a *Charter* violation should be excluded. The *Grant* case has been the subject of judicial education and now serves as an important contribution to the law concerning the *Charter.*

Crown counsel Jennifer Woollcombe has said that, in relation to s.24(2), "there can be little dispute that the Supreme Court of Canada has intentionally provided trial courts with an increased degree of flexibility in its new test" set out in *Grant.* At the same time, she notes that the guidelines "will significantly narrow the scope of judicial discretion and should assist judges in identifying each of the relevant factors to consider in any particular case."[9]

The Context of Youth Violence

> "It takes a certain desperation for a young person to walk our streets with a gun. The sense of nothing to lose and no way out that roils within such youth creates an ever-present danger. That danger arises from the impulsiveness of youth and the lack of foresight with which they often act. The unfortunate — and often tragic — reality is that it often takes very little provocation or incentive to trigger that latent violence once we have let the immediate risk factors develop. This most often puts other youth in danger's way, but can do the same for any of us, because it creates a reality in which violence is unpredictable — unpredictable in location, unpredictable in cause and unpredictable in consequences.
>
> The Review of the Roots of Youth Violence."[10]

As the *Grant* case worked its way through three courts, many significant events involving youth violence occurred in Ontario. Gun violence, in particular, was an increasing concern. A high profile event occurred in 2007, for example, when 15-year-old Jordan Manners was shot to death at a Toronto high school during school hours.

The Ontario government commissioned a review to identify the underlying issues creating this situation. In *The Review of the Roots of Youth Violence*, authors Roy McMurtry and Alvin Curling examined a variety of "roots," including poverty, racism, community design, educational and family issues, health, and issues in the justice system.

Research for this report showed that "seven per cent of Toronto high school students have been threatened or attacked by someone with a firearm."[11]

The report also noted that trends in violent crime among younger people include "the increasing frequency with which guns and knives are being used in disputes that might previously have been settled with fists."[12]

Contextual Issues Acknowledged in *R. v. Grant*

Interestingly, each of the three decisions acknowledges the concerns communities – and individuals in those communities – were facing. Each level of court looked at those concerns through slightly different lenses – demonstrating the balancing act the courts must perform in arriving at their determinations.

At the Ontario Court of Justice, Justice Monte Harris wrote: Grant "was checked out, to use a term, probably amongst other persons in the area to satisfy a community safety issue, to perhaps get word around that the police are checking out the area and as a bottom line to assist as best they could in crime

> "Consider what might have happened had the police not intervened here? Someone, perhaps another student in one of the nearby schools, could have been shot and perhaps killed. The public would be outraged."—*Brantford Expositor*
>
> (Dean, David, "The good of the people is the chief law," *Brantford Expositor*, August 12, 2009)

prevention aimed at the vulnerable student who could be bullied and swarmed without defending himself or herself."[13]

At the Court of Appeal level, Justice John Laskin wrote: "Although the right to be free from arbitrary detention touches an individual's rights of autonomy and freedom, increasing levels of gun violence in our communities threaten everyone's personal freedom. In this case, where the police did not grossly overstep the bounds of legitimate questioning, acted in good faith, used no force, and were patrolling one of Toronto's high-crime areas, I think the repute of the justice system would suffer if the evidence were excluded."[14]

In the Supreme Court, Justice Ian Binnie wrote: "A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified 'low visibility' police interventions in their lives…The appellant, Mr. Grant, is black. Courts cannot presume to be colour-blind in these situations."[15]

2003 – Donnohue Grant is charged with five weapons offences.

2004 – Grant is found guilty of all five offences in the Ontario Court of Justice.

2006 – Appeal to the Court of Appeal is dismissed, but the Court found that the trial judge had erred in deciding that Grant had not been detained. Grant was "psychologically" detained from the time he was asked about his criminal record and when his path was blocked by the officers. This detention was arbitrary contrary to Section 9. However, this breach was not considered flagrant by the Court.

2007 – Jordan Manners, a 15-year-old, was shot and killed at a Toronto high school during school hours, garnering significant media attention and community concern.

2008 – *The Review of the Roots of Violence*, a study commissioned by the Ontario government and led by former Chief Justice of Ontario Roy McMurtry and former provincial cabinet minister Alvin Curling

reported on how to make the province safer in the long term. The Manners shooting – along with other killings, many of which received less public profile – was a factor leading to this review.

2009 – The Supreme Court releases its decision in *R. v. Grant,* finding *Charter* breaches, yet upholding Grant's conviction on four of the five counts.

Conclusion

Very little is known about Donnohue Grant, the man who cooperated with the police on a Toronto sidewalk one fall day in 2003. We will never know if the loaded gun he was carrying would have led to violence, but we can understand why community policing efforts were directed to high-risk school areas. The case that resulted from his actions has had a significant impact on future criminal cases by creating guidelines for interpreting *Charter* provisions about detention and the exclusion of evidence. What began as a "chat" between the police and an 18-year-old man turned into a case that changed the law of the land.

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[1] *[2004] O.J. No. 6254, 2006 CanLII 16347 (ON CA), 2009 SCC 32*
[2] *Statistics Canada, "Youth Crime in Canada, 2006," Juristat, Volume 28, no. 3*
[3] *R. v. Grant*, [2004] O.J. No. 6254, para 42.
[4] *R. v. Grant*, [2004] O.J. No. 6254, para 42.
[5] Makin, Kirk, "A Chance Encounter That Might Rewrite the Rules," *The Globe and Mail,* April 21, 2008.
[6] *R. v. Grant*, 2009 SCC 32 at para 81.
[7] *R. v. Grant*, 2009 SCC 32 at para 139.
[8] *R. v. Grant,* 2009 SCC 32 at para 140.
[9] Woollcombe, Jennifer, "Grant, Suberu and Harrison: Detention, the Right to Counsel and a New Analysis under Section 24(2): Some Practical Impacts" (2010) 51 Sup Ct L Rev 480.
[10] McMurtry, Roy and Curling, Alvin, *The Review of the Roots of Youth Violence, Volume 2 – Executive Summary.* (Toronto: Queen's Printer for Ontario,2008), p.5.
[11] McMurtry, Roy and Curling, Alvin, *The Review of the Roots of Youth Violence, Volume 4 – Research Papers, Ontario, p.47.*
[12] McMurtry, Roy and Curling, Alvin, *The Review of Roots of Youth Violence, Volume 1 – Executive Summary*, p.3.
[13] *R. v. Grant,* [2004] O.J. No. 6254 at para 25.
[14] *R. v. Grant, 2006 CanLII 18347 (ON CA)*
[15] *R. v. Grant,* 2009 SCC 32 at para 154.

Period IV: 2000-beyond Notable Cases

R. v. Michael and R. v. Javier: Victim Surcharge – Judges Respectfully Disagree[1]

Two judges in the same court in the same city made decisions on the same issue. The similarity ended there. The two rulings from the Ontario Court of Justice in Ottawa, released a week apart, dealt with a requirement in the *Criminal Code* for convicted offenders to pay a "victim surcharge." Justice David Paciocco found the requirement to be unconstitutional and of no force and effect. Justice Robert Wadden found it to be valid.

What is the victim surcharge?

In criminal cases, when a defendant is found guilty, the judge must decide on the appropriate punishment. Section 737 of the *Criminal Code* says that, in addition to any other punishment imposed, the offender must pay a victim surcharge. Provincial governments use the revenues from the surcharge to fund programs that support victims of crime.

When a judge imposes a fine against the offender, the surcharge is 30% of the fine. If no fine is imposed, the surcharge is $100 for a summary conviction offence and $200 for an indictable offence.[2]

Until 2013, judges had the discretion to refuse to impose a surcharge in order to avoid "undue hardship" to the convicted offender. The law was then amended to remove this discretion. As a result, the surcharge became mandatory in all cases.

R. v. Michael

Shaun Michael was a twenty-six year old Aboriginal man who lived on the street. On three occasions, after becoming "grossly intoxicated" due to alcohol and drug addiction, Michael committed minor

assaults, damage to property, and breaches of court orders. His case was heard by Justice Paciocco who convicted him of nine offences. Because no fine was imposed, the surcharge, at a rate of $100 per offence, would have amounted to $900.

The defence counsel argued that imposing the surcharge on his client would be unconstitutional. After conducting a detailed legal analysis, Justice Paciocco found that the mandatory surcharge amounted to "cruel and unusual punishment" in violation of section 12 of the *Charter of Rights and Freedoms*.

Justice David M. Paciocco, Ottawa. (Courtesy: Office of the Chief Justice, Ontario Court of Justice.)

> *Mr. Michael is an addicted, virtually homeless individual living on a social assistance street allowance that puts him deep below the poverty line…For Mr. Michael, a $900 surcharge would be so crushing as to be grossly disproportionate…*[3]

It would have been possible in this case (but not all cases) to order nominal fines that would result in a nominal surcharge. In fact, that is an approach has been used by judges in other cases. In this case, however, Justice Paciocco wrote, "In my view the punitive component of the sentences required in this case is a jail sentence…In this case a fine is not an alternative, because Mr. Michael cannot pay a fine and it would a legal error for me to impose one."[4]

"Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

Section 12, *Charter of Rights and Freedoms*.

R. v. Javier

Joebart Phillip Javier pleaded guilty to one count of possession of crack cocaine. Justice Wadden sentenced him to one day in jail in addition to time served prior to the sentencing decision. The duty counsel representing Javier asked Justice Wadden to waive the imposition of the mandatory victim surcharge. She referred him to the decision of R. v. Michael that Justice Paciocco had released several days before. Although decisions from the same level of court are not binding, she asked Justice Wadden to accept Justice Paciocco's decision as persuasive authority that the surcharge provision of the *Criminal Code* was of no force and effect.

Justice Wadden respectfully noted that Justice Paciocco had done a "thorough and detailed review of the law" in R. v. Michael.[5] He disagreed, however, with his fellow judge's conclusion. Justice Wadden found s.737 of the *Criminal Code* to be valid legislation that obligated him to impose the victim surcharge."[6]

Justice Robert Wadden, Ottawa. (Courtesy: Office of the Chief Justice, Ontario Court of Justice.)

In his ruling, Justice Wadden noted that "cruel and unusual punishment," as described by the Supreme Court of Canada, is "so excessive as to outrage standards of decency" and disproportionate to the extent that Canadians "would find the punishment abhorrent or intolerable."[7]

Ultimately, he concluded that "there is sufficient flexibility available to a sentencing judge to avoid undue harshness in the application of this section."[8]

> *Although the financial stress of paying the victim surcharge may be onerous for some offenders I am not persuaded that it is cruel and unusual punishment that*

> *would result in a declaration of the invalidity of the legislation. The effect of such a declaration would be that the victim surcharge could not be imposed on any offender, even those who clearly have the means to pay. (R. v. Javier, par 19)*

Postcript: A Binding Decision

In April 2015, Justice Bruce Glass of the Ontario Superior Court issued his ruling in R. v. Tinker.[9] He found that the mandatory victim surcharge is not "grossly disproportionate" and that section 737 of the *Criminal Code* is valid. Judges of the Ontario Court of Justice became legally bound to follow that ruling. However the debate is not over. Within the judiciary and the media, strongly held views on both sides of the issue continue to be articulated. And some judges continue to order nominal fines when they feel that a surcharge of $100 or $200 per offence would be disproportionate.

In a ruling issued shortly after the Tinker decision, Justice Paciocco graciously acknowledged the binding nature of Justice Glass' decision:

> *I am therefore of the view that unless and until a summary conviction appeal court or the Ontario Court of Appeal rules to the contrary, after considering all of the issues that require consideration, the Tinker decision does settle the question, and I am obliged to follow it. I am therefore rejecting the constitutional challenge that has been brought by Mr. Eckstein, and I will be imposing the victim surcharge.*[10]

Conclusion

The Ontario Court of Justice decisions in *R. v. Michael* and *R. v. Javier* show how judges of the same court can respectfully disagree. As observed by Peter Griffiths, a former Associate Chief Justice of the

Court, "I am struck, looking at the two decisions, at the reasoned, respectful and responsible way they articulate and guide the public debate on a sensitive issue."[11]

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[1] *R. v. Michael,* 2014 ONCJ 360; *R. v. Javier,* 2014 ONCJ 361.
[2] Summary convictions offences are considered less serious than indictable offences because they are typically punishable by lesser sentences and smaller fines.
[3] *R. v. Michael*, par.58.
[4] *R. v. Michael*, par. 49.
[5] *R. v. Javier*, par. 10.
[6] R. *v. Javier*, pars 4 and 5.
[7] *R. v. Javier*, par 7.
[8] *R. v. Javier*, par 10.
[9] *R. v. Tinker* (April 9), 2015 ONSC 2284, [2015] O.J. No. 1758, 2015 CarswellOnt 4936 (Ont. S.C.), B. Glass J.
[10] *R. v. Eckstein* (April 13), 2015 ONCJ 222, [2015] O.J. No. 1869, 2015 CarswellOnt 5865 (Ont. C.J.), D. Paciocco J.
[11] Interview of P. Griffiths for the OCJ History Project, 2015.

Period IV: 2000-beyond Profiles & Stories

Brian W. Lennox: The Collaborative Leader

Introduction

Brian Lennox discovered an interest in criminal law when his legal education began at the University of Toronto in 1968. "I liked the intellectual discipline of it, the elements of logic and reason. Plus, it had the 'people' aspect that some other areas of the law don't," he recalled.[1] He wondered if he might be a criminal lawyer one day.

That interest transformed into a passion in 1970 during the October Crisis. Lennox was serving as an intern working for Members of Parliament in Ottawa. He watched the House of Commons debates unfold around the *War Measures Act.* "The experience of working in Parliament changed my life and those debates over the *War Measures Act* confirmed my interest in criminal law." During the October Crisis more than 450 people were arrested and held without charge. Lennox saw this as an abuse of power. It reinforced for him the necessity of a fair and just criminal process which respected the rights of all. That principled approach did lead Lennox into the practice of criminal law. By 1999 he had been appointed to the position of Chief Justice of the Ontario Court of Justice – the busiest and largest court in Canada, hearing approximately 98 per cent of criminal cases in the province.

Early Years

"When I was young, I had no clue what I wanted to do with my life," Lennox remembers. "I still really have no firm idea why I went to law school…. though my parents said that I always loved to argue."

Born in Thornhill in 1946, Lennox moved with his family to Rothesay, New Brunswick when he was in grade 8. He began to learn French at school during that year in New Brunswick, but returned to the

Toronto area for high school. His older brother, John, headed to Glendon College – then the only campus of Toronto's York University. Lennox followed along in his brother's footsteps. "John and I commuted from home together. Glendon offered a general first year program, which appealed to me; it was a new university, small and had a beautiful campus." After first year, he studied political science and economics, and played varsity basketball for York (after a fashion): "I got my basic training for the Court through basketball…. I sat on the bench." At Glendon, he also met his future wife, Susan Paton. They married in 1969.

Brian Lennox spent his early years in Thornhill. (Courtesy: Lennox Family).

Law School Days

Law school followed. It was a heady time at University of Toronto during those days. His professors included a future Supreme Court of Canada judge, Frank Iacobucci, and academics who greatly influenced the development of the law and the courts, including Alan Mewett and Martin Friedland. But Lennox's true transformative moment came in 1970 when he saw a notice pinned to a bulletin board at U of T, advertising the Canadian Association of Political Science parliamentary internship program at the House of Commons.

Instead of his third year of law school, Lennox went to Ottawa and began working for Ken Robinson, a Liberal MP from Toronto. "I chose to work with him because, at that time, he was a member of the Justice Committee of the House." Then there was the October Crisis, which was a riveting experience.

THE OTTAWA JOURNAL

WAR MEASURES ACT INVOKED

Hundreds Arrested as Police Pounce on Que. Separatists

During the October Crisis, Lennox was working as a parliamentary intern in Ottawa. Lennox described those tense days in an interview for the *Richmond Hill Post* in April 2006: "Lennox was schooled not only by parliament, but also by the political upheaval of 1970s Ottawa. The FLQ crisis was in full swing and Lennox saw the *War Measures Act* put into motion, and the ensuing tension in the streets. He remembers an encounter with a soldier guarding the National Defence Headquarters. The infantryman pointed his rifle at a woman attempting to take his photograph. 'I was stupid enough to say, "What are you going to do, shoot her?"' he says." (Source: *The Ottawa Journal*, October 14, 1970.)

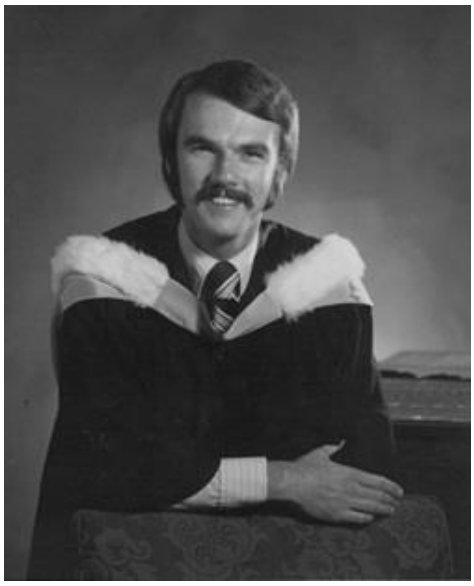
But "everything was set in motion for me when I began working for André Fortin." A Quebec MP, Fortin was then a member of the *Ralliement créditiste,* which became the Social Credit Party. As part of his duties, Lennox began writing speeches for Fortin – in French. "At that time, my French wasn't particularly strong and I learned a lot from being immersed in French in the office and writing those speeches."

Paris Beckons

After returning to Toronto for his final year of law school, Lennox headed to the University of Paris on a French government scholarship for graduate studies in criminal law. The first of his three children, Britt, was born there. The scholarship did little to support a family of three. His father sent him a *Globe and Mail* article describing how difficult it was to land articling positions in Ontario. From Paris, Lennox began trying to locate an articling position in Ottawa, where the young family had decided to settle. He

sent letters to every general practice law firm in Ottawa and received only two replies and one offer of a position. Unbeknownst to Lennox at the time, that offer was another transformative moment.

Practising in Ottawa



Law School Graduation. (Photo: Gerald Campbell Studios. Courtesy: Lennox Family.)

The law firm of Paris, Mercier, Sirois, Paris and Bélanger hired Brian Lennox by mail and the family returned to Canada in the autumn of 1973. Paul Bélanger, the lawyer who took a chance on the mail-order articling student and then kept him on after his articles, became Lennox's long-term mentor and friend.

In the spring of 1974, Lennox returned to Paris to sit his oral exams and graduated with a *Diplôme d'études supérieures de sciences criminelles.* But his first years in practice were spent at the low end of the legal pile. "I was a beginning generalist in an excellent firm. I was horrible at real estate law and I didn't like corporate law. I enjoyed litigation but wanted to do more criminal work."

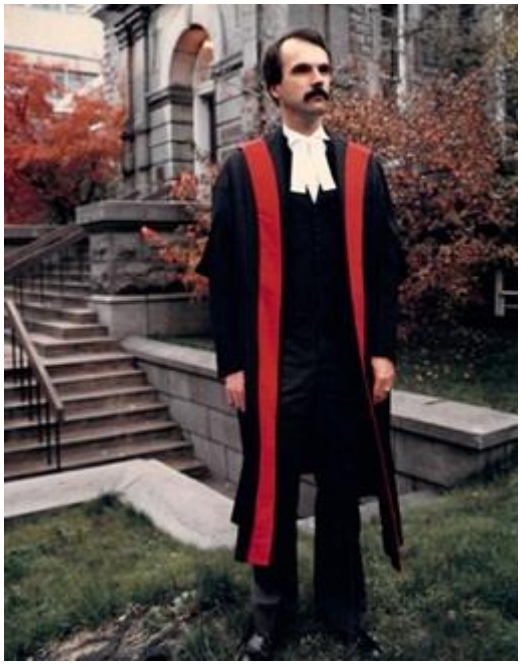
When he saw an opening for a part-time Crown Attorney in Ottawa, Lennox received the approval of the firm to apply for it. During the course of that competition, an opening for a full-time bilingual Crown became available when Assistant Crown Attorney Jack Nadelle was appointed to the Provincial Court (Criminal Division). Lennox then applied for and received the full-time position.

Prosecuting Criminal Cases

From 1978 to 1986, Brian served as an Assistant Crown Attorney, prosecuting criminal cases. "Roy McMurtry was the Attorney General in those days and I liked his approach to the Crowns. We were his 'local' ministers of justice. He took a very hands-off approach and gave independence and autonomy to us to do what appeared to be 'right' in individual cases." But he wasn't only working as a Crown. Lennox also began teaching various law courses – first at Algonquin College and then at the University of Ottawa. He taught a variety of subjects – from real estate to advocacy to criminal law.

In 1978, Paul Bélanger had been appointed to the Provincial Court (Criminal Division) and sometime later he began encouraging Lennox to apply.

The Provincial Court (Criminal Division): A Natural Fit



Lennox was sworn in as a Judge of the Provincial Court (Criminal Division) in 1986. (Courtesy: Lennox Family.)

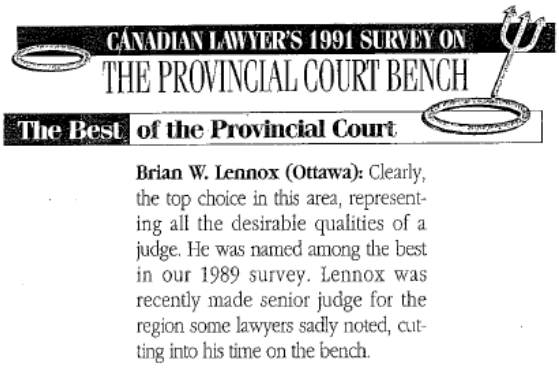
The Provincial Court (Criminal Division) was a natural home for Lennox. "The Provincial Court did my kind of work – criminal matters – and dealt with real people with real problems. During the 1980s, more and more counsel were electing to have matters tried in Provincial Court because the Court was building its expertise in criminal law and changes in legislation were giving the provincial courts in Canada increased jurisdiction in *Criminal Code* matters."

"The application process for a judicial appointment in those days was very simple. I only needed two letters of recommendation. I had no connections so I just put in my application and waited. The process was pretty summary, although I wouldn't be surprised if Paul Bélanger had a hand in it. I was called

down to Toronto in August 1986 to meet with the Judicial Council, where I was interviewed by Chief Judge Hayes of the Criminal Division, Chief Judge Andrews of the Family Division, Chief Justice William Howland (Chief Justice of Ontario), a couple of other judges and some others, including an Anglican minister. I was told shortly after that I would be appointed, but that I could not tell anyone until it was officially announced.… On September 25, 1986, I was driving home from work, listening to the CBC news and heard the announcement that a new judge had been appointed in Ottawa – and that it was me!"

Life as a Provincial Court Judge

Chief Judge Fred Hayes's practice was to bring newly appointed judges to Toronto for about three weeks of training by observation. As Lennox recalled, the program was fairly rudimentary, sitting in court and watching more experienced judges make decisions. Within the first couple of years following appointment, Hayes asked Lennox to chair the Court's University Criminal Law Program. At that time, all other education for criminal law judges was controlled by the Association of Provincial Criminal Court Judges of Ontario. The University Program was the only one over which the Chief Judge had full control.


CANADIAN LAWYER'S 1991 SURVEY ON
THE PROVINCIAL COURT BENCH
The Best of the Provincial Court

Brian W. Lennox (Ottawa): Clearly, the top choice in this area, representing all the desirable qualities of a judge. He was named among the best in our 1989 survey. Lennox was recently made senior judge for the region some lawyers sadly noted, cutting into his time on the bench.

Lennox quickly made a name for himself as a fair, courteous judge. (Source: *Canadian Lawyer*, 1991.)

This education work had two unexpected but crucial outcomes for Lennox and his long-term judicial career: it brought him into closer contact with the Chief's office and solidified his reputation as an educator within the Court. It also allowed him, over time, to meet every criminal law judge on the Court.

In his early years on the bench, Lennox felt in many ways that he had been appointed to the "Ottawa Court" as opposed to the "Provincial Court." There was little interaction with judges and justices of the

peace from other parts of the province. “The Provincial Court in those days was decentralized – we all worked in our own silos.”

The Possibility of a Single, Unified Trial Court?

By the end of the 1980s, everyone on the Court knew of the court reforms proposed by Attorney General Ian Scott, including the ultimate merger of all existing trial courts into a single, unified institution. “The big change arrived on September 1, 1990 with the first phase of court reform. The High Court and District Courts merged to become the Ontario Court (General Division). The Criminal and Family Divisions of the Provincial Courts were joined to become the Ontario Court (Provincial Division) with only one Chief Judge – the newly appointed Sidney B. Linden.[2]

It looked as though the planned reforms would fall apart when, on September 6, 1990, the governing Liberal party lost the election and Ian Scott moved into opposition. “There was all kinds of speculation and worry in the Court after that. Sid was an unknown. He’d never been a judge before. It was an uncertain time. And it was made more uncertain when it became apparent that the proposed second phase of court reform, the merger of the General Division with the Provincial Division would be delayed indefinitely.”

Lennox was already beginning to see the plan that Linden had in mind to guide the new Provincial Division forward – and he was impressed. Knowing of the merger to come in September 1990,[3] Linden set about putting an administrative structure in place to cope with the coming changes, including the appointment of a group of Regional Senior Judges (RSJ), one in each of the eight regions of the province.

Once again, Paul Bélanger influenced Lennox’s career. Bélanger, the logical candidate for the RSJ position in the East Region, encouraged Lennox to consider the position should he, Bélanger, not be appointed. When Lennox demurred, pointing out that he had no administrative experience or particular

interest in the position, he recalled Bélanger asking him: "It could be anybody, why not you?" Linden had met Lennox and, from Lennox's work on the Court's University Program, sized him up as intellectual, strategic and academic, in addition to being a solid judge. He also knew that, unlike many of the more senior judges on the Court who were concerned by Linden's lack of experience as a judge, Lennox was willing to support his plans for administrative changes to the Court.[4]

Lennox received the RSJ appointment in July 1990 – and quickly set to learning about court administration, while maintaining his involvement with the Court's educational programming.

Working in Judicial Administration

As RSJ, Lennox was tasked with bringing together the judges of the former Criminal and Family Divisions of the Court in the East Region. This proved to be relatively easy in Ottawa, where the criminal and family law judges had been working together in the same space since the opening of the Ottawa courthouse in 1986, but somewhat more difficult in the larger region. The integration of the former Provincial Courts and their judges was made more complicated by the proposed expansion of the Unified Family Court (UFC) from Hamilton to other parts of the province, an initiative that was supported by the new provincial government: many family law judges in the Provincial Division were anxious to maintain their position as clearly specialized family law judges in the event that the UFC did expand,[5] and the majority of criminal law judges were not particularly interested in doing family law cases.

The new collection of Regional Senior Judges and Senior Advisors, in November 1990. Back row, left to right: G. Michel, G. Campbell, J. Evans, B. Lennox, D. August, G. Lapkin (Senior Advisor, Co-ordinator of Justices of the Peace). Front row, left to right: B. Walmsley (Senior Advisor, ACJ Family), M. Hogan, S. Linden (Chief Judge), H. Momotiuk. Missing: R. Walneck. (Courtesy: S. Linden.)

A Variety of New Court Structures

The new court structures – and the Chief Judge's Executive Committee (CJEC) created by Sid Linden in particular – made the 1990 transition a joint responsibility. Linden ensured that all of the RSJs were given training and experience as well as specific responsibilities and devoted the majority of the time at frequent CJEC meetings to administrative matters.

Within six weeks of the creation of what Lennox has often referred to as "the modern Ontario Court of Justice", the Supreme Court of Canada, in its October 1980 *Askov* decision, changed the nature of judicial administration within the province. No longer was it good enough to do business-as-usual: management by the Court of its cases, resources and court lists became of critical importance and the

Court shifted into crisis mode. The response, in large part due to the collective leadership taken by CJEC and to the workload assumed by all of the judges of the Court, was generally successful. Innovative case management and scheduling practices, together with different forms of case triage minimized the impact of the *Askov* decision. In Ottawa,[6] Lennox was responsible for a series of criminal law practice directions that regularized pre-trial conferencing and promoted early resolution where appropriate. Similar practices were adopted in the area of family law. Another lasting feature of the *Askov* crisis was a closer working relationship among the justice "stakeholders", including the Court, courts administration, the crowns, police and the Bar.

Associate Chief Judge – Co-ordinator of Justices of the Peace Marietta Roberts in the mid-1990s. (Courtesy: C. Zawadzki)

Roberts and Lennox: Two New ACJs

In autumn 1995, Lennox (October) and Marietta Roberts (September) were appointed respectively to fill the two newly created positions of Associate Chief Judge and Associate Chief Judge-Co-ordinator of Justices of the Peace within the Ontario Court (Provincial Division). In the early 1990s, Chief Judge Linden had begun relying on Lennox's skill in the realm of judicial education: "Any time an education program needed to be beefed up, I'd lean on Brian," Linden recalled.[7] That made Lennox a natural choice for his ACJ position. In that role, he chaired the Education Secretariat, responsible for the design, development and delivery of education to the judges.

Leading Education Secretariat

The creation of the Education Secretariat was but one of the many administrative innovations introduced during the early 1990s – radically changing court operation on an institutional level. Prior to

its introduction, judicial education had been principally run by the two associations of judges – family and criminal. Education seminars had been the only way judges could get together for purposes of association meetings and business: "For this reason, in the early years, education was but one of many purposes served by holding education seminars. Later, the educational component of the seminars became much more important."

"Sid created the Education Secretariat – with equal numbers of judges appointed by the Chief Judge and the two associations – and providing a significant autonomous budget as well as giving it a supervisory and coordinating role over programming. This meant there was now a formal body, representing all judges, responsible for education. The creation of the Education Secretariat was a recognition of the need for and importance of continuing education for all judges."

At first, the judges' associations appeared to be somewhat wary of the Secretariat, but they soon came to see its value in providing quality education and they appreciated the shared decision-making authority and responsibility. At the same time, Chief Judge Linden recognized the legitimate need of the judge's associations to meet both as an executive and with their judge members and provided specific funding and an opportunity for those meetings.

A Steep Learning Curve

In his new administrative roles, Lennox was learning how to handle the unanticipated challenges, including surprise announcements from the government. "I was apoplectic!" recalled Lennox of the December 1995 meeting when he and Roberts were advised by the Assistant Deputy Minister (in the absence of the Chief Judge, who was on holiday) that the government was making budget cuts in the order of 30 per cent across the whole of government, including the Court.

"Given the fact that over 90 per cent of the budget of the Court went to pay judicial salaries and benefits, the proposed level of cuts was impossible and the proposal itself created a real potential for significant harm to the justice system. Sid agreed that something had to be done to create a record of our concerns and so he and I sat down and starting drafting a letter."

Before the letter was sent on January 17, 1996, Linden showed it to both Charles Dubin, Chief Justice of Ontario, and Roy McMurtry, Chief Justice of the General Division of the Ontario Court of Justice. They agreed to sign the letter together with Linden. It was an unprecedented move – a court rebuking an Attorney General for proposing budget cuts without a full and proper consultation.

"We would urge you to seek a moratorium on any cuts to the administration of justice until a proper analysis of the impact of any proposed cuts can be made," read the letter to the Attorney General Charles Harnick. "They could severely limit public access to justice and could put at risk some of the most vulnerable members of our society," the letter continued. That letter became front page news on January 31, 1996, following its leak to the press. "Cuts mean justice chaos top judges warn," read the headline in the *Toronto Star.*[8] According to the *Globe and Mail*, this vocal criticism of the government by members of the judiciary was a "highly unusual foray."[9]

As a result of the judges speaking out, Harnick pulled back on the proposed budget cuts for the justice system. Lennox learned from this experience that moments of crisis can have unexpected – and positive – outcomes. "The collective action of the three Chiefs, heralded a time of cooperation amongst the three Courts that had not previously existed and has since continued," he observed.

During Lennox's tenure as ACJ, the Ontario Judicial Appointments Advisory Committee was formally recognized in legislation. JAAC – as it became known – vets applicants to the Court, and produces a short, ranked list of candidates from which the government must choose appointees. JAAC was created as a pilot project in 1989, but not statutorily recognized until 1994.[10] Since its inception, JAAC "has been

recognized as a model of independent, rigorous and objective judicial appointment process." As many commentators have pointed out, the efforts of JAAC have resulted in a "very strong bench, untainted by patronage."[11]

A Witness to a Profound Evolution

From the time of his call to the Bar in 1975, Lennox had been a witness to and later a participant in the evolution of the Provincial Courts. On different occasions, he has listed a number of factors in this evolution.

1) The elimination of the grand jury, and of summary conviction appeal by trial *de novo,* the existence of both of which diminished the value of the work of the judges of the Court.

2) The formal requirement in the 1980s of 10 years' experience as a lawyer as a condition of appointment.

3) The rise of the judges' associations and their subsequent merger.

4) The increasing recognition of the family and criminal law expertise of the Court.

5) The development by the judges' associations of the framework agreement to settle issues of remuneration.

6) The creation in 1989 of the Judicial Appointments Advisory Committee process, ensuring the highest quality of judicial appointments, a process that has become an aspirational model for other jurisdictions.

7) The merger of the Family and Criminal Divisions of the Provincial Courts in 1990 under the strong administrative leadership of Sidney Linden.

8) Continuing high quality judicial education, since 1995 under the auspices of the Education Secretariat and later with the National Judicial Institute.

9) The creation in 1995 of the modern Ontario Judicial Council.

10) Continuously expanding jurisdiction in criminal matters by legislative enactment and as a result of accused elections for trial in Provincial Court.

A number of these factors have been largely mirrored for the justices of the peace in the areas of administrative structure, associations, appointment, discipline, remuneration, and education.

Chief Justice Brian W. Lennox (left) at his swearing-in as Chief Justice, Ontario Court of Justice, on September 19, 1999. At right is Justice David Wake who was sworn in as Associate Chief Justice that day. Associate Chief Justice of Ontario, Coulter Osborne, stands between Wake and Lennox. (Courtesy: Lennox Family.)

By the time he became Chief Justice in 1999, Lennox could see the progress the Court had made over time: "The administrative structure of the Court fashioned by Chief Justice Sidney Linden in the 1990s, the rapid expansion of its jurisdiction and the outstanding quality of the judges of the Court and of their work has led to the creation of a modern and progressive Ontario Court of Justice…" "From my vantage point as ACJ and Chair of the Education Secretariat, I could see a Court that was growing in reputation and capability because of the consistently high quality of new appointments, but its judges were still suffering from many decades of being considered the 'lowest' rung on the judicial ladder in the province. I knew that the Magistrates' and early Provincial Courts were no longer: that the Ontario Court of Justice was a modern, progressive, expert Court and that its judges could grace any Court in Canada. But, as Sid Linden had said on more than one

occasion in speaking of our judges, 'They had been down so long, they didn't know up.' It was time for everyone to appreciate the true nature of the Court."

Chief Justice Brian W. Lennox

On April 19, 1999, the Ontario Court (Provincial Division) became the Ontario Court of Justice.[12] Chief Judge Linden became Chief Justice Linden – until Chief Justice Lennox was appointed on May 3, 1999. Lennox started with a number of advantages that Linden did not have when he was first appointed: Lennox had been a sitting judge before becoming RSJ and then ACJ: he had come to know and be known by virtually every judge on the Court, largely through his involvement with judicial education. There was also a sense that the era of significant and sometimes worrying changes had come to an end. The Court itself was stronger than it had been in 1990: its appointment process, its judges and its administrative structure had attracted the attention of a number of other courts. By May of 1999, the newly created Ontario Court of Justice had earned a particular place in the Canadian judicial system.

Ontario names new Chief Justice

BY JOANNE LAUCIUS

The new Chief Justice of the Ontario Court of Justice has a reputation as a fair-minded legal scholar with a flair for administrative innovation.

Brian Lennox, who has been acting Chief Justice, was appointed yesterday by Attorney General Charles Harnick to one of the province's top judicial posts.

New Chief Justice Brian Lennox faces an increasing caseload for the court.

(Source: Joanne Laucius, "Ontario names new Chief Justice," *Ottawa Citizen*, April 27, 1999.)

Making His Priorities Clear

When Lennox was sworn in as Chief Justice, much was made of his contributions to judicial education. In his remarks at the swearing-in ceremony, Attorney General James Flaherty called that commitment "the hallmark of his career." Lennox duly announced that increasing judicial education would be one of his top priorities.[13] The first step would be solidification of the relationship with the National Judicial Institute (NJI) and the provision of formal support for the Court's educational programs by the NJI. "I saw myself as a consolidator of the gains we'd made during Chief Justice Linden's tenure – and one of the key ways of doing that was through the delivery of excellent continuing education."

Lennox thought that Ontario had a more important role to play in judicial education: as the largest Court in Canada and one of the best resourced, he wanted to ensure that the benefits of the Ontario Court of Justice/NJI partnership be available to all judges. To that end, in the Memorandum of Understanding negotiated by Associate Chief Justice David Wake with NJI Executive Director George Thomson, the Court agreed to partially fund an NJI position dedicated both to the Court and to Provincial Court education. As part of that agreement, all education developed by or for the Ontario Court of Justice was to be freely available to any court and to all judges. The agreement led to a new approach to education within the Court and to innovative programming that was later presented to a much broader, national audience. It also led to the formal training of a large group of judicial educators, among them a number who have gone on to national and international education programs: judges such as Katherine McLeod, Miriam Bloomenfeld and Joseph Bovard, to name but three.

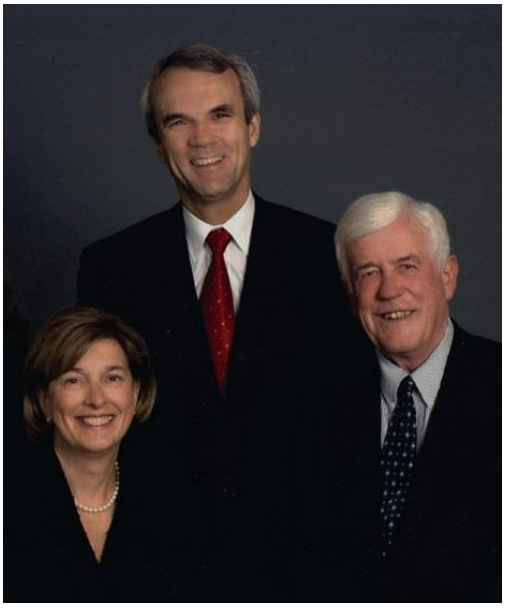
Maintaining and Building Relationships

As Chief Justice, Lennox maintained and built upon the relationships that Sid Linden had fostered. Meetings of the Chiefs of the three Ontario Courts were a regular occurrence (Lennox has often said

that his meetings with the legendary Chief Justices Patrick LeSage and Roy McMurtry early in his mandate were highlights of his career). He continued or instituted regular contacts with the Law Society of Upper Canada, the Ontario Bar Association, the Advocates' Society and the Criminal Lawyers Association, among others, and became a regular at Bar events and receptions.

Within the Court, Lennox met frequently with the judges' associations and their presidents, maintaining the tradition of association consultation and participation in CJEC. Regular, periodic meetings were scheduled with the Attorney General and Deputy Attorney General, and with Assistant Deputies Attorney General as required. While fully protective of its independence, the Court recognized that current Canadian constitutional structure required co-management of the courts, in which the Court saw itself as the leading partner.

In his administrative role, Lennox was greatly assisted by what he calls "an unbroken succession of outstanding public servants" in the position of Executive Coordinator of the Court. That position, created by Chief Justice Linden, had the effect of freeing the chief judge from routine matters of administration to concentrate on the most essential parts of the operations of the Court.



Chief Justice Lennox with two of his closest collaborators, ACJ Annemarie Bonkalo and ACJ-Co-ordinator of Justices of the Peace Don Ebbs, in 2006.

Lennox maintained the collaborative style of leadership within the Court that had been established by Linden. CJEC and its various committees were the focus of decision-making and he relied heavily on the Regional Senior Judges for the administration of the Court within each region. The RSJs in turn were seconded by Local

Administrative Judges at various court locations. His closest collaborators were the Court's Associate Chief Justices: Marietta Roberts and then Don Ebbs as ACJ-Co-ordinator of Justices of the Peace and David Wake and Annemarie Bonkalo as ACJ. Each of the ACJs had important provincial responsibilities and all worked closely together. Lennox credits much of his and the Court's success to his colleagues in the Office of the Chief Justice. It was important for the Court that the Office of the Chief Justice to be open, collegial and mutually respectful and that the Court speak with one voice, both internally and externally.

Facing Challenges and Changes

Consolidator was not the only role Lennox filled. He faced both challenges and changes during his tenure as Chief.

One of the people who watched Lennox grow into his new position was David Wake, who replaced Lennox in the ACJ role he vacated when he was appointed Chief Justice. "There's a certain naiveté to Brian," stated Wake. "He doesn't see the bad side of human nature as easily or clearly as others. But once things become apparent to him, he deals with things. He has a tremendous backbone when he needs it."[14]

Within months of his appointment, Lennox needed that backbone when dealing with challenges to the JAAC appointment process. Lennox maintained an arm's-length relationship with JAAC: he had and retained an implicit trust in the judgment of the Committee. The quality of its process and of its appointments was such that, unlike some other jurisdictions, the Chief Judge did not have to get involved in the appointment process. Lennox was, however aware of apparent discontent within government over the independent appointment process.

Harris politicizing judiciary, critics say

Ontario Premier wants golfing buddy named as a judge, opposition charges in legislature

(Source: Kirk Makin, "Harris politicizing judiciary, critics say," *Globe and Mail*, December 17, 1999.)

That discontent became public when the media reported that the government had refused to make an appointment to the North Bay court after the Premier had allegedly promised the appointment to a particular candidate – a candidate who had not been on JAAC's recommended list and was therefore ineligible for appointment. The delay in appointment to North Bay extended for well over a year, affecting the Court's ability to provide an appropriate level of service. Neither the government nor JAAC was prepared to yield and there was at least one reportedly heated meeting between JAAC and the Attorney General. It was then rumoured that the government was preparing legislation to amend the appointment process. In the end, no legislation was forthcoming and JAAC continued as it had in the past.

Additional Points of Friction

In April, 2000, a government backbencher introduced a private member's Bill in the Ontario legislature, Bill 66, the *Judicial Accountability Act*, 2000, which would have required the Attorney General to table an annual report identifying individual judges and the sentences they imposed in serious criminal cases. The proponent of the Bill indicated that one of its purposes was to "…motivate lenient judges to give out tougher sentences."[15]

An Attempt to Motivate "Lenient" Judges to Give Out Tougher Sentences

In May 2000, a private members' bill, which called for the publication of judges' sentencing records, was

introduced by Marilyn Mushinski, a Progressive Conservative member of the Legislative Assembly.

Mushinski made the following comments when introducing the bill:

> **Ms Marilyn Mushinski (Scarborough Centre):** This bill will require the Attorney General to table an annual report of the sentences that are handed out by judges in serious, non-plea bargained criminal cases compared to the maximum sentence under the law. This will let the government, law enforcement agencies and the public at large know which judges believe that stiff sentencing is an important way to protect law-abiding citizens and motivate lenient judges to give out tougher sentences.

The bill was condemned by the Criminal Lawyers' Association. Alan Gold, then president of the association called it "a blatant attack on the independence of the judiciary."

The bill was never passed into law.

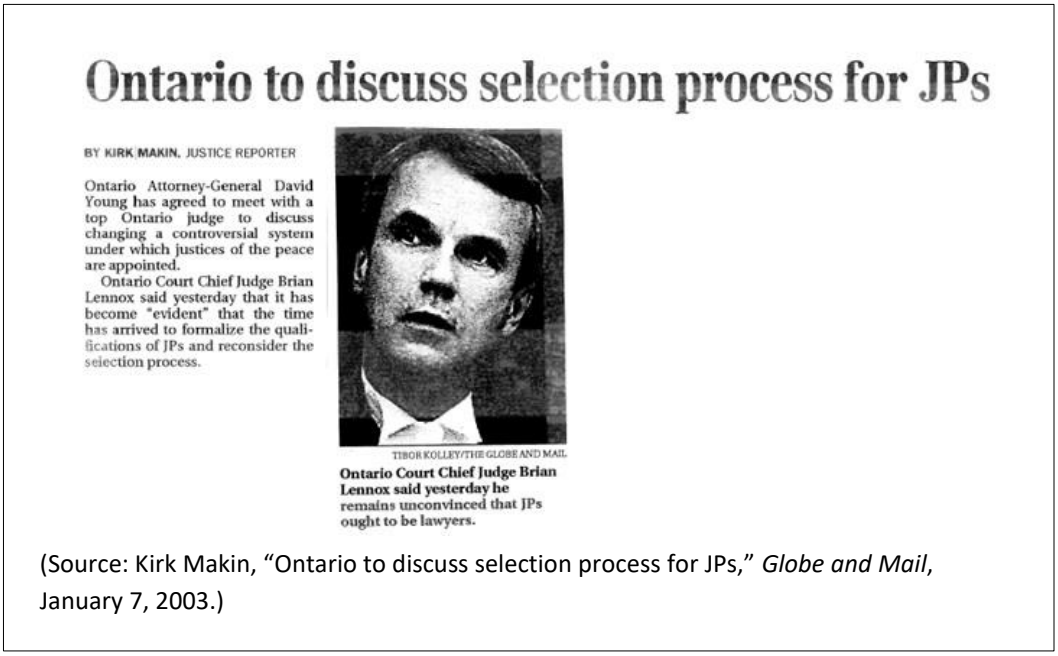
(Sources: Excerpt from Ontario Hansard, April 18, 2000, upon first reading of the *Judicial Accountability Act, 2000*. April Lindgren, "Soft judges' score cards under fire: Lawyers condemn bid to pressure judiciary to give higher sentences," Ottawa *Citizen,* May 16, 2000, p. A6.)

The Bill provoked an immediate negative reaction from the Law Society of Upper Canada, the Canadian Bar Association and others, but received initial support from the Attorney General, with which it went to Second Reading and was referred to Committee. Although the Bill died in Committee, the surprising fact that it passed Second Reading was indicative of the sometimes difficult relationship that existed at that time between the government and the Court and one that made occasionally for awkward meetings between the Chief Justice and the Attorney General.

The Justice of the Peace Appointment Process

Some of those meetings dealt with justices of the peace. In the early 1990s, the NDP government had put in place an informal justice of the peace appointment process. The Ministry placed newspaper

advertisements asking for applications for appointment as a justice of the peace. The process was administered by the Regional Director of Courts Administration in each region and involved local selection committees which included a lawyer and judge. In the absence of any formal criteria for appointment, some of the advertisements elicited hundreds of applications. The local committees reviewed the applications, selected a small number of candidates for interview, interviewed and made recommendations for appointment to the Attorney General.



Ontario to discuss selection process for JPs

BY KIRK MAKIN, JUSTICE REPORTER

Ontario Attorney-General David Young has agreed to meet with a top Ontario judge to discuss changing a controversial system under which justices of the peace are appointed.

Ontario Court Chief Judge Brian Lennox said yesterday that it has become "evident" that the time has arrived to formalize the qualifications of JPs and reconsider the selection process.

TIBOR KOLLEY/THE GLOBE AND MAIL

Ontario Court Chief Judge Brian Lennox said yesterday he remains unconvinced that JPs ought to be lawyers.

(Source: Kirk Makin, "Ontario to discuss selection process for JPs," *Globe and Mail*, January 7, 2003.)

The informal process quickly fell into disuse and by the mid-1990s, the only vehicle for the appointment of justices of the peace was the Justice of the Peace Review Council (JPRC). The JPRC's role was limited to interviewing candidates that were sent to it by the office of the Attorney General and advising whether they were suitable for appointment or not. On occasion, candidates with absolutely no knowledge of the work of a justice of the peace presented themselves before the JPRC on the recommendation of their local member of the Legislative Assembly. The situation was untenable for everyone involved and both the Court and the Attorney General were looking for a more satisfactory process.

At one meeting, Lennox agreed with the Attorney General that absolutely no further appointments would be requested or made until the Court came up with a systematic rationale for each request for appointment. Early the following week the Minister's office sent an unsolicited list of more than a dozen candidates to be interviewed by the JPRC. Lennox correctly surmised that the Minister would soon be changing portfolios.

Successive Coordinators of Justice of the Peace from Gerald Lapkin to ACJs Marietta Roberts and Don Ebbs had been urging the Attorneys General with whom they dealt to create a meaningful appointment process for justices of the peace. They met with little success until the early 2000s when the Ministry of the Attorney General agreed to change the process. In 2007, following consultations led for the Court by ACJ Ebbs, the *Justices of the Peace Act* was amended to create the *Justices of the Peace Appointments Advisory Committee* (JPAAC). The *Act* further stipulated qualifications for appointment, criteria for selection and an application, review and interview process that did much to modernize the justice of the peace bench and that was much more consistent with the important role of the justices of the peace within the Court.

Justices of the Peace and "POA Devolution"

Justices of the peace were also involved in another significant government initiative during Lennox' tenure as Chief Justice: "POA Devolution," or the transfer of prosecution and administration responsibilities for provincial offences courts from the provincial government to the municipalities. What this meant in practical terms was that provincial offences would no longer be dealt with in provincial courthouses but in a variety of municipal premises across the province. The government also agreed to transfer most of the provincial offences revenues to the municipalities.

Decided without consultation with the Court, this change meant that, for municipalities, the fines imposed by justices of the peace became part of the municipal revenue stream. The municipalities, by

agreement, paid the Ministry an hourly fee for justice of the peace services and some sought to maximize their return on investment. Initially, the tensions created led to concerns that certain municipalities were not fully aware of the principle of judicial independence.

One ongoing institutional challenge facing Lennox during his time as Chief Justice related to the family law jurisdiction of the Court. It had always been assumed that there was broader support for the creation and expansion of Unified Family Courts than for any other type of court unification. In the first phase of Ian Scott's court reform, while he had unified all civil jurisdiction within the General Division, he had deliberately left family court unification and the creation of a unified criminal court until the second phase. Scott feared that there would be no support for the creation of a unified criminal court if family court unification was completed first. Accordingly, the second phase of court reform was to see the simultaneous creation of a Unified Family Court and a Unified Criminal Court within a single level trial court.

Unified Family Court Expansion Stalls

Although the prospect of the second phase of court reform disappeared with the Liberal government's defeat in the 1990 election, there continued to be significant support for the expansion of the Unified Family Court in Ontario. A first expansion occurred in 1995, a second in 1999. Subsequently, the federal government introduced legislation creating funding for a number of UFC judicial posts that could have in theory allowed the completion of UFC expansion throughout all of Ontario. Nothing came of that legislation and UFC expansion in Ontario has been stalled since 1999.

Family law judges within the Ontario Court of Justice were originally brought into the merged Court in 1990, at a time when it appeared that many of them might shortly be appointed to an expanded UFC. With considerable justification, they felt largely ignored during the *Askov* era, when the energies of the Court were necessarily focused on resolving criminal backlogs. Fewer in number than the criminal law

judges of the Court, some family law judges regretted the fact that they were no longer a separate and independent court and were worried about being submerged in a predominantly criminal law court. This is the background against which every Chief Justice of the Court has worked since 1990.

As Chief Justice, Lennox always took the position that UFC expansion in Ontario should be completed as quickly as possible. Together with most of the family law bench and bar, he saw the UFC model as providing the best service to families in Ontario, with a cadre of dedicated family law specialist judges working within a specialist court. "I really have great difficulty understanding why UFC expansion has stalled. It either works well, as I believe it does, or it does not. If it works well, it should be quickly extended throughout the province. If it does not, it should be fixed, or, if it cannot be fixed, abandoned and replaced. Families in difficulty deserve access to the best justice system that we can devise."

While many of the Court's family law judges have been disappointed by the lack of progress on UFC expansion, they have not only persevered, they have thrived within the Court. The JAAC appointment process has continued to provide a steady stream of talented and committed family law specialist judges whose expertise is widely recognized. "You would be very hard put to identify a group of more creative, innovative and energetic judges than the family law judges of the Ontario Court of Justice. They are passionate about their work and dedicated to assisting children and families in crisis. I was always proud to be Chief Justice of a Court that had such exceptional judges in it," stated Lennox.

At the swearing-in of Annemarie Bonkalo as Associate Chief Justice of the Ontario Court of Justice on October 6, 2005, a collection of the "builders" of the Court gathered. Left to right: Former Chief Justice Sidney Linden, Chief Justice Roy McMurty (Chief Justice of Ontario and former Attorney General), Associate Chief Justice Annemarie Bonkalo, Attorney General Michael Bryant, Chief Justice Brian Lennox, former Attorney General Ian Scott. (Photo: Ashley and Crippen, Courtesy: S. Linden.)

The Result of JAAC

The theme of the exceptionality of the judges of the Court is a common one for Lennox. "The outstanding reputation that the Ontario Court of Justice has enjoyed may well be due in part to its leadership, but its true success comes from the judges. By this, I mean of course the judges who have been appointed through JAAC, but also each and every one of their predecessors. Many of them had been magistrates or became judges at a time when there was no prestige associated with the office of provincial judge. Salaries were low, the court room was often a parish or a legion hall, offices and staff were sparse or non-existent and the judges were frequently treated as civil servants. Independence was little more than a text-book notion."

"Yet it was those judges, working in isolation, who over the years, day by day, case by case, developed the knowledge and expertise, the ability to deal with real people in real time and who made the court what it is today: a proud and independent institution, dedicated to justice and to public service, peopled with judges who could easily grace any courtroom in the country. That is what makes and has made the Ontario Court of Justice."

A well-known devotee of hot dogs and Pepsi, Lennox is shown here frequenting his favourite food truck (parked in front of Toronto's New City Hall), together with former Chief Justice Annemarie Bonkalo. (Courtesy: Office of the Chief Justice, Ontario Court of Justice.)

Move to the National Judicial Institute

Lennox's career came full circle in 2007 when his eight-year term as Chief Justice concluded. He returned to Ottawa and his long-term passion: judicial education.

Since his days as Regional Senior Judge he had been involved with the work of the National Judicial Institute – as a consumer of the educational services and resources they offered. In addition, he had served on the NJI Board of Directors from 1999 to 2005. Now, he was heading to the NJI to become its Executive Director.

As he had assumed each new position, Lennox had specific goals and objectives in place. Resources allowing the NJI to provide services to provincial courts across Canada had been limited since the NJI was first created. The NJI Board of Governors, chaired by Chief Justice of Canada Beverley McLachlin, had always been supportive of NJI involvement in the education of provincially-appointed judges and viewed its mandate broadly, encompassing both federally and provincially-appointed judges. The manner in which the NJI was funded, however, meant that most of its funding was derived from presenting programs to federally-appointed judges.

Lennox in his role as Executive Director, National Judicial Institute. (Courtesy: National Judicial Institute.)

"A key part of my role was to find ways to allow provincial courts and provincial judges to participate fully in the NJI's education initiatives and to encourage them to do so." he stated. "We were able to do that in a variety of innovative ways, including encouraging provincial court judges to participate in the online courses that the NJI offers and providing them with access to the collection of legal e-resources and course materials created specifically for judges. The NJI also provided training programs in adult learning techniques for Provincial Court education chairs, and NJI's educators and staff were always available as education resources." Lennox also continued the tradition of the NJI Executive Director meeting regularly with the Provincial Courts' Canadian Council of Chief Judges.

Lennox was particularly proud of the fact that, as he had envisaged as Chief Justice, the MOU between the Ontario Court of Justice and the National Judicial Institute became a true partnership and the Court became a national leader in judicial education. Each of the partners benefited from the experience and expertise of the other: the Court and the NJI worked closely to develop programming, program ideas and techniques that found their way into NJI initiatives that were presented to larger judicial audiences, both of provincial and of superior court judges.

Largely because of the administrative and financial control that the Court had over its resources (under its MOU with the Attorney General), the Ontario Court of Justice has been able over the years to leverage its expertise in judicial education to benefit not only the NJI but also judges and courts across Canada.

Suite et fin

Lennox left his position as Executive Director of the National Judicial Institute in July of 2014. He retired from full-time service with the Court in October of that same year. He has remained involved in judicial education projects and in 2015 became a judge in residence at the Faculty of Law at the University of Ottawa.

In 1986, a generous – and prescient – article about Brian Lennox and his appointment to the Court appeared in the *Ottawa Citizen*: "Lennox is known among colleagues, adversaries in the defence bar, and court staff as an honourable, intelligent man. 'He is gracious in defeat and doesn't gloat in victory,' says lawyer Robert Meagher. 'His integrity is above reproach.'"[16] Interviews with many of his colleagues on the Ontario Court of Justice for the history project demonstrated that those qualities exemplified his tenure on the Court and beyond.

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[1]All quotes from Brian Lennox come from a collection of interviews for OCJ History Project, 2013-15.
[2]Hayes had been appointed to the District Court and Linden, appointed in April 1990, had replaced him as Chief Judge of the Provincial Court (Criminal Division) in the early summer of that year.
[3]Though the changes to the Court arrived on September 1, 1990, Linden had actually been sworn in as both Chief Judge of the Provincial Court (Criminal Division) and Chief Judge of the Ontario Court (Provincial Division) on June 27, 1990 – replacing Fred Hayes as Chief Judge of the Provincial Court (Criminal Division).
[4]Interview of S. Linden for OCJ History Project, 2015.
[5]UFC expanded in 1995 and again in 1999.
[6]The *Askov* decision had little impact in the East Region outside of Ottawa.
[7]Interview of S. Linden for OCJ History Project, 2015.
[8]Tracey Tyler, "Cuts mean justice chaos top judges warn," *Toronto Star,* January 31, 1996, p. A1.
[9]Kirk Makin, "McMurtry attacks cuts in judiciary," *Globe and Mail,* February 2, 1996.
[10]*Courts of Justice Statute Law Amendment Act, 1994,* S.O. 1994, c. 12. The *Act* was proclaimed on February 28, 1995.
[11]Professor Wayne MacKay, quoted in Kirk Makin, "Ontario system eliminated patronage in choosing judges, proponent says," *Globe and Mail*, April 27, 2012.
[12]*Courts Improvement Act, 1996*
[13]Joanne Laucius, "Ontario names new Chief Justice," *Ottawa Citizen,* April 27, 1999.
[14]Interview of D. Wake for OCJ History Project, 2015.
[15]Hansard, April 18, 2000
[16] Abby Deveney, "Prosecutor appointed to bench," *Ottawa Citizen*, September 25, 1986.

Period IV: 2000-beyond Profiles & Stories

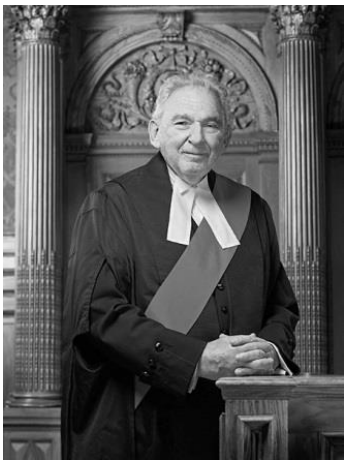
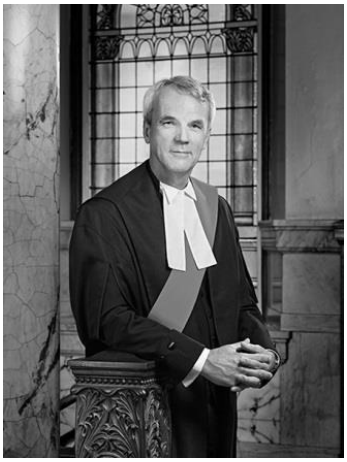
Annmarie E. Bonkalo: Leading the People's Court

Annemarie "Amie" Bonkalo had big shoes to fill. Her two predecessors – Chief Justices Sidney Linden and Brian Lennox – were legendary. Linden had achieved administrative independence for the Court, while Lennox personified and promoted the highest standards of judicial excellence. Everyone was watching to see how the first woman serving as Chief Justice of the Ontario Court of Justice would make her mark.

Bonkalo truly appreciated the transformational work that preceded her. As Chief Justice, she wanted to ensure the Court continued to benefit from these hard-won achievements. But she did much more than that, in ways that may not have been fully appreciated because of her understated manner.

Bonkalo saw her role as forging a collaborative and non-hierarchical approach to leadership. Her goal was to modernize the Court in ways that would help people coming before it and not just serve the convenience of judicial officers and administrators. "We are the people's court," she said. "The Ontario Court of Justice is the face of justice for the people of Ontario." Her legacy includes an unwavering commitment to education and support for justices of the peace, the judicial officers most commonly seen by members of the public.

Quietly and without fanfare, she made her mark.

		
Chief Justice Sidney B. Linden 1990-1999	Chief Justice Brian W. Lennox 1999-2007	Chief Justice Annemarie Bonkalo 2007-2015
In January 2014, portraits of three judges were installed at Osgoode Hall, the home of the Law Society of Upper Canada and the Ontario Court of Appeal, marking the first time provincially appointed judges were so-honoured. Sidney B. Linden was the first Chief of the Ontario Court (Provincial Division) which replaced the Provincial Court. He was succeeded by Brian W. Lennox and later by Annemarie Bonkalo. By then the Court had become known as the Ontario Court of Justice. (Photos by Paul Eekhoff. Courtesy: Office of the Chief Justice, Ontario Court of Justice.)		

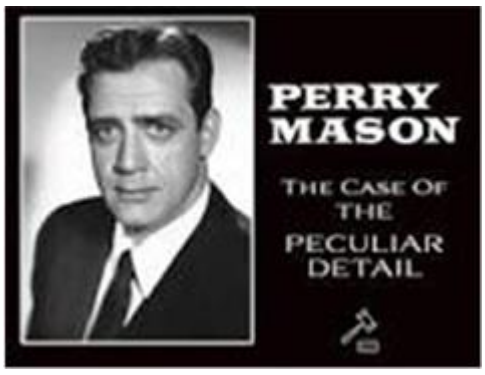
Making a Life in Canada: The Perry Mason Years

Amie Bonkalo was born in Stockholm, Sweden to parents who had grown up in Budapest, Hungary. The family immigrated to Canada in 1949 when Amie was 9 months old. The Bonkalo family adjusted well to life in Toronto, but the city was not then the diverse place it later became. It was tough to have a foreign-sounding name. A more mundane challenge, Amie recalled, was not being able to find a bakery that sold what her parents considered to be a decent loaf of bread.[1]

An emerging leader: Amie Bonkalo at age 3. (Courtesy: A. Bonkalo.)

Bonkalo's father was a neurologist and psychiatrist, as well as a professor at the University of Toronto. Bonkalo remembers her father engaging his two daughters in debates at the dinner table, often playing the devil's advocate and challenging them to think about the other side of an argument. This proved to be an excellent foundation for the legal career that Amie Bonkalo ultimately pursued.

Her mother's options as a new immigrant were limited; her efforts were devoted to raising her two daughters – and she was determined that both would have the opportunity to attend university and become professionals. At age ten, Bonkalo found her first professional role model: television defence attorney Perry Mason. Her mother soon discovered that the most effective form of discipline was not letting Amie her watch her favourite show.



Amie's first legal role model.

From Criminology to the Law

After completing high school at Branksome Hall in Toronto, Bonkalo majored in sociology and political science at Queen's University in Kingston, Ontario. There she developed an interest in criminology which she later studied in a new Master's program at the University of Toronto.

In 1973, Queen's Law School in Kingston reserved 25 first-year admissions for women. This encouraged Bonkalo to apply. After being accepted, she received advice from Mary Alice ("MA") Murray, well known as the sole woman in the first graduating class from Queen's Law. Murray went on to serve as the

school's Law Faculty Secretary and Registrar. Knowing the attitudes toward women in the legal profession, Murray advised Bonkalo that in order to succeed in the world of law, women had to be "better than the men."

Bonkalo was not comfortable with law school at first. "I felt they were twisting our thoughts about what was right and wrong and forcing us to think in a narrow way. This went against my father's pedagogical approach of always looking at both sides of an argument." As time went on, Bonkalo realized the law was her calling. She credits professor Stanley Sadinsky's lectures in civil procedure as inspiring her to want to practise law: "He made litigation real." Criminal and constitutional professor John Whyte similarly nurtured her desire to pursue criminal law. Bonkalo also developed an interest in family law, although she articled at a Toronto firm specializing in real estate and civil litigation.

In her early years of practice, she continued to be hampered by a last name that was still regarded as unusual in Toronto: "Pronouncing it was problematic for some in the profession. When I mention that these days, people are surprised because Ontario has now become such a diverse society."

First Female Assistant Crown in Peel

After being called to the Bar in 1978, Bonkalo obtained an interview for a Crown prosecutor position in Peel Region. Her application stood out because of her Master's degree in criminology. She tried to hide her surprise when the all-male interview panel handed her a warm beer – which she drank – and asked if she was planning to get married and have children. The interview eventually moved on to more substantive issues and she became the first female full-time Assistant Crown Attorney in Peel.

In 1979, Amie married Gerald Sadvari, a lawyer she had met while at Queen's. By the time she gave birth to the second of their three children, a full-time workload – including County Court jury trials – made it difficult to spend enough time with her family. Bonkalo arranged to work part-time and only in the

Provincial Court. She credits her mentor, Crown Attorney Leo McGuigan, for agreeing to what in those days was an unusual arrangement.

Amie and Gerald received child care help from "a nanny and a granny". The granny was Bonkalo's mother, who resided with them after her husband passed away.

From Prosecutor to Judge

After 12 years as an assistant Crown Attorney, B onkalo applied for one of two judicial vacancies in the Brampton Provincial Court. She thought her chances were ruined when Attorney General Ian Scott witnessed her husband performing a "rather naughty and satirical song" about wanting to be a judge at a bar association function. These fears were unfounded. On April 2, 1990, Annemarie Bonkalo and Justice Rebecca Shamai were appointed as the first female Provincial Court judges in Peel Region.

Justice Annemarie Bonkalo (Photo: Ashley and Crippen Photographers, Courtesy: Office of the Chief Justice of the Ontario Court of Justice.)

Bonkalo was age 41 at the time of her judicial appointment. She remembers Ian Scott commenting: "That is awfully young – I hope you don't get bored." She did not get bored. Amie Bonkalo went on to become a Local Administrative Judge in 2000, a Regional Senior Judge in 2004, an Associate Chief Justice in 2005, and achieved the Chief Justice position in 2007.

Shortly after being appointed to the bench, Bonkalo consulted old court transcripts to find precedents as to how judges had spoken to parties about the trial process, sentencing, bail and other matters relating to criminal proceedings. She transcribed these details in a notebook and began using it as a guide when sitting in court. Before long, copies of that handwritten "benchbook" became a hot commodity among her judicial colleagues. She shared it willingly with all who inquired – a first experience in providing support to her peers. Bonkalo took great satisfaction in helping others to succeed.

Breaking into Judicial Administration

During an assignment at Finch Court in North York, Bonkalo became interested in judicial administration. This accelerated when she and Justice Maryka Omatsu were assigned to the College Park Court in downtown Toronto. At first the two women took care not to intrude on the "old boys club" atmosphere of the room where the other judges –all male and much older – met for lunch. They felt that the men's attitudes toward women on the bench would change once they got to know their new female colleagues. After a few months, the women became well accepted. Local Administrative Judge Charles Scullion became a mentor for Bonkalo and recommended her to take on his position when he retired.

Justice Maryka Omatsu at Toronto's College Park courthouse in 1996. It is clear from the photographs behind her that this had been – until the arrival of Omatsu and Bonkalo – a bastion of white, male judges. (Courtesy: M. Omatsu.)

Justice Omatsu remembered these days well. “When Amie and I moved from North York to College Park, the judges were much older than us and they were all white men. They phoned the regional senior judge, Bernie Kelly, and said, ‘We don’t want those two women to come here.’ Bernie said, ‘Do you think this is a democracy? They are coming!’ But when we got there the men were civil and quite nice. Amie made it clear to Scullion – the local administrative judge – that she wanted to be the new LAJ. There was a bit of resistance, but she won them over and became the new LAJ. There wasn’t any hostility when that happened. At College Park, everyone came into Amie’s office, including the cleaning staff. She was sympathetic and a problem solver.”[2]

A New Model of Judicial Leadership

> Sometimes, outside 1 Queen, people didn’t see the leadership that was quietly and firmly given by Amie. When I was the Associate Chief, I was highly visible and engaged in a lot of projects. She was keen to give credit and profile to others, never self-aggrandizing. She was very humble, which is a commanding leadership style. She trusted the people working with her and let them do what their strengths allowed. But at the end of the day, she made the decisions.
>
> Former Associate Chief Justice Peter Griffiths[3]

In 2005, Bonkalo became an Associate Chief Justice, working closely with Chief Justice Brian Lennox and Associate Chief Justice Donald Ebbs at 1 Queen Street East in downtown Toronto. That was her first glimpse of the role of the Office of the Chief Justice. “The average judge, to this day, has no idea about what happens at 1 Queen. They don’t understand that we don’t just cut ribbons.”

Chief Justice Bonkalo receiving a Doctor of Laws degree from the Law Society of Upper Canada at 2013 call to the bar ceremonies. At left is Thomas Conway, former Treasurer of the Law Society of Upper Canada. (Courtesy: A. Bonkalo)

Promoted to Chief Justice in 2007, Amie Bonkalo became first woman to serve in this role. Many of her colleagues assumed the position would go to a male candidate. According to Omatsu, "Amie is warm and nurturing. I like that but it is not a male leadership style which is what many people expect."[4]

Bonkalo was undeterred by the sceptics. She stayed true to her belief in collaborative leadership and shared decision making, especially for significant determinations that affected the Court. She was also a delegator: "If I give people a job and I trust them to do it well, they will rise to the occasion." She followed the model established by her predecessors to meet with the Regional Senior Judges as a group and enable them to lead their regions without interference. "I come to swearing-in ceremonies in the regions across Ontario as a guest, not to run the show. The Regional Senior Judges are in charge of these events."

She kept in mind that the other members of the Court were her peers and she made great efforts to be respectful, fair and supportive. "I am not the boss of any court – I simply make different types of decisions from other members of the judiciary."

"I am not the boss of any Court – I simply make different types of decisions from other members of the judiciary."

Annemarie Bonkalo

Many people have spoken about Bonkalo's kindness on a

personal level. Former Associate Chief Justice John Payne shared the following anecdote. "I am allergic to garlic. My wife and I had arranged a cruise to Spain, Italy, Turkey, France and Greece. The Chief was so concerned about my allergy that she arranged to have cards typed – in each language of the countries we were attending – to explain my allergy. This kind and thoughtful gesture is something that I will never forget."[5]

Payne also observed that Bonkalo "worked tirelessly on behalf of the Court and the people of Ontario. At 1 Queen Street during her tenure, everyone worked together closely and supported each other. It was like a family. Her exemplary leadership skills were recognized when she was chosen as the Chair of the Canadian Council of Chief Judges. She became the 'leader of the leaders' of the Provincial and Territorial Courts across Canada."[6]

Justices of the Peace: The Face of Justice

A hallmark of Amie Bonkalo's tenure as Chief Justice was treating justices of the peace with respect and supporting them as true judicial officers. She and her associate chief judges understood well that justices of the peace were the "face of justice" for large numbers of people.

TREATING JUSTICES OF THE PEACE AS JUDICIAL OFFICERS

Changes made during tenure of Chief Justice Bonkalo

- Creating Principles of Judicial Office for Justices of the Peace, through the Justices of the Peace Review Council, recognizing justices of the peace as judicial officers; a document that is identical to the counterpart for judges once you substitute "justice of the peace" for "judge."
- Changing the internal "Benchmark" newsletter from a publication about judges to one inclusive of both judges and justices of the peace.

- Arranging for the National Judicial Institute's criminal e-letter, previously received only by judges, to also be distributed to justices of the peace.
- Creating an annual joint meeting for regional senior judges and justices of the peace, as well as encouraging joint regional meetings of local administrative judges and justices of the peace.
- Revamping and lengthening the education program for justices of the peace.
- Creating the position of Senior Justice of the Peace in the Chief's office.
- Delegating justices of the peace to represent the Court at a national symposium on bail.
- Including justices of the peace on committees such as the judicial allowance committee, pandemic planning working group, the History of the Court advisory board, the Justice on Target Advisory Group, and the bail experts table.
- Creating a pre-retirement seminar for justices of the peace – previously a program that had been available only to judges.

(Source: Former Associate Chief Justice John Payne)

A Transparent Court: Connecting with the Community

An accessible and accountable people's court was central to Bonkalo's approach as Chief Justice. Part of being a people's court is helping the public to understand what the Court does and how it operates. An example recalled by Peter Griffiths was the quick adoption of new criminal rules: "Overnight we went from dozens of arcane rules (modelled on those of the Superior Court and widely ignored) to only five rules written in plain language. In an era of increasing numbers of self-represented litigants, people need tools that will open the door of justice rather than obscure it."

Under Bonkalo's leadership, the Court developed guides – expressed in plain language – for self-represented litigants in family, criminal, and POA proceedings. She also encouraged judges and justices of the peace to speak with media students, community organizations, and college law classes. She asserted, "It is very important for people to see us as approachable and human."

> *"It is very important for people to see us as approachable and human."*
>
> *Annemarie Bonkalo*

The Court also led the way in Canada for making statistics about court hearings available to the public by posting quarterly family, criminal and provincial offences court data on the website. A policy was introduced to make it easier for the media to obtain digital recordings of court proceedings, and a protocol implemented to permit electronic recording devices in the courtroom unless there is a contrary court order in a particular case.

Technology: An Incremental Approach

Technology is an important part of modernizing the Court. Bonkalo's approach was to make incremental improvements, one step at a time –as opposed to large scale technology projects that tended to collapse under their own weight. In 2013, the Court initiated e-orders, a simple innovation that eliminated hours of waiting for documents. By installing a printer in the courtroom, the clerk can type the order, produce a hard copy, and hand it to the party concerned without delay. "We have to make it possible for people to minimize their time in court. People have jobs they need to get to," the Chief Justice noted. While the Courts lag behind many other sectors in terms of technology, such effective, incremental steps have made a difference.

The Family Bench

Because Bonkalo came from a criminal law background, she endeavoured to ensure that the family judges, who represent a much smaller bench than their criminal counterparts, felt well served by her office and received sufficient attention and visibility for their issues. In 2014, she created the position of Senior Family Advisory Judge, filled by Justice Deborah Paulseth, to chair the family advisory committee, sit on the rules committee, and advance issues of the family court bench.

Chief Justice Bonkalo pictured at Osgoode Hall in 2014 at the unveiling of portraits of the three Chiefs – Sidney Linden, Brian Lennox and Annemarie. (Courtesy: A: Bonkalo)

Mentorship

Amie Bonkalo never forgot the help she got in earlier years from mentors such as Crown Attorney Leo McGuigan and Local Administrative Judge Charles Scullion. As a judicial leader she became a strong proponent of mentorship for judges and justices of the peace. She felt that peer mentoring could provide orientation and practical ideas for managing the workload and time pressures. Mentorship could also help stimulate people to continue learning and take on new challenges in later years to avoid burnout. Her commitment culminated in strengthening the mentorship program for newly appointed justices of the peace.

Diversity – Changing Face of the Court

Chief Judge Bonkalo was delighted with the role advisory committees play in the selection of justices of the peace and judges for the Ontario Court of Justice. “They were able to get the best person for the job and also to increase the diversity of both benches.” To Bonkalo, diversity on the bench meant that

judges and justices of the peace learn from each other and become more understanding of the diverse public they serve.

In her early days on the bench, Bonkalo witnessed first-hand how diversity could change the way judges approach their work. She noticed her male colleagues modify their outlook as more women were appointed – "from rethinking sexual stereotypes to being less likely to use sports analogies."

Chief Justice Bonkalo pictured with – from left to right – Associate Chief Justice/Co-ordinator of Justices of the Peace, Faith Finnestad; former Chief Justice of Ontario, Warren K. Winkler; Chief Justice Bonkalo; and Associate Chief Justice Lise Maisonneuve, ACJ Maisonneuve became Chief Justice of the Ontario Court of Justice in May 2015. (Courtesy: A. Bonkalo.) (Photo: Ashley and Crippen Photographers, Courtesy: Office of the Chief Justice of the Ontario Court of Justice.)

Throughout her career, she was conscious of breaking through barriers affecting women in the legal system: "I always felt that, as a woman, I had to proceed with my career cautiously. It was as if I had a glass floor underneath me and I had to do things carefully, sensitively and thoughtfully. I didn't want to break it for fear that it would harm the future for other women."

Raising the Profile: Pictures in the Gallery

Walk the halls of Osgoode Hall and you will see dozens of portraits, including many stern looking gentlemen in formal dress from the 1800 and 1900s.They are chief justices of various courts in Ontario and Treasurers of the Law Society of Upper Canada. This collection serves as a valuable visual record of the history of the top levels of the judicial and legal professions in Ontario. Until January 2014, however,

there was no recognition of the existence of the Ontario Court of Justice – the provincially appointed part of the court system.

The Law Society recognized the Ontario Court of Justice for what it had become –the largest court in Canada filling an essential role in the justice system. On January 29, 2014, portraits were unveiled of the three Chiefs who served the Court since its creation in 1990 when the Criminal and Family divisions of the former Provincial Court were merged. The portraits of Sidney Linden, Brian Lennox, and Annemarie Bonkalo now hang on the walls of Osgoode Hall as tangible symbols that this Court matters.

Looking Back to Look Forward

As the end of Amie Bonkalo's tenure as Chief Justice was approaching, she began reflecting on what the Court had accomplished and challenges that remained to be addressed by her successor.

She realized that further improvements in the evolution of the Court were necessary. In Family Court, her main concern was with child protection cases, an area that would benefit from more intensive judicial education and improved interactions with Children's Aid workers and the Office of the Children's Lawyer. She was also concerned that the structure of the Court had not transformed sufficiently to meet the growing complexity of criminal cases. "Our Court was set up to give oral judgments and to handle one or two trials per day along with pre-trials and set dates. An impaired driving case used to take two to three hours; now it takes two to three days." This has led to a much stronger commitment to pre-trial resolution and case management, but further progress needs to be achieved.

In reflecting back, Bonkalo also realized that the history of the Ontario Court of Justice was not well known. She believed that "an understanding of how the Court has evolved can help to

> *"An understanding of how the Court has evolved can help to inform discussions of where it should be heading in the future."*
>
> *Annemarie Bonkalo*

inform discussions of where it should be heading in the future." After discussions with the Associate Chief Justices and other judicial leaders, Bonkalo launched a project to produce a history of the Ontario Court of Justice. In keeping with her desire for the Court to be modern and accessible, she asked for the history to be an engaging, online resource instead of a traditional "coffee table" memorial book. She specified that the history should focus on transformative events, profiles of participants and stories illuminating significant changes.

Annemarie Bonkalo made history when she became the first female Chief Justice for the provincially appointed bench. Part of her legacy has also been to ensure that the rich history of the Court will be preserved for generations to come.

