PROVINCIAL JUDGE'S JOURNAL, CANADA

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The Hon Justice Michael Kirby CMG**
Australia

THE IMPENETRABLE FUTURE

Il ne peut y avoir d'endroits plus intrigants ni dramatiques que celui-ci pour la tenue d'une conférence. Du haut du Cap Diamant, nous regardons le majestueux fleuve St-Laurent. Au pied de la falaise, se trouve Place Royale, le berceau d'une civilisation dont l'influence s'est répandue aux 4 coins du globe. Nous songeons à Jacques Cartier qui s'y est bravement aventuré et s'est accosté sur cette terre en 1534 et qui y est revenu un an plus tard. Tout juste à l'extérieur de cette salle, nous voyons la statue de Champlain qui a établi son village ici en 1608. Pas étonnant, qu'une vigoureuse culture ait pris racine. Cette culture a dû affronter non seulement un rude climat, mais parfois l'indifférence d'un pouvoir colonial et plus tard, le pouvoir économique de l'Amérique du Nord anglophone. Seule une civilisation forte pouvait survivre à de telles contraintes. C'est un endroit merveilleux pour la tenue d'une conférence dans quelque domaine qu'il soit. Dans ces circonstances, Québec constitue un endroit de choix pour la tenue de la recontre annuelle des juges des Cours provinciales de tout le Canada.

This is a testing time for the future of Canada held together by sentiment, history and law. It is a privilege for me, as an Australian judge, to join you on this occasion. I will deliver these remarks and then sit amongst you, learning of the ways in which you are tackling problems common to both our continental countries.

I am conscious of the special responsibility of the opening speaker of a law conference. He or she will usually be the only person who can capture fleetingly the attention of nearly everyone before a few steal away to the delights of the venue. The speech must therefore be witty, profound, practical yet rich in philosophy and insightful of the future. That is a tall order. You have chosen for your theme the Judge in the 21st Century. Who would be so bold as to foretell a whole century when the future but a week hence is so impenetrable?

THE CHANGES WE HAVE SEEN

To foresee the future we must know the past. A reflection on the changes we have seen in the judiciary, and in legal practice, in our own lifetimes gives us some clues as to what the future holds in store. Most of us are old enough to remember legal practice in the 1950s and 1960s:

> "Typists were gathered together in a typing pool and laboured away at manual typewriters. The senior partner's secretary had an electric typewriter which caused a considerable amount of jealousy ... [Many lawyers] did not believe in dictaphones, preferring old-fashioned dictation or longhand drafting of letters and documents. [Perhaps] the senior partner had had an unfortunate experience with one of the early

> record-type dictaphones where he had dictated all of one Saturday morning only to find that the machine was not recording. [Such an] incident reinforced the firm's distrust of modern technology for some years to come ... The early photocopiers also led a chequered existence. There were both wet and dry photocopiers which had but one characteristic in common - they produced poor quality photocopies. One solution [was] to have a typist copy incoming correspondence that you wanted to forward to your client. [In Australia] in the early 60s accounts were still rendered in guineas rather than pounds ... The Legal Aid Commission and Community Legal Centres had not yet been established and yet the cost of legal representation did not appear to be the problem it is today ... The profession felt an obligation to undertake a considerable amount of work on a pro bono basis ... The sixties were the era of the small firm."[1]

Then came the 1970s. Few manual typewriters were left. Photocopiers improved and copy letters disappeared forever. Now typically everything was photocopied many times over. Memory typewriters were introduced. Their capacity was expanded by the IBM mag card machines. Answering machines became all the vogue. Government funded legal aid was introduced into Australia. Legal firms started to get bigger.[2]

The 1980s was the decade of the computer and the word processor. VDUs spread from the secretaries to the desks of partners, advocates and even some judges. Fax machines were introduced at the end of the decade. I receive my invitation to this conference instantaneous by fax. Hands-free telephone calls "sounding like conversations through a long dark tunnel" annoyed clients and other lawyers alike.[3] The cost of modern technology became a factor in the growth of

the big legal offices. To cope with the vast expansion of statute and common law, continuing legal education for the profession, and ultimately the judiciary came about and was accepted quietly. Electronic mail was even replacing some of the facsimile traffic. Video performances in the top courts were introduced first in Canada and later in Australia. Transcontinental legal firms introduced teleconferencing to save the time of travel over such large distances. The attractive, sweet smelling bookstalls of legal conferences of yesteryear were replaced by clinical booths displaying sophisticated computer technology. All this and more in but thirty years of my professional practice.

