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CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX, U-K. Tel: +44 207 976 1007

Fax: +44 207 976 2394 Email: info@cmja.org website: www.cmja.org

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**COMMONWEALTH
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Journal of the
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EDITORIAL

It is a particular pleasure to include in this issue of the *Journal* two contributions from members of the CMJA's Council. A profile of the Association's executive vice-president, Sir Henry Brooke, appeared in the last issue as he took office in succession to Michael Lambert CBE. In this issue Sir Henry writes on mediation, a method of dispute resolution of growing importance in Commonwealth practice.

John Vertes, of the Supreme Court of the Northwest Territories of Canada, serves as a Council member for the North Atlantic and Mediterranean region, and we print a lecture he gave recently on the introduction of an effective system of trial by jury in that remote part of Canada with its many different aboriginal communities.

(Lest anyone should suppose that the pages of the *Journal* are open only to the 'top brass', we repeat our invitation to all members of the CMJA, and indeed others interested in issues concerning the judiciary in any part of the Commonwealth, to send in contributions.)

It is mere coincidence that this issue has two pieces with a Canadian focus. The second concerns not the remote Arctic but the busy Provincial Courts in Ontario and British Columbia. We devote our Law Reports section to two cases, not leading cases in any sense, but examples of the chronic problems encountered by the courts in dealing with the sometimes overwhelming flow of business, especially with limited judicial resources. It is a theme to which we will return in a later issue.

Ghana also features twice in this issue. Sadly, we have to mark the passing of George Kingsley Acquah in March of this year after an all-too-short tenure of office as Chief Justice. The judiciary in Ghana, as in other parts of Africa, faces particular questions posed by the existence of customary law, and indeed many different systems of customary law within a single nation. Justice Gbadegbe of the Court of Appeal shows how the courts have risen to the challenge these questions present.

Finally, Henry McKibben, a resident magistrate in Northern Ireland, writes about the practice of his Family Proceedings Court in dealing with the views of the children who may be affected by its decisions. His examination of the issues will be of interest to judges and magistrates in many parts of our diverse Commonwealth.

This *Journal* seeks to inform and encourage discussion of a wide range of issues of concern to the judiciary. Some are matters of judicial practice – case management, alternative methods of dispute resolution, hearing the voice of the child or those unfamiliar with the style of the common law. But there are also major issues, essential to the administration of justice, notably judicial independence. Readers of the *CMJA News* were reminded in its recent issue of troubles or concerns in Fiji, Gibraltar, Trinidad & Tobago and Uganda. To this list we must now add the United Kingdom.

Readers will recall that in 2004 a Government press release announced the abolition of the post of Lord Chancellor. In the end the office survived, but down-graded: the Lord Chancellor is no longer Speaker of the House of Lords or head of the judiciary, but has acquired the novel title of Secretary of State for Constitutional Affairs. Another sudden announcement sees that Department transformed into a Ministry of Justice, which will have responsibilities for prisons as well as courts and judges. On the very day this Editorial is being written the concerns of the judges are being aired in a parliamentary committee. They worry about undue pressure over sentencing policy and at the many cases before the courts which will involve 'their' Minister. No doubt suitable arrangements will be made within the six-week time-frame the announcement allowed. But once again a major change was made without any notice to or consultation with the judiciary, or for that matter, any consideration of practice in other Commonwealth countries. Will they never learn?

The Editor welcomes contributions of previously unpublished work, such as articles, reviews, essays. Contributions, ideally no more than 3,000 words, should be sent to the Editor, Commonwealth Judicial Journal, c/o CMJA, Uganda House, 58-59 Trafalgar Square, London WC2N 5DX.

The views expressed in this Journal are not necessarily the views of the Editorial Board, but reflect the views of individual contributors.

OBITUARY: GEORGE KINGSLEY ACQUAH

Chief Justice of Ghana

We learned with great sadness of the death on 25 March 2007 of Justice George Kingsley Acquah. Justice Acquah was Ghana's 11th Chief Justice and took office in July 2003. I first encountered Justice Acquah and his wife shortly afterwards when he participated in the CMJA's Triennial Conference in Malawi. Justice and Mrs Acquah arrived earlier than most of the delegates and became observers at the rehearsals of the young flag bearers whom they encouraged with friendly warmth and enthusiasm. Justice Acquah was so enthused by the Malawi Conference that he offered to host a Conference in 2005. His personal interest and involvement in the preparations which led up to the Conference confirmed his reputation for efficiency and hard work. He will be remembered by the 300 participants at the CMJA's Conference in Ghana for his address on a topic close to his heart: "Judicial Reform: Impact, Driving Force and the Future", and for his warm welcome and generosity. His continued support of the CMJA's activities, despite his long illness will be forever remembered by members of the CMJA Council and staff.

Justice Acquah was one of the reforming and progressive Chief Justices of the Commonwealth today. He was a staunch supporter of the ideals of the CMJA and in particular judicial independence. Although he was not in post as Chief Justice for many years, his contribution to the judicial profession has left a lasting legacy in Ghana. His many innovations during his term as Chief Justice included working towards integrating traditional cultural values and modern (Western) jurisprudence, new technology in the courts, the establishment of special courts such as family and commercial courts, the fast track courts and many reforms to procedures in order to ensure an effective and efficient court administration system.

He believed that "reforms should ultimately be to increase accountability and transparency; institute competition and choice by providing alternatives like ADR and specialized courts; streamline procedure by allowing the bulk of



litigation, especially simple cases, to be resolved swiftly and inexpensively in one or two hearings; and those reforms that increase resources should address incentives of judicial actors".

Mr Justice Acquah was born in Sekondi on March 6, 1942 and attended Adisadel College, Cape Coast, from 1957 to 1963. He proceeded to the University of Ghana, Legon in 1964 to 1967 and obtained a B.A (Hons) Philosophy. Between 1968 and 1970 he studied and obtained LL.B. Hons in Law from the same University. From 1970 to 1972, Justice Acquah attended the Ghana Law School where he obtained his Professional Certificate in Law and was called to the Bar in 1972.

He was in private legal practice from 1972 to 1989, served as a High Court Judge from 1989 to 1994 when he was promoted to the Court of Appeal. In the following year he became a judge of the Supreme Court. He was Chairman, Budget Committee of the Judicial Service; Chairman, Judicial Service Reform and Automation Committee; and Chairman, Board of Trustees of the Institute of Continuing Judicial Education of the Judicial Service of Ghana. He also served as chairman of several important committees of the Judicial Council of Ghana.

Mr Justice Acquah was also the Chairman, National Multi-Sectoral Committee on the

Protection of the Rights of the Child, and a member of the Africa Regional Council of the International Planned Parenthood Federation (IPPFAR) and an honorary legal adviser to that Federation. He was also a Member of the Governing Council of the Ghana Legal Literacy and Resource Foundation; Patron, Commonwealth Legal Education Association; Editorial Advisor, Banking and Financial Law Journal of Ghana; and External Examiner (Law of Evidence) Ghana Law School.

As Justice Barbara Mensah wrote in her obituary of Justice Acquah. "He was man with tremendous energy, serious and passionate about his work but he will also be remembered as a warm and friendly person, a great family man who

smiled and laughed easily". In the Profile in the December 2003 issue of this *Journal*, our then West African Regional Vice President, Justice G M Quaye, said that "It is a truism that nothing good comes easy, that is to say, except by hard work. This aptly sums up the track of the current Chief Justice of Ghana, His Lordship Mr. Justice G .K. Acquah".

Chief Justice George Kingsley Acquah continued to work exceptionally hard until his death and he will be greatly missed by the Commonwealth judicial and legal community whom he inspired to further judicial independence around the Commonwealth.

Dr Karen Brewer, Secretary General

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MEDIATION IN THE COMMONWEALTH: ENGLISH AND AFRICAN PERSPECTIVES

The Rt Hon Sir Henry Brooke

Executive Vice-President of CMJA, and formerly Vice-President of the Civil Division of the Court of Appeal in England and Wales.

At the CMJA Council meeting last September we heard something of the efforts now being made throughout the Commonwealth to establish mediation as an alternative means of resolving civil disputes. For instance, we were told that mediation was now fully established in all the member states of the Organisation of Eastern Caribbean States, although the number of cases referred to mediation, and the comparative success rate of mediation, were both still quite modest, as always happens at the start of a court-inspired mediation programme. In Jamaica mediation in the courts is now being given increased focus: it is seen as a complementary mechanism to restorative justice. And in Ghana the standard court building plan is being adapted so as to provide accommodation for chiefs and other traditional rulers to participate in court-based mediation processes, thereby supplementing the efforts of judges and magistrates towards this end.

Last summer I met the participants in a training programme conducted in both Pakistan and London by the London-based Centre for Effective Dispute Resolution (CEDR) for judges and administrators in the province of Sindh. In November 2006 I took part in the tenth anniversary celebrations of the Nigerian Negotiation and Conflict Management Group (NCMG) in Lagos and Abuja. More recently I spent a week with a group of Kenyan judges and lawyers who were visiting London to learn, among other things, what they might do to foster ADR through Kenyan court processes. And at the same time the ADR Group, another UK training provider, announced an 18 month project focussed on equipping judges and lawyers in India with core mediation and negotiation skills. The project would include a 'Train the trainers' programme in order to ensure the continuation of high quality training programmes locally after the project ended. All round the

Commonwealth interest is now being expressed in ADR and its possibilities. In this article I will say something about our experience in England and Wales; add a few thoughts based on my personal experiences as an accredited 'hands-on' mediator since my retirement from the Bench six months ago; and describe what I saw and heard on my visit to Lagos and Abuja.