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[1]Information and quotations in this profile about the Chief Justice's childhood, education and early career come from interviews of A. Bonkalo for OCJ History Project, 2014.
[2]Interview of M. Omatsu for OCJ History Project, 2015.
[3]Interview of P. Griffiths for OCJ History Project, 2015.
[4]Interview of M. Omatsu for OCJ History Project, 2015.
[5]Interview of J. Payne for OCH History Project, 2015.
[6]Interview of J. Payne for OCJ History Project, 2015.

Period IV: 2000-beyond Profiles & Stories

George Thomson and the Court

A few years ago, I called George Thomson with a request: "Would you be interested in writing a history of the Ontario Court of Justice?" The Court's history was not well known and I wanted someone to document stories about its many changes, challenges and achievements. I thought of George because of his long association with the Court in different capacities:

- first as a Provincial Court (Family Division) judge;
- then as the Associate Deputy Minister charged with reforming Ontario's children's services system and legislation;
- later as Ontario's Deputy Attorney General with responsibility for courts administration;
- then as Canada's Deputy Minister of Justice, where he helped shape the reform of Canada's youth justice laws; and
- finally as Executive Director of the National Judicial Institute.

George said he would do it subject to one condition. He wanted two writers to co-author the history with him: Karen Cohl and Susan Lightstone. I happily agreed and the OCJ eHistory project was launched.

Annemarie Bonkalo. (Courtesy: Office of the Chief Justice of the Ontario Court of Justice.)

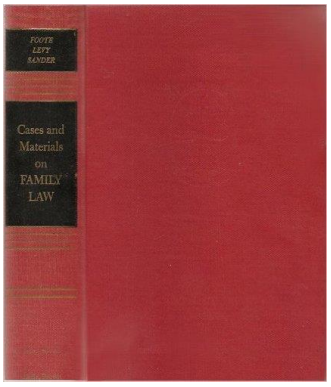
The eHistory contains many stories and profiles. This is George's story, written by his co-authors and included at my request.

_____

Annemarie Bonkalo
Chief Justice of the Ontario Court of Justice (2007-2015)
May 2015

The Lure of Family Law

George Thomson originally intended to become a labour lawyer. He articled at a Toronto labour law firm and subsequently headed off to complete a Master of Laws at the University of California, Berkeley in the turbulent late 1960s. Upon his arrival at Berkeley, George was dismayed to learn that their labour law professor was on sabbatical. His disappointment did not last long. Herma Hill Kay, who later became the Dean of Berkeley Law, was teaching family law using an influential book by Foote, Levy and Sander.[1] The text did not just explain the law – it also discussed what was actually happening in families and where the law was succeeding or failing to serve them. "I fell in love with family law there," said Thomson. "That was when I first realized the importance of the Family Court, which had been invisible in my law school education."[2]



> While at Berkeley he began to come around to the view that family courts are often required to solve problems which fundamentally are not legal but social.
>
> From a profile of George Thomson by June Callwood, the *Globe and Mail*, 1976[3]

Teaching about Children and the Law

Thomson became a law professor in 1968 at the University of Western Ontario[4] where he taught family law among other subjects. At the time, a typical family law course covered marriage and divorce. It did not focus on the child and the proceedings that came before the Family Court. He wanted to broaden the approach as his mentors in Berkeley had done and as John Barber, a professor at Osgoode Hall Law School, had begun to do in Ontario.

Thomson devoted the first month of his course to an examination of the concept of 'illegitimacy' and the impact that label had on parents and children. "As part of the course, I got a friend to take on the

role of a pregnant single parent who was seeking legal and practical answers from her lawyer. This freaked the students out. They were terrified at the prospect of a real client with both legal and non-legal challenges. At first they couldn't see why they needed to know about issues such as access to welfare."

At Western, Thomson developed a course on children and the law and did a lot of teaching and writing on juvenile delinquency. With no thought at the time of becoming a Provincial Court family judge, he was developing expertise in the specialized areas of law at issue there.

He became especially troubled by section 8 of the *Training Schools Act*. That provision allowed children to be sent to training schools for being unmanageable, even though no offence had been committed. "When judges sent kids to training school, the transcript from the court hearing went with them. I gathered many of the transcripts and was horrified. In some cases, the CAS would come in and basically say, 'Sally is hard to manage,' and the judge would send her to training school with virtually no due process."

While still at Western, Thomson was invited by Chief Judge Ted Andrews to speak to judges of the Provincial Court (Family Division). Thomson reciprocated by involving judges in his courses. He created a partnership with the local Family Court judge in London, Maurice Genest, so law students could assist unrepresented children and families in the courtroom. Thomson's connection to the Court was growing stronger.

Cutting Short a Trip Around the World

In 1972, after a few years of teaching, Thomson decided to travel for a year. While he was away, a vacancy arose in the Family Court in Kingston. Dalton Bales, then Ontario's Attorney General, was seeking younger candidates to join the Family Court. Ted Andrews was in favour of appointing Thomson

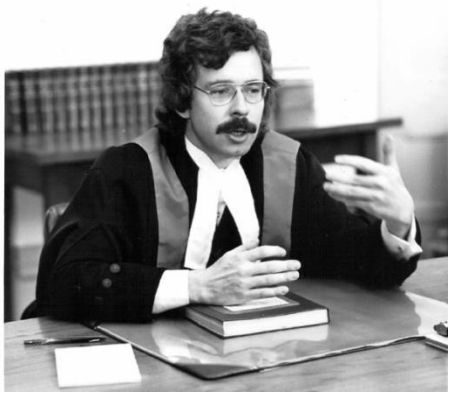
and several local people with political influence also recommended him. Andrews reached Thomson in Switzerland by phone.

> George Thomson was over in the Alps skiing when the opening came up in Kingston…I checked him out, great… so I phoned him up… and he said, "I have just gone on my sabbatical, and I have still got six months to go," and I said, "well, if you don't do it now, George, you might not get the chance."
>
> Ted Andrews, former Chief Judge of the Provincial Court (Family Division)[5]

Thomson cut short his trip to become the Family Court judge in Kingston. He was 30 years old.

Early Days as a Judge

The court building in Kingston, then on Brock Street, did not live up to Thomson's grand image of a place for the dispensing of justice. "It was a decrepit red brick residential house and hearings were held around a table in the dining room, while those waiting sat in the small living room."



George Thomson, 1973. (Courtesy: G. Thomson)

Thomson's very first case came before him the morning after the day he was sworn in as a judge. "The boy in front of me was charged with murdering his brother in a fight over what television shows to watch. His father had guns all over the house. It was for me a baptism by fire."

Like all new appointees, Thomson wondered how he was supposed to prepare for the job. "I was given some materials to read and then I was sent out to watch five judges at work. That was it for training at that time and it just made me more terrified about what I was taking on. I knew a lot about family law

but was obviously weak on procedure and evidence issues. Horace Krever, a colleague at Western, was an acknowledged expert in evidence and so, for a while, if I had a significant evidence problem I would reserve and call Horace to get me started."

Judge on a Motorcycle

Thomson was aware that he did not fit the image of a traditional judge of the 1970s. In June Callwood's profile of Thomson, she wrote, "A rumpled figure in turtleneck sweaters and corduroy pants, he looks more suited to his Triumph motorcycle than to his judge's black robes."[6] Thomson recounts an incident that occurred when he traded places with a judge in Toronto.

> The first time I arrived at the courthouse at 311 Jarvis Street in Toronto and parked my 1965 Triumph 500 motorcycle, I was ordered to leave the judges' parking area by a security guard. The Court was not yet used to younger judges like me and Rosie Abella.

A "Community Motivator"

As a family judge, Thomson quickly realized that he was limited in his ability to respond to children and families in crisis due to juvenile delinquency, acts of violence, or marriage breakdown. Desperately needed community resources and programs simply were not available to support the people he was seeing in his courtroom. With the encouragement of his Chief Judge, Thomson began working with the Kingston community to develop a Family Court Clinic to assess children and their families, an observation and detention home, a juvenile diversion program, a volunteer probation service, a shelter for abused women, a youth crisis centre and several new community-based group homes for youth.

While one of the early judges to embrace the role of "community motivator," he wasn't alone. "Many family judges across the province responded willingly to Chief Judge Andrews' expectation that they take on a leadership role within their communities. This was a distinguishing feature of the Provincial Court (Family Division) in the 1970s."

Law Students

At Queen's Law School in Kingston, where he first studied law, Thomson taught family law including a course on children and the law. He and Professor Heino Lilles[7] arranged for law students to come to the Court, appearing on cases to aid unrepresented parties or assist local lawyers. Before long, the involvement of law students had become an important resource at the Court.

One law student who evidently made a lasting impression on him was Judith Beaman. After she became a lawyer, they started dating and were married in 1977. That is not Beaman's only connection with the Ontario Court of Justice. She was appointed as a judge in 1998 and later served as the Regional Senior Justice in the East Region.

Thomson well remembers a project involving Donna Hackett, a future Provincial Court judge, when she was a law student.

> Ted (Andrews) sent me to a judicial education program in Reno, Nevada as part of the work to establish an education program for the family judges. There I listened to a man named Milton Luger, who was the first ombudsman for kids in New York state training schools. I thought this was a great idea. I got money to hire Donna Hackett for the summer to produce a paper for the Corrections ministry on whether we should have an ombudsman for youth in training school in Ontario. Donna was a law student at the time and later became a Provincial

> Court judge. She interviewed kids and staff in training schools across Ontario and recommended a program that the province never established. Later, it was discovered that many young persons were being sexually abused in some of the schools. I didn't send many youth to training school and I would visit those that I did. The fact that the children didn't disclose this to me or to Donna demonstrates how powerless they felt in that environment.

Another law student was Nick Bala. He was so enthused that he would later became a law professor at Queen's and taught the children's law course that Thomson and Lilles had started. Bala recalls being "impressed at how George and Heino got the class into the 'real world' by involving us in the family courts and various projects." Years later, Bala co-authoured a report for the Ontario government[8], "documenting problems that George and Donna had described in the 1970s."[9] That led to the establishment of the independent Office of the Provincial Advocate for Children and Youth, created by the Ontario legislature in 2007.

Early Judicial Education

Around 1973, Chief Judge Andrews asked Thomson to work with his office and others to develop an education program for Family Court judges. They produced a one-week program which included an early attempt at interactive judicial education. The week-long program, delivered three times over three weeks to one third of the Court's sitting judges at a time, was held first in Toronto, and then in Kingston the next year. Thomson subsequently collaborated with Sandra Oxner, a Nova Scotia judge leading judicial education initiatives for the Canadian Association of Provincial Court Judges, to develop the first national program for family judges.

Speaking Out: Juvenile Justice and Training Schools

A turning point in Thomson's career came after he addressed an April 1973 conference in Montreal on "Mental Health and the Legal Rights of Children".[10] His speech, entitled "Society vs. the Troubled Child" received media coverage and brought him to the attention of the Ontario government.

Child deserves right to be heard: judge

By MICHAEL VALPY
Globe and Mail Reporter

MONTREAL — An Ontario juvenile court judge says he finds merit in the argument that the young offender in his community would probably be better off—apart from a small number of cases—if he were not detected, processed, treated or institutionalized.

In a speech to be given today to an international conference on children's legal rights, Judge George Thomson of Kingston says too many children deteriorate while in care, too often treatment is not available and research into the treatment's effectiveness, if it is provided, is pessimistic.

He suggests that the child committed by the courts to training schools or a residential treatment program should have legal recourse to apply to the courts for release if treatment is not forthcoming.

Judge Thomson, 39, a former law teacher at the University of Western Ontario, pointed to the Ontario training schools' Oakville reception and assessment centre where decisions are made on the child after his court hearing to determine whether he should be institutionalized or allowed to remain in the community in a group home.

He said it was essential that a child have the right to be heard and be represented when these decisions are being made.

"If there is anything to be learned from the pessimistic research into the effectiveness of treatment, it is that the child's voice must be heard beyond the stages of adjudication, assessment and initial disposition.

"Provision should be made for consideration of such questions as 'was the treatment given?' and 'is it time for it to be over?' A proper hearing should also be provided when deciding whether to return the child for more treatment upon failure after release."

He said the problem which he finds to be the most acute in the juvenile judicial and treatment process is the dearth of evaluative done on the programs' effectiveness. "It helps us very little to know that a resource has a 40 per cent success rate when critics are arguing that if all the children in question were left alone the success rate would rise to 50 per cent."

He also said that juvenile judges should accept that their wide jurisdiction over a child ends "when we are unable to meet the obligation to treat . . . The child's right to be left alone is much less than that of adults; in return he (has been) granted the right to be protected and to be treated."

Any children's bill of rights, Judge Thomson said, would not be complete without some guarantee of the child's rights to be heard and represented at all stages of the state's intervention in his life.

"Despite this, we continue to engage in endless debate over his right to be represented when decisions . . . are made by a procedure in which the child cannot be ensured a hearing without such representation. And once we decide he should be represented, we tend to go only half way. He is allowed to waive the right or the judge is permitted to decide whether representation is necessary. . . ."

The judge also said there was a need to properly evaluate the process that now exists.

April 16/73

Thomson's Speech, "Society vs. the Troubled Child", received media coverage, including this article by Michael Valpy in *The Globe and Mail* on April 16, 1973.

From a Judge to Associate Deputy Minister

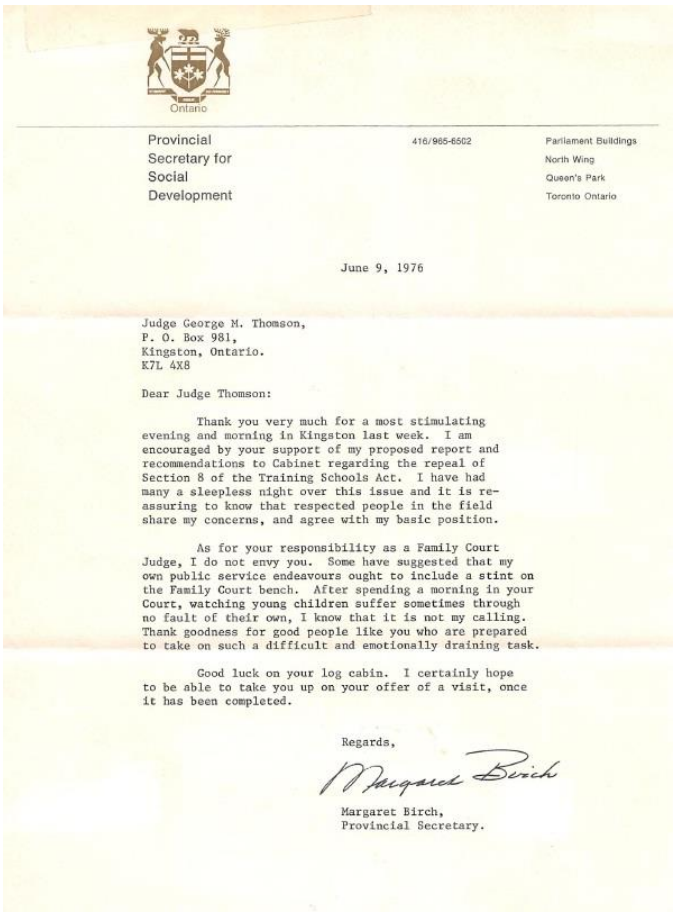
Keith Norton, a lawyer who had often appeared in front of Thomson in Kingston, moved into provincial politics, becoming a Member of Provincial Parliament in 1975. His colleague Margaret Birch, who was serving as the Provincial Secretary for Social Development, had been asked to formulate a new approach to delivering services for children at risk and their families to replace a fragmented and inadequate system. As Thomson recalled, this development was the direct result of the tragic case of Norma Dean.

> Norma Dean was a young teenaged girl who became difficult to handle at Thistletown, the children's mental health facility where she had been placed by her mother. Thistletown officials had her charged with minor offences, arguing that she needed controls that they could not provide. After several appearances in court, she was sent to a training school in Lindsay where she committed suicide. Her case became a vivid symbol of two things: the inadequacy of institutional care for children with emotional difficulties and the inappropriate practice of moving children to the criminal justice system when they became difficult to manage.

At Norton's suggestion, Birch travelled to Kingston to sit in Thomson's courtroom one spring day in 1976. She was impressed by what she saw. Early in 1977, she invited the judge to Winston's, a renowned Toronto steakhouse and gathering place of powerbrokers. Norton and others present from government wanted to hear Thomson's ideas for reform based on what he was seeing in court. He made suggestions and thought that was the end of it. A week later he was informed the government was creating a Children's Services Division in Norton's ministry to consolidate all children's services. George was asked if he would take a leave of absence, move to Toronto and head this new division as an Associate Deputy Minister, reporting to Norton who had become the Minister of Community and Social Services.

I was enjoying my life as a Provincial Court judge. I had just built a log house on Howe Island near Kingston. But I didn't pause. It seemed like a great opportunity and both my Chief Judge and the Attorney General encouraged me to take this on.

Thomson went from being a family judge in a one-judge courthouse to the leader of a government organization with thousands of employees.



Ontario

Provincial
Secretary for
Social
Development

416/965-6502

Parliament Buildings
North Wing
Queen's Park
Toronto Ontario

June 9, 1976

Judge George M. Thomson,
P. O. Box 981,
Kingston, Ontario.
K7L 4X8

Dear Judge Thomson:

Thank you very much for a most stimulating evening and morning in Kingston last week. I am encouraged by your support of my proposed report and recommendations to Cabinet regarding the repeal of Section 8 of the Training Schools Act. I have had many a sleepless night over this issue and it is re-assuring to know that respected people in the field share my concerns, and agree with my basic position.

As for your responsibility as a Family Court Judge, I do not envy you. Some have suggested that my own public service endeavours ought to include a stint on the Family Court bench. After spending a morning in your Court, watching young children suffer sometimes through no fault of their own, I know that it is not my calling. Thank goodness for good people like you who are prepared to take on such a difficult and emotionally draining task.

Good luck on your log cabin. I certainly hope to be able to take you up on your offer of a visit, once it has been completed.

Regards,

Margaret Birch

Margaret Birch,
Provincial Secretary.

Letter from Margaret Birch to Judge George Thomson.

Children's Services: Child Protection, Law Reform, Closing Training Schools

During his time with Children's Services, Thomson worked to extensively review laws and policies that involved the Family Court. His Division played a major role in amending the *Child Welfare Act*, introducing the *Children's Law Reform Act*, and closing training schools. Consultation with judges was a key part of the law reform initiatives. The Division also worked with the Ministry of the Attorney General as it created a program for providing lawyers for children, especially for children involved in child protection cases.

While heading the Children's Services Division, Thomson did not relinquish his judgeship, although he did not hear cases during that time. He was alarmed when Bora Laskin, Chief Justice of the Supreme Court of Canada, criticized the arrangement in a speech to other Provincial Court judges.

> I have no jurisdiction or authority to meddle in the affairs of provincial courts or intercede on any issue affecting the position of provincial Judges. It grieves me to know, however, and I think it grieves Chief Justice Howland and Chief Justice Evans that the provincial government of this Province has appointed a provincial Judge as a deputy minister while permitting him to retain his status as Judge. I regard this as a blot on judicial independence which should not be tolerated, and it speaks loudly of the misconcepetion that the governmental authorities, who are responsible in this matter, have of the meaning of judicial independence.
>
> Remarks of Chief Justice of Canada Bora Laskin at the opening of a judicial education event in Ottawa, November 1980[11]

Back to the Court – 311 Jarvis Courthouse in Toronto

After five years in government, Thomson returned to the Family Court. Instead of going back to Kingston, he asked to be assigned to the 311 Jarvis courthouse in Toronto. This made things easier on the home front since his wife, Judith Beaman, was now also in Toronto, in the process of starting an all-women's law firm. Thomson recalled that his return to the bench was not an easy transition.

> It was very satisfying to come back from the isolated world of senior public service and be able to work again with real children and their families. On the other hand, as I dealt with individual cases, I often found myself thinking about how the policy and legal reforms that were available to me when I worked within the government would have enabled me to deal with many children and families in similar positions.
>
> At that time, in that particular Court, the initiatives of individual judges were resisted by the senior judge so it was hard to try new approaches. It was a frustrating time because no service improvements at the Court happened unless all nine judges agreed and they almost never agreed! In addition, I began to worry about what I would be like as a judge after 30-40 years on the bench and so I started to consider other options.

Thomson and other Provincial Court judges continued to be active in the community in ways that they and the Chief Judge considered to be compatible with the judicial role. While at the 311 Jarvis court, Thomson chaired a committee for the Ontario government on environmental hypersensitivity, sat on the board of the Toronto Hospital for Sick Children with fellow Family Court judge Jim Felstiner, and became a founding member of Family Mediation Canada, the first national organization in support of family mediation.

In 1985, the new Attorney General, Ian Scott, also expressed strong views about judges performing other roles while retaining their positions on the Court. As a result, some Provincial Court judges – including Rosalie Abella from the Family Division and Clare Lewis from the Criminal Division – had to resign from the Provincial Court and give up their pensions. Lewis had retained his judicial status while serving as Police Complaints Commissioner and Rosalie Abella had done so while chairing the Ontario Labour Relations Board. Thomson decided to resign from the Court in 1985 to take on other roles.

Law Society Bar Admission Course

After leaving the Court, Thomson ran the Law Society's education program, including the bar admission program – the final hurdle for law students before becoming licensed to practise law in Ontario. He also chaired the Social Assistance Review Committee that produced "Transitions", a report that radically changed Ontario's approach to social assistance. Among other recommendations, it advocated reform that is "directed at more than income support and seeks to help those in need to make the transition towards self-reliance."[12]

Back to Government: Deputy Attorney General

Thomson returned to the provincial government in 1989. After a short term as the Deputy Minister of Citizenship, and three years as Deputy Minister of Labour, Thomson was appointed Deputy Attorney General in 1992. There, he again became part of the history of the Ontario Court of Justice, this time as the leader of the ministry responsible for administration of the courts.

One of the things that stood out for Thomson was negotiating the first Memorandum of Understanding between the Court and the Ministry of the Attorney General. His counterpart in the negotiation was Sidney Linden who was Chief Judge of the Ontario Court (Provincial Division), an integrated court that had replaced the former Provincial Court.

As Deputy Attorney General, Thomson also recalled helping to secure government agreement for a binding process for setting judges' salaries.

> Jim Thomas was the Deputy Minister at Management Board. He and I went to cabinet and persuaded them to agree to the binding process. We talked about judicial independence and the fact that if the government went this route, the question of judges' salary increases would no longer be something that the politicians would have to take ownership of. At cabinet, Premier Bob Rae said that this was the right thing to do.

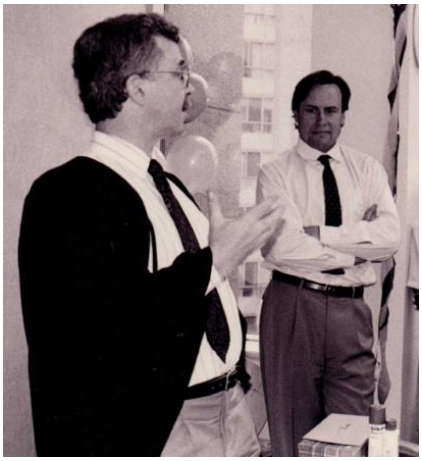
Then there was the "Social Contract". This 1993 initiative of the Ontario government, led by Premier Bob Rae, sought to address a fiscal crisis and concerns about the growing provincial deficit. Features of the Social Contract included wage freezes for public servants and mandatory days of unpaid leave, known informally as "Rae Days." Thomson was active in discussions about how the Provincial Division judges could contribute to the austerity measures without compromising judicial independence.

George Thomson as Deputy Attorney General, with senior staff from the Ministry of the Attorney General. Back row: Leslie Macleod, Doug Ewart, Ann Merritt, Karen Cohl, George Thomson, Denise Bellamy, Sandra Lang, Pamela Grant. Front row: Lori Sterling, Helen Hayward, Nancy Austin, Angela Hussein. Three persons in this photo served as Assistant Deputy Attorney General for Courts Administration/Court Services: Ann Merritt (2006 to 2011); Sandra Lang (1993 to 1995) and Karen Cohl (1992). (Courtesy: Helen Hayward)

> We negotiated with the Provincial Judges Associations about how to deal with the Social Contract.With the help of Sid Linden, we came up with the idea of

> judges giving more days of sitting time rather than having the government attempt to impose a salary cut. This plan preserved judicial financial independence while still having judges contribute to the resolution of a serious economic problem.

Another major initiative was reforming the *Courts of Justice Act*, to improve the judicial complaints and discipline process and to broaden the possible sanctions available to the Judicial Council. The amendments also included a requirement for the Chief Justice to have an education plan setting out the elements of the continuing education judges were to receive.



George Thomson with Michael Code, Assistant Deputy Attorney General for Criminal Law, 1994. (Courtesy: Helen Hayward)

When, as part of the effort to reduce the justice budget, the government said that court services would have to be cut, Thomson and Assistant Deputy Attorney General Michael Code (who later became a Superior Court Justice) put forward a different approach. They persuaded government to implement an "investment strategy." As Thomson explained,

> The idea was to provide funding to invest in front-end work, diverting cases, using Crowns to settle cases early, and pressuring the federal government to create more hybrid offences so that Crowns could elect more cases to proceed in a summary (more expeditious) manner.

To the Federal Government: Deputy Minister of Justice

In the fall of 1994, Thomson became the federal Deputy Minister of Justice. While in Ottawa, he was involved in some issues that affected the Court, such as introducing child support guidelines and one of

the expansions of the Unified Family Court in Ontario and other provinces. Thomson remembered the disappointment of longstanding family judges who expected to be going to the UFC but were not appointed. His previous boss, Ontario Attorney General Marion Boyd, had a similar recollection.

> We had to decide which judges to nominate for the UFC. It was difficult to choose because almost everybody wanted to go. It was a tough negotiation with the federal government because not all of the UFC positions were going to go to Provincial Court judges... With a patchwork of UFCs in the province, we now had a smaller number of judges who remained doing family law at the provincial level. Many of them felt isolated and underappreciated in a court where most of the work was on the criminal side. They felt that by pushing for the UFC we were not valuing their work and their dedication to family issues.
>
> Marion Boyd, former Attorney General for Ontario[13]

The most significant reform to affect the Court while Thomson was at the Department of Justice was the replacement of the Young Offenders Act by the Youth Criminal Justice Act. According to former Chief Justice Brian Lennox, "This had a transformative effect, not only on the Ontario Court of Justice's approach to youthful offenders, but on every court in Canada." The process to rewrite the legislation was initiated during Thomson's tenure and completed shortly after his move to judicial education.

Judicial Education: The National Judicial Institute

In 2000, Thomson became Executive Director of the National Judicial Institute. In that capacity, he attended a meeting of the Canadian Council of Chief Judges (of the Provincial Courts). The meeting was held in Lac Carling, Québec, to coincide with the education program for newly appointed judges. All the

Chief Judges and Associates from across Canada were in attendance. They told Thomson that they wanted the NJI to serve their courts better.

> I received a clear message, especially from the Chief from Alberta. He said that the NJI was not doing enough for the provincial courts, and they didn't feel that they were getting much in return for their financial contribution. I said, "Give me two or three years and let me show you how the NJI can be relevant to the provincial courts." I made it a priority to do so.

One of the main problems was that the NJI had a method of funding programs for federally appointed judges only, so most courses were offered only to them. Under Thomson's leadership, the NJI developed a method for provincial court judges to attend NJI courses by waiving any fee for development and design costs of the courses. As long as they covered the costs of their own materials and meals, provincial court judges could attend national NJI programs along with superior court judges. In addition, all of the NJI curriculum, materials, power points, and teaching materials were made available to provincial courts for use in their own court-based education programs. And special courses were developed of particular relevance to the provincial courts, including an intensive program to prepare judges for the new *Youth Criminal Justice Act*.

The most important change involved the Ontario Court of Justice and was the direct result of the shared desire of Thomson, Associate Chief Justice David Wake and Chief Justice Brian Lennox to have the Ontario Court serve as a model for provincial court judicial education. Thomson and Wake negotiated a special arrangement that included cost-sharing for an NJI senior advisor who would concentrate on supporting the Court's education programs and developing innovative new courses. One of the main features of the agreement was that all of the programs and resouraces developed by the NJI and the Court were to be freely available to all courts in Canada.

George Thomson at a judicial education program. (Courtesy: National Judicial Institute)

This resulted in innovative new programs for Canada judges, such as an annual communications course in Stratford and an annual skills-based course for newly appointed provincial and territorial judges in Niagara-on-the-Lake. New modules of education were added to the OCJ regional programs, such as a session organized by Justice Rebecca Shamai on systemic racism and sessions that focused on child protection issues. Ontario Court of Justice judges also became the prime users of online courses, with no financial contribution required.

The arrangement expanded both the OCJ and the NJI curriculum. Some judges worried that the NJI would take over our education and we would be sitting back watching NJI programs. That never happened. NJI provides assistance to OCJ judges to develop our own programming and our judges play a significant role in the development of NJI courses.

The Communications Course was George's bright idea. Our Court agreed to fund it in part and to give it ongoing funding. There was not universal acceptance of it amongst our judges – some thought of it as "acting school for judges." A *Globe and Mail* article[14] about the program inaccurately described how it would be taught, partly because it was being offered in Stratford which is a "theatre town". George was furious about the article. Of course, the program turned out to be fabulous and very successful. It still runs today and communication skills are taught within other programs like the New Judges Skills-Based Program.

David Wake, former Associate Chief Justice of the Ontario Court of Justice[15]

Conclusion

George Thomson's history with the Ontario Court of Justice has taken many forms and he has observed it from many angles and over many years. Now he has concluded yet another chapter in his relationship with the Court by serving on the team commissioned to write the Court's history.

Members of the Ontario Court of Justice History Project team: Adriel Weaver, Susan Lightstone, Karen Cohl, Angela Stamatakis, George Thomson, March 2015. (Courtesy: Office of the Chief Justice, Ontario Court of Justice)

[1]Foote, Caleb; Levy, Robert J.; Sander, Frank E.A. *Cases and Materials on Family Law* (Boston: Little, Brown and Co.)
[2]Quotes from G. Thomson in this profile come from interviews of G. Thomson for OCJ History Project, 2014 and 2015. Quotes from other individuals are specifically attributed to them.
[3] ProQuest G&M online archive: The informal George Thomson, Callwood, June. The Globe and Mail 16 Feb 1976: 8.
[4] Now Western University
[5] From interview of T. Andrews for the Oral History Project of the Osgoode Historical Society (used with permission)

[6] The informal George Thomson, Callwood, June, cited above.
[7] Heino Lilles became a judge of the Yukon Territorial court. He served as Chief Judge of the Court and was a president of the Canadian Association of Provincial Court Judges.
[8] Whitehead, Bala, Leschied & Chiodo, *A New Model for Child & Youth Advocacy in Ontario,* (Ontario Ministry of Children and Youth Services, July 2004).
[9] Interview of N. Bala for OCJ history project, 2015.
[10]The conference on "Mental Health and the Legal Rights of Children" was co-sponsored by the World Federation for Mental Health and the Canadian Mental Health Association, April 15-17, 1973.
[11]*Some Observations on Judicial Independence*, delivered by Bora Laskin, Chief Justice of Canada, at the opening of the New Judges Training Program sponsored by the Canadian Association of Provincial Court Judges (CAPCJ), Ottawa, November 1980; published in *Provincial Judges Journal*, Volume 4, No. 4, December 1980.
[12]*Transitions*, Report of the Social Assistance Review Committee, Prepared for the Ontario Ministry of Community and Social Services, Toronto 1988, p.4.
[13] Interview of M. Boyd for OCJ History Project, 2015.
[14] Stratford to teach judges how to play the role: Theatre experts will coach on walking, breathing, talking to convey authority from the bench, Makin, Kirk. The Globe and Mail 30 Jan 2003: A3.
[15] Interview of D. Wake for OCJ History Project, 2015.

Period IV: 2000-beyond Profiles & Stories

Stories from the North: Judge Peter Bishop

Video Connections – Sioux Lookout

While a teenager pleaded guilty to manslaughter in a Sioux Lookout courtroom in 2006, his mother, grandmother and extended family watched the proceedings on a video monitor in Big Trout Lake. The case involved an application under the *Youth Criminal Justice Act* for an intensive rehabilitation and custody supervision order. It was important for the family to hear the plea and the agreed-upon facts, and they would later participate in the sentencing hearing.

Judge Peter Bishop

Moments like this reminded Judge Peter Bishop of the impact that technology had made on justice in the north. A few months after video connections were set up in the Sioux Lookout courthouse, people who had opposed the change – including police and justices of the peace – said that they didn't know how they had managed without it.

Evolution of the Court

Leading an Independent Court

The expression "judicial independence" is both contextual and evolving. The definition of judicial independence is different now than it was one hundred, fifty or even twenty-five years ago and will undoubtedly continue to evolve into the future.

Brian W. Lennox, former Chief Justice, Ontario Court of Justice

Introduction

It is a well-accepted principle that judicial independence is vital to a democratic society. At its core, judicial independence is about judicial impartiality. Judges must be neutral when they adjudicate disputes between parties. They must not be beholden to any of the parties in the disputes that come before them, including (and especially) the government.

As former Attorney General Roy McMurtry has written: "If a government could count on the courts to enforce legislative and executive actions unauthorized by law, the individual citizen would have no protection against tyranny."[1] But this doesn't mean that judges can do whatever they want. The judges and justices of the peace of the Ontario Court of Justice are constrained in their behaviours by the law and the oaths of office all of them swear when they are appointed to the bench.

This "well-accepted principle," however, was not always so well accepted or well defined. The road to the current understanding of judicial independence was long, torturous and hard fought – and not without a few casualties along the way.

Judicial Independence in its Infancy: 1867-1967

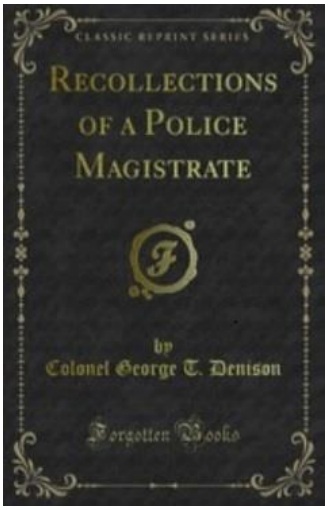
Introduction

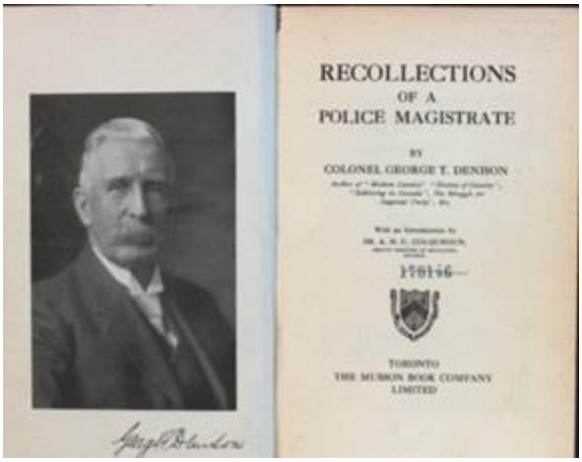
The Ontario Court of Justice is the descendent of local courts that dotted the province. By 1967, this loosely organized group of courts was staffed by an array of magistrates, justices of the peace and juvenile and family court judges. “A fractured mosaic of individual fiefdoms” is how these courts have been described.[2]

While the concept of judicial independence was recognized, the Court’s early history amply demonstrates that it was not always well respected or considered.

Appointments to the bench occurred where the size of the local population warranted it. Early judicial officers, although appointed by the provincial government, were paid by local municipalities – often on a fee-for-service basis. In certain instances, magistrates and justices of the peace were paid only on conviction of the person before them. Appointments were often patronage plums – blatant rewards from politicians.[3]

Originally, senior police officers presided as magistrates in Police Magistrates’ Courts. Police officers laid a criminal charge against a person and then that person went to court where another police officer decided his or her guilt or innocence. This did not contribute to the image of the magistrate being in any way separate, impartial or independent from the police.[4] It was not until 1934, that the court was renamed Magistrates’ Court.[5]





Police Magistrate, Colonel George Denison, wrote the seminal text on the work of a police magistrate in 1920.

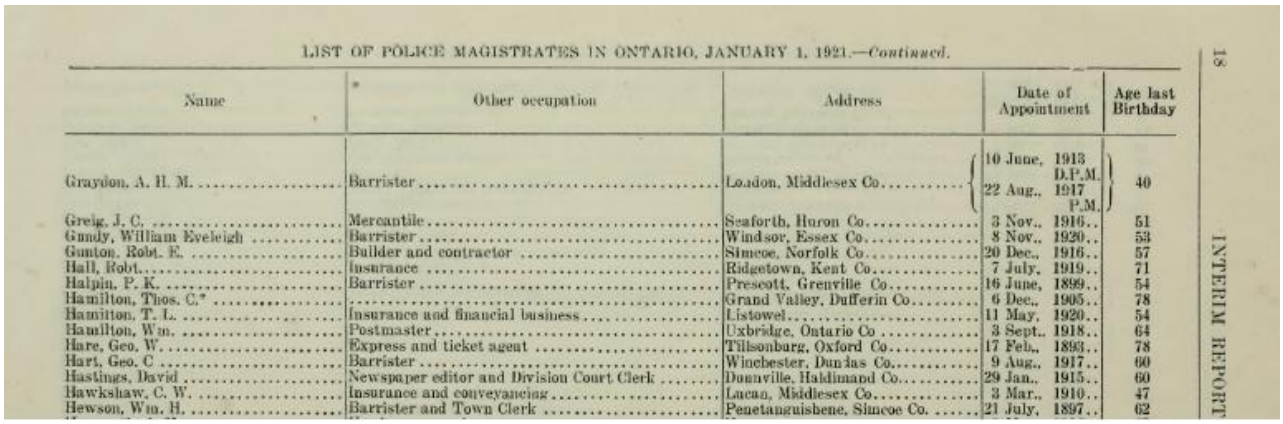
This collection of courts and judicial officers sat on the lowest rung in the judicial hierarchy. Judges appointed by the federal government – superior court judges – have historically possessed constitutional guarantees of independence, enshrined in the *British North America Act.* Superior court judges cannot be dismissed because the government disagrees with their decisions. Provincially appointed magistrates, family judges and justices of the peace, on the other hand, had no such constitutional guarantees of judicial independence. They were members of statutory courts – courts created by provincial statutes as opposed to being enshrined in the Constitution. For these statutory courts, the concept of judicial independence was "largely undefined"[6] until well into the 1990s.

In the early days of the Ontario courts, that lack of definition of judicial independence was readily apparent as the 1920s tale of the "whisky ring scandal in Dunnville" reveals.

The Whisky Ring Scandal in Dunnville

David Hastings served as a police magistrate, editor of the local newspaper and active politician – all at the same time – in Dunnville, a small town near Lake Erie. In 1920, William Raney, Attorney General and

ardent member of the temperance movement, decided to suspend Hastings as magistrate. Hastings' misdeed? He was vocally opposed to prohibition – he'd said as much in his courtroom and was not enforcing *The Ontario Temperance Act,* which forbade the purchase and sale of alcohol, to Raney's satisfaction. Further, there were allegations that Hastings was too friendly with certain members of the Dunnville "whisky ring," which was bringing illegal liquor into the town.



LIST OF POLICE MAGISTRATES IN ONTARIO, JANUARY 1, 1921.—*Continued.*

Name	Other occupation	Address	Date of Appointment	Age last Birthday
Graydon, A. H. M.	Barrister	London, Middlesex Co.	10 June, 1913 D.P.M. 22 Aug., 1917 P.M.	40
Greig, J. C.	Mercantile	Seaforth, Huron Co.	3 Nov., 1916	51
Gundy, William Eveleigh	Barrister	Windsor, Essex Co.	8 Nov., 1920	53
Gunton, Robt. E.	Builder and contractor	Simcoe, Norfolk Co.	20 Dec., 1916	57
Hall, Robt.	Insurance	Ridgetown, Kent Co.	7 July, 1919	71
Halpin, P. K.	Barrister	Prescott, Grenville Co.	16 June, 1899	54
Hamilton, Thos. C.*		Grand Valley, Dufferin Co.	6 Dec., 1905	78
Hamilton, T. L.	Insurance and financial business	Listowel	11 May, 1920	54
Hamilton, Wm.	Postmaster	Uxbridge, Ontario Co	3 Sept., 1918	64
Hare, Geo. W.	Express and ticket agent	Tillsonburg, Oxford Co.	17 Feb., 1893	78
Hart, Geo. C	Barrister	Winchester, Dundas Co.	9 Aug., 1917	60
Hastings, David	Newspaper editor and Division Court Clerk	Dunnville, Haldimand Co.	29 Jan., 1915	60
Hawkshaw, C. W.	Insurance and conveyancing	Lucan, Middlesex Co.	3 Mar., 1910	47
Hewson, Wm. H.	Barrister and Town Clerk	Penetanguishene, Simcoe Co.	21 July, 1897	62

18 INTERIM REPORT

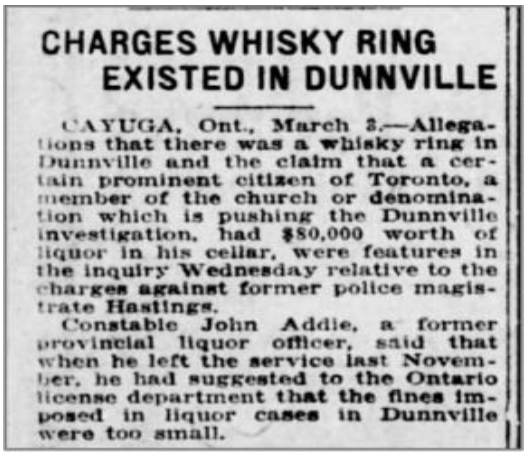
A report from 1921 shows that, in addition to being a police magistrate, David Hastings was a "Newspaper editor and Division Court Clerk." (Source: *Interim Royal Commission Report Respecting Police Magistrates*.)

The clash between Raney and Hastings – which ultimately resulted in Hastings' forced resignation from his position as magistrate – serves as a vivid backdrop to illustrate the ways in which judicial independence has evolved over the past 100 years for provincially appointed judges and justices of the peace in Ontario.

When it came to Raney's attention that Dunnville was awash in drunk and disorderly citizens and vendors of liquor – who went unpunished in Hastings' courtroom – Raney promptly sent a letter in July 1920 to all police magistrates in Ontario telling them "to administer *The Ontario Temperance Act* fully and effectually, and not to regard the enforcement of the law as simply a requirement of revenue but as a deterrent and preventive."[7]

On receipt of this letter, Hastings began corresponding directly with Raney, complaining about the legislation, suggesting it was impossible for him to administer and enforce it in a small town like Dunnville. Raney responded by letter in November 1920, curtly informing Hastings that he was suspended from his position as magistrate but "if you prefer to announce your resignation please wire me promptly upon receipt of this letter."[8]

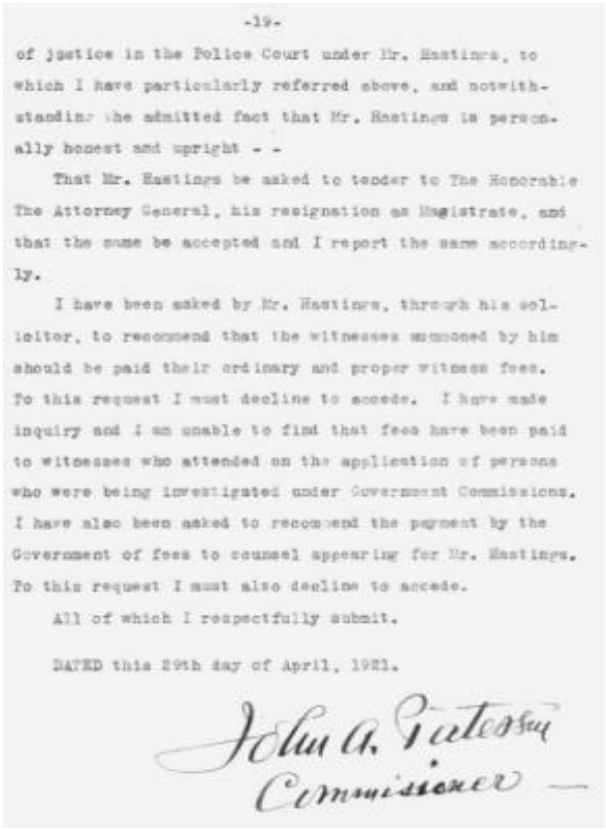
Raney was within his rights to suspend Hastings in this summary fashion. At that time, the *Magistrates Act* "stated that every Police Magistrate… shall hold office during pleasure."[9] If it pleased Raney to "fire" Hastings, he was entitled to do that.



CHARGES WHISKY RING EXISTED IN DUNNVILLE

CAYUGA, Ont., March 2.—Allegations that there was a whisky ring in Dunnville and the claim that a certain prominent citizen of Toronto, a member of the church or denomination which is pushing the Dunnville investigation, had $80,000 worth of liquor in his cellar, were features in the inquiry Wednesday relative to the charges against former police magistrate Hastings.

Constable John Addie, a former provincial liquor officer, said that when he left the service last November, he had suggested to the Ontario license department that the fines imposed in liquor cases in Dunnville were too small.



-19-

of justice in the Police Court under Mr. Hastings, to which I have particularly referred above, and notwithstanding the admitted fact that Mr. Hastings is personally honest and upright - -

That Mr. Hastings be asked to tender to The Honorable The Attorney General, his resignation as Magistrate, and that the same be accepted and I report the same accordingly.

I have been asked by Mr. Hastings, through his solicitor, to recommend that the witnesses summoned by him should be paid their ordinary and proper witness fees. To this request I must decline to accede. I have made inquiry and I am unable to find that fees have been paid to witnesses who attended on the application of persons who were being investigated under Government Commissions. I have also been asked to recommend the payment by the Government of fees to counsel appearing for Mr. Hastings. To this request I must also decline to accede.

All of which I respectfully submit.

DATED this 29th day of April, 1921.

John A. Paterson
Commissioner

Top: The story of the Dunnsville Whisky Ring Scandal in the *Winnipeg Tribune.*
Right: A page from the Hastings Investigation Report of the Commissioner John A. Paterson, April 29,1921.
Bottom: William Edgar Raney, Ontario's 10th Attorney General.

A Public Inquiry into Hastings' Conduct as a Magistrate

Hastings declined to resign and instead published Raney's letter to him in the Dunnville newspaper (recall that Hastings served as its editor) and asked for an investigation. A public inquiry was called to determine whether "the administration of justice in the Police Court at Dunnville has ceased to command public respect, and for this condition of things the Magistrate, Mr. Hastings, is largely responsible."[10] Raney was under no legal obligation to call this inquiry. In fact, the legal necessity for such a process did not exist until an - amendment was made to the *Magistrates Act* in 1952.[11]

Part of the inquiry's task was to investigate Hastings' close relationship to a group of men "in the control and domination of the affairs of the community," and allegedly operating the illegal "whisky ring" in Dunnville.

The commissioner of the inquiry, a lawyer, John Paterson, found that Hastings was "personally honest and upright," but nevertheless recommended that Hastings resign his position as magistrate.

In coming to his conclusion, Paterson depicted the group of Dunnville farmers selling liquor as cultivating the "Garden of Eden, being tempted" and shamefully falling.[12] According to Paterson, in those liquor cases where Hastings had convicted, he wrongly imposed the lowest possible fines. Paterson then took it upon himself to virtually retry Hastings' cases involving *The Ontario Temperance Act,* reviewing the evidence, and arriving at opposite conclusions, finding men that Hastings had discharged should have been convicted of multiple liquor offences. "I do not presume to act as a Court of Appeal… but, sitting as a Commissioner, I can quite understand how such a disposition of this case could create a want of confidence in the Magistrate, and I venture to say that in my own opinion it also creates a want of confidence."[13] Paterson concluded that Hastings was no longer a "useful" magistrate and, therefore, it would not be in the best interests of the administration of justice to keep a magistrate

as "inefficient" as Hastings.[14] Hastings subsequently resigned – and the flow of liquor into Dunnville fell by two-thirds.[15]

The Evolution of Judicial Independence

"Justitia," concluded Paterson, "must be beyond suspicion." While that ideal has not changed since the 1920s, virtually every other aspect of the concept of judicial independence has – in practical terms – evolved into something very different than in Hastings' day.

This comes as no surprise. As former Chief Justice Brian Lennox has written: "the expression 'judicial independence' is both contextual and evolving. The definition of judicial independence is different now than it was one hundred, fifty or even twenty-five years ago and will undoubtedly continue to evolve into the future. It is not a uniform standard…. In its most basic expression, however, judicial independence has always referred to the necessity that judicial decision making be free from external pressure or constraint. Contrary to the views of some, this is not a licence for arbitrary action, nor does it mean that decisions are taken in a vacuum."[16]

Concepts of judicial independence in 1921 were certainly much less stringent than they would later become. The Attorney General did not approve of a magistrate's behaviour and had no hesitation in contacting him directly to order his suspension. It may have been that David Hastings should have been removed as magistrate given his close relationship with the town's "whisky ring." But Attorney General Raney's 'command and control' approach clearly demonstrates the absence of judicial independence prevailing for magistrates at that time. Hastings was in no way free from the interference of the government in his decisions. The fact that an inquiry was called into Hastings' jurisprudence was a modest but unmandated nod to the principle of judicial independence and one wonders if it would have been called but for Hastings' publication of Raney's order to Hastings that he quit his post.

Judicial Independence – Progress from 1921 to 1967

How did the concept of judicial independence evolve between the 1920s and late 1960s? Specifically, how did the relationship between the government and the judiciary change over the years; what did the concept of judicial independence mean to the day-to-day work life of provincially appointed magistrates, judges and justices of the peace?

Salaries of Judicial Officials

Until the early 1960s, judicial salaries were negotiated by the government of the day with each individual magistrate or judge. These tended to be so low that magistrates and family judges took other work to support their families. Magistrates "should be paid salaries that will enable them to live and educate their families in dignity," wrote Commissioner James McRuer in the 1968 report of the Royal Commission Inquiry into Civil Rights in Ontario.[17] McRuer brought to light the fact that in 1968, 37 magistrates were employed by 68 Boards of Commissioners of Police, "for which they are in some instances paid substantial salaries…. Magistrates ought not to be members of Boards of Commissioners of Police for many reasons. Not the least of these is that there ought not to be an employer-employee relationship between judicial officers and the members of the police force. Another equally sound reason is that Police Commissioners make laws. A judicial officer ought not to be engaged in the legislative process other than that which may relate to procedure."[18] Like Magistrate Hastings of Dunnville fame juggling his judicial duties with politicking and running the local newspaper, the employment of magistrates outside the court was a recipe for generating controversy and conflict – and situations that would compromise their independence.

Similarly, virtually no justices of the peace occupied full-time, salaried positions. By the 1960s, being a justice of the peace usually was a side line to some other type of work – often a court officer or clerk.

Remuneration by collection of fees was found by McRuer to be "subversive to the administration of justice. The payment of judicial officers on a piece-work basis necessarily diminished the public respect for law and order. The fee system was a real inducement to justices of the peace to curry favour with police officers in order to 'get business.'[19]

Divorcing Politics from Judicial Compensation

Justice Kathleen McGowan served, in the 1990s, as the Chair of the Judicial Independence Committee of the Canadian Association of Provincial Court Judges. She has written extensively on the topic of judicial independence. The excerpt below appeared in 2006 in an essay, "The Struggle for Judicial Independence in Canada," included in the *Journal of the Commonwealth Magistrates' and Judges' Association.*

McGowan included the story below to illustrate why – in her words – "it is absolutely essential that we achieve a divorcing of politics from judicial compensation."

The story was told to me by a highly respected judge who has long since passed away. This fine gentleman was appointed to the bench in the early 1960s and as was the custom in his jurisdiction his salary was paid jointly by the province and the municipality. A practice had developed whereby the Crown Attorney and the Chief of Police would meet with the judge before court every day and review the docket and decide what was going to happen with the cases. The learned judge thought that this practice was improper and announced that he would discontinue it. The Chief of Police complained to the Mayor who directed the judge to reinstitute the practice or have his salary reduced. The judge refused and in short order a bylaw was passed reducing the municipality's portion of his salary to $1.00 a year. Fortunately for the judge, the Crown Attorney recognized that this was wrong and eventually the province took over and reinstated the judge's full salary and the judge went on to establish a well-deserved reputation for fairness.

(Source: Kathleen McGowan, "The Struggle for Judicial Independence in Canada," *Journal of the Commonwealth Magistrates' and Judges' Association,* Vol. 16, no 4, December 2005, p. 28.)

Magistrates and Family Judges Begin to Organize

Reflecting concern for their remuneration and working conditions, the juvenile and family judges and the magistrates formed associations – both of which were still in their infancy by the end of the 1960s, as David Vanek recalled of his early days as a Provincial Court (Criminal Division) judge.

I found the general meetings of the Association rather dull and uninspiring. Most of the discussion was devoted to securing an increase of remuneration and pensions, which were at unreasonably low levels, and improving working conditions. Unfortunately, an atmosphere of futility surrounded these discussions. These issues fell within the authority of a provincial government that disclosed no inclination to improve matters. Executive officers of the Association would address letters to the Premier, Attorney General, or other governmental authorities, in exaggeratedly deferential terms, seeking an appointment [for a meeting]. I found this embarrassing and inappropriate on the part of judicial officers…. This "cap in hand" approach to government brought little improvement. The attitude of the Provincial government reflected the low regard in which it held the magistrates and Provincial Court judges in my early years on the Bench.[20]

Vanek raised a significant point in his comments. Provincially appointed judicial officials were held in lower regard than their federally appointed counterparts, who sat on district and superior courts and enjoyed a constitutionally guaranteed judicial independence.[21]

Removal from Office

For many years, magistrates – like Hastings – and justices of the peace held their offices "at pleasure," meaning they could be removed when it suited the government of the day. In 1952 the *Magistrates Act* was amended to provide that Ontario magistrates with two years' or more experience could only be removed from office for cause – "for misbehaviour or for inability to perform his duties properly."[22] Further, a magistrate could only be removed after an inquiry by one or more superior court judges. The junior magistrates with less than two years' experience continued to serve as "at pleasure appointments."

As McRuer acknowledged in his 1968 report, judicial independence although "essential" and of "incalculable importance," should not be a cloak for preserving in office irresponsible judges or magistrates who have proved to be quite unsuitable for the tasks they have to perform."[23] Although McRuer did not specifically consider the Hastings case, he was highly critical of the type of process to which Magistrate Hastings was subjected by Attorney General Raney because it smacked of "supervision of the judiciary" by the Attorney General.[24] It was quite possible that Hastings engaged in "misbehaviour," but in McRuer's concept of judicial independence, it would not be the Attorney General or the government of the day who decided that but "some body to which members of the Bar and members of the public could present grievances with respect to the conduct of members of the judiciary… a judicial council."[25]

As for justices of the peace, they had no statutory protection whatsoever and could be removed at any point and for any reason by the government.

Did the 1952 *Magistrates Act* really change things?

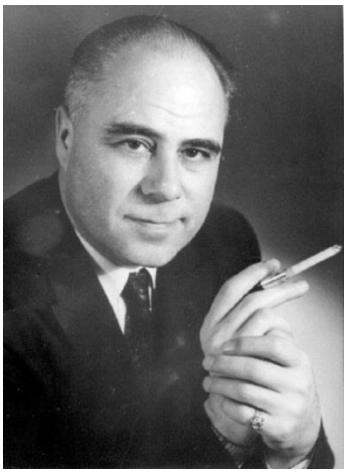
In his 1971 seminal text on sentencing in criminal cases by magistrates and judges of the Provincial Court, author John Hogarth reviewed the appointment and tenure of these judicial officials. He

suggested that the independence of magistrates may have been compromised – by Attorneys General influencing a magistrate or judge to resign. This was long after the 1952 legislation was in place requiring an inquiry before removal of a magistrate.

During the past twenty years [1951-1971], only two magistrates tendered their resignations to the Attorney-General before the removal orders were issued. There were a number of (other) instances brought to this writer's attention where resignations had been offered in circumstances suggesting encouragement by the Attorney-General, but the details were never made public.

(John Hogarth, *Sentencing as a Human Process,* (Toronto: University of Toronto Press, 1971), p. 44. The two inquiries Hogarth refers to concerned Magistrates J. Bannon and George W. Gardhouse.)

Governments Exercised Their Control



Frederick M. Cass, Attorney General for Ontario, 1962-1964.
(Photo dated November 1962, Niagara Falls Bridge Commission).

Politicians made it clear about who controlled the provincial benches. In the 1920s, Attorney General Raney ruled the courts and judicial officers under his purview with an iron fist. That attitude was perpetuated. In 1963, at the Ontario Magistrates Annual Conference in Kingston, the 70 conferees were informed by Attorney General Frederick Cass that he was mandating a procedural change requiring them to hear shorter cases at the beginning of each court day to ensure witnesses did not have to sit in court for long periods of time. Cass concluded his remarks emphasizing his power over the magistrates, despite legislation in place requiring an inquiry

before removal: “If I find that this is not the view of anyone occupying any court over which I have jurisdiction that person will forthwith be
removed.”[26]

Further, the government – through the Attorney General – was in full control of the appointment process of judicial officials as duly noted by McRuer in the following critical comment.

There has been a tradition in Ontario that there should be a strong political influence in the selection of magistrates. This has not been peculiar to any political party…. The appointment of a magistrate on the basis of political connections cannot be justified on any ground. It is not consistent with the elementary concepts of justice that one who has attained office merely by political service should have the right to preside over the liberty of the subject… [T]he independence of the judiciary is essential in the administration of justice and is of incalculable importance…[27]

As for the justices of the peace, McRuer could not have been more clear.

We condemn without reservation and with all the emphasis at our command the appointment of justices of the peace as a political reward. Such appointments can only be termed a sort of comic opera title system that can be described in no more appropriate language than “just silly.” … We recommend that the appointments of all present justices of the peace be cancelled and a fresh start made.[28]

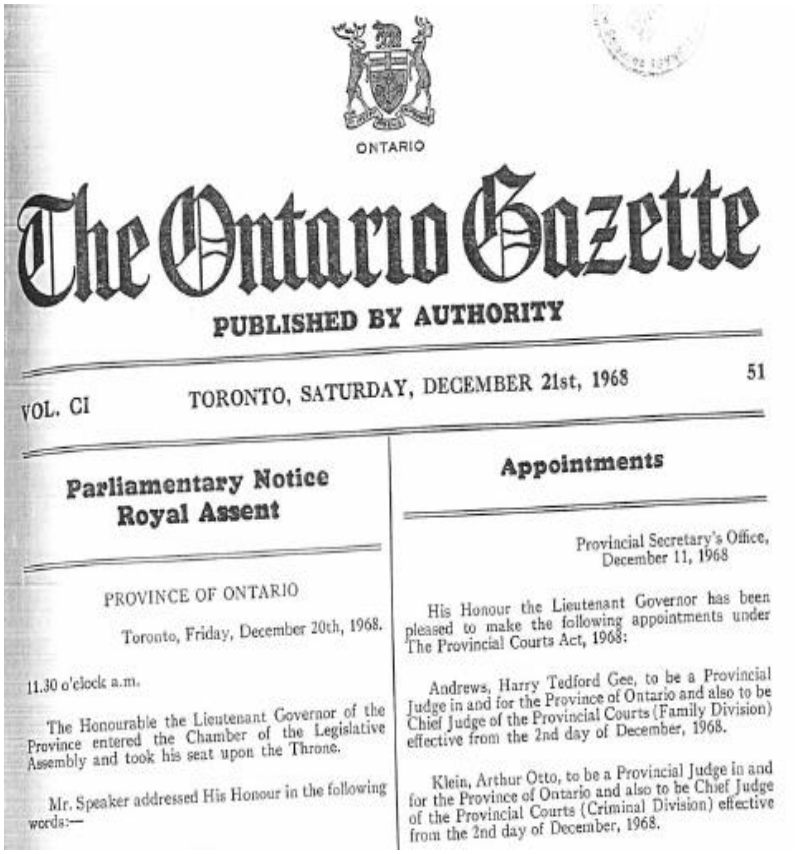
Inadequate Courtrooms

Accommodations for magistrates, justices of the peace and family judges affected the manner in which the courts were conducted and justice was delivered. Until 1968, *Magistrates Acts* made it clear that running a magistrates’ court was a “second string” activity.

Magistrates were given the right to use any courtroom or town hall, but that use “shall not interfere with the ordinary use of the courtroom” by other courts or with the use of the town hall “for the

purposes for which is maintained."[29] McRuer was particularly aware of this issue, pointing out that communities were placing these judicial officials in "entirely inadequate, poorly located and noisy" places across the province—often in police stations and even jails. "[30] "One cannot come to any other conclusion than those responsible have no concept of the elementary rights of accused persons and witnesses who attend trials, and the rights of the public, to have justice administered with the dignity and in circumstances that convey a respect for the law."[31]

Accommodations for magistrates, family judges and justices of the peace were often "inadequate." Here is an example - this is a magistrates' courtroom in Morrisburg in 1951. (Photo courtesy of the Law Society of Upper Canada Archives.)



ONTARIO

The Ontario Gazette

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Parliamentary Notice
Royal Assent

PROVINCE OF ONTARIO

Toronto, Friday, December 20th, 1968.

11.30 o'clock a.m.

The Honourable the Lieutenant Governor of the Province entered the Chamber of the Legislative Assembly and took his seat upon the Throne.

Mr. Speaker addressed His Honour in the following words:—

Appointments

Provincial Secretary's Office,
December 11, 1968

His Honour the Lieutenant Governor has been pleased to make the following appointments under The Provincial Courts Act, 1968:

Andrews, Harry Tedford Gee, to be a Provincial Judge in and for the Province of Ontario and also to be Chief Judge of the Provincial Courts (Family Division) effective from the 2nd day of December, 1968.

Klein, Arthur Otto, to be a Provincial Judge in and for the Province of Ontario and also to be Chief Judge of the Provincial Courts (Criminal Division) effective from the 2nd day of December, 1968.

When the Provincial Courts were created in December 1968, Ted Andrews was named Chief of the Family Division, and Arthur Klein was named Chief of the Criminal Division.

Lack of a Centralized Administration

Magistrates, family judges and justices of the peace formed what has been termed a "fractured mosaic" of "independent operators," each labouring alone in their own courts.[32] A centralized administrative structure for this loose collection of courts slowly began to evolve in 1922, when authority was granted to designate a "senior" magistrate, with the power to assign and direct Toronto's three other police magistrates.[33] In 1936, the Attorney General was given the authority to designate a senior magistrate in magisterial districts throughout Ontario. Shortly before the Magistrates' Courts and the Juvenile and Family Courts were replaced by the Provincial Courts in 1968, both the criminal bench and the juvenile

and family bench were led by chiefs – Chief Magistrate A.O. Klein and Chief Judge H.T.G. Andrews. The administrative structures each oversaw were "embryonic."[34] As McRuer detailed in his report, these Chiefs were mandated simply to "equalize the case load… and to provide for assistance in case of illness and absence,"[35] with little administrative support or structure to accomplish the task.

Judicial Independence – An Illusory Concept

In summary, the mixed bag of municipal officers, police officers and others who served as magistrates, family judges and justices of the peace before 1968 were not regarded or treated as judicially independent.

1. They were not secure in their jobs – many served "at the pleasure" of the government of the day. Many worked only part time and held down other jobs to supplement their incomes – which put them into conflict with their judicial roles.

2. They had very limited financial security. Magistrates negotiated their salaries individually with the government. Most justices of the peace were dependent on fees, as opposed to fixed salaries. Both arrangements were recipes for relationships too close to and dependent on police and government officials to be considered impartial.

3. The often "disgraceful" and inappropriate accommodations provided to these courts provided a clear example of how judicial independence of this group of judicial officers was regularly compromised, either in fact or perception.

Judicial Independence Becomes Defined for the Provincial Courts: 1968-1989

A Collection of Reports to Government – From McRuer to Mewett to Zuber to Henderson

Four important reports were delivered to government about the state of courts in Ontario – with particular focus on the provincial courts, and the independence not only of the judges and justices of the peace, but of the courts themselves. These reports, in both their timing and their recommendations, serve to frame the Provincial Courts era. Taken together, they demonstrate the progress made in defining the concept of judicial independence for judges – and the sorry lack of judicial independence for justices of the peace.

1968: Publication of the McRuer Report served to reveal significant flaws in the administration of justice in Ontario. Grave concerns about judicial independence were expressed throughout the report. Change was afoot.

By December 1968, in response to McRuer, the Provincial Courts, Family and Criminal Divisions, had been created and the magistrates became judges in these new courts.[36] This heralded a new era: "the judicialization of the magistracy" began.[37] As the judges of the Provincial Courts took their places and began defining their roles, the concept of judicial independence became increasingly – and often hotly – debated.

1981: Alan Mewett, then a law professor at University of Toronto, submitted his report to the Attorney General on the "Office and Function of Justices of the Peace in Ontario."[38] Mewett's findings were unambiguous.

The justice of the peace is the very person who stands between the individual and the arbitrary exercise of power by the state or its officials. It is essential that an independent person be the one to determine whether process should issue, whether a search warrant should be granted, whether and on what terms an accused should be released on bail and so on. This is a fundamental principle at the heart of the common law and in my opinion must be zealously preserved.[39]

Mewett concluded that there was "much confusion, not least in the minds of the justices of the peace themselves" about "the whole question of the independence of Justices of the Peace."[40] Mewett was particularly concerned about the employment status of justices of the peace. They were, at the time of his report, lumped in with and considered to be employees of the government. "Anyone in a decision-making position… cannot, either expressly or impliedly, be considered as a civil servant."[41] Further, he was highly critical of the lack of clarity around the administration of the justice of the peace bench, including directing the sittings of justices of the peace. He was equally critical of the manner in which work was assigned to justices of the peace: "the present system leads at least to the appearance of undue pressure on a justice of the peace to conform to the opinions of his superior or be assigned inconvenient or unpopular duties. Thus, the power to 'direct' may become a power to interfere with the judicial independence of the justice of the peace."[42] Despite these criticisms, the independence issues facing the justice of the peace bench did not begin to be fully addressed until the 1980s.

1987: In *Report of the Ontario Courts Inquiry,* Justice T.G. Zuber noted that judicial independence had been seriously debated in the years leading up to his investigations, and concluded that "judicial independence means many things to many people."[43] Zuber had been appointed by Attorney General Ian Scott to study the possible reorganization and streamlining of the entire provincial court system– from justices of the peace to the Ontario Court of Appeal.[44]

Zuber raised a variety of unresolved questions about the practical workings of judicial independence.

In general terms, it could be described as the freedom of the judiciary from outside interference in discharging their essential functions. Views begin to diverge on what is the meaning of outside interference and what are the essential functions of the judiciary…. [J]udges should hold office free from the threat of dismissal by the executive or the legislature because of dissatisfaction with individual decisions. It has also been accepted that judges could not be subject to reductions in salary as a form of

disapproval of or punishment for unwelcome decisions. These aspects of judicial independence are the two basic elements of security of tenure, and no one would today suggest any diminutions of the security of tenure of the judiciary. Questions begin to arise when one considers who should have the responsibility for the assignment of work to judges, the provision of financial resources for the court (in the form of buildings and personnel) and the management of the resources that are provided to the court system.[45]

1988: The Henderson Report[46] (properly titled the *Report of the Ontario Provincial Courts Committee*) tackled – in practical terms – some of the questions the Zuber Report raised with regard to issues of judicial independence and focused on the remuneration of judges.

"But what, exactly, does judicial independence entail? By now there is little room for dispute about its essential contours." The Henderson Report, 1988

Gordon Henderson in 1987. (Courtesy: Law Society of Upper Canada Archives, Paul Lawrence fonds, 2001088-339.)

The Henderson Report put flesh on the bones of the definition of judicial independence by critically reviewing and commenting upon relevant Supreme Court of Canada cases– specifically the landmark 1985 case, *R. v. Valente* – and the academic literature of the day.

As described by Henderson, the modern understanding of judicial independence involved two relationships which, together, are essential to true judicial independence:

1. the individual independence of a judge, reflected in such matters as security of tenure, and

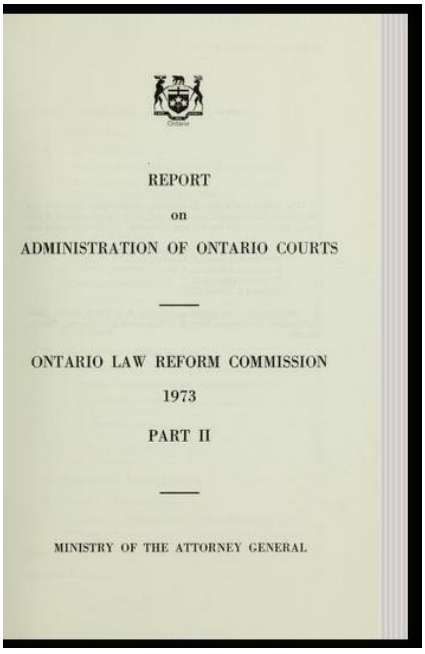
2. the institutional independence of the court over which that judge presides, as reflected in the institutional or administrative relationships to government and other people and organizations.[47]

This "modern understanding" came almost exclusively through litigation beginning in the provincial courts across Canada. How did it happen? And when did it begin?

Individual Independence – Judges Begin to Find Their Voices

During the 1970s and early 1980s, the status of the Provincial Courts and its judges began to improve – for a number of reasons.

McRuer had identified that these courts had been seriously neglected, and that message was repeated in subsequent reports, including the Ontario Law Reform Commission's 1973 *Report on Administration of Ontario Courts.*


REPORT
on
ADMINISTRATION OF ONTARIO COURTS
ONTARIO LAW REFORM COMMISSION
1973
PART II
MINISTRY OF THE ATTORNEY GENERAL

The Provincial Courts required greater attention because of the "number of people affected by these Courts, their broad jurisdiction and the resulting voluminous caseload," concluded the OLRC report.[48] Simply put, the work of the Provincial Courts was becoming more important and more sophisticated. This needed to be reflected in the approaches by which their independence was guaranteed.

The OLRC report recommended as follows.

- Improved salaries and a formalized salary structure for Provincial Court judges to reflect the significance of the work of the Court.

- The appointment of only lawyers as judges of the Court, with the elimination of part-time judges "on the basis of impropriety of one holding a judicial office" while being engaged in another business.[49]

- Reduction of political influence in the appointment of judges.

- A tightening of the "loose" administrative structure of the Provincial Courts.[50]

Concurrent with recommendations such as these finding voice, the complexity of cases the Court was hearing – together with the volume of cases – was increasing. This, in turn, led to more professionalization and specialization within the Provincial Court benches. Criminal cases, for example, were being heard in increasing numbers as the *Criminal Code* was regularly amended during these years to allow for more offences to be heard in the Provincial Court– and more accused persons elected to be tried in the Provincial Court as opposed to the Superior Courts.[51] That "explosion of workload" was noted in government reports concerning the Provincial Courts.[52]

"The Bench was Seething"

Despite recommendations dating from the 1960s that magistrates and judges of the Juvenile and Family Courts should be paid the same salary as certain federally appointed judges, Provincial Court judges had watched the salary differential between the two levels of court increase – with the Provincial Court judges stuck at the lower end of the pay scale during the 1970s.[53] Further, there was no formal mechanism for Provincial Court judges to bring their salary concerns to the government's attention.

"The period from 1980 to 1990 was a remarkable period of transformation in what the judiciary can and should do to advance its own interests."

Justice Paul French, Ontario Court of Justice. From 1980 to 1997, French served as legal counsel to the Provincial Judges Association (Criminal Division) and the Ontario Family Court Judges Association.

In the opinion of Justice Paul French (who served as legal counsel to the associations of criminal and family judges from 1980 to 1997[54]), the remuneration of Provincial Court judges depended on the "beneficence of the government," a situation that dramatically compromised their judicial independence. In his memoir, Judge David Vanek concluded: "It is demeaning for judges periodically to come to the government, cap in hand, begging for money."

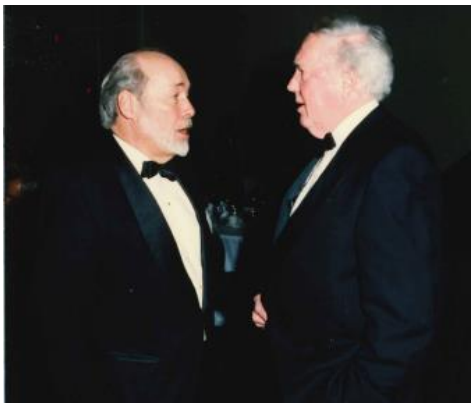
French recalled, "the bench was seething…. there was a lot of chatter about the lack of judicial independence" in the late 1970s.[55] The judges – led by their associations – decided to act.

Judge Bill Sharpe was one of the key players in the Provincial Court Judges Association (Criminal Division) in the late 1970s and early 1980s, serving as its treasurer. He was also chairman of the Salary and Pensions Committee, which Sharpe referred to with rueful humour as the "avarice and greed committee."[56] The Ontario Family Court Judges Association had a similar committee, led by Judge Joe James.

Judge David Vanek's memoir recalls the circumstances of the time.

The Government of Ontario still approached the exercise of its administrative authority over the Provincial Court and provincial judges, including the salaries and pensions of the judges as matters wholly within its discretion. Bill Sharpe's committee was encountering the usual difficulties, not only in obtaining increases to levels it regarded as reasonable but to get the government even to address the

submissions of the Association. In this state of affairs, Bill convened a joint meeting of his committee with a similar committee of the Family Division of the Provincial Court.[57]

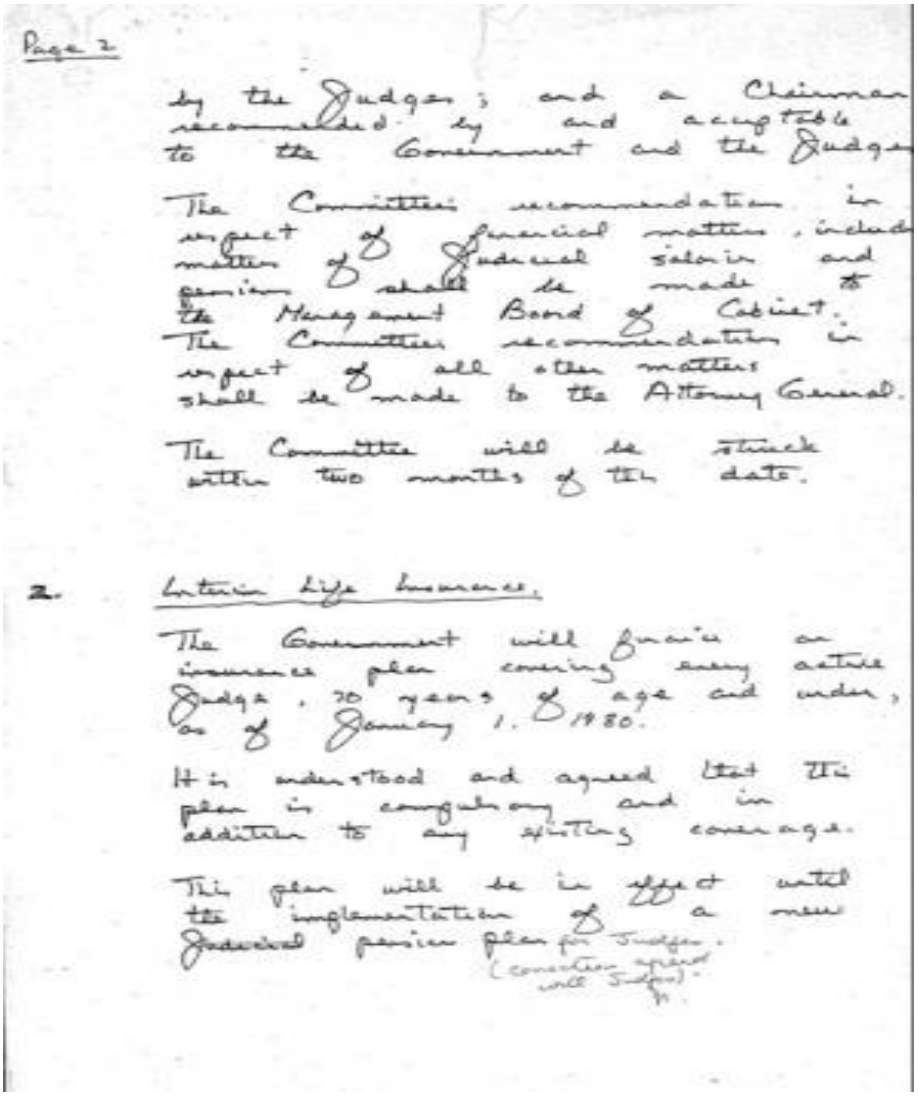


Judge Bill Sharpe as treasurer of the Provincial Court Judges Association (Criminal Division) and chair of the Salary and Pensions Committee, was a key player in judicial independence issues. (Courtesy: S. Linden)

In 1979, Bill Sharpe wrote a long letter to the Premier of Ontario, Bill Davis, requesting a meeting. Sharpe's request was granted and the judges decided they would take the opportunity to ask for the creation of a committee– comprised of one representative of the government, one of the judges and a chair acceptable to both parties – to deal with the financial matters of the judges at arm's length from the government.

"To our delight,"[58] the proposal was accepted and the Ontario Provincial Courts Committee was created. The Memorandum of Agreement, handwritten by Judge Joe James during that meeting on December 13, 1979 was initialled by Bill Davis and Attorney General Roy McMurtry.[59] As Paul French noted, this was the first functioning committee of its kind in North America.

Thus, the first formal step was taken toward building a structure to ensure individual independence of the judges – but it was in an embryonic state and soon to be disrupted by two realities. First, the Provincial Courts Committee simply made recommendations with no binding power, which could be ignored by the government of the day. Second, the *Charter of Rights and Freedoms* arrived in 1982.



Page 2

by the Judges; and a Chairman recommended by and acceptable to the Government and the Judges.

The Committee's recommendation in respect of financial matters, including matters of Judicial salaries and pensions shall be made to the Management Board of Cabinet. The Committee's recommendations in respect of all other matters shall be made to the Attorney General.

The Committee will be struck within two months of this date.

2. Ontario Life Insurance.

The Government will provide an insurance plan covering every active Judge, 70 years of age and under, as of January 1, 1980.

It is understood and agreed that this plan is compulsory and in addition to any existing coverage.

This plan will be in effect until the implementation of a new Judicial pension plan for Judges. (consultation agreed with Judges)

The introductory page of the handwritten Memorandum of Agreement, signed on December 13, 1979, served to create the Ontario Provincial Courts Committee.