Far from standing still to catch its breath, technology is galloping ahead at such a pace that we can scarcely guess where it will take us in the decade - let alone the century - ahead. One Australian lawyer recently ventured these predictions:

> "Every new generation of computers is obsolete by the time it is marketed ... There will be much more widespread use of electronic mail, resulting in less paper spread around [lawyers'] offices. Many ... will type their electronic mail themselves, either in their office or wherever they may happen to be on a portable personal computer. The nineties should also see the introduction of voice activated word processing systems which enable dictation to be word processed without the assistance of a word processing operator. Although such a system would not remove the need for secretaries who would then really become personal assistants rather than their previous role of document producers, it would cut down on the need for support staff. Libraries as we know them will be used less than in the past. Computerised library retrieval systems, available from every

> computer terminal in the office, should largely replace hard copy library books by the end of the nineties.[4]

In some parts of the world, including in Canada, judges already have VDUs on the bench. They can retrieve legal authorities, statutes and common law decisions. They can monitor the history of the case before them and review its place in the throughput of the court's system whenever adjournment is requested. Perhaps, during the more tedious of arguments, they can even refresh their mind with poetry or take comfort in some deft computer doodling. It is not entirely fanciful to predict that in a century, or even less, our fallible human judicial memories will be enhanced by implanted miniature computers which supplement our brain capacity. Just think what a boom it would be always to be able to retrieve the most obscure texts of statute or common law all neatly filed in an implanted wafer and subject to simple command.

THE ABIDING WILL TO DO JUSTICE

If we look at the recent past, the prospects of the immediate future seem dazzling indeed. Those of the long term - say a century hence - seem positively frightening. And if we scoff at this, we should pause to remember that the great engine of our time is technology. If at a conference like this a century ago a speaker had proclaimed the very changes we have witnessed, there is little doubt that the assembled judges and magistrates of yesteryear would have

laughed with derision. The notion that in but 60 years the sun would indeed set on the British Empire and that the primitive colonial peoples of Asia and Africa (many of them but recently brought under the civilizing influence of the Union Jack and the Tricolour) would be independent nations, would have seemed quite fanciful. A description of the jumbo jet that would bring conference goers to a never-ending cycle of international meetings would have seemed highly far fetched. The terrifying weapons of war and bombs that could destroy the whole world - with all its beauty and civilization - would have seemed unlikely in the extreme. Remarkable machines that could chatter away, sorting and sifting heroic quantities of information, even into the lawyers office and judges' chambers would have dazzled the mind of the law librarian of 1890, shining the leather bound Appeal Cases. The notion of manipulating life forms and patenting innovations of biology would have seemed a most peculiar one. The advent of a frightening global epidemic insusceptible to scientific skills would perhaps have been the development least surprising to our forebears. The change in our societies brought by broadcasting and television were then on the brink. The miraculous journeys to the moon and mankind's never ending quest for knowledge about outer space would certainly have appeared remarkable and wonderful to all but Jules Verne. These, and many more, are the changes which have occurred in the last hundred years. Most of them can be laid at the door of science and

technology. Most can be traced to the great leap forward of quantum physics. That we have coped with them - and absorbed them - even in our discipline, ancient with the centuries - is a tribute to the adaptability of human society and of the human mind. Above all, it is a tribute to the power of adjustment of the legal system to which we are heirs.

A travers tous ces changements, certaines choses demeurent les mêmes. Si un juriste de 1890 s'aventurerait aujourd'hui dans une salle d'audience de la Court du Québec ou de la Cour proinciale ailleurs au Canada, ce juriste se sentirait presque à son aise. Les procédures de base et les règles de preuve demeurent remarquablement les mêmes, malgré un siècle de progrès et de changements. Il est vrai que la toge a été modifiée à certains endroits. Il est égelement vrai que les vêtements des justiciables paraîtraient quelque peu osés. Certains équipments utilisés dans la salle paraîtraient étranges et surprenants. Cependant les techniques du base des avocats demeurent les mêmes surtout dans les procès criminels où les règles appliquées sont stables. Le plus stable de tout est néanmoins la volonté du juge qui préside le procès de trouver une solution juste. C'est cette volonté qui distingue notre système légal administré par des officiers de justice, d'un système purement mécanique par lequel la solution des problèmes serait réduite à la décision d'un tyran ou d'un ordinateur. La justice, devant les tribunaux - surtout dans les cours provinciales et la Court du Québec, où plus de 90% des

litiges canadiens sont traités - représente l'instrument formel selon lequel la société a choisi de résoudre les problèmes séreiux de manière définitive. Il s'agit d'un instrument de contrôle social, mais aussi de justice.

Our courts are open to members of the community to see us at work, to value us or to criticise. By the public resolution of serious questions, the courts every day demonstrate the search for justice which is an abiding feature of our legal system. They also demonstrate observance of the rule of law: a government of laws not of men. Machines could not do this: at least in societies organised like our own. That is why, for the foreseeable future the human decision-maker, reflecting human values and demonstrating the human will for justice, will remain the centrepiece of our system of justice. We may not know what the conference of Provincial Court Judges will be discussing in a century's time. But that there will be such judges - and such conferences - appears a fair bet. So many things change. But some things remain the same.