The emergence of ADR

In most Commonwealth countries ADR, other than arbitration, is a comparative newcomer to the civil justice scene. Adversarial litigation is the means provided by the State for dispute resolution within the common law tradition on which our systems of justice are founded. Hundreds of years ago, trial by ordeal and trial by battle were also on offer. And even longer ago King Solomon devised a yet more imaginative way of resolving a dispute over the parentage of a child (see the First Book of Kings, Chapter 3, verses 16-28). But by and large trial by a judge in a public court, sitting with or without a jury, has become the accepted means of official dispute resolution. Our civil procedure codes set out the way in which cases should be started, processed, and ultimately brought before a judge for trial. At the trial the judge will impose a solution on the parties if they have not already settled their dispute outside the court process.

In recent years, however, there has been worldwide recognition of the fact that litigation is not necessarily the only, or even the best, way of resolving disputes which the parties cannot settle by themselves. In some countries the emerging forms of dispute resolution are simply the rebirth of processes which go very far back into the country's history. Pakistani judges, for instance, have told me that mediation as a means of dispute resolution is anchored deep in the culture of their people, and that it was not a novelty at all. African

judges tell me the same thing. What is a novelty is the creation of procedural rules in modern codes that facilitate the use of mediation by those who are willing to have recourse to it. This is accompanied by appropriate training for judges and lawyers who have become well versed in conventional litigation practice. Some of them regard the advent of mediation with considerable suspicion, if not outright fear.

The English experience

In some countries, like the United States, Canada and Australia, there are jurisdictions which give a court power to order parties to submit their dispute to mediation quite often this is the result of pressure on court lists. At last autumn's conference in Abuja, Judge Alexander H Williams III gave a vivid description of a mandatory settlement conference in his courtroom in Los Angeles. He said that it was widely believed among local judges and attorneys that mediation would never have become so widespread and accepted as it is now if judges had not 'forced' cases into some kind of settlement conversation.

Governments, indeed, often see mediation as a cheaper means of dispute resolution when they are puzzling how to provide arrangements which guarantee justice not only fairly but also with reasonable speed. In England we have not gone down that path. English ADR providers believe very strongly that recourse to mediation should be a voluntary act, even if the move towards that voluntary act may be stimulated by judicial encouragement or direction.

Their view is now buttressed by a ruling in the Court of Appeal three years ago (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002) in which Lord Justice Dyson said:

We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in

Strasbourg has said in relation to article 6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to 'particularly careful review' to ensure that the claimant is not subject to 'constraint': see *Deweer v Belgium* ((1980) 2 EHRR 439, para 49). If that is the approach of the [European Court of Human Rights] to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6.

Many experienced commentators, including myself, are doubtful about the correctness of this ruling, since nobody can be compelled to reach an agreement at a mediation, and if mediation fails, access to a court is still guaranteed. There is, however, a general reluctance to order parties to incur the extra cost involved in a mediation if they do not wish to incur this expense, particularly in connection with low value disputes. I describe later in this article the efforts now being made in England to provide court-based mediation in low value claims at no extra cost to the litigants.

In the Commercial Court

When Lord Woolf started his two-year inquiry into Access to Justice in 1994, the judges of the Commercial Court had already adopted a practice of staying proceedings for a month if they thought that there was a reasonable prospect of having the matter resolved in some other way if the parties set their minds to it. They would direct the parties to take serious steps to resolve their dispute by recourse to ADR, and to exchange lists of neutral people to whom they might take their dispute for resolution. If these efforts failed, the litigation would continue as before.

Mr Justice Colman, who has been one of the foremost proponents of ADR in that court, explained concisely in one of his judgments what commercial mediation was all about. He said that as a tool for dispute resolution mediation was not designed to achieve solutions which reflected the precise legal rights and obligations of the parties. Instead it achieved solutions that were mutually acceptable to both sides at the time of the mediation. In

other words, both parties are willing to accept a mediate solution which is 'good enough', even if it does not give them what they are advised is probably their full legal entitlement.

Lord Woolf's reports

Lord Woolf published two reports during the course of his inquiry. In his interim report in 1995 he observed that resort to ADR had grown in recent years across the world. The contribution it might make to the fair, appropriate and effective resolution of civil disputes was becoming increasingly well known. Litigation was not the only means of achieving this aim, and it might not be the best way in every case. There was a need to increase the awareness of what ADR had to offer among the legal profession and the general public, and it was desirable to consider whether the various forms of ADR had any lessons to offer to the courts in terms of practices and procedures.

His final report in 1996 contained four relevant recommendations. When there was a satisfactory alternative in existence to resolving disputes in court, the court should encourage the use of that alternative. To this end, court staff and judges must know about the forms of ADR that exist and what can be achieved by them. At the first case management conference and also at the pre-trial review under the new procedural regime, the parties should be obliged to tell the court whether they had discussed ADR, and if not, why not. When deciding on the future conduct of a case, the judge should be able to take into account a litigant's unreasonable refusal to attempt ADR. And, finally, Government should bear the responsibility of making the public aware of the possibilities offered by ADR.

The Government accepted the main thrust of these recommendations. When the new Civil Procedure Rules came into effect, CPR 1.1(1) spoke of a new overriding objective of enabling the court to deal with cases justly, an objective the court had to further by active case management (CPR 1.4(1)). In the present context the phrase 'active case management' expressly included encouraging the parties to co-operate with each other in the conduct of proceedings, encouraging them to use an ADR procedure if the court considers that this would be appropriate and facilitating the use of that

procedure, and helping the parties to settle the whole or part of the case (CPR 1.4(2)(a)(e)(f)).

Incentives

So far as costs incentives were concerned, Lord Woolf recommended that the court should use its power over costs to encourage co-operative conduct on the part of litigants and to discourage unreasonable conduct, both before and after proceedings were commenced. These recommendations were implemented through the new Costs Rules in CPR Parts 43-48. Their purpose is to make the court's powers when awarding costs more effective as incentives for reasonable party behaviour and more compelling as deterrents against unreasonable behaviour. The Rules expressly provide, for instance, that in deciding what order (if any) to make about costs, the court must have regard to the conduct of all the parties (CPR 44.3(4)(a): and see also the detailed provisions contained in CPR 44.3(5)). Over the last seven years the English courts have been repeatedly making costs orders with these purposes in mind.

Other methods of encouraging co-operation between the parties can be seen in CPR 15.5(1), which allows the parties to extend the period for filing a defence by agreement and to ask for a stay of the action to allow the parties time to settle the case (CPR 26.4). The court will direct that the stay should last for one month, or for such specified period as it considers appropriate, in order that it may maintain control over the management of the case. Open-ended stays, which allow the court to lose control, are not provided for. The efforts the parties may make to resolve their dispute are a factor to which the court must have regard when deciding the amount of any costs award (CPR 44.5(3)(ii)).

As an example of these processes at work, a district judge showed the Kenyan judges an order he had made in a particular case; the order was made on 15 July 2005 after the claim form had been served, in these terms:

The parties do give serious consideration to using the Mediation Scheme at the Central London Civil Justice Centre with a view to reaching an early settlement... The parties will be expected to provide an explanation if mediation has not been attempted. Costs consequences may follow.

The action is stayed until ... 15th September 2005 ... during which period the parties shall try to settle the matter or narrow the issues.

By 4 pm on Thursday, 15th September 2005 the Claimant shall notify the court in writing of the outcome of the negotiations ... and what, if any, further directions are required.... If settlement has been reached the parties shall lodge a consent order signed by all of them.

Time for the Defendants to file defences extended until Thursday, 29th September 2005.

In other words, the defendants were excused from taking the next step in the action until after it had been ascertained whether the parties were able to resolve their dispute before they incurred any further litigation costs, and both parties were warned in bold print that there might be adverse costs consequences if they refused to attempt mediation without being able to explain convincingly why they had taken this course.

Current English practice

In achieving the aim of helping the parties to settle, the new Rules encourage the resolution of disputes before they come to litigation. Since April 2006 parties to litigation have been warned, through a new provision contained in paragraph 4.7 of the CPR Practice Direction on Pre-Action Protocols, that

The Courts take the view that litigation should be a last resort, and that claims should not be issued prematurely when a settlement is still being actively explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court must have regard to such conduct when determining costs.

In order to comply with this protocol parties must consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both sides may be required by the court in due course to provide evidence that alternative means of resolving their dispute were considered.

So far as English caselaw is concerned, in an early case, *R (Cowl) v Plymouth City Council*

[2001] EWCA Civ 1935; [2002] 1 WLR 803, Lord Woolf was concerned with a judicial review challenge to the elderly claimants' treatment by a public authority who had statutory responsibility for their care. All a court could have done would have been to order the authority to think again. Lord Woolf said that insufficient attention had been paid to the paramount importance of saving cost and reducing delay in such a case by avoiding recourse to judicial review procedures. In future a judge should scrutinise such applications very carefully and should use his powers to ensure that parties tried to resolve their dispute with the minimum involvement of the court. He added:

We do not single out either side's lawyers for particular criticism. What followed was due to the unfortunate culture in litigation of this nature of over-judicialising the processes which are involved. It is indeed unfortunate that, that process having started, instead of the parties focussing on the future they insisted on arguing about what had occurred in the past. So far as the claimants were concerned, that was of no value since Plymouth were prepared, as they ultimately made clear was their position, to re-consider the whole issue. Without the need for the vast costs which must have been incurred in this case, the parties should have been able to come to a sensible conclusion as to how to dispose the issues which divided them. If they could not do this without help, then an independent mediator should have been recruited to assist. That would have been a far cheaper course to adopt. Today sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible.