The Arrival of the Charter in 1982 – Questions are Raised About Judicial Independence

The *Charter of Rights and Freedoms* contains a specific reference to judicial independence. Section 11(d) states that a person "charged with an offence has the right… to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

Within a year after the *Charter* was enacted, a challenge was made to the independence of the Provincial Court (Criminal Division) in the case of *R. v. Valente.* That case ultimately made its way to the Supreme Court of Canada in 1985 where it was decided that: "A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(d) of the *Canadian Charter of Rights and Freedoms."*[60]

> "A judge of the Provincial Court (Criminal Division) of Ontario is an independent tribunal within the meaning of s. 11(d) of the *Canadian Charter of Rights and Freedoms."*
> *R. v. Valente,* [1985] 2 S.C.R. 673

The Story of *R. v. Valente*

A tragic set of facts lay at the heart of *R. v. Valente* before it progressed from the Provincial Court to the Supreme Court – and became the "most important" judicial independence case in Canada.[61]

While driving his car at high speed along a street in Burlington at midnight on July 3, 1980, Walter Valente struck five girls on their bicycles. Three were killed and the other two were injured, one seriously. The case began in County Court before a federally appointed judge. The original charge of dangerous driving was withdrawn and a charge of careless driving was laid, a *Highway Traffic Act* offence that carries a potential jail sentence. Valente pleaded guilty and Judge Quinlan accepted the plea, assessing a $200 fine and suspending his driver's licence for one year. The Crown appealed that sentence.

Because the matter was now a provincial offence, the sentencing appeal was heard in Provincial Court (Criminal Division). The case was assigned to Judge Bill Sharpe. "Valente was a crazy case," recalled Sharpe. "At the trial, the Crown and Valente's lawyer had made a deal for the $200 fine. The Crown then

appealed the sentence handed down by the County Court judge to the Provincial Court and this is how I got the case before me in December 1982. And that's when I said, I don't know whether I am independent to hear this, so I won't make a decision on it. Then the case went to the Court of Appeal."[62]

Valente – worried that the deal for the $200 fine would be overturned by Sharpe – had instructed his lawyer, Noel Bates, to keep him out of jail. Bates turned to the *Charter* provision stipulating any person charged with an offence has the right to a hearing before an "independent and impartial tribunal."[63]

Bates was aware that Provincial Court judges did not have the same constitutional guarantees of independence as judges who are higher on the judicial ladder. "So Bates argued that Provincial Court judges are not independent… because the Provincial Court judge charged with hearing Valente's case (Sharpe) was not independent, the judge had no authority to decide the case."[64]

Sharpe considered Bates' argument to have merit. He disqualified himself and referred the independence question to Ontario Court of Appeal on December 16, 1982. The Court of Appeal heard the appeal with breathtaking speed because, while awaiting the decision on their independence, a number of Provincial Court judges stopped taking cases until the Court of Appeal rendered its decision. On February 15, 1983, the Court of Appeal decided that "Judge Sharpe sitting as a member of the court was independent and… he was impartial."[65] In other words, Valente lost. He appealed to the Supreme Court of Canada and lost again.

But there's so much more to this story that explains why Sharpe disqualified himself in the *Valente* case, the involvement of the Court of Appeal and, subsequently, the Supreme Court in defining the judicial independence of the judges of provincial courts.

The Background to Valente

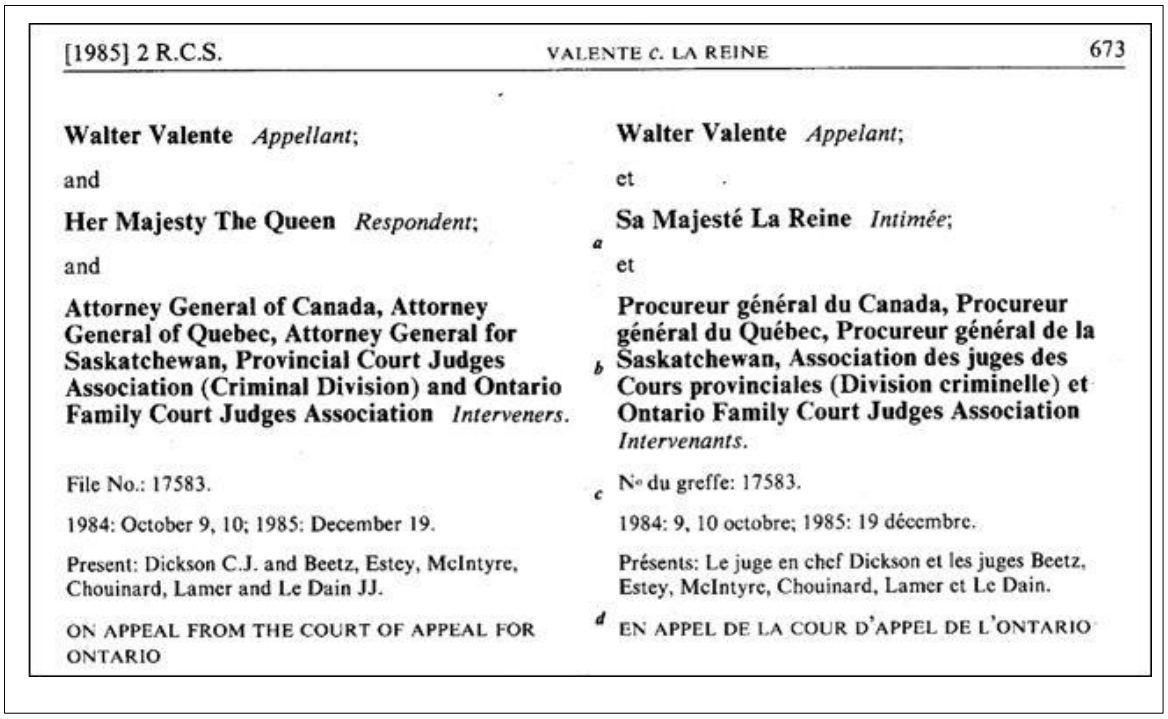
This was a ground-breaking case. It had its roots firmly in the fight Provincial Court judges were waging with the Ontario government, in the early 1980s, over their independence.

Sharpe, like many other judges on the Provincial Court, had for many years been irritated by the fact that federally appointed judges of the superior courts had a higher constitutional status. Sharpe, together with other provincially appointed judges, through the criminal and family judges' associations, had been pressing the provincial government to take action to reinforce their independence. They had some success in 1979 with the creation of the Ontario Provincial Courts Committee, but judges, like Sharpe, felt there were many other issues to address. The Supreme Court did address them in *Valente* – the "essential contours" of judicial independence were clearly stated in that judgment.

What was challenged in *Valente?*

Professor Martin Friedland prepared a report for the Canadian Judicial Council in 1995 on the subject of judicial independence and accountability, in which he reviewed the history of the development of judicial independence.

Within a year after the Charter *was enacted, a challenge was made to the independence of the Ontario Provincial Court bench [in the* Valente *case]. There were 18 grounds alleged for holding that the judge was not independent. Many of these involved differences from federally appointed s. 96 judges. Salaries, for example, were determined by the executive branch and not by the legislature as with s. 96 judges. And salaries and pensions were not, as with s. 96 judges, a charge on the consolidated revenue fund. Further, removal of provincial court judges did not, as with s. 96 judges, require a vote by the legislature.* (Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada,*(Ottawa: Canadian Judicial Council, 1995), *p. 8.)*



[1985] 2 R.C.S. VALENTE *c.* LA REINE 673

Walter Valente *Appellant*;

and

Her Majesty The Queen *Respondent*;

and

Attorney General of Canada, Attorney General of Quebec, Attorney General for Saskatchewan, Provincial Court Judges Association (Criminal Division) and Ontario Family Court Judges Association *Interveners*.

File No.: 17583.

1984: October 9, 10; 1985: December 19.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Chouinard, Lamer and Le Dain JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Walter Valente *Appelant*;

et

Sa Majesté La Reine *Intimée*;

et

Procureur général du Canada, Procureur général du Québec, Procureur général de la Saskatchewan, Association des juges des Cours provinciales (Division criminelle) et Ontario Family Court Judges Association *Intervenants*.

N° du greffe: 17583.

1984: 9, 10 octobre; 1985: 19 décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey, McIntyre, Chouinard, Lamer et Le Dain.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

The *Valente* Decision

The Supreme Court of Canada identified the three essential elements of judicial independence.

- Judges must have "security of tenure" – they cannot be fired because the government disagrees with their decisions and they cannot be removed for making an error in law, but only for behaviour inappropriate for a judge (such as bias or other types of misconduct).

- Judges must have "financial security" – their right to a salary must be legislated so that the government cannot manipulate judges by raising or lowering their salaries or threatening to do so.

- Judges must have "administrative or institutional independence" – decisions regarding the assignment of courtrooms, cases and judges, all of which could potentially affect judicial

decision-making, had to be made by judges and not by a public servant in the employ of a government ministry.[66]

The "first two elements of independence – security of tenure and financial security – relate largely to individual judges. The third element, administrative independence, speaks more to the court as an institution."[67]

The Two Aspects of Judicial Independence: Individual and Institutional

The Supreme Court was clear – judicial independence has two aspects involving:

1. **The individual independence of each judge, and**
2. **Institutional or administrative independence of the court.**

"It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government…. The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal."

(*R. v. Valente,* 23 C.C.C. (3d) 193, para. 20)

A Tumultuous Time: The View of Roy McMurtry, Attorney General (1975-1985)

As this excerpt from Roy McMurtry's memoir demonstrates, this was a time of heated and acrimonious debate about the definition of judicial independence, the relationship between the

Ontario government and Provincial Court judges, and the judges' motivation for raising the issue.

After my appointment as attorney general, I became aware of some tension between my ministry and the provincial court judges over the issue of salaries.

Some judges alleged that there was at least a perceived conflict of interest in a system where an independent judiciary relied on the prosecuting government for salaries and court administration. They argued that, as provincially appointed judges, they were disqualified from performing their functions because of the degree of control exercised by the provincial attorney general and that this fact raised a reasonable apprehension that judges could be biased in favour of the prosecution. After the entrenchment of the *Charter of Rights* in the Constitution in April 1982, several provincially appointed judges even threatened to stop hearing criminal cases because they regarded themselves as not being independent of the attorney general as the chief prosecutor. In my view, the protest was chiefly a strategy to obtain higher salaries through some form of independent arbitration.

(Source: Roy McMurtry, *Memoirs and Reflections.*)

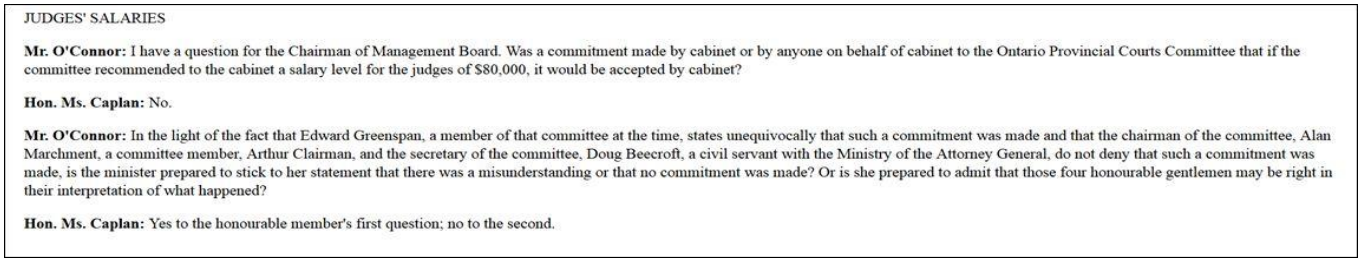
One Step Forward, Two Steps Back – The Impact of Valente on Financial Security

Although *Valente* was a strong statement from the Supreme Court that arrangements must be in place to ensure independence, at both the individual and institutional levels, the decision "wasn't the panacea a lot of people had hoped it would be," recalled French.[68]

In 1981, the Ontario Provincial Courts Committee had recommended that, by April 1985, the salaries of Provincial Court judges should be increased to the same level as that of federally appointed District Court judges. But raises at that level were not forthcoming.

In January 1985, Chief Judge Ted Andrews, Provincial Court (Family Division) told *The Globe and Mail:* "The Ontario government has failed to implement the recommendations of an independent committee set up specifically to advise the government on judges' salaries and other benefits and conditions…. Professional pride is about the only thing that is holding judges to their commitments right now. After a while they're going to have that diminished a bit."[69] The general consensus of the judges – the Provincial Courts Committee had been ineffective.

After the June 1985 provincial election, a new government came on the scene: the Conservatives were out; the Liberals attained power.



JUDGES' SALARIES

Mr. O'Connor: I have a question for the Chairman of Management Board. Was a commitment made by cabinet or by anyone on behalf of cabinet to the Ontario Provincial Courts Committee that if the committee recommended to the cabinet a salary level for the judges of $80,000, it would be accepted by cabinet?

Hon. Ms. Caplan: No.

Mr. O'Connor: In the light of the fact that Edward Greenspan, a member of that committee at the time, states unequivocally that such a commitment was made and that the chairman of the committee, Alan Marchment, a committee member, Arthur Clairman, and the secretary of the committee, Doug Beecroft, a civil servant with the Ministry of the Attorney General, do not deny that such a commitment was made, is the minister prepared to stick to her statement that there was a misunderstanding or that no commitment was made? Or is she prepared to admit that those four honourable gentlemen may be right in their interpretation of what happened?

Hon. Ms. Caplan: Yes to the honourable member's first question; no to the second.

Elinor Caplan's responses to questions in the legislature by Terry O'Connor, a Progressive Conservative Member of Provincial Parliament, concerning salaries of Provincial Court judges. (Source: Transcript of proceedings in the Ontario Legislature, December 18, 1985).

The tension between the government and the judges continued to mount. In October 25, 1985, it boiled over when Elinor Caplan, chairman of the Management Board of Cabinet, announced in the legislature that the Ontario government had "decided not to accept the 1981 recommendation of the Ontario Provincial Courts Committee to establish parity between the salaries of Provincial Court judges and those of federally-appointed District Court judges."[70]

On November 19, 1985, the judges' representative on the committee, criminal defence lawyer Edward Greenspan, resigned. In his resignation letter, he wrote that he had been misled about the salary issue

by the government. French, quoted in the *Toronto Star* on December 2, 1985, stated the judges' position clearly: "That committee was established so an independent body would decide on salaries. This government has ignored their advice… and in so doing it has tampered with that independence."

The battle between the judges and the government continued over salaries – and was extensively detailed in newspaper articles. Headlines announced: *Judges cry foul over talks on salaries*[71] and *Judges and Scott at odds over wages.*[72]

Attorney General Ian Scott's Recollections of the Remuneration Issue

Ian Scott, who served as Attorney General between 1985 and 1990, recalled the handling of the salary issues and the disagreements between the judge and the government in his memoir, *To Make A Difference.*

Ian Scott in the 1980s. (Source: *To Make a Difference*).

Provincial court judges were the ones most citizens were likely to brush up against. They handled most criminal charges and many matters arising out of marital breakdown...

I was forcefully reminded that provincial court judges deserved the same respect, and the same salary, as federally appointed judges. Ted Andrews, the chief judge of the provincial courts, surprised me by raising the issue at a public ceremony. My response was as follows:

'I also want to emphasize that I am conscious of the concerns of the members of the Provincial Court Bench about remuneration. I very much regret that the representatives of the Provincial Judges have not seen fit to reappoint their nominee to the statutorily established Provincial Courts Committee. I have met with representatives from the Provincial Judges on a number of occasions and will continue to do so in order to ascertain whether a more suitable mechanism for examining issues of compensation

cannot be devised. I must make it plain, however, that it is the position of the government that no mechanism can be established which removes or reduces the authority of the government of the day to control or determine the expenditure of tax dollars to be allocated for judicial remuneration.'

Supreme Court of Ontario judges disagreed with Chief Judge Andrews' view on levels of remuneration. Some of the provincial court magistrates were not lawyers: this proposal would have the effect of elevating them to the same level as other judges, who were all lawyers, an outcome not popular with the Supreme Court of Ontario judges.

(Ian Scott, *To Make a Difference,* (Toronto: Stoddart Publishing Co. Limited, 2001), p. 177)

The furor culminated in April 24, 1987, when "all the Provincial Court judges in Ontario met to consider their options collectively. At a press conference in Toronto's Royal York Hotel held after that meeting, their legal counsel, Paul French, announced that the judges had passed a resolution requesting the personal intervention of the Premier."[73] The difference between the annual salaries of Provincial Court judges and federally appointed District Court judges was set to grow to $50,000. The press conference served to make the Provincial Court judges' position clear. Attorney General Scott was "high-handed, demeaning and arrogant" in his handling of the compensation dispute. While all but three of the 177 judges who cast votes were against a strike or withdrawal of services[74]… "everything is on the table," Paul French declared.[75]

Scott is 'arrogant,' Ontario judges say

BY KIRK MAKIN
The Globe and Mail

Attorney-General Ian Scott has been "high-handed, demeaning and arrogant" in his handling of a compensation dispute with Ontario's Provincial Court judges, the 240 judges said in a statement yesterday.

While Mr. Scott engages in a combative and unfair battle with the judges, the justice system itself is deteriorating into a shambles, a spokesman for the judges said following an emergency meeting.

All but three of the 177 judges who cast votes in person or by proxy yesterday were against a strike or withdrawal of services.

However, they addressed a resolution to Premier David Peterson imploring him to take over negotiations immediately, and questioning

(Source: Kirk Makin, *The Globe and Mail*,

Three months later, the Provincial Courts Committee was reactivated, with lawyer Gordon Henderson as its chair. This restructured committee reported on September 27, 1988. The report critically reviewed the *Valente* decision (and reminded the government of its obligations) and provided a detailed review of the financial and social restrictions placed on judges that were necessary to maintain judicial independence and the obligations judicial independence imposed on the government.

The Henderson Report concluded that Provincial Court judges' salaries should not be tied to those paid to District Court judges. Among other reasons, the report pointed out that the two groups of judges are paid by two different levels of government, with the result that judicial remuneration scales that might be appropriate for one level of government may be inappropriate for another.[76] However, the report advocated a significant increase in the salaries of Provincial Court judges to be "sufficiently generous to offset the financial and social restrictions Provincial Court judges must endure as a cost of insuring their independence…. We have paid particular attention to the reported earnings of partners who have fifteen to twenty years' experience practicing in small and medium-sized firms. Our recommendation establishes a salary structure that we believe will be attractive to better than average lawyers in Ontario who have ten or more years' private practice experience and who are willing to exchange some income for the security of tenure and the honour of a judicial appointment."[77]

Answering the Media's Questions About Judicial Compensation

On September 20, 1996, Judge Kathleen McGowan, was interviewed on CBC Radio in her role as Chair of the Judicial Independence Committee for the Canadian Association of Provincial Court Judges.

The CBC interviewer asked McGowan the following question: "How do we separate your (the judges') concerns for judicial independence form judges' concerns, legitimate as they may be, about what they're paid?"

Here is McGowan's response:

Our concern is the process by which we deal with government, so basically what judges are saying is that after a lengthy history of going cap in had to various Attorneys General to talk about salaries, we have felt that there could possibly be a very strong perception in the mind of the public that judges are dependent upon the Attorney General for their salaries. In fact, what we're requesting is that there be a separate independent process so that judges can deal with government in a manner which allows them to be independent of various ministers and yet allows the public to see that the manner in which judges are remunerated from the public purse is fair and reasonable.

(Source: Metro Morning, CBC/CBL Radio (Toronto), September 20, 1996.)

The Costs of Judicial Independence

The Henderson Report included a section entitled "The Costs to the Judge of Maintaining Judicial Independence," in which the obligations of the judge are detailed, together with the resultant restrictions on the judge's life. It was clear much had changed since the days of Hastings, Raney and the Dunnville Whisky Ring.

At the heart of the notion of judicial independence is the conviction that the individual judges must have complete liberty to hear and decide the cases that come before them. Here, as elsewhere, such liberty

has both a negative and an affirmative aspect. Negatively, it means that nothing may constrain or distract the judge from entertaining the full range of available options for disposition of a particular case: the judge's bearings are to come exclusively from the law itself. Affirmatively, it means that the decision, irreducibly, is the judge's alone. Each of these aspects of their office sets judges apart from people in other callings.

Although it is traditional to be concerned about governmental interference with the judicial function, government is not the only source of danger to judges' independence: many others have something to gain or lose from the outcomes of particular disputes. Any significant connection a judge may have with such people or organizations threatens to predispose him or her toward certain solutions to legal problems involving them. Such potential predispositions are no more tolerable with respect to private parties than with respect to government. As Shimon Shetreet has said in Judges on Trial:

> A judge must be free from political or other pressures. This means that a judge must first be immune from such systems of distorting justice as direct pressure, bribery or approaches by the litigant, a friend or counsel: he must also be removed from any sophisticated entanglements, be they political, personal or financial, which might seem to influence him in the exercise of his judicial functions, let alone entanglements that might actually influence him.

The consequence is that judges must, upon taking office, dissolve any business or financial connections they may have had before their appointment (and make no new ones while on the bench), terminate their political affiliations and withdraw (or distance themselves) from personal relationships they may have developed with former professional colleagues. In isolated cases, judges may, and do, disqualify themselves from presiding at matters involving individuals or organizations with whom or with which they have or have had some connection. The clear understanding is that they will arrange their affairs in such a way as to maximize their capacity to hear without conflict the cases within their court's

jurisdiction. For those who preside in the smaller centres, where few other judges may be nearby to substitute in cases of possible conflict, the need for circumspection is acute.

Essential though they clearly are, such sacrifices and restrictions distort the lives of Provincial Court judges in several important ways. First, they keep to a minimum the occasions when judges may exercise their constitutionally guaranteed rights of association and free expression; whatever a judge's private convictions, he or she must subordinate them to the cultivated impartiality of the judicial role. Second, they isolate the judge from many ordinary forms of social interaction within his or her community. Such isolation breeds loneliness, especially in those accustomed to the collegial atmosphere in which most lawyers practice. Finally, …the judge's unique position inhibits his or her ability to follow many business opportunities. Judges do not have the same flexibility of investment that they had as members of the practicing bar…. The judge stands alone and on public display. He or she must face individually any criticism directed against his or her decisions or conduct as a judge.

Such criticism – no matter how personal or how unfounded – must be borne in silence: the canons of independence prohibit judges from making any public response. A judge's personal feelings of grievance must not be allowed to give anyone occasion to doubt the disciplined detachment of judicial deliberation.[78]

Moving Beyond *Valente*

The Henderson Report made it clear that its conception of judicial independence for provincially appointed judges in Ontario went beyond the minimum standard the Supreme Court of Canada set out in *R. v. Valente.* The report pointed out that, in *Valente*, the issue was not the articulation of an ideal standard of the independence of the Provincial Court judge.

The task instead (in *Valente*) was to ascertain the absolute minimum conditions sufficient to make a

tribunal independent enough to try offence proceedings… Repeatedly throughout the judgments, the Supreme Court observed that existing occupational arrangements for Provincial Court judges 'fall short of the ideal'… and that higher standards of judicial independence… 'may well be preferable…'

We accept the invitation to endorse a higher standard. Judicial independence, in Canada, has constitutional status. Governments should always be prepared to hold themselves to higher standards of constitutional behaviour than those the courts are prepared to enforce against them.

(Henderson Report, pp. 50-51.)

"Henderson was a godsend," stated French. "Henderson and the others on his committee (Mary Eberts and William Hamilton) travelled the province and solicited views along the way. The government implemented almost all of the recommendations in the report. The key message of the report was to 'treat professionals as professionals.' The report made the judges feel good and respected. And, the government had an entirely new attitude toward the judges."[79]

Despite this new attitude, it did take time for government to act on the Henderson Report. The year 1989 ended with Provincial Court judges agitating for the Henderson Report to be acted upon – and their salaries to be raised in accordance with the recommendations contained in the report. "The judges are of the view that the time is now," said Judge Allan Sheffield, president of the Ontario Family Court Judges Association. "The level of morale is lower than I have ever seen it on the bench."[80] All was set to change in 1990 with the introduction of new legislation governing the judges of the Provincial Courts, which was foreseen, and the election of a new NDP government, which was not.

The Fight for Judicial Independence – Was it Only About Judicial Self-Interest?

Some have equated the Provincial Court judges' fights for judicial independence with judicial self-

interest. After all, many of the battles did concern their salaries and demands for more money. Attorney General Roy McMurtry was certainly alive to that view: "the [judges'] protest was chiefly a strategy to obtain higher salaries."

For the judges, there is no doubt that increased remuneration and formalized structures for negotiating salaries at a distance from the government were critical to defining "financial security." An April 25, 1987 article in *The Globe and Mail* indicates that salary issues were top of mind for Provincial Court judges, but other independence issues – such as independence from the police – were also of concern.

"In their statement yesterday, the judges said a Government (of Ontario) proposal to peg their salaries to those of assistant deputy-ministers means they are seen as civil servants. 'So the judges feel that the very independence of the judiciary is now at stake,' it said.

The judges said their salary levels are too low to attract high-quality judges. 'In sum, the judges have exhausted every reasonable means at their disposal to bring about a solution to the problem, but nothing has happened,' the statement said.

(Mr. French, counsel representing the judges), told reporters that the judges deeply resent recent statements by Mr. Scott implying the dispute is limited to money. Moreover, they are 'enraged' that Government spokesmen consistently tell the media they work only three to five hours a day.

A great deal of routine judicial duties and research goes on in each judge's chambers, the statement said. However, judges cannot speak out to refute these arguments…. 'The fact is that judges are, in a very real sense, imprisoned by their office.'

Strike action or withdrawals of service are unlikely in the future, Mr. French said. He referred vaguely to 'administrative' actions the judges could eventually take if the Government does not reach an agreement with them.

Taking the opportunity to complain about the justice system, the judges spoke of dangerous courthouse conditions and towering case-loads. They said these conditions 'have led to what can only be described

as a "crisis" in our judicial system.'

Justice in Ontario is rendered through a second-class system, they said. Among their examples:

- A courthouse was recently condemned as unsafe for public use.
- Makeshift courtrooms have been set up in rented parish and legion halls, in community centres and in taverns. "Some are located in police offices, in which the unavoidable contact between the judge and police leave many citizens wondering about the impartiality of the whole system," they said.
- Courthouse security for witnesses and the public is "at a minimum" and dangerous individuals are shunted through public areas.
- There are so few Crown Attorneys that cases are often interrupted when new attorneys have to take over. Many defence lawyers have to be retained as part-time (Crown counsel), and end up negotiating plea bargains with fellow defence counsel.
- The caseload is so great that it is impossible to complete cases within a reasonable time.

(Kirk Makin, "Scott is 'arrogant,' Ontario judges say," *The Globe and Mail*, April 25, 1987.)

"Institutional" or "Administrative" Independence: Changes in the Approach in the 1980s

In the 1980s, the individual independence of the judges – security of tenure and financial security – drew most of the attention of the judges and the media, but there were also discussions about how the administration of the courts and the process for judicial appointments had an impact on judicial independence.

The Zuber Report Summarizes the Issues Concerning Court Administration

Zuber made it clear in his report that contours of administrative independence were still a "grey zone" in 1987: "Questions begin to arise when one considers who should have responsibility for the

assignment of work to judges, the provision of financial resources for the courts (in the form of buildings and personnel) and the management of the resources that are provided to the court system."[81]

The question of who should control the administration of the court was relatively new at the time Zuber delivered his report.

Historically, the Court had very little to do with its own administration. Scant attention was paid to the scheduling or management of cases – "because they did not appear to require it." The judge's role was simply to adjudicate the disputes that appeared on a court docket. Prior to the 1970s and 1980s, "trial court dockets were relatively short, as were the trials themselves, and there was no particular pressure or need to create more effective ways to deal with cases."[82] That all changed by the mid-1970s with an "explosion of workload" in the Provincial Court, especially in criminal cases.

This workload issue was detailed in a 1976 report prepared by Ontario's Ministry of the Attorney General, which recommended that the Court have control over certain of their own processes.

It is only in recent years, with the explosion of workload, that it has been necessary to exert authority over the court system by the application of modern management techniques through case-flow management… It is essential to recognize that effective case-flow management can only be achieved if those responsible for that management are responsible for, and have control over, the allocation of all resources necessary to implement case-flow control.[83]

This recommendation was met with some public hostility in 1976. The proposal was seen as a transfer of administration of major public resources into the hands unelected, unaccountable members of the judicial branch of government.[84]

In his report, Zuber stuck to a conservative approach to court administration. Yes, the judiciary should have "final say on matters of assignment of judges, standards for judges' workloads, assignment of

individual cases and the arrangement of a sitting schedule." But, Zuber also counselled: "The administration of all other aspects of the court system would be left in the hands of the Ministry of the Attorney General with the provincial government having final authority on certain matters. To ensure co-ordination of the efforts of the judicial and administrative sides and the constant interchange of information, a permanent courts management committee should be set up."[85]

The Appointment Process is Revolutionized – JAAC Comes into Being

Concerned by the role political patronage played in the appointment of judges, Attorney General Ian Scott set out to change the way judges were appointed to the Provincial Courts. The Judicial Appointments Advisory Committee ("JAAC") was established in December 1988; to address this concern. Originally envisioned as a three-year project, it replaced the Ontario Judicial Council and began advising the government on prospective judicial appointees. The Ontario Judicial Council was composed of the Chief Justices and Chief Judges of all Ontario courts, representatives of the bar and two non-lawyers. Its primary function was to serve as a disciplinary body for provincial judges, but the *Courts of Justice Act* also gave it a role in the appointment process.[86]

The relationship between the judicial appointment process and independence requires a short explanation. By the late 1980s, concern was growing that appointments to the Provincial Courts were a reward for political services. The fear was that this perception "may precipitate the belief among both the public and the legal profession that… judges, having attained their position as a result of the government's favour, are therefore obligated to that government, in a manner which might undermine the independence of the judiciary. The effect on public confidence in the legal system could be corrosive."[87]

Ian Scott described the JAAC model in his memoir. "I instituted a new appointments system that has a different focus. Instead of inquiring about party affiliation, I looked for two things: I wanted judges to be appointed on merit, and I wanted them to reflect more accurately the diverse Canadian population. In the new system, anyone who wished to be appointed to the bench had to make a formal application, and had to be recommended by the local bar association. This put a kind of quality-control check on the beginning of the process. Next, hopeful judges had to apply to an appointments committee, headed by Peter Russell, whose expertise in judicial and constitutional subjects was universally acknowledged. The people on this committee were selected to represent different communities and viewpoints. The committee itself had a built-in affirmative-action edge; it was eager to have the courts represent the diversity of modern Canadian society. They recommended a short list of candidates to me, and I made my selection from that list. This took old-style politics out of the process. The new appointments system was an important breakthrough. It helped to recruit many women judges, and it helped to make the bench more professional and competent."[88]

The judicial independence of justices of the peace is challenged – the Currie case

As with the judges, the judicial independenc e of the justices of the peace has been challenged in the courts.

In the early 1980s, while *Valente* was wending its way upwards through the courts, but before a decision was handed down by the Supreme Court of Canada, a similar case challenging the judicial independence of Ontario's justices of the peace, began its life in the Niagara region.

Mr. Charles Currie was facing a charge under the *Niagara Escarpment Planning and Development Act.*[89] Justice of the Peace Murray Allen – a salaried justice of the peace, as opposed to a fee-for-service justice – was presiding in the trial of Mr. Currie, who happened to be represented by the same lawyer that

represented Mr. Valente – Noel Bates. Mr. Bates did what he had done in *Valente* and challenged the jurisdiction of all justices of the peace in the province.

Justice of the Peace Murray Allen, 1988.
(Source: Milton Historical Society.)

Once again, Bated relied on s. 11(d) of the *Charter*, arguing that justices of the peace were without jurisdiction because they were not independent and impartial when trying the prosecution of provincial offences. Bates began with an application to the Ontario's High Court of Justice (a predecessor of the Superior Court of Ontario), basing his argument on a number of issues which included the following:

- Justices of the peace lacked security of tenure because they held their offices at the pleasure of the government.
- They were not able to perform any judicial duties unless directed to do so by a Provincial Court judge – and, therefore, dependent on a higher level of the judiciary.
- The classification system of justices of the peace resulted in salary variations amongst them.
- Justices of the peace could be paid through "fee-for-service" arrangements which could make them dependent on the goodwill of the police.

Bates relied heavily on the Mewett Report – in particular Mewett's comments that the appointments and removal process for justices of the peace was "chaotic" and "clearly violates every principle of judicial independence."[90]

At Ontario's High Court, Justice Ewaschuk agreed with Bates' arguments and decided that Justice of the Peace Allen and all other justices of the peace were not independent. He prohibited any justice of the peace from hearing the prosecution against Mr. Currie. Justice Ewaschuk delivered his decision on June 19, 1984.

Ewaschuk's decision threw the justice of the peace system into a virtual state of collapse. The immediate effect was that many justices of the peace adjourned hearings and generally refused to process matters until the issue was settled – in other words, they were waiting for an appeal of Ewaschuk's decision to the Ontario Court of Appeal.

The story gets more complicated.

Ewaschuk's decision made it clear that he had not given consideration to a brand new piece of legislation governing Ontario's justices of the peace – the *Justices of the Peace Amendment Act, 1984*, which had been proclaimed effective May 1, 1984. This legislation was not in force when Mr. Currie was originally charged, thus the case had to be determined under the older *Act.* The new legislation had changed many of the factors Bates had cited in his arguments in the Currie case. For example, justices of the peace could no longer be removed "at pleasure" of the government. They could only be removed for cause on the basis of a complaint investigated by the Justices of the Peace Review Council.[91] The fee-for-service arrangements disappeared – all justices of the peace, under the 1984 amendments, were paid on an hourly basis or became salaried.[92]

Subsequently, on Friday, June 22, 1984, in an unrelated case dealing with a separate matter that arose after May 1, Justice of the Peace N.R. Burgess ruled that, despite the changes made by the *Justices of the Peace Amendment Act, 1984*, he lacked the judicial independence to preside over a trial.[93]

When *Currie* made its way to the Ontario Court of Appeal, that Court considered the law both before and after the May 1 enactment of the *Justices of the Peace Amendment Act, 1984.* The December 5, 1984 Court of Appeal decision adopted a practical approach to the issue, reviewed the statute law and practice relating to justices of the peace, and decided that they were sufficiently independent.

JP status restored in appeal decision

By KIRK MAKIN

Five judges of the Ontario Court of Appeal have ruled that Ontario's 700 justices of the peace are independent within the meaning of the Charter of Rights and Freedoms.

The ruling overturns a Supreme Court of Ontario Motions Court ruling earlier this year which thrust the status of the JPs into limbo and led to temporary disruption in the court system.

Mr. Justice Eugene Ewaschuk had found that JPs could not be considered independent of the provincial Government because of the manner in which they are appoint-

(Source: Kirk Makin. *The Globe and Mail*, December 6, 1984.)

"The statute law has been continually evolving until it has reached its present state. Many of the recommendations made in the McRuer Royal Commission Report and the Law Reform Commission of Ontario Report of 1973 have been accepted and implemented, as well as some of those made by Professor Mewett. While the statute law has been evolving, the equally important traditions have remained constant. When these considerations are interrelated in the mind of the reasonable, informed and fair-minded observer, such observer would conclude that the sitting justices of the peace, in reality and perception, have the necessary independence to discharge their judicial duties."[94]

As with the judges, the justices of the peace entered the 1990s with their judicial independence reinforced.

The Pace Picks Up – A "Renaissance for the Court": 1990-1999

Scott's "Big Picture" Plan for Court Transformation

It was clear by the end of the 1980s and beginning of the 1990s that Attorney General Ian Scott had a big picture in his mind for the transformation of the courts in Ontario.

Some of these changes were implemented in the 1990s and nearly all of them had major impacts on the judicial independence, particularly the administrative independence, of the new Ontario Court (Provincial Division).

Increased Administrative Responsibility for the Operation of the Court

September 1, 1990 was a landmark day for the Court. The Provincial Courts (Criminal and Family Division) were replaced by the Ontario Court (Provincial Division). Sidney B. Linden was appointed Chief Judge of the integrated Court.

Sidney Linden in 1990. (Courtesy: S. Linden)

This change was seen as "Phase I" of Ian Scott's vision for court reform. Phase II was to see the Superior and Provincial Courts integrated into a single "unified" trial court. Phase II never came to be. Five days after the proclamation of the *Courts of Justice Act* that September, a provincial election was held and the government changed hands. The NDP did not share the former Liberal government's agenda for court reform – and Attorney General Scott was replaced by Attorney General Howard Hampton.

Linden recalled those days. He came into a Court that had seen the nature, volume and scope of its work increase over the previous decade. Recent amendments to the *Criminal Code* had widened the jurisdiction of the Provincial Court.[95] Cases had become much more complex, and Provincial Court

judges were, by 1990, routinely required to make decisions on intricate issues of law and procedure, in both criminal and family law. In many criminal cases where the accused had a choice of which court to select, the Provincial Court had become the court of choice, preferred over the superior courts.

Linden believed that the new Court could not be a true partner in the management of the judicial function without judicial leadership that could help the Court to adapt to these very different conditions. He and Scott had shared the idea of a cooperative management system but Linden was not sure the NDP agreed with that approach. Linden decided to take action, even though the Attorney General who had appointed him was gone and a new government was in place.

Linden embarked on a radical makeover of the administrative structure of the Ontario Court (Provincial Division), which ultimately resulted in a significant increase in the administrative – or institutional – independence of the Court.[96]

Administrative Independence – The Introduction of the Memorandum of Understanding Between the Attorney General and the Chief Judge

The story of how the increased administrative independence came to be is best told by Linden himself.

For decades prior to 1990, the judiciary, especially the Provincial Court judiciary, had very little administrative responsibility for the operation of the courts, or for the administrative support of judges. Despite the best efforts of former Chief Judges, there was little or no involvement by our judges in such areas as: financial management; operational decisions; the implementation of judicial support programs; the use of statistical and management information for assessing caseloads or judicial resource needs; or the day-to-day administrative needs of the judges.

The Provincial Court was managed as if it was a small branch or division with the Attorney General's Ministry. Officials within the Ministry provided the Provincial Division with necessary support services

including financial monitoring, and the scant statistical information that existed was, at best, only intermittently shared with the Chief Judge's office.

That September 1990, amendments of the Courts of Justice Act presented a unique opportunity to change that pattern.

Coincidentally, only five days after proclamation of the Courts of Justice Act on September 1, 1990 there was a provincial election and a change in the provincial government. Whether one agreed with the vision of the justice system as expressed in the Courts of Justice Act or not, it did represent a new vision and an agenda for change. I think it is fair to say that the new government formed in 1990 did not share the former government's agenda for court reform. Although the new Attorney General did support several justice initiatives, for whatever reason, justice issues were moved from near the top of the government's agenda to closer to the bottom…

The Court decided to concentrate its attention inward to the task at hand of building an administrative infrastructure that previously didn't exist…

Some of the changes we made involved very large matters, such as the signing (in 1993) of a Memorandum of Understanding (MOU) with the government. This agreement, for which there was no precedent, was signed by the Attorney General and the Chief Judge. It transferred many financial and management responsibilities from the Ministry to the Chief Judge and introduced the notion of co-management or partnership. For the first time, the Chief Judge of the Provincial Division was given a mandate and a responsibility for some management and operational issues related to court administration. This MOU changed the very nature of the relationship between the Ministry and the Chief Judge's office.

Prior to 1990, officials in the Ministry, and often at very junior levels made most of the administrative decisions that affected the judges. For example, if a Provincial Division judge wished to attend an education conference, he or she would write to the Chief Judge. The Chief Judge would pass that request onto the Ministry on behalf of the judge, usually with his own recommendation. However, the final decision was made in the Ministry, by Ministry officials. Once the decision was made, it would be communicated to the Chief Judge who in turn would communicate it to the judge. This has all changed.

[As a result of the arrangements set out in the MOU], the Chief Judge's office has its own budget and within that budget, it is the Chief Judge, in consultation with other judges, who makes most of the administrative and managerial decisions that affect the judges.

That being said, it is important to note that the judiciary is not a hierarchical structure wherein the Chief Judge dictates policy or procedure to the judges on the court. Professor Peter Russell, a well-known academic and scholar on the judiciary, has said that 'managing judges can be compared to "herding cats".' Judicial independence, which is at the heart of the judicial function, is so deeply rooted in the system that it spills out of the courtroom and into administrative issues in general. To be successful, a Chief Judge, or a managing judge, must take the time and make the effort to develop a democratic, consultative process which reaches consensus, wherever possible. Otherwise, any attempts to reform the system will fail.[97]

Putting the Importance of the MOU into Context

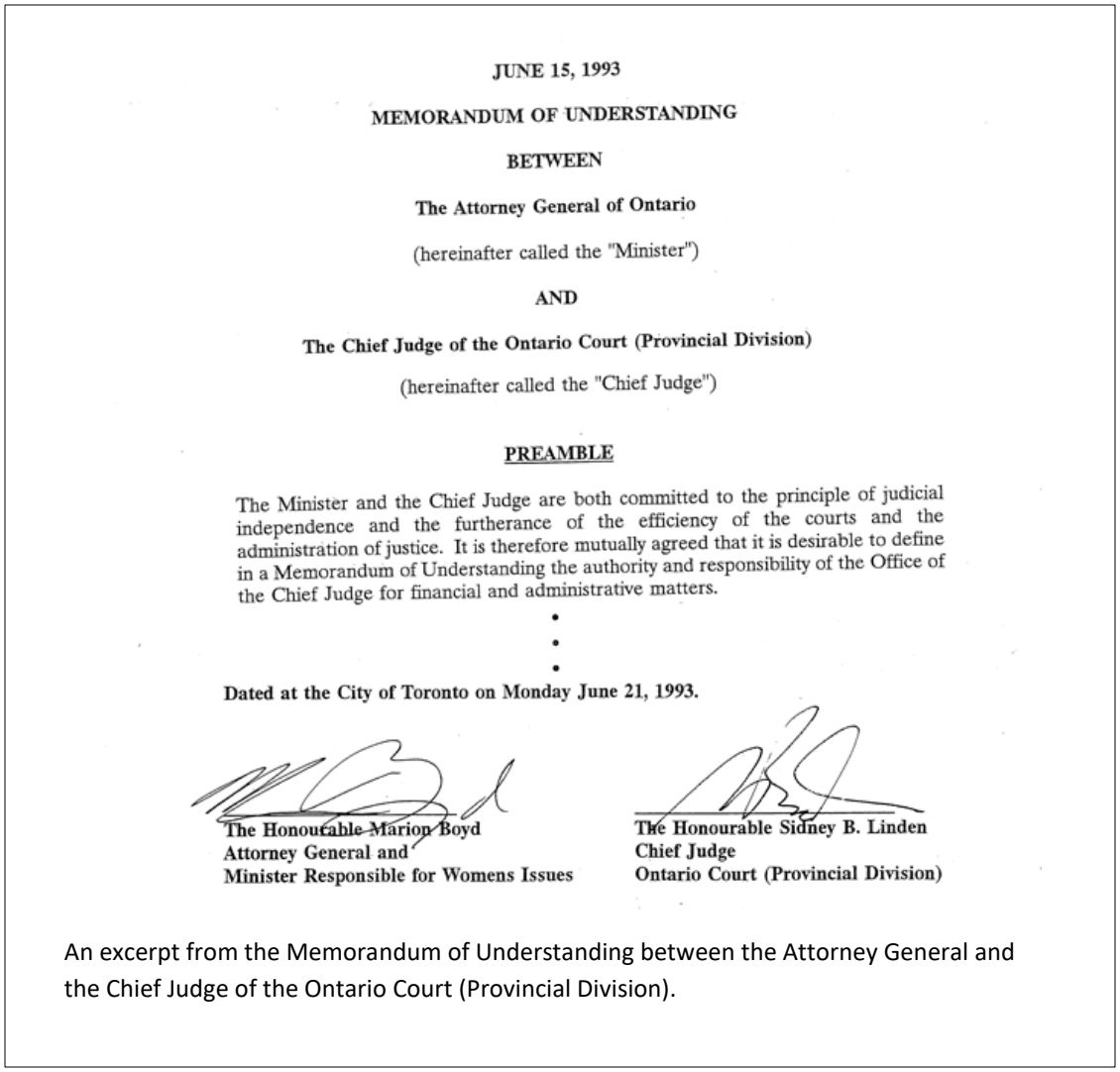
The third condition of judicial independence, "administrative independence," had received the least amount of attention in jurisprudence and in discussions about judicial independence – until the late 1980s. While the Supreme Court in *R. v. Valente* considered administrative independence to be essential to judicial independence, it set out only the minimal standards for institutional independence, including

assignment of judges, sittings of court and court lists. "While the Court recognized that some greater degree of administrative autonomy over the financial and personnel aspects of court administration might well be highly desirable, it concluded that this enhanced autonomy could not be regarded as essential for the purposes of s. 11(d) of the *Charter.* In some respects, the issue of administrative independence in *Valente* was treated as a secondary issue."

That is what makes the 1993 MOU between the Attorney General and the Chief Judge so ground-breaking for a provincial court.

The MOU goes far beyond what *Valente* considered to be sufficient to ensure administrative independence – and "it is somewhat ironic that it is a provincial court, our Court, through its MOU with the Attorney General, that has achieved such a significant level of administrative independence" – greater than any other provincial court in Canada. This has allowed Ontario's Provincial Court to maintain an institutional independence recognized and envied throughout Canada at all levels of court.

(Source: Brian W. Lennox, "Judicial Independence in Canada – The Evolution Continues," in Dodek, Adam and Sossin, Lorne, eds. *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010))



JUNE 15, 1993

MEMORANDUM OF UNDERSTANDING

BETWEEN

The Attorney General of Ontario

(hereinafter called the "Minister")

AND

The Chief Judge of the Ontario Court (Provincial Division)

(hereinafter called the "Chief Judge")

PREAMBLE

The Minister and the Chief Judge are both committed to the principle of judicial independence and the furtherance of the efficiency of the courts and the administration of justice. It is therefore mutually agreed that it is desirable to define in a Memorandum of Understanding the authority and responsibility of the Office of the Chief Judge for financial and administrative matters.

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Dated at the City of Toronto on Monday June 21, 1993.

The Honourable Marion Boyd
Attorney General and
Minister Responsible for Womens Issues

The Honourable Sidney B. Linden
Chief Judge
Ontario Court (Provincial Division)

An excerpt from the Memorandum of Understanding between the Attorney General and the Chief Judge of the Ontario Court (Provincial Division).

How Did the MOU Work?

The MOU set out the division of roles and responsibilities between the Court and the Ministry and allowed the Court, within limits, to administer its own budget.

The day-to-day administration of the MOU remained with the Court in the hands of professional administrative staff (under an Executive Coordinator, a public servant recruited in practice from the senior levels of the Ontario Public Service but working under the direct supervision of the Chief Judge). The Office of the Chief Judge then took over many of the administrative responsibilities that had

previously belonged to the Ministry of the Attorney General, including the administration of the Court's budget. The professional staff relieved the Chief Judge of a number of administrative tasks. It also allowed the Chief Judge and the Court to concentrate on the Court's role as a service provider in developing and implementing practices and policies designed to provide meaningful access to a more effective justice system.[98]

The Education Secretariat – How Assuming Control of the Court's Budget Fostered Administrative Independence

The 1993 MOU stated that the Office of the Chief Judge had exclusive responsibility for judicial training and education for judges and justices of the peace out of its budget.[99] Control over the design, development and delivery of education is an essential component of judicial independence. What is taught – and how it's taught – where, when and to whom must be within the purview of the Court. But this was not always the case for the Provincial Court. The control over the education budget had been in the hands of the Ministry of the Attorney General prior to 1990 – with the result that the Chief Judges did not have final say over judicial education for the Court's judges. This changed with the creation of the Education Secretariat, the judge-led body with overall responsibility for the Court's education policy. With judges taking leadership roles in designing educational programs and setting education policy, the Court not only ensured that the education offered was relevant to the needs of the judiciary, but also ensured judicial independence through judicial control over all aspects of educational programming.

The Social Contract: A Challenge to Judicial Independence

In the midst of the early 1990s – and while many changes to the administrative structure of the Court were being made – the new NDP government began to make significant funding cuts across the civil service as a whole. At that time, Ontario was in the midst of a serious economic recession. Premier Bob Rae requested $2 billion in wage cuts within the civil service – and the initiative (which came to be

known as “Rae Days” – involved imposing 12 days of unpaid leave for many civil service workers. As Linden recalled: “The Provincial Division was no exception as a target for these constraints.”[100] Linden balked at this challenge to the Court’s independence: “This meant that judges would be treated like civil servants. So, we proposed that, instead of taking days off, the judges would agree to sit more days. We added 11 days to our sitting schedule.”[101] The government accepted the Court’s solution. This delighted Linden – who used the opportunity to refine the way the Court defined its judicial year, and tracked the number of days judges sat in court, worked on judgments and spent on education. A potential challenge to judicial independence became another opportunity for Linden to refine the administration of the Court.

Recognition of Judicial Independence in the Courts of Justice Act

The 1994 amendments to the *Courts of Justice Act* served to statutorily recognize and reinforce the administrative independence of the Provincial Court in a number of aspects.

- The Judicial Appointments Advisory Committee, which had been operating since 1988, was given firm statutory footing. The appointment process was formalized and the Committee made permanent by virtue of the amendments to s. 43 of the *Courts of Justice Act* effective in 1995.

- The Ontario Judicial Council was restructured by the *Courts of Justice Act* and the balance on the Council shifted from federally to provincially appointed judges. The legislation also provided for meaningful involvement by community representatives.[102] The Provincial Division’s administrative independence was strengthened by virtue of the increase of the participation of provincially appointed judges and the decrease of federally appointed judges on the Council. Further, the Chief Judge of the Provincial Division chaired the Council except during consideration of disciplinary matters.[103]

- The amendments authorized the Chief Judge to establish "standards of conduct for provincial judges."[104] Linden subsequently created a Judicial Conduct Subcommittee to prepare a *Principles of Judicial Office* document in consultation with the judges' associations and judges of the Court. The Ontario Judicial Council adopted the *Principles of Judicial Office* in 1997 as the standard to govern judicial conduct and ethics in Ontario.[105]

The Tension Between Judicial Independence and Judicial Conduct

While the independence of the judiciary is essential in the administration of justice and is of incalculable importance, it should not be a cloak for preserving in office irresponsible judges or magistrates who have proved to be quite unsuitable for the tasks they have to perform.

McRuer Report, Vol. 2, p. 541.

Public knowledge of improper conduct by a judge can only erode public confidence in him as a judge and in the administration of justice.

Justice Robins, Commission of Inquiry Re: Provincial Judge Williams, 1979

An independent judge is fair, impartial and judges in good faith. Improper conduct – be it bias, misuse of office, prejudgment, dereliction of duty, lawbreaking, or some other sort of misconduct or misbehaviour – can undermine the public's confidence in the ability of a judge to perform his or her duties.

The 1968 McRuer Report called for clarification as to what constitutes conduct that is so serious as to undermine the independence, impartiality and integrity of the judge and the judiciary – and results in loss of public confidence in the judge and judiciary. The McRuer Report further recommended the creation of an entity to which lawyers and members of the public could register complaints about the conduct of members of the judiciary – with the proviso that the Attorney General "jealously avoid any appearance of supervision of the judiciary," in order to preserve judicial independence.

The recommendations contained in the McRuer Report sowed the seeds for two bodies, both

independent of the government – the Ontario Judicial Council, created in 1968, and the Justices of the Peace Review Council, created in 1980. These councils receive and investigate complaints of alleged misconduct against judges and justices of the peace.

Over the years, the composition of both councils and the range of sanctions open to them has changed significantly. For example, both councils have lay members who are neither judges nor lawyers. Originally, the councils could only recommend that a judge or justice of the peace be removed from office. Both now have a broad range of sanctions open to them including: warnings, reprimands, orders to take education or to apologize, or suspension.

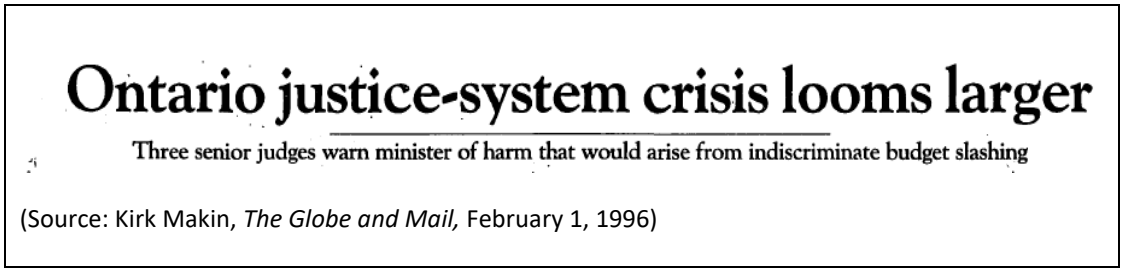
(Sources: J.C. McRuer, *Royal Commission into Civil Rights,* Vol. 2 (Toronto: Queen's Printer, 1968), pp. 541-542; In the matter of a complaint respecting Honourable Justice William G. Richards, June 7, 2002; Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada,* (Ottawa: Canadian Judicial Council, 1995), pp. 110-111.)

Maintaining administrative independence was not always easy: Although great strides were made in the realm of administrative independence, the upward trajectory was not without challenges along the way, including the following two incidents.

- The surprise 1995 announcement by the government of a proposed reduction to the Court's budget by one third over two years.
- Accusations in the late 1990s that the government was "trying to 'fix' judicial appointments for political cronies."[106]

The Court's response to proposed budget cuts in 1995

The Provincial Division combined forces with Ontario's two other courts (the Court of Appeal and the Ontario Court (General Division)) in an unprecedented move. Chief Judge Linden and Chief Justices Dubin and McMurtry sent a letter to Attorney General Charles Harnick warning of "justice chaos" if the cuts were to go ahead. This assertion of their administrative independence was heard – Harnick pulled back on the proposed budget cuts.



Ontario justice-system crisis looms larger

Three senior judges warn minister of harm that would arise from indiscriminate budget slashing

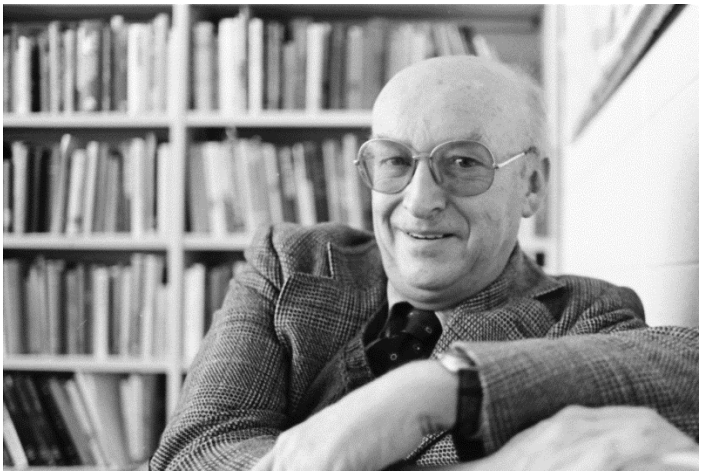
(Source: Kirk Makin, *The Globe and Mail,* February 1, 1996)

"Harris politicizing the judiciary, critics say"[107]

According to the 1999 headlines in *The Globe and Mail,* "Ontario Premier wants golfing buddy named as a judge, opposition charges in legislature."[108] This was a reference to allegations that Mike Harris – the Premier of Ontario at that time – wanted certain lawyers appointed to the bench.

In the accompanying *Globe and Mail* article, Peter Russell, the first chair of the appointments committee, was quoted as saying "the Harris years were a difficult period." It began when Charles Harnick became Attorney General. "Prof. Russell said there was great concern in legal circles… when Charles Harnick became attorney-general [in 1995] that he would tamper with the selection process. In time, Prof. Russell said, Mr. Harnick came around" and became a strong supporter of the process.[109]

In an interview for the Ontario Court of Justice history project, Russell described the strategy he employed. "Apparently, backbenchers had been getting pressure from friends at home who were unable to get appointed… Certain backbenchers said that 'the Russell appointments are all socialists.' That's all I needed. I created a list of well-known progressive conservatives, including former MPPs, who had been selected by our process. This was to show that it was not just a bunch of socialists! After that the pressure came off."[110]



Professor Peter Russell (Courtesy: Law Society of Upper Canada Archives, Paul Lawrence fonds, "Photographs of Professor Peter Russell and Harold F. Caley," 2001088-394.)

The pressure resumed in 1999 with the appointment of a new Attorney General – Jim Flaherty. At issue was the abnormally long time several judicial posts had remained vacant and the suggestion by opposition leaders that the delays were because the government was holding out until it could reward party loyalists with judgeships on the Provincial Court. This raised fears that the principles underpinning the judicial appointments procedures were being thwarted and that political patronage had returned to the process – compromising administrative independence.

Russell told *The Globe and Mail* at the time*:* "Now that we've got a new Attorney General who seems to have a slow learning curve, it looks as if we have got to go through it all again. It is no laughing matter, this appears to be subverting the process and inconveniencing – to say the least – a lot of citizens who have a right to have their trials as soon as possible."[111]

The matter was finally settled when appointments were made – in accordance with the judicial appointments process. Issues such as these concerning the appointment of judges have not subsequently arisen.

The continuing evolution of the individual independence of judges

While great strides were being made on the refinement of administrative or institutional independence, the concept of individual independence continued to evolve as well – not as dramatically perhaps, but in real and significant ways.

Milestones have included the following.

- Signing of the "Framework Agreement" on November 18, 1992 by the government and the judges of the Provincial Court (as represented by The Ontario Judges Association and The Ontario Family Law Judges Association). This agreement created the Provincial Judges Remuneration Commission. In 1994, the Framework Agreement was incorporated to the *Courts of Justice Act*.[112]

- The Supreme Court of Canada decision – *Provincial Judges Reference*[113] – in 1997, which further clarified the issue of financial security of provincial court judges in Canada.

The Framework Agreement – and the introduction of a binding process for determining judges' salaries

This agreement between the government and the Ontario Court (Provincial Division) judges established the framework for a binding process for the determination of judge's compensation. It did this, in part, by establishing a remuneration commission independent of the Ontario government. The Framework

Agreement explicitly states that the decisions made by the commission shall contribute to securing and maintaining the judicial independence of the judges.[114]

But in 1994 the Ontario government advanced a further initiative no one could have predicted during the tumultuous days before and after the introduction of the first Provincial Courts Committee 15 years earlier. It enshrined, in legislation, the binding process outlined in the Framework Agreement for the determination of judicial salaries and benefits. The decision of the committee was no longer simply a recommendation to government; it would be a final decision.

George Thomson, former Deputy Attorney General and former Provincial Court judge. (Courtesy: National Judicial Institute)

"I was Deputy Attorney General at that point and we had an NDP government that you wouldn't think would be sympathetic to such a change, something Ian Scott had said government would never do," said George Thomson, a former Provincial Court (Family Division) judge. "And yet I think the decision to do this came mainly from within government, with support from Chief Judge Linden, the judges' associations and their lawyer, who had direct access to key government leaders. The argument that was most persuasive was that this would remove a major irritant between government and the judiciary and would take the government out of the equation and place the issue squarely with an independent body. The premier at that time, Bob Rae – in particular – saw how this approach respected the judiciary's independence."[115]

"For me," added Thomson, "this is where the judges' associations made a brilliant decision by seeking only a very modest adjustment when the new approach of binding arbitration was used for the first

time. The model was made to work because both sides were prepared to take into account the state of the economy, which at that time was pretty bleak."

In 1999, the judges reaped the benefit of not immediately pressing for significant pay increases from this unique model for setting judicial salaries. The government had agreed to a remuneration committee chair, Stanley Beck, a well-respected academic and arbitrator, who understood the importance of attracting the best candidates to the judiciary. "I think the government failed to focus on the importance of the chair position and also didn't recognize how effective Michael Mitchell, the judges' lawyer, would be in setting out the judges' position," Thomson recalled. By a 2-1 vote, judges' salaries increased from approximately $130,000 in 1998 to $170,000 in 2000.[116]

The government didn't change the model after implementing the committee's recommendation for a salary increase and the model has remained in place. "I think it is a remarkable example of both the Provincial Court and government recognizing that financial security is a fundamental element of judicial independence," recalled Thomson. "It brought to an end a difficult but enormously important struggle that stretched over a quarter of a century."[117]

Provincial Judges Reference[118]

While *Valente* identified financial security as one of the key elements of judicial independence, the components of financial security were further refined in the decision of the Supreme Court of Canada in the *Provincial Judges Reference.* The issue that gave rise to this case was a proposed reduction of the salaries of provincial court judges in Prince Edward Island, Manitoba and Alberta. The Supreme Court decision mandated the creation of independent remuneration commissions in all provinces, in large part to insulate judges or their representatives from having to negotiate their salaries with governments.

The case is important for going further than *Valente.* The decision also went beyond the provisions of s. 11(d) of the *Charter* – which provides for a hearing by an independent and impartial tribunal – to establish that judicial independence in Canada is an unwritten norm, recognized and affirmed as a constitutional principle by the preamble to the *Constitution Act, 1867*[119].

The decision is particularly interesting in that it accords recognition to the fundamental truth of judicial independence: that it does not exist for the benefit of judges; it belongs not to the judge but to the individuals being judged and the public at large.[120] The true purpose and rationale for judicial independence are to ensure impartiality in adjudication. "Judicial independence is valued because it serves important society goals – it is a means to secure those goals…. including public confidence in the impartiality of the judiciary and the maintenance of the rule of law."[121]

Once again, provincial courts were at the forefront of the litigation that served to define the meaning of judicial independence in Canada.

A different challenge to the judicial independence of the justices of the peace – *Eton Construction* Case

In 1990, the competence of justices of the peace was challenged.

On October 18, 1990, Eton Construction Company Limited and Gus Krauza were charged with committing several offences under the *Occupational Health and Safety Act.* The charges related to an industrial accident in which a worker was injured. The company faced hefty fines and Mr. Krauza would be subject not only to fines, but also imprisonment, if found guilty of the provincial offences.[122]

Lawyers for Eton Construction and Krauza requested that the case be presided over by a Provincial Court judge rather than a justice of the peace.

Why? According to the lawyers, justices of the peace, as a class, lacked the judicial training and competence required of a judicial officer conducting a trial of a person charged with a serious offence. Further, this "lack of competence" meant that the *Charter* rights of Eton Construction and Krauza would be infringed if a justice of the peace tried the case. The argument went this way: the system is structurally flawed because it allowed incompetent people to become justices of the peace. Incompetent judging would make for a lack of confidence in the justice system. Confidence in the system requires a healthy perception of judicial independence amongst members of the public – and the understanding that people have the right to be tried by an "impartial" tribunal. An impartial tribunal should, therefore, be based upon the right to be tried by a competent judicial officer.[123]

The *Charter* arguments in *Eton* involved s. 11(d) – the right to an independent and impartial tribunal – and s. 7 – the right not to be deprived of the right to life, liberty and security of the person, except in accordance with principles of fundamental justice. The lawyers for Eton and Krauza alleged "defects" relating to Ontario's justices of the peace included the following.

- An absence of criteria for their appointment together with the method of appointment.
- Their inadequate training and lack of legal education.

The Court of Appeal answered these allegations in a strongly worded judgment, explaining that the government had addressed many of the concerns raised about the office of justice of the peace in both the McRuer and Mewett reports.

"Candidates for the office are required to submit an application. All applications are screened and the candidates are interviewed by members of the judiciary. Following appointment, they are subjected to a training program and they are classified and promoted on the recommendation of members of the judiciary. They are also subject to ongoing supervision and education. The record does not support the

appellant's [Eton and Krauza] contention that the current system is institutionally and structurally flawed so as to lead to an unfair trial and to violate the principles of fundamental justice with the meaning of… the *Charter.*"[124]

The Devil is in the details – Small things speak volumes about judicial independence

Many major issues defining judicial independence have been decided since 1990. Some other changes were made that, in retrospect, may seem minor but which had a significant impact on the perception of judges and justices of the peace as independent of the government and others. These symbolic changes altered the way the judges and justices of the peace presented themselves to the world.

A decision to stop using government letterhead and replace it with judicial letterhead is one of those symbolic changes.

In 1996, Linden recalled that seemingly small change and its impact. "This may seem trivial, but when the Attorney General is the chief prosecutor in the Court, the fact that judges have to routinely use the Ministry's letterhead does not contribute to the image of the judges as being separate or independent from the government."[125]

A profound decade for judicial independence

The Ontario Court (Provincial Division) and its judges and justices of the peace entered the 2000s with a new appellation – the Ontario Court of Justice – and a strong sense of their individual judicial independence. The principles of judicial independence had been detailed and defined by the Supreme Court of Canada and the Ontario Court of Appeal in several cases. The Ontario Court of Justice and its predecessor Provincial Division – through the initiatives of its members – had taken great strides in establishing itself and reinforcing judicial independence, both individually and institutionally.

The Court's Structure Reflects Judicial Independence: 2000 and Onwards

"…judicial independence is a dynamic rather than a static idea."[126]

In the first decade of the new millennium, three important cases – *Ell, Bodner* and *Association of Justices of the Peace of Ontario* – further refined the definition of judicial independence as it pertains to the individual dimensions of judicial independence: security of tenure, and financial security of judges and justices of the peace.[127]

Taken together these decisions strongly restated key elements of judicial independence.

- Judicial independence is "the lifeblood of constitutionalism in democratic societies"[128] and this means that the constitutional guarantees of judicial independence extend to all courts in Canada.

- The principle exists for the benefit of the people being judged, not the judges or justices of the peace.

- The level of judicial independence that is constitutionally required will depend on the nature of the court or tribunal – this means the essential conditions for judicial independence will vary among courts, depending on the work they do.[129]

How were these statements applied in these cases?

Ell – Judicial Independence is for the People Being Judged

The *Ell* case concerned an amendment to legislation that required sitting justices of the peace in Alberta to be lawyers, resulting in the removal of justices of the peace who were not lawyers. (Note: This is not the situation in Ontario, where justices of the peace are lay appointments and there is no requirement

for them to be lawyers before appointment.) The Supreme Court of Canada decided that this amendment strengthened judicial independence. By deciding to appoint only lawyers, the province of Alberta was strengthening the qualifications of the bench, and furthering public confidence in the judicial system. Added to this was the fact that the Supreme Court found the removal of the non-legally trained justices of the peace was neither arbitrary nor discretionary. A clear statement was made that the principle exists for the judged, not the judges.

Bodner – More on Financial Security of Judges

The decision in *Bodner* clarified the earlier Supreme Court of Canada decision in *Provincial Judges Reference* about the manner in which salary disputes were to be resolved between governments and the courts. This case arose from cases in four provinces involving the associations of judges from not only Ontario but also New Brunswick, Quebec and Alberta. Each case involved the interpretation of how to properly pay provincial court judges in each of those provinces. The Supreme Court re-affirmed that independent remuneration commissions must be established to make recommendations regarding judicial salaries. The key features of these decision-making bodies must be:

- independence,
- objectivity , and
- effectiveness.

At the same time, the Court held that a government's refusal to implement a particular recommendation of a commission would be justified if the government:

- articulated a legitimate reason for its decision;
- relied upon a reasonable factual foundation, and

- respected the purposes of the commission and its processes.

According to Professor Lorne Sossin, in many Canadian jurisdictions, such independent remuneration commissions have led to a more politicized relationship between the judiciary and the government. However, he has observed that the decision to utilize a binding process in Ontario (and in a limited number of other provinces) has meant disputes over remuneration and benefits have been kept to a minimum. "It is believed that this 'made-in-Ontario' process and result honours the commission process, the framework agreement, *Bodner*, and especially the *Provincial Judges Reference."*[130]

Association of Justices of the Peace of Ontario – More on Security of Tenure

In a case brought by the Association of Justices of the Peace of Ontario[131], security of tenure of Ontario's justices of the peace was at issue. How did this case arise? In 2008, the *Justices of the Peace Act* provided for mandatory retirement of justices of the peace at 70 years of age. A group of justices of the peace applied to the Ontario Superior Court of Justice. They didn't want to retire and felt that mandatory retirement at age 70 caused them feelings of rejection, together with a loss of dignity and respect. They further asserted the legislation violated their *Charter* rights by discriminating against them on the basis of age.

Justice George Strathy. (Courtesy: Tim Fraser for The Law Society of Upper Canada)

Justice George Strathy (later appointed Chief Justice of Ontario) decided that this provision in the *Justices of the Peace Act* did violate the *Charter* rights of the justices of the peace. He drew a connection between employment and a person's

identity, self-esteem, dignity and emotional well-being. To remedy the situation, Justice Strathy applied the retirement provisions applicable to the Provincial Court judges into the legislation pertaining to the justices of the peace: retirement at age 65 with continuation in office to 75 years of age, subject to annual approval by the Chief Justice of the Ontario Court of Justice.

Mandatory retirement was determined to be a significant component of security of tenure. Why? "The presence of mandatory retirement ensures that intrusions on the professional autonomy that judges require in their work are kept to a minimum. In Ontario, the term of office of a provincial judge may be ended only by the statutory removal process, voluntary retirement or mandatory retirement."[132]

In coming to this decision, Strathy acknowledged the evolution the Court had seen over the past 40 years, focusing on the justices of the peace.

"…the qualifications of the bench have been enhanced, the tenure of the justices has been made more secure and the processes and procedures surrounding the office have been made more professional, more formal, and, in a word, more 'judicial.' This evolution reflects the important role played by justices of the peace in the administration of justice in the province and the significance attached to that role by the legislature. It shows a desire to attract highly qualified applicants to the position and to provide a structure, compatible with their judicial independence, to support the performance of their responsibilities."[133]

Strathy's reasons served to further define and restate the contours of the definition of judicial independence. But his reasons also foreshadowed the fact that the edges of judicial independence will continue to be defined far into the future.

Strathy reiterated that there was no uniform standard or formula for the preservation of judicial independence: "…the manner in which the essential conditions of judicial independence are satisfied will vary with the nature of the tribunal and the interests at stake."[134]

The ultimate question in each case is whether a reasonable and informed person would conclude that the Court is independent – with the fundamental proviso that independence is intended to protect the interests of the public, first and foremost.

Conclusion – What Does the Future Hold for Judicial Independence?

Concepts of judicial independence for provincially appointed judges and justices of the peace have changed radically since the 1920s. However, much remains to be discussed, considered and debated about judicial independence as the Ontario Court of Justice moves forward.

For example, despite the strides made in the administrative realm, that element of judicial independence – and the role of the judiciary in administering the Court – will continue to be a topic for discussion and concern. Former Attorney General Michael Bryant raised that point in 2004. He acknowledged that "it is not desirable for the judges to be under the thumb of the Attorney General, the chief litigator in the courts…. I'd like to think that mine is an affable, collaborative thumb, but 'twas not always so and may not be tomorrow, so now is the time to consider the role of the judiciary in administering the courts."

One thing is certain: the concept of judicial independence continues to be refined and defined

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[1]Roy McMurtry, *Memoirs and Reflections*, (Toronto: The Osgoode Society for Canadian Legal History by University of Toronto Press, 2013), p. 181.
[2]Millar, Perry S. and Baar, Carl. *Judicial Administration in Canada.* (Montreal: McGill-Queen's University Press, 1981).
[3]McRuer, J.C. *Royal Commission into Civil Rights,* Volumes 1 and 2 (Toronto: Queen's Printer, 1968).

[4]Zuber, T.G. *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987), p. 23.
[5]Zuber Report, p. 23.
[6]Lennox, B.W. "Judicial Independence: Past, Present and Future," Speech delivered to Justices of the Peace, May 7, 2015.
[7]Hastings Investigation, Report of the Commissioner, Mr. John A. Paterson, April 29, 1921, p. 4.
[8]Hastings Investigation, p. 5.
[9]*Magistrates Act*, S.O. 1914, c. 88, s. 2.
[10]Hastings Investigation, p. 1.
[11]*Magistrates Act,* S.O. 1952, c. 53, s. 3.
[12]Hastings Investigation, p. 9.
[13]Hastings Investigation, p. 8.
[14]Hastings Investigation, p. 17.
[15]Hastings Investigation, p. 15.
[16]B.W. Lennox, "Judicial Independence in Canada – The Evolution Continues," in Dodek, Adam and Sossin, Lorne, eds. *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010), p. 624.
[17]McRuer Report, Vol. 2, p. 529. By 1968, when McRuer was conducting his inquiry, magistrates' salaries were fixed by the Lieutenant Governor in Council, and paid by the province.
[18]McRuer Report, Vol. 2, p. 542.
[19]McRuer Report, Vol. 2.
[20]Vanek, David, *Fulfilment: Memoirs of a Criminal Court Judge* (Toronto: The Osgoode Society for Canadian Legal History), p. 225.
[21]This attitude may in part, be attributed to the *Constitution Act, 1867* (originally known as the *British North America Act, 1867*). During this time period, the *BNA Act* was interpreted as providing a full guarantee of judicial independence only to superior courts.
[22]Magistrates Act, S.O. 1952, c. 53, s. 4; McRuer Report, Vol. 2, p. 541.
[23]McRuer Report, Vol. 2, p. 541.
[24]McRuer Report, Vol. 2, p. 541.
[25]McRuer Report, Vol. 2, p. 541.
[26]*Kingston Whig Standard*, 1963
[27]McRuer Report, Vol. 2, pp. 539-541.
[28]McRuer Report, Vol. 2, p. 519.
[29]*Magistrates Act* S.O. 1937, c. 133, s. 17. Similar provisions continued to exist in *Magistrates Acts* until the end of this period.
[30]McRuer Report, Vol. 2, p. 538.
[31]McRuer Report, Vol. 2, p. 539.
[32]Interviews of B.W. Lennox for OCJ History Project, 2014-15.
[33]*Magistrates Act,* S.O. 1922, c. 48.
[34]Interviews of B.W. Lennox for OCJ History Project, 2014-15.
[35]McRuer Report, Vol. 2, p. 543.
[36]*Provincial Courts Act, 1968,* S.O. 1968, c. 103.
[37]Peter McCormick and Ian Greene, *Judges and Judging: Inside the Canadian Judicial System*, (Toronto: Lorimer, 1990).
[38]Alan W. Mewett, Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario, Part 1, ("Mewett Report"), 1981.
[39]Mewett Report, p. 39.
[40]Mewett Report, p. 45.
[41]Mewett Report, p. 81.
[42]Mewett Report, p. 63.
[43]T.G. Zuber, *Report of the Ontario Courts Inquiry* (Toronto: Queen's Printer, 1987), ("Zuber Report"), p. 142.
[44]Ian Scott, *To Make a Difference,* (Toronto: Stoddart Publishing Co. Limited, 2001), p. 178.

[45]Zuber Report, p. 143.
[46]Report to the Ontario Provincial Courts Committee, 1988. This committee was chaired by Gordon Henderson and is known as the "Henderson Report."
[47]Henderson Report, p. 42.
[48]Ontario Law Reform Commission, Report on Administration of Ontario Courts, Part II (Ministry of the Attorney General, 1973), ("OLRC Report"), p. 5.
[49]OLRC Report, Part II, p. 10.[50]OLRC, Part II, p. 8.
[51]Interviews of B.W. Lennox for OCJ History Project, 2014-15.
[52]Ministry of the Attorney General, White Paper on Courts Administration, 1976, pp. 10-15, as quoted in Zuber Report, p. 145.
[53]In 1981, for example, Provincial Court judges received $56,000 annually, while federally appointed District Court judges received $68,000.
[54]Interview of P. French for OCJ History Project, 2015.
[55]Interview of P. French for OCJ History Project, 2015.
[56]Vanek, *Fulfilment,* p. 228.
[57]Vanek, *Fulfilment,* p. 229.
[58]Vanek, *Fulfilment,* p. 230.
[59]The Ontario Provincial Courts Committee was formally established by an Order-in-Council, dated March 5, 1980 (OC-643/80). The first members of this committee were: R.J. Butler as government appointee, Arthur Maloney as appointee of the judges' associations, and Clarence Sheppard as chair.
[60]*R. v. Valente,* [1985] 2 S.C.R. 673, 23 CCC (3d) 193, para. 55.
[61]Martin Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, (Ottawa: Canadian Judicial Council), p. 8.
[62]Interview of B. Sharpe for OCJ History Project, 2014.
[63]S. 11(d), *Charter of Rights and Freedoms.*
[64]McCormick and Greene, *Judges and Judging,* p. 5.
[65]*R. v. Valente (No. 2)* (1983) 2 C.C.C. (3d) 417, p. 444.
[66]McCormick and Greene, *Judges and Judging*, pp. 5-6.
[67]Interviews of B.W. Lennox for OCJ History Project, 2014-15.
[68]Interviews of P. French for OCJ History Project, 2015.
[69]"Judges say their morale low over pay," *The Globe and Mail,* January 11, 1985.
[70]Henderson Report, p. 20.
[71]*Globe and Mail*, December 7, 1985.
[72]*Toronto Star*, September 4, 1986.
[73]Henderson Report, p. 24.
[74]*The Globe and Mail*, April 25, 1987.
[75]*The Globe and Mail*, April 11, 1987.
[76]Henderson Report, p. 68.
[77]Henderson Report, p. 71.
[78]Henderson Report, pp. 43-44. Note: This quote contains a quote from Shimon Shetreet, *Judges on Trial,* (Amsterdam: North-Holland Publishing Co., 1976), p. 383. Shetreet's comments were quoted with approval in the Supreme Court's decision in *R. v. Valente.*
[79]Interviews of P. French for OCJ History Project, 2015.
[80]Kirk Makin, "Provincial Court judges seek ways to push for better pay, conditions," *The Globe and Mail,* April 14, 1989.
[81]Zuber Report, p. 143.
[82]Lennox, "Judicial Independence in Canada," p. 635.
[83]White Paper on Courts Administration, 1976, Ministry of the Attorney General, pp. 10-15.
[84]Zuber Report, p. 154.
[85]Zuber Report, pp. 157-158.