MORE TECHNOLOGY FOR A CRUSHING WORKLOAD

The special feature of the past decade, at all levels of the judicial hierarchy in Canada, Australia and other like countries, has been the crushing burden of increasing court business. One Justice of Australia's highest Court complained that the Court was "burdened and overburdened".[5] An inquiry into the workload of the Supreme Court of Victoria, Australia disclosed a ten-fold

increase in its throughput since 1950 matched only by an increase in judges from 11 to 21.[6] Legal practitioners constantly call out for more streamlined procedures and an increase in the number of judicial officers. Parliaments repeatedly enact laws imposing new functions on judicial officers. In hard times it is increasingly realized that our communities must be more economical in their use of the judiciary. This involves various possibilities.

* Reforming laws which place an inordinate workload on judges;
* Diverting some matters out of the judiciary altogether;
* Defining more closely the respective functions of judges at different levels of the judicial hierarchy; and
* Improving the cost effectiveness of the way judges go about their work.

There is no doubt that law reform can come to the rescue of the hard pressed judiciary in various ways. There are many familiar examples.

* The Breathalyzer has reduced the tedious and agonizing testimony of members of the police force and other witnesses concerning impressions of intoxication of a motorist which I remember so well from my youth. A scientific instrument and a statutory presumption of commission of a

criminal offence have combined to save many judicial hours, without any significant reduction in the justice dispensed in the courts dealing with this particular social phenomenon;

* In like manner, law reform proposals in Australia have repeatedly concluded that the introduction of sound and video recording of confessions to police will reduce the many tedious courtroom debates, at every level of the hierarchy, which presently precede the admission of most disputed confessional recollections;

* The power conferred on police to impose on the spot fines has substantially reduced the number of cases which must come before judicial officers in the first tier of courts. Of course, the procedure is not perfect. It presents some risks of oppression and corruption. It transfers decision-making effectively (at least in the first instance) from the judicial branch to the Executive. But it does help to sort out most of the cases where a clear offence has occurred and to distinguish them from cases where there is a dispute in which the parties derive resolution by a judicial officer;

* In various jurisdictions of Australasia attempts have been made to find more cost-effective ways

of delivering the compensation dollar to persons injured in motor vehicle or employment accidents. I know that you have had reforms in Canada along similar lines. No reforms have been more radical than those adopted in New Zealand where personal accident cases have been swept from the courts altogether and replaced by a national compensation scheme based on social security principles. The high component of judicial time absorbed in Australia in accident cases would be immediately released for other work, perhaps of greater social utility and need for individualised decision-making, if a scheme such as that in New Zealand, or a modification of it, were adopted in Australia.[7] Needless to say such schemes invite the adamant opposition of litigation attorneys and barristers. There is no doubt that the quality of justice is reduced as the price paid for reducing the proportion of compensation funds that must be expended in the highly cost intensive system provided by the ordinary courts; and

* To reduce costs of divorce and better to utilize scarce judicial time in that painful field, proposals have been accepted in Australia by which, where disputes about children and

property are not involved, divorce can now be secured by post.[8]

SENDING PROBLEMS TO SOMEONE ELSE

It seems likely that law reform of this kind will continue to address the problems presented by the increasing burden of work imposed on the judges. But other techniques have lately come into vogue. These seek to stream away from the public courts a number of disputes considered appropriate for alternative, non-curial, resolution. The quest for alternative dispute resolution is now seen in most jurisdictions. It was primarily stimulated by developments in the United States where the truly crushing workload of the courts demanded immediate solutions. In many cases there are undoubted advantages in the systems of alternative dispute resolution which call upon negotiation, mediation or adjudication. In Australia, we are beginning to copy the "rent-a-judge" system developed in the United States. A number of retired judges are now offering their services as arbitrators. They are doing well financially, at the same time as drawing their judicial pensions earned over many years of public service and avoiding the embarrassment of appearances in court.

Nearly a century and a half ago Abraham Lincoln, himself a lawyer, cautioned his fellow citizens: "Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner [in litigation] is often a real loser in fees, expenses and a waste of time".[9] However,

whilst these words still remain painfully true for many litigants, for others the cautionary words of Chief Justice Allan McEachern also command respect:

> "It should ... be recognised that in many cases the court is ... the only protection the weak and timid have against stubborn and unreasonable adversaries. We must all be careful not to let that important responsibility be transferred to other disciplines whose only remedy (often ineffectual) is reasonable persuasion".[10]

In some cases there is not a great deal more that can be done to reduce the burden on the courts. The criminal docket provides the clearest example of this. Some relief could be obtained by clearing the statute book of a great range of criminal offences which reflect the social mores of the nineteenth century but which persist because of the difficulty of securing reform. Yet for every offence removed, new offences must be inserted for modern crimes undreamt of in the nineteenth century. These include crimes involving data trespass or the manipulation of computer records.[11] Breathalyzers, recorded confessions and on-the-spot fines may also reduce the criminal case load. But the bulk business remains the same. The only prospect of truly radical change in that business would occur if a public health approach to drug offences were to replace the present criminal justice approach, with all of its imperfections. In Australia it has been estimated that seventy percent of criminal cases coming to the higher courts are, in some way or other, connected with illegal drugs.