Soon afterwards, I was concerned, in *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 1 WLR 2434, with a private law dispute in the Court of Appeal. The claimant owned a paddock next to a railway line, in which she kept three beautiful horses. There was an old-fashioned crossing over the line, and pedestrians could cross the line there, if there were no trains about, and then pass through a gate into her field and onto an adjoining path. On the day in question some children had left the gate open, and the horses strayed onto the

line where they were all killed by the Swansea to London express. The defendants owned the railway line, and they considered that they had no legal liability for what had occurred. Their lawyers fought the claim all the way to the trial in the local county court, where they won.

The claimant then sought permission to appeal, and when Lord Justice Schiemann granted permission to appeal, he strongly advised the parties in writing to resolve their dispute by mediation before any further costs were incurred. The claimant was willing to try, but the defendants were not. And they did not explain why they were not willing to try. Instead they argued their case all over again in front of my court, and again they won on the law.

But when they asked for their costs we said 'no'. We said that it was obvious that the dispute had long since stopped being about money. All the claimant really wanted now was some formal expression of regret. The case had cried out for mediation as soon as Lord Justice Schiemann had suggested it.

We gave two main reasons for denying the defendants their costs. The first was that we felt that they had failed in their express duty, imposed in CPR 1.3, of helping the court to further the overriding objective. We added that a mediator might have been able to provide solutions which were beyond the power of courts and lawyers to achieve. We said that we knew of cases where intense feelings had arisen but a skilled mediator had been able to achieve a settlement of the dispute on terms with which both parties were happy to live.

The main message from that judgment was that parties and their legal representatives should be alert in future to the possibility that if they turned down the suggestion of ADR out of hand when it was suggested by the court they might have to face uncomfortable costs consequences even if they won.

Costs

These two cases sent a clear message to litigators that they now had to take very seriously the possibility of resolving their clients' disputes by ADR. At the same time the Government stated that it would consider the possibility of ADR as a serious alternative to litigation in every matter in which the Government itself was involved. ADR providers said that there was then an increase

in the number of disputes being referred to mediation, and they were reporting quite high success rates. There remained, however, some uncertainty about the circumstances in which a court might refuse costs to a successful party who had refused to contemplate ADR, and two test cases were prepared for a hearing by the Court of Appeal on this point, with ADR providers being allowed to intervene in order to tell the court what was now happening in the mediation market.

In giving the judgment of the court in those cases (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002) Lord Justice Dyson said that while a court had no power to order parties to mediate, it could, however, encourage them to consider ADR in the strongest terms, and could facilitate mediation. Every lawyer should routinely discuss with his or her client whether the dispute was suitable for ADR. At the end of a case costs would normally follow the event, but if a successful party had acted unreasonably in refusing ADR, the court might make a different order. The court explained how a party's reasonableness in this context would be assessed. Relevant factors included the nature of the dispute; the merits of the case; the extent to which other settlement methods had been attempted; whether the costs of mediation would be disproportionately high; whether any delay caused by a late mediation would have been prejudicial; and whether a mediation would have had a reasonable prospect of success.

The court must not, however, investigate why the ADR process did not result in agreement. What happened during the process must remain confidential to the parties and the mediator.

This decision undoubtedly led to a falling off of references to mediation, because litigators now believed that they would be less likely to imperil their clients' entitlement to costs so long as they explained in clear terms why they considered ADR unsuitable.

More recently, in *Burchell v Bullard* [2005] EWCA Civ 358, the Court of Appeal has reiterated the parties' duty to consider ADR in fairly strong terms in an appeal that arose in the course of a small building dispute. At the end of the day the claimants recovered a net sum of £5,000: to achieve this outcome the

parties had spent £185,000 in costs. Lord Justice Ward, who had presided in the earlier case, said that the merits of the case favoured mediation, and that the defendants had been unreasonable in refusing to mediate. The cost of mediation would have been minimal compared with the cost of the continuing litigation. On the facts of that case the court did not make a special order as to costs. He continued, however:

The profession must, however, take no comfort from this conclusion. *Halsey* has made plain not only the high rate of a successful outcome being achieved by mediation but also its established importance as a track to a just result running parallel with that of the court system. Both have a proper part to play in the administration of justice. The court has given its stamp of approval to mediation and it is now the legal profession which must become fully aware of and acknowledge its value. The profession can no longer with impunity shrug aside reasonable requests to mediate. The parties cannot ignore a proper request to mediate simply because it was made before the claim was issued. With court fees escalating it may be folly to do so. I draw attention, moreover, to paragraph 5.4 of the pre-action protocol for Construction and Engineering Disputes – which I doubt was at the forefront of the parties’ minds – which expressly requires the parties to consider at a pre-action meeting whether some form of alternative dispute resolution procedure would be more suitable than litigation. These defendants have escaped the imposition of a costs sanction in this case but defendants in a like position in the future can expect little sympathy if they blithely battle on regardless of the alternatives.

I recently mediated a settlement in a similar small building dispute where there was a Scott Schedule of disputed items nearly 40 pages long. The parties would have been heading for three arid, costly, days in the county court if they had not been wise enough to settle as a result of the mediation.

English pilot schemes

The ways in which ADR may be developed in England and Wales in future falls within the

remit of the Civil Mediation Council. This imaginative body is chaired by a senior retired judge, now Lord Slynn of Hadley and before him Sir Brian Neill, and it includes representatives of ADR providers, representatives of Government, and others interested in developing the use of ADR. A number of pilot schemes for mediation were first tested at different courts: Central London, Exeter, Birmingham and Manchester, for instance. In this pilot scheme the arrangements for the mediations were administered by the court’s staff, and the mediation usually took place at the court’s premises for three hours after the courts closed for ordinary business. The closing moments of some mediations were marked by the caretaker threatening to lock up and turn the lights out just as the parties were reaching a settlement.

The Manchester scheme involved small value claims: a former policeman successfully mediated many of them, often over the telephone, by fairly straightforward methods that might be less appropriate where larger sums were at stake. A Courts Service Press Release described the outcome of this experiment in these terms:

The pilot proved extremely successful with an 86 per cent settlement rate on the day of mediation. Most small claims that went to mediation in Manchester took around five weeks from the claim being lodged, whereas to take a claim to a full court hearing takes an average of 13 weeks. The mediation itself usually takes around one hour, though this can be extended depending on the complexity and value of the claim. The pilot originally focused on mediations in person but was extended to include telephone mediations with a substantial number of people taking up this option due to the greater flexibility afforded.

All these schemes were carefully monitored, with a view to analysing what worked and what didn’t work when mediation was attached to the processes of a particular court.

Present arrangements

After the trial period it was decided to set up a national court-based mediation scheme, administered from a small call centre in the west of England. If the court has successfully

encouraged parties to mediate, this centre will direct them to one of the ADR providers who have mediators available for hire in the relevant area of the country. The court will still provide a venue (when needed), but the ADR provider will identify the mediator, send out the mediation agreement to the parties, ensure that the mediation fees are paid, and arrange all the necessary paperwork. Nearly all the communications are conducted electronically, which makes great savings in time and cost to the parties. For instance, either the ADR provider or the mediator assigned to the case is obliged to keep an events log up to date on a closed area of the NMH's website, so that progress in the mediation, and its outcome, can be monitored inexpensively from the centre.

Once the centre has selected the local provider (CEDR or the ADR Group or ADR Chambers, for instance) whose turn it is to have a mediation at that centre, the provider will contact its chosen mediator, and he or she will then contact the parties if there is anything he or she needs them to know or to do before they meet for the mediation itself.

Mediations may also be arranged through the National Mediation Helpline (NMH). This was set up by the Courts Service, and it provides people with information and advice on mediation, and explains how they should apply for a mediator. The availability of the Helpline is advertised by leaflets, which are also distributed by the county courts to parties at the allocation stage of litigation, and by posters placed in public areas within the courts.

The Helpline can be accessed not only through its website but also by phoning the centre between 8.30am and 6.00pm. In addition to providing information about the potential benefits of mediation, Helpline staff will describe the mediation process. They do not provide advice on individual cases or mediators, and I have already described how mediators are provided through the call centre. Fees are charged on a fixed scale, ranging from £250 for a two-hour mediation (if the claim is under £5,000) to £750 for a four-hour mediation if the claim is worth between £15,000 and £50,000. Each side pays half the mediator's fee (although this may be re-allocated as part of a mediation settlement). The parties will negotiate the mediator's fee if the claim is worth more than £50,000.

In the second week of October 2006 there was a National Mediation Week. Events were arranged in different parts of the country to celebrate what has been achieved so far and to provide information about mediation to those who want to know more about it. At the Royal Courts of Justice there was a celebration of the tenth anniversary of the Central London County Court's mediation scheme. We had addresses from the Master of the Rolls, as Head of Civil Justice, and from the judge in charge of the Central London county court, as well as from Professor Dame Hazel Genn QC, a leading academic who has conducted research into a number of court-based schemes.