[86]*Courts of Justice Act, 1984,* S.O. 1984, c.11, sec. 47, as amended by 1989, c. 55, s. 2.
[87]Manitoba Law Reform Commission, *Report on the Independence of Provincial Judges* (Winnipeg, 1989, p. 18.This excerpt is quoted with approval in Martin Friedland, *A Place Apart,* p. 233.
[88]Ian Scott, *To Make a Difference,* pp. 138-139.
[89]R.S.O. 1980, c. 316
[90]*Re Currie and Niagara Escarpment Commission,* 1984 CanLII 1835 (ONSC), p. 13.
[91]*Justices of the Peace Amendment Act, 1984,* S.O. 1984, c. 8, s. 7b.
[92]*Justices of the Peace Amendment Act, 1984,* S.O. 1984, c. 8, s. 2.
[93]*Reference re Justices of the Peace, Re Currie and Niagara Escarpment Commission,* 1984 CanLII 2143 (ON CA) (mentioning *R. v. City National Leasing Limited*).
[94]*Reference re Justices of the Peace.*1984 CanLII 2143 (ON CA).
[95]Sidney Linden, "Where we are, where we're going!" Address to Criminal Lawyers' Association, Spring Education Program, April 20, 1996, Toronto, p. 1.
[96]Linden, "Where we are, where we're going!" p. 2.
[97]Linden, "Where we are, where we're going!"
[98]Lennox, "Judicial Independence in Canada."
[99]1993 Memorandum of Understanding, s. 2.4
[100]Linden, "Where we are, where we're going!"
[101]Interview of S. Linden for OCJ History Project, 2015.
[102]S. 49
[103]Friedland, *A Place Apart,* p. 110.
[104]S. 51.9
[105]Ontario Court of Justice, Biennial Report, 2008/2009, p. 35. Note: In 1998, the Canadian Judicial Council (which investigates complaints of alleged misconduct involving federally appointed judges) published *Ethical Principles for Judges.* Upon recommendation of the Ontario Conference of Judges and the Chief Justice's Executive Committee, *Ethical Principles of Judges* was approved by the Ontario Judicial Council and adopted by the Ontario Court of Justice in 2005, and now also forms part of the ethical standards for judges of the Ontario Court of Justice.
[106]Kirk Makin, "Harris politicizing judiciary, critics say," *The Globe and Mail,* December 17, 1999.
[107]Makin, *The Globe and Mail,* December 17, 1999.
[108]Makin, *The Globe and Mail, December* 17, 1999.
[109]Makin, *The Globe and Mail,* December 17, 1999.
[110]Interview of P. Russell for OCJ History Project, 2014.
[111]Makin, *The Globe and Mail, December 17*, 1999.
[112]*Courts of Justice Act Statute Law Amendment Act, 1994*, S.O. 1994, c. 12, s. 51.13.
[113][1997] 3 S.C.R. 3.
[114]*Courts of Justice Act Statute Law Amendment Act, 1994*, S.O. 1994, c. 12, s. 48 (See Schedule, Framework Agreement, s. 2).
[115]Interview of G. Thomson for OCJ History Project, 2015. Interestingly, the government of Saskatchewan decided to introduce the same model at about the same time. However, when the next courts committee proposed a significant salary increase, the government quickly changed back to a committee that only recommended rather than decided.
[116]Lorne Sossin, "Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism," in Dodek, Adam and Sossin, Lorne, eds. *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010), p. 74.
[117]Interview of George Thomson for OCJ History Project, 2015.
[118]*Reference re Remuneration of Judges of the Provincial Court (P.E.I.),* [1997] 3 S.C.R. 3.
[119]*Provincial Judges Reference,* paras. 83 and 109.
[120]*Provincial Judges Reference,* para. 329.
[121]*Provincial Judges Reference,* para. 9.
[122]*Eton Construction Co. v. Ontario,* 1991 CanLII 7102 (ON SC), p. 4.

[123]A tangled argument was put forward by the lawyers for Eton and Krauza. As Justice Borins of the Ontario Court (General Division) stated in his reasons for decision in the case: "I must confess to some difficulty in understanding the issues to be address." *Eton Construction Co. v. Ontario,* 1991 CanLII 7102 (ON SC), p. 7.
[124]*Eton Construction Co. v. Ontario,* 1996 CanLII 1344 (ON CA), p. 5.
[125]Linden, "Where we are, Where we're going!" April 20, 1996, p. 5.
[126]Adam Dodek & Lorne Sossin, "Judicial Independence in Context," Dodek, Adam and Sossin, Lorne, eds. *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010), p. 11.
[127]In 2003, the Supreme Court of Canada decided *Ell v. Alberta,* [2003] 1 S.C.R. 857, 2003 SCC 35 (CanLII) and, in 2005, *Provincial Court Judges' Assn. of New Brunswick v. New Brunswick (Minister of Justice); Ontario Judges' Assn. v. Ontario (Management Board); Bodner v. Alberta; Conférence des juges du Québec v. Quebec (Attorney General); Minc v. Quebec (Attorney General[127])*2005 SCC 44 (CanLII). In 2008, the Ontario Superior Court of Justice decided *Association of Justices of the Peace of Ontario v. Ontario (Attorney General),* 2008 CanLII 26258 (ON SC).
[128]*Ell*, para. 18, p. 11.
[129]*Ell*, para. 30, p. 15.
[130]Lorne Sossin, "Between the Judiciary and the Executive: The Elusive Search for a Credible and Effective Dispute-Resolution Mechanism," in Dodek, Adam and Sossin, Lorne, eds. *Judicial Independence in Context* (Toronto: Irwin Law Inc., 2010), p. 77.
[131]*Association of Justices of the Peace of Ontario v. Ontario (Attorney General),* 2008 CanLII 26258 (ON SC)
[132]*Association of Justices of the Peace of Ontario v. Ontario (Attorney General),* 2008 CanLII 26258 (ON SC), para. 48.
[133]*Association of Justices of the Peace of Ontario v. Ontario (Attorney General),* 2008 CanLII 26258 (ON SC), para. 32.
[134]*Association of Justices of the Peace of Ontario v. Ontario (Attorney General),* 2008 CanLII 26258 (ON SC), para. 70.

Educating Judges and Justices of the Peace

Introduction

As the Ontario Court of Justice evolved, passing through its many incarnations, formal education[1] went from something dismissed as unnecessary and inappropriate to become an essential element of the continuing professional development of judges and justices of the peace. Informal education – studying and reading on one's own or learning informally from one another – had always been an aspect of judging and actively encouraged. But structured, organized continuing education did not begin in earnest until the 1960s.

How did this happen and why?

Colonel George Taylor Denison in his military regalia.

From the Court's Beginnings Until 1968

The Magistrate's Approach to Education: "Why, this job is actually very simple!"[2]

Common sense and intuitive feelings developed through past experiences ruled the day for many magistrates and justices of the peace – and defined their approach to decision making. The culture of the Magistrates' Court, the backgrounds of those who sat as judicial officers, and the approach to judging reinforced the opinion that formal judicial education was not only unnecessary, but actually an affront.

"I depend upon an intuitive feeling as to a man's guilt or innocence and not to weighing and balancing the evidence…" wrote police magistrate, Colonel George Taylor Denison in 1920.[3] He was close to retirement at this point, after serving in Toronto's Magistrates' Court since 1877. His disrespect for the

rule of law was palpable. "My main desire has been above all things to administer substantial justice in all cases coming before me. This I felt should be done in preference to following legal technicalities and rules…I never follow precedents unless they agree with my views."[4] The "law unto Denison" prevailed in his court – an individualistic approach that many magistrates and justices of the peace adopted. To their minds, education was simply not necessary.

Although Denison was a lawyer and cavalry officer prior to becoming a magistrate, the vast majority of judicial officers of that day had no previous legal training and did not see this as an impediment to fulfilling the role of magistrate. David Vanek, who later became a magistrate and then a judge of the Provincial Court (Criminal Division), recalled – with shock – an appearance in Magistrates' Court he made when practising law in the 1960s. Vanek's experience during that appearance vividly evokes the impact of a lack of training either before or after appointment to the bench.

"I recall making a strategic error in Magistrates' Court when, in addressing the Bench, I argued that the case should be dismissed because the prosecution had failed to disclose any evidence of *mens rea*, probably the most basic concept of criminal law. It refers to a guilty mind or some quality of intention that is an essential ingredient of every criminal offence. It was obvious that the magistrate did not know what I was talking about."[5]

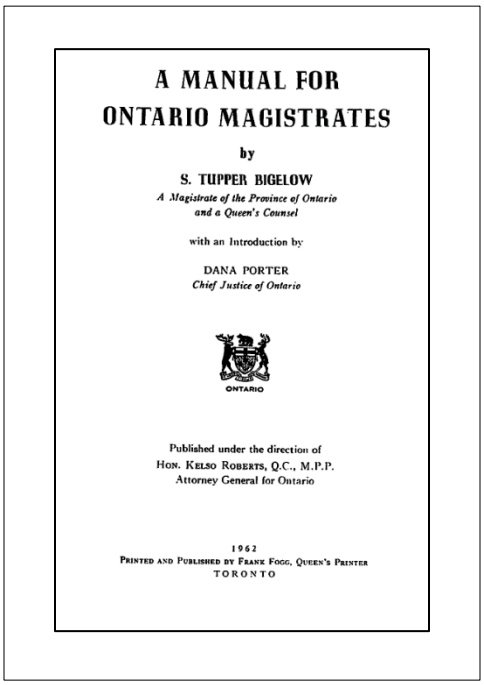
A Manual for Magistrates: Published in 1962

By the 1960s, as more and more lawyers were being appointed to the Magistrates' Court, the resistance to formal education assumed a slightly different tone. In general, the opposition took two forms:

- a perception that it was unnecessary because of the expertise lawyers brought to the bench; and

- a concern that education would interfere with the impartiality and independence integral to the work of a magistrate.

This opposition is evident in a manual written in 1962 by S. Tupper Bigelow, a lawyer and magistrate, to serve as a guide for all magistrates, but particularly tailored for new appointments to the bench.[6] Great care is taken in the introduction to Bigelow's book – even though it is intended only as a guide – to reassure readers that judicial independence is of primary concern: "Each magistrate, of course, must in each case make up his own mind not only as to sentence, but also as to questions of law."



A MANUAL FOR
ONTARIO MAGISTRATES

by

S. TUPPER BIGELOW
A Magistrate of the Province of Ontario and a Queen's Counsel

with an Introduction by

DANA PORTER
Chief Justice of Ontario

ONTARIO

Published under the direction of
HON. KELSO ROBERTS, Q.C., M.P.P.
Attorney General for Ontario

1962
PRINTED AND PUBLISHED BY FRANK FOGG, QUEEN'S PRINTER
TORONTO

Bigelow acknowledged that some judges, at the time, did receive formal training, but dismissed that approach as inappropriate for Ontario magistrates.

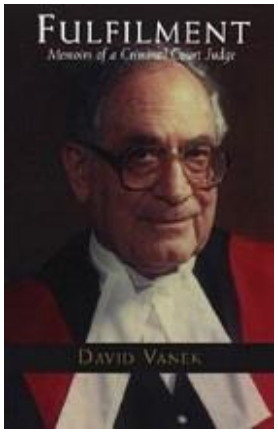
"In some European countries, there are schools for judges, and perhaps such a system has its merits. However, in all English-speaking countries, a judge or magistrate commences his duties on appointment without any instruction whatever. He probably thinks of the best judge or magistrate he has ever seen in court, and does his best to emulate him in performing his own duties."[7]

In Bigelow's world, education was to be undertaken only on an "as needed," individual basis – and it was very much directed at the new appointee who wanted to learn court procedures, as opposed to the law. Knowledge of the law was assumed – and the experienced magistrates – "the seasoned fellows," as Bigelow referred to them – were assumed to already have all the education they needed.[8]

"It would be well for the newly appointed judge to sit in court with a fellow magistrate until he thinks he has the 'feel' of the job....After court, he will naturally ask many questions, which the senior magistrate

will only be too glad to answer. If possible, he should sit in this way with as many magistrates as he can. Thus, he will find many viewpoints on the same questions, and he will be able to reconcile them as best he can for his own purposes….There will come a time, and it will not be long, when the newly appointed magistrate will think, 'Why, this job is actually very simple!'"[9]

This informal system continued – unabated until the late 1960s – as the only education a new judge would receive.[10] And that system often proved to be pretty thin gruel for many a new magistrate. Bill Sharpe, appointed in 1971, recalled his education this way:



David Vanek authored his memoir, *Fulfilment: Memoirs of a Criminal Court Judge,* in 1999.

"My training was watching Judge [Robert] Dnieper for a morning, after which he said I looked good to go and left to play golf. I also spent a few days with Judge David Vanek too. I think they felt that since I had been practising law for at least 15 years, I knew what I was doing."[11]

Justice Sidney Lederman, an Ontario Superior Court judge, was – during his tenure as an evidence professor at Osgoode Hall Law School – an early advocate for judicial education programming for federally appointed judges. Here is how he characterized the early resistance of judges to education from anyone other than a fellow jurist. "They didn't want to hear from an academic. They thought it was a Marxist idea to have someone from the outside become involved in judicial education. They thought it could be a vehicle to influence the court by special interests. The other theory was that 'we know the law, what can they tell us?'"[12]

Changes Began with the Organization of an Association of Magistrates

In the early 1960s, magistrates formed an association and began holding annual conferences. While these conferences were primarily social events, they were also multi-purpose, since they provided the

only opportunity for magistrates from across the province to get together and discuss matters of common interest. Discussion was "devoted to securing an increase of remuneration and pensions, which were at unreasonably low levels, and improving working conditions," recalled Vanek.[13] As well, educational programming was tacked on to the conferences, which provided justification for funding by the provincial government. The Court had no power over its own funding – and relied on the good graces of the government of the day to pay for these gatherings.[14]

David Vanek recalled that the educational component tended to be thin in content.[15] And, given the funding structure, the magistrates could also expect a presentation from the "funder" – the Attorney General of the day – who would have no hesitation in "putting them in their places," and demonstrating that judicial independence was a flimsy construct.

"Talkative Magistrates Are Laid Low by Attorney-General Fred M. Cass"

At the 1962 annual conference organized by the Ontario Magistrates Association, the group received a lecture from Fred Cass, the Attorney General, on his view as to how a magistrate should manage the courtroom. *The Kingston Whig-Standard* reported Cass delivered a "blistering attack" on the magistrates. When a magistrate interrupted Cass with a question betraying disagreement with his suggestions, the newspaper reported: "The attorney-general turned both barrels on the interrupter, saying 'It is my impression that our courts are there to serve the public. If I find that this is not the view of anyone occupying any court over which I have jurisdiction, that person will be forthwith removed.'"

A Similar Situation Prevailed in Juvenile and Family Courts

The experience of judges in Juvenile and Family Courts was quite similar to that of the magistrates. "Judges did not receive any training for presiding over these specialized courts,"[16] wrote Ted Andrews, who served as Chief Judge of the Provincial Court (Family Division) from 1968 to 1990. A noticeable

effect was evident in the quality of the work of these judges. As Andrews pointed out, "they conducted their Courts in their own peculiar way, and were given pretty much a free rein."[17] This resulted in "a lack of uniformity in practice."[18]

Ted Andrews in 1990. (Photo courtesy of S. Linden)

Recognizing this shortcoming, the judges took it upon themselves to form the Association of Juvenile and Family Court Judges. Andrews reported that the association "undertook a critical study of the various facets of the operation of the Juvenile and Family Courts…As a result, the Association made numerous recommendations for improvement to the Attorney General who was responsible for the administration of the Courts. With the co-operation and financial support of the senior people in the Attorney General's Department, the Association began holding its own annual seminars in an attempt at self-education of its members."[19]

Justices of the Peace – The Sorriest State of All

Fifty years ago, justices of the peace faced an even more daunting challenge of learning the job than magistrates and Juvenile and Family Court judges. A 1966 *Globe Magazine* article, "The JP's awesome power," detailed the broad scope of the jurisdiction of the justices of the peace, the fact there was no requirement for them to be legally trained, and then pointed out: "JPs get no formal introduction in their duties. By the provincial *Justices of the Peace Act*, each JP who is appointed must be examined and certified by a County Court judge before he takes up his duties. In practice, the questioning usually takes a perfunctory five or 10 minutes. After that, though the JP is


OF UPPER

The JP's awesome power

Last year there was an uproar over Ontario's "police state" bill but there is little disquietude over the fact that 950 persons who are unversed in the law and owe their jobs to political patronage have the power to jail a citizen in perpetuity

Headline from a 1966 *Globe Magazine* article.

presumed to call on the nearest magistrate or Crown Attorney if he needs guidance, he is on his own."[20] A new justice of the peace was lucky to be given his or her own copy of the *Criminal Code.*[21]

The Transformation in Judicial Education Begins: Progress During the 1960s, 1970s, and 1980s

The advance toward instituting formal judicial education began in the 1960s for judges and picked up steam in the early 1970s, following the demise of the Juvenile and Family Courts and the Magistrates' Courts and upon the creation of the Provincial Courts (Criminal and Family Divisions). This trend continued throughout the 1980s and by decade's end, it was generally accepted that judges needed access to continuing, high-quality education throughout their careers. Serious challenges remained, however, in providing that education to all judges, and justices of the peace didn't see the same degree of progress until well into the 1990s.

What Led To Education and Training for Judges Becoming a Priority?

In the case of Ontario's Provincial Courts, three important developments contributed to judicial education becoming a priority:

1. A more visible Court and judiciary.
2. Strong judicial leadership.
3. Societal and judicial recognition, and acceptance, of the necessity of adult education.

A More Visible Court and Judiciary

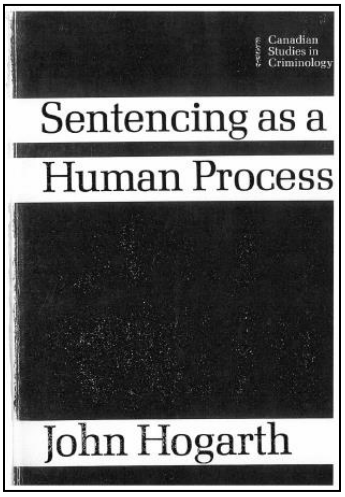
In the 1960s and 1970s, the academic, legal and media worlds began to research and write about the Provincial Courts – both family and criminal – identifying the importance of the work and the difficulties the judiciary and the courts were experiencing. These voices were often critical, recommending judges

and justices of the peace needed formal education to develop a "greater level of sophistication" in their approach to their work.[22]

Sentencing as a Human Process: Professor John Hogarth

Perhaps the most important and influential research was authored by Professor John Hogarth, then the Director of the Institute of Public Policy Analysis at Simon Fraser University. He was insistent that judges needed education – "an urgent need," he concluded.[23]

His ground-breaking book, "Sentencing as a Human Process," was published in 1971 through the new Centre of Criminology, University of Toronto, the result of intensive, structured interviews with 71 full-time Ontario magistrates (virtually everyone in the province), together with extensive analysis of their various cases, decisions and sentences imposed.[24]

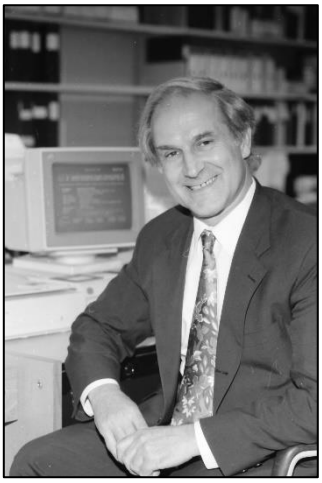


Hogarth acknowledged, at the outset, that "Magistrates' Courts have been under considerable and mounting criticism."[25] He concluded that "50% of the variations in sentencing could be accounted for simply by knowing certain pieces of information about the judge himself" and that "…the judicial process is not as uniform and impartial as many people would hope it to be. Indeed, it would appear that justice is a very personal thing." He also identified the direct and indirect ways that magistrates' independence was being compromised, while providing strong evidence in support of all members of the Court being legally trained before appointment.[26]

Hogarth reported that the magistrates were generally gratified by their participation in this very important, original research. They felt isolated and overlooked, despite having heavy responsibilities

within the justice system, deciding the vast majority of criminal cases in Ontario, and were delighted that someone – finally – was paying attention to the challenges they faced.[27]

In his concluding chapter, Hogarth made a forceful argument for judicial education. "The data presented here show that most magistrates sentence without a great deal of background information concerning the cause of crime or the results of research concerning the efficacy of different types of correctional methods. Few do any significant reading in this field and only a minority have visited penal institutions.



Professor John Hogarth (Photo courtesy of the Law Society of Upper Canada)

No effective mechanism exists at present for bringing new information to the attention of the Courts, and, unless this is corrected, judges….are likely to continue to sentence 'in the dark.' There appears to be an urgent need to provide initial and ongoing training for judges."[28]

Hogarth also provided specific advice as to the form and content future education initiatives should embody, along with not-so-subtle criticism of the quality of training offered to the judges at that time.) Education "should not be considered a frill that can be dispensed with in times of economic stress or pressures of work…training should not be directed solely to providing information…but primarily to enhancing the perceptual skills, human sensitivity, and critical abilities of judges and magistrates in handing information and assessing the results of research concerning the effectiveness of different types of penal measures."[29]

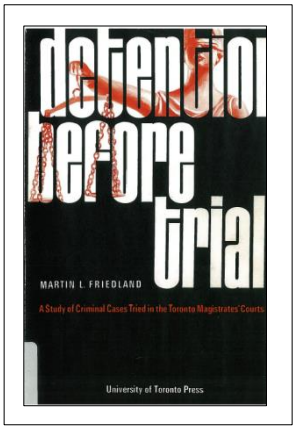
According to Hogarth, the time was right for his book. "Although some judges were dismayed by what the book revealed, they felt proud – by opening themselves up, they were pioneers." The book served as an important trigger for the introduction of a more formal and considered approach to judicial

education. Hogarth explained: "That's the way historical changes happen. Society was changing and the Court too was ready for change."[30]

The academic world began to assume a key role in advocacy for judicial education during this period. Perhaps the most influential academics in bringing the issue to the fore were Professor John Edwards, who founded the Centre for Criminology at the University of Toronto in 1963, and Professor Tony Doob, whom Edwards brought to the Centre in 1971.

Both John Hogarth and Tony Doob noted that Chief Judge Fred Hayes (who was a Senior Judge when the research was conducted) was unhappy about the criticism levelled at his judges and the quality of the education provided to them. As a result, Hayes became less favourably disposed toward the research being done by the Centre of Criminology after the publication of Hogarth's book. But there was support within the judiciary. Hogarth recalled he had judicial champions within the Provincial Courts who played important roles in building support for both the research and the book – and the education initiatives he proposed.[31]

Additional Recommendations for Judicial Education



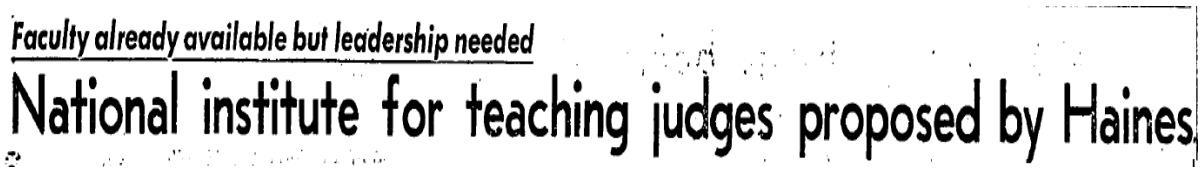
Another influential book in the history of judicial education was Professor Martin Friedland's 1965 analysis of the bail process, "Detention before Trial." He, like Hogarth, examined magistrates' decision making process. Friedland, a law professor at Osgoode Hall Law School, conducted a thorough study of pre-trial detention, and in his concluding chapter, he wrote: "...the magistrate deciding the bail must have sufficient knowledge on which to base an intelligent decision. The system in Toronto depends mainly on speculation, the view of likelihood of the accused appearing for trial merely from his looks in court."

(Friedland, Martin, *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates'*

Courts, (Toronto: University of Toronto Press, 1965))

The Work of the Court Becomes More Visible Through the Media

Both *The Globe and Mail* and the *Toronto Star* published numerous articles that put the Provincial Courts – and the judges sitting in them – in the public spotlight and subject to increased critical analysis.


Faculty already available but leadership needed

National institute for teaching judges proposed by Haines

The Globe and Mail, January 8, 1972


Professor Martin Friedland (Photo courtesy of the Law Society of Upper Canada)

In 1972, for example, Justice Edson Haines of the Ontario Supreme Court spoke out vociferously in *Chitty's Law Journal* about the need for education for all judges in Canada – and called for the creation of a national institute for the education of the judiciary. *The Globe and Mail* duly reported on Justice Haines comments.

"Mr. Justice Haines wrote that most of those appointed to the bench have received their formal education a long time before. 'They were average students. Their instruction varied, and they learned in haste concepts which they have not been able to develop. Lawyers practice the kind of law their clients bring them, with the result that they become adept in a few fields, fairly proficient in some, and as for the remainder they avoid them or consult another lawyer. A man can have a distinguished career in law and almost never appear in court. Now as a judge he must engage in

the whole field of law. Many of the subjects were not even taught when he went to law school. No lawyer knows all the law, but we expect it of our judges….A judge needs the opportunity, time and assistance in the reduction of his ignorance. In many instances it will not be a case of re-tooling, it will be tooling up for the first time.'"[32]

The Criminal Law Reports (that included editorial commentary by its editor, Professor Alan Mewett, Faculty of Law, University of Toronto) and the Criminal Reports began including more Provincial Court decisions. Reporting these cases made the decisions of the provincially appointed judges visible (and, thus, open to scrutiny) in a manner never before manifest. Later, the Reports of Family Law were introduced, under the leadership of Judge David Steinberg, making the Family Court more transparent.

Voices Calling for Improved Judicial Education in the Family Court Arena

The Juvenile and Family Courts were essentially invisible in the 1960s, their work often done behind closed courtroom doors and subject to little academic and media analysis. Criticisms of the juvenile system became more public in the United States and Canada after the 1967 U.S. Supreme Court's decision, *In re Gault*,[33] that held juveniles accused of crimes in delinquency proceedings were entitled to due process protections, similar to those available to adults. Research in both Canada and the U.S. focused on the denial of children's rights and on the perceived failure to protect their best interests, particularly in the child welfare system. Information about the significant number of aboriginal children in care, the impact of the "60s scoop," and incidents of poor foster care started to emerge – highlighting the importance of the work being done by the judges in the provincial courts.

The "60s Scoop"

The 60s Scoop refers to the removal of large numbers of Aboriginal children from their families and their subsequent adoption by non-Aboriginal families in Canada between 1960 and the mid-1980s. This was

done with little if any involvement of the families' communities or bands.

(Murray Sinclair, Donna Phillips and Nicholas Bala, "Aboriginal Child Welfare in Canada" in Nicholas Bala, Joseph Hornick and Robin Vogl, eds., *Canadian Child Welfare Law* (Toronto: Thompson Educational Publishing, Inc., 1991))

Lawyers began appearing more frequently – and better equipped – in provincial Family Court proceedings beginning in the 1960s. At that time, academics such as Professor John Barber, at Osgoode Hall Law School, and Professor George Thomson, at Western University Law School, introduced areas of law being applied in Juvenile and Family Courts to the curriculum, such as child protection and proceedings under the *Training Schools Act.* Young lawyers entering the profession became more adept in crafting sophisticated arguments in Family Courts across the province. Similarly, the establishment of Ontario's legal aid plan in 1967 and the steady growth in community legal clinics in the 70s, including law school clinic programs with a special connection to the work of the Provincial Courts, were powerful forces inevitably leading to a more transparent court.[34]

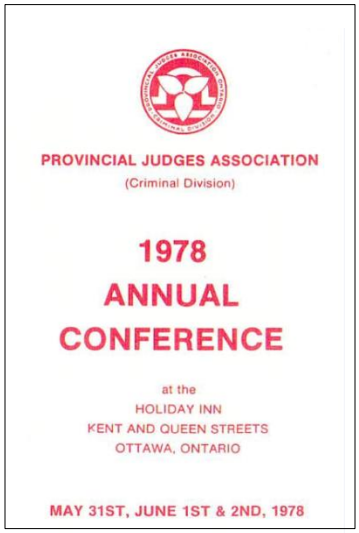
Judicial Leadership

Ontario's Provincial Courts were acknowledged early pioneers in judicial education. This was a direct result of having two Chief Judges who served throughout the 1970s with a special interest in education, together with two judicial associations that began to take leadership roles in education,

Ted Andrews served as Chief Judge, Provincial Court (Family Division) from 1968 to 1990. Fred Hayes, his counterpart on the Provincial Court (Criminal Division) was Chief Judge from 1972 to 1990. Interestingly, Andrews appears to have had more success at providing education to the judges of the family bench.[35] "Although the family bench was small, Andrews was demanding of Attorneys General

and got more for his judges' educational programming than Hayes," stated Allen Edgar, Research Counsel to the Court. "That continued when the two benches were combined (in 1990). Then it was a question of bringing the criminal bench up to the standard of the family bench in judicial education."[36]

Leadership of Criminal Division Educational Programming



PROVINCIAL JUDGES ASSOCIATION
(Criminal Division)

1978
ANNUAL
CONFERENCE

at the
HOLIDAY INN
KENT AND QUEEN STREETS
OTTAWA, ONTARIO

MAY 31ST, JUNE 1ST & 2ND, 1978

FRIDAY, JUNE 2ND, 1978

9:30 a.m.	Educational Program South Ballroom
10:30 a.m.	Coffee - South Ballroom
10:45 a.m.	Educational Program South Ballroom
12:30 p.m.	Symposium (Cash Bar) South Gallery
1:00 p.m.	Luncheon - Dalhousie Room
2:15 p.m.	Educational Program South Ballroom
3:15 p.m.	Coffee - South Ballroom
3:30 p.m.	Educational Program South Ballroom

Annual conferences organized by the magistrates' association date back to the 1960s. However, as indicated previously, these were primarily social occasions, combined with reports about the business of the Court, interspersed with lectures – usually delivered by magistrates – on the law.

David Vanek, appointed to the Magistrates' Court in 1968, wrote of his introduction to formal judicial education:

"Several years before I took office, the magistrates of Ontario had organized an association that held annual conferences and arranged educational seminars and meetings. After magistrates became judges (in 1968), the association continued to operate as the Provincial Judges Association of Ontario (Criminal Division)….I developed an interest in the educational programs of the association, although I found these to be lacking in substance."[37]

Undaunted, Vanek stepped up to the plate and joined the Association's educational committee, eventually serving for several years as chairman of the committee, aided by a group of equally devoted judges. Working with Chief Judge Fred Hayes, this committee kick-

FRIDAY, JUNE 2ND, 1978

11:30 a.m. Sherry Party - Alta Vista & Britiannia Rooms

6:30 p.m. Reception - Rideau and North Gallery Room

7:30 p.m. Dinner - Black Tie - North Ballroom
Guest Speaker: His Honour Judge Rene J. Marin

9:00 p.m. to 12:30 a.m. Dance to the Wilf Steabner Orchestra

12:30 a.m. Hospitality Suite will be open for Judges and their ladies and to Guests of the Association

LADIES COMMITTEE
MRS. SHEILA FITZPATRICK
MRS. JEAN HUTTON
MRS. PATRICIA RYAN
MRS. MADELIENE BORDELEAU

Excerpts from the Provincial Judges Association (Criminal Division) 1978 Annual Conference Agenda. It would appear that the educational programming was not nearly as detailed as the social elements of the conference. (Agenda provided by the Association of Ontario Judges)

started a more comprehensive approach to judicial education, introducing new programming, including a week-long "University Judicial Education Program," a collection of annual regional sentencing seminars conducted in four locales, and periodic visits to the Court of Appeal.

The judges were generally receptive to these new programs. As Vanek recalled, in the 1970s and 1980s, "successive governments have been responsible for the enactment of a huge amount of legislation that added enormously to the importance and burden of the work in the Provincial Court. Amendments to the Criminal Code on a variety of topics brought forth an entirely new spectrum of charges and defences. Provincial Court judges were being called upon to hear and determine issues of a very high order of complexity. Educational courses were necessary to keep the judges abreast of developments in the law and the educational conferences became more focused."[38]

Justice Sidney Lederman was an early leader in the judicial education field when he was teaching at Osgoode Hall Law School. For Lederman, Hayes' annual University Judicial Education Program at Western University in London, Ontario "may seem modest now but this was probably the first regularly scheduled education program for judges in Canada. Hayes was a real leader with this initiative."[39] In the early days, this program was offered twice each June and one-sixth of the criminal bench was invited (so that every judge would attend once every three years). The judges felt obliged to participate and Hayes

would call those who missed in their designated year to be sure they would be there for the next offering.

Justice Sidney Lederman at a judicial education conference in the 1970s. (Photo courtesy of S. Lederman)

The basic format was a set of lectures, with time for questions and answers. The following is an extract from Hayes' report on the June 1974 edition of this program, offering a good summary of the scope of the proceedings.

"This year groups will study various subjects such as witnesses, the *Protection of Privacy Act*, the admissibility of photographs, video-tape and voice prints, diminished responsibility, competence, parties to offences, identification, and other subjects."[40]

The acknowledged judicial leader in criminal law, Court of Appeal Judge G. Arthur Martin, was a frequent lecturer. He would be joined by other judges from various courts along with academics who would present on all aspects of criminal law. In the 1980s, teaching methods started to expand beyond the simple lecture ("talking head") formula to become more sophisticated and oriented specifically toward adult learners. For example, videos, as learning tools, were developed on subjects including qualifying an expert witness.

Chief Judge Hayes attending 1979 Regional Sentencing Seminar (Photo courtesy of the Association of Ontario Judges)

In the 1970s, the Provincial Judges Association of Ontario (Criminal Division) began offering, on a regional basis, four annual sentencing seminars that enabled judges to compare their sentences in simulated cases. Attendance was considered "obligatory"[41] by the judges. The seminars had the reputation for being simply exercises where each judge defended the perspective he or she brought to the fact situations that were presented.[42] John Hogarth and David Vanek were, however, equally critical of these seminars. According to Vanek, they simply "lapsed into a comparison of sentences for similar offences from locality to locality."[43]

In his book, Hogarth pointed out the danger of this approach to education about sentencing practices.

"The content of courses and seminars for judges and magistrates must be carefully developed….Improperly handled, formal training can lead to the development of more sophisticated rationalizations for essentially punitive practices."[44]

Justice G. Arthur Martin (Photo courtesy of the Law Society of Upper Canada)

For this reason, Hogarth advocated using skills training, as opposed to what Vanek called lapsing into comparisons of sentences.[45] As Hogarth explained: "Training should not be directed solely to providing information about sentencing procedures or the content of institutional programmes available for offenders (as important as these matters are), but primarily to enhancing the perceptual skills, human sensitivity, and critical abilities of judges in handling information and in assessing the results of research concerning the effectiveness of different types of penal measures….This will undoubtedly make sentencing more complicated and difficult for them, but at the same time it is likely to create an atmosphere in which sentencing can be improved."[46]

Vanek's recollections reveal another great challenge the Court faced when developing educational programming – funding – or, specifically, the lack therof.

At the Association's Annual Conference for criminal judges in 1974, when Vanek was chair of the Education Committee, he proudly reported on a proposed educational program "designed to give each Provincial Court judge an opportunity to observe hearings in the Court of Appeal for several days, and to participate in discussions" about the results of the appeals heard.[47] This program ran for several years but was cancelled due to lack of funding from the provincial government, Vanek later reported.[48]

David Vanek (Photo: *Fulfilment: Memoirs of a Criminal Court Judge.*)

This cancellation points to a major impediment to the development of much-needed educational programming. The government's control of the budget left the Court without full control over the development and delivery of its education. Change on that front, however, was coming in the form of an historic memorandum of understanding in 1993.

As recently as the late 1980s, the primary "training" a new Criminal Court judge could expect still only involved shadowing a judge at Toronto's Old City Hall for up to two weeks. A case in point: upon his appointment to the Provincial Court (Criminal Division) in 1986 to sit in Ottawa, Brian Lennox recalled travelling to Toronto for a stint of a couple of weeks at Old City Hall watching other judges do their work between the date of his appointment and his swearing-in. Lennox credits all of the Ottawa judges, led by then Senior Judge Paul Bélanger, with guiding him in his new role as a judge – and providing ample informal education to him.[49]

Lennox also recalled attending a week-long program in substantive law offered by the Canadian Association of Provincial Court Judges (CAPCJ). This innovative program had been introduced in the

1970s for new appointees from all provincial courts across Canada but, as Lennox recalled, back in the 1970s and 1980s, not all new appointees from Ontario were given the opportunity to attend.[50]

Newly appointed judges were also given some instructional materials, including "The Conduct of a Trial" (a document Hayes developed and augmented in response to new developments in the law); a copy of the *Criminal Code* and a subscription to a criminal law case reporting service.[51] Circulation of pertinent materials improved when Allen Edgar joined the Court as Research Counsel in 1980. Edgar recalls that "The Conduct of a Trial" comprised approximately 75 pages when he began working with the Court. In the early 1980s, Hayes gave Edgar responsibility for updating the manual. "Now it is fatter and electronic – some 300 pages in length," stated Edgar. "The judges call me with legal questions and, as a result, I know what revisions need to be made to 'The Conduct of a Trial' – it's a synergistic process."[52]

Allen Edgar in 1990. (Photo courtesy of S. Linden)

"Ontario had the best judicial education"

Sandra Oxner at a judicial education conference in the 1970s. (Photo courtesy of S. Lederman)

"My first brush with judicial education was in Ontario in the very early 1970s," recalled Judge Sandra Oxner. Oxner, who later became a leader in her own right in the realm of judicial education in Canada, was appointed to the Provincial Court of Nova Scotia in 1971.

"I had just been appointed to the bench but they had no judicial education at all in Nova Scotia at that time. I went to Fred Haye's Court to see his education program. Fred and Judge Cy Perkins were involved in developing the programs at that time. In those days, judicial education was an afterthought, not at all esteemed and there was no money for it in most provincial courts in Canada. Ontario, on the other hand, had the best judicial education for any provincial court at that time and that was because of Fred Hayes."

The Canadian Association of Provincial Court Judges was founded in 1973, with a key objective of promoting judicial education to all provincial court judges in Canada. Oxner became CAPCJ's first education chair and patterned her initial efforts on those already established in Ontario. "In those early days, a lot of support for CAPCJ's education programming came from Ontario."

(Source: Interview of S. Oxner for OCJ History Project, 2014.)

Leadership of Family Division Educational Programming

Chief Judge Andrews, with the support of the Association of Juvenile and Family Court judges and individual judges, including Patrick Gravely, David Steinberg, and George Thomson, introduced the first education programs including some elements of what is now called experiential education. Andrews

recruited Thomson to put together the first Judges' Training Institute, which began in 1974 with three one-week programs offered to one-third of the family judges at each session. These programs involved many interactive elements, including analysis and discussion of the wide variations between amounts of spousal and child support awarded by judges, as well as a review of family assessment issues with Toronto Family Court Clinic psychiatrist, Dr. Clive Chamberlain.

The 1974 program also included opportunities to:

- visit a shelter for abused women;
- meet a person who had experience working with adolescents in Regent Park (then Toronto's largest community housing project);
- eat dinner at a youth group home; and
- visit the Oakville Assessment Centre.

Associate Chief Judge Robert Walmsley
(Photo courtesy of the Walmsley Family)

The 1975 program included viewing videos of mock family law proceedings followed by discussion of errors presented in the videos; identifying and resolving various evidence and ethics problems; debating truancy laws; and detailing alternatives to training school. Offered annually, thereafter, subsequent subjects of study included court administration issues such as caseload management, automatic enforcement of support orders and what a family court might look like in the future. The gradual move to planned, interactive judicial education with the Court had begun.

Justice Robert Walmsley played a significant role in judicial education after he became the Associate Chief Judge in the Provincial Court (Family Division) in 1978. He possessed an erudite outlook and

advocated an eclectic approach to learning, which was always apparent in the programs he helped design.

In fact, Walmsley is credited as one of the pioneers in the area of "social context" education in Canada. "In 1985, at the invitation of Associate Chief Judge Robert Walmsley of the then Ontario Provincial Court, Family Division, the Ontario Women's Directorate (OWD) delivered a full court programme on violence against women in relationships. Following the success of this programme, a second programme on women's equality was also designed and delivered by the OWD to this court in March of 1987."[53]

Roman Komar in the 1990s. (Photo courtesy of the Walmsley Family)

On the informal side of the education ledger, Andrews also brought in research counsel in 1974 to provide assistance to the family judges. Roman Komar[54] began collecting and circulating judgments and relevant statutes, as well as conducting research and producing valuable resource materials. His "Reasons for Judgment: A Handbook for Judges and Other Judicial Officers" was published in 1980. Chief Judge Andrews also expected newly appointed family judges to "learn by watching." They were encouraged to sit and observe, for a couple of weeks, four or five judges whom Andrews recommended.

What is "Social Context" Education?

"What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an 'enlargement of mind.' We do this by taking different perspectives into account. This is the path out of blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective….It is the capacity for 'enlargement of mind' that makes autonomous, impartial judgment possible."

(Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997), 42 *McGill L.J., p. 107*

In practical terms, this means that – as a step toward judicial impartiality – a judge should understand the factual and social context of a case. In fact, the law requires that context be taken into account by a judge. To this end, judicial education has developed in the area of "social context."

Justice Donna Hackett of the Ontario Court of Justice has, in various roles, provided the judiciary in Canada with extensive guidance on the development of social context education.

Here is her definition of that term:

"[S]ocial context education for judges entails the pursuit of at least four broad goals:

- increasing judges' understanding of equality principles;
- facilitating enhanced recognition by the judiciary of the pervasiveness of disadvantage and inequality in modern society;
- challenging judges' assumptions and the impact that such assumptions might have on the process of judicial decision-making; and
- demonstrating the relevance of the experience of diversity, (in)equality and (dis)advantage to the judicial function."

(Donna Hackett and Richard F. Devlin, "Constitutionalized Law Reform: Equality Rights and Social Context Education for Judges" (2005) *4. J.L.&Equal*.157, pp. 158-159. See also *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484)

A Summary of Programming for Judges Pre-1990 – And the Challenges of Moving Forward

"Until the merger (of the Courts) in 1990, the Family and Criminal Divisions each had separate jurisdictions, their own Chief Judges, and distinct education programs, which had been largely developed during the early years of their existence. Education programming was, in significant measure, the responsibility of the respective family law and criminal law judges' associations in each of the two Courts.

Programming within the Family Division consisted of:

i) a fall family law meeting;

ii) an intensive week-long program (created by Chief Judge Ted Andrews) known as "The Judicial Development Institute" in January; and

iii) a third seminar in the spring.

Within the Criminal Division, there were also three education programs:

i) a series of virtually identical regional criminal law seminars held in the fall in each of four regions;

ii) the annual spring meeting of the Court; and

iii) a one-week intensive criminal law program created by Chief Judge Fred Hayes and presented each summer in a university setting.

The challenge at the time of creation of the Ontario Court (Provincial Division) was to preserve the benefits of strong programming that had been provided both in criminal law and in family law within a reorganized and newly created Court. It was also important that the judges' associations, both criminal and family, retain their preeminent role in the development and presentation of judicial education."

(David Wake and Brian W. Lennox, "The Ontario Court of Justice: A Journey in Education," *National*

Judicial Institute: 20th Anniversary Essays, p. 41)

Justice of the Peace Educational Programming

There is no better description of the education (or lack thereof) that justices of the peace received than the following passage in Professor Alan Mewett's 1981 report to the Attorney General concerning the then sorry state of Ontario's justices of the peace.

If we were to look only at the formal provisions made for the training and continuing education of Justices of the Peace in Ontario, the position could only be described as appalling. In practice, one sees that it is less appalling than quite unsatisfactory.

On appointment, a justice will receive a binder containing material relevant to his office. This will include extracts from the relevant portions of the Code, *the* Provincial Offences Act*, the* Provincial Courts Act *and so on, together with written material explaining some of the provisions. He may also be given a copy of the* Criminal Code. *He is expected either to be or to become familiar with these so as to have or acquire a working knowledge of what is expected of him. That is all the express formal training – if it can be so designated – that is provided for a new Justice of the Peace and the only "education" that he receives. But this only tells a very small part of a real story. While the Ministry has made sporadic efforts to provide training and educational seminars for Justices of the Peace, these have been few and far between. Not all Justices were invited to attend them, and some of those invited did not appear.*

As a result, the burden of training and educating Justices of the Peace has fallen, of necessity upon the Provincial Court Judges and the Justices of the Peace themselves. In some localities, the Crown Attorney has also volunteered his services in this area. There is no consistency. Most Provincial Court Judges are acutely aware of the need to have their local Justices of the Peace properly trained and able to function intelligently. They will take the time to observe them, offer them advice and help. In the large urban

centres, where conditions warrant it, a more formal program can be arranged. The Ontario Justice of the Peace Association has done its best, with limited resources, to arrange work-shops and discussion programs. The Toronto Justices of the Peace Association (separate from the Ontario body) also holds meetings and seminars. In some localities, a newly appointed Justice of the Peace will undergo an 'apprenticeship' period of sitting in or observing more experienced Justices of the Peace.

As a result, one can only conclude that the actual training and education of Justices of the Peace in this province range from virtually non-existent to the barely acceptable, depending upon the location. Clearly, steps must be taken to remedy this situation.[55]

Chief Judge Hayes became responsible for the justices of the peace upon his appointment as Chief in 1972. He recognized there were major problems with the lack of training provided to them, but the government made few funds available. This left Hayes scrambling to find the most basic materials for the justices of the peace.

Judge Gérald Michel with then-Attorney General Roy McMurtry at a 1979 judges' conference. (Photo courtesy of the Association of Ontario Judges)

Hayes made a huge, courageous and enduring contribution to education of justices of the peace in one critical area – Aboriginal appointments to the bench. Ontario's Native Justice of the Peace Program owes its existence to Hayes – and the prodding of Alan Mewett.

Delivered to Attorney General Roy McMurtry, Mewett's report on the office and function of justices of the peace included a separate set of recommendations concerning Native communities and remote areas. Mewett commented upon the relative absence of Native people from the ranks of justices of the peace.[56] One of Mewett's

suggestions to remedy this situation was a three-to-four-week "pre-appointment" education program tailored to Aboriginal candidates for the position of justice of the peace.[57]

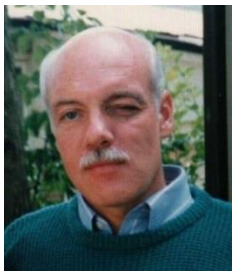
Hayes acted on Mewett's recommendations. The Native Justice of the Peace Program has been called "remarkable in its grass-roots foundation and its audacity."[58] Retired Justice Gérald Michel and Doug Ewart (director of the Policy Development Division of the Ministry of the Attorney General when the program was introduced) share identical memories of Hayes' actions. According to Ewart , "At a time of widespread discrimination, and well before significant numbers of aboriginal people entered law schools and joined the legal profession, this program provided the first sustained and supportive educational program to bring aboriginal people into presiding positions in Ontario's courts."[59]

"The aim was to have aboriginal people working in the courts where there was a concentration of aboriginal people, so they could feel part of the system…and to better serve the justice system in the isolated communities where people had no one to turn to for private complaints….The aim was also to train Justices of the Peace who would preside over minor offences under the reserve band by-laws and hear other provincial regulatory offences…."[60]

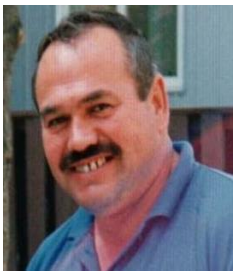
How did Hayes accomplish this feat? "The program worked with and within aboriginal communities," explained Ewart. "People were identified who, while lacking formal qualifications, clearly had the intelligence, integrity and judgment that would make for a fine judicial officer. Instead of letting the lack of justice-system knowledge or other formal qualification bar them from such positions, Hayes instituted an education program that provided intensive, in-person, pre-appointment training so those gaps could be filled, and fully qualified individuals could be considered for appointment."[61]

To make all this happen, Hayes made three crucial appointments to guide the program: Justice of the Peace Richard LeSarge (who became the Senior Justice of the Peace Responsible for the Ontario Native

Justice of the Peace Program in 1994), Judge Gérald Michel, and Stan Jolly, an advisor with the Ministry of the Attorney General.



Stan Jolly



Richard LeSarge

Shelley Howell

Jolly, LeSarge and Howell were instrumental in developing materials for the Native Justice of the Peace Program. (Photos courtesy of K. Cohl and G. Lapkin.)

They were later joined by others, including Judge Gerald Lapkin,[62] appointed the Co-ordinator of Justices of the Peace in 1990, and Shelley Howell,[63] who became research counsel serving the justices of the peace, in 1991. This group developed a manual of course material that was taught during programs of two-to-four-weeks duration across the province. Most days in these programs concluded with a test to assess the degree of comprehension of the material, recalled Michel.[64]

A Glimpse at the Success of the Native Justice of the Peace Program

The 1988/90 Annual Report of the Ministry of the Attorney General documented the tangible success of the program:

"The Ontario Native justice of the peace program…encourages and enables native citizens to play an expanded role in judicial proceedings. To date, five full-time and almost 20 part-time Native JPs have been appointed under the program."

This innovative program had two significant outcomes.

1. Eventually, Ontario was served by a good number of excellent Aboriginal justices of the peace.

2. A body of educational materials was developed, together with an approach to teaching not only pre-appointees but also newly appointed justices of the peace. By the mid-1990s, this material and approach became part of the introduction all newly appointed justices of the peace received before assuming full responsibilities for sitting – Aboriginal or otherwise.

Despite Hayes "audacious" move to introduce the Native Justice of the Peace Program, progress was generally slow on the broader education front. Even after the scathing comments delivered by Mewett in his 1981 report, the government was tardy in acting on his call for the situation to be "remedied." Not until 1989 did the government, led by Attorney General Ian Scott, begin to respond – in the form of the *Justices of the Peace Act, 1989*, which created the Co-ordinator position that Lapkin filled in 1990. Ultimately, development of an education plan for the justices of the peace became mandated as a statutory requirement in 2002.

The Native Justice of the Peace Program – "Very Gratifying"

Gerald Lapkin in the 1990s. (Photo courtesy of G. Lapkin)

Gerald Lapkin recalled his involvement with the Native Justice of the Peace Program as follows.

"We took people with absolutely no involvement with or knowledge of the justice system. We invited people who were part of the community – respected by the community, not just "fly-in" people – they were members of the community. We trained them and it was very intensive. And it was very gratifying when they became justices of the peace. The first time I went to swear someone in it was in Attawapiskat. I went up there as much for the community as for the new justice of the peace. Richard Le Sarge said this is a big deal. We rented the

local town hall, and they put on a feast of traditional foods afterwards…. At another swearing in at a remote community, Richard Le Sarge, Stan Jolly, a local judge and I landed at an air strip, three miles from town. Nobody shows up. Finally, Richard flagged down a passing pick-up truck. We sat in the back of the open truck and put on our gowns as we were driving. When we pulled into town, everyone was waiting. The guy who was supposed to pick us up said: 'I thought about picking you guys up, but I didn't want to be late for the swearing in!'"

(Interview of Gerald Lapkin for OCJ History, 2014)

Societal and Judicial Recognition and Acceptance of Adult Education: Judicial Education Becomes a National Priority

Adult education is now an integral part of nearly every professional career. It's easy to forget this is a relatively recent phenomenon. Although people have always learned "on the job" in an informal fashion, continuing formal education aimed at adults in the workplace was rare until the mid-1950s.[65] The history of judicial education in the Ontario Court of Justice mirrors what was happening in broader society.

What began as court-based programming, primarily at the provincial level, slowly became broad-based support for judicial education for all judges in Canada. Several organizations, all born in the 1970s and 1980s, focused on judicial education and had a significant influence on the development of education programming for the Provincial Court. That influence continued well into the 1990s and beyond. These organizations included:

- The Canadian Association of Provincial Court Judges;
- The National Association of Family Court Judges;
- The Canadian Institute for the Administration of Justice; and

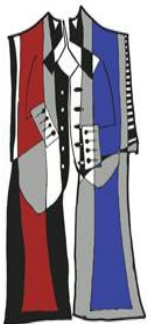
- The Western Judicial Education Centre.

The Origins of Canadian Organizations Devoted to Judicial Education

The work done at each of these organizations influenced the development of the approach taken by the Ontario Provincia Courts – both criminal and family – to judicial education.

- **The Canadian Association of Provincial Court Judges (CAPCJ)**

  On May 4, 1973, under the leadership of Magistrate Lloyd Hicks from Newfoundland and with financial support from the federal government, CAPCJ was formed. This federation of provincial and territorial judges' associations grew to include most of the thousand-plus provincial and territorial judges in Canada. One of its aims and objectives was: "To enlarge and perfect the knowledge and understanding of Provincial and Territorial Court Judges of the judicial function, by meaningful research and continuing education in various aspects of the law."



CAPCJ logo

Sandra Oxner, then a judge of the Provincial Court of Nova Scotia, was CAPCJ's first education chair ("The only reason I was given education to do was that nobody wanted it.") and became its president. In addition to instituting regional seminars, she led the development of the first course for newly appointed judges in Kingston, Ontario in November 1976; a ten-day program, ultimately shortened to a week. It was the first such program in Canada and remains an essential introduction to the work of provincial and territorial court judges.

At the time of the introduction of the new program, Ontario's Criminal Court judges had joined CAPCJ but the Family Court judges had not. However, Ontario Family Court judge, George Thomson, developed the family law programming at this historic first course for new judges in Canada.

CAPCJ holds a national annual conference that includes a substantial education program. Many

Ontario Court of Justice judges have taken leadership roles in developing educational programming for CAPCJ. (Source: Interview of S. Oxner for OCJ History Project, 2014.)

- **The National Association of Family Court Judges**

  Chief Judge of the Provincial Court (Family Division), Ted Andrews, was eager to create an association of Family Court judges across Canada to build support for these courts, promote judicial education for its judges and to advocate for a Unified Family Court. With a federal grant, he organized the first meeting of the association and it promoted family law education programming over the next decade. Ontario Family Court judges resisted joining CAPCJ until steps were taken in the 1980s to reassure them that CAPCJ would accommodate a focus on family law in its programming.

- **The Canadian Institute for the Administration of Justice (CIAJ)**

  In 1974, the CIAJ was formed as a multi-disciplinary organization to link individuals and organizations active in the administration of justice. Judicial education was one of its mandates and when the federal judiciary was initially resistant, the organization turned to the provincial courts and joined with CAPCJ to develop its first regional and new judges' programming. Later, CIAJ developed the first program for newly-appointed superior court judges and, perhaps most important, introduced the first skills-based education program for judges in Canada, with its now long-running program on judgment writing. The CIAJ has worked with the National Judicial Institute on many programs, including a seminar for longer-serving judges.

- **The Western Judicial Education Centre (WJEC)**

WJEC was a later entry into the field but an important initiative at the provincial court level, led by Judge Douglas Campbell of the Provincial Court of British Columbia. It was the first judicial education program to concentrate on social context education for judges, using innovative, experiential programming and involving those from the community who brought special experience and expertise to the programs offered. It worked closely with the Provincial Courts in the delivery of social context education in 1991.

Over the years, these organizations co-operated in various combinations to develop and deliver many different education programs in partnership. This focus on judicial education culminated in the formation of the National Judicial Institute (NJI) in 1988, with the strong support of the then-Chief Justice of Canada, Brian Dickson. The NJI was founded with modest financial support from the federal government and many of the provinces, including Ontario. From its inception, two provincial court representatives have sat on the NJI Board of Directors, one from the Council of Chief Judges and one identified in consultation with Canadian Association of Provincial Court Judges. Chief Judge Hayes was one of the first board members. He was followed in that position by Judge Charles Scullion. Although there was a desire to serve all courts in Canada, little early programming was offered that provincial court judges could or did attend. Although the method of securing funds for new courses guaranteed that the NJI initially almost exclusively served federally appointed superior court judges, that emphasis was to change – and another transformation was set to begin for judicial education in Ontario.

The Transformation Takes Root: From 1990 Onward

"The legislation…will require the Chief Judge to establish a plan for judicial education. These reforms will give the Ontario judiciary additional tools to continue their professional development and to maintain their high professional standards. This will help to ensure that Ontario's justice system remains one of the finest in the world."[66]

These are the words of Attorney General Marion Boyd when introducing the *Courts of Justice Statute Law Amendment Act, 1993* on July 7, 1993. The justices of the peace would see a similar commitment to formal education in 2002, when the *Justices of the Peace Act* was similarly amended to provide a requirement for a plan for the continuing education of justices of the peace.[67]

These legislative changes were but one aspect of a transformation in judicial education. The amendments to the *Courts of Justice Act* did not stand alone. They were accompanied by a radical set of new tools guaranteeing formal education programming for all Provincial Court judges. Those tools included – among other provisions – new funding arrangements with the provincial government and new partnerships with various judicial education organizations, including CAPCJ, WJEC and NJI.

Education for Judges

Creation of the New Court

Work to improve the continuing education program was under way in the early 1990s when the family and criminal divisions of the Provincial Court became a single court: the Ontario Court (Provincial Division).[68] Sidney Linden was appointed the first Chief Judge of that newly constituted Court and very quickly learned that the Court had very little control over the realm of education.

"Just after my appointment, I heard about a French language training program that was taking place in Quebec. I read the material for the program and decided that it would be a great program for our judges, very practical stuff. I wanted to send several of our bilingual judges to attend the program and I assumed that this was just a matter of informing the Ministry and our judges would be off and on their way. How wrong I was! I received a call from the deputy minister and I can still hear him saying: 'Oh, no, no, no. We can't send your judges off to Quebec. It can't be done. It's far too extravagant and you have no budget for that. We might be able to afford to send one judge, but that's it. And by the way, that decision is not yours to make, it's ours.' Of course he meant that it was the Ministry's decision. I hung up the phone and asked myself: 'Am I the Chief Judge of this Court or is the deputy minister?' The answer was clear – at that point in time, the deputy minister was in charge." [69]

Determined to rectify this situation, Linden approached the provincial government and suggested the creation of a memorandum of understanding between the Court and the Ministry of the Attorney General. This was the first of several such memoranda the Court signed with various parties and which served to enunciate the Court's approach to education (along with many other Court-related issues.)

An Innovative Experience: Gender Equity Education, 1990-1991

From the time of his appointment to the bench in 1986, former Chief Justice Brian Lennox was involved with education programming. As he describes it, the approach to education – particularly for criminal judges – began to shift dramatically in the early 1990s, when the Court began working with the Western Judicial Education Centre (WJEC).

"The Provincial Court (Criminal Division) had been pretty complacent about its education programming, based on the assumption that we were the biggest and best criminal court in Canada and accordingly must have the best education programming. The complacency that arose from that assumption was

shattered by the Court's work with WJEC on Gender Equity in 1990 and 1991. The preparation for the program was meticulous, the materials (research, documentation, videos) were something we had never seen. The concept of training the trainers was entirely new for us and the extensive collaboration with academics, experts and the community was unprecedented. Without criticizing those who had gone before within the Court (and who often lacked the training, time, experience and resources), it became obvious that truly valuable judicial education required far more time and resources than we had ever been able to put into it."

As former Chief Justice Sidney Linden recalled, this gender equity education arrived at a particularly important moment in the Court's history. "It was the first time we put our toes into social context education and it was also the time when the Ontario Judicial Council had received complaints about the conduct of Judge Walter Hryciuk." These complaints involved Hryciuk's alleged sexual assault and harassment of female Crown Attorneys and court staff. (Hryciuk was ordered removed from the bench in 1993 after an Ontario Judicial Council Inquiry into the sexual misconduct allegations, but was later vindicated in 1996 by the Ontario Court of Appeal after it ruled the Inquiry judge unfairly allowed new misconduct complaints to be added to the Inquiry. Hyrciuk did not return to the bench following the Inquiry and retired in 1998.)

"When I saw what WJEC was doing with gender equity education, I came back and said 'We have to do this in Ontario.' At that time, our Court did not have control over our own education budget and I persuaded the Ministry of the Attorney General to give us the money to offer this critical program. I was so proud that we could deliver this high quality of education," recalled Linden.

The experience of working with WJEC made the Court rethink the educational programming as a whole. It also helps explain the later decision to form a closer relationship with the NJI once that organization

embraced this method of designing and developing skills-based, experiential education.

(Sources: Interviews of Brian W. Lennox for OCJ History Project, 2014-15; Interviews of S. Linden for OCJ History Project, 2014-15; David Wake and Brian W. Lennox, "The Ontario Court of Justice: A Journey in Education," *National Judicial Institute: 20th Anniversary Essays,* p. 41)

Impact of the Memorandum of Understanding Between the Court and the Ministry of the Attorney General

The memorandum of understanding between the Court and the Ministry, first signed in 1993, transferred to the Chief Justice's office both the budget and responsibility for the content of judicial education for judges and justices of the peace. More than that, it transferred funding for a number of other functions and provided the Chief Justice with enough flexibility in the Court's budget to enable the Court to identify and prioritize areas of particular importance.

Requirement for a Continuing Education Plan for Judges – *Courts of Justice Act*

This provision was introduced into the *Courts of Justice Act* in 1994 – a formal recognition of the necessity of continuing education for provincial judges in Ontario.

51.10 (1) The Chief Justice of the Ontario Court of Justice shall establish a plan for the continuing education of provincial judges, and shall implement the plan when it has been reviewed and approved by the Judicial Council.

Duty of Chief Justice

(2) The Chief Justice shall ensure that the plan for continuing education is made available to the public, in English and French, when it has been approved by the Judicial Council.

Goals

(3) Continuing education of judges has the following goals:

1. Maintaining and developing professional competence.

2. Maintaining and developing social awareness.

3. Encouraging personal growth.

A New Governance Model and Another Memorandum of Understanding

Chief Judge Linden's first task was to develop a governance model that balanced the obligation placed on the Chief's office with the established role of the two associations of judges – the Ontario Provincial Judges Association (Criminal Division) and the Ontario Family Law Judges Association – and ensured their support for the memorandum of understanding as a whole. (These two associations merged in May 1999 to become the Ontario Conference of Judges.) To accomplish this, a separate memorandum of understanding was developed with the two associations and, subsequently, the Ontario Conference of Judges. This document served to rationalize the education program for the Court and reaffirm the important role of the Conference in developing the regional and annual meetings and determining the content of the core education programming.

Creation of the Education Secretariat

The memorandum of understanding between the associations also formally recognized the creation of the Education Secretariat – "a body responsible for overall education policy and funding associated with judicial training" for the Court.[70]

Two former chairs of the Education Secretariat – former Chief Justice Brian Lennox and former Associate Chief Justice David Wake – provided a concise history of the development of the Secretariat over its life.

The "body included representatives from both judges' associations (family law and criminal law)….Initial discussions at the Secretariat were related to the timing of judicial education programs and general curriculum issues, but quickly became more substantive….The mandate of the Secretariat was to coordinate education policy and programming for the whole Court, and it became increasingly active in programming."[71]

The role of the Secretariat was further explained by Linden in 1999 as follows. "It administers an annual budget for education and allocates that budget among education programs which are either organized by the associations for the judges of the Court or otherwise offered to the judges. Core education programs are developed and presented by the judges' associations."[72] Further, it was the responsibility of the Education Secretariat to maintain the statutorily mandated education plan.

What is "Core" Education for the Judges?

The programs presented by the Education Secretariat and the Ontario Conference of Judges constitute the Core Program of the Ontario Court of Justice education curriculum. The Ontario Conference of Judges selects a chair of criminal law education and a chair of family law education. The two chairs in turn may create a support committee to advise and assist them in putting together the core education programs. Part of the core programming is offered annually and part of it is presented "as needed."

1) Annual Core Programs

Seven family and criminal programs are presented each year with a changing curriculum to reflect the educational needs of the Court. These courses are open to every criminal and family

judge in accordance with their area of practice.

2) "As Needed" Recurring Programs

These are programs presented annually or biannually with limited enrolment. They fulfil a variety of education needs such as the development of judicial skills and leadership and social context training. Examples of these "as needed" programs have included programming on the following topics:

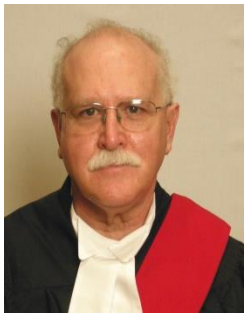
- Social context,
- Judicial leadership and administration,
- Communication skills,
- Computer training, and
- Preparation for retirement.

For further details, see the Ontario Court of Justice, "Continuing Education Plan" published on the Ontario Court of Justice website and attached as an appendix to this essay.

According to Justice David Wake, who chaired the Secretariat from 1999 to 2005, it has faced a number of challenges over the years, including: continuing uncertainty about the different roles of the Conference and the Office of the Chief Justice; concern about possible erosion to the core programs; lack of coordination between the different programs; and the ongoing worry of the family law judges that their unique programming needs might be lost as their numbers declined with the expansion of the Unified Family Court.[73] The Secretariat has struggled with long-term planning. However, it has also overseen a remarkable expansion in continuing education that has benefitted not only the Court itself

but also affected the quality of education available to provincial court judges across Canada – as a consequence of having shared many of its resources with other provincial courts over the years.

The Court's University Program, 1998-2006



Justice Elliott Allen

Justice Elliott Allen served as the leader of the Court's University Program, originally established by Fred Hayes, Chief Judge of the Provincial Court (Criminal Division) in the 1970s. These are his reminiscences of volunteering on this program from 1998 until its end in 2006.

As a 1991 appointee to the Court, I never had the opportunity to attend the original University Program which had been established in the 1970s for criminal judges by former Chief Judge Fred Hayes. I got involved in judicial education around 1995 and, in 1998, was asked to run a week-long session at the Windermere facility on the north edge of the Western campus in London. This version of the University Program had been designed for the judges of our Court by Justice Don Fraser, and Professors Allan Manson, Don Stuart and Ron Delisle (all from Queen's Law School), among others under the direction of then Associate Chief Justice Brian Lennox. Its focus was criminal law – and the thought was that all criminal law judges would attend at some point during their careers on the bench. Justice Greg Pockele was the "site convenor." The Court's research counsel, Allen Edgar, was a perennial presenter and resource.

The new program reflected the "disciplined" approach to program design being promoted by the National Judicial Institute, and included social context education, which followed on the heels of the gender equity and "Court in the Inclusive Society" programs earlier in the decade.

Before going any further, I must recognize the huge contribution to the program by Professor Allan Manson. He presented every year I was involved with the program. He recruited speakers, most notably the brilliant and dependable Professor Dale Ives from Western University. Manson always had a lecture

in his back pocket to fill in if the scheduled speaker didn't show. He was one of the main reasons the program became a bit of a salon for academics, with the discussions at mealtimes being as educational as the classes.

The program ran from Monday morning to Friday lunch, with Wednesday afternoon off. There were generally between two and three dozen judges in attendance each year. We had a fabulous bright room for the sessions, with windows and glass doors the full length on both sides.

To give you an idea of the types of presentations we heard: the opening session on June 8, 1998, was delivered by Professor Stuart on the law concerning the rape shield and honest belief. We went on to deal with domestic violence, and C*harter* issues, evidence and sentencing issues. That was followed by a presentation by Professor Connie Backhouse on the role of race, class and gender in the history of our criminal law. That year, Justices Sally Marin, Jim Blacklock, Saul Nosanchuk, Paul Megginson, Gilles Renaud and Greg Pockele assisted with presentations, a practice of peer-led education that continued throughout the life of the program.

The University Program evolved over the years. Some things worked better than others, and the program had to be completely new every three years. The practice was that judges were offered the opportunity to attend every three years – so that meant a rework of the program on a three-year cycle. We attempted to respond to the needs of the bench by including current issues in social context education as well as black letter law. Presenters included notable academics, judges and practitioners from across Ontario and Canada. They included Professors Julian Roberts, Lorne Sossin, Lee Stuesser, Tony Doob, Justices Gary Trotter, Patrick Healy, the beloved Marc Rosenberg and many others.

Professors Scot Wortley and David Tanovich presented on racial profiling. A pre-appointment Diane Oleskiw (now a member of our Court) achieved a huge "aha" moment for the group on the admissibility of third party records. Dale Ives, in the first of many presentations precipitated one of the hottest

debates ever with an aside about how she didn't have much use for the right to silence. Jim Blacklock was in his element listening to Professor Richard Devlin tell us why we should study jurisprudence. Professor Alan Leschied told us about the actual outcomes of our youth sentencing practices.

I can't begin to cover the vast array of sessions and presenters who made the University Program what it was. Most of the criminal law bench attended, some at every opportunity. The program functioned as a "working conversation," with full participation of all those present in the sessions and in small problem-solving breakout groups.

I was blessed with a free hand to modify the program on an ongoing basis. I became friends with some of the great criminal law thinkers of our time. It was an education volunteer's dream. When I later took up teaching at the University of Guelph, all five authors of the textbook I used in my course on sentencing had previously presented at the University Program.

While I worked with a free hand, I recognized that I was building on a long tradition. From the 1970s onwards, the University Program was continued and improved under a series of different judges of the Court, including Judges Cy Perkins, Russell Merredew and Douglas Walker. Judge Brian Lennox was given responsibility for the University Program by Chief Judge Hayes in 1988. I took over from then Associate Chief Judge Lennox in 1998 and worked with Associate Chief Justice David Wake after 1999.

Following the 2006 session, the program was put on hold as the Court under then ACJ Annemarie Bonkalo began offering the opportunity to increasing numbers of judges to attend a new "Judges to Jail" program, designed to introduce judges to the corrections system. "Judges to Jail" was presented in the time slot customarily reserved for the University Program and was also university based, with the venue switching to Kingston and Queen's University. Regrettably, for reasons having largely to do with the changing demographic of the bench and the increasing opportunities to attend the "Judges to Jail" series, the University Program ended.

The University Program, which Hayes created and cultivated, served the criminal law judges well over its lifetime. In the process of evolution from the judicial education programming of the 1970s onwards, the University Program operated as an essential transition point and a proving ground for the dynamic, experiential judicial education of the modern Court.

I will close with a memory of our very last session on June 16, 2006. Justice Tom Cromwell was still on the Nova Scotia Court of Appeal – he has since moved to the Supreme Court of Canada. I had no need to introduce him before he presented on the law of hearsay evidence and on the expression of findings of credibility, because he greeted everyone at the meeting room door, introducing himself to those he hadn't met at the barbeque the night before in his customary humble and engaging manner. We hung on his every word – and learned.

We had a good run.

Groundwork is Laid for Strong, Consistent Support for Judicial Education

With the establishment of the Education Secretariat and the requirement for an education plan, the stage was set for a more coordinated approach to formal education – and that is what occurred. While it was modifying its own educational structure, the Court began to work – tentatively – with the NJI.

Involvement of the National Judicial Institute

In the early 2000s, the NJI began to expand its curriculum significantly. It continued an important new focus on social context education while moving to a model of education emphasizing experiential, skills-based learning. To make NJI seminars and materials accessible to provincial court judges, attendance at NJI programs was opened to provincial court judges who would pay only their expenses and a fee to

cover the added costs for materials and food at the program. In addition, the NJI made its course materials and other resources freely available for use in court-based programming. Provincial judges were given access to the new, online courses and they became the most active students in these courses.

All of these developments encouraged the Court to formalize its relationship with the NJI – with another memorandum of understanding, signed in 2000 – and the NJI began providing substantive, pedagogic and logistical support. The key to the involvement of the National Judicial Institute was that the Court and its judges retained control over education and programming, while the NJI served in a significant advisory capacity.[74]

An NJI Senior Advisor (a lawyer who is also an education professional) was assigned the task of making the partnership work. The involvement of a Senior Advisor in the conception, design, development and presentation of programs has been critical to the evolution of judicial education within the Court. In consequence, the Ontario Court of Justice has had full access to the educational expertise of the NJI while, at the same time, the judges of the Court retain overall control and direction of their programming.[75] The education remains "judge-led" and those judicial education leaders are knowledgeable and given support to plan and design courses that reflect adult education principles.

The Court Builds an Expanded, Innovative Curriculum for Judges

Over the years, dozens of Ontario Court of Justice judges have taken leadership roles in developing education, and many others have served as instructors and facilitators. In addition to the judges who have served as criminal and family education directors, many have also served as education chairs at the four regional seminars presented annually and in the various family law programs. This approach of judge-led and judging-focused education recognizes two important dimensions of judicial education: the

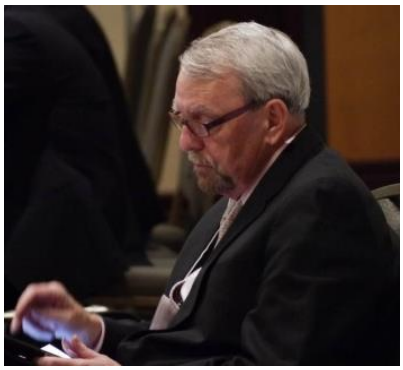
need to ensure that programs are relevant and responsive to judicial experience, and the need to preserve judicial independence.

At the regional level, with NJI support, the regional education chairs have developed innovative new modules on criminal law topics as varied as racial profiling, expert evidence, conditional sentences, human trafficking, and evidence in an electronic world. In the family law realm, topics have included interviewing children and assessing their credibility, cultural fluency in family court, evidentiary issues in family and child protection cases, adoption, and jurisdictional issues in custody cases.

This sampling of courses illustrates the organized approach taken to curriculum development. Subjects and themes focus on the content of judging (e.g., substantive law), the craft of judging (e.g., judicial skills), and the context of judging (e.g., judicial ethics, racial profiling).

Programming for Judicial Administrators

A new set of courses was introduced to the curriculum as a result of the signing of the Memorandum of Understanding with the Ministry of the Attorney General in 1993. "One of the consequences of signing the initial MOU," recalled former ACJ Peter Griffiths, "was that, for the first time, we became responsible for the administration of our workplace. Over time, we came to understand that our responsibilities included a wide variety of administrative issues, such as human resources for the care and support of our judiciary, fiscal responsibility for a multi-million dollar budget, and responsibility for the development and dissemination of policy to bring uniformity in the manner that justice is administered. Added to these responsibilities, since the 1990s, judges have assumed new



Justice Peter Griffiths served as the Associate Chief Justice of the Court from 2007 to2013. In that position, he served as the Chair of the Court's Education Secretariat. (Photo courtesy of C. Mews)

and larger roles in case management in keeping with the recognition of their judicial independence for scheduling matters in the Court. These new and important roles for judges also required new education programs to assist our existing and future judicial administrators."

"We knew what we had to do when the MOU arrived on the scene in the early 1990s, but we didn't know how to do it. As judges – and not professional administrators – we lacked the tools and expertise to perform the now necessary tasks. It was in light of these changes that the Court developed the first provincial education course for administrative judges. This program is now an integral element of the curriculum and is delivered bi-annually.

"The course has grown from a series of lectures to a skills-based program covering subjects like the importance of leadership, the use of court statistics for case management, time management tips, dealing with challenging people, and ways of working collaboratively. Given the relatively new position of the 'administrative judge' in courts in Canada, the Court's program has drawn attention from other provincial courts and is now widely attended by senior administrative judges from other provinces. It now provides a forum not only for educating our administrative judges, but also sharing approaches to common problems with other judges from across the country," explained Griffiths. Griffiths, in his role as Associate Chief Justice, served as Chair of the Education Secretariat from 2005 until 2013.

The Introduction of "As Needed" Programs

This creativity in programming has extended well beyond the annual core courses, with the Secretariat having approved several new "as needed" programs.

Since securing overall management of its budget, the Court has been able to increase the annual education allocation from approximately $750,000 each year to more than $1million. The Continuing Education Plan "provides each judge with an opportunity of having approximately 10 days of continuing

education per calendar year dealing with a wide variety of topics."[76] According to David Wake, in certain years, judges could select from more than 50 days of judicial education delivered by the Court itself. Judges could attend the programs that most directly met their specific learning needs. In addition, the education budget is also tapped to assist individual judges wishing to attend important education programs offered by other judicial education organizations, including the Canadian Association of Provincial Court Judges, the International Association of Women Judges, the Advocates' Society, the Association for Family Court Mediation, the Cambridge Lectures (offered by the Canadian Institute of Advanced Legal Studies), Osgoode Professional Development, and the NJI – to name a few. [77]

Former ACJ Griffiths noted that, since the early 2000s, an important shift occurred in the philosophy of educating the Court's judges. Previously, virtually the entire education budget had been spent on the core education programs and the University Program offered by the Court to its own judges. "Judges are now encouraged to seek out programs beyond the core programs that meet their individual needs. The budget for attending 'outside' education has increased more than fivefold in the past couple of decades," he explained. Attendance at these outside courses has many benefits, including exposing the Court's judges to new and innovative ideas – and bringing back many of those ideas to the Court's own programming.

"As needed" new courses, many developed with the NJI, included: the first course in Canada designed to teach judges communication skills; a judgment writing course; the first child protection program; courses on managing domestic violence cases; special programs to teach leadership and management skills to judges assuming the administrative roles within the Court; and a "family law primer" for Criminal Court judges who periodically sit in Family Court. According to Brian Lennox, "many of these programs were seen as truly innovative within the judicial community and have gone on to form the

basis of education programs presented by other courts, national and international, and other judicial education organizations."[78]

An "as needed" course that has since become a staple for provincial courts across Canada is the Newly Appointed Provincial and Territorial Judges Skills Seminar, originally developed by the Court in partnership with the NJI and CAPCJ. Designed to complement the substantive law program presented to new appointees by CAPCJ, the Skills Seminar develops and enhances skills in a variety of areas, including delivering oral judgments, managing lawyers and lawyer conflict, dealing with self-represented litigants and recognizing ethical challenges that can arise in court.

One of the most creative courses, "Judges to Jail," developed under the leadership of Justices Inger Hansen[79] and David Cole, enabled judges to learn about and be exposed to correctional institutions.

The Story of the "Judges to Jails" Program

As an example of how educational programs come into existence at the Court – and how judge-led education works in practical terms – Justice David Cole, one of the designers of this program, recounts how it came into being:

"Prior to my appointment to the Ontario Court of Justice (Provincial Division) in 1991, much of my 17-year practice as defence counsel involved litigating issues related both to sentencing and to what might loosely be termed 'prisoners' and parolees' rights.' From this work I had learned that Canadian judges at all levels of courts are largely unfamiliar with what happens once sentence is imposed; indeed, I usually found myself quite disappointed with some of the myths and urban legends that too often inform judicial decision-making. Either judges had never visited penal institutions, or their experience was so far in the past that it was simply irrelevant to comprehending the complexities of contemporary understandings of human rights in prisons and penitentiaries.

Inger Hansen (Photo: Chuck Mitchell, Canadian Press)

A few months after my appointment I approached Chief Judge Linden and Associate Chief Judge Lennox with a plan to take judges to visit federal and provincial institutions in the Kingston area. Both were immediately enthusiastic and supportive. After some discussions, it was decided that the first program, which took place in November 1991, would be administered by the National Judicial Institute. That way both federal and provincial judges would be able to attend, and the feasibility of the developing this into a more permanent program could be evaluated.

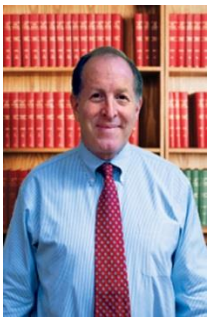
David Cole (Photo: Phil Brown for Criminal Lawyers' Association)

Though the program has gone through several iterations over the years, the basic template was set in the first program. Over approximately a week, small groups of 15 to 25 judges would visit a variety of prisons and penitentiaries, from maximum security Millhaven to the Napanee Detention Centre, to the Prison for Women, and to halfway houses. Inside the institutions they would meet with custodial and treatment staff, as well as prisoners. These visits would be supplemented by lectures and panels on several topics, including 'What a Difference a Day Makes' (what factors should a judge consider when contemplating a sentence in the two year range), what to think about in terms of realistic expectations about when and how much rehabilitative programming a prisoner would (and would not get) while incarcerated, discussing and observing the work of the National Parole Board, and listening to former prisoners, mostly lifers, tell judges about what it is like to live in the community after many years "inside". Above all, organizers asked staff and prisoners to be candid, and we asked judges to keep an open mind. The aim of these programs is not to persuade judges to impose more lenient (or harsher) sentences, but rather to come away with a better understanding of what happens once the prisoner is shackled and removed from one's courtroom.