If the criminal workload is relatively impervious to change, alternative dispute resolution must concentrate on civil disputes. Whilst the courts should be made more accessible to meet the problem mentioned by Chief Justice McEachern, their incapacity in the foreseeable future to provide justice for middle class citizens who cannot afford lawyers leads inevitably to the exploration of alternatives.

It is here that Provincial Courts, and the Court of Quebec, as the first instance court where most citizens come for justice, have a special responsibility. It is in such courts that, for most of our people, the law and justice manifest themselves. It is imperative therefore to enhance standards and enlarge jurisdiction. But not at the price of increasing costs and distancing the first instance courts from the ordinary citizens in the community they serve. Otherwise the courts will increasingly become still more irrelevant to the resolution of the disputes of ordinary people. Such people must then either accept perceived injustice with a cynical shrug or turn to the sometimes unequal forum of a non-court decision-maker. Every observer realizes that improving access to justice is a major challenge to our courts as they face the twenty-first century. Unless we can do so, our much vaunted boast of living under the rule of law involves a qualification. Our justice is then available only for people poor enough to qualify for legal aid or rich enough to afford lawyers to represent them.

Those who do not want to close off access to justice in the courts will try to find better ways of processing claims than simply excluding people from judicial decisions. It is because courts themselves realize that they should not become the exclusive club for rich, powerful or funded litigants, that they are constantly searching for new procedures to enhance their social utility. Increasing the power of judicial officers to control proceedings more vigorously than they tend to at present, may be one way. In appellate courts, and probably also at the trial level, I believe that we will see strict time limits imposed for oral argument. Such limits have long since been observed in the Supreme Court of the United States and more recently in the Supreme Court of Canada.[12] We may even see judicial officers made available to parties for a strictly limited time to determine their case. The lawyers' skill would then become that of so refining the issues for determination as to present them to the judge in a manner suitable for decision in the time allotted.

If there are some who believe that technology will miraculously solve all of these problems, it must be said there will be many new dilemmas which technology will introduce which technology will introduce which will take up the time of the courts. I have already mentioned the complex problems presented to the law by computers and transborder data flows. Even more difficult of resolution are the dilemmas of biotechnology. In Canada, and in other

countries, judges have had to decide whether, contrary to parental wishes, remedial surgery should be performed on retarded or physically incapacitated infants.[13] Lawyers who are judges may have only a general knowledge of the technology about which they must make decisions. The forensic trial may not be the best way of equipping such decision-makers for an understanding of the ramifications - technological and social - of the decisions they make. Yet, ultimately, society must have a place where decisions can be made in hard cases, even those involving entirely novel questions. In countries like Canada and Australia, that burden falls, ultimately, on the courts. It is unlikely that this feature of the judicial role will change in the century ahead. All that can be safely predicted is that the decisions will become more numerous, more difficult and more controversial.

REORGANIZATION OF THE TRIAL COURTS

I have left till last three matters of controversy. I have done so in order to lift your flagging spirits and to reward those who have stayed the course with a few words of topical relevance.

High in the concerns of the participants in this conference is the future design of trial courts in Canada. The reorganisation of the trial courts has been a feature of the Canadian judicial scene, at least since 1934. It was in that year that the Ontario District Court judges proposed to the Attorney General a merger of their Court with the Supreme

Court.[14] The proposal was repeated in 1971 in a submission to the Ontario Law Reform Commission. In 1975 all of the District Court Judges of Prince Edward Island were elevated to the Supreme Court, resulting in a single trial court. In 1978 the Court of Queen's Bench of Alberta was formed by a merger of the District Court and Trial Division of the Supreme Court. Similar amalgamations took place in the succeeding years in other provinces. In 1987, the Ontario Courts Inquiry under Justice Thomas Zuber recommended the establishment of a single superior trial court for that province.[15] However, an "infamous" sentence on page 83 of that report held back from recommending that judges of the District Court be automatically transferred to the proposed Superior Court. It would be made up of all current High Court Justices together with new appointees. The most that Justice Zuber would recommend was that "the appointing authorities look first to the members of the District Court when increasing the complement of the new Superior Court".[16] It was this recommendation which, naturally enough, raised deep concerns about the personal position of the incumbents in the District Court. More fundamentally, it raised important questions concerning the protection for, and respect of, judicial independence upon the reorganization of a court system.