We are now seeing the introduction of a court-based mediation scheme for low-value claims. The Courts Service will train a number of members of their own staff who will be providing mediation services free of charge within different geographical areas to those whose cases have been allocated to the small claims track. One of them, who has had nearly 30 years experience in the courts, has recently said:

I have always had a strong customer focus and I'm really looking forward to playing a key role in changing the way small claims are dealt with and the way people perceive the procedure. Mediation is about encouraging communication between parties to give them a choice and to have control over reaching their own settlements.

In all these initiatives the Government, the judiciary and the mediation providers are working together to encourage the growth of mediation, and although there is still quite a long way to go, these recent developments have put civil mediation very firmly on the map throughout the country.

Personal experience

For my own part, I spent thirteen days in the second half of 2006 with three different training providers, learning to be a mediator. Mediation involves different skills from those required of a judge, and I still have a lot to learn. Gathering practical experience at the [fairly] shallow end has been quite like my early days at the Bar all those years ago.

My own personal experience as a mediator has showed me that very few disputes cannot be resolved through mediation. Of the 12 disputes

I have mediated so far, only four did not settle on the day, or shortly afterwards. I anticipate that at least half of these will settle within four weeks after the mediation. I have direct personal experience of successfully mediating a bitter employment dispute between an employer and an ex-employee, a bitter family dispute about money in a trust fund, bitter disputes between neighbours about a right of way across the property of one of them or the location of the boundary between neighbouring properties, and a hotly contested building dispute involving a quite small sum in which the 'Scott Schedule' of disputed items ran to 39 pages.

An allegation of fraud may make settlement elusive, or the issues may need more time to talk through than the single day allowed for the mediation. Problems, too may arise if one party is unrepresented and takes an over-optimistic view of the relevant law (since a mediator must not give legal advice to either party).

Conclusions on the English experience

Of course there are English lawyers who regard mediation with suspicion. Mediation transfers power from the lawyer to the mediator and the lawyer's clients (who are readier than the lawyer may be to determine that the proposed settlement terms are 'good enough'). But as English judges gain more experience of cases in which apparently irreconcilable parties have settled their dispute at the end of a session with an experienced mediator, and as the parties to disputes in this jurisdiction gain more and more experience of the advantages of recourse to mediation, I have no doubt that its use will grow and grow.

In summary, the English story so far is that it is now the duty of parties to further the overriding objective. This means that even if they are unwilling to mediate, they must be prepared to explain their reasons for adopting this attitude. Insurers and solicitors are now obliged to understand the advantages and disadvantages of mediation, too, because if they are not, they cannot make well-informed decisions and may be penalised in costs if they go on litigating regardless of the fact that mediation might well provide a more satisfactory and cost effective way of resolving the dispute. Expert mediators report 80% success rates, and even if the mediation does not result in settlement, the process very often takes a lot

of the heat out of the dispute and leads to a narrowing of the issues or a consensual settlement further down the line.

Nigeria

In Nigeria I saw a living example of the US-inspired 'Multi-Door Courthouse' concept, first propounded 30 years ago by Professor Frank Sander of the Harvard Law School, at the High Court in Lagos. This aims to supplement the avenues for justice by making available additional doors through which disputes can be resolved. Its proponents say they are able to utilise what they describe as the 'immense resource' of retired judges and senior citizens through the mediation, arbitration and other ADR mechanisms on offer. They say:

Instead of the traditional mono-door of litigation leading to the courtroom, the Lagos Multi-Door Courthouse has three other alternative and supplementary doors or openings by which disputants can resolve their disputes:

- Early neutral evaluation
- Mediation
- Arbitration.

When the claimant's statement of issues and the respondent's statement in response have been filed, the matter is assigned to a dispute resolution officer (DRO), whose task it is to determine the appropriate 'door' for referral. At a pre-session meeting the DRO will outline the options, and once the parties have chosen the path they want to take, will make the necessary arrangements. The fees chargeable for each option are readily available, and as in England, the ADR session may be held at the courthouse or at a venue of the parties' choice. A free *pro bono* service is provided for those whose statement of means satisfies the criteria stipulated by the Courthouse's Pro Bono Committee.

The impact of the Lagos Multi-Door Courthouse (LMDC) has been assessed in 12 different ways. It is said to provide easier justice for all; a reduction in judicial case dockets; speedy resolution of disputes (a former Vice-President of the Republic has made no secret of his delight when a 17-year old lawsuit was settled by mediation in one day through the auspices of the LMDC);

reduction in expense and time; ‘harmonious co-existence’; ‘accommodation and tolerance’; the restoration of pre-dispute relationships; the restoration of business relationships; public satisfaction with the justice system; resolutions suited to the parties’ needs; an increase in voluntary compliance with resolutions; and finally, and importantly, increase in foreign investment.

I chaired the CEDR Awards Panel which awarded the LMDC a ‘Special Mention’ in 2004, two years after it first opened for business. It has now been greatly enlarged with the help of British money, and I attended the day-long ceremony in Lagos which heralded the opening of the enlarged premises. The multi-door courthouse model is already being replicated in two other Nigerian states, and there are plans to extend it to 12 more states as soon as resources permit. At the same time a project sponsored by the World Bank is facilitating the use of ADR for the resolution of commercial disputes for small and medium businesses in three Nigerian states (including Lagos and Kaduna). This project, too, has the explicit aim of encouraging foreign investment by providing a dispute resolution process that is not bedevilled by the spectres of cost, uncertainty and delay. At the Abuja conference Justice James Ogoola spoke of a similar initiative in the Commercial Court of Uganda, where 80% of cases are now disposed of through ADR.

The strength of Nigeria’s Negotiation and Conflict Management Group (NCMG) lies in the strength of its leadership. Although much of the inspiration came from a single Lagos-based lawyer, Mr Kehinde Aina, the Board is led by a charismatic former Supreme Court justice, and it includes energetic ex-diplomats and businessmen as well as lawyers and judges. They have now obtained the unqualified support of Nigeria’s senior judiciary. The National Judicial Institute helped to sponsor the remarkable two-day event I attended in Abuja, and in his opening address Chief Justice Belgore articulated the concerns of many of those I met in Nigeria when he said:

The factors which work to impede the dispensation of justice, and indeed limit access to justice, must be frontally tackled if the judiciary is to live up to its expectation as the ‘... last hope of the common man; a strong fortress providing succour and shelter for the defenceless, the vulnerable, the upstanding, the expectant and indeed the whole society.’

This is what the ADR movement is all about. Mr Kehinde Aina brought its potential to life when he said:

Can I ever forget the eighty-five year old woman whose only fear was going to her grave bequeathing the litigated case she inherited from her parents to her own children? How can I ever forget her prayers when the twenty-six year old family dispute was resolved after three months of mediation at the LMDC? ... While ADR may not be the panacea to decongesting our courts, it is without doubt the answer to a sizeable number of these challenges.

I agree. ADR cannot prosper in the absence of strong judicial leadership. Strong judicial leadership can achieve little if the local procedural code still leaves the lawyers in control of the pace and prevailing ethos of litigation. And even where there is strong judicial leadership and a modern procedural code, there is still a need for high quality mediation training (such as I was lucky enough to receive from three different sources last year) followed by close attention to the importance of quality control and continuation training once a mediator is trained and accredited and permitted to practise as such.

While I am Executive Vice-President of CMJA, I hope to do what I can to help with the processes of modernising civil procedure codes and encouraging the growth and acceptance of ADR throughout the Commonwealth. This is because I am firmly convinced that litigation does not and cannot provide a satisfactory response to every dispute which the parties are unable to resolve on their own. ADR has a very important part to play.

JURY TRIALS IN CANADIAN ABORIGINAL COMMUNITIES

*The Hon Mr Justice John Z Vertes, Supreme Court of the Northwest Territories.
A lecture delivered as part of the 'Law & Society' Lecture Series at the University of British
Columbia Faculty of Law in January 2007.*

When I was practising law, and when I was appointed a judge in 1991, the Northwest Territories encompassed an area of 1.3 million square miles. That is an area approximately equal in size to the country of India. However, the population was only about 70,000 people living in some 60 different communities. The population encompassed 12 different aboriginal groups and at least 14 different languages.

In 1999, the Northwest Territories was divided into two thus creating the new territory of Nunavut. In Nunavut, over 85% of the population is Inuit. In the present Northwest Territories, aboriginal people make up 55% of the total population. That fifty-five per cent represents five different Indian or Dene sub-groups (Cree, Chipewayan, Dogrib, Slavely, and Gwich'in), two Inuit sub-groups (Inuit and Inuvialuit), and those who identify themselves as Metis. By law, there are eleven official languages in the Northwest Territories: English, French, seven different Dene languages and two dialects of Inuktitut (the Inuit language).

This unique social and political mix has led to some unique practices in our court system.

The Supreme Court caselaw

In the past 10 years, the Supreme Court of Canada has issued a large number of judgments that address how courts should approach cases involving issues of aboriginal law and aboriginal persons in conflict with the law.