Participants continually rate the program in very positive terms, many suggesting that it should be mandatory for judges, and that it should be taken early in the judicial career. Since 2007, the program has been offered every other year, and it is expected that this will continue to be the pattern for Ontario judges.

(Interview of David Cole for OCJ History Project , 2015)

Assessing the Educational Needs of the Bench



Nicholas Bala

In addition to preparing the "Bala Report, " Professor Bala who teaches at Queen's Law School, often served as a faculty member at various OCJ conferences. The Court has regularly invited law professors from across Canada to participate in the delivery of its programs. (Photo courtesy of N. Bala)

The Education Secretariat is responsible for monitoring the educational offerings available to ensure these meet the needs of the judges. Several initiatives have been undertaken, including:

- The "Kirby Report": In 1997, David Kirby delivered a report entitled "Continuing Education Needs of the Ontario Court of Justice (Provincial Court).

David Paciocco (Photo: Ottawa Citizen)

- The "Paciocco Report": Professor David Paciocco (now a judge of this Court) was retained by the Court to design a multi-year criminal law training program for judges. His report, "Ontario Court of Justice (Provincial Division): Long Range Education Plan (Criminal and Youth) was delivered in July 1998. According to Brian Lennox, "although the program was never fully implemented, elements of it proved extremely useful in subsequent programs and the plan itself demonstrated the potential benefits of integrated planning."[80]

- The "Bala Report": Professor Nicholas Bala prepared a paper in 1998 for the Ontario Association of Family Law Judges that spoke to the ongoing need for long-range planning for the education of family law judges.

- A comprehensive survey of all criminal law judges: This survey was undertaken in 2003 to identify areas requiring greater emphasis in the Court's educational programming. Justice Katherine McLeod, who served as criminal law Education Chair at the time of this survey, recalled that "the educators learned from the judges themselves what the judges needed to learn and the information we gathered from that survey formed the backbone of the content of future conferences."[81]

Where Do Those Teaching Skills Come From?

Katherine Mcleod

"I knew nothing about the structure of education in our Court and, frankly, nothing about educating judges when I became the criminal law Education Chair of the Court in 2001," stated Justice Katherine McLeod. "And I learned very quickly that planning education programs for judges requires specialized knowledge about adult education principles, and a huge commitment of time and a large learning curve. I learned a lot in the five years I worked as an Education Chair – I went to NJI workshops designed for judicial educators, I listened to and learned from more experienced judges on the Court, and I watched how the staff at NJI designed and developed programming."

"Judicial education in Canada is judge-led," explained McLeod. "That places a big responsibility on the Education Chairs of the Court – and other judges involved in education programming – to learn the skills they need to design and develop programming.

Rick Libman presenting at a justice of the peace conference. In addition to the design of programs being judge-led, the Court's education programs are often delivered by judges, serving as faculty members. Libman has regularly lectured the justices of the peace on provincial offences matters, an area in which he has an expertise as co-author of *Handling Provincial Offence Cases in Ontario – 2013*. (Photo courtesy of C. Mews).

Judges and justices of the peace in the Ontario Court of Justice undertake a number of education roles:

- presenters and facilitators,
- course planners, and
- education leaders as Education Chairs and members of various Court committees.

Judges of the Court can attend a "Judicial Education Leadership" seminar provided every two years for provincial and territorial judges offered by the NJI and the Canadian Association of Provincial Court Judges. For justices of the peace, the Court offers a similar program every two years – focusing on adult learning principles, experiential learning, program design and planning skills.

(Source: Interview of Katherine McLeod for OCJ History Project, 2015)

A Panel Discussion at a Justice of the Peace Fall Conference in 2009. Panel discussions are often used in the Court's education programming. Depending on the topic presented, panel members can include a wide variety of participants. In addition to members of the Court, panelists can include judges from courts other than the Ontario Court of Justice, academics, lawyers, and experts from various professions. Care is taken in assembling these panels to balance the perspectives amongst the panellists. (Photo courtesy of C. Mews).

Other Judicial Education Resources

In addition to in-person educational programming, a variety of other resources are provided to judges and justices of the peace of the Ontario Court of Justice, many reflecting the Court's commitment to informal learning.

- **E-Learning:** Judges now have access to remote learning computer-based online courses prepared and hosted by the NJI covering substantive law issues such as unlawful detention, mental health, and evidence, offered regularly each year.
- **Educational Materials and Resources:** The Centre for Judicial Research and Education (CJRE), created in 1991, is a law library and computer research facility located in the Office of the Chief Justice in Toronto. Staffed by six research lawyers and three assistants, it is accessible in person,

by telephone, e-mail or fax. Staff at CJRE responds to specific requests from the judiciary for research assistance and provides bi-weekly updates with respect to legislation and relevant case law through its electronic publication, *Items of Interest*. Since 2000, *Items of Interest* has combined updates on criminal, family and justice of the peace matters – and has been distributed via email to all judicial officers of the Court.

As Brian Lennox recalled, "We tend to forget how much the format of judicial education has changed over the years. We forget the inadequacies of communications before the advent of the instant communication offered by, first, the fax machine and later e-mail. The ease of communication today obscures the difficulties of an earlier era. When Fred Hayes was Chief Judge, the only practical way of providing any kind of formal learning was to bring judges and justices of the peace together. Modern communications have largely freed judicial educators from the necessity of emphasizing substantive law – much of that can now be provided electronically – and have allowed us to deal more directly with skills and context education – a luxury the Court did not have until the 1990s."

An example of the utilization of modern communications? Under the leadership of Education Secretariat chair, then-Associate Chief Justice Lise Maisonneuve, the Education Secretariat piloted "Judge Talks" – the Court's version of TEDTalks, based on lectures provided at the Court's in-person educational programming. Maisonneuve served as Associate Chief Justice from 2013 until 2015, then becoming Chief Justice of the Ontario Court of Justice.

Sharing the Wealth: The Ontario Court of Justice Shares Programming Internationally

The reputation of the judges of the Ontario Court of Justice has extended into the international arena. Over the years, many have been invited to address international conferences and volunteer on the

boards of international organizations.

The judges involved with problem-solving courts have been particularly active. Justices Ted Ormston and Richard Schneider, pioneers in the Mental Health Courts, have been frequent lecturers at international programs concerning mental health issues. Justice Kofi Barnes, previously a judge of this Court and who is now a Superior Court judge, was an active educator for the Organization of American States on the topic of his involvement with Drug Treatment Courts.

Ted Ormston in 1990 (Photo courtesy of S. Linden)

Justice Petra Newton has served on the board of directors of the International Association of Women Judges. Peter Griffiths worked with the Canadian Bar Association on judicial reform projects in Jamaica.

Justice Petra Newton in 1990 (Photo courtesy of S. Linden)

The Court's judges have become active educators at the international level as part of NJI education projects in other countries. Examples include: Justices Katherine McLeod and Brian Lennox in Mexico, Justice Joe Bovard in Peru and Chile, and Justice Miriam Bloomenfeld in Chile and Ukraine. These efforts are often built on the reputation of this Court for employing "judicial best practices" and the education offered internationally is seen as critical to the development of an impartial, competent, efficient and effective judiciary.

Judicial Education to Achieve Other Objectives: A Sanction for Judicial Misconduct

The *Courts of Justice Act* permits the Judicial Council to require attendance at judicial education programming as a response to judicial misconduct. If the Council finds that there has been misconduct

by a judge, it can order a variety of dispositions, one of which is an order that the judge take specific measures, such as receiving education, as a condition of continuing to sit as a judge.

(Ontario Judicial Council, "Eighteenth Annual Report", 2012-2013, pp. 13-14)

Mentoring for Judges and Justices of the Peace

The Continuing Education Plan states: "The fundamental education of judges continues to be self-directed and is effected in large part through continuing peer discussions and individual reading and research." This culture traces its way back to the beginnings of this Court – but has been promoted within the Court by many people, particularly by former Chief Justice Annemarie Bonkalo.

"I saw my work in this area as a formalization of 'going down the hall to talk to a colleague,'" explained Bonkalo. Since the inception of the Court, new judges and justices of the peace have "shadowed" more experienced colleagues. Bonkalo's work served to formalize mentoring.

In her early days as a judge, Bonkalo had prepared a "benchbook" bringing together key items, including cases and legislation, she would need to use while presiding. She began receiving many requests for copies of her benchbook, which she was happy to share. "In the courthouses in which I sat, there was always a culture of cooperation and generosity with both materials and one's time," she explained.

In her discussions with judges requesting her benchbook, she came to realize that her colleagues had both professional and personal questions about being a judge – and that it would serve all to have a couple of peers they could speak with on a regular basis: one in their courthouse and one from a different courthouse. In the early 2000s, she prepared a handbook for judicial mentors and mentees, which was distributed to all judges.

A more formalized approach to mentoring was adopted by the justice of the peace bench. Unlike judges, all of whom come to the bench with a significant legal background, the majority of justices of the peace are not lawyers – and the justice system is often a completely new working environment for them. Thus, the mentoring program is considered by the Court to be an integral part of the education offered to new appointees to this lay bench.

In 2011, a Provincial Mentoring Coordinators' Committee was created to offer support and guidance to all mentors and mentees, and the mentoring program itself. The goal is to match mentors and mentees and ensure that every new justice of the peace has observed, understood and is able to put into practice the principles, skills and procedures he or she learned during the in-person sessions new justices of the peace attend in their first year following appointment.

(Ontario Court of Justice, "Justice of the Peace Education Plan," April 2013; Interviews of Annemarie Bonkalo for OCJ History Project, 2014-5; Ontario Court of Justice, "Guidance on Mentoring for Justices of the Peace.")

The Court's Administrative Support for Judicial Education

Given the demands of the job, it was understood that judges and justices of the peace could not devote sufficient time to adequately organize the administrative details of their conferences and educational programs. Thus, the Office of the Chief Justice created "a unique feature of the Ontario Court of Justice" as described by former Chief Justice Brian Lennox.

He refers to a group of judicial education and training assistants (JETAs) who organize the administrative and logistical details for the educational programs, seminars, workshops and conferences held

throughout Ontario; and produce all the materials required for these sessions.

Lennox further emphasizes the imperative to viably sustain the educational efforts. "Most courts do not have the resources to do this or do not see its importance. To quote former Chief Justice Sidney Linden: 'It is not the big things that go right that people remember, it is the little things that go wrong.' The JETAs ensure that all is right with our educational programming."

(Source: Interviews with Brian W. Lennox for OCJ History Project, 2014-15)

Education for Justices of the Peace

"Formal education for the justice of the peace bench is essential for the judicial system to perform and uphold public trust and confidence in the judicial system."

Educational Sessions and Workshops Offered to Justices of the Peace

A panel discussion offered at a justice of the peace conference in 2008. During this session, panellists shared their perspectives on the impact residential schools had on Aboriginal communities.

While this session was offered to all the justices of the peace in Ontario, the Court also annually delivers a Native Workshop to which all Native justices of the peace are invited. The Native workshops focus on a mix of substantive legal issues and other non-legal issues relevant to Native justices of the peace. Three days in length, it is usually held in northern Ontario.

Faculty for these workshops have included judges, justices of the peace, counsel from the Crown Law Office – Criminal and the Crown Law Office – Civil as well as other lawyers in the Ministry of the Attorney General, lawyers in private practice, and representatives of various Aboriginal organizations.

Specific topics covered at recent Native workshops include search and seizure; bail; private prosecutions; avoiding conflicts in small communities; and Aboriginal rights of Métis.

(Source: National Judicial Institute, *Judicial Education Guides,* 2009, p. 25. Photo courtesy: C. Mews)

These are the introductory words of the Justice of the Peace Education Plan, April 2013. This plan has been statutorily mandated since 2002.[82] Education for the justices of the peace has undergone a radical transformation since 1981, when Professor Mewett wrote so angrily about its "appalling" condition.

Since the inception of the Ontario Court of Justice (Provincial Division) in 1990, justice of the peace education has become more rigorous, organized and professionalized. This can be, in part, attributed to the appointment of administrative justices of the peace with responsibilities for the delivery of education programs. The process was further hastened by fundamental changes made to the bench in the mid-1990s that saw the retirement of many justices of the peace and the consequent influx of many new appointments.

The Bench Modernizes – Administrative and Programming Changes

Upon enactment of the *Justices of the Peace Act, 1989,* a Co-ordinator of Justices of the Peace was appointed; the Office of the Co-ordinator within the Office of the Chief Justice was also established. Senior Judge Gerald S. Lapkin was the first co-ordinator formally appointed in August 1990. One of his key responsibilities was the delivery of education for the justices of the peace and he tackled that portfolio with a variety of initiatives.

- Introduction of a formal program of education for all new appointees – delivered in the first year following their appointment.
- An increase in the amount of educational programming offered to all justices of the peace.
- Bringing justices of the peace into the Office of the Chief Justice to work with him to support educational programming.
- Improvements to the mentoring program for new appointees.
- Hiring professionals to help prepare materials and deliver education programming.

Shelley Howell was hired as research counsel in 1991 to help deliver more educational programming – both in-person courses and resources. She recalled using materials developed for the existing Native Justice of the Peace program and "morphing" them into a set of week-long programs for the newly appointees.[83] "We started slowly in the north by offering a bail program because it had been decided that the Court wanted all justices of the peace to conduct bail hearings. That would have been in the early 1990s."[84]

Howell began firming up the mentoring program in 1992, by creating a set of checklists of tasks which mentors and mentees were expected to complete together before the mentee began performing those tasks. "We recognized that there was only so much the new appointments could learn in workshops, they also had to learn by doing with their mentors."[85]

This set of week-long programs gradually grew into 9.5 weeks of education which new appointees receive in their first 18 months. In combination with the mentoring program, these workshops are seen as essential for all new appointments. "This education is premised on the fact that the justice of the peace bench is a lay bench, and that justices of the peace on appointment usually do not have legal education," according to Chief Justice Bonkalo."[86]

Opal Rosamond in the 1980s. Rosamond was appointed a justice of the peace in 1978. In 1990, she became a Regional Senior Justice of the Peace in Central East Region and, in 1998, she was appointed Senior Advisory Justice of the Peace. She served in that capacity until 2004. As SAJP, one of her responsibilities included design and delivery of educational programming to justices of the peace. (Photo courtesy of G. Lapkin).

Andrew Clark presenting at a justice of the peace conference in 2012. Clark served as Senior Advisory Justice of the Peace from 2004 to 2015. (Photo courtesy of C. Mews)

Continuing education for experienced justices of the peace was being expanded as well. Prior to Gerald Lapkin's appointment as co-ordinator, this had consisted of one educational conference per year. By 1995, he had increased that to two conferences per year. "Lapkin made a major contribution to the bench," recalled Howell. "He was fully supportive of education."

A Picture is Worth a Thousand Words

The filming of a video concerning the management of judicial pre-trials. From right to left: Justice Mavin Wong; defence counsel, Paula Rochman; and Joe Hanna, Crown Attorney. This video was used in 2015 educational programming for judges across Ontario.

At the heart of experiential learning is the idea of learner engagement by seeing and doing. Fact scenarios are often used to animate learning and link it concretely to the work judges and justices of the peace do. These scenarios are often presented using written fact patterns. However, a visual presentation of the scenario can often be more effective. A video recreates the physical environment in which judges work and it also allows the addition of "realistic moments" and non-verbal elements which occur when people talk and discuss issues. Realism is heightened by using lawyers and judges as "actors." These fact scenarios – either written or visual – are used at conferences to promote discussion amongst participants and the refinement of the skills of judges and justices of the peace through practice and feedback.

(Courtesy: J. Chewka)

In addition to Shelley Howell, Lapkin also relied on several justices of the peace who worked with him in the Office of the Chief Justice, beginning with Justice of the Peace René Proulx in 1990. In 1996, that position was formally established in the Office of the Chief Justice as the Senior Advisory Justice of the Peace, upon the appointment of Justice of the Peace Carolyn Robson.[87] In 2008, the position of Senior Justice of the Peace was created to aid in the design, development and delivery of education.

The position of Co-ordinator of Justices of the Peace was transformed in 1995 and renamed "Associate Chief Justice/Co-ordinator of Justices of the Peace.[88] Justice Marietta Roberts was the first judge appointed to that position.[89]

"Conversion" of the Justice of the Peace Bench – Why Education Became Such an Important Priority in the 1990s

Before the implementation of the *Justices of the Peace Act, 1989,* many justices of the peace worked part-time and were paid on a fee-for-service basis meaning they were paid a separate and discrete amount for each service they performed, but otherwise received no remuneration as a justice of the peace.

The new legislation contemplated justices of the peace working in full-time, salaried positions. Beginning in 1994, the Court undertook a process of "conversion" of justices of the peace to accomplish this purpose. "Conversion" was completed on August 1, 1995. Along the way, however, many justices of the peace decided to retire rather than convert to full-time work. Others were forced to retire as a mandatory age of retirement – 70 at that time – had been imposed by the *Justices of the Peace Act, 1989* and many of the existing justices of the peace were older than that. "Some people were 80 or 90 years old. There had been no age limit when it was a fee-for-service system," recalled Lapkin.[90]

According to Howell, the process of conversion had a profound and transformative impact on education for the bench. "It not only meant many retirements, but that was followed by an influx of new justices of the peace. It was an impetus for much more training than we'd ever had before."[91] At the same time, increased procedural and substantive decision-making was assigned to justices of the peace. "Bail hearings, search warrants, plus the province was downloading regulatory offences to justices of the peace – some involving potential jail time and fines up to $1 million. We had to train our justices of the peace for this work. We had to professionalize the bench and, up until the 1990s, there had been very little training. It just wasn't sufficient."[92]

Given the magnitude of the task of educating so many justices of the peace and the time pressures involved, Howell recalled the situation as "a bit of a nightmare." Lapkin estimated 21 education

programs were offered in 1990 alone on subjects ranging from the basics of the role of justice of the peace, to more specific functions such as bail hearings and issues related to ethics. In addition, these new programs were offered all over the province, with the result that Shelley Howell and others from the Office of the Chief Justice spent the mid-1990s "on the road" delivering education programs to new appointees.

Howell and other research counsel also built a comprehensive library of materials to introduce justices of the peace to all aspects of their work – reinforcing the obligation on all justices of the peace to "self-educate." Further, Gerald Lapkin reached out to lawyers and academics to write textbooks designed for use by justices of the peace in preparing themselves to undertake their new responsibilities; the *Annotated Provincial Offences* Act, authored by Murray Segal and Justice Rick Libman being one such text.[93] As stated in the Justice of the Peace Education Plan, April 2013: "[O]ngoing education of justices of the peace continues to be self-directed and is encouraged and effected through continuing peer discussions and individual reading and research."[94]

Changes Continue: The Move to Experiential, Skills-based Education

Over the years, a variety of new programs have been added to the curriculum – and a growing emphasis has been placed on utilizing experiential methods of adult education. This approach duly reflected changes to the *Justices of the Peace Act* in 2002 which statutorily recognized the need for continuing education for justices of the peace.[95] And, like the judges, justices of the peace have a plan in place – the Justice of the Peace Education Plan – a public document enunciating the goals of educational programming offered to the members of this bench and related policies.

Requirement for a Continuing Education Plan for Justices of the Peace – *Justices of the Peace Act*

This provision was introduced into the *Justices of the Peace Act* in 2002 – a formal recognition of the imperative of continuing education.

14. (1) The Associate Chief Justice Co-ordinator of Justices of the Peace shall establish a plan for the continuing education of justices of the peace, and shall implement the plan when it has been reviewed and approved by the Review Council.

Consultation

(2) In establishing the plan for continuing education, the Associate Chief Justice Co-ordinator of Justices of the Peace shall consult with justices of the peace and with such other persons as he or she considers appropriate.

Plan to be made public

(3) The Associate Chief Justice Co-ordinator of Justices of the Peace shall ensure that the plan for continuing education is made available to the public, in English and French, when it has been approved by the Review Council.

In addition to the 9.5 weeks of education provided to new appointees, each justice of the peace is provided with six days of continuing education per year, including spring and fall conferences and a regional meeting. Several specialized programs are also offered including:

- a Native workshop to which all Native justices are invited,
- a French-language workshop offered to bilingual justices of the peace,
- pre-retirement workshops,
- seminars for administrative justices of the peace, focusing on leadership issues, and

- seminars designed to provide justices of the peace with teaching, mentoring and facilitation skills.

The curriculum is monitored and reviewed by the Advisory Committee on Education (ACE), comprised of justices of the peace nominated by both the Associate Chief Justice/Co-ordinator of the Justices of the Peace and the Association of Justices of the Peace of Ontario. Educational needs assessments of the bench have been conducted, including a survey of the all justices of the peace in 2012. Further, to benefit from professional pedagogical experience in designing and developing education, the Court has retained educational consultants from the NJI to support the work of the justices of the peace involved in the delivery of education.

The Goals of Justice of the Peace Education

The Justice of the Peace Education Plan – a statutorily mandated document – sets out the goals of the educational programming offered to all justices of the peace.

The goals of the initial education and mentoring program are:

- to develop the personal and professional competence and skills necessary to exercise judicial responsibilities in an independent and impartial manner, and improve the administration of justice;
- to develop an understanding of the legal issues and substantive law in areas in which a justice of the peace will be required to exercise jurisdiction;
- to preserve and enhance the judicial system's fairness, integrity and impartiality by eliminating bias and prejudice; and
- to develop and maintain a sense of judicial independence and impartiality.

The goals of the ongoing continuing education programs are:

- to help members of the justice of the peace bench attain, maintain and advance professional competence;
- to develop and maintain social and cultural awareness in order to preserve and enhance the judicial system's fairness, integrity and impartiality by eliminating bias and prejudice; and
- to encourage personal growth.

For further details, see the Ontario Court of Justice "Justice of the Peace Education Plan, April 2013" published on the Ontario Court of Justice website and attached as an appendix to this essay.

Judicial Education for Judicial Learners

"I quickly learned that lectures were not enough," stated Justice Katherine McLeod. "Not only must judicial education be responsive to judges' needs but it also must engage them by encouraging them to practise the skills they're being taught. That's the most effective way for an adult to learn."

Judicial education at the Ontario Court of Justice has become increasingly based upon established adult education principles. It's well understood that judicial education will be most engaging and effective when it implements these principles and employs an experiential, skills-based, judging-focused approach to the design and delivery of educational programming.

What are adult education principles?

Seven key principles distinguish adult learners from children and youth:

1. *Adults cannot be made to learn.* They will only learn when they are internally motivated to do

so.

2. *Adults will only learn what they feel they need to learn*. They are practical.

3. *Adults learn by doing*. Active participation is especially important to them.

4. *Adult learning is problem-based and these problems must be realistic*. They like finding solutions to problems.

5. *Adult learning is affected by the experience each adult brings to it.*

6. *Adults learn best in a relaxed and inviting environment.* They like the opportunity to discuss issues and decide on possible solutions.

7. *Adults want information that will help them with their work or will improve their situation.* They do not want to be told what to do; they want to choose options based on their individual needs.

(Source: Canadian Literacy and Learning Network, based on the pioneering work of Malcolm Knowles)

What is experiential, skills-based learning?

"What we have to learn to do, we learn by doing." These are the words of Aristotle and they describe in basic terms the concept of experiential learning. It's all about learning skills from experience – as opposed to pure academic learning where there's no need for direct experience.

Experiential learning is particularly appropriate for adult learners because:

- adults have a store of work and life experiences,
- they draw conclusions based on their experiences, and

- they take actions based on previous experiences and the conclusions they've drawn.

Experiential learning:

- encourages adult learners to reflect on and discuss their experiences, explore what they meant and how they might apply them in the future,
- learn from the approaches, perspectives and interpretations of others, and
- practise the application of those approaches with feedback, in a learning environment.

(Source: National Judicial Institute)

What skills do judicial officers need?

- Intellectual or cognitive – e.g., judicial reasoning, decision making
- Verbal – e.g., communicating in court, mediating, managing trials and other procedures
- Written – e.g., judgment writing, providing reasons

What are the unique attributes of judicial learners?

Judicial education must be developed in a manner that understands and respects the roles of judicial officers, the independence of the judiciary, and the complexity of the issues judicial officers face.

- Judges are practically oriented and learning must be connected to their experiences and judicial needs.
- Various and balanced perspectives must be integrated into the learning activities, with focus on learners not on teachers.
- Authority as judges must be respected, and no "right" answers prescribed.

- A “safe space” must be provided for learning, in which judges remain in control of the learning environment and their confidentiality is respected.
- Judges must lead educational initiatives with appropriate supports.

(Source: National Judicial Institute, Interview of Katherine McLeod for the OCJ History Project, 2015.)

Conclusion

Judges and justices of the peace are expected to know the law and how to apply it skilfully and effectively.

Not so long ago, that presumption translated into the belief that they needed very little education or training after their appointments. Many judges believed that their experience as lawyers was adequate. Justices of the peace believed that they could acquire the necessary knowledge and skills along the way. Negligible concern was evinced about the possible impact of personal perspectives and intuitive feelings; possessing an understanding of the social context of the cases before them was not seen as part of sound decision-making.

As the Court's history demonstrates, these beliefs have been relegated to the past.

Chief Justice of Canada Beverley McLachlin has eloquently addressed the reasons for continuing judicial education.

> "We have learned how difficult it can be to decide cases under newly enacted laws without a proper understanding of their purpose and design. We have learned that judges can be called upon to play new roles, roles such as mediation and dispute resolution, and that those rest on the mastery of

> complex processes and skills. We have learned that judges can write more effectively, and be more responsive to the needs of litigants in the delivery of reasons for judgment. We have learned that the judge must be attuned to the psychological dimensions of being a witness, or a litigant, or a lawyer in the very special atmosphere of the courtroom."[96]

The Ontario Court of Justice has built institutional structures to develop its own independent education programs and the administrative structures to deliver these. Over the years, the judges and justices of the peace have worked diligently to design, develop and deliver programs that help the judiciary to keep up-to-date with changes in the law, learn essential skills, and develop a better understanding of the importance of context. They have experimented with novel programming and introduced new methods of teaching that would have baffled – and likely enraged – magistrates George Denison and Tupper Bigelow.

Given the long history of courts – including the Ontario Court of Justice – judicial education is still in its infancy. How it continues to mature depends on many factors: new developments in technology, added responsibilities for members of the judiciary, the modernization of the judicial system, for example – all will play a role. But the case for judicial education as an essential aspect of the judicial role has been made and the consequent reforms will endure.

Appendix A

ONTARIO COURT OF JUSTICE

CONTINUING EDUCATION PLAN

2012 – 2013

ONTARIO COURT OF JUSTICE

CONTINUING EDUCATION PLAN

2012-2013

The Continuing Education Plan for the Ontario Court of Justice has the following goals:

1. Maintaining and developing professional competence;

2. Maintaining and developing social awareness;

3. Encouraging personal growth.

The Plan provides each judge with an opportunity of having approximately ten days of continuing education per calendar year dealing with a wide variety of topics, including substantive law, evidence, *Charter of Rights*, skills training and social context. While many of the programs attended by the judges of the Ontario Court of Justice are developed and presented by the judges of the Court themselves, frequent use is made of outside resources in the planning and presentation of programs. Lawyers, government and law enforcement officials, academics, and other professionals have been used extensively in most education programs. In addition, judges are encouraged to identify and attend external programs of interest and benefit to themselves and the Court.

EDUCATION SECRETARIAT

The coordination of the planning and presentation of education programs is assured by the Education Secretariat. The composition of the Secretariat is as follows: the Chief Justice as Chair (*ex officio*), four judges nominated by the Chief Justice and four judges nominated by the Ontario Conference of Judges. Research counsel of the Ontario Court of Justice serve as consultants. The Secretariat meets approximately five times per year to discuss matters pertaining to education and reports to the Chief Justice. The mandate and goals of the Education Secretariat are as follows:

> The Education Secretariat is committed to the importance of education in enhancing professional excellence.
>
> It is the mandate of the Education Secretariat to promote educational experiences that encourage judges to be reflective about their professional practices, to increase their substantive knowledge, and to engage in ongoing, lifelong and self-directed learning.To meet the needs of an independent judiciary, the Education Secretariat will:

- Promote education as a way to encourage excellence; and
- Support and encourage programs which maintain and enhance social, ethical and cultural sensitivity.

The goals of the Education Secretariat are:

1) To stimulate continuing professional and personal development;

2) To ensure that education is relevant to the needs and interests of the provincial judiciary;

3) To support and encourage programs that maintain high levels of competence and knowledge in matters of evidence, procedure and substantive law;

4) To increase knowledge and awareness of community, the diversity of the population and social services structures and resources that may assist and complement educational programs and the work of the courts;

5) To foster the active recruitment and involvement of the judiciary at all stages of program conceptualization, development, planning, delivery and evaluation;

6) To promote an understanding of judicial development;

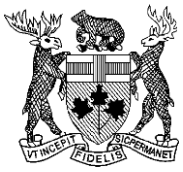
7) To facilitate the desire for life-long learning and reflective practices;

8) To establish and maintain structures and systems to implement the mandate and goals of the Secretariat; and

9) To evaluate the educational process and programs.

The Education Secretariat provides administrative and logistical support for the education programs presented within the Ontario Court of Justice. In addition, all education program plans are presented to and approved by the Education Secretariat as the Secretariat is responsible for the funding allocation for education programs.

In 2011, the Education Secretariat approved a schedule of judicial qualities and abilities that should be supported and developed through education. This schedule will be helpful to assist in developing our education programs to meet our needs. A copy of that schedule is found in the table below.



Judicial Abilities and Qualities

A. Knowledge and Technical Skills

Sound knowledge of the law, procedure and their application.

Rapid mastery of unfamiliar areas of law.

Maintains bilingual skills.

B. Communication and Authority

Listens and communicates effectively.

Establishes and maintains authority of the court.

Manages hearing to enable fair and timely disposal.

C. Decision making

Sound judgment.

Appropriate exercise of discretion.

D. Professionalism and Civility

Maintains independence and authority of the court.

Maintains personal independence and integrity.

Promotes highest standards of behaviour in court

E. Effectiveness

Manages hearings to facilitate fair and timely disposal.

Actively manages cases to promote effective and just conclusion of business.

Applies technologies to effectively manage cases.

F. Leadership Skills for Puisne Members of the Judiciary

Sets tone for the court and courthouse.

Shows interest in upholding a positive image of the organization.

Demonstrates ethics, collegiality and support of colleagues.

G. Leadership & Management Skills for Administrative Judiciary

Strategically plans and organizes.

Manages change.

Supports and develops talent.

Manages judicial resources.

Encourages and facilitates teamwork.

The current education plan for judges of the Ontario Court of Justice is divided into two parts:

- First Year Education
- Continuing Education

I. FIRST YEAR EDUCATION

Each judge of the Ontario Court of Justice is provided with certain texts in print or electronic format and materials upon appointment including:

- *Conduct of a Trial*
- *Conduct of a Family Law Trial*
- *Writing Reasons*
- *Commentaries on Judicial Conduct (Canadian Judicial Council)*
- *Ethical Principles for Judges (Canadian Judicial Council)*
- *A precedent for a Benchbook*

The Ontario Court of Justice organizes a one-day orientation program for newly-appointed judges shortly after their appointment which deals with practical matters relating to the transition to the bench, including judicial conduct and ethics, courtroom demeanour, and administrative procedures. This program is presented twice a year.

Upon appointment, each new judge is assigned by the Chief Justice to one of the seven regions of the Province. The Regional Senior Judge for that region is then responsible for assigning and scheduling the new judge within the region. Depending on the new judge's background and experience at the time of appointment, the Regional Senior Judge will assign the newly-appointed judge for a period of time (usually several weeks prior to swearing-in) to observe senior, more experienced judges and/or specific courtrooms. During this period, the new judge sits in the courtroom, attends in chambers with experienced judges and has an opportunity to become familiar with their new responsibilities.

In April of their first year, new judges are encouraged to attend a six-day New Judges' Education Program presented by the Canadian Association of Provincial Court Judges (CAPCJ). This intensive one-week program is largely substantive in nature and is oriented to criminal law. In 2011, the program was

presented at Château Bromont in the Province of Quebec.

The Ontario Court of Justice, the National Judicial Institute and the Canadian Association of Provincial Court Judges jointly present a five-day intensive program focusing on judicial skill training in November of each year at Niagara-on-the-Lake. The program includes sessions on the delivery of judgments (both written and oral), issues related to self-represented accused, controlling the courtroom, communication skills, judicial ethics, and the effective conduct of a judicial pre-trial. The program has been very successful and is refreshed annually. Ontario gives national leadership at this course by providing many of the organizers and faculty members along with financial support.

Judges in their first year of appointment are also encouraged to attend all education programs relating to their field(s) of specialization presented by the Ontario Court of Justice. These programs are outlined under the heading "Continuing Education".

A Library Committee of the Court develops a list of texts and reporting services from which each judge is permitted annually to select materials of a value of up to $2,600 for their personal chamber's library.

II. CONTINUING EDUCATION

Continuing education programs available to judges of the Ontario Court of Justice are of two types, either internal or external:

A) Programs developed and presented internally by the Ontario Conference of Judges with the involvement of the Education Secretariat;

and

B) Programs presented by external organizations, such as the National Judicial Institute, the Canadian Association of Provincial Court Judges and the International Association of Women Judges.

(A) PROGRAMS ADMINISTERED BY THE EDUCATION SECRETARIAT

The programs presented by the Education Secretariat and the Ontario Conference of Judges constitute the Core Program of the Ontario Court of Justice education curriculum. The Ontario Conference of Judges selects a director of criminal law education and a director of family law education. The two directors in turn may create a support committee to advise and assist them in putting together the core education programs. Part of the core programming is annual in occurrence and part of it is presented "as needed".

1) Annual Core Programs

Seven family and criminal programs are presented each year with a changing curriculum to reflect the educational needs of the Court. These courses are open to every criminal and family judge in accordance with their area of practice. They are more particularly described below:

There are two education programs dedicated to family law issues—the Judicial Development Institute in January and the Annual Family Law Program in the fall. Generally speaking, the principal topics are devoted to child welfare and family law (custody, access and support). Additional topics involving skills development, case management, legislative changes, social context and other areas are incorporated as the need arises. Each program is of two to three days' duration and is open to any judge who spends a significant amount of his or her time presiding over family law matters.

A family law education component is also included in the Annual General Meeting of the Ontario Court of Justice held in May.

There are five major criminal law education conferences presented each year.

a) At four regional locations, a three-day Regional Seminar is organized to be delivered in October and November of each year. These seminars cover a wide range of topics in the area of criminal law. Four separate agendas are developed each year to be responsive to the issues found in each region.
b) A two and a half day education seminar is presented annually in May in conjunction with the Annual General Meeting of the Ontario Court of Justice.

All judges are entitled and encouraged to attend these seminars.

2) "As Needed" Recurring Programs

These are programs presented annually or biannually with limited enrolment. They fulfil a variety of education needs such as the development of judicial skills and leadership and social context training.

Particulars of the programs offered are set out below:

a) PRE-RETIREMENT SEMINARS: This program assists judges and their domestic partners in their retirement planning. The one and one-half day program deals with the social and financial issues that arise in the transition from the bench to retirement. This seminar was presented in March 2012.

b) JUDICIAL COMMUNICATION PROGRAM: The Court, in partnership with the National Judicial Institute, developed a Communication Skills in the Courtroom seminar presented annually for one week in Stratford. Judges learn and practice techniques to improve both their verbal and non-verbal communication skills. The faculty includes judges and Stratford performers who coach judges to improve their ability to communicate effectively.

c) FAMILY LAW PRIMER: A number of judges who preside primarily in the criminal courts throughout the province expressed an interest in presiding in family court. As well, in a number of jurisdictions judges preside in both family and criminal courts. A Family Law Primer program was developed with the assistance of the National Judicial Institute, and, in September 2006, 28 judges participated in an intensive week-long family law seminar. Judges who preside primarily in family courts across the Province provided a comprehensive overview in the following areas of family law:

- Child Protection and Adoption
- Introduction to Domestic Proceedings
- Custody and the *Children's Law Reform Act*
- Enforcement: *Family Responsibility and Support Arrears Enforcement Act*

This in-depth Family Law Primer was held again in April 2008 and, for the first time, was jointly developed and delivered by and for the judges of both the Ontario Court of Justice and the Superior Court of Justice. In 2010, the Education Secretariat chose to explore new ways to prepare new family court judges. The development of this program will continue in 2013.

d) SOCIAL CONTEXT PROGRAMS: The Ontario Court of Justice has presented significant programs dealing with social context. The first such program, entitled *Gender Equity*, was presented in the fall of 1992. That program used professional and community resources in its planning and presentation phases. A number of Ontario Court of Justice judges were trained as facilitators for the purposes of the program during the planning process, which lasted over twelve months. Extensive use was made of videos and printed materials which form a permanent reference. The facilitator model has since been used in a number of Ontario Court of Justice education programs.

The Court undertook its second major social context program, presented to all of its judges, in May 1996. The program, entitled *The Court in an Inclusive Society*, was intended to provide information about the changing nature of our society, to determine the impact of the changes and to equip the Court to respond better to those changes. A variety of pedagogical techniques, including large and small group sessions, were used in the course of the program. A group of judicial facilitators were specifically trained for this program which was presented following significant community consultation.

In September 2000, the Ontario Conference of Judges and the Canadian Association of Provincial Court Judges met in Ottawa for a combined conference which covered poverty issues and issues related to aboriginal justice.

At the Court's Annual General Meeting in 2003, the theme of the education program was "Access to Justice". A play followed by a panel discussion was used to describe issues of literacy, race, poverty, neglect, abuse and violence in the home affecting access to justice. Another session used lectures, videos, panel discussions and small group work to explore the issue of literacy and the courts.

As a result of our experience with these special programs, social context education is now integrated into most of the courses presented by the Education Secretariat.

Our approach to social context education has changed and matured since these courses were offered. We no longer deliver these programs as stand-alone courses that can serve to isolate the issues from the day-to-day experience of judges. Instead, social context education is now integrated into most of our core programming.

e) JUDICIAL ADMINISTRATION CONFERENCE: This is an occasional conference last held over two days. It brought together about 75 administrative judges of the Ontario Court of Justice and was also open to those judges who have shown an interest in judicial administration. The program returned in January 2011 and was attended by five Chief Judges and seven Associate Chief Judges from other provinces as well as 70 judges of the Ontario Court. The curriculum included Leading Change, Developing Skills for Managing People, Technology in the Courtroom, Time Management and National Court Cultures.

f) COMPUTER TRAINING: The Computer Effectiveness and Skills Training Seminar, developed in 2008, was delivered for the first time in February 2009. This course was designed by judges of the Ontario Court of Justice, the National Judicial Institute and the Judicial Information Technology Office. The course was divided into two programs - one designed for judges at the beginner level and another designed for those at the intermediate level where a new note-taking template was introduced. This note-taking template was developed to assist and encourage judges who wish to use their computers in the courtroom. In 2010, this course was extensively redesigned in response to course evaluations recommending it focus on judges with entry-level computer skills. The course was repeated in 2011. In 2012 the course focused on intermediate level skills with an emphasis on electronic legal research.

In 2009-2010, the computers of the Ontario Court of Justice were upgraded and a change was made from Outlook 2003 to Outlook 2007. The Judicial Information Technology Office, in partnership with the NJI, developed an extensive series of training modules pre-loaded onto each new computer to assist the judiciary in making the transition to Outlook 2007.

g) AD HOC PROGRAMS: From time to time, a need is identified for a focussed program of education for which judges are individually selected to ensure regional and gender balance. In October 2009, such a program was offered on the subject of problem-

solving courts. This program looked at the challenges, rewards and best practices for the development of problem-solving courts to address the special needs of aboriginals, mentally-disordered offenders and drug-addicted offenders.

In 2010, a special course was developed and delivered to educate judges and justices of the peace on the policy and procedures of the Courts' newly implemented Discrimination and Harrassment Policy. These judicial officers will serve as mediators/advisors to help in resolving conflicts between members of the Ontario Court of Justice that arise out of discriminatory actions or words. A follow up two-day course was presented in the fall of 2010 to develop mediation skills.

In 2011, a course was given by invitation to judges sitting in larger communities on the topic of Urban Aboriginal Issues. The course was designed to develop understanding of the special issues confronted by native peoples in urban settings and to encourage the development of local processes that are culturally sensitive.

(B) EXTERNAL EDUCATION PROGRAMS

1) FRENCH-LANGUAGE COURSES: Judges of the Ontario Court of Justice who are proficient in French may attend courses presented by the Office of the Commissioner for Federal Judicial Affairs. The frequency and duration of the courses are determined by the judge's level of proficiency. The purpose of the courses is to assure and to maintain the French language proficiency of those judges who are called upon to preside over French language matters in the Ontario Court of Justice. There are two levels of French-language courses: Terminology courses for francophone judges and Terminology courses for anglophone (bilingual) judges. This program is offered annually. In 2011, a new course was developed by the Province of New Brunswick that is skills based. It will become part of the education planning for judges working in the French language in the future.

2) OTHER EDUCATIONAL PROGRAMS: Judges of the Ontario Court of Justice are encouraged to pursue educational interests by attending education programs presented by other organizations and associations including but not limited to:

- Canadian Association of Provincial Court Judges
- National Judicial Institute
- Federation of Law Societies: Criminal (Substantive Law/Procedure/ Evidence) & Family Law
- International Association of Juvenile and Family Court Magistrates
- Canadian Bar Association

- Criminal Lawyers' Association
- The Advocates' Society
- The Association for Family Court Conciliation
- Ontario Association for Family Mediation/Mediation Canada
- Canadian Institute for the Administration of Justice
- International Association of Women Judges (Canadian Chapter)
- Ontario Family Court Clinic Conference
- Canadian Institute for Advanced Legal Studies (Cambridge Lectures)
- French Language Education at Caraquet, New Brunswick and Quebec City

The Education Secretariat has established a Conference Attendance Committee to consider applications by individual judges for funding assistance to attend conferences/seminars/programs other than those presented by the Ontario Court of Justice. But judges are able to claim travel and accommodation expenses over and above this subsidy against a judicial allowance received by each judge in the amount of $2,500. Over the last several years, the budget has quadrupled to enable judges to define and meet their individual education needs.

3) In accordance with a Memorandum of Understanding with the Ontario Conference of Judges, the Ontario Court of Justice annually sends 10 judges selected by the Conference to the annual meeting and education program of either the Canadian Bar Association or the Canadian Association of Provincial Court Judges.

4) COMPUTER COURSES: In 2006, a position of Education Librarian Consultant to the Ontario Court of Justice and the Superior Court of Justice was established as a joint initiative of the two Courts. The Consultant provided the judges of both Courts with a dedicated resource to provide enhanced training and support on electronic legal resources. The consultant's time was made available to train judges on a one-on-one basis and, if appropriate, in group sessions in court locations around the province. This position was continued until mid-2007 when the contract expired. Other less structured formats are now used to deliver computer training. Regional Seminars and the Annual General Meeting regularly contain a module dedicated to providing and improving computer research skills.

In 2007, the Ontario Court of Justice IT Committee was established. Its mandate includes promoting opportunities for computer training.

5) NATIONAL JUDICIAL INSTITUTE (NJI): The Ontario Court of Justice, through its Education Secretariat, makes a financial contribution to the operation of the National Judicial

Institute. Based in Ottawa, the NJI is a world leader in the development and delivery of judicial education programs. Since 2002 the Ontario Court of Justice has made a significant financial contribution to the NJI in return for receiving dedicated education assistance from a senior NJI advisor. This relationship has given many judges of the Ontario Court of Justice the opportunity to work on the development of innovative programming and to serve as faculty for the delivery of that programming across the country. They are then able to bring their expertise back to the Court to the benefit of all aspects of the education portfolio.

6) Judges have access to remote learning computer-based courses prepared and hosted by the NJI covering substantive law issues such as unlawful detention, mental health, and evidence. These programs, offered usually twice per year, are available at no cost to the judges of the Ontario Court of Justice.

OTHER EDUCATIONAL RESOURCES

1. CENTRE FOR JUDICIAL RESEARCH AND EDUCATION: The Centre is a law library and computer research facility located in Toronto and staffed by five research lawyers and three assistants. It is accessible in person, by telephone, e-mail or fax. The Centre responds to specific requests from the judiciary for research assistance and provides bi-weekly updates with respect to legislation and relevant case law through its electronic publication *Items of Interest*.

2. SELF-FUNDED LEAVE: In order to provide access to educational opportunities that fall outside the parameters of regular judicial education programs, the Ontario Court of Justice has developed a self-funded leave policy that allows judges to defer income over a period of years in order to take a period of self-funded leave of up to twelve months. Prior approval is required for such leave, and a peer review committee reviews the applications in selecting those judges who will be authorized to take such leave.

3. In addition to the educational programs outlined above, the fundamental education of judges continues to be self-directed and is effected in large part through continuing peer discussions and individual reading and research.

Appendix B

ONTARIO COURT OF JUSTICE

JUSTICE OF THE PEACE

EDUCATION PLAN

April 2013

JUSTICE OF THE PEACE EDUCATION PLAN

Introduction

Formal education for the justice of the peace bench is essential for the judicial system to perform and uphold public trust and confidence in the judicial system.

The Education Plan for the justices of the peace of the Ontario Court of Justice (OCJ) encompasses both initial education and mentoring of newly appointed justices of the peace as well as ongoing continuing education programs for all justices of the peace.

The goals of the initial education and mentoring program are:

- to develop the personal and professional competence and skills necessary to exercise judicial responsibilities in an independent and impartial manner, and improve the administration of justice;
- to develop an understanding of the legal issues and substantive law in areas in which a justice of the peace will be required to exercise jurisdiction;
- to preserve and enhance the judicial system's fairness, integrity and impartiality by eliminating bias and prejudice; and
- to develop and maintain a sense of judicial independence and impartiality.

The goals of the ongoing continuing education programs are:

- to help members of the justice of the peace bench attain, maintain and advance professional competence;
- to develop and maintain social and cultural awareness in order to preserve and enhance the judicial system's fairness, integrity and impartiality by eliminating bias and prejudice; and
- to encourage personal growth.

Advisory Committee on Education

The coordination of the planning and presentation of education programs is assured by the Advisory Committee on Education (ACE). The Committee includes the Associate Chief Justice-Coordinator of Justices of the Peace as Chair (*ex officio*) and justices of the peace nominated by the Associate Chief Justice-Coordinator of Justices of the Peace and the Association of Justices of the Peace of Ontario. The Committee meets approximately four times per year to discuss matters pertaining to education and reports to the Associate Chief Justice-Coordinator of Justices of the Peace.

The Senior Advisory Justice of the Peace (SAJP) chairs ACE meetings and is assisted by the Senior Justice of the Peace (SJP), who also sits on the Committee and advises the SAJP on all issues pertaining to the education and mentoring of justices of the peace. The Senior Justice of the Peace/Administrator of the Ontario Native Justice of the Peace Program is also a member of the Committee, and is involved in developing and coordinating special education programs for Native justices of the peace. Two bilingual (French/English) justices of the peace who are involved in developing and coordinating special education programs for bilingual justices of the peace are also members. The legal counsel of the OCJ serve as consultants to the Committee.

ACE provides administrative and logistical support for the education programs presented within the OCJ. In addition, all education programs are reviewed by ACE, which makes recommendations to the Associate Chief Justice-Coordinator of Justices of the Peace on changes and additions to existing programs. ACE also makes recommendations on the content and format of new programs as they are being proposed and developed.

Principles

The Justice of the Peace Education Plan has been developed based on the following principles:

1. The Associate Chief Justice-Coordinator of Justices of the Peace is responsible for establishing a plan for the continuing education of justices of the peace and implementing the plan once it has been approved by the Review Council: s. 14(1) *Justices of the Peace Act*. In turn, the Associate Chief Justice-Coordinator of Justices of the Peace has delegated responsibility for coordinating the development and implementation of education programs to the SAJP.

2. Justices of the peace as professionals are responsible for acquiring and maintaining a knowledge of the legislation and case law which affects their jurisdiction, as well as other relevant information of significance to the performance of their duties, and for developing and maintaining the skills necessary to perform these duties effectively.

3. Justices of the peace are judicial officers, and all education programs and mentoring are based on that fact.

4. Education is presented in a non-prescriptive manner. The education and mentoring of a justice of the peace involves exposure to the views and practices of many judicial officers who perform judicial functions in a variety of different ways. This allows the new justice of the peace to develop his/her own particular skills in the courtroom setting.

5. Education encompasses a broad variety of topics, including education on legal and jurisdictional issues, an understanding of the role of a judicial officer, ethical issues impacting on judicial conduct, the development of specific skills necessary to perform the functions of a justice of the peace, and the development of an awareness of social and cultural context in which social issues and challenges may arise and manifest themselves in judicial proceedings.

6. Educational programing is an essential and integral component of the work of a judicial officer. It is essential that time and resources be made available for it as a part of the judicial officer's regularly scheduled responsibilities.

7. Education is an ongoing process. Upon completion of the initial education program, ongoing continuing educational programing is required to maintain the standards which have been developed, to strengthen pre-existing skills and knowledge, and to update justices of the peace regarding legislative amendments and case law which affect the jurisdiction of a justice of the peace.

8. Technology is an increasingly significant factor in the delivery of judicial services and education programs. New programing reflects that fact and may incorporate new technologies as teaching tools and delivery methods. Sessions on improving and learning computer skills are included in the Initial Education workshops and the continuing education conferences.

Educational Materials and Resources

a) Materials

On appointment, each justice of the peace is provided with appropriate resource materials and texts, including the *Criminal Code* and *Provincial Offences Act*. Materials are updated periodically, as needed.

b) Resources

Centre for Judicial Research and Education

Justices of the peace of the OCJ have access to the Ontario Court of Justice Centre for Judicial Research and Education (CJRE). The CJRE, including a law library and computer research facility, is staffed by legal counsel, together with administrative staff, and is accessible in person, by telephone, e-mail or fax. The CJRE responds to specific requests from judges and justices of the peace for information and research.

In addition, the CJRE provides updates with respect to legislation and relevant case law through its regular publication, *Items of Interest*, which is distributed to every judge and justice of the peace electronically on a bi-weekly basis. It also contains hyperlinks to relevant legislation and web sites of interest, including those with decisions of the Supreme Court of Canada and the Court of Appeal for Ontario.

Initial Education

The Education Plan is premised on the fact that the justice of the peace bench is a lay bench, and that justices of the peace on appointment usually do not have legal education. The Plan provides each justice of the peace on appointment with nine weeks of intensive workshops. These workshops are supported by a formal mentoring program. The mentoring is provided by experienced justices of the peace. The formal initial education concludes with a three-day refresher course.

The workshops are designed on the presumption that newly appointed justices of the peace come into the system with limited knowledge of the judicial system and the role of a judicial officer. The workshops are usually offered in small groups. The size depends on the number of new appointments.

The format includes lectures, small group discussion, case studies, role-play videos, live demonstrations, writing and communication exercises. All workshops are designed to be highly participatory and interactive.

Particular attention is paid to employing adult education principles to the design and delivery of the programming. The programming is both practical and relevant, employing a skills-based, hands-on approach to delivery. Resource people and faculty members include experienced justices of the peace and judges, as well as law professors, crown counsel, and lawyers in private practice with expertise in specific areas of the law and others with relevant knowledge.

Intensive Workshops

a) Intake Court

There are two workshops devoted to general intake court responsibilities. Topics include commencement of proceedings in both criminal and provincial offences, introduction to search warrants, the effect and enforcement of recognizances of bail, *Mental Health Act* orders of examination, *Child and Family Services Act* warrants of apprehension, subpoenas, weapons disposition and prohibition hearings and an introduction to criminal set date court.

b) Search and Seizure

This workshop is an intensive program in all aspects of search warrants which may be issued by a justice of the peace. It reviews the legislation and case law under s. 487 of the *Criminal Code*, s. 11 of the *Controlled Drugs and Substances Act*, s.8 of the *Charter of Rights and Freedoms* and other federal and provincial statutes.

In addition, arrangements are made for justices of the peace to spend a number of days with an experienced justice of the peace. They attend in small groups, reviewing examples of informations to obtain a search warrant and search warrants. Participants consider whether a warrant should issue and, if not, identify the deficiencies in the material presented.

c) Judicial Interim Release Workshops

The two judicial interim release workshops provide an in-depth review of all aspects of the bail process. Time is spent in these workshops reviewing transcripts of bail hearings and discussing whether an accused person should be detained and, if released, the type and conditions of release, and domestic violence issues. The remainder of the workshops is spent in lectures, discussions, and demonstrations of the various proceedings relating to judicial interim release.

d) Good Judgment

Coming to a decision in a judicial proceeding is the essence of the judicial role. A justice of the peace must learn to assess, filter and sort evidence. The role of precedent must be considered and applied. Legal principles must be interpreted.

This seminar blends lectures and case scenarios. Topics covered include the transition to the bench, ethical principles for justices of the peace and judicial conduct, the structure of the courts, the role of

precedent in the common law; the adversarial system; onus and standards of proof; judicial independence and impartiality; and discrimination and harassment.

e) *Provincial Offences Act* Trials

There are three intensive workshops on the trial of an offence under the *Provincial Offences Act*. The sessions focus on relatively straightforward trials that comprise the majority of the trials over which justices of the peace preside. Such trials are typically completed in a single day or less, with an oral judgment delivered at the conclusion of the trial. Defendants are often unrepresented. Some are represented by a licenced paralegal or lawyer. Lectures, case studies, discussion groups and demonstrations are used to present the topics in these workshops.

Specific topics covered include the role of the prosecutor, defendant and justice of the peace; the presumption of innocence; proof beyond a reasonable doubt and findings of credibility; elements of an offence; guilty pleas to an offence charged or another offence; *mens rea*, strict liability and absolute liability offences; defences to regulatory charges, including due diligence, reasonable mistake of fact and officially induced error; trial procedure; presentation of evidence; rules of evidence; the *voir dire*; dealing with the unrepresented defendant; *Charter* applications; access to justice issues; paralegals and lawyers in the courtroom; requests for a bilingual trial; articulating reasons for judgment; delivery of a judgment; sentencing; and trials of young persons.

f) Wrap Up

The Wrap Up workshop is offered approximately two years after appointment. It provides the justices of the peace with the opportunity to get together to discuss issues and concerns that have presented themselves in the period of time that they have been presiding. The agenda is driven by the various requests received from the particular groups of new appointments. Therefore, each agenda is different from the last.

Mentoring

In addition to the workshops described above, a core element of education for newly appointed justices of the peace is the mentoring program. The program involves the new justice of the peace working, usually on a one-on-one basis, with a more experienced justice of the peace who has been designated as a mentor in consultation with the SAJP, SJP and applicable Regional Senior Justice of the Peace (RSJP). The mentor`s primary responsibility is to assist the new justice of the peace in making the transition to the bench and acquiring the knowledge and skills necessary to carry out his or her judicial responsibilities.

The mentoring program is integrated into the intensive workshops. Mentors and the newly appointed justices of the peace are both provided with detailed checklists of the tasks a newly appointed justice of the peace should be exposed to and learn about before attending the relevant intensive workshop. Thus, the two core elements of initial education – mentoring and the intensive workshops – both complement and support one another.

Mentoring is offered on the various duties justices of the peace perform, including intake courts, bail courts, assignment courts and *Provincial Offences Act* trial courts. Different justices of the peace are often involved as mentors at different stages of the program. The period of time a new justice of the peace spends in a mentoring program varies with the individual justice, but it can last up to twelve months.

In order to strengthen the mentoring program, the OCJ offers a number of workshops for mentors. These workshops focus on a discussion of issues faced by mentors in order to encourage consistency in education across the various parts of the province. They also include discussions of the mentoring process itself, and various mentoring and adult education techniques which may be of assistance in facilitating the learning process for new justices of the peace.

Continuing Education

Continuing education supports the on-going professional development of the justice of the peace bench. Various materials and programs are provided on an ongoing basis to facilitate this process. As with the Initial Education programing, the emphasis in continuing education is on experiential methods of adult education.

Continuing education programs give every justice of the peace an opportunity of having a minimum of six days of continuing education per calendar year. This programming deals with a wide variety of topics, including substantive law; evidence; *Charter of Rights;* skills training and social context education. There is an emphasis on utilizing faculty drawn from the ranks of the justice of the peace bench – illustrating a reliance on peer-to-peer education. To strengthen the teaching and facilitation skills of these faculty members, workshops are offered which focus on learning adult education teaching technique and skills.

While the programs are developed and presented by judges and justices of the peace of the Court, frequent use is made of outside resources in the planning and presentation of programs. Lawyers, judges, government and law enforcement officials, academics, and other professionals have been used extensively in most education programs. ACE is currently exploring the possibility of developing online education programming as a means of offering continuing education and supplementing and complementing existing face-to-face education.

Annual Spring and Fall Conferences

The cornerstone of the continuing education programs for justices of the peace are the annual spring and fall conferences. Each conference is offered twice in order to accommodate all members of the bench. Every justice of the peace is invited to attend one of these conferences in both the spring and the fall of each year. Each of these conferences is three days in length. The conferences use a combination of lectures, educational fact scenarios and videos, panel discussions, demonstrations and small group discussions.

The topics covered at these conferences are wide ranging and vary from year to year. Specific topics which have been covered in recent conferences include judicial ethics; interpreters; delivering reasons for judgment; assessing credibility; social media; technology and search warrants; managing a provincial offence trial; effectively communicating an oral judgment; risk assessment and indicators of lethality at bail hearings; the *Youth Criminal Justice Act*; eye-witness identification; conducting pre-trials; specific issues at trials of regulatory offences; fly-in-courts, residential schools; application of *Gladue* principles; mistrials and bias; accident reconstruction; search warrant issues; domestic violence issues; orders for examination under the *Mental Health Act*; child apprehension warrants under the *Child and Family Services Act*; evidentiary issues; discrimination and harassment in the workplace; stress management; and pre-retirement planning.

Native Workshop

The Native Workshop is an annual workshop to which all Native justices of the peace are invited. These workshops focus on a mix of substantive legal issues and other non-legal issues relevant to Native justices of the peace. It is three days in length, and is usually held in northern Ontario.

Resource people have included judges, justices of the peace, counsel from the Crown Law Office – Criminal and the Crown Law Office – Civil as well as other lawyers in the Ministry of the Attorney General, lawyers in private practice, and representatives of various Aboriginal organizations.

Specific topics covered at recent Native workshops include search and seizure; bail; private prosecutions; avoiding conflicts in small communities; and Aboriginal rights of Métis.

French Language Workshop

A three-day intensive workshop is offered to bilingual justices of the peace once a year. The workshop is usually held in Ottawa. The workshop is conducted entirely in French, allowing participants to converse in the French language.

All resource people are fluent in the French language. They have included judges, justices of the peace, law professors, legal translators, and counsel from the Ministry of the Attorney General and the Department of Justice.

A core part of each workshop is the enhancement of the use of French legal terminology. Recent topics have included discussions of Anglicisms in French; the legal obligations of the court to provide French or bilingual services; accident reconstructions; and delivering oral judgments in French.

Computer Education

All justices of the peace are provided with a laptop computer. Basic education is provided in online legal research resources. In addition, justices of the peace receive education in Quicklaw during their initial education program.

Computer skills and computer literacy vary greatly among justices of the peace. The ability to function effectively in an electronic environment has become increasingly important in the past few years.

The use of hyperlinks in *Items of Interest* is designed to facilitate electronic research of case law and legislation. Computer education continues to be provided on an as-needed basis.

Specialized Workshops

In addition to the regularly scheduled programs, the Court also offers specialized workshops from time to time on a variety of topics, including pre-retirement; judicial administration; mentoring; and providing education to justices of the peace to deliver and facilitate educational programming.

Regional Meetings

The OCJ is divided into seven regions for the purposes of judicial administration. All regions hold annual regional meetings. While the meetings principally provide an opportunity to deal with regional administrative and management issues, they also have an educational component.

Self-directed Learning

In addition to the educational programs outlined above, ongoing education of justices of the peace continues to be self-directed and is encouraged and effected through continuing peer discussions and individual reading and research. As mentioned, online learning programs are currently being explored as a possible method for new venues of self-directed learning.

External Conference Policy

The Office of the Chief Justice partially reimburses justices of the peace, at the request of the justice of the peace, for expenses incurred in attending workshops or conferences offered by outside sources. This funding is available for workshops or conferences which assist the justice of the peace in performing his

or her assigned duties. The External Conference Committee of the OCJ receives and considers applications from justices of the peace to attend these programs.

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[1] Formal learning or education is structured (in terms of learning objectives, learning time, or learning support). Formal learning is intentional from the learner's perspective. Informal learning or education is not structured and typically results from daily life activities related to work, family, or community. Formal learning is an organized form of learning and encompasses what is referred to as adult education and training. Informal learning is considered to be a non-organized form of learning. (These definitions are based upon definitions, provided in "Adult learning in Canada: Characteristics of Learners," Statistics Canada, Publication 81-004-XIE, Vol. 5, No. 1.)
[2] Bigelow, S. Tupper. *A Manual for Ontario Magistrates* (Toronto: Queen's Printer, 1962), p. 2.
[3] Denison, George T. *Recollections of a Police Magistrate* (Toronto: The Mission Book Company, 1920), p. 9.
[4] Denison, *Recollections,* p. 9.
[5] Vanek, David. *Fulfilment: Memoirs of a Criminal Court Judge* (Toronto: The Osgoode Society for Canadian Legal History, 1999), p. 215.
[6] Bigelow, *A Manual,* p. ix.
[7] Bigelow, *A Manual,* p. 1.
[8] Bigelow, *A Manual,* pp. ix-x. See Preface ("I beg the indulgence of my seasoned fellows if, as they read the manual, they are inclined to think that a good deal of what they read they learned either (a) at their mothers' knees; (b) the first day they attended law school; or (c) within half-an-hour of being appointed a magistrate.")
[9] Bigelow, *A Manual,* p. 2.
[10] Former Chief Justice Brian Lennox explained that this was not unique to the Magistrates' Court in Ontario. "It was a prevailing view at the time amongst most judges that a judge who needed formal education had been a bad appointment." Interviews of Brian W. Lennox for OCJ History Project, 2014-15.
[11] Interview of Bill Sharpe for OCJ History Project, 2014.
[12] Interview of Sidney Lederman for OCJ History Project, 2014.
[13] Vanek, *Fulfilment,* p. 225.
[14] Vanek, *Fulfilment,* p. 225.
[15] Vanek, *Fulfilment,* p. 225.
[16] Andrews, H.T.G. *Family Law in The Family Courts* (Toronto: The Carswell Company Limited, 1973), p. 11.
[17] Andrews, *Family Law,* p. 11.
[18] Andrews, *Family Law,* p. 11.
[19] Andrews, *Family Law,* p. 11.
[20] Warson, Albert. *The Globe Magazine,* February 1, 1966, p. 5. This provision continues to exist in the *Crown Attorneys Act,* R.S.O. 1990, c. 49, s. 11(h).
[21] Interviews of Allen Edgar for the OCJ History Project, 2014-15.
[22] Hogarth, John. *Sentencing as a Human Process* (Toronto: University of Toronto Press in association with the Centre of Criminology, University of Toronto), p. 390.
[23] Hogarth, *Sentencing,* p. 389.
[24] Hogarth, *Sentencing,* p. 45. By the time Hogarth's book was published, the magistrates who were interviewed were judges. That transition occurred in December 1968. "Magistrates' Courts in Ontario were legislated out of existence shortly after the data for this study were collected. This is not the disaster it may appear to be…none of the changes affected the jurisdiction or sentencing powers of the individuals involved."
[25] Hogarth, *Sentencing,* pp. 3-14.
[26] Hogarth, *Sentencing,* pp. 3-14.
[27] Interview of John Hogarth for OCJ History Project, 2014.
[28] Hogarth, *Sentencing,* p. 389.
[29] Hogarth, *Sentencing,* p. 390.
[30] Interview of John Hogarth for OCJ History Project, 2014.
[31] Interviews of Tony Doob and John Hogarth for OCJ History Project, 2014.

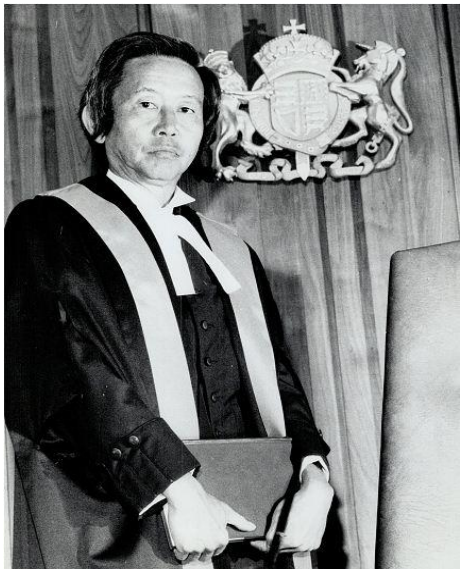
[32] *The Globe and Mail,* January 8, 1972
[33] 387 U.S. 1 (1967)
[34] On the family side, this was reinforced by the opening of a specialty clinic in 1978 called Justice for Children, founded by Jeffrey Wilson and then led by Marion Lane. Soon after this, the Ontario government introduced a funded program of child representation – meaning more lawyers arguing before provincial court judges.
[35] This differential of quality between education for the family and criminal benches was commented on by Justice Edson Haines, of the Ontario Supreme Court, in a *Globe and Mail* article in 1972: "…the most progressive and original are the conferences on juvenile and family courts….the programs have a wide variety of professional men and workers. There is an atmosphere of real participation." ("National institute for teaching judges proposed by Haines," *The Globe and Mail*, January 8, 1972)
[36] Interviews of Allen Edgar for the OCJ History Project, 2014-15.
[37] Vanek, p. 225
[38] Vanek, *Fulfilment,* p. 227.
[39] Interview of Sidney Lederman for the OCJ History Project, 2014.
[40] Chief Judge F.C. Hayes Report, Minutes of the Annual Conference of the Provincial Judges Association (Criminal Division), held at the Holiday Inn, Ottawa, on June 5, 6, 7 and 8, 1974, p. 3.
[41] Hayes, 1974 minutes of Annual Conference, p. 11.
[42] Interviews of George Thomson for OCJ History Project, 2014-15.
[43] Vanek, *Fulfilment,* p. 225.
[44] Hogarth, *Sentencing,* p. 390.
[45] Hogarth, *Sentencing,* p. 390.
[46] Hogarth, *Sentencing,* p. 390.
[47] Hayes, 1974 minutes of Annual Conference, p. 12.
[48] Vanek, *Fulfiment,* p. 225.
[49] Interviews of Brian W. Lennox for OCJ History Project, 2014-15.
[50] Interviews of Brian W. Lennox for OCJ History Project, 2014-15.
[51] Interviews with Allen Edgar for OCJ History Project, 2014-15.
[52] Interviews with Allen Edgar for OCJ History Project, 2014-15.
[53] Donna Hackett and Richard F. Devlin, "Constitutionalized Law Reform: Equality Rights and Social Context Education for Judges" (2005) 4 J.L.&Equal. 157, p. 166.
[54] Interview of Roman Komar for OCJ History Project, 2014.
[55] Mewett, pp. 18-19
[56] Mewett, Alan W. "Report to the Attorney General of Ontario on The Office and Function of Justices of the Peace in Ontario, Part II, Native Communities and Remote Areas," April 2, 1982, p. 8.
[57] Mewett, Report, Part II, pp. 16-18.
[58] Interview of Doug Ewart for OCJ History Project, 2014.
[59] Interview of Doug Ewart for OCJ History Project, 2014.
[60] Michel, Gérald. *Provincial Courts in Northern Ontario,* (unpublished), p. 25
[61] Interview of Doug Ewart for OCJ History Project, 2014.
[62] Gerald Lapkin became a "senior judge" in 1988, but it was not until legislation was introduced in 1990 that he became Co-ordinator of Justices of the Peace.
[63] Interviews of Shelley Howell for OCJ History Project, 2014-15.
[64] Michel, *Provincial Courts,* p. 25.
[65] For more information on the early days of adult education, see the works of educators Eduard Lindeman and Malcolm Knowles.
[66] Hansard, July 7, 1993
[67] *Justices of the Peace Act,* R.S.O. 1990, c. J.4, s. 14.
[68] The Criminal Division and Family Division of the Provincial Courts merged in 1990 into one court – the Ontario Court (Provincial Division). The Ontario Court (Provincial Division) became the Ontario Court of Justice on April 19, 1999.

[69] Interviews of S. Linden for OCJ History, 2014-15.
[70] Memorandum of Understanding, 1993, p. 10. The Education Secretariat had been created by Chief Judge Linden in the early 1990s, with Justice Mary Hogan as its first chair.
[71] Wake, David and Lennox, Brian W. Lennox, "The Ontario Court of Justice: A Journey in Education," *National Judicial Institute: 20th Anniversary Essays,* p. 42.
[72] Linden, Sidney B. "Opening of the Courts," January 6, 1999.
[73] Interview of David Wake for the OCJ History Project, 2014.
[74] In 2000, the Ontario Court of Justice signed a Memorandum of Understanding with the National Judicial Institute. Pursuant to this MOU, the NJI provided a staff person with the responsibility of a Senior Advisor who would devote half of his or her time to the Court, and the other half to the provincial and provincial and territorial courts of Canada. It was also agreed that any and all of the work done by the NJI with respect to the Ontario Court of Justice or to the provincial and territorial courts would be available to all Canadian courts. The NJI representative assumed the title of Education Director of the Ontario Court of Justice, and the NJI provided critical substantive, pedagogic and logistical support.
[75] Wake and Lennox, "The Ontario Court of Justice," pp. 42-43.
[76] Ontario Court of Justice, "Continuing Education Plan, 2012-2013," p. 2.
[77] Ontario Court of Justice, "Continuing Education Plan, 2012-2013," p. 10.
[78] Interviews of Brian W. Lennox for OCJ History Project, 2014-15.
[79] Prior to her appointment as a judge of the Provincial Court, Justice Inger Hansen was the first ombudsman of the Kingston Penitentiary and, in 1977, she was appointed the first Privacy Commissioner of the federal Human Rights Commission. She retired from the Ontario Court of Justice in 1993 and died in 2013.
[80] Interviews of Brian W. Lennox for OCJ History Project, 2014-15.
[81] Interview of Katherine McLeod for OCJ History Project, 2015.
[82] *Justices of the Peace Act,* R.S.O. 1990, c. J.4, s. 14.
[83] Interviews of Shelley Howell for the OCJ History, 2014-15.
[84] Interviews of Shelley Howell for the OCJ History, 2014-15.
[85] Interviews of Shelley Howell for the OCJ History, 2014-15.
[86] Interviews of Annemarie Bonkalo for the OCJ History, 2014-15.
[87] Carolyn Robson was followed in the position of Senior Advisory Justice of the Peace by Justices of the Peace Opal Rosamund, Andrew Clark, and, then, Bernard Swords.
[88] *Courts of Justice Act*, R.S.O. 1990, c. C.43. s. 35 (a.1)
[89] Marietta Roberts was followed in that position by Justices Donald Ebbs, John Payne, and, then, Faith Finnestad.
[90] Interview of Gerald Lapkin for OCJ History, 2014.
[91] Interviews of Shelley Howell for OCJ History, 2014-15.
[92] Interviews of Gerald Lapkin for OCJ History, 2014.
[93] Interview of Gerald Lapkin for OCJ History, 2014.
[94] Ontario Court of Justice, "Justice of the Peace Education Plan," April 2013.
[95] *Justices of the Peace Act*, R.S.O. 1990, c. J.4, s. 14(1).
[96] Remarks of the Right Honourable Beverley McLachlin, On the Occasion of the 2nd International Conference on the Training of the Judiciary, November 1, 2004.

Diversity: Changing the Face of the Court

Introduction

On a Friday in the 1970s, an Ontario family court judge received a threatening phone call from a man of Asian descent who had appeared before him. Because the caller was known to be violent, the judge was assigned 24-hour police protection. On Monday morning, a police officer followed the judge into the court house parking lot. Observing an Asian man getting out of a nearby car, the officer slammed him up against the car. The "suspect" was actually family court judge Kechin Wang. "Such a gentle sweet man," recalled Ted Andrews, who was then Chief Judge of Ontario's Provincial Court (Family Division). "It was shocking for him to be rousted like that."[1]



Judge Kechin Wang. (Photo: Ron Bull, *Toronto Star*, August 25, 1975, Getty Images)

The incident with Judge Wang took place at a time when judges were predominantly white men. It must not have occurred to the police officer that the individual might be a judge heading into work. Much has changed since then.

This essay examines the changing face of the Ontario Court of Justice. It considers ways in which the Court has – or has not – become more diverse, how the changes came about, and what the impact has been.

A Note on Terminology

One of the challenges in writing about diversity is deciding what terms to use when describing different groups of people. The literature refers to "women judges" so we use that term in this essay, but we do not refer to "men judges" because no one seems to use that term. When referring to statistical data, we use the terminology of the organization that holds the data in question. So we say "visible minority" when referring to data kept by the Judicial Appointments Advisory Committee and "racialized group" for data provided by the Law Society of Upper Canada. We refer to the Court's data on "native" justices of the peace and the Committee's data on the appointment of "First Nations" judges. And of course, all quotes from interviews and newspaper articles contain the language used by the author. All of this has resulted in inconsistencies in the terminology used in this essay, which we acknowledge, but we have chosen to be faithful to our sources. We also recognize that terminology can be a minefield. An appropriate term today can be viewed as inappropriate – or even offensive, sexist or racist – tomorrow. We apologize if any terms in this essay make readers uncomfortable.

Diversity on the Court

What do We Mean by "Diversity?"

A diverse court is one whose judges and justices of the peace come from different backgrounds and life experiences, duly reflecting the population being served.

A diverse court includes women and men; persons with and without disabilities; persons of different sexual orientations; Aboriginals and non-Aboriginals; Anglophones, Francophones, and other linguistic groups; and individuals from a variety of racial, cultural and religious backgrounds.

Diversity is not, however, limited to the inclusion of judges and justices of the peace from specific populations or social identities. It can refer to any sense in which people bring a variety of perspectives to the court, including the kind of work they did before their appointments. Justices of the peace, who

are not required to be lawyers, come from a wide range of occupations. They include former teachers, real estate agents, nurses, journalists, court clerks, social workers, and many more.

In a study of sentencing practices by Ontario magistrates, John Hogarth wrote: "Age, religion, education, social class background, and previous employment experience all were shown to have a relationship to magistrates' behaviour on the bench."[2]

Donald McLeod

Donald McLeod grew up in Toronto public housing with his mother and sister. He was appointed to the Ontario Court of Justice in Brampton in 2013.

"The law obligates me to look at the personal circumstances of each person who comes in front of me," McLeod explained for an article about his story in *The Globe and Mail*.

"My background doesn't help me to make the decision. At times it may help me to understand the individual."

(Sources: "From the projects, for the projects", by Sean Fine, *The Globe and Mail*, July 5, 2014; *Ministry of the Attorney General News Bulletin*, September 23, 2013.)

Why is Diversity Important?

Justice Maria Linhares de Sousa's appointment as a Provincial Court judge in 1989 received media attention in Ottawa because she was a woman and an immigrant, having come to Canada from Portugal as a child. Linhares De Sousa later became a Superior Court judge when a Unified Family Court was established in Ottawa. She has described

Justice Maria Linhares de Sousa (Courtesy: M. L. de Sousa)

the importance of diversity from the perspective of the people who appear before the court.

> For people coming before the court, diversity makes a real difference. A court should be representative of the people because it is the people's court. The court should be something they can identify with—a place where they feel that they can be heard and understood. If the court is not diverse, people feel it is not part of them. A court could easily be rendered irrelevant as an institution if the bench is not representative of the population. Great care must be taken in selecting judicial officials.[3]

The importance of diversity among judges is often explained in terms of public trust, judicial impartiality, and the legitimacy of the court. Many authors, including former Supreme Court of Canada Justice Bertha Wilson, have cited the following statement.

> But the ultimate justification for deliberately seeking judges of both sexes and all colors and backgrounds is to keep the public's trust. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged.[4]

This rationale was echoed by the Diversity Institute of Ryerson University when releasing the findings of its 2012 study on diversity among federally and provincially appointed judges in Ontario.

> Judges are extremely powerful. Judicial impartiality and independence is a cornerstone of democracy. So is representation. The public trust and perceived legitimacy of the court depends on it.[5]

Judicial diversity is seen as something that can enhance impartiality and decision making. This does not mean that individual judges will be more impartial due to their backgrounds. It means that the court as a

whole will be more open to different perspectives rather than viewing the world from a single vantage point. As expressed by Justice Maryka Omatsu of the Ontario Court of Justice, "[a] one-sided homogeneity of the judiciary cannot help but carry with it a narrowness of vision and of life experiences that is bound to create unconscious biases."[6] In a similar vein, American academic Sherrilyn A. Ifill wrote that "racial diversity on the bench also encourages judicial impartiality, by ensuring that a single set of values or views do not dominate judicial decision-making."[7]

Rosalie Abella became a judge of the Provincial Court (Family Division) in 1976 and, following a series of other appointments, joined the Supreme Court of Canada in 2004. She wrote that "[e]very decision maker who walks into a courtroom to hear a case is armed not only with relevant legal texts, but with a set of values, experiences and assumptions that are thoroughly embedded."[8]

Having a broadly representative court does not guarantee that individual litigants will have judges who share their background or life experiences. However, the more varied the values, experiences and assumptions within the court as a whole, the more the court will be – and will be seen to be – open to the realities of the diverse public that appears before it.

"I recognize the value of having a different cultural perspective than many of my colleagues," said Justice Manjusha Pawagi of the Ontario Court of Justice. "My cultural lens doesn't take away the need to examine carefully, as all judges must, how my personal background and experience can affect the way I see the cases that come before me. The challenge for all of us is to use cultural sensitivity and avoid cultural bias".[9]

A diverse court is an inclusive court. Just as the public should expect a fair and impartial hearing, there must be a fair judicial selection process that is open and accessible to qualified people from a variety of backgrounds. In 1990, Ontario's newly created Judicial Appointments Advisory Committee captured the essence of why diversity matters:

The committee believes the judiciary will better serve the community if, in a sociological sense, it is reasonably representative of that community. The committee believes this for two reasons.

First, it is important that the perspectives of the various racial and ethnic groups that make up Ontario society, and the outlook and experience of women as well as men should influence how justice is administered. Judges have a great deal of discretion in interpreting and applying the law. In the Ontario Court of Justice (Provincial Division), this is particularly true with regard to sentencing and the resolution of family problems. This discretion will be exercised more effectively and fairly when the judiciary is not dominated by a single race, or ethnic group or gender.