I am, of course, aware of this controversy and the way in which it has implications for the role, appointment, status, salaries and independence of the Provincial Court

judiciary. In the recent past, that judiciary has had a lively concern about its own independence as witness the Valente litigation which went to the Supreme Court of Canada.[17] There is no doubt that the judges of the Provincial Courts perform the overwhelming bulk of criminal dispositions in Canada. The estimates run up to 97%. They are certainly over 90%. Pressure for rationalization of the court system arises in respect of civil trials where delays are great and occasion the abandonment of claims or resort to alternatives outside the courts. But they are most acute in the field of criminal law. This has led to a proposal by the Law Reform Commission of Canada for significant changes in criminal procedure and for consideration of a Unified Criminal Court.

This proposal arose out of suggestions by Professor Friedland in 1969 for a substantial restructuring of the court hierarchy.[18] The proposal gained momentum with the passage of the legislation in Quebec to amend the Courts of Justice Act and to reorganize the Provincial Court, the Court of Sessions of the Peace and the Youth Court into a single judicial body: the Court of Quebec, whose members are our hosts at this conference. The details of the reorganization will be well known.[19] At the time of the consolidation the hope was expressed that a single judicial body would "help to standardise management practices and administrative practices which in the past often differed from one court to another and even from one region to another, often without any clear

justification". It was hoped that the new structure would "allow for better coordination and planning of human material and financial resources, particularly in view of the fact that all new judges appointed to the Court of Quebec [may] be required to exercise the court's full jurisdiction, whatever division they are assigned to".[20]

The difficulties in the way of pressing further the form of "qualified" unification evidenced by the merger of Superior Courts has been acknowledged by the proponents of still further unification in a single provincial trial court.[21] As well possible constitutional difficulties, which I would not dare to explore, are said by some to stand in the way of any proposal which undermines the constitutional assumption of a superior court. But the proponents of reform, like law reformers everywhere, are courageous (or foolhardy) enough to press on with their ideas. They urge the removal of the multi-tiered court system, at least for the trial of criminal cases in order to reduce the complexities of procedural complication said to be "Byzantine" in their intricacy, to rationalise the use of court resources, to reduce the delays occasioned by labyrinthian structures and to facilitate better scheduling of cases and the more efficient disposition of scarce and expensive judicial time.

Behind the arguments for change are sensitivities as to salary, designation, status and perceived independence on the part of judges appointed under s 96 of the Canadian

Constitution and judges appointed by the provinces. I was somewhat amused to see one note which indicated that a source of particular anxiety in some quarters is the fact that Provincial and County Court judges are called "Your Honour" whereas judges of the Superior Courts are addressed as "my Lord" or "my Lady".[22] In Australia and New Zealand, as in the United States, judges of superior courts must all make do with "Your Honour". No Lordships or Ladyships breathe our more egalitarian air. Perhaps this is the equalising direction in which you should be moving. The notion of appointing more Lords and Ladies on the brink of the twenty-first century and in the New World strikes an outside observer as a trifle anachronistic.

There are, of course, opponents of the unified criminal court in Canada, just as there are in Australia. If I rehearsed for you the basis of the opposition in my own country, it will (I feel sure) come as no surprise. Whenever it is suggested there, the opponents say that (difficult and hurtful as it is to mention it) there is within the judiciary, as there is in any field of expertise, a hierarchy of talent. True, it is not reflected exactly in the disposition of personnel throughout the court decided hierarchy. Occasionally, at the highest level there is a poor appointment. Quite often at the lowest level there are brilliant appointees who would grace the appellate bench. But the notion that every judicial officer is of equal talent is self-evidently false. Some appellate judges who are first

rate in conceptualising the law might be much less expert in running a trial. Some judges capable in a short trial might not have the trial experience or even the intellectual equipment to run a lengthy trial or one bristling with numerous difficult and technical points. A Canadian judge of my acquaintance, in a letter to me, encapsulated this idea, in a comment on the single trial court that it involved a "kind of socialist levelling [which] has never succeeded in economic matters; I have great doubts that it will work in the judicial system".[23] To the same effect is the comment of another judge that the notion that all judges are equal is "logically and factually unsound".[24] If a single court were imposed, so it is argued, an informal hierarchy would develop within it which would impose heavier burdens of responsibility and industry on some members without commensurate reward or public recognition.

I do not venture to arbitrate between these schools of thought. We in Australia are some way behind the developments that have already occurred in Canada. In most of the jurisdictions of Australia there are still three tiers of judicial officers: magistrates, District Court judges and judges of the Supreme Court. Only in one State, my own, is there a separate permanent Court of Appeal. The other States persist with various forms of rotational Full Court arrangements. As in Canada, there is a Federal Court. There is also in Australia a separate Family Court. The system comes together in the High Court of Australia which hears

appeals only by special leave of that Court. There are no formal moves to create a single trial court; although proposals to that end are occasionally made by politicians who speak of combining the trial divisions of the Supreme and District Court or, occasionally, of the Supreme, District and Local Courts. In New Zealand a major reform was achieved 15 years ago, following a Royal Commission, when the Magistrate's Courts were abolished and magistrates elevated to a District Court with the status, title and designation of judge. In these circumstances, you will understand me when I say that not a few judicial eyes are upon the reforms that you are effecting in Canada. Although we do not have the same dichotomy between Federally and State appointed State judges, many of the issues raised in your debate present parallels to our situation.