In the field of aboriginal rights in particular, the Supreme Court said that a court must approach the rules of evidence, and interpret the evidence presented, with a consciousness of the special nature of aboriginal claims and the evidentiary difficulties in proving a right which originates in a time before there were written records. The Courts must not undervalue the evidence presented by aboriginal claimants simply because the evidence may not conform to our rules of evidence. And, most significantly,

the Courts must take into account the perspective of the aboriginal peoples themselves.

Now these were admonishments to judges to think creatively, and with sensitivity to the people whose claims are being adjudicated. But they are equally guideposts to lawyers who are litigating such a case.

In the field of criminal law, the Supreme Court of Canada laid down what has become a new approach to addressing the special challenges posed by aboriginal offenders. The Supreme Court ruled that the sentencing of aboriginal offenders must be approached differently with an awareness of the systemic factors that have contributed to the difficulties faced by aboriginal people in the justice system and throughout society at large. This, of course, stems from the Supreme Court's 1999 decision in *R. v. Gladue* ([1999] 1 S.C.R. 688). That case interpreted the requirements imposed by section 718.2(e) of the Criminal Code that tells judges 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 every case involving an aboriginal offender, the judge has an obligation to inquire into the unique systemic or background factors which may have played a part in bringing the particular offender before the court; and, the types of sentencing procedures and sanctions which may be appropriate for the offender because of his or her particular aboriginal heritage or connection. It is only after a thorough review of these considerations that a sentencing judge will be in a position to determine a fit and proper sentence. And, of course, the burden falls on counsel to adduce relevant evidence so as to assist the judge.

Members of aboriginal communities – over-represented in our courts and in our jails –

have long argued for a justice system that considers the complex social, economic and cultural factors that cause aboriginal people to be in conflict with the law *and* that takes a healing or restorative approach to sentencing.

For the criminal justice system to appropriately deal with aboriginal offenders, much like having to deal with other members of our population who pose special challenges, such as those who are mentally ill or addicted to drugs, there needs to be a paradigm shift in our thinking and practice.

There needs to be a comprehensive approach that focuses on the intractable social and personal issues that underlie criminal behaviours. This requires empathy and non-paternalism from the legal professionals, lawyers and judges alike. This requires that the people who come into our courts be treated with respect and dignity (and here I speak just as much about victims as I do about offenders). It requires that they be treated as individuals, rather than as numbers on a docket; that they be given an opportunity to tell their story; that they be treated fairly and consistently; and that they be able to understand and play an active part in the proceedings.

Innovation in the North

The modern court system in northern Canada commenced in 1955 with the establishment of a resident superior court based in Yellowknife (what is now known as the Supreme Court of the Northwest Territories). The first judge appointed to the court was John Sissons (from Peace River, Alberta).

When the new judge took office, it was assumed, by government authorities at least, that all serious cases would be heard in Yellowknife, the territorial capital, with the accused and witnesses being brought there for trial. However, one of the first serious cases heard by Justice Sissons convinced him that justice would be better served if the court went on circuit. The case involved one Kaotak, an Inuit from Coppermine on the Arctic Ocean coast, who was charged with murder. He was brought to Yellowknife and tried before Justice Sissons and an all-white jury. This is how Justice Sissons described the situation in his memoirs:

‘I was uneasy about holding the trial in Yellowknife, six hundred miles from

Kaotak’s home. The common law states that an accused is entitled to be tried in the area where the offense was committed and to be tried by a jury from his area. I was told by the lawyers in the case that it would be highly inconvenient, if not impossible, to hold court in December in Kaotak’s area. I thought this must be wrong. The trial could have been held at Cambridge Bay, which is a busy northern centre with air service at all seasons. It seemed entirely possible to travel to Cambridge Bay by air, and as for convenience, I did not think convenience entered into it at all. However I was new to the job and even newer to the Territories, so I gave in.

For decades Eskimos charged with serious offenses were tried in Edmonton, Calgary, Winnipeg, Ottawa or some other outside point ‘convenient’ for the authorities, before judges and juries who, no matter how well-intentioned, could not know the north and the situation. This would be the last trial in which convenience would be a factor in determining the location. From then on, justice would be taken to every man’s door and he would be tried by a jury of his peers; and in the case of an Eskimo like Kaotak a jury of his peers would have to include Eskimos. The Yellowknife jurors were six white men. They were good men, honest and fair, but they could not form a jury of peers for an Eskimo.’

Shortly after this event, in December 1955, Justice Sissons started to plan the new court’s first circuit to the eastern Arctic. He was opposed by the police and government bureaucrats. The Superintendent of the Royal Canadian Mounted Police told him that the Mounted Police had been the law for many years in the eastern Arctic and handled matters by ‘giving Eskimo offenders a kick in the pants and having white offenders moved out of the country.’

The circuit system

Sissons was not to be deterred and thus began the system of court circuits still employed by the Supreme Court of the Northwest Territories. It is in many ways unique in Canada, if not in all of North America. The court routinely travels on circuit from Yellowknife for the purpose of holding jury

trials in the community where the offence allegedly occurred. This results in the direct participation of the largely aboriginal population in the criminal justice process. It also means trial in one's language, since unilingual aboriginal speakers are entitled to sit as jurors.

In the early years of the circuit system the court was faced with numerous challenges. Trials, and particularly jury trials, were unheard of in the small outlying aboriginal communities. But the circuit court was not just about bringing justice to every person's door. It was also about sovereignty. Canadian sovereignty in the Arctic, during the cold war years, was enhanced by the imposition of law and order through the police and the courts.

The court also played a role in the then stated policy of assimilating native people into the framework of non-native society. Even Sissons viewed as part of the role of the court the education of aboriginal people about mainstream society.

Sissons, however, attempted to mitigate the clash between the traditional 'law' of the different aboriginal cultures and the mainstream Canadian legal system. Holding trials in the communities, having aboriginal jury members, employing interpreters and native court workers, as well as the creation of a territories-wide legal aid plan, all contributed to making the Canadian legal system understandable and acceptable to the aboriginal population. This was a means of accommodating them to the Canadian legal system.

There was throughout these years a great deal of tension between formal and substantive equality. By that I mean that historically the same law was applied to both aboriginal and non-aboriginal people while at the same time judges recognized the need for differences in the manner of application and result in order to ensure that substantive justice was delivered.

It was not just through these means that the courts tried to bridge the cultural divide in the North. Justice Sissons, during his tenure, often bent the strict letter of the law in favour of aboriginal rights, although with mixed success. In a series of cases on game laws in the mid-1960s he upheld aboriginal rights to hunt and fish. These cases were ultimately reversed by the Court of Appeal and Supreme Court of

Canada, but they opened up new ways of thinking about these issues and foreshadowed legal developments of a few decades later. Justice Sissons also recognized in law the validity of customary marriage and adoption.

The Shooyook and Aiyoot case

One of the most interesting of the circuit jury trials in the Sissons era was the trial of Shooyook and Aiyoot held in Spence Bay (now called Taloyoak) in April 1966. It was a case that illustrated, in a most striking fashion, the inter-play of traditional Inuit cultural norms and modern twentieth-century justice.

The case involved the killing of a woman who was part of a small Inuit hunting party out on the land. They were isolated by bad weather for a long period. The woman, Soosee, started to act very strangely. She became violent and delusional. The others in the group believed her to be possessed by evil spirits. The group felt that they had no choice but to try to expel Soosee from the camp. If she would not leave then she must be killed. Shooyook and Aiyoot were delegated the task. Feeling he had no option, Shooyook shot her. Some months later, when the group made contact with outsiders, they told of the killing and the police investigated. The accused readily told the police about the entire affair.

Shooyook and Aiyoot were jointly charged with murder. In order to empanel a jury the court, using a ski-equipped DC-3 airplane, went around to several other communities scattered over a distance of 1,500 miles. At that time a jury only required six persons but all of them had to be able to understand English. Justice Sissons was very keen on having aboriginal people sit on juries. But it took an excursion to four other communities to find jurors. As a result the jury consisted of four white persons (including the first woman ever to sit on a northern jury) and two Inuit.

Much of the evidence at the trial focused on Inuit custom and beliefs. The verdict reflected this in the words of the foreman of the jury: 'Our decision has been very difficult. We considered the Eskimo culture as it affects this case, and the decision reached is Aiyoot not guilty, Shooyook guilty of manslaughter, with a strong plea for leniency in sentencing.' In the end, Shooyook was given a suspended sentence.

This case is notable for the understanding of Inuit tradition reflected in the juror's verdict. Oral histories carry many accounts of how a man or a woman, judged by others in the group to have become a danger to the group, was eliminated through group action. But it is doubtful that a jury, composed entirely of non-Inuit and hearing a trial several hundred miles away, would have understood or appreciated that the accused in this case felt they had no choice but to do what they did.

The late William G. Morrow, defence counsel for Shooyook, and later the successor to Justice Sissons as the resident superior court judge, reflected in his memoirs on the seriousness with which the jury took their role and the result of the verdict:

‘...They all showed that they were deeply affected by the seriousness of their task; everyone seemed to be aware of the fact that the clash between two cultures was on trial as well. On one side, a small nomadic group of hunters had instinctively resolved a question of survival in the way similar situations had been solved over thousands of years of precarious survival; on the other side, the governing society insisted on imposing a set of rules evolved from a culture far removed from the severe circumstances of Eskimo existence.