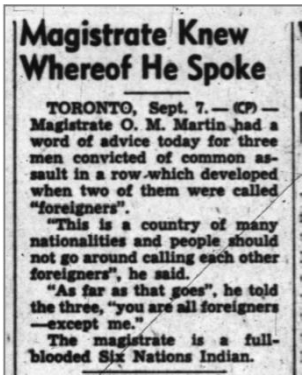
Second, the judiciary is likely to be more credible when significant sections of the community do not appear to be excluded from its membership. Judges of the Ontario Court of Justice (Provincial Division) exercise great powers; they can impose years of imprisonment on a citizen and authorize the removal of children from the custody of their parents. Those who are subject to such decisions are likely to have more confidence in their fairness when they see members of their own social group appointed to the court that makes them.[10]

The Early Years (1867 to 1967): A White Man's World

A great Judge must also be a great man.

John Buchan – A Manual for Ontario Magistrates, 1962[11]

Ontario's early magistrates, judges and justices of the peace were almost exclusively white men. There were a few exceptions, of course.



Magistrate Knew Whereof He Spoke

TORONTO, Sept. 7.—(CP)—Magistrate O. M. Martin had a word of advice today for three men convicted of common assault in a row which developed when two of them were called "foreigners".

"This is a country of many nationalities and people should not go around calling each other foreigners", he said.

"As far as that goes", he told the three, "you are all foreigners—except me."

The magistrate is a full-blooded Six Nations Indian.

(Source: *Ottawa Journal*, Sept. 8, 1948)

- In 1908, William Peyton Hubbard became a justice of the peace for the County of York. Hubbard, the son of freed slaves from Virginia, had been Toronto's first black alderman before becoming York's first black justice of the peace.
- In 1922, Margaret Patterson, a white physician, became Ontario's first female magistrate and presided over the Toronto Women's Police Court.
- O.M. Martin, an Aboriginal man, was an Ontario magistrate in the 1940s and 1950s. Martin was elected president of the Magistrates' Association in 1956.[12]
- In 1955, Daisy Graydon, the widow of a deceased member of parliament, became a family court judge in the County of Peel.

Mrs. Daisy Graydon Appointed Judge

BRAMPTON, Ont., March 7.—(CP)—Mrs. Daisy Graydon, widow of Gordon Graydon, former Conservative Member of Parliament for Peel, has been appointed judge of the Peel County juvenile and family court.

(Source: *Ottawa Journal*, March 7, 1955)

Despite these historic appointments, the provincial bench remained predominantly white and male for many years. When Ted Andrews replaced Mrs. Graydon in 1962, he observed that women judges were a rarity.[13]

That same year, S. Tupper Bigelow published *A Manual for Ontario Magistrates*. The presumption that judging was exclusively a male profession is evident throughout the text: magistrates are consistently referred to as "he." There can be no mistake about the gender of the intended audience when reading the quotations Bigelow included to illustrate the attributes of a good judge.

> *John Buchan: A great Judge must also be a great man*.[14]

Justice Bernard Botein: There is a modern version of Lord Chancellor Lyndhurst's definition of a good Judge: "First he must be honest. Second, he must possess a reasonable amount of industry. Third, he must have courage. Fourth, he must be a gentleman. And then, if he has some knowledge of law, it will help."[15]

These three photos of Ontario magistrates and judges were taken between 1860 and 1879. The names of the gentlemen (and they are all men) are unknown. (Courtesy: Law Society of Upper Canada Archives)

Bigelow's manual, written for an audience of male magistrates, contains assumptions about women who appear in criminal court, whether as an accused person or as a witness. Back in the 1960s, Bigelow's views were probably not considered to be exceptional or objectionable within legal circles.

It sometimes happens that an accused person conducts himself in an obstreperous or violent manner. This is much more often true of women than men.[16]

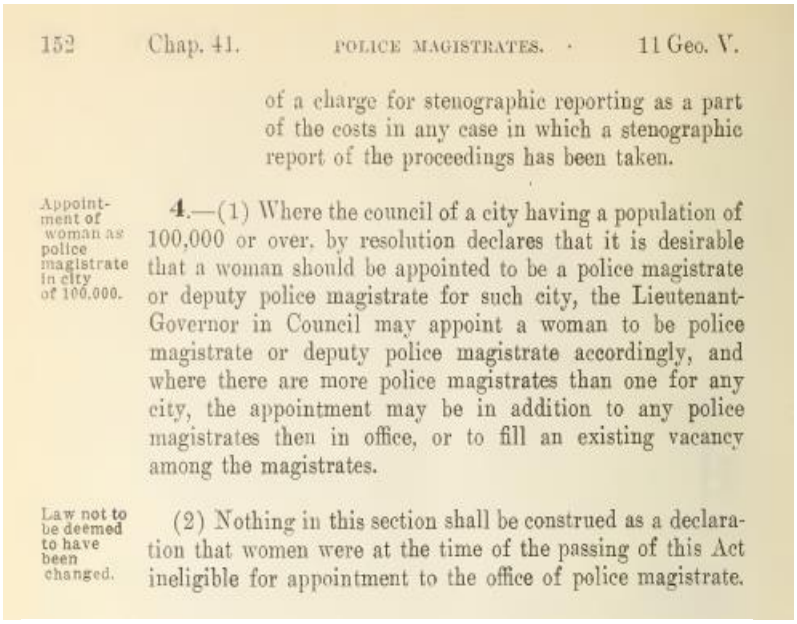
If a woman lies about her age, it is wholly probable that that is the only thing she ever lies about. Once a magistrate hears counsel ask a female witness: "How old are you?" he should say to the witness: "You don't have to answer that question, Mrs. Smith."[17]

The *Police Magistrates Act*: Women on the Bench

In 1920, Magistrate George Taylor Denison announced that he would be retiring.

The Toronto Local Council of Women and others lobbied for legislation to enable a woman to be appointed as his replacement on the Toronto Women's Police Court.[18] There was nothing in the *Police Magistrates Act* to prohibit the appointment of women, but the view at the time was that the statute should be modified to address the issue before such an extraordinary step was taken.

The *Act* was amended in 1921 to specify that women could be appointed as police magistrates, but only in cities with populations of 100,000 or more and only where a resolution of the municipal council declared it was desirable for a woman to be appointed.[19] This paved the way for the appointment of Margaret Patterson as Ontario's first woman magistrate in 1922.



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of a charge for stenographic reporting as a part of the costs in any case in which a stenographic report of the proceedings has been taken.

Appointment of woman as police magistrate in city of 100,000.

4.—(1) Where the council of a city having a population of 100,000 or over, by resolution declares that it is desirable that a woman should be appointed to be a police magistrate or deputy police magistrate for such city, the Lieutenant-Governor in Council may appoint a woman to be police magistrate or deputy police magistrate accordingly, and where there are more police magistrates than one for any city, the appointment may be in addition to any police magistrates then in office, or to fill an existing vacancy among the magistrates.

Law not to be deemed to have been changed.

(2) Nothing in this section shall be construed as a declaration that women were at the time of the passing of this Act ineligible for appointment to the office of police magistrate.

In 1921, the *Police Magistrates Act* was amended to specify women could be appointed as magistrates in cities with populations over 100,000.

The decision to amend the *Police Magistrates Ac*t was probably wise. Five years earlier, on Emily Murphy's first day as an Alberta magistrate in 1916, a lawyer challenged her authority on the basis that women were not considered to be "persons" under the *British North America Act* (Canada's Constitution). The next year, the Supreme Court of Alberta ruled that women were persons, but that

concept was not decided for Canada as a whole until the famous 1929 "Persons Case" which went all the way to the Privy Council in England.[20]

The special provisions for female magistrates remained in Ontario's *Magistrates Ac*t until 1952.

The Provincial Courts Era (1968-1989): Native Justices of the Peace

By 1968, transformation was underway in response to the Royal Commission Inquiry Into Civil Rights conducted by Chief Justice James McRuer. In December of that year, legislation was proclaimed to create the Provincial Courts, with a Family Division (to replace the Juvenile and Family Courts) and a Criminal Division (to replace the Magistrates' Courts).[21]

The Provincial Courts structure remained in place for over 20 years. During that period, a notable change in the composition of the court came about as a result of the Ontario Native Justice of the Peace Program.

The Native Justice of the Peace Program

A report by law professor Alan Mewett to the Attorney General in the early 1980s marked a turning point in Ontario's approach to justices of the peace. Among other things, Mewett recommended that "steps be taken to ensure the appointment of more justices of the peace for native reserve communities."[22]

> Confidence by the native people themselves in our criminal justice system will not be achieved unless they see native peoples dispensing not other people's justice but their own justice. They must be part of the system, not subjects of the system, and if this requires reconciling Indian morals and ways of life with those of the larger community, then it will require trained, dedicated native

> justices of the peace, who have the necessary support, to achieve this. In the abstract, therefore, I have no hesitation in saying that there must be considerably more native persons appointed as justices of the peace for reserves and local native communities.[23]

Mewett's vision included a training program to qualify native candidates for justice of the peace appointments.[24] Chief Judge Fred Hayes – known for a deep respect for native traditions and elders – embraced this vision and set out to create the Native Justice of the Peace Program. Staff from the Ministry of the Attorney General worked closely with local communities and northern Ontario Judge Gérald Michel to make it happen.

A feature of the program was intensive, pre-appointment training for candidates who might otherwise have been considered to lack qualifications necessary for appointment as a justice of the peace.

"Status Indian first native JP for Ontario."

This headline appeared in The Globe and Mail on June 21, 1985. The article was about Charley Fisher, a status Indian member of the Islington Band.

Fisher had just been appointed as a full-time justice of the peace after having served on part-time basis for several years.

Fisher was quoted: "I hardly completed grade 8 education, but I have learned a lot about court procedures."

Judge Michel described the intent of the program as follows.

> The aim was to have Aboriginal people working in the courts so they could feel part of the system in which they were so frequently involved, and to better

> serve the justice system in the isolated communities where people had no one to turn to for private complaints and the police had no one to go to for the issuance of process.
>
> The aim was also to train justices of the peace who would preside over minor offences under the reserve band by-laws and to hear other provincial regulatory offences. It was expected that these justices of the peace would better administer the law in these communities where the culture was different from white man's culture and not always understood by non-Aboriginal people.[25]

Michel recalled the challenges in recruiting applicants who feared their families would be ostracized if they assumed enforcement roles in the community.[26]

Opinions on the program were diametrically opposed. They ranged from "The best program that all justices of the peace should have to go through" to "It discriminated against native justices of the peace." However all agreed that it was a very demanding program.[27]

Although the Native Justice of the Peace program continued for many years after it began in 1985, eventually the pre-selection education was eliminated. Nonetheless, the program's impact has been significant in providing access to justice for Aboriginal communities, and access to judicial positions for members of those communities.

> Now if we have a vacancy for a bilingual or First Nations justice of the peace, we advertise and carry on like any other advertisement. We have designated positions but sometimes we move them around for greatest need. In the northeast we have full time native justices of the peace in North Bay, Sudbury and Timmins.[28]

Four Women Judges and Counting

In his memoir, David Vanek wrote about being appointed as a magistrate in 1968, just a few months before the creation of the Provincial Courts. Vanek recalled, "Automatically I joined a select brotherhood of the judiciary. It was indeed a fraternal organization because not a woman graced the dais at this time or for several years thereafter."[29]

Woman judge makes history

TORONTO (Staff) — Ontario has appointed its first woman criminal court judge.

Attorney-General Roy McMurtry Tuesday named Toronto lawyer June Tarshis Bernhard, 54, to serve in the provincial court (criminal division) in York County.

Opposition MPPs last year complained strongly about the lack of women on the bench. McMurtry said he has had difficulty getting qualified women to accept judicial posts.

He claimed by the time women lawyers are experienced enough to be named judges, they usually are established in their practices and unwilling to give them up.

Judge June Bernhard

(Source*: Ottawa Journal*, April 18, 1979)

In December 1968, the *Ontario Gazette* listed the individuals appointed to be Provincial Judges in the new Provincial Courts. Based on the names in that list, only four were women: Margaret Moncrieff Chambers, Marjorie May Hamilton, Mary Catherine Maloney, and Bertha Esther Thompson. These women were all family court judges.

It was not until 1979 that history was made with the appointment of June Bernhard, the first woman to become a judge in criminal court, serving with Vanek and the "brotherhood" in the Provincial Court (Criminal Division).

Author Jack Batten made the following observations about Judge Bernhard in his book, *Judges*, published in 1986.

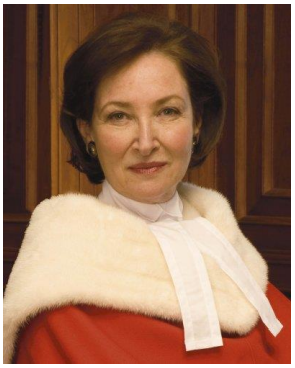
> She specialized in civil litigation and built a career as a hard-working, astute counsel who didn't miss a legitimate trick in court. In all her years at the bar, she took only a single criminal case….Bernhard never entirely believed she'd be named to the bench, not even when the big call came at seven o'clock one night in the spring of 1979.

> "I'm the Deputy Attorney General," the voice on the phone said. "And I'm the Shah of Iran," Bernhard answered. She got the appointment anyway….
>
> She was the judge whom you could spot in her office or over in the law library at Osgoode Hall at nine o'clock in the evening. "I prefer cases that have a little law to them and aren't just a matter of assessing the facts," she says. "The thing is that counsel often don't direct you to the right law, which means you have to look it up for yourself. You have to research the decisions. Find the precedents. And that's all right by me."[30]

Mary Hogan was appointed in 1987 as a judge to hear criminal cases in Toronto's Old City Hall, where Bernhard was the only other woman judge. Hogan was pregnant with her third child at the time. Attorney General Ian Scott had warned her that there was no maternity leave for judges. Hogan was out of the hospital on a Friday and back at work on Monday, with the baby. A secretary looked after the baby while Hogan presided in court. Later, Hogan and others were successful in getting maternity leave added to the list of judicial benefits.[31] New mothers on the bench had not been an issue when virtually all the judges were men.

Rosalie Silberman Abella: Appointed 1976

In 1976 there were only a few women serving as judges in the Provincial Court (Family Division) and none in Toronto. Chief Judge Ted Andrews wanted to help rectify the situation and deflect criticism about the lack of women judges available to hear family law matters. He called the family judges at the 311 Jarvis Street courthouse in Toronto and asked if they could recommend a "good woman candidate."



Justice Rosalie Silberman Abella (Photo credit: Philippe Landreville, Photographer, Copyright: Supreme Court of Canada)

Judge David Main recommended "Rosie" Abella, a young lawyer with a growing reputation in the local legal community. Andrews followed through and the Ontario government was prepared to appoint Abella to the Court. When Attorney General Roy McMurty eventually met with her, he was taken aback to see that she was several months pregnant. "Nobody told me about this," he said. "Your appointment is going to cabinet next week. Do you still want the job?" She said yes and, at the age of twenty-nine, joined "the guys" at 311 Jarvis.

She sat in court until the day before giving birth. Afterwards, she stayed at home with the baby for two months, still receiving her judicial salary. When someone from the Ministry of the Attorney General called to say that there was no maternity leave program for judges and she would have to give the money back, she did.

Abella thrived as a Provincial Court judge. But there was also danger associated with the position due to angry parties in family law cases. "I had to deal with threats," she said. "At one time my children had two bodyguards when they went to school."

While sitting as a family judge, she retained a high profile in the community, speaking out on a variety of issues and, in 1984, serving as Commissioner of the federal Royal Commission on Equality in Employment. She resigned from the Court in 1988 when Ian Scott, newly named as Attorney General, said she could no longer serve as both a judge and as chair of the Ontario Labour Relations Board. She

remained with the Board until 1989 when she became chair of the Ontario Law Reform Commission.

In 1992, Abella became a judge again, this time with the Ontario Court of Appeal. In 2004, she was appointed to the Supreme Court of Canada. In reflecting back, she acknowledges the "group of remarkable family judges"--such as David Main, Patrick Gravely, Peter Nasmith, James Karswick, and Norris Weisman at the 311 Jarvis Street Provincial Court where she began her judicial career.

(Sources: Interview of R. Abella for the Ontario Court of Justice History Project, 2015; Biography of R. Abella on the Supreme Court of Canada website.)

George E. Carter: Appointed 1979

George E. Carter was born in Toronto in 1921. After graduating from the University of Toronto and a brief period of military service, Carter studied law at Osgoode Hall Law School. He articled with B. J. Spencer Pitt, known as the only black lawyer to be practising law in the province, and then practised real estate, criminal, and family law.

Justice George Carter, left, with Roy McMurtry, York University Chancellor and former Attorney General and Chief Justice of Ontario. April 27, 2014. (Courtesy: Michael Litwack (JD '15), Osgoode Hall Law School, York University.)

Attorney General Roy McMurtry was proud to appoint Carter as a Provincial Court judge in 1979. This made Carter the first Canadian-born black judge. Maurice Charles, born in Guyana, had been appointed to the provincial court several years earlier.

In the book *Judges*, Jack Batten provides the following sketch. "Judge George Carter is black and he's massive in the manner of an old football linebacker who has let his weight find its natural

limits….He was one of the few black lawyers in Toronto in the days when they were called Negroes. Carter practised by himself and took a shot at everything until he got his appointment to the Provincial Court."

In January 2014, Carter became a member of the Order of Ontario, the province's highest honour.

(Sources: Jack Batten, *Judges* (Toronto: Macmillan of Canada, 1986), 88; websites of African American Registry, Ontario Ministry of Citizenship, Immigration and International Trade, Osgoode Hall Law School, University of Toronto, The Law Society of Upper Canada, (accessed January 2015)).

A Consolidated Court (1990-1999): Judicial Appointments Advisory Committee

A New Way of Selecting Judges

A pivotal moment in the changing face of the Court occurred with the creation of Ontario's Judicial Appointments Advisory Committee by Attorney General Ian Scott. Helping to create a more representative bench was and has remained an explicitly stated goal of the committee. From the start, the committee aspired to identify judicial applicants with grassroots experience that qualified them above and beyond knowledge of the law.

> Diversity was a high priority from the beginning.[32]
>
> *Susan Dunn, Secretary to first Judicial Appointments Advisory Committee*
>
> We would go far and wide to find lawyers who would understand people in the community they would be serving.[33]…. At the time, almost all the province's 222 judges were men of Anglo-Saxon background; only 10 were women.[34]

Michele Landsberg, public member on first Judicial Appointments Advisory Committee

The advisory committee model – and its commitment to diversity – remains intact over 25 years later. In 2015, committee chair and community member Hanny Hassan said, "There is a political commitment that is also reflected in the *Courts of Justice Act* and in the advisory committee's own published criteria: we expect to have a diverse bench."[35]

Judicial Appointments Advisory Committee (1989/1990)

Front row, left to right: Denise Korpan, David McCord, Michele Landsberg, Valerie Kasurak. Back row, left to right: Robert Muir, Peter Russell (Chair), Susan Dunn (Secretary), Ben Sennik. Absent: Tom Bastedo, Judge Robert Walmsley. (Courtesy: Susan Dunn)

The Judicial Appointments Advisory Committee began as a pilot project in 1988 near the end of the Provincial Courts era. It became enshrined in legislation in 1995[36] when the Court was known as the

Ontario Court of Justice (Provincial Division). Ontario was the first jurisdiction in Canada to enact legislation of this type.

The committee was made up of public members (non-lawyers), lawyers and judges, with the majority – at Ian Scott's insistence – being the public members.[37] After a process of advertising, interviews and reference checks, the committee would send its top candidates for judicial vacancies to the Attorney General. The government would then appoint a judge from the list.

Encouraging applications: The Hampton Letter

Ontario

Office of the Minister
Cabinet du ministre

Ministry of the Attorney General
Ministère du Procureur général

720 Bay Street
11th Floor
Toronto, Ontario
M5G 2K1

720, rue Bay
11e étage
Toronto (Ontario)
M5G 2K1

416/326-4000
FAX 416/326-4016

November 27, 1990

Dear Colleague:

I am writing to you today to alert you to the fact that a number of judicial appointments to the Ontario Court (Provincial Division) will be made within the next two months.

My government is committed to the principle of Employment Equity and as I have said publicly, my goal is that at least 50% of the new appointments be women. I urge eligible applicants to consider applying for a judicial appointment.

The appointment process is undertaken by the Judicial Appointments Advisory Committee in order to ensure that the process is as far removed from the political process as possible and a high standard of excellence is maintained. The Committee is now receiving applications for review in December and will embark on the interview process in January.

Because the Committee will review applications in December, please fax a notice of your intent to apply at (416) 326-4065 as quickly as possible. The Judicial Appointments Advisory Committee will in return send to you an application form, for you to fill out.

Thank you for your attention to this matter.

Yours sincerely,

Howard Hampton
Attorney General

This Paper Contains Recycled Materials / Ce papier contient des matériaux recyclés

Advertising judicial vacancies – seen as a radical move at the time – was intended to produce a more diverse pool of qualified candidates. In the case of applications from women, the numbers spiked following active outreach in 1990 by Attorney General Howard Hampton of the newly elected New Democratic Party government.

Hampton was planning to appoint judges to help address court delays in light of the *Askov* decision.[38] In that decision, the Supreme Court of Canada defined a person's right under the *Charter* to be tried within a reasonable time. As a result, there was a real risk of serious criminal cases being thrown out due to delays in bringing them to trial. Hampton wanted to ensure that 50% of the new appointees were women, and that racial minority, Aboriginal and Francophone judges were also appointed.

In November 1990, Hampton sent a letter to women who had been practising law for at least 10 years to encourage those eligible to apply for judicial positions. It worked. Due to the letter and the ads, the committee was flooded with applications from qualified women candidates. Many of them had previously thought it would not be "worth the bother" to apply without political connections.[39]

Attorney General Howard Hampton and Chief Judge Sidney Linden with Associate Chief Judge Robert Walmsley, a member of the Judicial Appointments Advisory Committee in the early 1990s. (Courtesy: Walmsley Family)

Hampton also made sure there was outreach to Aboriginal, Black and Francophone lawyers through their associations.[40]

In a statement to the Ontario Legislature in March 1991, Attorney General Hampton reported on his progress in the context of responding to court delays.[41]

> Mr Speaker, I am pleased to be able to tell you today that we have appointed 18 new provincial court judges, and in the upcoming weeks I expect to appoint the remaining nine. The 27 appointments will help us to achieve a more representative provincial bench. Of the 18 appointments to date, 11 of these judges are women, including Canada's first woman native Canadian judge.[42]
>
> In November I wrote to some 1,200 women lawyers inviting them to apply to become judges. As a result, more than 40% of applications for the new positions on the provincial bench came from women, compared to 12% of applications in previous competitions. The trend in judicial appointments is clear: No longer will we hear the argument that there are not enough eligible women who want to become a judge.

Opposition member and future Attorney General Charles Harnick responded that hiring "francophones, racial minorities and women" is "all very good and it is all very proper." However, he worried that the criterion of ability "has gone out the window."[43]

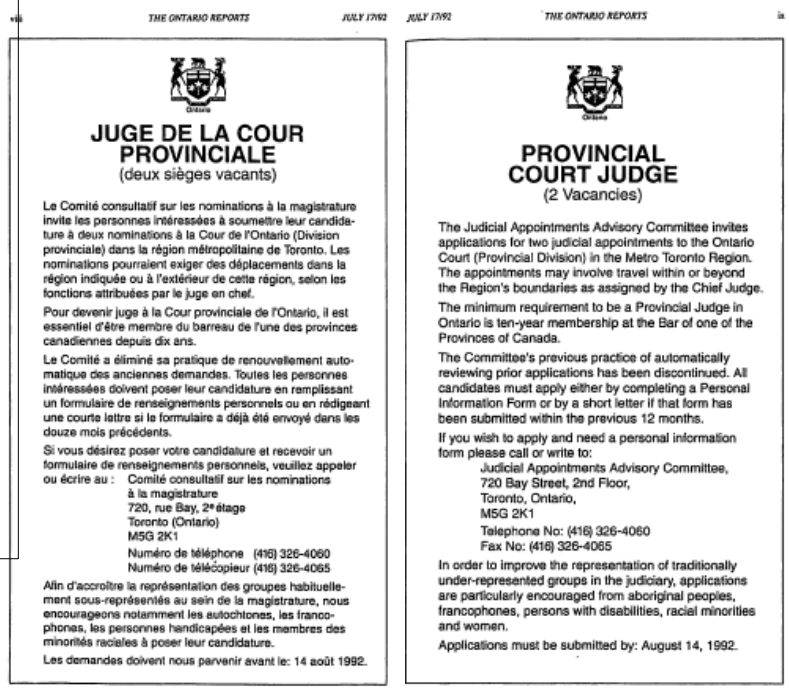
Active outreach to achieve judicial diversity continued through the 1990s and beyond. In 1997, Justice Maryka Omatsu made the following observation.

> Social commentators have long remarked on the ties between the judiciary, business, and the major political parties. Now there is also an increasing adverse popular response in a pluralistic society to a powerful, tenured institution that is overwhelmingly white, male, and upper-middle class.

In this climate, governments are moving towards greater representation on the bench, in recognition that increasing public respect for the law requires a judiciary that is more reflective, aware and sensitive to the people and issues before the court.[44]

Swearing-in ceremony of Justice Maryka Omatsu, 1993. (Courtesy: M. Omatsu)

Omatsu, the first woman of East Asian origin to become a judge in Canada, applied to become a judge after reading a notice that changed her life. The notice – in the July 17, 1992 edition of the Ontario Reports – *encouraged "traditionally under-represented groups in the judiciary" to apply for two provincial judicial vacancies.*[45]



viii THE ONTARIO REPORTS JULY 17/92

JUGE DE LA COUR PROVINCIALE
(deux sièges vacants)

Le Comité consultatif sur les nominations à la magistrature invite les personnes intéressées à soumettre leur candidature à deux nominations à la Cour de l'Ontario (Division provinciale) dans la région métropolitaine de Toronto. Les nominations pourraient exiger des déplacements dans la région indiquée ou à l'extérieur de cette région, selon les fonctions attribuées par le juge en chef.

Pour devenir juge à la Cour provinciale de l'Ontario, il est essentiel d'être membre du barreau de l'une des provinces canadiennes depuis dix ans.

Le Comité a éliminé sa pratique de renouvellement automatique des anciennes demandes. Toutes les personnes intéressées doivent poser leur candidature en remplissant un formulaire de renseignements personnels ou en rédigeant une courte lettre si le formulaire a déjà été envoyé dans les douze mois précédents.

Si vous désirez poser votre candidature et recevoir un formulaire de renseignements personnels, veuillez appeler ou écrire au : Comité consultatif sur les nominations à la magistrature
720, rue Bay, 2e étage
Toronto (Ontario)
M5G 2K1

Numéro de téléphone (416) 326-4060
Numéro de télécopieur (416) 326-4065

Afin d'accroître la représentation des groupes habituellement sous-représentés au sein de la magistrature, nous encourageons notamment les autochtones, les francophones, les personnes handicapées et les membres des minorités raciales à poser leur candidature.

Les demandes doivent nous parvenir avant le: 14 août 1992.

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PROVINCIAL COURT JUDGE
(2 Vacancies)

The Judicial Appointments Advisory Committee invites applications for two judicial appointments to the Ontario Court (Provincial Division) in the Metro Toronto Region. The appointments may involve travel within or beyond the Region's boundaries as assigned by the Chief Judge.

The minimum requirement to be a Provincial Judge in Ontario is ten-year membership at the Bar of one of the Provinces of Canada.

The Committee's previous practice of automatically reviewing prior applications has been discontinued. All candidates must apply either by completing a Personal Information Form or by a short letter if that form has been submitted within the previous 12 months.

If you wish to apply and need a personal information form please call or write to:
Judicial Appointments Advisory Committee,
720 Bay Street, 2nd Floor,
Toronto, Ontario,
M5G 2K1
Telephone No: (416) 326-4060
Fax No: (416) 326-4065

In order to improve the representation of traditionally under-represented groups in the judiciary, applications are particularly encouraged from aboriginal peoples, francophones, persons with disabilities, racial minorities and women.

Applications must be submitted by: August 14, 1992.

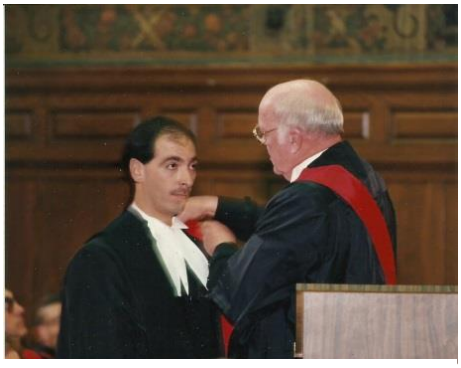
The notice, in *Ontario Reports*, soliciting applications for the Provincial Court Judge, and encouraging applications from "traditionally under-represented groups in the judiciary." (Source: *Ontario Reports*, July 17, 1992.)

Backlash: "I Want to Be a Judge But I Don't Wear a Skirt!"

Not everyone was pleased with the growing diversity of judicial appointments or the push for more women to become judges. This was especially true among white, male, politically connected lawyers who thought that it was "their turn." Peter Russell, the first chair of the Judicial Appointments Advisory Council, recalled the following incident.

> I got a call pretty early, maybe in the second or third year, from a male lawyer. He said he was pretty disgusted: "I want to be a judge but I don't wear a skirt!" I controlled my temper. I said, "Yes, we have recommended a number of women. But please do me a favour. If you find out from your own experience before these women judges or from your colleagues in the profession that they are not up to scratch, I want to know. I won't disclose you as my source. We want to be doing good work here." He said, "It's a deal," but he never called me back![46]

Harvey Brownstone: Appointed 1995



Swearing-in ceremony of Justice Harvey Brownstone, robed by former Chief Judge Ted Andrews, 1995.

Harvey Brownstone was born in France and raised in Hamilton, Ontario. When Attorney General Marion Boyd appointed him as a judge of the Ontario Court of Justice in 1995, he became the first openly gay judge in Canada. As Boyd has said, "Harvey was openly gay but there were others appointed before him who were not comfortable about being open in their sexual orientation."

In 2011, Brownstone achieved another "first" as a judge when he began hosting a television show to educate the public about family law matters. This followed from his bestselling book ***Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court***. The book, also aimed at the general public, includes a foreword by Ted Andrews who had served for many years as Chief Judge of the Provincial Court (Family Division).

(Sources: Interviews of M. Boyd and H. Brownstone for OCJ History Project, 2014 and 2015; *The Globe and Mail*, "Ontario judge's showmanship leads to TV series," Kirk Makin, Sept. 7, 2011. Photo courtesy: H. Brownstone.)

In the 1970s, when affirmative action helped to place women and racial and ethnic minorities on federal courts in the United States, another type of backlash occurred as defendants "began challenging their minority judges for bias."[47] A similar phenomenon occurred in the mid-1990s as Ontario's administrative tribunals became more diverse. For example, women adjudicators were challenged for bias in sexual discrimination and harassment cases due to their feminist backgrounds.[48] Fortunately, the Ontario Court

of Justice did not experience this type of backlash as the new appointment process began to increase the diversity of that Court.[49]

A Welcoming Environment for All?

It must have been difficult for Maurice Charles to be the only black judge when he was appointed in 1969 and for June Bernhard – the only woman criminal court judge – when she was appointed 10 years later. To encourage and maintain a diverse court, it is important that the environment is welcoming of diversity. This can benefit all people who find themselves in an Ontario courthouse, whether as a judicial official, court staff, legal professional, or member of the public.

In 1993, a public report from an inquiry into allegations of a judge's conduct put a spotlight on the need for a safe and harassment-free environment for women working in the Ontario Court of Justice, whether as judges, justices of the peace, or administrative staff.

> This inquiry…is not concerned with Judge Hryciuk's ability or performance as a judge in the courtroom. The evidence is unchallenged, that over his career he has been not just a good judge but an excellent judge in that respect. What is in question is Judge Hryciuk's conduct in relation to women when he is not engaged in his specific judicial function.[50]

This was not the first or only report that found a male judge or justice of the peace to have engaged in inappropriate sexual comments or actions. Even though the Court of Appeal later quashed the Commissioner's findings and recommendation,[51] the report had a major impact on personnel within the court system. It led to more comprehensive gender sensitivity training for judges of the Court and greater involvement of women in delivering such programs.

2000 and Beyond: Keeping Track

> In the best of all possible worlds, those holding public office would, by the simple law of averages, tend to reflect the same ratio as the general ethnic make-up of society – if, that is, social, economic and cultural backgrounds were such as to provide equal educational, employment and economic opportunities for all members of society. We do not live in that Utopian society yet, though perhaps one day we will.
>
> Alan Mewett, 1982[52]

Since 1995, the Ontario Court of Justice has kept statistics on the gender, bilingual status, and age of its judges. It later began to do the same for justices of the peace, and also to track the number of native justices of the peace. The Judicial Appointments Advisory Committee reports statistics about appointments from representative groups. What can we learn from the numbers?

The Justice of the Peace Bench is More Diverse

Almost 20 years after a committee began to select judges in a radically different way, the government amended the *Justices of the Peace Act* to create the Justices of the Peace Appointments Advisory Committee. From its creation in 2007, this regionally based committee has operated on similar principles to those of the Judicial Appointments Advisory Committee. The legislation recognizes "the desirability of reflecting the diversity of Ontario's population in appointments of justices of the peace."[53]

Even without a longstanding committee, Ontario's justice of the peace bench has become more diverse than the bench of judges. For example, the Court's statistics show a higher percentage of female justices of the peace than female judges: 47% versus 32% as of January 2015. Of the Court's 398 justices of the peace, 187 were women as of January 2015.

Justices of the Peace Ontario Court of Justice									
	Full Time	Per Diem[54]	Total justices	Male	Female	Bilingual	Average age	Average age at appointment	Native justices
Jan 2015	328	70	398	53%	47%	11.1%	62	47	7.3%

Judges Ontario Court of Justice								
	Full Time	Per Diem	Total judges	Male	Female	Bilingual	Average age	Average age at appointment
Jan 1995	248	22	270	83.3 %	16.7%	5.6%	56	44
Jan 2015	284	59	343	67.3%	32.7%	12.1%	61	47

(Data Source: Statistics provided by the Office of the Chief Justice, Ontario Court of Justice, January 2015).

The justice of the peace selection process appears to place less emphasis than its judicial counterpart on outreach and tracking appointments from designated groups, with the exception of native justices of the peace. Nonetheless, the committee has recommended the appointment of many justices of the peace from diverse backgrounds. This may be a reflection of the diverse individuals who apply for positions, encouraged by an awareness of people like themselves actually holding these positions.[55] While statistics are not available on all types of diversity, the photograph of newly appointed justices of the peace at the end of this essay bears witness to the mix of women and men from different backgrounds being appointed to the justice of the peace bench.

The Percentage of Women Judges Continues to Rise

The most dramatic change during the first 20 years of data collection has been the increase in women judges: from 16.7% in 1995 to 32.7% in 2015. Thus, as of January 2015, 113 of the 343 judges on the Ontario Court of Justice were women.

In 1921, a legislative amendment had to be passed to allow for the appointment of Ontario's first female magistrate. In 2015, women held all three of the top judicial leadership positions (Chief Justice and the

two Associate Chief Justices). Times have certainly changed, at least with regard to women on the bench.

Sisters on the Court

Judge and Justice of the Peace from Temagami First Nation

Appointed 2014

Holly Charyna, a former chief of the Temagami First Nation, was appointed in March 2014 as a Justice of the Peace in Owen Sound. Her sister, lawyer Catherine Mathias McDonald, was appointed the next month as a judge in Parry Sound. Both women were raised on Bear Island.

Journalist John R. Hunt reported about this notable family in an article for the *North Bay Nugget* as follows.

> Linda and George Mathias are probably the two proudest parents in Temagami these days. Few parents can boast of having both a Justice of the Peace and an Ontario Court Judge in their family….[W]hat is of particular significance is that the Mathias family are all proud members of the Temagami First Nation….
>
> > There are still far too many reservations and settlements where native children do not get equal education opportunities when compared with non-natives. There is also too much poverty and lack of opportunity on reserves across the land.
> >
> > Bear Island has long been more progressive and perhaps enjoyed greater opportunities than on other reservations. However, the

Mathias family has every reason to be proud and more ordinary mortals just a little envious.

Justice of the Peace
Holly Charyna

Justice Catherine
Mathias McDonald

(Sources: *North Bay Nugget*, "Judge, Justice of the Peace in the family", by John R. Hunt, April 16, 2014 (reprinted with permission); *Ministry of the Attorney General News Bulletins*, March 4, and April 8, 2014. Photos courtesy: *Bear Island Blast Newsletter*, May 2014.)

There Has Been Progress in Appointing Aboriginal Justices of the Peace and Judges

When Terry Vyse was appointed as a judge of the Ontario Court of Justice in 1991, she became the first Aboriginal woman appointed as a judge in Canada. By 2012, Ontario had appointed six judges who had identified as belonging to a First Nation. This represented 1.9% of judges appointed through the Judicial Appointments Advisory Committee process. According to Law Society of Upper Canada data from 2013, this percentage is similar to the 1.8% of Aboriginal lawyers who have been members of the bar for more than 10 and fewer than 20 years. Ten years at the bar is the minimum requirement for appointment as a

judge of the Court. The 2013 data also indicate that Aboriginal people comprise 2.3% of the Ontario population.[56]

In 2015, there were 29 native justices of peace, comprising 7.3% of that bench. This percentage is higher than that of judges who identified as First Nations and greater than the percentage of Aboriginal people in the overall population of the province.

Justice David Cole, who co-chaired the Commission on Systemic Racism in the Ontario Criminal Justice System, recalled an event from 1994.

> During the Commission's work, (Chief Judge) Sid Linden called me up and asked me to go to a conference of U.S. judges looking at race bias in American courts. Sid sent Judge Terry Vyse and me as the court's representatives. We were the only non-Americans among the 1000 attendees. We knew going in that Terry was the first Aboriginal woman judge appointed in Canada. What we could not have known is that according to the Americans – and the attendees would be in a good position to know – there were at that time no known Aboriginal women judges in the entire US judiciary, excluding women in tribal courts.[57]

Bilingual Capacity Has Risen Among Judges and Justices of the Peace

In criminal cases, people have the right to be tried in French if that is their choice. This right generally applies where the person's language is French or where French is the official language in which they can best give testimony. In family and *Provincial Offences Act* cases, there is a right to bilingual court proceedings. Therefore, it is essential for the Ontario Court of Justice to have judges and justices of the peace who are able to hear cases in French.[58]

The Court's statistics show an increase in judges who are bilingual, rising from 5.6% in 1995 to 12.1% in 2015. This meant that 42 of the 343 full time and per diem judges were able to conduct hearings in English and French as of January 2015. Similarly, 11.1% of justices of the peace (44 of 398) were bilingual as of January 2015.

In 1990, when the Judicial Appointments Advisory Committee was still a pilot project, its members were relieved to see that, with one exception, the Attorney General had selected the individuals most highly ranked by the committee:

> The one exception occurred in unusual circumstances. Because none of the judges serving the particular region could conduct trials in French and there was a significant Francophone population in the area, the Attorney General was determined to appoint a fluently bilingual person to the position. He made this known to the community and to the committee. The committee's first recommendation for this position did not have a fully bilingual person at the top of its list. The Attorney General decided not to appoint any of the persons on this list and asked the committee if it could recommend a strong bilingual candidate. The committee then submitted the name of a bilingual candidate who was highly ranked but when the Attorney General received negative comments on the individual from the Judicial Council, the appointment was not made. The committee then endeavoured to generate some additional applications from bilingual candidates. It interviewed several more candidates and eventually was able to recommend a fully bilingual lawyer with outstanding qualifications who was then appointed to the position.[59]

It should be noted that a bilingual judge is not necessarily a person whose mother-tongue is French. As of December 2012, the Judicial Appointments Advisory Committee reported that 7.1% of judges selected through its process were Francophone.

The Provincial Bench is More Racially Diverse than the Federal Bench

How can we determine if the Court has become more racially diverse since the 1970s incident involving Judge Kechin Wang? Several data sources can shed light on this question.

First, the Judicial Appointments Advisory Committee reported that as of 2012, 23 judges who had identified as "visible minorities" had been appointed through its process, representing 7.1% of appointments.

Appointments from Representative Groups

	Total No	Percent(N=322)
Women	117	36.3%
Francophone	23	7.1%
First Nations	6	1.9%
Visible Minority	23	7.1%
Persons with disabilities	0	0%

(Source: 2012 Annual Report of Ontario Judicial Appointments Advisory Committee.

(As of April 2015, this was the most recent annual report available.))

Second, the Law Society data show that 19.1% of Ontario lawyers practising for 10 to 19 years, and 7.1%

practising from 20 to 30 years, are from racialized groups[60] as compared to 16.9% in the community.[61] This is a clear indication that the pool of lawyers eligible to become judges is becoming more racially diverse.

Third, Ryerson University's Diversity Institute has examined the representation of women and visible minorities in various levels of courts in Ontario. Their research found a notable variance between federally and provincially appointed judges in terms of visible minorities. In 2012, using a sample of 138 provincially appointed judges, Ryerson found that 10.9% were visible minorities, compared to 15% of practising lawyers in Ontario. By contrast, the study found that only 2.3% of federally appointed judges were from visible minorities. The Diversity Institute credits the provincial appointment process – in place since 1988 – for increasing this type of diversity within the Ontario Court of Justice.[62]

A picture of growing diversity can also be gleaned from the Law Society of Upper Canada's "Biographies of Early and Exceptional Ontario Lawyers of Diverse Communities." Excerpts from the biographies appear in the appendix to this essay.

For its First 23 Years, the "JAAC" Process Resulted in No Appointments of Judges with Identified Disabilities

There have always been persons with disabilities on the Court. Examples include veterans who became magistrates and justices of the peace after returning from the Second World War. And they include judges such as James Lunney, who was close to legal blindness at the time of his appointment as a judge in North Bay in 1970. In some cases the disabilities were visible and known at the time of appointment. In others, the disabilities remained "invisible" or emerged years after appointment.

It is somewhat surprising that the annual reports of the Judicial Appointments Advisory Committee show zero appointments of judges with identified disabilities during its first twenty-three years of operation. Between 1989 and the end of 2012, 322 judges were appointed through the "JAAC" process.

This included women (36.3%), Francophones (7.1%), First Nations (1.9%), and visible minorities (7%). By contrast, none of the 322 appointees were persons who had identified themselves as having a disability.[63] This may be due, in part, to the limited pool of applicants with disabilities among lawyers eligible to become judges, or to a lack of self-identification regarding certain disabilities during the selection process.[64]

Victoria Starr identified herself as having a disability when she applied for an appointment to the Ontario Court of Justice. In her application, she stated:

> I am a person with a visual disability. Not once has my visual disability stopped me from being a strong and effective advocate and litigator or from making significant and meaningful contributions to both the non-legal community and legal profession. I do not see my visual disability as negatively affecting my ability to be a judge, but it will mean that I do some things differently from how other judges do them…. I am very familiar with what's out there in terms of low vision technology and aids, and I know how to use these tools effectively. Being a visually challenged judge will bring, as it should, a greater sense of and respect for the strength of vulnerability in our community.[65]

Justice Starr, who had practised family and child protection law, became a judge of the Ontario Court of Justice in July, 2014, presiding in Milton. She has said, "One in nine people has some sort of disability. Having a legally blind judge is part of the Court's evolution to create a more diverse and representative judiciary."[66]

Despite some encouraging examples, the JAAC statistics are an indication that disability is an aspect of diversity that the judicial appointment process has not addressed. To do so would require more than

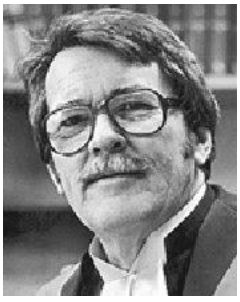
simply appointing persons with disabilities. It requires efforts to prevent and remove barriers and to make arrangements (accommodation) that enable individuals to participate fully.

While the nature and extent of a disability could prevent a person from conducting certain judicial duties, many disabilities can be accommodated, especially with new advances in technology.

In the case of mobility challenges, the structure of courthouses is a major factor that affects access by the public, legal profession, court staff, judges and justices of the peace. In a brief to the 2014 review of Ontario's disability legislation, advocates noted that "a number of good accessibility features were commendably included" in two new courthouses built after the passage of the *Ontarians with Disabilities Act 2001* and the *Accessibility for Ontarians with Disabilities Act*. "Yet only 25% of the courtrooms in each of these two new buildings are equipped with an accessible judicial dais. For fully 75% of those courtrooms, a judge with a mobility disability cannot get up to the judge's bench and preside."[67]

James Lunney: Appointed 1970

"Blindness is irrelevant to judging"



Justice James Lunney

James Lunney was the regional solicitor for Ottawa-Carleton before being appointed as a provincial court judge in North Bay in 1970. He replaced Judge Gérald Michel, who switched from North Bay to Sudbury.

When Chief Judge Hayes recommended the appointment, Lunney had extremely poor vision from a hereditary condition. He was declared legally blind two years later. According to Michel, "Hayes knew he was blind and there were some concerns. But he also knew that he could practise with the disability and that he had a reputation as being very bright, so it was worth taking a chance."

"Lunney did well on the bench despite his disability," observed Michel. "He got others, including his wife Eleanore, to help with reading. The only restriction was that when he was doing out of town courts — Sturgeon and Mattawa, for example—he had to go by taxi, hampered by his inability to drive."

It helped that Lunney had an excellent memory that enabled him to remember the evidence and the regulars who appeared in his courtroom. "Blindness is irrelevant to judging," Lunney said. It also helped that, at the time, criminal cases were generally shorter and less complex than they later became, so there were fewer legal materials and transcripts for judges to read.

Lunney died in 2005 at the age of 79. An obituary reported that he was known around town as "the blind judge with the seeing-eye poodle."

It might be hoped that Lunney would be seen as a trail blazer, paving the way for persons with disabilities to serve as provincially appointed judges. History has shown that this was not the case.

(Sources: Interview of G. Michel for OCJ History Project, 2015; Obituaries in *North Bay Nugget* and *Ottawa Citizen*; *Toronto Star* article, Jan. 15, 1994, "Poodle pioneer gives freedom to judge with failing sight." Photo from Lunney obituary, *Ottawa Citizen*.)

Reasons for Different Levels of Diversity

Some authors have written about the "prestige theory." This premise is that in certain countries (but probably not in Canada or the United States) women and minorities are most likely to be appointed to less prestigious courts.[68] Those who take a hierarchical view of the courts could make something of the fact that, when it comes to visible minorities, the federally appointed Superior Court bench in Ontario is less diverse than the provincially appointed bench[69], which in turn is less diverse than the justices of the peace bench.

In the case of provincially appointed judges, the face of the Court began changing dramatically (with the exception of persons with disabilities) after the introduction of the Judicial Appointments Advisory Committee in 1988. The even greater diversity of Ontario's justices of the peace bench is interesting since its appointments advisory committee wasn't introduced until almost 20 years after the judges' committee was established. The fact that justices of the peace need not be lawyers, and can therefore be drawn from a larger population pool, is likely a significant factor.

Social Context Education

> Judging is a significant act that requires careful attention, and respect for legal rules and principles. It is an act that requires qualities of humanity and compassion. Judging requires an effort to shed prejudice and untested beliefs.[70]
>
> *Right Honourable Beverley McLachlin, P.C., Chief Justice of the Supreme Court of Canada*

Even a highly diverse court cannot guarantee that parties will be treated with sensitivity and understanding in relation to gender, race, disability and other issues, or that judicial bias and stereotyping will no longer exist. Since 2000, judicial education programs have encouraged judges to consider the social context of the cases before them, in addition to the factual and legal context. The goal is to promote equality and reduce unintended bias that can result from being unaware of social conditions and changes.

> *Deciding in accordance with the law, within reasonable time, and in accordance with the process mandated by law, is only one part of the judicial task. Justice must also be delivered in a responsive manner, one that takes account of the social context, and the different perspectives of those who seek it. Justice must also be*

> *delivered in an impartial manner, one which is free from prejudice or false assumptions about cultural difference. In a world marked by pluralism, in communities where diversity is so prevalent, the judge must become the interpreter of difference. The judge must become the one who understands every voice.* [71]
>
> Right Honourable Beverley McLachlin, P.C., Chief Justice of the Supreme Court of Canada

Initially, social context education was controversial with some members of the judiciary, but it has been welcomed by many as a way to further equality within a framework of judicial independence. In a 1997 decision, the Supreme Court of Canada formally recognized the importance of judges taking social context into account.[72]

Conclusion: Different Pictures

> There has been progress in terms of a more reflective bench as law students change and work their way through the system. When I finished law school in Ottawa in 1977, I was the only black person there. Now we see outstanding candidates in almost every composition of the group making it to the interview process. But it is still not where it needs to be.
>
> *Hugh Fraser, Judicial Appointments Advisory Committee member and Regional Senior Justice, Ontario Court of Justice*[73]

The Ontario government appointed 21 new justices of the peace effective March 12, 2014. In the group photo below, much more diversity is evident than in the photos from the 1800s appearing earlier in this essay.

Left to right: Thomas Glassford, Rizwan Khan, Karen Valentine, Lloyd Phillipps, Rosann Giulietti, Karen Baum, Raffaella Scarpato, Paula Konstantinidis, Holly Charyna, Veruschka Fisher-Grant, Jane Hawtin, Ginette Forgues, Audrey Greene Summers, Jane Moffat, Anna Blauveldt, Renée Rerup, Andrew Clark (Senior Advisory Justice of the Peace), Kathy-Lou Johnson (Senior Justice of the Peace), Paul Langlois, J. Gary McMahon, Ralph Cotter, Michele Thompson, Faith Finnestad (Associate Chief Justice). Absent: Helena Cassano

The judges and justices of the peace of the Ontario Court of Justice are no longer a predominantly white male group – the *status quo* that had prevailed until as recently as the 1980s. To some extent, this parallels what was happening in other sectors as societal attitudes became more open to the inclusion of women and minority groups in leadership positions. But has the Court become truly representative of the population and has its diversity made a difference?

The Court is not, and never could be, a perfect mirror of Ontario's population. Nor can we expect all types of diversity to be measured, given the variety of backgrounds people bring to the Court in addition to being members of specific demographic groups. Still, the data collected by the Court and others can shed light on where progress has – and has not – occurred.

The most dramatic progress, as of January 2015, has been with native justices of the peace and with women (as justices of the peace and judges). While there has also been progress with Francophones and some groups of visible minorities, there is still a distance to go, particularly when it comes to the appointment of persons with disabilities. In the case of judges, diversity can be expected to increase as the eligible pool of Ontario lawyers becomes more diverse.

> My personal experience has been that the appointment of a diverse bench has been of real benefit in a number of different ways, many of them intangible.
>
> *Brian Lennox, Former Chief Justice of the Ontario Court of Justice*

There have been growing pains and some backlash generated along the way. But for the most part, the Ontario Court of Justice has evolved into a more diverse court, more so in some respects than courts comprised of federally appointed judges. The extent to which the Court's diversity has improved overall impartiality and decision making is difficult to assess. It is fair to assume, however, that diversity has helped to avoid unconscious biases that likely were present in earlier times when the bench was much more homogeneous than it is today.

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[1] Interview of T. Andrews for OCJ History Project, 2014; Transcript of T. Andrews' oral history interview, Osgoode Society, 1995 (used with permission).
[2] Hogarth, John. *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1972), p. 388.
[3] Interview of M. Linhares de Sousa for OCJ History Project, 2014.
[4] As quoted in Scott, J.E. "Women on the Illinois State Court Bench" (1986) 74 *Ill B.J.* p. 436 at p. 438; as cited by Wilson, Bertha. "Will Women Judges Really Make a Difference?" ***Osgoode Hall Law Journal*** 28.3 (1990): 507-522 at p. 518.
[5] Diversity Institute, Ryerson University, Media Release, "Research from Ryerson University Finds Increased Representation of Women in Canada's Judiciary, but Visible Minorities Left Behind," June 27, 2012, quote from Wendy Cukier.
[6] Omatsu, Maryka. "The Fiction of Judicial Impartiality," 9 *Can. J. Women & L.* 1 (1997), p. 16.
[7] Ifill, Sherrilyn A. Racial Diversity on the Bench: Beyond Role Models and Public Confidence, 57 *Wash. & Lee L. Rev.* 405 (2000), p. 411.
[8] Abella, Rosalie Silberman. "The Dynamic Nature of Equality" in Martin, Sheilah L. and Mahoney, Kathleen E., eds. *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 3 at pp. 8-9.
[9] Interview of M. Pawagi for OCJ History Project, 2015.
[10] The Judicial Appointments Advisory Committee, Interim Report, September 1990, p. 20.

[11] Bigelow, S. Tupper. *A Manual for Ontario Magistrates* (Toronto: F. Fogg, Queen's Printer, 1962), p. 176.
[12] *Ottawa Journal*, May 14, 1956.
[13] Transcript of T. Andrews' oral history interview, Osgoode Society, 1995 (used with permission).
[14] Bigelow. *A Manual for Ontario Magistrates,* p. 176.
[15] Bigelow. *A Manual for Ontario Magistrates,* p. 175.
[16] Bigelow. *A Manual for Ontario Magistrates*, p. 31.
[17] Bigelow. *A Manual for Ontario Magistrates*, p. 55.
[18] Glasbeek, Amanda. *Feminized Justice: The Toronto Women's Court 1913-1934* (Vancouver: UBC Press, 2009), p. 33.
[19] *The Police Magistrates Amendment Act, 1921,* S.O. 1921, 11 Geo. V, c 41 (assented to April 8, 1921).
[20] *The Canadian Encyclopedia* (online), "Emily Murphy."
[21] *Provincial Courts Act*, S.O 1968, c 103 (proclaimed December 2, 1968)
[22] Mewett, Alan W. *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario, Part II: Native Communities and Remote Areas*, at p. 10.
[23] Mewett. Part II, at p. 8.
[24] Mewett. Part II, at p. 16.
[25] Michel, Gérald. *Provincial Courts in Northern Ontario*, an unpublished document provided to OCJ History Project, 2014, pp. 24-25.
[26] Michel. *Provincial Courts in Northern Ontario,* p. 25.
[27] Interview of northern judicial officers for OCJ History Project, 2013.
[28] Interview of northern judicial officers for OCJ History Project, 2013.
[29] Vanek, David. *Fulfilment: Memoirs of a Criminal Court Judge* (The Osgoode Society for Canadian Legal History: 1999), pp.216 and 219.
[30] Jack Batten, *Judges* (Toronto: Macmillan of Canada, 1986), p. 91
[31] Interview of M. Hogan for OCJ History Project, 2013.
[32] Interview of S. Dunn for OCJ History Project, 2014.
[33] Interview of M. Landsberg for OCJ History Project, 2014.
[34] Landsberg, Michele. "Native judge shows system can change," *Toronto Star*, March 5, 1991.
[35] Interview of H. Hassan for OCJ History Project, 2015.
[36] Amendment to the *Courts of Justice Act* passed in 1994, and proclaimed on February 28, 1995.
[37] Interview of P. Russell for OCJ History Project, 2014.
[38] In *R. v Askov*, [1990] 2 S.C.R. 1199.
[39] Interviews of H. Hampton and P. Russell for OCJ History Project, 2014.
[40] Interviews of H. Hampton and P. Russell for OCJ History Project, 2014.
[41] Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 35 (26 March 1991) "Court System" (Hon Howard Hampton).
[42] Canada's first woman native judge, referred to by H. Hampton, was Terry Vyse.
[43] Legislative Assembly, Hansard, March 26 1991.
[44] Omatsu. "The Fiction of Judicial Impartiality," p. 8.
[45] Omatsu. "The Fiction of Judicial Impartiality," p. 2; Federation of Asian Canadian Lawyers website (accessed January 9, 2015)
[46] Interview of P. Russell for OCJ History Project, 2014.
[47] Omatsu. "The Fiction of Judicial Impartiality," p. 12.
[48] Omatsu. "The Fiction of Judicial Impartiality," pp. 9-12.
[49] Interview of M. Omatsu for OCJ History Project, 2015.
[50] *Report of a Judicial Inquiry Re: His Honour Judge W. P. Hryciuk, A Judge of the Ontario Court (Provincial Division)*, Madam Justice J. MacFarland, Commissioner, Toronto, 1993, p. 49.
[51] In 1994, the Divisional Court upheld the Commissioner's findings which recommended Hryciuk's removal from judicial office (*Hryciuk* v. *Ontario (Lieutenant Governor)* (1994), 18 O.R. (3d) 695). However, a 1996 decision of the Ontario Court of Appeal quashed the Commissioner's findings and recommendation (*Hryciuk* v. *Ontario (Legislative*

Assembly), (1996), 31 O.R. (3d) 1). The Court of Appeal found that the Commissioner had exceeded her jurisdiction by hearing three misconduct complaints in addition to the two that had been previously investigated by the Judicial Council and specified in the Order-In-Council.

[52] Mewett. Part II, at p. 24.

[53] *Justices of the Peace Act*, RSO 1990, c J.4, s.2.1 (12), paragraph 6.

[54] *Per diem* judges and justices of the peace are those who have elected to sit on a part-time basis upon retirement from full-time work.

[55] Submitted by J. Beaman to the OCJ History Project, 2015.

[56] Interview of J. Bouchard for OCJ History Project, 2015

[57] Submitted by D. Cole to the OCJ History Project, 2015.

[58] See, for example, s. 530, *Criminal Code*.

[59] The Judicial Appointments Advisory Committee, *Interim Report*, September 1990, p. 16.

[60] In its 2015 consultation paper on *Challenges Faced by Racialized Licensees*, the Law Society of Upper Canada notes the position of the Ontario Human Rights Commission that the terminology "racialized person" or "racialized group" is more accurate than "racial minority," "visible minority," "person of colour," or "non-White." The Ontario Human Rights Commission has explained "race" as "socially constructed differences among people based on characteristics such as accent or manner of speech, name, clothing, diet, beliefs and practices, leisure preferences, places of origin and so forth. The process of social construction of race is called racialization: "the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life." For further information, visit the Ontario Human Rights Commission website.

[61] Interview of J. Bouchard for OCJ History Project, 2015.

[62] Unpublished study of the Diversity Institute, Ryerson University, with summary results provided in a Slide Deck (*Improving Representation in the Judiciary: A Diversity Strategy*) and Media Release (*Research from Ryerson University finds Increased Representation of Women in Canada's Judiciary, but Visible Minorities Left Behind*), both released on June 27, 2012; Interview of J. Olson from Diversity Institute, Ryerson University for OCJ History Project, 2015. See also Diversity Institute, Ryerson University, *DiverseCity Counts: A Snapshot of Diverse Leadership in the GTA,* 2011, p.28, in which a sample of 45 justices of the peace in the Greater Toronto Area was found to include 44.4% visible minorities.

[63] Judicial Appointments Advisory Committee, *Annual Report for 2012*.

[64] Interview of H. Hassan for OCJ History Project, 2015.

[65] Application of V. Starr to become a judge of the Ontario Court of Justice, used with permission.

[66] Interview of V. Starr for OCJ History Project, 2015.

[67] Accessibility For *Ontarians With Disabilities Act* Alliance, Brief to Mayo Moran 2014, *Independent Review of the Implementation and Enforcement of the Accessibility For Ontarians With Disabilities Act, June 30, 2014*, pp. 240-241.

[68] Thomas, Cheryl. *Judicial Diversity in the United Kingdom and Other Jurisdictions – A Review of Research, Policies and Practices, Commissioned by Her Majesty's Commissioners for Judicial Appointments*, November 2005, pp. 7, 46-48.

[69] Diversity Institute, Ryerson University, Media Release and Slide Deck, June 27, 2012.

[70] McLachlin, Beverley. *Remarks on the Occasion of the 2nd International Conference on the Training of the Judiciary,* November 1, 2004.

[71] McLachlin. *Remarks on the Occasion of the 2nd International Conference on the Training of the Judiciary.*

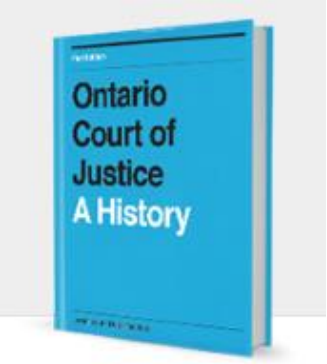
[72] *R*. v. *S. (R.D.),* [1997] 3 S.C.R.

[73]Interview of H. Fraser for OCJ History Project, 2015.

Transformation of the Court: 1867 to 2015

Introduction: An Evolving Court

Throughout its history, the Ontario Court of Justice and its predecessors changed in fundamental ways. The work of the Court was profoundly affected by the enactment of various federal and Ontario statutes, the release of Supreme Court of Canada decisions, and the introduction of the *Charter of Rights and Freedoms*. Judicial leadership drove other changes, from innovating education programs for judges and justices of the peace to renegotiating the Court's relationship with government. Major structural reforms included the creation of Provincial Courts in 1968 (with two divisions and two chiefs) and their subsequent consolidation in 1990.



This essay chronicles transformative events in the Court's history over a period of almost 150 years during four broad eras. Each of these eras is characterized by changes in the Court reflecting broader societal shifts. Cumulatively they illustrate the profound evolution of the Court from what it was in post-Confederation times to the modern Court of 2015.

1867-1967: The Magistrates' Era

1800s

A Province in the Dominion of Canada

The history of the Ontario Court of Justice can be said to formally begin on July 1, 1867, the date of Canadian Confederation. Although the Police Magistrates' Courts pre-dated Confederation[1], their status as "provincial" courts began with the formation of the Dominion of Canada under two levels of government. As a province in this new nation, Ontario was empowered to make appointments to what

were then called Police Magistrates' Courts and other "lower courts" not specifically identified in section 96 of the *Constitution Act, 1867*. Appointments to the section 96 "superior courts" were to be made by the federal government. The Magistrates' Courts and justices of the peace – along with the later formed Juvenile and Family Courts – eventually evolved into the Ontario Court of Justice.[2]

The original of this painting of the Fathers of Confederation, by Robert Harris, was destroyed in the 1916 Parliament buildings fire. (Source: Library and Archives Canada, accession number 1989-565 CPA, item 90.)

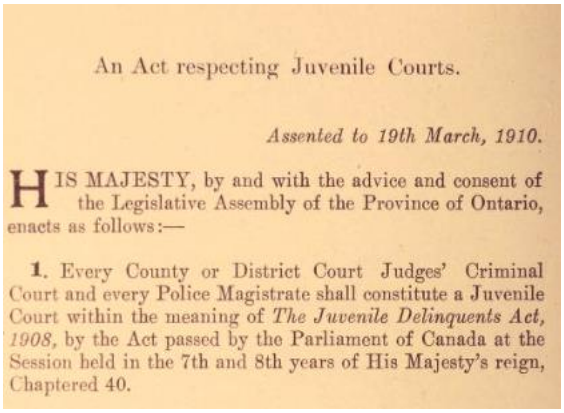
The First *Criminal Code*

The jurisdiction of the early police magistrates was fairly limited. That changed in July 1892 when the federal Parliament enacted Canada's first *Criminal Code*. With the consent of the accused person, police magistrates could try many cases "summarily." Without consent, they could try cases in large cities where the value of property stolen or received by false pretences did not exceed a total of $10.00. And they could try cases involving "disorderly houses" as well as all non-indictable offences. This was on top of the authority police magistrates had to try actions for breach of municipal bylaws or provincial statutes such as the *Ontario Temperance Act*.[3]

> *The extension of the jurisdiction of Police Magistrates made by the* Criminal Code *[in 1892] has worked a revolution in the administration of criminal justice in Ontario.*
>
> A Royal Commission Report on Ontario's Police Magistrates, 1921, p.4.

1900s

Juvenile and Family Courts



An Act respecting Juvenile Courts.

Assented to 19th March, 1910.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Every County or District Court Judges' Criminal Court and every Police Magistrate shall constitute a Juvenile Court within the meaning of *The Juvenile Delinquents Act, 1908*, by the Act passed by the Parliament of Canada at the Session held in the 7th and 8th years of His Majesty's reign, Chaptered 40.

Ontario had no provincial juvenile or family courts until 1910, when the province enacted the *Juvenile Courts Act*[4] and police magistrates were constituted as Juvenile Courts. This followed from the *Juvenile Delinquents Act*[5], a federal statute allowing local authorities to establish courts to handle youth in conflict with the law along with adults who may have contributed to delinquency. In 1934, Ontario passed the *Juvenile and Family Courts Act*[6], adding family matters – such as child neglect and domestic relations – to the work of the Juvenile Courts.

Women on the Court

In 1921, an amendment to Ontario's *Police Magistrates Act* allowed for women to be appointed as magistrates, but only in cities with populations of 100,000 or more and only where a resolution of the municipal council had declared that it was desirable for a woman to be appointed. Margaret Norris Patterson was appointed Ontario's first woman magistrate the following year, presiding in the Toronto Women's Court. By the late 1930s, Ontario no longer had any women serving as magistrates. There were, however, six female justices of the peace at that time.[7]

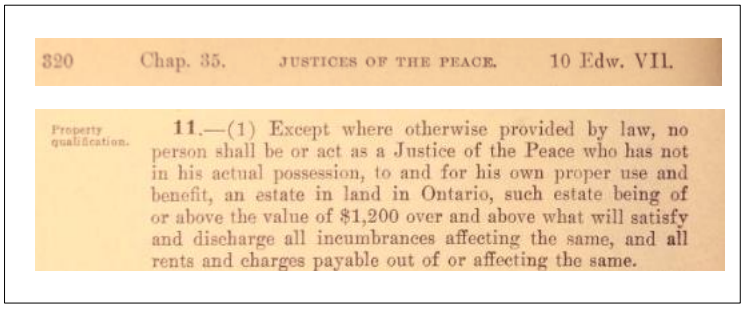
Margaret Patterson, *The Winnipeg Tribune*, January 10, 1922

No More Police Courts

The early magistrates were known as "police magistrates." They sat in "Police Courts," often located in police stations. These magistrates (who heard criminal cases) were clearly not sufficiently independent of the police (who investigated the crimes). An important symbolic change took place in 1934 when legislation was modified to state that they would be known as Magistrates' Courts instead of Police Courts.[8]

Changing Expectations for Justices of the Peace

For many years, justices of the peace were expected to be property owners selected from the so-called upper class, as was the tradition in England. Property ownership requirements were steadily reduced and then abolished in 1935 by amendments to the *Justices of the Peace Act*.[9] Around the same time, justices of the peace ceased to have any trial functions, except when acting under the authority of a magistrate.[10] This was part of a change in which magistrates were given more jurisdiction and the role of justices of the peace became more limited.


320 Chap. 35. JUSTICES OF THE PEACE. 10 Edw. VII.

Property qualification.

11.—(1) Except where otherwise provided by law, no person shall be or act as a Justice of the Peace who has not in his actual possession, to and for his own proper use and benefit, an estate in land in Ontario, such estate being of or above the value of $1,200 over and above what will satisfy and discharge all incumbrances affecting the same, and all rents and charges payable out of or affecting the same.

Chief Judges and Magistrates

The concept of a judicial leadership structure began in 1922 with legislation specifying the designation of a senior magistrate for the City of Toronto, followed in 1936 by the authority to designate a senior magistrate in other districts.[11] The creation of "chief" positions did not take place until the 1960s. The position of Chief Magistrate was created in 1964 and filled by a succession of three individuals that year: Johnstone L. Roberts, F.W. Bartrem, and Arthur O. Klein. In the same year, provision was made for the

appointment of a senior Juvenile and Family Court judge and an associate senior judge, wherever there was more than one judge of a Juvenile and Family Court. The position of Chief Judge of the Juvenile and Family Courts was created in 1968 and filled by Ted Andrews, shortly before these Courts and the Magistrates' Courts were replaced by the "Provincial Courts." The creation of these early leadership positions was the first step in fashioning a loose collection of judicial officers into a court.

Removal from Office

For many years, magistrates and justices of the peace held their offices "at pleasure," meaning they could be removed from office when it suited the government of the day. In 1952, the *Magistrates Act* was amended to provide that a magistrate with two years' or more experience could only be removed from office for cause – "for misbehaviour or for inability to perform his duties properly – and only after an inquiry conducted by one or more Supreme Court judges."[12]The junior magistrates with less than two years' experience continued to serve as "at pleasure" appointments. The situation was different for Juvenile and Family Court judges. Until the creation of the Provincial Courts in 1968, the tenure of these judges was dependent only upon good behaviour.[13]

1968-1989: The Provincial Courts Era

1968

Creation of Provincial Courts and Judicial Council

The creation of the Provincial Courts[14] was a transformative moment on the road to judicial leadership and independence of the provincial bench. The former Juvenile and Family Courts became the Provincial Courts (Family Division). The former Magistrates' Courts and justices of the peace became the Provincial

Courts (Criminal Division). Each magistrate and judge was appointed as a "Provincial Judge" and then informally assigned to one of the two divisions.[15]

> **10.**—(1) The Lieutenant Governor in Council may appoint a judge as chief judge of the Provincial Courts (Criminal Division) and a judge as chief judge of the Provincial Courts (Family Division).
>
> *Provincial Courts Act, 1968*

Each Division had a Chief Judge. Ted Andrews served as Chief on the family side. He was a former "two hatter" who had done both criminal and family work in the previous system. On the criminal side, Fred Hayes replaced Arthur Klein as Chief Judge in 1972. In 1977, the *Provincial Courts Act* allowed for the appointment of an Associate Chief Judge in each division.

> **8.**—(1) The functions of the Judicial Council are,
>
> (*a*) at the request of the Minister, to consider the proposed appointment of provincial judges and make a report thereon to the Minister; and
>
> (*b*) to receive complaints respecting the misbehaviour of or neglect of duty by judges or the inability of judges to perform their duties, and to hold inquiries in respect thereof.
>
> *Provincial Courts Act, 1968*

The *Provincial Courts Act, 1968* created the first Judicial Council for provincial judges. Its purpose was to consider proposed judicial appointments and to inquire into complaints about judicial conduct. In addition to the two new chiefs, its members included the federally appointed Chief Justice of Ontario and Chief Justice of the High Court.

The Justices of the Peace Review Council – comparable to the Ontario Judicial Council – was created in 1974.[16]

1970s

Criminal Code Amendments

From the 1970s onward, an increasing number of indictable (more serious) offences have been reclassified as hybrid offences in the *Criminal Code.* For hybrid offences, the Crown can elect to proceed by way of "summary conviction," in which case the trial will be held in the Ontario Court of Justice (formerly the Provincial Courts (Criminal Division)) rather than the Superior Court of Justice or its predecessors. For most charges involving hybrid offences, the Crown does indeed elect to proceed summarily. Hybridization has been accompanied by an increase in the maximum penalty available for certain offences where the Crown proceeds summarily. As a result of these changes, the Court has transitioned from handling predominantly minor criminal matters to a larger variety of more serious offences.[17]

> Amendments to the Criminal Code on a variety of topics brought forth an entirely new spectrum of charges and defences.
>
> Judge David Vanek[18]

Reclassification was not the only factor that led to the expansion of the criminal jurisdiction of provincial courts. Over time, a growing recognition of the criminal law expertise of provincial court judges across Canada saw a major shift in jurisdiction nationwide as accused persons charged with indictable offences increasingly chose ("elected") to proceed in provincial court. This shift also contributed to the increase in volume, seriousness and complexity of provincial court cases.[19]

Formal Approaches to Judicial Education

In the early years of the Court, there was little, if any, formal education offered to judges or justices of the peace. For judges, that began changing in the 1970s. In 1974, for example, under Chief Judge Andrews, an annual education program was introduced for family judges. Chief Judge Hayes instituted programs for the Criminal Court judges. The programming was largely organized by the associations of

criminal and family judges. The offices of the two Chief Judges prepared judicial handbooks, such as *The Conduct of a Trial* for criminal cases, and *Reasons for Judgment* for family law. Formal education programs for justices of the peace, however, were not instituted until many years later.

Unified Family Court

The Unified Family Court began as a pilot project in Hamilton in 1977. Legislation gave it jurisdiction over all family law matters, a jurisdiction which had previously been spl

it between provincially and federally established courts. As a result, all family law cases in Hamilton were heard in a single court. The Unified Family Court was slowly expanded to other regions of the province in 1995 and 1999, and by 2015 covered about 40 per cent of Ontario's population. Seventy-five per cent of the judges appointed to these newly-created Unified Family Courts came from the Ontario Court (Provincial Division).

Choosing the Ontario Court of Justice

Over a three-year period ending on March 31, 2001, 92 per cent of all accused persons who had an election as to the court of trial chose to proceed before the Ontario Court of Justice, as opposed to eight per cent in the Superior Court of Justice. Over the same period of time, 98.3 per cent of all criminal cases were resolved in the Ontario Court of Justice vs. 1.7 per cent in the Superior Court of Justice.

(Source: Webster, Cheryl Marie and Anthony N. Doob, The Superior/Provincial Criminal Court Distinction: Historical Anachronism or Empirical Reality?, Criminal Law Quarterly, 48, 2003, 77-109, at pp. 82, 83, 105-107.)

In areas of the province without a Unified Family Court (now known as the Family Court of the Superior Court of Justice), the Ontario Court of Justice (the successor of the Provincial Division) has retained important family law jurisdiction, particularly in the area of child protection, for almost 60 per cent of the population.

Creation of the Unified Family Court

The perception was that the creation of the Unified Family Court "pilot project" in Hamilton in the 1970s was the first step and the rest would be done in a few years: the family judges would be gone and the Ontario Court of Justice would just be a criminal bench.

The UFC changed the dynamic within the Provincial Court. The family judges became fewer in number and our specific issues were not always addressed or understood. Therefore we could not operate as efficiently as we would have liked to. Nor were we able to get the resources we felt we needed. The emphasis was on the criminal work. This was due to the numbers and public and political pressures to address the criminal case backlog.

(Source: Input from provincial family judges for OCJ History Project, 2012.)

Family Law Reform

The 1970s were a time of legal reforms that changed the nature and complexity of cases before judges of the Provincial Courts (Family Division).

- The Court was given jurisdiction to conduct adoption proceedings.
- The oversight role of the Court was expanded in child protection proceedings.
- The Court was given the authority to require the appointment of lawyers for the children.
- The requirement to find someone at fault in spousal support proceedings was eliminated.

- Parents and guardians could no longer ask the Court to send a child to training school simply because their child was "unmanageable."[20]

The 1970s was also a time when Family Court judges began working actively in their communities to create resources such as diversion programs, observation and detention facilities, and Family Court Clinics to provide better outcomes for children and families.

Demise of Trial *De Novo*

> The demise of the "trial de novo" was seen as greatly enhancing the status of the Court.
>
> Justice Brian Lennox, former Chief Justice, Ontario Court of Justice[21]

In the 1970s, most criminal trials in Provincial Court involved "summary conviction" offences as opposed to more serious "indictable" offences. Appeals from summary conviction trial decisions were heard by way of a new trial ("trial *de novo*") in District Court.[22] The right to appeal was automatic. During each appeal, a District Court judge would hear evidence and arguments from both sides all over again, as if the Provincial Court trial had not occurred.

In the late 1970s, the "trial *de novo*" appeal was abolished.[23] Instead, summary conviction appeals (now to the Superior Court of Justice) are heard and judged on the basis of the existing record. The onus is on the appellant to demonstrate a serious error was committed by the trial judge. Where a new trial is ordered, the trial takes place in the Ontario Court of Justice (the successor of the Provincial Courts).[24]

End of the Grand Jury

In the 1970s, Ontario was one of the last provinces to have a grand jury system. In this system, the decision of a provincial judge presiding over a preliminary hearing for an indictable offence was not sufficient to send a criminal matter to trial before a federally appointed judge in District or High Court. After the preliminary hearing, the Crown Attorney was required to present essentially the same evidence heard by the preliminary hearing judge to a "grand jury" of lay persons. Without the grand jury's agreement, the case could not proceed to trial. The elimination of the grand jury in the late 1970s meant that the decision of the provincial judge at a preliminary hearing would alone determine whether an accused person would have to stand trial.[25]


Simple Justice

This is now the law. Know your rights. Consider your options.

We all make mistakes...

A new order in the courts:

What's covered?

Weigh the decision.

It's your choice.

It's your responsibility.

1980s

Justices of the Peace: Provincial Offences and Bail

The Provincial Court was profoundly changed on March 31, 1980 when the Provincial Offences Act came into force. The Act simplified the process for prosecuting and enforcing offences in provincial statutes and regulations and municipal by-laws. The work of the justices of the peace changed dramatically as they presided over most provincial offence trials.

Until the mid-1980s, many bail hearings in Ontario were heard by Provincial Court judges. That began to change when bail hearings were assigned to those justices of the peace classified as "presiding." There was no need to change legislation since the *Criminal Code* gives the power to hold bail hearings to

"justices," which includes justices of the peace. By the mid-1990s, Ontario justices of the peace were routinely appointed as "presiding" and therefore able to conduct bail hearings, except for those involving the most serious *Criminal Code* offences.

A Decade of Hearing Small Claims Court Cases

Small Claims Court Judges being sworn into Provincial Court in 1983. From left to right, back row: Ronald Radley, Gordon Chown, Stewart Kingstone, Ben Lamb, T. Charles Tierney, Marvin Zuker. From left to right, front row: Douglas Turner, Moira Caswell, Gerald Vickers, Pamela Thomson, Reuben Bromstein.

In 1980, the Provincial Court (Civil Division) was created. For ten years – from June 1980 until September 1990, there were accordingly three divisions of the Provincial Court: criminal, family, and civil. The Civil Division was introduced on a pilot basis in Metropolitan Toronto and then more broadly to hear Small Claims Court trials. Cases were heard by full-time Civil Division judges in areas where they had been appointed and by District Court judges or local lawyers serving as deputy judges in other parts of the province. In 1990, as part of a larger court reform project, the Small Claims Court function was

transferred to the federally appointed court that later became known as the Superior Court of Justice. Although Superior Court judges can hear small claims cases, these cases are heard almost exclusively by deputy judges (lawyers who work on a part-time basis as Small Claims Court judges).

Legal Complexities: *The Charter of Rights and Freedoms*

The *Charter of Rights and Freedoms*, enacted in 1982 as part of the Constitution of Canada, guarantees the rights and freedoms set out in it "…subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In practical terms, this means that the *Charter* imposes limits on government interference with the rights and freedoms of Canadians. All laws passed by government must be consistent with the *Charter* and actions of the police and Crown must not violate the *Charter* rights of individuals. The Supreme Court of Canada has held that provincial courts have the power, in criminal trials, to refuse to apply legislation deemed inconsistent with the *Charter*, including the power to dismiss charges where the legislation itself violates the *Charter*.[26]

> The Charter has changed the face of criminal justice in this country. No longer are individuals powerless to challenge state laws and actions that are supported by the majority. No longer are judges required to respect the choices of the executive or legislature when those choices violate fundamental societal values.
>
> Justice Shaun Nakatsuru[27]

The *Charter* added to the complexity of the Court's work.