Greater efficiency is certainly needed in the use of judicial time. But ability and experience in judicial officers is not equal, any more than in other professions. How we recognise and reconcile these two propositions is the challenge for court reorganisation. Even if you were to fasten me to the rack, you would not extract more opinions on the topic than that.

PUT NOT YOUR FAITH IN PRINCES

In Australia, the controversies about court reconstruction have been different. They may have some parallels for you in Canada. You should study them and ensure that you do not make our mistakes. Traditionally, in

Australia, as in Canada, where a court or court-like tribunal is restructured, great care has been taken to appoint all former members of the abolished court or tribunal to the new body. This is done, not out of respect for the talents of the incumbents. Of necessity, they will have been revealed with varying strengths and weaknesses. Instead, it is done out of respect for the principle of judicial independence and the notion that a judicial or other independent officer holder, once appointed, should not effectively be removed from office by the simple expedient of the reconstruction of his or her court. Sad to say, that is what has happened in two unfortunate cases in Australia in recent years.

One case concerned Justice James Staples, a judge of the Australian Conciliation and Arbitration Commission. For constitutional reasons, that body is not, strictly, a Federal court. But by an Act of Federal Parliament its members, with legal qualifications, were given the same title, rank, designation and salary as a Federal Court judge. They were appointed by a like commission. Moreover, the Act of Parliament appointing them provided that they could only be removed from office in the same way as a Federal judge could be removed, namely by an address of both Houses of Federal Parliament in the same session praying for the removal by the Governor General on the ground of proved misbehaviour or incapacity.

Justice Staples, a charming and interesting character, was something of a maverick. Successive Presidents of his

Commission reduced and then abolished his sitting allocations in that body. The government took the occasion of the restructuring of the body and the creation of the Industrial Relations Commission of Australia to appoint every member of the former tribunal to the new body, except Justice Staples. There was a delayed protest but a vigorous one. It is a bad precedent.[25]

Just as bad is what occurred on the reorganization of the magistracy of New South Wales. The purpose was admirable. It was to abolish the Courts of Petty Sessions and reconstitute the Magistrate's Courts as an independent Local Court. Only five of more than one hundred magistrates of the old court were not "reappointed" to the new. These five were not informed of certain allegations of unfitness which had been made privately about them to the Attorney General when it was recommended that they should not be appointed to the new court. The New South Wales Court of Appeal set aside the decision of the Attorney General not to recommend their appointment. It held that the decision was voided by procedural unfairness.[26] It held that the magistrates were not entitled to an order for appointment to the new court but to a declaration which would secure them a full and fair consideration of their applications, freed from the allegations of unfitness which had not been disclosed to them. The High Court of Australia refused to grant special leave to appeal from that decision.

Unfortunately this was not an end to the litigation.

The State Attorney General purported then to require each of the five applicants to make a fresh application. He stated that they would only be considered along with other fresh applicants and, by inference, in competition with them. In respect of the lone former magistrate who stayed the course, the Court of Appeal decided that no fresh application was required. His original application should still be considered by the Attorney General according to law. The Court of Appeal said:

> "The vice of the course which is followed by the Attorney General is plain. The public interest in the security of judicial tenure upon reconstitution of a court was given no apparent weight and was not acknowledged ... [There was no] warrant in treating Mr Quin and his colleagues merely as fresh applicants, in competition with other new applicants, when a principal basis of the previous decision was their special position from which only was derived their special entitlement."[27]

This decision was recently reversed by the High Court of Australia by a narrow majority.[28] The majority held that the courts should not intrude into the workings of the Executive Government to review judicially advice given to the Crown on the appointment of judicial officers. Such legitimate expectations as the former magistrates held by reason of their earlier Judicial office could not, so the majority held, stand against the unfettered power of the

Puisqu'au Canada, vous avez adopté le principe similaire de la nomination à la magistrature par la Couronne (que ce soit au niveau fédéral ou au niveau provincial, c'est

le gouvernement qui nomme les juges) vous pourriez tirer des leçons, des exemples malheureux que je viens de mentionner. Les protestations générales résultant des recommandations du juge Zuber concernant la nomination des juges indiquent la haute sensibilité qui, à bon droit à mon avis existe au Canada à ce sujet. Les juges canadiens doivent être vigilants lorsqu'il s'agit de restructuration des tribunaux. Ils devraient toujours se rappeler la mise en garde "Shakespearienne" qui est particulièrement à propos pour la magistrature dans ses relations avec l'exécutif: "ne mettez pas tous vois espoirs dans les princes".