The jury rose to the occasion. It brought in a verdict of manslaughter against Shooyook and acquitted Aiyaoot. Judge Sissons sentenced Shooyook to two years' suspended sentence and enabled my client to join his wife and children that evening. The whole community breathed a sigh of relief – it was as if a heavy pall had been lifted from everyone's shoulders. The white man's laws had been satisfied and, yet, wonderfully, the participants were free to go on living in their traditional way.’

Morrow called it a complete vindication of the jury system resulting in a verdict that was socially acceptable even if it may not have strictly accorded with the law of the time.

Current practice

As I said, our practice is to hold a trial, when necessary, in the community where the crime allegedly occurred. This is done for all crimes, whether big or small, and particularly when there is a need for a jury trial. We do not, like

most other jurisdictions in Canada, and elsewhere in the world, hold trials only in the larger centres. We do not bring accused persons and witnesses hundreds or thousands of miles from their homes to stand trial. The tradition of the northern courts has always been to go to the people.

The circuit system is the accepted practice in the North, so much so that today our court's criminal procedure rules mandate that the trial be held in the applicable community unless there are special reasons to move it (and mere convenience to lawyers and judges is not a special reason). We hold court in every imaginable space – community halls, schoolrooms, even airplane hangars – and the court party stays in every imaginable type of quarters.

Jury reform

The most significant change to our practice was one in 1986. That year the Legislative Assembly of the Northwest Territories passed a provision amending the Jury Act to provide that an aboriginal person who did not speak English or French, but who spoke an aboriginal language, could serve as a juror. Prior to this, the Jury Act required all jurors to speak either English or French.

The amendment to the Jury Act was the subject of study by the territorial Committee on Law Reform. That committee's study noted that, while the concept of trial by jury was unknown to traditional aboriginal societies, there was a history of community consensus as an aspect of social control among both the Dene and the Inuit. Thus, to the extent that the jury system succeeds in involving members of the community in the legal process, it is analogous to those traditional practices. The provision was viewed as an attempt to increase community involvement by allowing unilingual aboriginals to take part in the jury process. And the provision was widely supported by aboriginal groups.

The Committee was also greatly influenced by the ‘representative’ role of the jury. It referred to long-standing jurisprudence that the right to trial by jury means the right to trial by a jury representing a ‘fair cross-section of the community’. It concluded that there are many places in the Northwest Territories where a jury that does not include unilingual aboriginal persons could not represent a fair cross-section of the community.

The Jury Act now provides that every person who is able to speak and understand an 'official language', i.e., the eleven languages noted previously, is qualified to serve on a jury. This applies in both the present Northwest Territories and Nunavut.

The immediate effect of the change in juror qualification was a rapid increase in the number of jury trials. Statistics have been maintained haphazardly over the years but some comparisons are available. Between 1955 and 1969, there was an average of five jury trials per year. There were sixty-eight jury trials in that total period, of which thirty-nine were held in communities outside of Yellowknife. In only twenty-seven cases were there aboriginals on the jury. Only two cases had all-aboriginal juries. In the period of 1988 to 1991, the number of jury trials rose from thirty in 1988 to 93 in 1991. Of the 1991 cases, seventy-nine were outside of Yellowknife. Statistics kept by the Sheriff of the Northwest Territories indicate that in 1998, the last complete year before division of the territories, there were 83 criminal jury trials, of which 65 were in communities outside of Yellowknife. Generally, throughout the 1990s, on a per capita basis, the rate of jury trials in the Northwest Territories was significantly higher than comparable rates in southern jurisdictions.

There are, of course, reasons other than the change to the Jury Act that account for the relatively large increase in jury trials. Over the years, legal aid has expanded; there are more lawyers practising in the North; and, there is a growing sophistication about legal matters generally among the population. There has also been a significant increase in the crime rates. Between 1980 and 1990 the number of charges laid by the RCMP more than doubled. Much of this increase, however, simply mirrored the fact that there was increased policing: more police in more communities, less reliance on informal resolution of conflicts and greater recourse to formal charges, and less discretion due to mandatory charging policies for certain types of crimes. But undoubtedly the facility for unilingual aboriginal speakers to serve on a jury encouraged more accused to opt for that mode of trial.

The fact that a unilingual aboriginal person may serve on a jury is one of the fundamentally unique features of our northern justice system.

It has always been accepted, of course, in every type of trial, that if an accused person or witness did not speak the language of the trial (that being either English or French) they were entitled to the services of an interpreter. This in fact is one of the rights protected by the Charter of Rights and Freedoms. But nowhere else in Canada, indeed nowhere else in the western world, is there allowance made for someone who does not speak the majority language to serve on a jury in the mainstream court system. Australia does not allow it for their Aborigine populations. New Zealand, even though a recent study recognized that Maori are under-represented in jury pools, and even though Maori is an official language, does not allow anyone to serve on a jury who does not speak English. Even in South Africa, which also has eleven official languages, studies have shown that court participants will more commonly use English even when all of them are able to speak the same indigenous language.

Language issues

Part of the reason for this is that our legal system assumes monolingualism. For example, when interpreters are used in court in a case in the English language, the official transcript records only the English utterances. The original utterances, in the language other than English, have no legal status. This means that in any appeal proceedings the actual utterances of a defendant or witness are unavailable. It is the interpreter's English version which is the basis of any legal arguments or decision.

Our northern practice has made it extremely important to examine the language we use. Not only do lawyers and judges grapple with the need to put legal terminology into plain language so that English speakers can more readily comprehend them, they also grapple with the need to put them into terms that aboriginal interpreters will be able to translate.

For many years in the Northwest Territories (and now in Nunavut) there has been an extensive legal interpretation training programme for aboriginal speakers. The requirement for competent interpretation is obvious. In a trial with unilingual aboriginal jurors, the interpreters must interpret everything from start to finish: jury selection, the judge's instructions, the evidence, counsels' submissions, and the jury charge. And all of this is done out loud consecutively so that a recording of the inter-

pretation can be made. In addition, the interpreters are also expected to provide interpretation for the audience. This service for the public is one that is rarely, if ever, provided in other jurisdictions (indeed it is a common complaint in studies of the impact of the justice system on aboriginal Canadians).

As you can imagine, there are enormous linguistic hurdles for interpreters to overcome. There are no equivalents for many of our commonly-used terms. So one of the principal objectives of the interpreter training programme was the development of standardised legal terminology in the different aboriginal languages. And this became the biggest challenge.

How does one interpret words and concepts for which there are no equivalents in the native tongue? As many northerners have pointed out, there are at least 25 different words in Inuktitut that can be used to describe different states of 'snow', but there is not one word to translate the English word 'guilty'.

Our interpreters met this challenge by developing new terminology using descriptive definitions. They coined new words and terms instead of simply incorporating the English words.

Difficulties are encountered, however, because by using such descriptive definitions there is a danger of misunderstanding what is meant if one does not know the context in which the words are used. There is an overt literal meaning and a more figurative or implicit meaning. If one relies on a literal straightforward translation of the aboriginal word then the meaning is often incomprehensible. So let me give you an example of what I mean.

In the Inuktitut language, the English word 'pardon' is translated as *sinirvainiq*. Interpreted literally that word means 'putting something on the side of'. Figuratively, however, the word is understood as 'putting aside' or 'the act of forgiving something or someone'. Without knowing the context in which the word is used, the literal meaning may not mean much of anything.

Generally speaking I think our aboriginal interpreters have done an excellent job over the years in developing an entirely new lexicon in the aboriginal languages. And I have no hesitation in saying that I am satisfied that they are

able to convey the basic English legal concepts in an understandable manner. No one has yet demonstrated that fundamental legal principles cannot be translated into understandable terms.

But the most significant feature is that the people can truly participate in the workings of the justice system. By holding trials in the communities, by allowing people to use their own languages, there is far less distrust of the justice system. In my opinion the great benefit of the circuit court jury system is that it gives meaning to the representative and public involvement functions of the criminal jury. By its inclusive nature it also provides a bridge to traditional aboriginal resolution practices.

One of my former colleagues, the late Justice Mark deWeerdts wrote in a judgment in 1985:

'It cannot be said that the modern jury is part of the indigenous aboriginal cultures of the Northwest Territories. However, the ancient traditions of mutual consultation, reliance upon the wisdom of elders and community decision-making, are not essentially foreign to the Euro-Canadian institutions of the criminal jury trial. The jury, as an institution, allows for a measure of mutual consultation and community involvement in decision-making within the framework of the trial process of the superior court, and can therefore be recognized as fostering continuation of this important element of our indigenous aboriginal cultures within our criminal justice system.' (*R. v. Punch*, (1985) 22 C.C.C.(3d) 289)

Implicitly, this view of the jury also comports with the traditional western concept of the jury as a 'political' institution. The jury acts as a representative body through which the community registers its response to the criminal law and the enforcement of that law; it acts as a check on the excessive enforcement of the criminal law; and it acts to justify and reinforce the community's faith in the administration of justice. There is significant societal value and function in community participation in the justice system through the vehicle of a jury.

Most of the traditional rationales for the use of the jury are as applicable to northern aboriginal society as they are for mainstream society. Through its collective decision-making, the jury is an excellent fact-finder; due to its representa-

tive character it acts as the conscience of the community; it provides a means whereby the public increases its knowledge of the criminal justice system; and it increases, through involvement of the public, societal trust in the system as a whole. Public confidence is enhanced by a jury from the community, composed of a representative and fair cross-section of the community, and delivering a unanimous verdict. All of these things legitimise the criminal justice system to society. The verdict is seen as the community's decision.