> What made the biggest difference to what I was doing was not the changes in the Court; it was the Charter. It required a major change in attitude that the judge had to bring to bear in the consideration of cases.
>
> Justice Donald Dodds[28]

> The Charter of 1982 forced the Court to a level of intellectual rigour and analysis that had before been virtually unknown in provincial courts, where previously the only real test of admissibility of evidence had been relevance.
>
> Justice Brian Lennox, former Chief Justice, Ontario Court of Justice[29]

Valente Decision

Mr. Valente was charged with careless driving. In 1982, his lawyer questioned whether the Provincial Court was sufficiently independent to hear the case in light of Canada's new *Charter of Rights and Freedoms*. Bill Sharpe, the Provincial Court judge assigned to the case, declined to hear it due to the independence challenge. The matter was appealed to the Ontario Court of Appeal and then to the Supreme Court of Canada. Ultimately, the Supreme Court decided that the Provincial Court (Criminal Division) was an independent tribunal within the meaning of s. 11(d) of the *Charter*. It identified the three essential elements of judicial independence as: security of tenure, financial security, and administrative or institutional independence. *Valente* was a key decision in a series of cases that led ultimately to the conclusion that judicial independence for all Canadian judges, whether they were provincially or federally appointed, was constitutionally protected.

Native Justices of the Peace

In his 1981 report to the Attorney General, law professor Alan Mewett's vision included a training program to qualify native candidates for justice of the peace appointments.[30] Fred Hayes, Chief Judge of the Provincial Court (Criminal Division) set out to make that vision a reality. Northern Ontario judge Gérald Michel and others were enlisted to develop the Native Justices of the Peace Program. The program, which began in the mid-1980s, featured an intensive pre-appointment education program. This enabled Aboriginal candidates to become justices of the peace, even though they may have lacked

formal qualifications. The Native Justice of the Peace Program changed the face of the justices of the peace bench[31] and improved access to justice for Aboriginal communities. The program served as the basis for what has become extensive training for all new justices of the peace in Ontario – Aboriginal or not.

Requirement for Judges to be Lawyers

Those appointed magistrates and early Family Court judges were not required to be lawyers, and many were not. However, after the Provincial Courts were created in 1968, the practice was to appoint only lawyers with at least five years' experience.[32] As of January 1, 1985, the *Courts of Justice Act* specified that new provincial judges be lawyers with a minimum of 10 years' experience. This helped the Court to attract more highly qualified candidates. It was also a symbolically important change: recognizing the pivotal role performed by judges of the Provincial Court by imposing the same minimum eligibility requirement for appointment as federally appointed judges.

PROVINCIAL COURTS

JUDGES

Appointment of judges

52.—(1) The Lieutenant Governor in Council, on the recommendation of the Attorney General, may appoint such provincial judges as are considered necessary. R.S.O. 1980, c. 398, s. 2.

Qualifications

(2) No person shall be appointed as a provincial judge unless he or she has been a member of the bar of one of the provinces of Canada for at least ten years. *New.*

Courts of Justice Act, 1984

Young Offenders Act

The *Young Offenders Act* came into force in 1984, replacing the *Juvenile Delinquents Act.* This federal statute shifted the focus from promoting young people's welfare to protecting their rights, and from "curing" delinquency to responding to their offending behaviour.

A New Way of Appointing Judges

In 1988, the Judicial Appointments Advisory Committee was created to recommend judicial appointments to the Attorney General. Although it began as a pilot project, the Committee process has endured and was enshrined in legislation in 1995. The Committee is composed of a majority of public (non-lawyer) members and its process includes community outreach and interviews. The work of the Committee has been credited with depoliticizing the judicial appointment process and improving the quality and diversity of appointees, and has been a major factor in enhancing the reputation of the Court.

Attorney General Howard Hampton and Chief Judge Sidney Linden with Associate Chief Judge Robert Walmsley, a member of the Judicial Appointments Advisory Committee in the early 1990s. (Courtesy: S. Linden)

1990-2015: The Integrated Court Era

1990s

Ontario Court (Provincial Division)

In 1990, the Provincial Courts (Family and Criminal Divisions) were replaced by the Ontario Court (Provincial Division), which became known simply as the Ontario Court of Justice in 1999. The formerly separate criminal and family benches, including all judges and justices of the peace, were consolidated

to form a single court, although in practice, many judges continued to concentrate their work on either family or criminal cases.

The Chief Judge of the Provincial Division when the integration process began was Sidney B. Linden. Using the skeletal administrative structure set out in the *Courts of Justice Act* as a foundation, Linden built a strong judicial administration designed to outlive his term. Among other changes, he established the Chief Judge's Executive Committee (CJEC) of Regional Senior Judges, creating a collaborative approach to judicial administration; secured staffing for the Office of the Chief Judge and to support the Regional Senior Judges; and provided ongoing training in judicial leadership for judges in management positions.

Early on, in order to associate the whole of the Court with his reforms, he invited the executive of the family and criminal judges' associations to take part in CJEC meetings and decisions.

> The creation in 1990 of what is now the Ontario Court of Justice and the appointment as Chief Judge of Sidney Linden, much contested at the time because he had not sat as a Provincial Court judge before his appointment as Chief, was a stroke of genius. Our administrative organization, our structure and our memorandum of understanding with government[33] are probably not sufficiently appreciated, but they have played a significant role in creating and maintaining an institutional independence recognized and envied throughout Canada at all levels of court.
>
> Justice Brian Lennox, former Chief Justice, Ontario Court of Justice[34]

Backlog Crisis: The *Askov* Decision

The *Askov* decision – a criminal case that originated in Brampton – was released in 1990, shortly after the creation of the Provincial Division. In *Askov,* the Supreme Court of Canada defined a person's right under the *Charter* to be tried within a reasonable time.[35] In Ontario, the result was to put in peril thousands of criminal cases, with a real risk of serious criminal cases being thrown out due to delays in bringing them to trial. The Court's response was to develop a series of mechanisms, practices and strategies to tackle court delays. The new government at that time and Attorney General Howard Hampton increased the complement of the Court by 35 judges. With outreach from Hampton and the new Judicial Appointments Advisory Committee, those new appointments were much more diverse than before, especially in the numbers of women who joined the bench. The face of the Court was changing.

> The Askov decision was ultimately of benefit by forcing the Court collectively to develop coherent approaches to dealing with backlog.
>
> Justice Brian Lennox, former Chief Justice, Ontario Court of Justice[36]

Computers and "Electronic Mail"

New technologies began changing the ways the Court worked. In the Chief Judge's Newsletter of May 1991, Chief Judge Linden was happy to report that each Regional Senior Judge had been equipped with a personal computer. The goal was to connect Linden's office with an "electronic mail system." This was a modest but significant step in the introduction of technology to the Court.

Computers in Regional Senior Judges' Offices

I am happy to advise that each Regional Senior Judge is now equipped with a personal computer. This is in addition to the computers that their staff people have. My goal is to have the Chief Judge's office connected with the Regional Senior Judges' offices by an electronic mail system. Such instantaneous communication will greatly facilitate our administrative tasks.

From Chief Judge's Newsletter, Ontario Court (Provincial Division), May 1991

Administrative Independence: Memorandum of Understanding

To ensure administrative independence from government, Chief Judge Linden negotiated a Memorandum of Understanding with the Attorney General. This Memorandum, signed in 1993, gave the Court control over its own budget and a degree of administrative autonomy that was unparalleled among trial courts in Canada. Under the MOU, the Office of the Chief Judge took over many responsibilities that had previously belonged to the Ministry of the Attorney General, including the administration of the judicial budget.

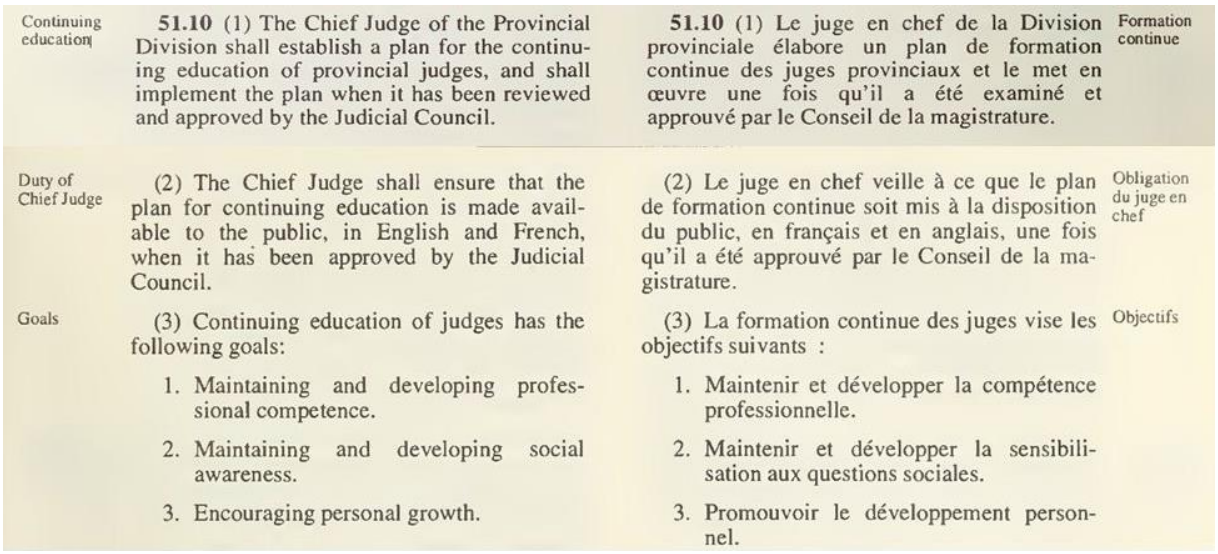
> For decades prior to 1990… the Provincial Division of the Court was managed as if it was a small branch or division with the Attorney General's Ministry….This agreement, for which there was no precedent, transferred many financial and management responsibilities from the Ministry to the Chief Judge.
>
> Sidney Linden, former Chief Justice, Ontario Court of Justice[37]

Requirement for Education Plans

A legislated commitment to formal judicial education for judges came into force in 1994 through changes to the *Courts of Justice Act*. In 2002, the *Justices of the Peace Act* was similarly amended to require a continuing education program for justices of the peace.

Independent Process to Set Judicial Salaries

Historically, provincially appointed judges had much lower salaries (and less prestige) than federally appointed judges. The financial gap was reduced after processes were introduced to determine judicial salaries and benefits. From 1979 to 1992, a three-person Provincial Courts Committee had been put in place – by agreement between the Ontario government and the judges' associations – to make recommendations about judicial salaries and benefits.



Continuing education	**51.10** (1) The Chief Judge of the Provincial Division shall establish a plan for the continuing education of provincial judges, and shall implement the plan when it has been reviewed and approved by the Judicial Council.	**51.10** (1) Le juge en chef de la Division provinciale élabore un plan de formation continue des juges provinciaux et le met en œuvre une fois qu'il a été examiné et approuvé par le Conseil de la magistrature.	Formation continue
Duty of Chief Judge	(2) The Chief Judge shall ensure that the plan for continuing education is made available to the public, in English and French, when it has been approved by the Judicial Council.	(2) Le juge en chef veille à ce que le plan de formation continue soit mis à la disposition du public, en français et en anglais, une fois qu'il a été approuvé par le Conseil de la magistrature.	Obligation du juge en chef
Goals	(3) Continuing education of judges has the following goals: 1. Maintaining and developing professional competence. 2. Maintaining and developing social awareness. 3. Encouraging personal growth.	(3) La formation continue des juges vise les objectifs suivants : 1. Maintenir et développer la compétence professionnelle. 2. Maintenir et développer la sensibilisation aux questions sociales. 3. Promouvoir le développement personnel.	Objectifs

Courts of Justice Act / Loi sur les tribunaux judiciaires, 1994

On November 18, 1992, the government and the associations of the provincial Family and Criminal Court judges signed an historic Framework Agreement. As a result of that agreement, the Committee became known as the Provincial Judges' Remuneration Commission and its recommendations regarding salaries and benefits became binding on government.

The existence of the Provincial Courts Committee and the Framework Agreement pre-dated by several years the decision of the Supreme Court of Canada in the *Provincial Judges Reference* case[38] and served as examples of the foresight of the provincial judges' associations in their stewardship of the judicial independence issue. The Framework Agreement was included as a schedule to the *Courts of Justice Statute Law Amendment Act, 1994*.[39]

> The decision for the Commission to make binding decisions is a remarkable example of both the Provincial Court and government recognizing that financial security is a fundamental element of judicial independence. It brought to an end a difficult but enormously important struggle that stretched over a quarter of a century.
>
> George Thomson, former Deputy Attorney General and former Provincial Court judge[40]

"Conversion" of Justices of the Peace

Before the implementation of the *Justices of the Peace Act, 1989,* many justices of the peace were paid by fees ("fee for service") and worked part-time. The new legislation provided that justices of the peace were to work in full-time, salaried positions to avoid compromising their judicial independence. Beginning in the 1990s, the Court started "converting" justices of the peace to this new status. The full conversion was completed by 1998. This process has had a profound impact in increasing the professionalism of the bench.

***Courts of Justice Act* Amendments: Judicial Conduct**

Initially, the Ontario Judicial Council was essentially controlled by federally appointed judges. It was also involved both in judicial appointments and in judicial discipline. Amendments to the *Courts of Justice Act* in 1994 changed both the role and the structure of the Council.[41] This included naming the Chief Judge of the Provincial Court as the Co-chair instead of simply serving as a member of the Council. The Council ceased to have a role in the judicial appointment process and focused on judicial discipline, investigating complaints of alleged misconduct against provincially appointed judges.

The 1994 amendments also authorized the Chief Judge to establish "standards of conduct for provincial judges."[42] Chief Judge Linden created a Judicial Conduct Subcommittee to prepare *Principles of Judicial Office* in consultation with the judges' associations and judges of the Court. The Ontario Judicial Council adopted *Principles of Judicial Office* in1997 as the standard to govern judicial conduct and ethics in Ontario.[43] The Court also later adopted *Ethical Principles for Judges,* which had been prepared and adopted by the Canadian Judicial Council in 1998.

Principles of Judicial Office for Justices of the Peace came later, approved by the Justices of the Peace Review Council in 2007. The principles are identical to those for the judges, recognizing the important role of justices of the peace as judicial officers.[44]

Judicial Case Management

In the 1980s, criminal and family judges of the Provincial Court began to develop judicial case management systems to improve access to justice through early resolution and the establishment of time lines to avoid delays. A key element is the monitoring of cases by judges, individually or collectively. In the Family Court, the case management approach was enshrined in 1995 when the Office of the Chief Judge issued *Case Management in the Family Court: A Guide to Implementation*.[45]

> The Judicial Case Management system made a huge difference to the way we do family cases. I was one of the resisters but once it came on board, it was phenomenal, although difficult for unrepresented people to manage. It was a seismic shift in opening up the way people got access to justice.
>
> Justice Heather Katarynych[46]

The Rise of Problem-Solving Courts

In 1998, two "problem-solving" courts opened in Toronto. One was a Mental Health Court, established in May of that year. The other was a Drug Treatment Court, established in December. These Courts represented a departure in the handling of criminal charges for certain segments of the population and certain types of cases. In the 2000s, other problem-solving courts emerged, such as the Aboriginal (*Gladue*) Court and the Integrated Domestic Violence Court. In these courts, based on the principles of restorative justice, judges become more active in interacting with the parties and experts from the community to find solutions for vulnerable individuals, while protecting those who may be potential victims. During the 2000s, the numbers and types of problem-solving courts expanded across the province.

> The Drug Treatment Court model represents a radical departure from the traditional role of a judge. In the Drug Treatment Court the judge becomes an active player, engaging in personal and direct dialogue with each Drug Court participant.
>
> Justice Paul Bentley[47]

Transfer of *Provincial Offences Act* to Municipalities

Amendments to the *Provincial Offences Act* in 1998[48] transferred the responsibility for the administration of that Act – and revenues generated from it – from the province to the municipalities. Justices of the Peace hearing these cases remained part of the Ontario Court (Provincial Division), but the administration was now provided at the municipal level.[49] The transfer led to an increased demand for justice of the peace services by municipalities and a corresponding increase in the justice of the peace complement within the Court.

2000 to 2015: The Ontario Court of Justice Era

What's In A Name?	
Magistrates' Courts Juvenile and Family Courts	Until 1968
Provincial Courts (Family and Criminal Divisions) (Civil Division 1980-1990)	1968-1990
Ontario Court (Provincial Division)	1990-1999
Ontario Court of Justice	From 1999

Change of Names

As of April 19, 1999, the General Division, comprised of federally appointed judges, became the Superior Court of Justice and the Provincial Division became the Ontario Court of Justice. The title of provincially appointed judges became "Justice" instead of "Judge".[50] The new title reflected a change in attitude towards the provincial bench, resulting from changes in the appointment process, qualifications for appointment, increased jurisdiction, as well as the widely recognized expertise of the Court.

> There is a much greater respect for the provincial court judges now than when I started. This Court has some of the finest judges in the country.
>
> Edward Greenspan, criminal defence lawyer[51]

Association of Ontario Judges

The Provincial Court in Ontario has always benefited from the existence, under various names, of strong associations of the judges of the Court, particularly in dealing with issues of judicial independence and judicial education. The judges' associations have, since their creation, played a key role in the evolution of the Court. In 1994, Chief Judge Linden and the presidents of the Ontario Judges' Association and the Ontario Family Judges' Association signed a Memorandum of Understanding (MOU) which recognized both the distinct and complementary roles of the Office of the Chief Judge and of the judges' associations. The MOU underlined and formalized the positive, collaborative relationship existing between the two associations and the Chief Judge.

At the Annual Meeting of the Court in May 1999, the criminal and family judges associations merged into a single association of provincially appointed judges known as the Ontario Conference of Judges.[52] In 2015, they became known as the Association of Ontario Judges.

Education Secretariat

The 1994 Memorandum of Understanding between the associations and the Chief Judge formally recognized the Education Secretariat as the body responsible for overall education policy and funding associated with judicial training for the Court. The Education Secretariat was created by Chief Judge Sidney Linden in the early 1990s, with Judge Mary Hogan as its first chair. Composed of an equal number of representatives of the Chief Justice and of the Association of Ontario Judges, the role of the Secretariat is to coordinate the many education programs offered to the judges of the Court. It controls the education budget and is responsible for education policy, planning and presentation. The Secretariat works closely with the National Judicial Institute in presenting a range of judicial education programs. A

similar approach to education was later taken for justices of the peace with the creation of the Advisory Committee on Education.

Youth Criminal Justice Act

The *Youth Criminal Justice Act* – a federal statute in force since 2003 – focuses on holding young offenders accountable by measures proportionate to their conduct. It reserves the most serious responses for the most egregious offences, providing sanctions akin to those imposed on adult offenders. For less serious matters which comprise the vast majority of youth crime, alternatives to courts and custody are the norm and the model is restorative and rehabilitative. The net result has been significant declines in the use of courts and custody for youth. This *Act* replaced the *Young Offenders Act*, and represents the second major transformation of juvenile justice since the *Juvenile Delinquents Act* of 1908.

***Access to Justice Act*: Transformation of Justice of the Peace Bench**

The *Access to Justice Act,* 2005 changed the justice of the peace system in Ontario, mandating the move to a bench of presiding justices. This statute formalized qualifications for appointment, created independent appointment and disciplinary processes, and formally recognized the office of Regional Senior Justice of the Peace. It also created a system whereby retired justices of the peace could remain available for assignment on a part-time *(per diem)* basis – similar to the situation already in place for retired judges.

Technology

Attempts at large-scale restructuring of court services through technology in the 1990s and 2000s were not successful. However, incremental changes have enabled the Court to improve service to the public.

For example, in 2013, the Court initiated e-orders, a simple innovation that eliminated hours of waiting for documents. By installing a printer in the courtroom, a clerk can type the order, produce a hard copy, and hand it to the party concerned without delay. Videoconferencing has also had an impact, especially in northern locations.

> You can't fly people everywhere, but they can get to a video site. That gives access to people knowing what actually happened in court. That has been a big innovation.
>
> Justice Peter Bishop[53]

> Technology changed the way we make custody and access orders. The parents have to set up a new email account and that's the way they have to communicate with each other about custody and access, and the judge gets to see everything they say to one another.
>
> Consultation with family judges at 311 Jarvis Courthouse, Toronto[54]

Conclusion

The history of the Ontario Court of Justice began with the police magistrates and justices of the peace existing at the time of Confederation. Juvenile and Family Courts were added to the mix in the 1900s. In 1968, this collection of courts was folded into the Criminal and Family divisions of the new Provincial Courts. In 1990, the Provincial Courts were consolidated into the Ontario Court (Provincial Division), ultimately renamed Ontario Court of Justice in 1999. Along the way, the institution changed in many ways – including processes for appointing judges and justices of the peace, structures for judicial leadership and independence, and changes in the law affecting the volume and complexity of the cases.

We have come a long way since our courtrooms were in police stations, jails, basements of town halls, and furnace rooms of public libraries. Our Court has evolved from the most neglected in the province to one of the most significant and well-respected courts in the country.

Justice Annemarie Bonkalo, former Chief Justice, Ontario Court of Justice[55]

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[1]According to a 1921 Royal Commission report on Ontario magistrates: "Police Magistrates appear to have been appointed first in Ontario under the provisions of the Municipal Corporations Act of Upper Canada, passed by the Parliament of Canada in 1849. This Act provided for the appointment of a Police Magistrate in each city or town upon the request of the Council." W. D. Gregory, et al., *Interim Report Respecting Police Magistrates of the Commission to Inquire into, Consider and Report upon the Best Mode of Selecting, Appointing and Remunerating Sheriffs, etc., etc.,* Printed by order of the Legislative Assembly of Ontario, Toronto: Printed by Clarkson W. James, printer to the King's Most Excellent Majesty, 1921, ("1921 Magistrates Report"), p. 3.
[2]The Provincial Courts were created in 1968; they were replaced by the Ontario Court of Justice (Provincial Division) in 1990, which in turn became known as the Ontario Court of Justice in 1999.
[3]1921 Magistrates Report, pp. 3-4.
[4]*Juvenile Courts Act*, 1910, 10 Edw. VII, c. 96 (Ont.).
[5]*The Juvenile Delinquents Act*, 1908, 7-8 Edw. VII, c. 40 (Can.).
[6]*Juvenile and Family Courts Act*, 1934 24 Geo. V, c. 25 (Ont.).
[7]Dorothy E. Chunn, Maternal Feminism, Legal Professionalism and Political Pragmatism: The Rise and Fall of Magistrate Margaret Patterson, 1922-1934, in *Canadian Perspectives on Law and Society*, Chapter VI, at pp. 110-111.
[8]*The Magistrates Act*, *1934*, 24 Geo. V, c. 28 (Ont.), s. 2.
[9]*Justices of the Peace Act*, 1935, 25 Geo. V, c. 34 (Ont.), s. 7.
[10]T.G. Zuber, *Report of the Ontario Courts Inquiry*, 1987, p. 23. ("Zuber Report")
[11]*Magistrates Act*, *1922*, 12-13 Geo. V, c. 48, s. 32; *Magistrates Act*, *1936*, 1 Edw. VIII, c. 35 (Ont.), s. 5.
[12]*Magistrates Act*, s. 4; McRuer, J.C. *Royal Commission into Civil Rights,* Vol. 2 (Toronto: Queen's Printer, 1968), p. 541. ("McRuer Report").
[13] McRuer Report, p. 558. See also *Juvenile and Family Courts Act,* R.S.O. c. 201, s. 4(1), as amended by Ont. 1964, c. 51, s. 1(1).
[14]*Provincial Courts Act*, *1968,* S.O. 1968, c. 103, ss. 14 (Criminal Division) and 17 (Family Division).
[15]Zuber Report, p. 27.
[16]*The Justices of the Peace Amendment Act, 1973*, S.O. 1973, c. 149, s. 3, in force on January 1, 1974.
[17]Interview of B. Lennox for OCJ History Project, 2015.
[18]Vanek, David, *Fulfilment: Memoirs of a Criminal Court Judge* (The Osgoode Society for Canadian Legal History: 1999), p. 227.
[19]Interview of B. Lennox for OCJ History Project, 2015.
[20]Under Section 8 of the *Training Schools Act*, a parent or guardian could apply to the Court simply because they were "unable to control the child or to provide for his social, emotional or educational needs." In May 1975, the Ontario Legislature voted to repeal Section 8. Proclamation took place on January 1, 1977.
[21]Brian Lennox, *Judicial Independence: Past, Present and Future: Judicial Independence and the Justice System*, Remarks to Central West Regional Meeting of Judges, Burlington, November 25, 2014.
[22]References to "District Court" in this essay include the former District and County Courts which constituted one court under one chief judge.

[23]In very rare circumstances, an appeal can still be heard by way of trial *de novo,* but this remedy is now rarely sought and rarely granted. The party requesting the trial *de novo* must satisfy the appeal court that the interests of justice would be better served by a trial *de novo* than by an appeal on the record, either because of the condition of the trial record or for some other reason. For more information, see the section in this history entitled, "The Demise of the Trial *de Novo.*"
[24]Brian Lennox, *Judicial Independence: Past, Present and Future: Judicial Independence and the Justice System*, Remarks to Central West Regional Meeting of Judges, Burlington, November 25, 2014.
[25]Interview of B. Lennox for OCJ History Project, 2015.
[26]*R. v. Big M Drug Mart,* [1985] 1 S.C.R. 295.
[27]Excerpted from Justice Nakatsuru's article concerning the *Charter of Rights and Freedoms* included as a "major change" in this history.
[28]Interview of D. Dodds for OCJ History Project, 2014.
[29]Lennox, *Judicial Independence* Speech, November 25, 2014.
[30]Alan W. Mewett, *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario, Part II: Native Communities and Remote Areas*, 1981.
[31]As of 2015, OCJ statistics indicate there were 29 native justices of the peace comprising 7.3 per cent of that bench.
[32]S.9(2) of the *Provincial Courts Act, 1968* provided that the full array of judicial duties could be provided only by judges who had been members of the bar for at least five years or who had served for five years on the bench. This would explain the practice, after the creation of the Provincial Courts, of appointing only lawyers of five years' standing. In the 1980s, Attorney General Roy McMurtry adopted the practice of appointing only lawyers with 10 or more years' experience.
[33]See discussion of later in this section on "Administrative Independence: Memorandum of Understanding."
[34]Lennox, *Judicial Independence* Speech, November 25, 2014.
[35]In *R. v Askov*, [1990] 2 S.C.R. 1199.
[36]Lennox, *Judicial Independence* Speech, November 25, 2014.
[37]Chief Judge Sidney B. Linden, *Where We Are, Where We're Going!*, Address to the Criminal Lawyers' Association Spring Education Program, April 20, 1996, Toronto.
[38]*Reference re Remuneration of Judges of the Provincial Court (P.E.I.),* [1997] 3 S.C.R. 3. In order to protect judicial independence, this decision mandated the creation of independent remuneration committees for all courts.
[39]By a 1993 Order in Council (OR-407/93), the recommendations of the Provincial Judges' Remuneration Commission were given the same force and effect as if enacted by the Legislature. The Framework Agreement became a schedule to the C*ourts of Justice Statute Law Amendment Act, 1994,* S.O. 1994, c. 12 s. 16. See also *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 51.13.
[40]Interview of G. Thomson for OCJ History Project, 2015.
[41]C*ourts of Justice Statute Law Amendment Act, 1994,* S.O. 1994, c. 12 s. 16
[42]C*ourts of Justice Statute Law Amendment Act, 1994,* S.O. 1994, c. 12 s. 16; see also *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 51.9.
[43]*Ontario Court of Justice, Biennial Report 2008/2009*, p. 35
[44]Under section 13 of the *Justices of the Peace Act*, the Associate Chief Justice-Coordinator of Justices of the Peace obtained jurisdiction to establish standards of conduct for all justices of the peace in Ontario. This includes the authority to create a plan for bringing those standards into effect once they have been reviewed and approved by the Justices of the Peace Review Council.
[45]Judge Mary Jane Hatton and Judge Joseph C.M. James, editors, Case Management in the Family Court: A Guide to Implementation, issued by the office of the Chief Judge, Ontario Court (Provincial Division). At the Opening of the Courts, 1999, Chief Judge Linden said, "The Toronto Family Law judges at 311 Jarvis, deserve special recognition for the establishment of the original model of case management (in family law) and for its continued success and subsequent expansion to other Provincial Division locations throughout the province."
[46]Interview of H. Katarynych for OCJ History Project, 2014.

[47]Bentley, P. (2000). Canada's first drug treatment court. *Criminal Reports*, 31, 257-271.
[48]*Streamlining of Administration of Provincial Offences Act*, S.O. 1998, c. 4, s. 2 [came into force on Royal Assent, June 11, 1998].
[49]Sidney Linden, Opening of Courts Speech, January 6, 1999.
[50]*Courts Improvement Act, 1996*, S.O. 1996, c. 23, Part IV, s. 8 [Note that this change only applied to the Chief, Associate Chief, and Associate Chief Co-ordinator of Justices of the Peace]
[51]Interview of E. Greenspan for OCJ History Project, 2014.
[52]Sidney B. Linden, Opening of the Courts Speech, January 6, 1999.
[53]Interview of P. Bishop for OCJ History Project, 2013.
[54]Consultation meeting at 311 Jarvis Courthouse, Toronto for OCJ History Project, 2012.
[55] Interview of A. Bonkalo for the OCJ History Project, prior to the end of her term as Chief Justice in 2015.

The Judge Outside the Courtroom

Introduction: Possibilities and Limits of the Judicial Role

Most people would agree that a judge's main role is to hear cases and render decisions. There is less consensus about the extent to which judges should be active outside the courtroom. What kinds of activities can judges and justices of the peace undertake without compromising judicial independence? Specifically, what can they do to promote law reform, engage with the community, build public understanding of the justice system, and participate in efforts to improve access to justice?

Not surprisingly, the kinds of decisions individual judges and justices of the peace have made about their outside activities differed at various points during the history of the Ontario Court of Justice. In some respects – such as the degree to which judges interact with the community to make the courts more effective – the pendulum has gone back and forth. A fundamental backdrop has been the evolving discussion and debate about the meaning of judicial independence and the application of ethical principles.

This essay considers the possibilities and limits of the judicial role outside the courtroom.

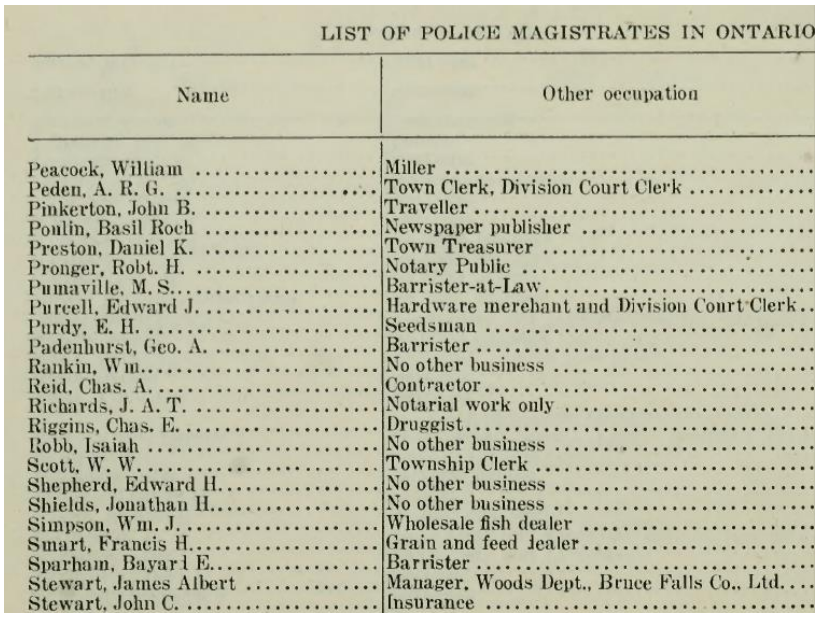
Magistrates: 1920s to 1968

Outside Employment is the Norm

In 1920, Police Magistrate David Hastings was vocal in his opposition to the *Ontario Temperance Act* and the Attorney General who wanted him to vigorously enforce it. The report of a public inquiry into his conduct reveals a circumstance that would never be possible for a provincial judge in modern times: while on the bench, Hastings also served as the editor of a local newspaper.[1]

Hastings' outside activities were not unusual. At the time, it was common for magistrates to take on additional types of work. A 1921 Royal Commission report on Ontario magistrates found that, "[i]n many places the Police Magistrates devote their whole time to Magistrates' work, but as a general rule they are men engaged in active business callings or in professional life…. In thirty-six cities and towns the Police Magistrates are lawyers engaged in active practice."[2] The report provides specific examples of magistrates who had ruled on cases involving their clients or business associates.[3]

The Royal Commission report provides a fascinating list of other occupations held by Ontario's police magistrates as of January 1, 1921. In addition to barristers, there was a manufacturer of cement products; a harness maker; a manager of a canning company; builders and contractors; a carriage painter; a restaurant owner; a grocer; real estate and insurance agents; postmasters; a miller; farmers; a seedsman; dealers in grain, feed, lumber, coal and wholesale fish; a ticket agent; a storekeeper and merchants; court and town clerks; newspaper publishers; notaries public; an associate coroner; a druggist; a dentist; and a physician.[4]



LIST OF POLICE MAGISTRATES IN ONTARIO

Name	Other occupation
Peacock, William	Miller
Peden, A. R. G.	Town Clerk, Division Court Clerk
Pinkerton, John B.	Traveller
Poulin, Basil Roch	Newspaper publisher
Preston, Daniel K.	Town Treasurer
Pronger, Robt. H.	Notary Public
Pumaville, M. S.	Barrister-at-Law
Purcell, Edward J.	Hardware merchant and Division Court Clerk
Purdy, E. H.	Seedsman
Padenhurst, Geo. A.	Barrister
Rankin, Wm.	No other business
Reid, Chas. A.	Contractor
Richards, J. A. T.	Notarial work only
Riggins, Chas. E.	Druggist
Robb, Isaiah	No other business
Scott, W. W.	Township Clerk
Shepherd, Edward H.	No other business
Shields, Jonathan H.	No other business
Simpson, Wm. J.	Wholesale fish dealer
Smart, Francis H.	Grain and feed dealer
Sparham, Bayard E.	Barrister
Stewart, James Albert	Manager, Woods Dept., Bruce Falls Co., Ltd.
Stewart, John C.	Insurance

From List of Police Magistrates in Ontario, January 1, 1921, *Interim Royal Commission Report Respecting Police Magistrates*. (See footnote 2.)

The report recommends that the work of police magistrates be performed by specially qualified men "devoting their whole time to it and engaging in no other business."[5] While this recommendation was made in 1921, a prohibition on outside employment for provincially appointed judges did not actually occur until 1968. The report also recommended that magistrates should not serve as members of police commissions[6], a change not instituted until 1984. The approach adopted by this Royal Commission was clearly well ahead of its time.

> We would not tolerate for a moment the practice of law or the carrying on of any other business by our Judges: in fact they are prohibited from so doing by Statute. The objection in the case of Judges applies with at least equal force to Police Magistrates.[7]

One reason for the persistence of 'other occupations' was the fact that magistrates' salaries were "sadly inadequate."[8] At the time, a fee system was still in place which remunerated magistrates when they convicted someone, but usually not if they dismissed the case.[9] Although fees were eventually abolished, the adequacy of remuneration for provincially appointed judges remained a sore point for many years.

Although the problem of outside work by Ontario's magistrates was identified in 1921, it lingered as an issue for more than 40 years. It was still an issue when James McRuer released his report from the Royal Commission Inquiry into Civil Rights in Ontario, in 1968.

> It is improper for one holding a judicial office of this character to be engaged at the same time in the practice of law or any business… There should be no room for suspicion that the magistrate presiding at a trial may be influenced by his relations with his clients or his business connections. It is most undesirable that

> lawyers should be appearing before the magistrate one day and carrying on ordinary legal business with him the next day.[10]

McRuer was also critical of the common practice of Ontario magistrates to serve as police commissioners. He reported that 37 magistrates were employed by 68 boards of commissioners of police, "for which they are in some instances paid substantial salaries." His recommendation in this regard was unequivocal. "Magistrates ought not to be members of Boards of Commissioners of Police for many reasons. Not the least of these is that there ought not to be an employer-employee relationship between judicial officers and the members of the police force."[11]

The issue of outside employment was even more pronounced for justices of the peace who, for many decades, had served on a part-time, fee-for-service basis. In the 1960s, being a justice of the peace was still often seen as a side line to another type of work, whether as a court clerk or in other functions. The risks of this approach were highlighted in Professor Alan Mewett's comprehensive report on justices of the peace in 1981.[12]

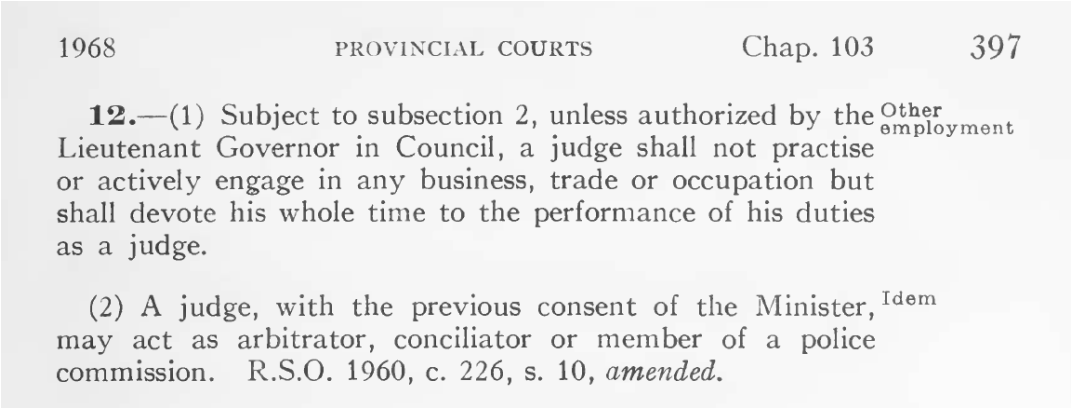
Provincial Court Era: 1968-1990

Outside Employment is the Exception

> A judge must be… removed from any sophisticated entanglements, be they political, personal or financial, which might seem to influence him in the exercise of his judicial functions, let alone entanglements that might actually influence him.
>
> Shimon Shetreet, Judges on Trial[13]

Upon proclamation of the *Provincial Courts Act* in December 1968, the Magistrates' Courts, justices of the peace, and Juvenile and Family Courts were transformed into the Criminal and Family Divisions of

the new Provincial Courts. The statute included a clear statement to convey the expectation that judges' 'whole time' should be devoted to their court duties. While acting as an arbitrator, conciliator or member of a police commission was not prohibited, consent of the Minister would now be required to assume these roles.



1968 PROVINCIAL COURTS Chap. 103 397

12.—(1) Subject to subsection 2, unless authorized by the Lieutenant Governor in Council, a judge shall not practise or actively engage in any business, trade or occupation but shall devote his whole time to the performance of his duties as a judge. Other employment

(2) A judge, with the previous consent of the Minister, may act as arbitrator, conciliator or member of a police commission. R.S.O. 1960, c. 226, s. 10, *amended*. Idem

Notwithstanding the express permission to act as a member of a police commission, that practice eventually came to an end with the passage of the *Courts of Justice Act, 1984*. This statute, which replaced the *Provincial Courts Act*, did not include the possibility of obtaining consent to act as an arbitrator, conciliator or member of a police commission.[14]

The Family Court Judge as a "Community Motivator"

An issue judges often face is the absence of resources to deal with the legal or broader social problems facing those who appear before them. Many judges, as respected members of the community, have taken the opportunity to influence how the community and government respond to such challenges. No better example exists of judges acting to address the reality of inadequate resources than the work done by members of the Provincial Court (Family Division) bench in the 1970s.

> It's all about what happens after you make your decision.
>
> Jim Felstiner, former Family Court judge[15]

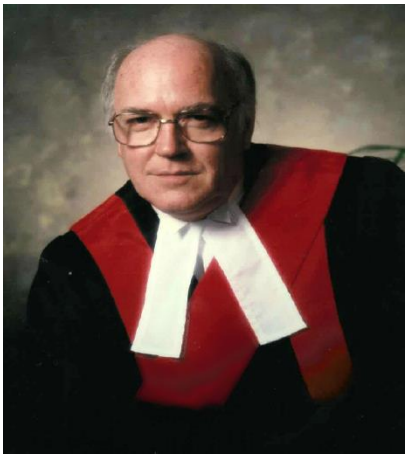
The goal was simple. Faced with a virtual absence of needed community resources, many Family Court judges decided to encourage the creation of new facilities and programs to help make youth and family justice more effective. Some might say these judges crossed a line: that their activities affected their actual or perceived impartiality. Others would assert they left a lasting legacy that continues to benefit Ontario children and families years later.

A motivating factor was the judges' frustration that training schools funded by the Ministry of Correctional Services were often the only place they could send young offenders. Community-based care, offering support and treatment generally closer to home, was usually considered to be a much more effective alternative. Such care was, however, simply not available in many communities. Moreover, there was often no place available to keep youth in the community while they were before the Court, or to provide an expert assessment of them and their families. Building community resources became a way to ensure more effective outcomes, especially when dealing with youth under the *Juvenile Delinquents Act* and assisting families in child welfare cases.

The types of resources developed included:

- group homes,
- child-friendly local observation and detention facilities,
- treatment programs,
- Family Court clinics,
- diversion programs,[16]
- mediation and conciliation programs, and
- shelters for abused women.

The judges who took on this role were numerous, including: Maurice Genest in London, Joe James in Toronto, Jim Karswick and Warren Durham in Brampton, David Steinberg and John Van Duzer in Hamilton and George Thomson in Kingston. They came to realize that as influential voices in their communities they could motivate positive change. They used their voices with the strong encouragement and blessing of Chief Judge Ted Andrews.


Ted Andrews, Chief Judge, Provincial Court (Family Division), 1968-1990.

> So my role basically, I felt, was to encourage and support the judges and try to instil in them a need to be a motivator within the community. You see, in Family Court a judge can only be as good as the resources available to him…. If you have only got a training school to send kids to, then that is where they go. But if you have a group home which you can place them in, on probation, and make it a condition of probation, this is an added resource, and that is great…. We had to be proactive and get things done, mobilize the community, make them aware of the needs.[17]
>
> Ted Andrews, Chief Judge, Provincial Court (Family Division)

"Half of the group home residents sent there by one Peel Region Judge"

On July 31, 1975, a *Globe and Mail* article reported that half the children in the Viking 1 group homes "came from one juvenile court – that presided over by Judge Warren Durham in Peel Region."

The article added that, "The judge's enthusiasm for Viking, and his aversion to training schools, has caused a controversy in the region, in part because the judge can act independently of the local Children's Aid Society, which is not a Viking fan, and order a delinquent child placed with Viking, the bills to be picked up by the municipality."

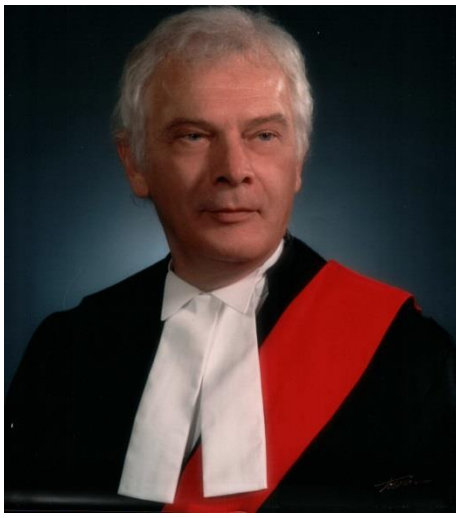
Community organizations and volunteers also became leaders in the creation of juvenile and family resources. Governments, too, had a role to play. Child psychiatrist John S. Leverette acknowledged the role of the Ontario government and the judiciary when he wrote that "…court-related clinic services in the province of Ontario, Canada were robustly developed with cooperation between the ministries of the Attorney General, Health, Community and Social Services, and Corrections. Key to the inter-ministerial coordination and high profile for these services was leadership from the Office of the Chief Judge of the Provincial Court (Family Division)."[18]

The federal government played an important role by providing funding to test diversion programs and conciliation services as it gave consideration to replacing the *Juvenile Delinquents Act* and introducing a new *Divorce Act*.

Concerns began to arise that some judges were becoming too close to, or dependent on, particular programs. The criticism focused in particular on Judge Warren Durham, sitting in Brampton, with regard to the number of children he had placed with one group home operator, Viking Houses. At the time, Family Court judges could invoke a powerful tool in section 20(2) of the *Juvenile Delinquents Act*. This provision enabled the judge to order an amount of money the municipality had to contribute to a child's care once the judge had determined the child's placement.

The municipalities of Toronto and Peel were concerned about the impact such orders were having on their budgets. Legal challenges were launched including two cases involving Viking Houses which ultimately were heard by the Supreme Court of Canada. The result: the power to order municipal payments was declared to be unconstitutional.

Although some Family Court judges remained active in the development of community resources after the 1970s, that role became less common. According to Jim Karswick, "Judicial outreach was beginning to meet resistance in the 1980s. At meetings of the association of family judges there were many who did not think that this was the role of the judge. They thought we should stay in the courtroom and do our work as judges, not go out and interact with the community."


Family Court Judge Jim Karswick, 2001. (Courtesy: J. Karswick.)

Nonetheless, the legacy of the "community motivators" in the Family Court has remained in the form of community resources created in the 1970s and 1980s that are still in place many years later.

Brampton

In Brampton, Karswick recalled that "[t]he Family Court clinic, supervised access centre, mediation service, and community service orders all came about because of judges making contact with organizations, institutions and people in the community. It was common among Family Court judges to do outreach work. Without it, the resources we needed would not have been there."[19]

London

In London, the Centre for Children and Families in the Justice System has acknowledged the "proud legacy" of Maurice Genest, also a former Family Court judge, in relation to a Family Court Clinic.

> In the early 1970s, Judge Genest mustered a small group of local professionals to pursue the idea of a local Family Court Clinic, one modelled after that in Toronto. The major stumbling block – funding – fell away when Dr. Naomi Rae-Grant secured support from the Ministry of Health. As Judge Genest continues the story: "a modest complement of staff was hired, a volunteer board of directors was established, and in 1974 the London Family Court Clinic was started."
>
> What was then two people conducting "pre-disposition assessments" for the juvenile court is today a multi-faceted agency with 22 staff, six vibrant clinical programs, productive linkages to community partners, a high-quality applied research program, in-demand training services, and the capacity to generate an impressive array of resources to aid intervention and prevention. In 1974, we saw 40 youths. This year [2004], we saw almost 800.[20]

Kingston: One Community's Response

George Thomson, a Family Court judge in Kingston in the 1970s, recalls one community's efforts to meet the needs of at-risk children and troubled families:

I remember well my excitement in 1972 as I drove up Brock Street in Kingston to see, for the first time, the Family Court to which I had just been appointed. I equally remember my shock when I discovered it was located in a decrepit red brick house and hearings were held around a table in the dining room, while those waiting sat in the small living room.

Even that paled in comparison to the realization of how little was available in the community to support the work of the Court. Almost daily I was reminded of the limits of my ability to respond to children and families in crisis, juvenile delinquency, family violence, and marriage breakdown because the needed resources and programs simply weren't there. If the possibilities I saw when offered the position were to become other than false hopes, I needed to play a role in changing this bleak situation.

Four years later, Chief Judge Andrews publicly commended the Kingston community for the way it had come together to create the needed resources. The Court now had access to a Family Court clinic to assess children and their families, an observation and detention home, a juvenile diversion program, a volunteer probation service, a youth crisis centre and several new community-based group homes for youth. Kingston had opened up one of the early shelters for abused women and was testing a court-based conciliation service that was settling most of our support and custody cases. And a new Family Court had just opened that offered night court and child care for those who needed it.

I believe there were three things that brought about this transformation and made my job as a Family Court judge so much easier and more effective.

The first is that Kingston was and is a unique community for its size. It has a large teaching hospital, one of Canada's leading universities, and a host of other institutional settings that attract persons with the skills and experience to develop new programs and lead significant change.

Second, and the essential element in all communities that see and respond to the needs of others, was the participation of many committed individuals who gave their time and expertise to develop these programs. The examples were many and varied. They included social workers,[21] child psychiatrists,[22] educators,[23] and many enthusiastic and committed law students.[24]

Third, and just as important, was the realization that I, as the Family Court judge, needed to play an active role to help ensure that essential supports to the Court were in place. This is a decision that my Chief Judge, Ted Andrews, actively encouraged.[25]

Sometimes my role involved identifying the need. At other times, it was to find the individuals who could turn a general idea into a concrete program. I sought government funding to test new approaches and then make them sustainable. And I encouraged research so we could learn from our successes and failures.


Former Family Court judge George Thomson, 1973. (Courtesy: G. Thomson)

The biggest gamble I made was to help set up an observation and detention facility, a place where kids who had to be held could stay in the community instead of over 100 miles away in Ottawa. I found Mike Ozerkevich who was teaching child care workers at the local community college. We got a bit of money from the Ministry of the Attorney General. And we got a local businessman to provide a broken down stone building in mid-town Kingston. When the centre opened, it was almost all staffed by the community college students. In retrospect, that was a risky thing to do: a detention home run by students. The current facility grew from that. It was a great resource to try things out.

In my mind, there was no reason to fear that these community activities would compromise my independence within the courtroom. Many Family Court judges across the province responded willingly to Chief Judge Andrews' expectation that they take on a leadership role within their communities. This was a distinguishing feature of the Provincial Court (Family Division) in the 1970s.

As I reflect back 40 years later, I recognize that this form of "judicial activism" raised legitimate questions about how far a judge can go to engage the community. However, I am proud that in Kingston and many other Ontario communities, judges made the effort to develop resources so that children and families could have better outcomes.

A Public Voice: Defining the Limits

Chief Justice Bora Laskin and Two Provincial Court Judges

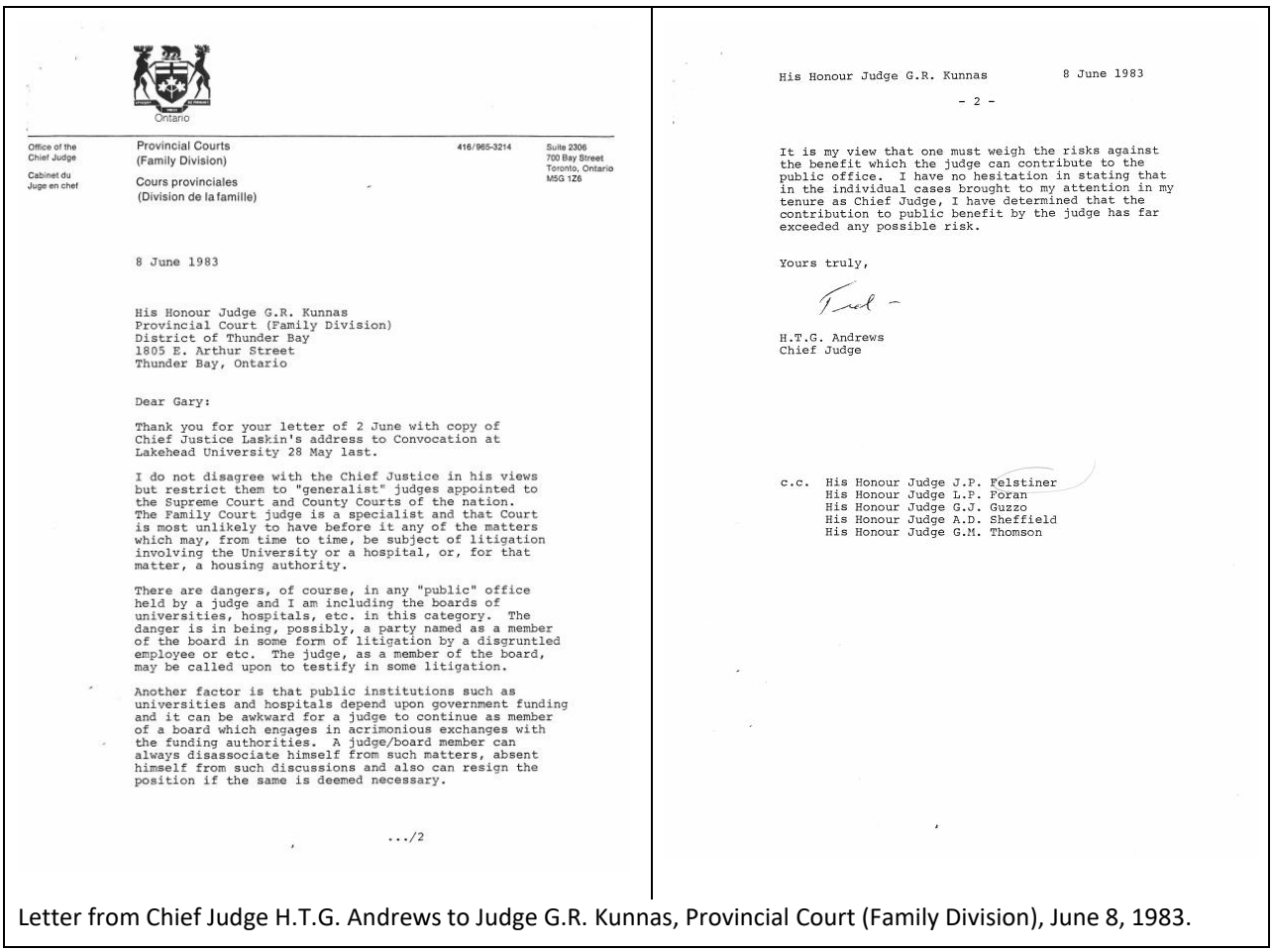
Beginning in the late 1970s, the issue of what a judge may do or say outside the courtroom became the subject of debate – led by the Canadian Judicial Council[26] and its Chair, Chief Justice Bora Laskin.

In 1977, George Thomson took on a full-time assignment with the Ontario government as an Associate Deputy Minister to head a new children's services division. Although he was no longer sitting in court, he retained his status as a Provincial Court judge and returned to the bench five years later. "My Chief Judge and the Attorney General had given their permission and so I thought there was no problem. However when I showed up at judicial education program a year later in Ottawa, I found that Chief Justice Laskin had spoken the night before and had called my public service appointment (without using my name) 'a blot on judicial independence which should not be tolerated'."[27]

Thomson was not the only one to encounter Chief Justice Laskin's disapproval. In May of 1983, Laskin addressed the Convocation of Lakehead University. He explained how his association with universities had to terminate once he became a judge. This was because "universities had become enveloped in litigation which beset them from time to time." Laskin said that he would not be a member of the university's Board of Governors or Senate. "Were I to be involved in University policy, I would, according to my code of judicial behaviour, have been precluded from taking the post….[A judge's] choice of a vocation has meant, in my view, a deliberate choice to leave public affairs alone…"[28]

This was an uncomfortable moment for Provincial Court judge Gary Kunnas who was on the podium with Laskin. He was a judge in Thunder Bay and a member of the board of Lakehead University.

Kunnas wrote a letter seeking advice from Ted Andrews, Chief Judge of the Provincial Court (Family Division). Andrews replied that the Family Court, as a court of "specialist judges", is "most unlikely to have before it any of the matters which may, from time to time, be subject of litigation involving the University or a hospital, or, for that matter, a housing authority." Andrews' bottom line was that, in his experience, "the contribution to public benefit by the judge has far exceeded any possible risk."[29]



Ontario

Office of the Chief Judge
Cabinet du Juge en chef

Provincial Courts
(Family Division)
Cours provinciales
(Division de la famille)

416/965-3214

Suite 2306
700 Bay Street
Toronto, Ontario
M5G 1Z6

8 June 1983

His Honour Judge G.R. Kunnas
Provincial Court (Family Division)
District of Thunder Bay
1805 E. Arthur Street
Thunder Bay, Ontario

Dear Gary:

Thank you for your letter of 2 June with copy of Chief Justice Laskin's address to Convocation at Lakehead University 28 May last.

I do not disagree with the Chief Justice in his views but restrict them to "generalist" judges appointed to the Supreme Court and County Courts of the nation. The Family Court judge is a specialist and that Court is most unlikely to have before it any of the matters which may, from time to time, be subject of litigation involving the University or a hospital, or, for that matter, a housing authority.

There are dangers, of course, in any "public" office held by a judge and I am including the boards of universities, hospitals, etc. in this category. The danger is in being, possibly, a party named as a member of the board in some form of litigation by a disgruntled employee or etc. The judge, as a member of the board, may be called upon to testify in some litigation.

Another factor is that public institutions such as universities and hospitals depend upon government funding and it can be awkward for a judge to continue as member of a board which engages in acrimonious exchanges with the funding authorities. A judge/board member can always disassociate himself from such matters, absent himself from such discussions and also can resign the position if the same is deemed necessary.

.../2

His Honour Judge G.R. Kunnas 8 June 1983

- 2 -

It is my view that one must weigh the risks against the benefit which the judge can contribute to the public office. I have no hesitation in stating that in the individual cases brought to my attention in my tenure as Chief Judge, I have determined that the contribution to public benefit by the judge has far exceeded any possible risk.

Yours truly,

H.T.G. Andrews
Chief Judge

c.c. His Honour Judge J.P. Felstiner
His Honour Judge L.P. Foran
His Honour Judge G.J. Guzzo
His Honour Judge A.D. Sheffield
His Honour Judge G.M. Thomson

Letter from Chief Judge H.T.G. Andrews to Judge G.R. Kunnas, Provincial Court (Family Division), June 8, 1983.

Government Consults with Judges on New Laws

During the Provincial Court era, Family Court judges struck a law reform committee and were actively involved in discussions about how to reform child welfare laws. Heather Katarynych, who became a provincial judge subsequent to working for the Ontario government in the Children's Services Division in the late 1970s, reflects on that period.

> "I recall how Family Court judges from the Provincial Court reached out in the late 1970s to inform policy development and legislative reform, especially in the area of child welfare law. Day in and day out, these judges saw how the existing laws played out for the children, families and state agencies appearing in their courtrooms. They brought a perspective that no one else could bring to the reform agenda: a focus on real life mischiefs in existing law that had been crying out for a cure for a very long time."[30]

Another example of judges being well heard in law reform was the extensive consultation process that led to passage of the federal *Young Offenders Act* in 1982. One reason judges were well consulted was that the government brought in a Saskatchewan Provincial Court judge, Omer Archambault to lead the exercise. Not only were Ontario judges included in the public discussions but they also had direct access to Archambault.

The family judges used their access to Archambault to request a provision to strengthen judicial control in the area of sentencing. They were concerned that after a judge's order had placed a child in a secure setting, correctional authorities could unilaterally decide to relocate that child before the term of the order had expired. Archambault agreed to add a provision to the new legislation so that the judge's approval would be required before taking a child out of a closed custodial facility.[31]

Judges' Views Hit the Media

Occasionally the different perspectives of judges on matters affecting the Court spilled into the public realm. On November 5, 1985, a headline in the *Ottawa Citizen* read: "Use of lawyers bad for young offenders: judge." The article reported on remarks made by Judge James Felstiner at a conference of the Probation Officers Association of Ontario. Felstiner was reported to have said that the widespread use of criminal lawyers in the juvenile justice system was harmful to the children.

> "When you add a lawyer, you add a lot of problems to a case," said Felstiner, asking how a 13-year-old makes sense of a defence lawyer who tells the child he will plead not guilty even though the child has admitted committing the crime. The judge wondered how a lawyer can explain this in light of a moral system against telling lies developed by parents, teachers and clergymen…. If Ottawa wanted to criminalize the system for young kids 12 and over, they sure got it.[32]

In response to a similar article in *The Globe and Mail* headlined "Use of Criminal Lawyers in Youth Courts Assailed," three Family Court judges (J.D. Karswick, J.B. Allen and R.E. Stauth) submitted a letter to the editor expressing the wish to "totally disassociate ourselves" from Judge Felstiner's comments.[33] This created the unusual situation of provincial judges expressing contrary views in the media about a public policy issue.[34] Other interested parties – including lawyers, social workers and youth services advocates – joined in the debate, publicly supporting or denouncing what Judge Felstiner had said.[35]


Use of lawyers bad for young offenders: judge

METRO

Judge draws ire for criticizing lawyers

LETTERS T

Judges' stand

We wish to totally disassociate ourselves from the comments made in the article Use Of Criminal Lawyers In Youth Courts Assailed (Nov. 5).

The juvenile court system

Provincial judges J. D. Karswick, J. B. Allen and R. E. Stauth (letter — Nov. 14), disassociate themselves from remarks made by Judge James Felstiner on the juvenile court system. The letter was discouraging, but typical.

Judge Felstiner spoke the truth with great perception and rare candor. Anyone familiar with the criminal justice system knows the games played by many defence lawyers to spin out the process at the expense of the courts (us), the client if he can pay, or the legal aid system that is again us, the taxpayer. That this process is apparently now common at the juvenile court level would make one weep. Justice appears to be the least important consideration.

The three judges would better serve the public by paying attention to and maybe even acting on the most refreshing and enlightened comments in a long time, rather than gathering like a circle of musk-oxen to defend the dubious practices of the profession from which they emerged as judges.

Winfield C. McKay
Toronto

All of these headlines appeared in November 1985. The upper-most is from the *Ottawa Citizen*; those below it ran in *The Globe and Mail.*

The Criminal Lawyers' Association launched a complaint against Judge Felstiner, "questioning the judge's ability to deal fairly with young offenders who are represented by lawyers." The Ontario Judicial Council dismissed the complaint.

> On all the evidence we are not persuaded that the remarks made by Judge Felstiner, as reported in the media, were such as to lead to the perception by the public generally and by the defence bar and young offenders specifically, that a young person appearing before him with counsel might be the subject of resentment and unfair treatment.[36]

A Cautionary Tale: The Case of Thomas Berger

In the 1980s, the case of Thomas Berger became a highly visible example of limitations being placed on a judge's ability to speak publicly on issues. Berger, a judge of the British Columbia Superior Court, had chaired three Royal Commissions in the 1970s, including one on the proposed MacKenzie Valley Pipeline. A 1981 article in the *Ottawa Citizen* reported him saying that "the decision of all Canadian first ministers to abandon native rights as one of the prices for agreement on the constitution was 'mean-spirited and unbelievable'." A week later, Berger authored a piece in *The Globe and Mail* that elaborated on this and other political views.[37] Berger's public comments generated a complaint to the Canadian Judicial Council.

B.C. Supreme Court Justice Tom Berger in November 1981. (Photo: Frank Lennon via Getty Images.) November, 1981.

CANADIAN JUDICIAL COUNCIL
CONSEIL CANADIEN DE LA MAGISTRATURE

RESOLUTION

BE IT RESOLVED THAT:

1) The Judicial Council is of the opinion that it was an indiscretion on the part of Mr. Justice Berger to express his views as to matters of a political nature, when such matters were in controversy.

2) While the Judicial Council is of the opinion that Mr. Justice Berger's actions were indiscreet, they constitute no basis for a recommendation that he be removed from office.

3) The Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the courts.

Following an investigation, the Canadian Judicial Council resolved, in 1983, that Berger's actions were "an indiscretion" but constituted no basis for a recommendation that he be removed from office.[38] Shortly afterwards, Berger left the bench.

The Berger case focused attention on what judges could do or say outside the courtroom without compromising their independence. Professor Jacob S. Ziegel wrote that, "Chief Justice Laskin was… emphatic in his opposition to judges becoming involved in political debates off the bench. He told his lawyerly audience in the aftermath of the Berger affair that '[a] judge has no freedom of speech to address political issues which have nothing to do with his judicial duties'."[39]

Not everyone was as cautious as Laskin. John Sopinka, another justice of the Supreme Court of Canada, later asked, "Must a judge be a monk?" He asserted, "No longer can we expect the public to respect

decisions from a process that is shrouded in mystery and made by people who have withdrawn from society."[40]

Attorney General Ian Scott: A Restrictive View

Rosalie Abella is an example of a Provincial Court judge who had a strong voice in public policy issues in the 1970s and 80s. She took time off from sitting in court to conduct a study on access to legal services by persons with disabilities , to lead a ground breaking Royal Commission on equality in employment, and to chair the Ontario Labour Relations Board. Chief Judge Ted Andrews supported her in all of these activities.[41]

When Ian Scott became Ontario's Attorney General in 1985, he took a restrictive view of the roles judges could assume. He told Clare Lewis that he could not remain a Provincial Court judge while serving as Police Complaints Commissioner and he took the same position regarding Judge Rosalie Abella and the Ontario Labour Relations Board. Abella chose to stay with the Board even though losing her judge's pension despite 12 years on the bench.[42]

Ontario Court of Justice: 1990 and Onwards

Serving on Commissions, Task Forces and Committees

As the calibre of appointments was heightened and the credibility of the Court improved, provincial judges began to receive government appointments to sit on commissions of inquiry and task forces. In 1989, the Ontario government appointed Judge Clare Lewis to serve as chair of the Race Relations and Policing Task Force. A few years later, with permission from Chief Justice Linden, Justice David Cole was freed from full-time judging in order to co-chair a commission on systemic racism in the criminal justice system. Since then, several other judges from the Ontario Court of Justice have been appointed to chair inquiries into important public policy issues.

Reports by Provincial Judges

Leading Commissions & Task Forces

Clare Lewis, Co-Chair, Race Relations and Policing Task Force, 1989
David Cole, Co-Chair, Commission on Systemic Racism in Ontario's Criminal Justice, System, 1995
Sidney Linden, Commissioner, Ipperwash Inquiry, 2007
Norman Glaude, Commissioner, Cornwall Public Inquiry, 2009
Paul Bélanger, Commissioner, Elliot Lake Inquiry, 2014

Although recognized as a suitable role, even here the appointment of sitting judges has not been free of discussion and debate. The Canadian Judicial Council "Protocol on the Appointment of Judges to Commissions of Inquiry" concluded while valuable, such appointments also present risk.

> Public inquiries chaired by judges play a very valuable role in Canada. They do, however, present risks to the judiciary. The objective of these guidelines is to ensure that the judiciary can continue to serve the public interest in this important way when asked to do so, while at the same time maintaining public respect and confidence for the judicial office and the independence of the judiciary.

Case Study: Justice Lesley Baldwin

A Judicial Council matter involving Justice Lesley Baldwin illustrates the challenge for a judge who takes on an important social and justice policy issue outside the courtroom.

In autumn 1998, at the request of the Attorney General, Baldwin began a leave of absence to chair the Joint Committee on Domestic Violence. The Committee's mandate was to provide advice on implementing recommendations from an inquest held to examine recent and notorious domestic murders. Baldwin possessed extensive expertise in this area stemming from her work prior to being appointed to the Ontario Court (Provincial Division) in May 1997.

"Chief Judge Linden advised me to be careful not to become involved in political activism but supported me in taking on this role. Throughout my term on the Committee, including when the Committee report was released, I made the decision not to be available to the media."[43]

After submitting the Committee's final report in August 1999, Baldwin returned to the Ontario Court of Justice to sit as a full-time judge. Almost a year later, following a spate of fatalities arising from domestic

Justice Lesley Baldwin preparing for the public inquiry. (Photo: Randy Quan via Getty Images)

violence incidents, members of the Committee became concerned about the delay in adopting recommendations they felt might have prevented those deaths. Baldwin agreed to write to the Attorney General in her capacity as the former Committee chair. In a brief letter, she noted "I… can add parenthetically that I have observed no noticeable changes in the manner in which counsel are approaching these difficult cases in the criminal courts in which I preside. "

A complaint was subsequently filed with the Ontario Judicial Council by a group of defence counsel, signed by Alan Gold, president of the Toronto-based Criminal Lawyers' Association.

The alleged misconduct was described as follows.

> Specifically, the misconduct is described by Presenting Counsel Mr. Hunt to be the continuing contact with Executive Branch over matters of government policy affecting the area of criminal justice administration beyond the time frame during which permission had been granted for Justice Baldwin to assist the Executive Branch – thereby aligning herself with initiatives or strategies that were being presented by a particular group. Such conduct raised questions with respect to her ability to remain impartial and independent on issues that might come before her.[44]

Left: Media coverage of Baldwin and her actions was generally positive. *The Standard* (St. Catharines-Niagara), Sept. 19, 2000. Top middle: *National Post*, Sept. 18, 2000. Top right: *National Post*, 2002. Bottom: *The Hamilton Spectator*, Apr. 5 and May 15, 2002.

"I was very alone dealing with this," said Baldwin. "The Chief's office took a hands-off approach because the Chief Judge chaired the Judicial Council. There was little or no support from other judges. Nothing was said by the Ontario Conference of Judges, which at that time didn't see this as part of its role. It was a very difficult time. On the other hand, the media was generally very supportive, and I received two warm letters of support from [former Supreme Court of Canada Justice] Claire L'Heureux-Dubé".[45]

After a public hearing with many media representatives present, the Judicial Council found that "the writing of the letter was more in the nature of a reaffirmation by Justice Baldwin of the views earlier expressed in the Committee's report." The Council concluded that there had been no misconduct, dismissed the complaint, and recommended that Baldwin be compensated for her legal costs. The decision was delivered 19 months after the complaint had been submitted.

> "I look back on the work of the Committee with pride. The discussion my case generated gave the issue more profile and probably helped in ensuring our proposals for implementation of the inquest recommendations were acted on. So I now see the benefits of what I did, even though it was a very painful time. As well, the Ontario Conference of Judges now has a media committee and is developing a protocol on when and how it should speak out on behalf of judges dealing with situations like the one I faced."
>
> Lesley Baldwin[46]

Judicial Conduct and Ethics

Judicial misconduct is something that can result in a judge or justice of the peace being sanctioned or, in the most serious cases, removed from the bench. The *Courts of Justice Act* provides a mechanism for investigating complaints into judicial conduct. However it does not define the term "judicial misconduct."

Judicial ethics is the application of values associated with the judicial role to behaviour within and beyond the realm of the courtroom. In some cases, what was once seen as a question of ethics (e.g., sexist behaviour) can later be viewed as misconduct.

Since 1997, three key documents have been produced to provide guidance on ethical issues.

Principles of Judicial Office for Judges

The principles are intended to assist judges in addressing ethical and professional dilemmas. They address the role of the judge in the courtroom, with the Court, and in the community. They were

created under the leadership of Chief Judge Linden[47] in consultation with the judges' associations and adopted by the Ontario Judicial Council in 1997.

Ethical Principles for Judges

In 1998, the Canadian Judicial Council (which investigates complaints of alleged misconduct involving federally appointed judges) published *Ethical Principles for Judges* to provide guidance on how comportment by judges in and out of the courtroom should reflect such fundamental principles as judicial independence, integrity, impartiality and equality. The Ontario Judicial Council approved and adopted the principles in 2005 upon the recommendation of the Ontario Conference of Judges and the Chief Justice's Executive Committee. As such, they form part of the ethical standards for judges of the Ontario Court of Justice.

Principles of Judicial Office for Justices of the Peace

The principles are identical to those for the judges, except for the substitution of the term "justice of the peace" for "judge." This approach respects and recognizes the important role of justices of the peace as judicial officers. The principles were approved by the Justices of the Peace Review Council in 2007.[48]

PRINCIPLES OF JUDICIAL OFFICE

Published by the Chief Justice of the Ontario Court of Justice

3. The Justice of the Peace in the Community

3.1 Justices of the peace should maintain their personal conduct at a level which will ensure the public's trust and confidence.

3.2 Justices of the peace must avoid any conflict of interest, or the appearance of any conflict of interest, in the performance of their judicial duties.

Commentaries:

Justices of the peace must not participate in any partisan political activity.

Justices of the peace must not contribute financially to any political party.

3.3 Justices of the peace must not abuse the power of their judicial office or use it inappropriately.

3.4 Justices of the peace are encouraged to be involved in community activities provided such involvement is not incompatible with their judicial office.

Commentaries:

Justices of the peace should not lend the prestige of their office to fund-raising activities.

With the benefit of the three sets of principles, education programs for judges and justices of the peace of the Ontario Court of Justice have been expanded to focus on judicial conduct and ethics and how these concepts are evolving. Education for newly appointed judges and justices of the peace, for

example, assist them in the important skills of recognizing ethical dilemmas, thinking through the issues they raise, and identifying possible responses.

The question of what judicial officers may do or say in the community continues to be the subject of debate and discussion. Guidance and education are, however, now available to assist in preventing problems and addressing those that may arise.

New Approaches in a New Millennium

In recent years provincial judges have forged new pathways to engage with their communities and to have a voice in justice reform outside the courtroom. The debate continues with regard to when such activity raises judicial independence concerns or compromises judicial ethics.

Problem-solving Courts

When Family Court judges of the Provincial Court were actively developing community resources in the 1970s and 1980s, the Criminal and Youth Court judges were engaging with the community but in different ways, for example through the introduction of community service orders and other alternatives to incarceration. Beginning in the late 1990s, criminal judges found a new avenue for community engagement through the development of "problem-solving courts in some locations."[49]

Problem-solving courts focus on issues such as drug offences, mental health, domestic violence, and Aboriginal persons in conflict with the law. The first two problem-solving courts in Canada – a mental health court and a drug-treatment court – opened in Toronto in 1998.

In developing and designing a problem-solving court, judges build close connections with treatment organizations and community leaders who are an essential part of the process.

Justice Judith Beaman was involved in the development of two drug treatment courts in Kingston and Ottawa. She observed that "[t]he work that judges have to do to get funding, secure government approval, and build a partnership with the appropriate treatment professionals is similar to what Family Court judges had to do in the '70s."[50]

This is an example of where the sense of what is permissible in terms of interaction with the community has moved in both directions across the spectrum of choices – broadening and narrowing at different points in time.

> The problem-solving courts resulted from the pioneering work of certain individuals. Without Justice Paul Bentley and Justice Ted Ormston, there would be no drug treatment or mental health courts. These judges are recognized internationally for their work and they have addressed courts around the world to speak of their experience. Similarly, the first Aboriginal "Gladue" court in Canada (and for a long time the only such court) was a direct result of the work of Justice Pat Shepherd, Justice Brent Knazan and Justice Rebecca Shamai.
>
> Former Associate Chief Justice Peter Griffiths

Judges Taking on Related Roles

Judges of the Ontario Court of Justice continue to serve on government-appointed commissions, committees and task forces. Some have begun to take on other roles that might not have met Ian Scott's restrictive view in the 1980s about what was acceptable, but later came to be seen as compatible with the judicial function. The following serve as just a few examples of initiatives taken in recent years.

Justices Schneider and Ormston – Tribunal Chairs

Justice Richard Schneider, appointed to the Ontario Court of Justice in 2000, also serves as Chair of the Ontario Review Board. This is an independent tribunal that oversees individuals found to be unfit to stand trial or not criminally responsible on account of mental disorder.

From 2014 to 2015, he also served as Acting Chair of Ontario's Consent and Capacity Board. Most applications to this board involve a review of a person's involuntary status in a psychiatric facility or a review of a finding about an individual's incapacity to consent to or refuse treatment. In this role, Schneider succeeded Justice Ted Ormston.

Like Ormston, Schneider sat as a judge in the Mental Health Court in Toronto's Old City Hall prior to these board appointments. "I was told by Chief Justice Bonkaloto think of it as a secondment – my judicial assignment was to serve as chair of these two boards. The work of the boards – both involving mental health issues – was a natural segue from my work as a judge."[51]

Chief Justices Linden and Lennox – Commissioner and Educator

Two former Chief Justices of the Ontario Court of Justice – Sidney Linden and Brian Lennox – took on full-time positions outside the Court. Linden was appointed by the Ontario government to become Ontario's Conflict of Interest Commissioner; Lennox took a position as Executive Director of the National Judicial Institute. Although no longer sitting as judges after moving to these positions, both retained their judicial status.

Justice Wake – Tribunal Vice-Chair

Justice David Wake had served as Associate Chief Justice and as the Local Administrative Judge in Ottawa. In 2013, he received a federal government appointment to serve as Vice-Chair in the Appeal Division of the new Social Security Tribunal. Concurrently, he continues to serve as a judge on a non-presiding per diem basis.

Justice Ebbs – Chair, Shaken Baby Death Review

Public confidence was rocked by the findings of the Goudge Inquiry into Pediatric Forensic Pathology.[52] It was clear that wrongful convictions had occurred due to a reliance on now questionable medical opinions about "shaken baby syndrome" and related issues. In December 2008, following the release of the Inquiry report, Attorney General Chris Bentley announced the formation of a committee of legal and medical experts to review cases in which criminal convictions had resulted from determinations of pediatric head injury.

The Committee was chaired by Justice Donald Ebbs of the Ontario Court of Justice[53]. Justice Ebbs is a former Associate Chief Justice who had also served as Regional Senior Justice of the West Region. At the time of his selection for the Committee, he was a *per diem* judge, sitting on a part-time basis.

The review was designed "to identify cases where the pathology evidence relied on at trial would be considered questionable in light of current scientific knowledge" and to "advise the Attorney General of concerns relating to the soundness of criminal convictions… in light of today's understanding of the evolving science."[54]

> The composition of the Committee, with its members drawn from both disciplines [legal and medical], represented an example of a criminal justice system willing to examine itself in order to take action against potential wrongful convictions.[55]
>
> The Committee reviewed and analysed selected cases, including many where medical evidence about had trauma "had been fundamental to the conviction." Selected cases were subject to additional medical evaluation by a group of international experts. In its report of March 4, 2011, the Committee advised the Attorney General of concerns in four cases.

Policy Reform

For many years, bench and bar committees have brought the judiciary, the bar and other justice personnel together to discuss and resolve problems within a local court.

Recent experience in Ontario with the "Justice on Target" initiative to address criminal court delay has demonstrated that judicial leadership at the central and local levels is an essential component of the reform effort. Although it is always the government's prerogative to change legislation, there is a growing recognition that effective justice reform requires the involvement of all the players in the system, including the judiciary. The question arises, nevertheless: how to include the judicial voice without compromising judicial independence and impartiality.

Justice on Target

Reflections by Justice Peter Griffiths of the Ontario Court of Justice

"Justice on Target" was a provincial government initiative to reduce the time to trial and the number of court appearances in criminal cases. Our Court was not consulted by the Ministry of the Attorney General about its creation or structure. A Crown Attorney and a Superior Court judge were selected as co-leaders. I was asked by Chief Justice Bonkalo and the Minister to be the lead participant from our Court.

There was widespread concern among the judges about our involvement and our lack of a leadership role. I was not concerned. I saw this as an opportunity to work with others in the justice sector to make the courts more efficient.

As long as the cornerstones of judicial independence were respected, I felt there was nothing to lose and much to gain in working with others to improve the system. The bottom line for me was that we

cannot direct judges in the management of individual cases and we cannot compromise our independent role in the scheduling of cases.

I found Justice on Target to be an exciting endeavour that represented several firsts in justice sector collaboration:

- Defence counsel, court administrators, the judiciary, Crowns, police, corrections, and outside experts were all engaged in the process.
- All regions and offices were involved, recognizing that effective solutions must take into account the local context.
- The model for collaboration was designed to be permanent, which helped to build and sustain a commitment to continuous improvement at all levels.