THE CHALLENGE OF THE CHARTER

I will not tarry long over the tremendous impact of the Charter on future judicial activity in Canada. I can safely leave this to my admired friend Walter Tarnopolsky. In this regard we in Australia remain staunchly unreformed. It is not true to say that the Australian Constitution contains no express or implied constitutional guarantees.[29] In a number of critical decisions, our highest court has found in the somewhat sterile language of our Federal Constitution unexpected principles defensive of notions useful for rights and freedoms. Perhaps the most notable case occurred when Federal legislation to ban the Communist Party was declared unconstitutional, even at the height of the Korean War in 1951.[30] More recently, a little known provision in the Constitution was found to be a weapon to strike down the restrictions placed by the Queensland courts on interstate

legal practitioners securing a right of audience before the State courts of Queensland.[31] Many are the decisions where the High Court and other courts of Australia have upheld fundamental principles of the common law in the face of the general language of legislation which did not (as it was found) adequately demonstrate an intention to repeal or override basic rights.[32]

However, the fact is that we in Australia do not enjoy the stimulus of a Charter. I am aware of the controversy in Canada, even after the Charter, as to the desirability of providing such a large licence for lawmaking to such a small group of unelected and unaccountable officials.[33] The fact is that you now have the Charter. It is no reproach to judicial officers to say that they must learn to live with it. They must give effect to its obligations and opportunities. It imposes upon judges at every level in Canada duties of foresight and conceptual thinking, of social engineering and sensitivity that takes your judiciary beyond the traditional tasks still performed by your judicial cousins in the Antipodes. These are obligations and opportunities which did not exist a century ago. Where they will take your judiciary in the century ahead remains to be seen.

It will be fascinating, from afar, to study the course of this experiment. There seems little likelihood that Australia will take the same path in my lifetime. An attempt in 1988 to introduce a few seemingly uncontroversial basic

rights in our Constitution was lost at the referendum. The proposals did not secure approval in a single state or territory. None of them secured a national vote of more than 30%. Constitutionally speaking, Australia remains the frozen continent. Its people resolutely support the notion of lawmaking by Parliament, not the judiciary. Any amount of judicial and academic writing about the existing scope of judicial lawmaking in the common law will not convince a sceptical population otherwise.[34]

A LAND FAVOURED BY PROVIDENCE

The basal question of the future of Canada itself cannot be ignored. It behoves a foreign visitor to step lightly where home-grown judicial angels would fear to tread. What can I properly say on a topic at once so important and so sensitive?

In a sense, we all have Crown commissions. By whatever government appointed, we are all part of the constitutional machinery of our respective countries. In the past, there has been a tendency to over-estimate the similarities between Australia and Canada. True, they share a similar history of a period of British colonial rule. They also share Federal political systems, enduring economic affluence by comparison with the rest of the world, large sparsely populated territories and a legal system profoundly influenced by the common law of England. Yet according to recent observers, our two Federations have increasingly taken divergent paths[35]. Fundamentally, this has been attributed to the

regionalism which has persisted in Canada but has been absent in Australia. My country has been described, with accuracy, as possessing "linguistic, social and cultural homogeneity unparalleled across so great an area anywhere else in the world".[36] It has been the special linguistic and cultural feature of this part of Canada which has given your confederation its particularly, unique character and its imperative need for internal sensitivity.[37]

Nagging at all our minds in considering the future of the judiciary of the Provincial Courts of Canada a century hence is the inevitable question: What will be the shape of Canada at that time? Every decade or so you seem to have a crisis in Canada. Foreign observers see it come and then recede. But it would be a mistake to see these crises as peculiar to the Canadian community. A moment's reflection upon the revolutions of the last year, which are continuing in Eastern Europe, the Soviet Union and down into Asia, demonstrate the abiding power of language and culture and group identity. I have no doubt that in the decades ahead we will see much more of group rights and peoples rights as a complement to the assertions of individual human rights which have so dominated international thinking in the past fifty years.[38]

Canada and Australia share an official philosophy of multiculturalism. You were there first; but we followed close behind. You arrived first because you had longer to think about the issue by reason of the special place of

Quebec in the Confederation. It was the very existence of the two dominant communities which sparked the idea of multiculturalism, as Pierre Trudeau explained it:

> "In Canada ... the die is firmly cast. There are two main ethnic and linguistic groups. Each of them is too strong and too deeply rooted in the past, too firmly bound to a mother-culture, to be able to engulf the other. I have always believed that if these two groups could collaborate at the hub of a truly pluralistic State, Canada could become an envied seat of a form of Federalism that could be a brilliant prototype for the moulding of tomorrow's polyethnic civilisation, a better model even than the American melting pot. Rather than forging a new alloy, the Canadian model would preserve the characteristics of each group in a mosaic of cultural coexistence."[39]