There is an important public validation role played by a jury. Whereas decisions of judges, sitting alone, might be subject to public criticism, decisions of juries rarely attract criticism to the jurors. They are perceived to be acting as the conscience of the community.

Back in 1883, one of the giants of the development of our criminal law system, Sir James Stephen, remarked that trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It gives a degree of power and credibility to the administration of justice which could hardly be derived from any other source.

Service on a jury is also very much a 'political' activity, an exercise in democracy. It is a badge of citizenship. It is a mark of equality and full status as citizens. This is particularly important for peoples who have been historically marginalized and excluded from our public institutions.

Alexis de Toqueville, writing in 1840 in his historic work, *Democracy in America*, identified the education of the citizenry as one of the greatest contributions of the jury system. According to de Toqueville, the jury serves as a 'free school' for its citizens, teaching them about self-governance in a democracy.

Jury service provides for the ordinary citizen one of the few opportunities, in addition to voting, to participate directly in self-governance. Deciding a case is a first-hand lesson in democracy because the parties are present in the courtroom and the jury's verdict will directly affect them.

Although many citizens seek to avoid jury duty initially, once they actually serve on a jury, a transformation occurs. They understand the seriousness of their task and perform it conscientiously. This is why research studies and

anecdotal evidence all confirm that jurors have highly positive feelings toward the jury after they have actually served on one.

The drawing of jurors from the local community can be instrumental in creating a positive impression of the criminal justice system through the sense that the proceedings are perceived to be fair. Numerous studies in mainstream society have shown that the justice system is judged largely on whether it is perceived as being 'fair' in the manner in which it uses its authority. Procedural fairness is more important than specific outcomes. There is no reason to think it is any different among aboriginal groups.

Of course, the primary role of the jury is to act as a fact-finder. The judge in the case instructs the jury on the law but it is the jury's duty to decide from the evidence what the facts are and then apply the law to the facts. The jury is particularly well-suited for this role. It consists of a group of individuals working together to reach a group solution. Studies have shown that groups perform better than individuals in terms of solving problems and reaching correct answers. Individual prejudice is more easily overcome in group situations. A group also ensures that members can correct each other's mistaken ideas or faulty recollections. And, in finding the facts, juries also engage in an interpretation of the legal principles given to them by the judge in the context of those facts. They bring to their task their sense of prevailing norms. With those norms in mind, they must decide whether to hold a defendant liable for his or her conduct.

Having a local jury, especially one that can understand the nuances of the local language and behaviour, can only enhance the jury's fact-finding function. An aboriginal jury avoids the danger of decision-making, particularly about credibility, on the basis of stereotypical generalisations (as may be applied by a fact-finder not knowledgeable about local communication patterns or behaviours). Assessments of credibility based on demeanour are particularly difficult in a cross-cultural setting. There are cultural differences in both the frequency and nature of body movements and facial expressions (what the experts call illustrators and emblems). Without knowledge of the cultural group to which a witness belongs, and the meaning of such illus-

trators and emblems, the trier of fact is in danger of drawing the wrong inferences as to credibility by misinterpreting both the presence and absence of these movements.

The Supreme Court of Canada has said that a representative jury is one of the safeguards included in the constitutional right to a fair trial before an impartial jury. It is also an anti-discrimination right. The application of racial stereotypes by the trier of fact is a form of discrimination. By going into the community, and drawing a jury from that community, this danger is overcome.

Holding a trial in the community is an important way of creating a sense of trust and ownership in the justice system. It encourages individuals in the community to take on greater responsibility in addressing the social and economic problems that are often at the root of the offending behaviour. A serious criminal offence is an affront to the community. The community therefore has a real interest in knowing what happened and through the jury in deciding whether it is a crime or not. All of this can be said to enhance the system of justice and to educate the public.

But, fundamentally, it is an exercise in democracy by giving true meaning to the right of every citizen to serve on a jury. As written by Jeffrey Abrahamson in his book, *We, the Jury*: 'The whole point of a jury is to subject law to a democratic interpretation, to achieve a justice that resonates with the values and common sense of the people in whose name the law was written.'

The jury court circuit system of the Northwest Territories is, of course, only one part, and indeed a small part, of the overall administra-

tion of justice in the North. It is very much a part of the conventional trial process. Many commentators have made the point that the discussion of aboriginal justice measures must cease to focus on that process. There is a need to develop comprehensive solutions to the problems encountered to date in the justice system's impact on aboriginal communities. But so long as there is a role for the conventional trial process, then arguably the northern way of conducting jury trials is an answer to some of the systemic problems encountered in other jurisdictions.

I do not want to leave the impression that there are no other significant steps being taken in the North. There most certainly are. There is widespread use of sentencing circles, alternative sentencing dispositions with restorative aims, local Justices of the Peace and community committees, networks of native court workers, and the devolution of governance powers to First Nations. Traditional healing and mediation services are being developed. All this reflects the effort to create comprehensive solutions.

The early circuit court system was seen as a way of integrating the Inuit and Dene of the North into the Canadian system of law. We may look back upon it as merely another method of assimilating aboriginal communities into the mainstream.

We now recognize however that a more meaningful relationship must be developed between aboriginal communities and the institutions of modern Canada. The circuit court, as we now know it, may be just a small part of some future pluralistic legal model. But no doubt there will still be a role for it to play.

THE VOICE OF THE CHILD IN THE FAMILY PROCEEDINGS COURT

*Henry McKibben, Resident Magistrate Northern Ireland
A paper from the 2006 CMJA Triennial Conference*

The law in Northern Ireland in respect of Family Proceedings closely follows the law in England and Wales. Our courts follow the 'welfare principles' in Article 3 of the Children (Northern Ireland) Order 1995. This provides that:

'Where a court determines any question with respect to –

- (a) the upbringing of a child; or
- (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration'.

It continues:

'...a court shall have regard in particular to –

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, educational and emotional needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
- (g) the range of powers available to the court under this Order in the proceedings in question.'

What this does is to ensure that all decisions taken by Family Proceedings Courts, at whatever level (and remembering that, almost uniquely, the courts at the lowest level have almost exactly the same powers as at the highest level) are predicated on the fact that all our decisions must reflect, so far as we can, the best interests of the child who is the subject matter of the cases which come before the court. It has to be pointed out, however, that

the wording is expressed in terms of the 'welfare' of the child, which seems to me to be indicative of a mindset in the original legislators which discourages rather than encourages the involvement of the child in the decision-making process. But times are changing.

Nor must we forget the provisions of the European Convention on Human Rights, incorporated into the law of the United Kingdom, which reminds us, under article 8 of that Convention that :

- '1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

It has to be pointed out, however, that there is no specific mention of children being singled out for special treatment in the actual wording of that document.

The necessity to take seriously the voice of the child is also a concept which is reinforced by article 12 of the United Nations Convention on the Rights of the Child which assures to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child to be given due weight in accordance with the age and maturity of the child. The child must be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or appropriate body or in any manner consistent with the procedural rules of national law. It has to be pointed out, at the outset, that this provision is not, as yet

anyhow, incorporated into the law of any part of the United Kingdom. It is, however, a provision which is often referred to in decisions taken in the courts in Northern Ireland.

The Northern Ireland courts

I say all this as a brief background to my discussion as to how the voice of the child is, in fact, heard in the Northern Ireland jurisdiction. I myself sit as the senior Family Proceedings Resident Magistrate in Belfast, the main city in Northern Ireland. Family Proceedings in Northern Ireland are heard at three levels. These are (in ascending order):

1. The Family Proceedings Courts (in which I practise)
2. County Court level (known in this context as the Family Care Centre), and
3. The Family Division of the High Court.

Although the longest and most complex cases are dealt with at the higher levels, statistically speaking over 90% of all Family Proceedings cases in Northern Ireland are handled at the level at which I operate. The Children (Northern Ireland) Order 1995 came into force during 1996 and I have been involved in deciding Family Proceedings cases since then, that is, for the past ten years. I say that, not to 'blow my own trumpet' in any way, but, rather, to demonstrate that I have considerable experience in deciding a great number of cases involving children and their futures.

Throughout that time, I have spoken to a number of children, but not as many as you may think. The reason for this is that the courts in Northern Ireland, in common with their counterparts in England and Wales – though not in Scotland, of which more anon – have traditionally been reluctant to engage directly with young persons in a Family Proceedings Court.

The secure accommodation exception

There is, in my case, one major exception to this in the field of Family Proceedings. Article 44 of our Order enables a court to keep a child in 'Secure Accommodation', defined as 'accommodation provided for the purpose of restricting liberty'. The Order provides that:

'...a child who is being looked after by an authority may not be placed, and if placed, may not be kept, in secure accommodation unless it appears –

- (a) that –
 - (i) he has a history of absconding and is likely to abscond from any other description of accommodation; and
 - (ii) if he absconds, he is likely to suffer significant harm; or
- (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons.'

In these cases, the child is almost invariably present in the courtroom, listening to what is going on. He or she will be represented by a solicitor, whose role is to present the child's wishes to the court and by a Guardian ad Litem (a qualified Social Worker, who acts in 'the best interests' of the child). This is known as 'tandem' representation. The law relating to Secure Accommodation gives the court – which comprises, at Family Proceedings Court level, a presiding Resident Magistrate and two Lay Magistrates (one of whom must be a woman), – no choice in the matter. Either the pre-conditions set out above, are met, in which case the Order *must* be made, or they are not met, in which case no Order can be made, even if it may be considered to be in the best interests of the child.