We should not measure the success of Justice on Target solely by how well it met arbitrary numerical targets. The real success was the willingness of all parties to come together to work on solutions. It was important for our judges to be at the table, not as "partners" surrendering judicial independence to the government, but as "good stewards" of a system that operates for the benefit of the people of Ontario.[56]

Judges of the Ontario Court of Justice have also sought other means to inform public policy issues while maintaining the independence of the judicial role. As one of many examples, Justice Rick Libman prepared a research paper in 2010 for the Law Commission of Ontario on "Sentencing Purposes and Principles for Provincial Offences."[57]

Building Public Understanding

Historically, numerous provincial judges have authored books and articles addressing various legal topics, often aimed at professional and academic audiences.

More recently, there have been attempts to reach out to wider audiences. A notable example is Justice Harvey Brownstone, author of a best-selling book for the general public: *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court*. Brownstone is also the first judge of the Ontario Court of Justice to host a television show. Its purpose is to educate the public on family law matters. Such public engagement has been lauded by some and criticized by others – indicative that the debate about what a judge may do and say outside the courtroom is far from over.

A more broad-based technique to help foster public knowledge about the law and legal process has been pioneered by the Ontario Judicial Education Network. "OJEN" was founded by Ontario's three chief justices, including Brian Lennox of the Ontario Court of Justice. Judge Ted Ormston was very involved in the early days of OJEN.

> I would be right up there with the people they classify as an activist judge. I mean, I speak out on many occasions, I think judges should. I was delighted to be asked by Roy McMurtry to be our Court's representative on OJEN, the Ontario Justice Education Network.[58]

Many justices of the peace and judges directly engage with students and others through OJEN's educational programs and dialogues.

> It's been very rewarding to assist young people experiencing financial hardship and who want to have a career in the law. In the bursary program, they come to Old City Hall and meet with justices of the peace and sit in court. They get a unique look at the workings of the justice system. We keep in touch and I have been a mentor to many….To be honest, the most valuable part of the schools

> program is the tour of the cells at Old City Hall – the students are pretty shocked by the conditions. One young man told me, "If I'm in a bad situation where I have to make a choice, there is no doubt which way I'm going -- I do not want to end up in those cells."
>
> Justice of the Peace Lynette Stethem[59]

Judges and justices of the peace also teach at universities and community colleges, speak at conferences, and help to educate the media on justice issues.

In 2001, Chief Justice Lennox actively encouraged judges and justices of the peace to get out and speak to members of the public. To support this judicial role, the following structures and guides were created:

- the Chief Justice's Advisory Committee on Communications,
- a template to assist judges and justices of the peace in the development of public remarks,
- a speakers program to connect judges and justices of the peace to multicultural organizations, the media, and media students,
- a media guide for the Court, and
- a press officer in the Office of the Chief Justice to provide support and guidance when speaking in public.

The combined effect of these initiatives was to send the clear signal that judicial officers had an approved and supported role to speak to the public about judicial roles and functions.[60]

Conclusion

From the early days of the Provincial Court to the modern era of the Ontario Court of Justice, a common goal has been to find the right balance between helping to make the court system effective, while

maintaining the unique, independent role of the judiciary. The discussion has become more nuanced over time and increased support has become available for judges and justices of the peace as they strive to achieve that balance.

While a consensus about the possibilities and limits of judicial activities outside the courtroom can be elusive, there is agreement on the importance of the issue and the need for each judge and justice of the peace to address its implications for his or her role on the Ontario Court of Justice.

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[1] *Re Hastings Investigation, Report of the Commissioner Mr. John A. Paterson, K.C.*, April 29, 1921. Note: There was a period of time in the 1980s during which the Provincial Court had a Civil Division to adjudicate small claims. This represented a move toward having full-time judges preside in small claims court cases – although these continued to be frequently heard by part-time "deputy judges", many of whom were also involved in the private practice of law or other occupations. In 1990 the small claims function was transferred to the Superior Court where virtually all such cases are heard by deputy judges. Similarly, many administrative tribunals use part-time adjudicators to preside over hearings and make decisions.

[2]Gregory, W. D. *et al.*, *Interim Report Respecting Police Magistrates of the Commission to Inquire Into, Consider and Report upon the Best Mode of Selecting, Appointing and Remunerating Sheriffs, etc., etc.,* Printed by order of the Legislative Assembly of Ontario. Toronto: Clarkson W. James, printer to the King's Most Excellent Majesty, 1921, (*1921 Magistrates Report*), p. 5.

[3]*1921 Magistrates Report*, p. 8.

[4]*1921 Magistrates Report*, pp. 16-21.

[5]*1921 Magistrates Report*, p. 13.

[6] 1921 *Magistrates* Report, p.14.

[7] 1921 *Magistrates* Report, p.8.

[8] 1921 *Magistrates* Report, p.5.

[9] 1921 *Magistrates* Report, p.7.

[10]James McRuer, Royal Commission Inquiry into Civil Rights in Ontario, 1968, Vol. 2, p. 529-530.

[11]McRuer, Royal Commission Inquiry into Civil Rights in Ontario, 1968, Vol. 2, p. 542

[12]Mewett, Alan W. *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario*, 1981, pp. 17-18.

[13]Shetreet, Shimon *Judges on Trial* (1976), at pp. 17-78, quoted with approval in *R. v. Valente [198]5 2 SCR 673,* p. 686.

[14]See *Courts of Justice Act*, 1984, s. 53.

[15]Interview of J. Felstiner for OCJ History Project, 2014.

[16]Diversion programs were aimed at diverting certain cases out of the courts to help children accused of minor transgressions avoid the stigma of being labelled as juvenile delinquents.

[17]Transcript of T. Andrews' oral history interview, Osgoode Society, 1995 (used with permission).

[18]Leverette, John S. "Enhancing the learning curve in child an adolescent forensic psychiatry: inter-professional relationships, resource and policy development." *Current Opinion in Psychiatry*, 2004. Baltimore: Lippincott Williams &Wilkins.)

[19]Interviews of J. Karswick for OCJ History Project, 2012 and 2014.

[20]*Centre for Children and Families in the Justice System, Year in Review – Tricennial Edition 1974 – 2004*, at p. 4.

[21]Molly Knowles, a long-term social worker from a local psychiatric hospital, gave up her job and then, over the next 20 years, led one of the first and best conciliation services for families with support, custody and access disputes before the court.
[22]Child psychiatrists Bob Riggs and John Leverette worked with the Family Court and children's mental health services to create a Family Court Clinic.
[23]A community college teacher – Mike Ozerkevich– set up an open facility for difficult youth, staffed almost totally by his child care students. Dorothy Neuchterlein, the wife of a visiting professor, established a volunteer probation program.
[24]Two law students – Dick and Sherrie Barnhorst – postponed their legal careers to spend a year establishing a diversion program that remains a vital community resource almost 40 years later. Another law student – Anne Hewitt – left her law course and opened a shelter for abused women. Law students also did research work to promote innovative services for youth. One of them was Donna Hackett who later became a provincial court judge.
[25]In an article by Ian Hamilton in the *Kingston Whig-Standard*, 1976, Chief Judge Andrews is quoted: "From programs developed here (Kingston) will come the impetus to develop similar programs in other parts of the province of Ontario."
[26]The Canadian Judicial Council has authority over the work of federally appointed judges by setting policies and investigating complaints. However, its policies are often instructive to provincially appointed judges and in some cases have been formally adopted by the Ontario Judicial Council and the Ontario Court of Justice.
[27] Chief Justice Bora Laskin, "Some Observations on Judicial Independence," Provincial Judge Journal, Volume 4, No. 4, December, 1980, at p.20; Interview of G. Thomson for OCJ History Project, 2014.
[28] Chief Justice Bora Laskin, Convocation Address to Lakehead University, May 28, 1983, pp.1-3.
[29] Letter from Chief Judge H.T.G. Andrews to Judge G.R. Kunnas, Provincial Court (Family Division), June 8, 1983.
[30]Interview of H. Katarynych for OCJ History Project, 2015.
[31] Interview of G. Thomson for OCJ History Project, 2015.
[32]CP article, "Use of lawyers bad for young offenders: judge," *Ottawa Citizen*, Nov. 5, 1985.
[33]"Judges' stand", letter from Provincial Judges J.D. Karswick, J.B. Allen, and R.E. Stauth. *The Globe and Mail*, November 14, 1985.
[34]Interview of J. Karswick for OCJ History Project, 2014.
[35]See for example: Makin, Kirk "Judge draws ire for criticizing lawyers", *The Globe and Mail* Nov. 15, 1985.
[36]"Judge receives 'slap on wrist' for comments" *The Globe and Mail*, Feb. 15, 1986.
[37]The two articles are reprinted as appendices to the Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council, 1983. Appendix C: Hill, Bert "Berger blasts 'mean-spirited' ministers" *Ottawa Citizen*, Nov 10, 1981. Appendix E: Berger, Thomas "Steps that'll give Canada a fairer form of constitution" *The Globe and Mail*, Nov. 18, 1981.
[38]Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council, 1983.
[39] Jacob S. Ziegel, "Judicial Free Speech and Judicial Accountability: Striking the Right Balance", 45 U.N.B.L.J., 175, 1996, at p.177.
[40]Sopinka, John "Must a Judge be a Monk – Revisited"(1996) *U.N.B.L.J.* 167, at p. 169.
[41] Interview of R. Abella for OCJ History Project, 2015; Biography of R. Abella on Supreme Court of Canada website.
[42]Interview of R. Abella for OCJ History Project, 2015.
[43]Interview of L. Baldwin for OCJ History Project, 2015
[44]Ontario Judicial Council report, In the matter of a complaint respecting the Honourable Madam Justice Lesley M. Baldwin, 2002 ("Baldwin report").
[45]Interview of L. Baldwin for OCJ History Project, 2015. Letters dated Sept. 17, 2001 and July 5, 2002 to L. Baldwin from C. L'Heureux-Dubé.
[46]Interview of L. Baldwin for OCJ History Project, 2015.
[47]The *Courts of Justice Act 1994* authorized the Chief Judge to establish "standards of conduct for provincial judges."

[48]Under section 13 of the *Justices of the Peace Act*, the Associate Chief Justice-Coordinator of Justices of the Peace obtained jurisdiction to establish standards of conduct for all justices of the peace in Ontario. This includes the authority to create a plan for bringing those standards into effect once they have been reviewed and approved by the Justices of the Peace Review Council.
[49]In 1998, the first two "problem-solving" courts in Canada opened in Toronto: a mental health court, established in May of that year, and a drug treatment court, established in December. These courts represented a departure in the handling of criminal charges for certain segments of the population.
[50] Interview of J. Beaman for OCJ History Project, 2015.
[51]Interview of R. Schneider for OCJ History Project, 2015.
[52]The Honourable Stephen T. Goudge, *Report on The Inquiry Into Pediatric Forensic Pathology in Ontario*, 2008.
[53]The other members of the committee were: Dr. Michael Pollanen, Chief Forensic Pathologist for the Province of Ontario; Dr. Dirk Huyer, Regional Supervising Coroner for the Regions of Peel, Halton and Counties of Simcoe and Wellington; Marie Henein, Senior Criminal Defence Counsel and President of the Advocates' Society; and Mary Nethery, Director of Justice Excellence and Senior Crown Attorney.
[54]Ebbs, D. *et al. Committee Report to the Attorney General: Shaken Baby Death Review*, March 4, 2011 (Ebbs Committee)
[55]*Ebbs Committee*, p. 2.
[56] Submitted by P. Griffiths to the OCJ History project, 2015.
[57]Libman, Rick "Sentencing Purposes and Principles for Provincial Offences" (research paper prepared for the Law Commission of Ontario, Summer 2010).
[58] Transcript of T. Ormston's oral history interview, Osgoode Society, 1995 (used with permission).
[59] Interview of L. Stethem for OCJ History Project, 2015.
[60]Interview of P. Griffiths for OCJ History Project, 2015.

Adapting to Change: Juvenile Justice

Introduction

The Police Magistrates' Court in Toronto had the distinction, in 1894, of establishing the first known "Children's Court" in North America.

> [It] was not really a separate court, but we set apart a small room in the lower part of the City Hall, with a table and a few chairs, and I was accustomed to go down to that room to try all charges against children, in order to keep them out of the public court.
>
> … If I felt that punishment was necessary, I would send the child to the Children's Aid Society, or the Roman Catholic School for Children, for a few days, and give the culprits a scolding, and warn them to behave themselves in the future.
>
> Police Magistrate Col. G.T. Denison[1]

It has been more than 120 years since this early attempt to treat young people accused of breaking the law differently than adult offenders. During this time, the Court's approach to juvenile justice changed significantly. This was due, in large part, to three successive federal statutes, each premised on different values and objectives.

- The *Juvenile Delinquents Act*, enacted in 1908, gave judges broad discretion in imposing dispositions to "cure" children and youth of delinquency.

- The *Young Offenders Act* came into force in 1984. It shifted the focus from promoting young people's welfare to protecting their rights, and from "curing" their condition to responding to their offending behaviour, while continuing to recognize their special needs.

- The *Youth Criminal Justice Act* – in force since 2003 – focuses on holding young offenders accountable by measures proportionate to their conduct. It reserves the most serious responses for the most egregious offences. For less serious matters, alternatives to courts and custody are the norm.

Juvenile justice was not the only area where major changes in the law have occurred, but it serves as an illuminating case study of how the Ontario Court of Justice and its predecessors chose to adapt to and participate in the development of changes.

Tony Doob, a professor of criminology and an expert in juvenile justice has described the changes as profound.

> The story of how our laws dealing with the criminal behaviour of young persons have evolved over the past century is a fascinating one. The powers and responsibilities of judges changed dramatically: from being asked to find the solution a "good parent" would adopt to choosing a sentence that matched the seriousness of the offence and the degree of responsibility of the young person, while also being most likely to rehabilitate the young person.
>
> This was a huge change that was brought about as a result of input from many groups, including judges. Judges made an important contribution through their decisions, their involvement in proposals for reform, and in their work with others to develop the programs and services they needed to do what the changing laws asked of them.[2]

The "Child-Saving" Approach

> [A]s far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.
>
> Section 38, Juvenile Delinquents Act, 1929.

For most of the 19th century, Ontario's police magistrates did not need to follow any special procedures when hearing cases of children accused of breaking the law. Children as young as age seven could be charged with criminal offences. They were tried in the same courts as adult offenders and subject to the same penalties.

Reformers who were part of what became known as the "child-saving" movement advocated a completely new approach, one that would treat young offenders not as criminals but as wayward children in need of care.

Two men led the crusade. J.J. Kelso was a newspaper reporter and Ontario's first

The First Children's Court in North America

J.J. Kelso had lobbied for a Children's Court that would be "an educational rather than a police tribunal." Toronto's solution of hearing children's cases in the basement of the Old City Hall courthouse was far from meeting that vision.

It was, however, unlikely that any court could live up to Kelso's ideals. In 1908, he wrote that the concept of a Children's Court "stands for a loving, sympathetic and patient effort to win the child over to a recognition of the virtue of being good for its own sake, to awaken ambition, to inspire with high ideals, to stimulate growth in all that makes for manliness and good citizenship."

(Source: J. Kelso, "Children's Courts" (1908), 28 Can. L. Times and Rev. p. 163.)

Superintendent of Neglected and Dependent Children. W.L. Scott was a lawyer and president of the Ottawa Children's Aid Society. Under their leadership, the child-saving movement mounted an intensive lobbying and public relations campaign aimed at persuading parliament to enact comprehensive reforms.[3]

By the late 1800s, these efforts helped to create a broad consensus in Canada that children and youth in conflict with the law should: be tried in specialized courts; be incarcerated only as a last resort, and; if incarcerated, serve their sentences separately from adult offenders. The federal Parliament responded with the *Act Respecting Arrest Trial and Imprisonment of Youthful Offenders* in 1894[4] and the *Juvenile Delinquents Act* in 1908.[5]

A Separate Law for Kids: *Juvenile Delinquents Act*

The *Juvenile Delinquents Act* transformed the law for youthful offenders and the role of the courts hearing their cases. Unlike the *Criminal Code*, which specifies hundreds of distinct adult offences, the "JDA" created only one possible youth offence: delinquency.

In practice, a finding of delinquency was more akin to a diagnosis than being charged with an offence. This was made especially clear in a 1929 amendment which directed that a juvenile delinquent "shall be dealt with not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision."[6]

So broad was the definition of delinquency that courts could find a child to be a juvenile delinquent for virtually any bad behaviour.[7] In 1908, "juvenile delinquent" was defined as a child who violated any provision of the *Criminal Code*, or any federal or provincial statue or any municipal by-law for which a fine or imprisonment could be imposed, or who was "liable by reason of any other Act to be committed

to an industrial school or juvenile reformatory." In 1929, this was amended to include a child who was "guilty of sexual immorality or any similar form of vice."[8]

The very broad definition of delinquency meant young people could be charged with offences that did not apply to adults. These so-called "status offences" included truancy (not attending school), incorrigibility (habitual disobedience), drug use, and sexual activity (even if entirely consensual).

Rather than pass sentence on a young person found to be delinquent, the judge would impose a "disposition." Non-custodial dispositions ranged from a fine of up to $10 (increased to $25 in 1929), a suspended sentence, or placement in a foster home. Alternatively, the judge could commit the child to the care and custody of a probation officer, a children's aid society, an industrial school, or a juvenile reformatory. All of these dispositions were available to the judge, no matter what behaviour led to the child being found to be delinquent.

Once found to be delinquent, children could be summoned back to the Court until they turned 21. On these return visits, the judge could again consider any of the dispositions in the *Juvenile Delinquents Act*. In theory, this power ended when children were "cured" of delinquency. In practice, juvenile offenders were often kept under the jurisdiction of the Court – and in many cases kept in custody – for longer periods that would have been imposed on adults sentenced for the same conduct under the *Criminal Code*.

The Creation of Juvenile Courts in Ontario

Juvenile Court proceedings were meant to be different from those in adult criminal courts. The *Juvenile Delinquents Act* stressed the need to separate children and youth from adults in pre-trial detention, at trial, and in post-trial incarceration. It also emphasized the need to preserve their privacy and avoid exposing them to stigma and public censure. Unlike adult criminal courts, juvenile proceedings could be

held “in the private office of the judge or in some other private room in the courthouse or municipal building” from which the public could be excluded.[9]

The Court also had to ensure that the identity of the young person was kept confidential; the publication of any identifying characteristics was prohibited.[10] Proceedings were to be “as informal as the circumstances permit” and consistent with due regard for the proper administration of justice.[11]Juvenile accused did not have a guaranteed right to counsel, and lawyers rarely participated in the proceedings.[12]

After the *JDA* came into effect, a practical question for each province was where juvenile cases should be heard. In Ontario, *An Act respecting Juvenile Courts* was adopted in 1910.[13] It simply provided that every County or District Court Judge’s Criminal Court and every Police Magistrates’ Court would constitute a Juvenile Court.

Through the efforts of reformers Kelso and Scott, the *Act respecting Juvenile Courts* was passed in 1916 requiring that a Juvenile Court be created in every city, town and county in which the *Juvenile Delinquents Act* had been or would be proclaimed.[14] Judges appointed under the *Act* could, in turn, appoint probation officers to perform duties assigned by the judges; each had the powers of a police officer and a truant officer. The Act also provided for the establishment of Juvenile Court committees, consisting of probation officers and community volunteers, to assist judges in crafting dispositions.

Under the *JDA*, juveniles could be transferred to adult court if the offence charged was an indictable (that is, more serious) offence under the *Criminal Code*, and if the youth was actually or apparently at least 14 years old. The decision to transfer a youth to adult court was made by the presiding judge.[15]

There was initially no provision for an appeal from any decision of a Juvenile Court judge, whether that decision was to transfer an accused to adult court, find him or her to be delinquent, or to impose a particular disposition. That changed in 1929 when amendments allowed a provincial Superior Court judge to grant special leave to appeal any decision of the Juvenile Court on “special grounds.” A Juvenile

Court decision could not, however, be set aside because of an informality or irregularity, as long as the decision appeared to be in the best interests of the child.[16]

In 1934, Ontario passed the *Juvenile and Family Courts Act*, adding family matters – such as child neglect and domestic relations – to the work of the Juvenile Courts, which became known as Juvenile and Family Courts.[17]

Widening the Net: Provincial Statutes and Training Schools

Ontario's Juvenile Court judges had more than the federal *Juvenile Delinquents Act* to contend with. Provincial laws also came into play, often widening the net of children whose behaviour could bring them before the Court.

Offences under provincial statutes that applied only to children, such as truancy, fell within the definition of juvenile delinquency. As a result, truants and adolescents accused of other minor offences often found themselves in court as alleged juvenile delinquents. Otherwise, they could be dealt with as "children in need of protection" under the province's child welfare legislation. The route they took into the system often depended on whether the Children's Aid Society or the police were the first to become involved with them or their families.

Judges often also had to deal with a provincial statute called the *Training Schools Act*.[18] Under the *Juvenile Delinquents Act*, they could not order juvenile delinquents to be incarcerated in any place where adults could be imprisoned.[19] Judges could, however, commit the child to an "industrial school."[20] This usually meant committal to a training school regulated by the provincial corrections ministry.

Although they were "schools" with the purpose of "training," these facilities were also a form of incarceration. Upon admission, children became wards of the institution and the control of the parents

or guardians was suspended.[21] Children could be returned by force if they tried to escape and it was an offence for anyone to shelter them.

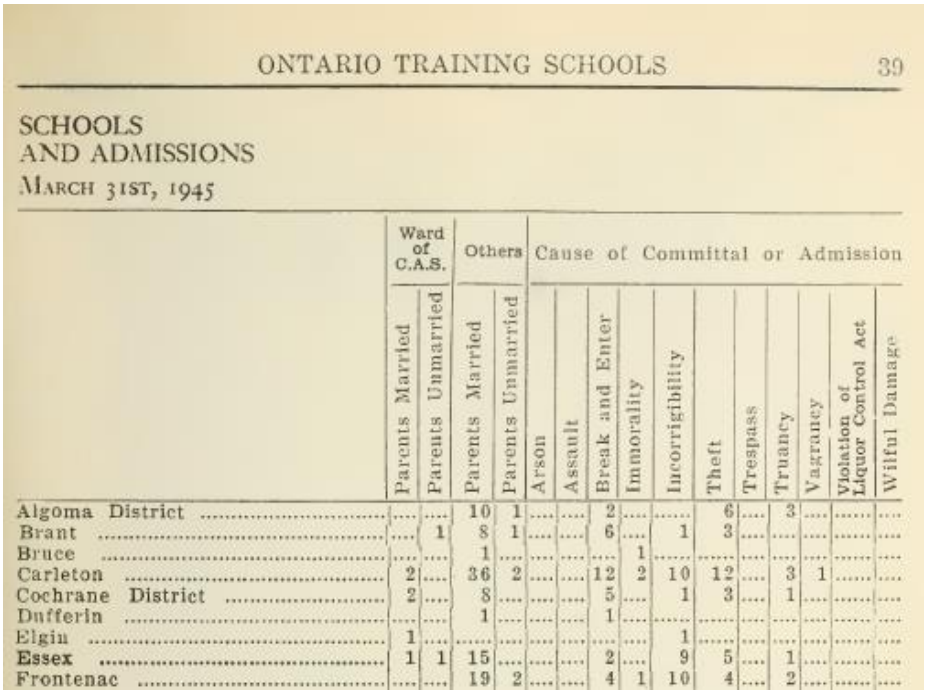
> [T]he word "prison" as defined in the Criminal Code includes an "industrial school," a term commonly taken to mean training school…. Therefore, in law, training schools have a direct penal nature…. Committal to training school results in a very real deprivation of liberty and that fact is not changed by refusing to call it punishment or because the good of the child is the objective.
>
> Karen Weiler, 1978[22]

Judges were often asked to make committal orders under section 8 or 9 of the *Training Schools Act.*

Under section 9, the judge could commit children between ages 12 and 16 years to a training school for offences punishable by imprisonment if committed by an adult. However, the judges did not have to stay within the limitations of this section. By relying instead on section 20 of the *Juvenile Delinquents Act*, they could commit children younger than 12 and for other offences.[23]

Section 8 of the *Training Schools Act* widened the net even further. Under that section, a parent or guardian could apply to the Court simply because they were "unable to control the child or to provide for his social, emotional or educational needs." Section 8 created a whole new class of status offender: the "unmanageable" child.

Children as young as seven were brought before the Court under section 8. The Ministry of Correctional Services opened a special training school – the White Oaks facility in Hagersville – to care for wards under the age of 12 years.



ONTARIO TRAINING SCHOOLS 39

SCHOOLS
AND ADMISSIONS
MARCH 31ST, 1945

	Ward of C.A.S.		Others		Cause of Committal or Admission										
	Parents Married	Parents Unmarried	Parents Married	Parents Unmarried	Arson	Assault	Break and Enter	Immorality	Incorrigibility	Theft	Trespass	Truancy	Vagrancy	Violation of Liquor Control Act	Wilful Damage
Algoma District	....	....	10	1	....	....	2	....	.....	6	....	3	....	.....	....
Brant	....	1	8	1	....	....	6	....	1	3	....	....	....	.....	....
Bruce	....	....	1	....	....	....	....	1	.....	.....	....	....	....	.....	....
Carleton	2	....	36	2	....	....	12	2	10	12	....	3	1	.....	....
Cochrane District	2	....	8	....	....	....	5	....	1	3	....	1	....	.....	....
Dufferin	....	....	1	....	....	....	1	....	.....	.....	....	....	....	.....	....
Elgin	1	....	.....	....	....	....	....	....	1	.....	....	....	....	.....	....
Essex	1	1	15	....	....	....	2	....	9	5	....	1	....	.....	....
Frontenac	....	....	19	2	....	....	4	1	10	4	....	2	....	.....	....

Children were sent to Ontario training schools for causes such as "immorality, incorrigibility, and truancy." (Source: Annual Report upon the Ontario Training Schools For The Year Ending 31st 1945, printed by order of the Legislative Assembly of Ontario, Sessional Paper No. 25, 1946.)

"I was a young law professor trying to understand how these confidential proceedings worked," George Thomson recalled. "In the late 60s, I wrote to Family Court judges across the province, asking if they could send me transcripts of cases where they had sent children to training school under section 8. I was amazed at how many I received. One judge sent me about 25 transcripts -- none was more than 4-5 pages long. All it seemed to take to send a child to training school was a brief presentation from the Children's Aid Society to the judge, indicating that a child had become unmanageable."[24]

The broad definition of delinquency and the authority to bring unmanageable children to Court meant that children's aid societies, treatment centres, and others had access to a process that could result in their wardship or guardianship role being transferred elsewhere. This became a source of frustration for

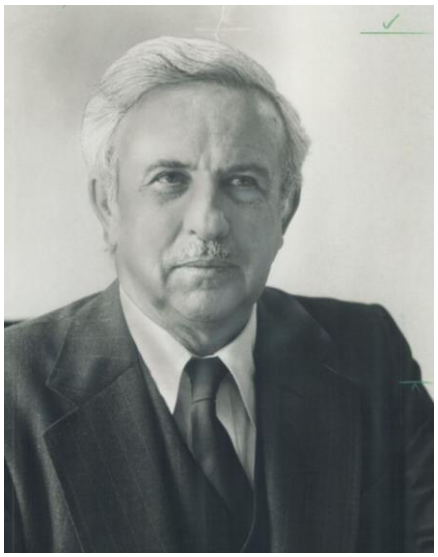
some judges who felt the court process was being used inappropriately as a "dumping ground" for hard-to-serve children, especially those from disadvantaged backgrounds, such as Aboriginal youth and adolescent girls from poor families.

Profile of a Judge from the "Child-Saving" Era: Lorne Stewart

The "child saving" philosophy of the *Juvenile Delinquents Act* had an impact on the types of individuals who were seen as best suited for appointment to the Court to deal with these cases. Often they were non-lawyers, appointed because of their expertise in emerging professions such as social work or because they had experience in working with children and youth. Senior Judge Lorne Stewart was a prime example.[25]

"How are you going to help people in need?"

Victor Lorne Stewart was born on December 13, 1909 at South Mountain in Eastern Ontario. He grew up in Qu'Apelle, Saskatchewan where his father was a farmer. "As I got older I did a lot of farming. Pitched a lot of sheaths, and milked a lot of cows." He studied both theology and psychology. The common denominator was, in his words, "How are you going to help people in need?"



Lorne Stewart, Senior Judge of the Juvenile and Family Court in Toronto. (Photo: Fred Ross/*Toronto Star* via Getty Images. June 28, 1972.)

He stayed out of school for a year and worked for the Big Brothers, "doing social work…This was in the slums of Toronto, Moss Park and so on. That was my territory. That is where I got to know what was happening to families, that is where I saw what was

happening to kids. And I followed many of those cases into court, you know, unofficially, as a friend…" He also worked as a preacher in several small churches.

From the Air Force to the Court

Stewart became interested in delinquency and questions such as, "[W]hat kind of person should be helping families with their problems? Who has the knowledge, who has prepared themselves to sit down with people, where families are falling apart, and kids are raising hell?" He became such a person when, in 1944, he was appointed Chief Probation Officer for the City of Toronto and a Deputy Judge in Family Court.

His route to the bench was somewhat unusual. He had enlisted in the Chaplaincy Corps of the Royal Canadian Air Force where he spent two years in the Commonwealth training program at Paulson, Manitoba. His commanding officer said, "'Old Judge Mott is getting older and he needs help and all hell is breaking loose in Toronto with kids. All kinds of problems are coming up that they didn't expect. And the authorities in Toronto have been after me to send Stewart back to Toronto. And he will be appointed as a Deputy Judge to work with Judge Harley S. Mott.' So that became a tough decision, the war was just about over… and Mott said, 'you have to come, we need you.' So I came."

In his role as Chief Probation Officer, Stewart "encouraged the policy of keeping cases out of Court if at all possible. Probation officers advised a lot of parents who had problems as to what to do… without going into Court. And I encouraged that."

Stewart became a full judge (no longer a deputy) in 1952, Senior Judge of the Juvenile and Family Court of Metropolitan Toronto in 1964, and Senior Judge of the Provincial Court (Family Division) of the County of York when the Provincial Courts were created in 1968.

It is notable that Stewart moved up the judicial ladder despite his lack of legal training. He believed that legal expertise was important for a judge, but not enough on its own. "…I don't think a legal degree is enough in the Family Court. I think it is important, and I don't think any person should be appointed any more as a judge unless they do have a degree in law, but I think they have to have something else as well."

Like a Father

Before Norris Weisman became a judge in 1975, he used to serve as a lawyer for Big Brothers. "I would go down to Family Court and represent families. This was before legal aid existed. Lorne Stewart, as a Family Court judge, was my hero. He would have the kids stand right smack in front of the dais and talk to them like a father. He had a touch with those kids. I modeled myself after him."

Stewart was a key driver of the development of the 311 Jarvis courthouse, in what was then a low income part of Toronto. He referred to it as "the justice house where children and families were brought to mend, strengthened by those trained in care, skilled in the ways of law and in the human arts, a court brought together by separate paths leading to a single goal, to protect and cure, police, lawyers, social workers, psychologists and doctors, working together…."

Before retiring from the Court in 1976, Stewart was a member of the "Young Persons in Conflict with the Law" committee that produced proposals for reform of the *Juvenile Delinquents Act* in 1975. Later he became a senior research associate at the Centre of Criminology. He also worked for UNICEF and was involved with the drafting of the United Nations Declaration of the Rights of the Child.

More Court or Clinic?

Judge James Felstiner was a long-time friend and one of many who regarded Stewart as a mentor. In a column that he wrote after Stewart's death, one can sense their shared dismay

about a growing emphasis on legal rights and punishment at the expense of helping kids. Here are excerpts from that column, published in 2002 in *The Globe and Mail*.

In 1957, Metro Toronto Chairman Fred Gardiner and Judge Lorne Stewart succeeded in building an innovative comprehensive Juvenile and Family Court at 311 Jarvis St. in Toronto. The plaque in the building's lobby states that the building was "…dedicated to the task of strengthening family life." Lorne was forever proud of a newspaper's description: "More clinic than court."

The court at 311 Jarvis concentrated on the needs of the children and families appearing there: probation, counselling, mediation and psychiatric services and the detention home for juveniles were all within the building. Lorne described the plan of the court this way: "The idea was to build a real team, working together, helping one another to solve problems."

But Lorne's creation was gradually eroded over the years as concern with legal rights and calls for punishment displaced the concern for what you do to help the people appearing in court….

I took my mentor back to see 311 Jarvis Street [in the late 1990s] when he was 88 years old. After seeing the children in handcuffs in court and the dirty, crowded, windowless steel cells in which the detained children are now held, tears started to come to his eyes and he asked me to take him home.

Only after his death did I discover that he had written about that day: "What did I see – handcuffs, locked doors, more court than clinic." His dream was no more.

Calls for Change

Early Concerns About Juvenile Delinquents Act

At the outset there was some opposition to the lack of due process protections in the *JDA*. When the bill was debated in the House of Commons in 1908, M.P. Edward Lancaster, an Ontario lawyer, expressed

concern about the failure to provide for the protection and defence of children by counsel, with the result that they were "entirely at the mercy of a person called a probation officer" and deprived of the "inherent right to trial by jury."[26]

When amendments were debated in 1929, Senator Wellington Willoughby, a lawyer from Saskatchewan, objected to a proposed provision – ultimately adopted – that would prevent certain decisions of a Juvenile Court from being set aside if they appeared to be in the best interests of the child. Senator Willoughby described the amendment as "most embarrassing to anybody practising law, and … hardly fair," noting that "the interest of the child … is always a controversial question, and a matter of opinion."[27]

Notwithstanding these concerns, the *Juvenile Delinquents Act* focus on the needs of the child as opposed to criminal accountability enjoyed wide support for over 40 years.

In the 1950s and 1960s, academics, judges and the media began to question a juvenile justice system that denied young persons the basic due process protections provided to adults.

Concerns included the wide discretion given to judges, the great disparity in sentencing for similar behaviour, and the open-ended, indeterminate nature of Juvenile Court dispositions. Simply put, the legislation was seen to authorize things to be done in the name of helping children that could never have be done in the name of punishing adults – an outcome argued to be at odds with the goal of ensuring that juvenile offenders were treated with leniency and compassion.

Catalysts for Change

In 1961, the federal Department of Justice established a committee to examine the juvenile justice system. In 1965, the committee released a report entitled *Juvenile Delinquency in Canada*. The report recommended more formal procedures and enhanced due process protections, including notice to the

accused of the right to retain counsel and broader rights of appeal. It also called for stricter limitations on the exercise of court powers, more standardization of services and programs, better training for judges and other court officials, and mandatory pre-sentence reports.

Around the same time, the United States Supreme Court released two landmark decisions that greatly enhanced the due process rights of juvenile offenders.

The 1966 case of *Kent v. United States* involved a young person who had been transferred to adult court without a hearing. The U.S. Supreme Court held that the young person was entitled to: a hearing; access by his lawyer to the records considered by the Juvenile Court, and; reasons for the decision sufficient to enable a meaningful appeal. In the Court's judgment, the "*parens patriae*" philosophy of viewing the state as a surrogate parent was "not an invitation to procedural arbitrariness."[28]

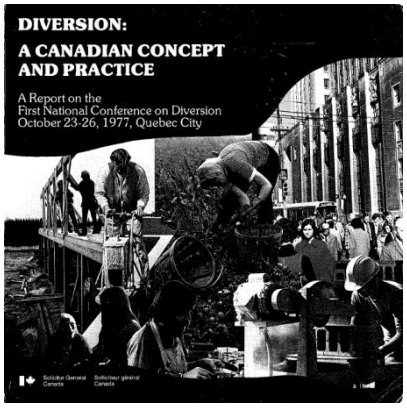
This was followed in 1967 by *In re Gault*, a case in which a 15-year-old was found to be a delinquent because he had made a lewd telephone call. He was committed to a state industrial school until he turned 21 or was "sooner discharged by due process of law." The U.S. Supreme Court held that children and their parents or guardians had the right to timely and specific notice of the proceedings. It also held that children were entitled to the same protection against self-incrimination as would be available to adults charged with a criminal offence. [29] The Court recognized that confinement to an industrial school was intended to be rehabilitative but, in reality, it was often a harsh environment.

Provincial Court Judges Add Their Voices

In 1968, Ontario's Juvenile and Family Courts were subsumed into the new Provincial Court (Family Division). Before long, many family judges joined the chorus expressing concern about the state of the juvenile justice system.[30]

In the courtroom, some judges began to question the lack of due process for children and to resist the use of the Court for minor offences. They were particularly concerned about use of the Court process to deal with difficult children who were not true offenders but rather children in need of care and treatment.

"Many family judges took strong, principled positions in support of the children who appeared before them," recalled Justice Rosalie Abella, a former Provincial Court family judge and a current member of the Supreme Court of Canada. Abella made early decisions in support of child representation and she joined other judges in taking a strong stand against the practice of bringing status offenders, such as truants, before the Provincial Court.[31]



Diversion programs began to emerge in the 1970s. The first national conference on diversion was held at Quebec City in 1977.

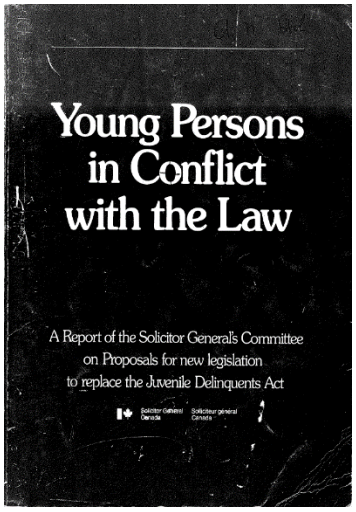
Outside the courtroom, judges in many locations worked actively to develop programs in the community to assist them in making decisions about the youth before them and to reduce the use of training schools for kids who needed treatment as opposed to punishment. During the 1970s, the first diversion programs began to emerge with support from the federal government and leadership from Provincial Court judges. These programs were designed to find more effective out-of-court solutions or less serious offenders.

Consultation to Replace the *Juvenile Delinquents Act*

The process for replacing the *Juvenile Delinquents Act* with the *Young Offenders Act* stretched across almost 20 years. It included committee reports, proposed legislation, consultations and draft bills from successive federal governments.

Media criticism of the *Juvenile Delinquents Act* added to the debate.

> The present legislation is swarming with injustice and absurdity. Children as young as seven years of age may be branded as delinquents, criminals; the law is capable of dragging children into Juvenile Court, not only for criminal behaviour, but also for what is vaguely referred to as 'delinquent behavior': school truancy, underage smoking, sexual promiscuity. The *Act* denies children the right to a fair, unprejudiced trial on the discredited assumption that this is in their best interest, and it closes all Juvenile Court proceedings to the public.[32]



In 1975 the federal government released proposals for new legislation in a report called "Young Persons in Conflict with the Law" (known informally as "Y-Pickle").

Near the end of the consultation process, Omer Archambault, a provincially appointed judge from Saskatchewan, was seconded to the federal Department of Justice to lead discussions with the judiciary. Ontario judges used this access to promote specific reforms. As an example, they successfully sought a provision requiring the judge's approval before transferring young persons from secure to open custody or releasing them on probation.

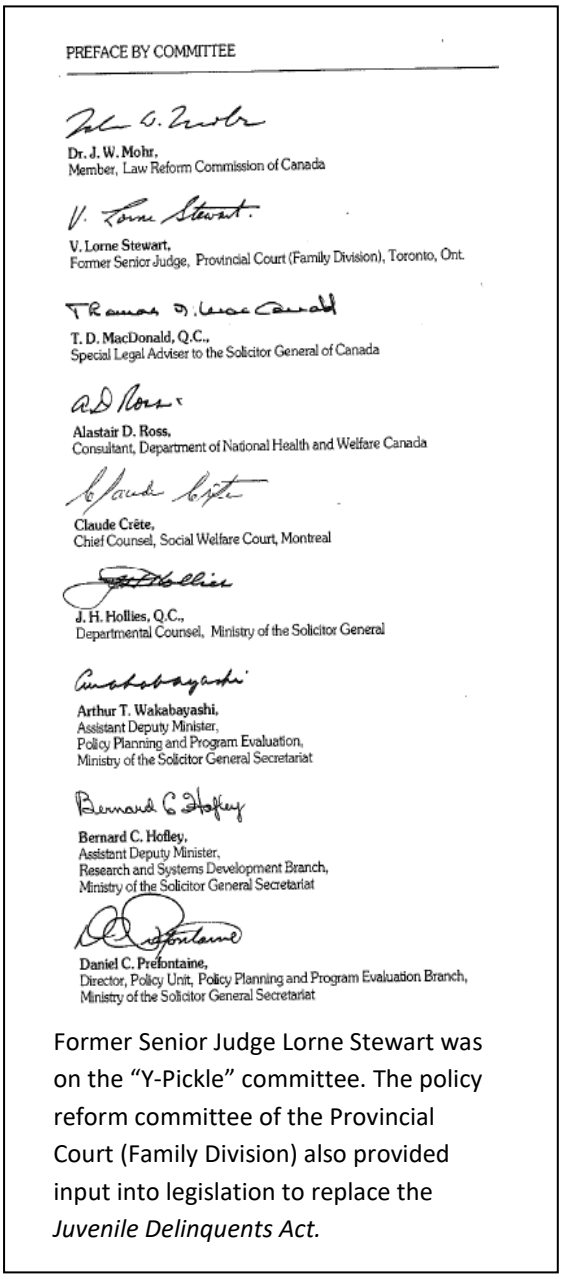
Concerns Intensify About Training Schools

In addition to the scrutiny being given to the *Juvenile Delinquents Act*, judges and others were becoming increasingly vocal about the shortcomings of the provincial *Training Schools Act*.

Karen Weiler, who later became a judge of the Ontario Court of Appeal, worked as a duty counsel in the Thunder Bay Provincial Court in the early 1970s. She became dismayed and disheartened by the number of young people being sent to training school by judges under section 8 of the *Training Schools Act*. "I felt very strongly [that children] shouldn't be going there, especially as it was so far away. I always used to argue against the applications and usually lost."[33]

With the help of two government corrections researchers who shared her concern about training schools, Weiler wrote a masters of law thesis that argued forcefully for reform. In a later article she wrote that, "the most frequent reasons cited by judges in their orders for committal were truancy, running away, and staying out late or overnight, but swearing, disobedience to parents, temper tantrums, and undesirable associations have also been given as reasons."[34]

As was the case with the *JDA*, media concerns added to the debate.



PREFACE BY COMMITTEE

Dr. J. W. Mohr,
Member, Law Reform Commission of Canada

V. Lorne Stewart,
Former Senior Judge, Provincial Court (Family Division), Toronto, Ont.

T. D. MacDonald, Q.C.,
Special Legal Adviser to the Solicitor General of Canada

Alastair D. Ross,
Consultant, Department of National Health and Welfare Canada

Claude Crête,
Chief Counsel, Social Welfare Court, Montreal

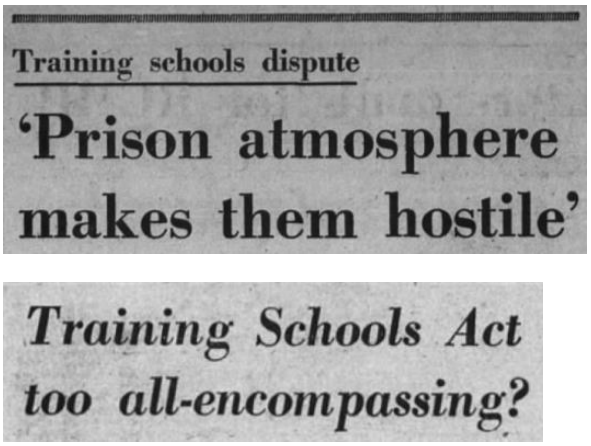
J. H. Hollies, Q.C.,
Departmental Counsel, Ministry of the Solicitor General

Arthur T. Wakabayashi,
Assistant Deputy Minister,
Policy Planning and Program Evaluation,
Ministry of the Solicitor General Secretariat

Bernard C. Hofley,
Assistant Deputy Minister,
Research and Systems Development Branch,
Ministry of the Solicitor General Secretariat

Daniel C. Préfontaine,
Director, Policy Unit, Policy Planning and Program Evaluation Branch,
Ministry of the Solicitor General Secretariat

Former Senior Judge Lorne Stewart was on the "Y-Pickle" committee. The policy reform committee of the Provincial Court (Family Division) also provided input into legislation to replace the *Juvenile Delinquents Act.*



Training schools dispute

'Prison atmosphere makes them hostile'

Training Schools Act too all-encompassing?

The Ottawa Journal, March 19, 1975.

In May 1975, the Ontario Legislature voted to repeal Section 8 of the *Training Schools Act.* Proclamation did not take place until January 1, 1977.

The Tragic Case of Norma Dean

Norma Dean was a 14-year-old who committed suicide while residing at an Ontario training school. Her tragic story illustrates the problem of using the Court as a safety valve or escape route when those caring for children consider them difficult to manage. It also highlights the frustrating circumstance a judge can face when no suitable facilities exist in which such a child can be placed.

Norma Dean had a history of emotional problems. On February 10, 1976, she became a voluntary patient at Thistletown Regional Centre, a treatment centre for emotionally disturbed children and adolescents. The staff there found her difficult to handle. She was aggressive, disruptive and would often run away.

One of Thistletown's strategies for dealing with Norma was to bring her to court under the *Juvenile Delinquents Act* for minor offences committed within the institution. This occurred repeatedly, although it was not evident this approach was helping. She first appeared on a charge of assaulting a 15-year-old

boy who had thrown a bible and called her names; another time for stealing $14 which she returned the next day.

Norma was back in court for having twice missed her curfew by one or two hours. That was not an offence but now that she had a record as a delinquent, Thistletown could bring her before a judge without a specific charge being laid. Norma was sentenced to one week in juvenile detention. The theory was that such a "short, sharp shock" might serve to alter a child's behaviour.

On June 30, Norma had yet another court appearance – for breaking and entering. After having an argument with her mother when home for the weekend, she had broken back into Thistletown as she had nowhere else to go. Provincial Court Judge Stewart Fisher thought that Norma needed further treatment in a Ministry of Health facility. But Thistletown had decided it would not take her back and no other children's mental health program was available. In the words of the Director of Thistletown, "What she needed was a closed setting, which we could not provide."[35]

Having run out of options, Judge Fisher committed Norma under section 9 of the *Training Schools Act*. Her initial placement was at the Ministry of Correctional Services' regional assessment centre. The judge's recommendation was that they find an appropriate Ministry of Health treatment setting for her, rather than placing her in a training school on a long term basis.

> I would think probably in my view that Norma should not go to a training school. I think that would be a bad mistake. I am not an expert in this area. But my feeling is that it would not be my recommendation that she should go to a training school at all.
>
> From the verdict of Judge Stewart Fisher, July 7, 1976[36]

Once in the assessment centre, Norma became a training school ward.[37] That wardship enabled training school officials to decide where she should go next. Their decision was to send her, on a temporary

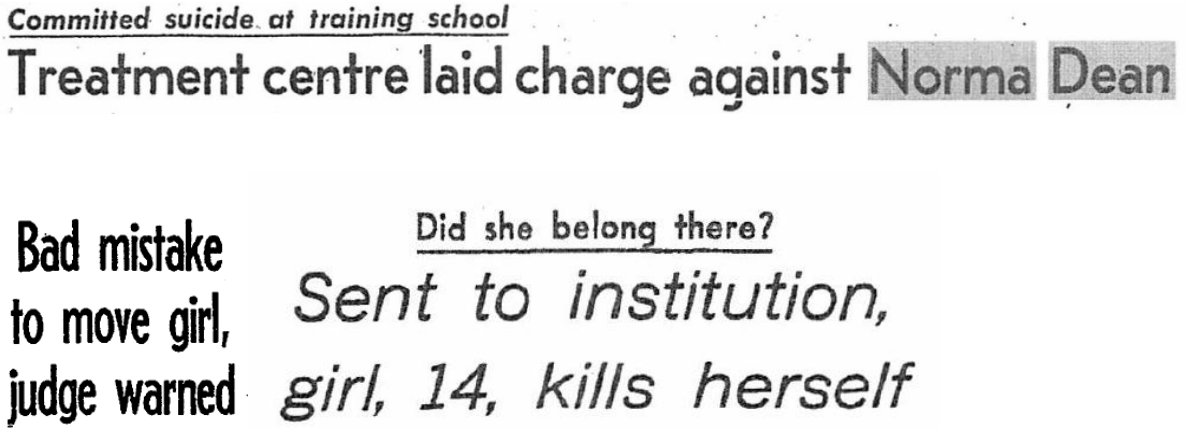
basis, to the Kawaratha Lakes Training School in Lindsay, outside Peterborough, while waiting for a residential treatment bed to open up through the Ministry of Health.

Transferred to the training school on July 29, Norma was now located at a considerable distance from her mother – and the institution reduced visits by the mother to once a month. On August 20, 1976 Norma hanged herself in the closet of her room.

This tragedy only came to light two months later when an anonymous whistleblower drew it to the attention of Victor Malarek, a *Globe and Mail* reporter.[38] He would write a series of articles (and later a book chapter) about the case and the inquest held into Norma's death, triggering an "emotionally charged debate" in the Ontario Legislature.[39]

In an interview, Judge Fisher spoke out strongly about what he perceived as the main cause of this tragedy.

> Family Court Judge F. Stewart Fisher said he has been attempting to get the Ministry of Health to establish centres for emotionally disturbed children since he was appointed to the bench 3 ½ years ago, "but nobody seems to be listening"…. Judge Fisher said it is imperative that closed treatment centres for children with emotional problems be established with locked doors, but separate from centres for juvenile delinquents…. "No one person or one centre is responsible" for the death of Norma, he said. "It is a lack of resources."
>
> *The Globe and Mail*, October 29, 1976



Committed suicide at training school

Treatment centre laid charge against Norma Dean

Bad mistake to move girl, judge warned

Did she belong there?

Sent to institution, girl, 14, kills herself

(Source: Articles in *The Globe and Mail* on Oct. 29, Nov. 2 and Nov. 6, 1976.)

This case was seen as a tragic illustration of flaws in how children were moved from one part of the system to another. Much political debate ensued about the number and quality of treatment programs available for children like Norma Dean. This provided the primary impetus for a 1977 decision to unify government services for at-risk children and families within one ministry of the Ontario government. The new Children's Services Division would be headed by George Thomson, then a judge of the Provincial Court (Family Division).

"In Need of Protection"

This was the headline of an editorial in The Globe and Mail on December 16, 1977.

> Keith Norton, Minister of Community and Social Services, rose in the Ontario Legislature yesterday to announce a series of government proposals…

> for reform of the province's system of caring for troubled, abused, abandoned or emotionally disturbed children.
>
> While Mr. Norton held centre stage, his statement provided perspective in the chilling manner of Greek drama by a chorus – a silent chorus – of corpses: Norma Dean, 14, who hanged herself with a length of macramé cord in August, 1976 at the Kawartha Lakes Training School where she had been sent after having criminal charges laid against her by the staff at Toronto's Thistletown Regional Center…"

Over the next few years, the training schools were closed, a secure treatment program for youth was established with close judicial control over admission and length of stay, and child welfare laws were reformed to substantially increase the child welfare agencies' accountability to the Court for decisions made about youth.

In addition, a large, government-funded program of child representation was established, now the Office of the Children's Lawyer, giving judges the power to order that a child be provided with a lawyer in child protection cases.

Further, in the wake of the Norma Dean tragedy, the case to replace the Juvenile Delinquents Act – and to stop the practice of bringing children to court for minor matters – grew even stronger.

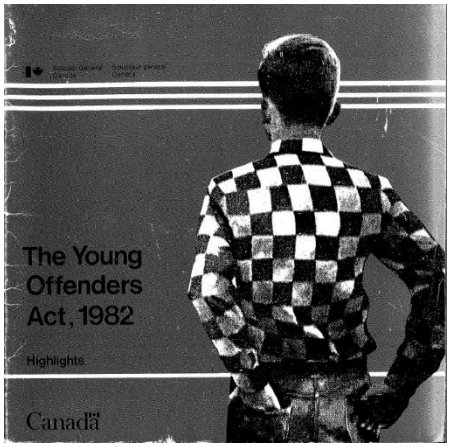
The Move to "Children's Rights"

Due Process for Children: *Young Offenders Act*

After two decades of policy discussion and public debate about juvenile justice reform, the *Young Offenders Act* ("*YOA*") replaced the *Juvenile Delinquents Act,* passing with the support of all parties in 1982 and coming into force on April 2, 1984.

As Tony Doob recalled, "The *YOA* attracted widespread support among both politicians and the judiciary because of the extent to which various proposals for reform had been made, challenged, and refined over the years. By the time the *YOA* came into effect, there were essentially no surprises."[40]

Unlike the *JDA*, which allowed for provincial variation in age of Juvenile Court jurisdiction, the *Young Offenders Act* applied uniformly across Canada to all persons over age 12 and under 18 years of age. It eliminated "status offences," which meant that youth could no longer be sanctioned simply for bad behaviour or for offences not applicable to adults. It also introduced due process rights and procedural safeguards not provided for in the *Juvenile Delinquents Act*.



The *Young Offenders Act* was passed in 1982 and came into force in 1984.

The provisions included the right to counsel and definite, fixed-term sentences. These had long been features of adult criminal proceedings and were all the more strongly guaranteed with the advent of the *Charter of Rights and Freedoms* that had become part of the Canadian constitution in 1982.

The *YOA* also gave judges greater control over where youth would be placed (and for how long) once a decision was made to place them in a custodial setting.

Making the Adjustment

Many judges were excited about the new "rights-based approach" of the *Young Offenders Act*. Their main disappointment was that the new *Act* did not address the lack of community-based alternatives to training school, such as group homes and treatment programs.

Judge James Felstiner, among others, expressed concern that some of the benefits of the former "child saving" approach had been lost. Felstiner began his professional life as a social worker, one of the first to work with youth on the streets rather than in residential and institutional settings. He brought that experience – along with a Harvard law degree and masters of Social Work from the University of Toronto – to the Family Court in Metropolitan Toronto when he was appointed as a judge in 1970.[41]

"Devil's Disciples" – a group of boys with James Felstiner when he was a social worker in the 1960s, prior to becoming a Provincial Court judge. Felstiner referred to this group as the "devil's disciples." (Courtesy: J. Felstiner.)

In October 1985, Judge Felstiner authored an article setting out his observations of "practice and procedures under the *Young Offenders Act*."

> Procedures under JDA relied on the reasonableness and common sense of the judge and all others to proceed quickly to a fair and appropriate result. Under the YOA, we now rely on the detailed sections of the Act and Criminal Code. The pathway is often confused and tortuous. I have read again and again the comments praising the protection children have under YOA. In reality, I feel they have less. The long delays, costly procedures and restricted dispositions do not meet the needs of many children for quick and effective punishment, the needs for behaviour modification, acceptance of responsibility, increase in self-discipline, etc. While procedural legal rights are being protected, the overall benefit of YOA to the child, and therefore society, is of dubious value in my opinion.[42]

Still other Family Division judges saw the new approach as simply an evolution in the role of the judge. "There was a pendulum that swung back and forth when it came to being more focused on treatment or more concerned with holding youth accountable," said Judge Norris Weisman. "I adjusted to it -- that was my job." [43]

Who Should Hear *YOA* Cases?

It was not obvious at first which division of the Provincial Court should function as the "Youth Court" under the new legislation. Previously, the Family Division heard cases against youth up to age 15, while

the Criminal Division dealt with older offenders. Now that the maximum age of a "young offender" was 17, which Division should assume the Youth Court role?

The Ontario government had opposed the increase in the maximum age. It decided to keep the 16- and 17-year-olds under the jurisdiction of adult corrections system, although in separate facilities (or at least separate section of adult jails), while younger youth remained with the social services ministry. In keeping with this decision, both divisions of the Provincial Court had a role in young offender cases. The Criminal Division kept the older youth and the Family Division heard cases involving those age 12 to 15.

> The decision by the Ontario government to leave 16 and 17 year olds in adult corrections, and to have the same criminal judges as before dealing with them as Youth Court judges, was for me the low point in implementing the new law. The Parliament of Canada, with support of all parties, had decided that the break between being a 'youth' and an 'adult' was to be the 18th birthday. Ontario appeared to be thumbing its nose at this decision. In terms of the administration of justice and the most serious punishment (imprisonment), it was going to change as little as possible.
>
> Tony Doob[44]

To complicate matters, a Unified Family Court existed in Hamilton, established on a pilot basis as of 1977. This court – a Superior Court that included several former Provincial Court judges – had been hearing juvenile delinquency cases. Should proceedings under the new law remain there?

When the Unified Family Court expanded to new locations, Youth Court matters did not go with it and were removed from the Hamilton court. *YOA* cases remained a matter for the Provincial Court. Some saw this as an appropriate decision in light of the *YOA*'s criminal law focus. For others, it represented the

loss of one of the goals of having a Unified Family Court because so many young offenders are also involved in child protection proceedings.

Nick Bala, a law professor at Queen's University who has studied and written extensively about the youth justice system, made the following observation.

> Ironically, one of the benefits that comes from not having a Unified Family Court in Toronto is that the Ontario Court of Justice there is able to deal more effectively with the many youth who straddle both systems.[45]

Profile of a Judge from the "Children's Rights" Era: Lynn King

Over time, the "child-saving" philosophy of judges such as Lorne Stewart began to be replaced by an emphasis on respecting children's rights. Lynn King was an example of a judge who believed passionately in due process for children and youth.

All in the Family

Lynn King, lawyer, with her father, County Court Judge Harry Waisberg, in 1981. (Source: *Toronto Star* via Getty Images.)

Originally from Sudbury, King practised law from 1973 until her 1986 appointment as a judge of the Provincial Court (later the Ontario Court of Justice). Her aunt and father, both former judges, attended her swearing-in ceremony.[46] The aunt – June Bernhard – had made history as the first woman to be appointed to sit in the Provincial Court (Criminal Division).[47]

Ted Andrews, Chief Judge of the Provincial Court (Family Division) spoke at the ceremony about the ever-changing nature of the law that King would have to apply: "The law is constantly being reformed and no branch of law is more greatly affected than the courts dealing with families and children…. they are the very root of social change."[48]

Why Kids Need Lawyers

> She was in the vanguard of pushing for easy access [for youth] to expert [legal] representation.
>
> Justice Brian Weagant[49]

Some of King's reasons for believing strongly in the right of to counsel for young offenders are evoked in a 1997 newspaper article. It quotes her as "bemoaning the fact that recent cutbacks in legal aid have led to 65 per cent of family-law litigants appearing in court without lawyers…. She said it is no better in Youth Court, where a staggering number of teen-agers [without lawyers] unthinkingly agree to unrealistic or inappropriate bail conditions. They inevitably end up breaching them, she said, and are incarcerated until their trial date."[50]

Using the *Charter* to Protect Children's Rights

King's judicial decisions underscored her strong belief in children's rights. In 1991, she stayed (indefinitely postponed) mischief charges against three boys under the age of 16.[51]

The boys had been kept in "overcrowded, hot, dirty holding cells [in the basement of the courthouse at 311 Jarvis Street] for hours and taken to and from Court in handcuffs." In King's view, this treatment was humiliating, out of proportion, and insensitive to cases dealing with young persons. She found it to be cruel and unusual treatment, contrary to section 12 of the *Charter*.

She also found that the lack of privacy when talking to their lawyers in the holding cells violated the boys' right to counsel under section 10(b) of the *Charter*.

In reference to this case, colleague Justice Brent Knazan was quoted: "She was completely fearless. She didn't care what anybody thought, which is a great strength in a judge. "[52]

Common Ground with "Child-Saving" Judges

Although they had different philosophical perspectives about children's criminal behaviour, Lynn King and Lorne Stewart (profiled above) possessed a shared belief about how children should be treated in the courtroom. Both were seen as role models to other judges.

> Lynn had a great feel for the young people before her. She engaged with them and took an interest in their lives. She spoke in very plain language. Her approach empowered the young persons and gave them a sense they were being heard and reinforced their sense of self-worth. I modeled a lot of my judging on it.
>
> Justice Brian Scully[53]

King's tenure as a Family and Youth Court judge was cut short by her death in 2005 at the age of 60. At a memorial event, Justice Marion Cohen spoke of her late colleague's approach to young offenders in the courtroom.

> Lynn by nature resisted authority and convention, but she did not judge from an ideological point of view. For Lynn, whether in the Youth Court or the Family Court, it was all about children…. No matter how horrendous the charge they were facing, Lynn always saw something smart and good in these children. She always called the accused by their first names, and she spoke to them and their

parents in court. She wanted to know what school they went to, and what courses they liked, and who their teachers were.

Lynn believed that we had to do everything we could to keep young people out of the justice system because of the strong chance that we might, for no good reason, make their lives worse.…

Lynn King, Justice of the Ontario Court of Justice. (Source: Obituary in the *National Post*, March 21-22, 2005.)

Lynn could never understand why we treat children as adults from the moment they step into Youth Court, and she could not bear to see children in the prisoner's box. In the past year we sent a particularly large and obtrusive prisoner's box back to the government because Lynn would not allow it to remain in the building.

A New Approach: Youth Criminal Justice

Concerns about the *YOA*

The *Young Offenders Act* accomplished many of the goals that had guided the effort, over many years, to replace the *Juvenile Delinquents Act*. It did not, however, end the debate about how best to respond to the criminal behaviour of young persons. For those who felt youth needed to be held more accountable, especially for more serious criminal behaviour, the sanctions available to the Court were regarded as insufficient.

By the late 1980s, the *Young Offenders Act* was subject to growing public and political criticism. Critics cited statistics showing that the number of youth charged with violent offences had risen steadily from 1986 to 1993. This led to amendments "toughening up" the *Young Offenders Act* in 1995.

Others argued that the growth in Youth Court charging rates was more a reflection of police charging practices and a general move to treating youth crime in the same way as adult criminal behaviour. A survey published by Professor Doob in 2001 conveyed a concern many Ontario Youth Court judges expressed about the numbers of youth being brought to court rather than being dealt with informally. Of the Ontario judges surveyed, 55% agreed that half or more of the cases that came before them could have been adequately dealt with outside of court.[54]

Concern was also voiced that custody was being overused. Although the numbers of youth in custody rose sharply after the *YOA* came into force, more than three-quarters of youth receiving custodial sentences under that *Act* had not committed violent offences.[55]

In the late 1990s, the federal Department of Justice reported that Canada had a higher rate of youth incarceration than many Western countries, including the United States, Australia, and New Zealand, with youth being incarcerated more often than adults tended to be for similar behaviour.

In 1998, the federal government released *A Strategy for the Renewal of Youth Justice*, advocating strong sanctions for violent behaviour. At the same time, it argued for much greater use of alternatives for the majority of young offenders who had not committed serious offences.[56] The stage was set for another transformation of youth justice – one that would have a major impact on the work of the Ontario Court of Justice.[57]

Proportionality: *Youth Criminal Justice Act*

The *Youth Criminal Justice Act* came into force in 2003.

The "*YCJA*" is premised on the principle that youthful offenders should be held accountable for their actions in ways that best facilitate their rehabilitation and reintegration into society. It holds that the most serious interventions should be reserved for the most serious crimes. Custodial sentences can only be imposed in specific circumstances, such as the commission of a violent offence.

Proportionate responses are encouraged by setting out criteria and requiring the judge to be explicit about why a non-custodial sentence would be inadequate.

The *YCJA* promotes avoidance of court and custodial sentences in many cases, expounding that "extrajudicial measures are often the most appropriate and effective way to address youth crime" and are "presumed to be adequate to hold a young person accountable" if he or she has committed a non-violent offence and has not previously been found guilty of an offence.[58]

The *YCJA* eliminates "transfers" of youth to adult court. Now youth remain in Youth Court, but the Crown may seek an adult sentence for the most serious offences.[59] If a youth sentence is deemed to be of sufficient length to hold the young person accountable, he or she is sentenced as a youth; otherwise, sentencing as an adult applies.[60]

In the view of Professor Bala, the *YCJA* "has done an excellent job of moving less serious offenders out of the Court. Those left are serious or repeat offenders who generally also have significant emotional, social and family difficulties. This is a huge challenge for the judges who hear these cases."[61]

Preparing for the Change

The five years between the release of the government's strategy in 1998 and proclamation of the new *Act* in 2003 provided an opportunity to prepare the youth justice system for the changes.

> The fact that it was a new Act, not just a series of amendments, signalled a new direction. Judges took it very seriously, including the strong presumption against custody and the hurdles to be jumped before making a custody order.
>
> Tony Doob[62]

> It took several years for the proposals for reform to become the new Youth Criminal Justice Act. This meant that education on the directions proposed by the new law could begin early. In my mind the most important reason why the Act has had such a huge impact was the educational effort that produced what became a major cultural shift in all parts of the system.
>
> Nick Bala[63]

Justice for Children and Youth

Justice for Children and Youth is a specialized legal aid clinic in Ontario. It provides legal representation to low-income children and youth and advocates for legal and policy changes affecting them.

Two judges of the Ontario Court of Justice – Marion Lane and Brian Weagant – are former executive directors of this organization.

The National Judicial Institute developed a comprehensive *YCJA* education program for judges. Convened over several days with a "train-the-trainers" component, it provided opportunities to apply the Act to simulated case situations. Later, programs were developed at the local court level across the country, including the Ontario Court of Justice.

Other professionals such as police and probation officers also developed education programs. Thus, when the *Act* was proclaimed in 2003, the whole system was ready to move in the directions it promoted.[64] Indeed, even before the *Act* came into force, the Ontario Court of Justice – along with courts across Canada and other participants such as the police – anticipated the changes and began re-directing less serious offenders out of court. The number of young persons in custody subsequently declined dramatically under the new law and has remained low.

A Return to the Community

The *YCJA* includes provisions to curb the previous over-reliance on Youth Court and custodial sentences. Before launching judicial proceedings, police are required to consider whether it would be sufficient to take no further action, warn the young person, administer a caution or, with the consent of the young person, refer him or her to a community program or agency.[65]

The law promotes alternative measures (called extrajudicial measures in the *Act*), the use of innovative community-based programs, and ways of bringing together those involved in the life of the child to consider how best to respond to the criminal behaviour.

In many cases, young people must plead guilty to the offence before referral to a community program is possible. This is intended to ensure that there is a basis for intervening in the young person's life. It creates a risk, however, that the young person will plead guilty without fully understanding his or her rights or the consequences of having a criminal record. This reinforces the need for good legal representation and for judges to have the skills and time to communicate well with the young people who appear before them.

The emphasis in the *YCJA* on community-based alternatives has led to judges adopting a pro-active role along with others in the community. The main purpose is to develop new programs or court processes

for youth who might otherwise be placed in custody. In some ways, it resembles the activism of Provincial Court (Family Division) judges in the 1970s to develop community resources such as diversion programs and group homes.

Youth Mental Health Courts are an example of collaboration between the Court and the community. This initiative was pioneered in Ottawa and similar Courts now exist in several other communities as "problem-solving" resources for young offenders with mental health challenges. Certainly, nothing such as this was available in the '70s when Norma Dean was rejected by her children's mental health treatment centre and shifted to juvenile corrections.

Another example is the process put in place for urban Aboriginal youth in Toronto.

> We have started an Aboriginal Youth Court here. It is a resolution court, a diversion court. Two days a month Justice Marion Cohen and I do this. We wear regular clothes, not gowns, and we sit at a table. We invite parents and guardians to the table. I am in a position of authority but I am there to support what the community is developing as a strategic plan for the young person.
>
> Justice Brian Scully[66]

Working with the Community: New Programs

The following are examples of programs involving judges of the Ontario Court of Justice which are intended to expand community solutions as envisaged by the *Youth Criminal Justice Act*. While not available in all Court locations, such innovations offer alternatives to Court and detention.

Peacebuilders

Peacebuilders is a highly regarded restorative justice response to youth criminal

behaviour. Young persons who acknowledge their guilt are referred to the program by a judge, defence counsel, or probation officer, generally out of a pre-trial conference. Each person is assessed and prepared for a circle gathering to develop a plan with others involved in his or her life. The program includes group meetings to discuss the participants' conduct and how it affected their families and themselves. It includes a meeting with the victim or someone from the community who represents that role. The focus of the program, currently active in Toronto, is how to repair harm and restore confidence in the community.

Springboard

While custody levels declined with the *Youth Criminal Justice Act*, pre-trial detention did not. Many youth are in pre-trial detention due to a failure to comply with conditions set by the Justice of the Peace when releasing them after arrest.

Springboard is a community organization that helps to address this and other issues affecting youth age 12 to 17 who are involved in the criminal justice system. Its programs include:

- residences for young males who are awaiting trial or sentenced to a period of custody there,
- youth-in-transition workers placed in courthouses, and
- strategies to help youth plan for the future in partnership with their families, defence counsel, and communities.

Diversion Programs

Diversion programs existed long before the introduction of the *YCJA*, in keeping with the *Act*'s focus on diverting all but the most serious cases, they have grown in number and also expanded in scope. According to Darren Dougall from Kingston Youth Diversion, "[t]he focus is increasingly on the underlying issues behind the criminal behavior with mental health workers, restorative justice programs, intensive community support teams and even supportive housing."

PACT Urban Peace Program

PACT stands for "Participation, Acknowledgement, Commitment, and Transformation." It is a community-based program that helps youth reach their potential through partnerships with the police, courts, probation, schools, and others. Among other approaches, it offers intensive probation by workers who know what it was like to be on the street. They provide intensive life-skills training and support to young people at risk of a future life of crime and imprisonment.

Youth Justice Committees

The *YCJA* reintroduced the concept of Youth Justice Committees – bodies not unlike the Juvenile Court committees established in the early part of the 20th century under the *Juvenile Delinquents Act*. Youth Justice Committees are comprised of volunteers who develop community-based alternatives to formal court proceedings for youth who have committed relatively minor offences.

While this concept has been used effectively in some court locations, such as Scarborough, Newmarket, and Sault-Ste. Marie, concerns about membership and role have meant it has not yet been implemented extensively elsewhere.

(Sources: Interviews of D. Dougall, and Justices B. Scully and D. Paulseth for the Ontario Court of Justice History Project, 2015; Springboard, PACT and Peacebuilders websites accessed April 2015.)

Use of the Court for "Unmanageable Youth"

The *YCJA* did not deal with the challenge of youth appearing simultaneously before Youth Court and in child protection proceedings. Nor did it end the practice of the Court being used to move youth who are minor offenders but difficult to manage out of child welfare and into young offender programs. This is often done through "administration of justice offences" where the charge is failure to comply with an earlier order of the Court, such as a condition attached to a bail or probation order.

Youth involved in both the child welfare and youth justice system are known as "crossover kids." Judges and others are developing a pilot project for crossover kids in four Ontario communities: Belleville, Chatham, Thunder Bay and Toronto. The goal is to ensure that such youth appear before the same judge in both matters, with resources available to enable the judge to find an integrated outcome that meets the child's specific needs. This approach cannot, however, be implemented in jurisdictions with a Unified Family Court. That is because the UFCs deal with child welfare but not youth criminal justices cases.

> The judges in my court see enormous value in being able to deal with what are called "crossover kids" in one court and ideally in front of one judge. The concept recognizes that child welfare is the long term plan; once someone is charged, the child welfare system shouldn't just say, "Let the justice system take care of it. Both systems need to work together."
>
> Justice Brian Scully[67]

Conclusion

The role of the Court in "juvenile justice" has changed dramatically since children's cases began to be heard in the basement of Toronto's Old City Hall courthouse. The emphasis shifted with each of the three successive federal statutes, from "curing" delinquency, to protecting children's rights, to an approach that emphasizes proportionality and community based responses.

Although the legal framework is certainly different than it was when the first delinquency law was introduced, many of the difficult questions that faced the first Juvenile Court judges remain.

- How to find the right balance between holding youth accountable and promoting their rehabilitation?
- How to avoid overuse of the Court, especially for youth who do not have the support of parents or community members?
- Which community-based programs are most effective and how can they be made more widely available?
- What are the best approaches for serious offenders who also have social and emotional challenges or addictions?
- How to ensure that youth placed in custody receive the treatment they need and are not subject to punitive measures?
- What kinds of court processes and alternatives to court are best suited to the range of needs demonstrated by young offenders?

Ontario judges have played an important role in the reforms and the efforts to find answers to these and other challenges. The story of how they have done so illustrates well how Ontario Court of Justice judges have learned to adapt to a world of continuous change.

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[1] Denison Col G.T. *Recollections of a Police Magistrate* (Toronto: Musson, 1920), p. 254.
[2]Interview of A. Doob for Ontario Court of Justice History Project, 2015.
[3]Department of Justice Canada, International Cooperation Group, *The Evolution of Juvenile Justice in Canada*, 2004, at p. 20.
[4]*An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders*, 1894, 57-58 Vict., c. 58 (Can.). See description of features in Department of Justice Canada, International Cooperation Group, above, pp.18-19.
[5] *Juvenile Delinquents Act*, 1908, 7-8 Edw. VII, c. 40 (Can.).
[6]*Juvenile Delinquents Act* 1929, 19-20 Geo. V, c. 46, s. 3(2) (Can.).
[7] Doob, Anthony N. and Sprott, Jane B. "Youth Justice in Canada" (2004) 31 *Crime and Justice* 185, p. 187.
[8]*JDA, 1929,* s. 2(g).
[9]*JDA, 1929,* s. 12(2).
[10]*JDA, 1929,* s. 12(3).
[11]*JDA, 1929,* s. 17(1).
[12]The participation of lawyers was viewed by some with suspicion if not outright hostility. Leon quotes correspondence between Kelso and Scott revealing that in crafting Juvenile Court procedure, Kelso would have taken "a firm stand on the exclusion of lawyers from the court." Scott felt that a blanket exclusion might arouse opposition, but agreed that the appearance of lawyers should perhaps be limited to exceptional cases. (102, fn 212-213 and accompanying text). Leon, Jeffrey S. "Development of Canadian Juvenile Justice: A Background for Reform."Osgoode Hall Law Journal 15.1 (1977): 71-106 at p. 102, fn 212-213 and accompanying text.
[13]1910, 10 Edw. VII, c. 96, ss. 1 and 3 (Ont.).
[14]Leon, p. 101; 1916, 6 Geo. V, c. 54, s. 2 (Ont.).
[15]*JDA, 1929*, s. 9.
[16]*JDA, 1929,* s. 17(2).
[17]24 Geo. V. c. 25 (Ont.).
[18] *Training Schools Act* replaced *An Act respecting Industrial Schools*, S.O., 1874, chapter 29.
[19]*JDA, 1929*, s. 26.
[20]*JDA, 1929*, s. 20(1)(i).
[21]*Training Schools Act*, s. 17.
[22] Weiler, Karen. "Unmanageable Children and Section 8" (1977-78), 8 *Interchange* 176, p. 177.
[23]Weiler, p. 177.
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Advisory Group

Annemarie Bonkalo, Judge and Former Chief Justice, Ontario Court of Justice (Chair)

George Brophy, Judge, Ontario Court of Justice

Frank Devine, Justice of the Peace, Ontario Court of Justice

Deborah Paulseth, Senior Advisory Family Judge, Ontario Court of Justice

Paul Reinhardt, Judge, Ontario Court of Justice

Frank Squires, Justice of the Peace, Ontario Court of Justice

Authors

Karen Cohl, Writer and Public Policy Consultant

Susan Lightstone, Writer and Counsel, Ontario Court of Justice

George Thomson, Senior Director, International, National Judicial Institute; Former Judge, Provincial Court (Family Division)

Special Advisors and Reviewers

Nicholas Bala, Professor, Faculty of Law, Queen's University

Paul Bélanger, Judge, Ontario Court of Justice

Susan Charendoff, Former Director, Civil Policy and Programs, Court Services, Ministry of the Attorney General

Frank Devine, Justice of the Peace, Ontario Court of Justice

Peter Griffiths, Judge and Former Associate Chief Justice, Ontario Court of Justice

Brian Lennox, Judge and Former Chief Justice, Ontario Court of Justice

Patrick LeSage, Former Chief Justice, Superior Court of Ontario

Sidney Linden, Former Chief Justice, Ontario Court of Justice

John Payne, Judge, Former Associate Chief Justice – Coordinator Justices of the Peace

David Wake, Judge and Former Associate Chief Justice, Ontario Court of Justice

Members of the OCJ History Project Team: Left to right: Adriel Weaver, Susan Lightstone, Karen Cohl, Angela Stamatakis, George Thomson, March 2015. (Courtesy: Office of the Chief Justice, Ontario Court of Justice.)

Contributing Writers

Elliott Allen, Judge, Ontario Court of Justice

Jack Batten, Author

George Brophy, Judge, Ontario Court of Justice

David Cole, Judge, Ontario Court of Justice

Frank Devine, Justice of the Peace, Ontario Court of Justice

Charlotte Gray, Author

Brian Lennox, Judge and Former Chief Justice, Ontario Court of Justice

Gérald Michel, Retired Judge, Ontario Court of Justice

Katrina Mulligan, Judge, Ontario Court of Justice

Shaun Nakatsuru, Judge, Ontario Court of Justice

Peter Walmsley, Professor, McMaster University

Adriel Weaver, Lawyer and Legal Researcher

Frank Squires, Justice of the Peace, Ontario Court of Justice

Educational Liaison

C. Adèle Kent, Executive director, National Judicial Institute; Judge, Court of Queen's Bench of Alberta

Keath Jeacle, Chief Financial Officer, National Judicial Institute

Research Team

Jason Carroll, Statistical Information Officer, Ontario Court of Justice

Cecylia Kawka, Librarian, Ontario Court of Justice

Mirella Morello, Research and Administrative Officer, Ontario Court of Justice

Karen Teeple, Archivist

Adriel Weaver, Lawyer and Legal Researcher

Technology Team

Judicial Information Technology Office:

Julian Appel, Manager, Operations and Security

Julia Liu, Business Analyst, Web Designer

Ana Vrana, Information Technology Intern

David Williams, Team Lead

Editorial Assistants: Nivedita Chandrasekhar (standing) and Stephanie Pollard. (Courtesy: Office of the Chief Justice, Ontario Court of Justice).

Administration

Dureaden Awan, Project Officer, Ontario Court of Justice

Cassandra Bascombe, Secretary, Ontario Court of Justice

Christina Manefski, Secretary, Ontario Court of Justice

Lori Newton, Executive Legal Officer, Ontario Court of Justice

Angela Stamatakis, Secretary, Ontario Court of Justice

Jane Warwick, Manager, Executive Support and Communication, Ontario Court of Justice

Editorial

Nivedita Chandrasekhar, Editorial Assistant

Bill Kretzel, Copy Editor

Stephanie Pollard, Editorial Assistant

Legal Historians

Paul Leatherdale, Archivist, Law Society of Upper Canada

Marilyn MacFarlane, Administrator, Osgoode Society for Canadian Legal History

Legal Specialists

Centre for Judicial Research and Education, Ontario Court of Justice:

Allen Edgar, Research Counsel

Shelley Howell, Research Counsel

Roman Komar, Research Counsel

William Rolls, Research Counsel

Damon Usborne, Research Counsel