There is no more eloquent statement of the philosophy of cultural coexistence which is now accepted on a multipartisan basis for the Commonwealth of Australia. No longer do we insist that all should march to the one drum. At its heart, that notion has a fascist ideal of uniformity, consistency and compliance. Diversity on the other hand, is the protectress of freedom. The acceptance of diversity in a multiracial and multicultural Federation is a true model for the world of the twenty-first century. After Hiroshima, it must be the model to which humanity aspires if it is to survive and flourish in this blue planet. If the federal idea in some form cannot succeed in Canada, Balkanisation is the inevitable alternative.

There would be certain tears if the Federation of the Soviet Union were to fall apart and the myriad of little

Republics, with their old battles, sentiments, hatreds and prejudices were revived unconnected with each other and warring at their borders. But I venture to suggest that there would be a flood of tears if the brave idea of Canada proved beyond the safekeeping of this generation of people and politicians. Forgive me for speaking on a topic so delicate. But a conference in Canada, at this time, which failed to look to this aspect of the future would not deserve intellectual credibility.

Ce sont les juristes qui mettent les fédérations en place et qui créent les formules de constitution fédérale. Ce sont les juristes et plus particulièrement les juges qui mesurent les situations et qui protègent les droits fondamentaux des individus, y compris des minorités. Le fédéralisme est du légalisme. Néanmons, c'est un système de justice particulièrement adopté au zle siecle alors qu'à coup sûr, il existera de forte pression vers la centralisation, l'uniformité et un contrôle omniprésent. Il constitue une espèce d'inefficacité planifiée de la société et du gouvernement: mais une inefficacité qui défend la liberté, les droits de la personne et des peuples. Pour cette raison, elle est souhaitable.

We, as judges and unelected officials cannot solve the great political controversies of the day. But by good example, working together, speaking each other's language and drawing on the strengths of more than one legal and cultural tradition, we can greatly enrich our societies. By good

example, we can lead them confidently to the future. It is this prospect which lured me across half the world to this historic city, at a special time, to the company of fellow workers in the cause of justice under the law. My fervent hope is that, a century hence, when judges and lawyers of Canada gather in Quebec City, they will talk of the adaptation of ancient systems of law to an age of unimaginable technology. But they will also talk, as we will, of the rule of law: safeguarded by independent judges of integrity, diligence and learning in a land favoured by providence.

Enfin plusieurs choses changent. Mais certaines doivent toujours demeurer telles qu'elles le sont.

ENDNOTES

* Keynote Address delivered to the Conference of the Association of Canadian Provincial Court Judges and of the Cour du Québec, Quebec City, Québec, Canada, 13 September 1990.

** President of the Court of Appeal, Supreme Court of New South Wales, Australia. Commissioner of the International Commission of Jurists. Personal views.

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4. Id, 27.
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19. (1988) 14 Cth L Bulletin 295.

20. Ibid, 296.

21. Cohen, 9.

22. Ibid, 10.

23. Unattributed letter to the author, 11 April 1990, 2.

24. Unattributed letter to the author, 6 April 1990.

25. The story is told in M D Kirby, "The Removal of Justice Staples and the Silent Forces of Industrial Relations" (1989) 31 J Indl Rels (Aust) 334. See also J Kitay and P McCarthy, "Justice Staples and the Politics of Australian Industrial Arbitration" (1989) 31 J Ind Rels (Aust) 310.

26. Macrae & Others v Attorney General for New South Wales (1989) 9 NSWLR 268 (NSWCA).

27. Quin v Attorney General for New South Wales (1988) 28

IR 244 (NSWCA).

28. Attorney General (NSW) v Quin (1990) 64 ALJR 327 (HCA).

29. Murphy J in McGraws-Hinds (Aust) Proprietary Limited v Smith (1979) 144 CLR 633, 670; Deane J in Street v Queensland Bar Association (1989) 63 ALJR 715, 737 (HCA).

30. The Australian Communist Party & Ors v The Commonwealth & Ors (1951) 83 CLR 1. The story is told in M D Kirby, "H V Evatt, the Anti-Communist Referendum and Liberty in Australia" to be published in the Australian Bar Review, 1990.

31. See Street v Queensland Bar Association, above.

32. See Baker v Campbell (1983) 153 CLR 52, 85. A good recent illustration is Balog v Independent Commission against Corruption (1990) 64 ALJR 400 (HCA).

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34. See B Horrigan, "Taking the High Court's Jurisprudence Seriously" (1990) 20 Queensland Law Soc J, 143.

35. See A F Mason, "Judicial Independence and the Separation of Powers - Some Problems Old and New", The Leon Ladner Lecture, 1989, to be published in the U Brit Col L Rev.

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