This is an exception to the welfare principle referred to above, to some degree. It is a most draconian sanction, effectively to lock up a child who need not have committed any crime. The significance of this of course has to be explained to the child and his family by the presiding Resident Magistrate and it follows from this that representations from the child's representatives and if the child wishes, from the child himself, can be made. Usually, in this context, if a child wishes to say something to the court, this will be allowed and, indeed, encouraged. It is obviously of the utmost importance that the child fully understands what decision is to be made and the reasons why the court is acting in a certain manner.

More generally

However, these sorts of cases are, if not rare, then representative of an extremely small percentage of all cases which come before us. More usually, we are dealing with Private Law applications (mostly by parents seeking residence or contact with a child or seeking to prevent or to promote some activity between the other parent and the child), or with Public Law applications which are mostly brought by

‘Trusts’ (Local Authorities in England and Wales), who seek to obtain either Care Orders or Supervision Orders in respect of a certain child or children.

In the case of Public Law applications, Guardians ad Litem, with solicitors instructed by them on behalf of the child, are involved to represent the needs and wishes of the child. In Private Law applications, where the court needs to be informed of or be made aware of the views of the child on some specific matter, it will ask the local Social Services or the local Court Welfare Officer to call with the child and speak to him or her and to present a report to the court which will be used to inform the court of the child’s wishes and feelings. We must be very careful not to equate the agreement of the parents, in all cases, as the best solution for their child. It may suit them, but the ultimate decision is made by the Bench, acting collectively, on a majority vote, if necessary. We do not merely ‘rubber-stamp’ agreements between the parties. The law requires us on the Bench to make the decision in all cases after application of the principles referred to earlier. Often, we find that what the parents have agreed seems to us to be a good solution, but we must examine it carefully to ensure that we are satisfied that all of the welfare principles are met. That includes giving full weight to the child’s point of view.

The Official Solicitor

There is an exception in our law to no direct representation of a child in Private Law proceedings. That is, in appropriate cases, we can appoint an officer of the court, known as the ‘Official Solicitor’, to act as the child’s Guardian ad Litem. Usually, a court will decide that a Welfare Report from a Social Worker will suffice to safeguard the interests of the child. However, where a court is not so satisfied, and it feels that the child should have actual separate representation, then the Official Solicitor will be appointed to represent the child directly in the case. This cannot be done for statutory reasons in the Family Proceedings Courts. So, if I feel that there needs to be separate representation for the child, then I have at once to transfer the case – which I am entitled to do for that purpose – to the Family Care Centre for hearing at that level.

Our Children Order Advisory Committee has drawn up ‘Best Practice Guidance’. It gives us

indicators of when it may be appropriate for the Official Solicitor to be appointed. It includes the following –

- (a) there is a foreign element
- (b) there are exceptional or difficult points of law
- (c) there are unusual or complicating features, such as where one parent has killed the other
- (d) there is conflicting or controversial medical evidence
- (e) where the child is ignorant of the truth as to his or her parentage
- (f) where the child is totally refusing contact with a parent in circumstances which point to the need for psychiatric assessment
- (g) there is an issue regarding the removal of the child from the jurisdiction
- (h) the child has a physical or mental disability
- (i) there are racial, religious or cultural issues
- (j) there are allegations of physical or emotional harm which do not meet the threshold criteria of risk of significant harm (necessary for the making of a Public Law order)
- (k) the child has sought representation by a solicitor but the court does not consider that he is competent.

The problem in all of this, as I have said, is that the Order is worded in a way which makes the welfare of the child the paramount concern. This has led to a scenario in which it could easily be argued that the courts in the family justice system are still collectively gripped by a paternalism in which, as Dame Elizabeth Butler-Sloss recently put it: ‘We continue to think of children largely in terms of needs and welfare, with insufficient thoughts of their rights.’

The fear expressed at a recent Conference in Northern Ireland by the President of our Family Division of the High Court in Northern Ireland, Mr. Justice Gillen, is that ‘a failure to adopt a rights based approach leads to flawed implementation of measures to protect (children).’ The ‘rights’ to which he alludes in this context include, of course, the right to be heard in person and not through the agency of third person, invariably an adult, no matter how well qualified that adult may be. In the case of *Mabon v. Mabon*, the Court of Appeal in England held that the courts must, in the case of articulate teenagers, accept that the

rights of freedom of expression and participation in family life outweighed the paternalistic judgement of welfare. It is to be earnestly hoped that this kind of thinking will change the way in which courts in Northern Ireland approach the question of how to elicit the true views of the child, certainly with reference to 'articulate teenagers'.

The reasons for the current approach are quite clear. There is a risk that children may be intimidated in the court atmosphere of acrimony between the two principal adults in their life, and they may feel that they are, in effect, being asked to decide between their mother and their father. In short, there is a real risk that the court process may itself become very quickly a form of emotional abuse of that child and thereby give rise to exactly the sort of problem the courts are trying to protect the child against.

Alternative approaches

There are of course, other family law jurisdictions where the child's views are directly canvassed, almost, it seems, as a matter of course. This – and I am not an expert in either case – seems to be what happens in Germany and in Scotland. Decisions of the European Court of Human Rights in Strasbourg have demonstrated that it is not illegal for courts in England and Wales (and, by extension, in Northern Ireland) *not* to interview children directly, and that the eliciting of the views of the child, although essential, can be done in more than one way. As they put it in the case of *Sahin v. Germany* (2003):

'It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned.'

This rings to me of an obvious compromise between two conflicting systems, those in which it is usual to interview children in these cases and the other in which such a course would be against normal practice. Judges in Northern Ireland have tended to adopt the same approach as that adopted by their colleagues in England and Wales and are, in general, reluctant to interview children. Significantly, the wording of the Statute

governing the law in Scotland (section 11(7)(b) of the Children (Scotland) Act 1995), gives the child of twelve years or older the opportunity 'if he does so wish', the opportunity to express his views. One has to have a lot of sympathy for this point of view. Children are regularly heard in criminal cases as defendants and as witnesses, so why not in Family Proceedings cases too?

Should the child be directly heard?

There are many arguments for and against the direct involvement of children in these cases. For the present exercise, suffice it to give a few brief thoughts on the topic.

There is much evidence to suggest that many more children than is currently the case would like to have the chance to 'speak to the Judge'. As a result, many children feel that they are not being heard. This, despite the fact that the courts do feel that they are hearing the voice of the child through the Guardian ad Litem, the Social Services and solicitors.

Are we, as adults, thinking in a paternalistic way too much in terms of a child's welfare and needs and too little of their rights?

Does listening to the views of the parents in court, and yet not giving a chance to children to do the same, give a legitimate impression that we are thereby placing a higher value on the rights of parents than on the rights of children?

Except as I have mentioned regarding the Official Solicitor in the Family Care Centre and in the High Court, there is no current right for children to be separately represented in Private Law cases in Northern Ireland. This is something which we, in this jurisdiction, need to address urgently.

Are Judges and Magistrates really qualified to interact directly with children, so as to ascertain their views? As it was put recently by Mr. Justice McLaughlin in the 2005 Northern Ireland case of *H v C*,

'I do not have any professional skills in interviewing children with a view to assessing their true wishes and feelings and certainly do not think that I could extract a more meaningful expression of her wishes and feelings than (the social Worker in the case).'

This is typical of current judicial thinking in our jurisdiction.

The Judge in the last mentioned case went on to make a further point:

‘There is a risk that such an arrangement would simply impose further stress upon (the child) particularly if her views were to be made known to her parents. The idea that a Judge could sit down in a room on one occasion and find the answer to such an important question in a better way than a Social Worker who has seen the child on several occasions and whose training, expertise and skills, which a judge does not possess, is mistaken in my view.’

In other words, questioning on intimate matters of family life if not undertaken by properly trained persons carries with it a risk of adding further emotional abuse to the child. It is quite clear that if this *were* to be undertaken on a regular basis, the Judges and Magistrates would require to receive a lot of training to learn the necessary skills.

Confidentiality?

If the child sees the Judge privately, the Judge must make it quite clear to the child that what he or she says will have to be told to the parties in the case, most often, his or her feuding parents. In Scotland, I understand that the Judge can guarantee to the child that what the child tells the Judge will be kept in total confidence. I am greatly concerned that such an approach, although it has much to commend it, is at risk of violating article 6 of the European Convention on Human Rights, the right to a fair trial. I think that it cannot be fair on a party to any legal proceedings for a Judge to be put in possession of information which is likely to have a bearing on the outcome of a case but about which that party is ignorant.

The right of the child to know

Irrespective of whether or not the Judge sees a child, it is surely essential that a child has a right to know – but only if he or she wishes – as to what is happening at all stages of the case. Curiously, there is nothing in our Order which imposes a specific duty on anyone to keep the child informed of the proceedings.

Some conclusions

It is clear to me, at least, that to give true effect to acting in the best interests of the child, children *must* be given the chance to participate in the system by attending or giving

evidence if they genuinely wish to do so. For this to happen, the Judge *must* be quite sure that by doing so, we are not allowing a situation to develop in which a child feels that he or she is expected to take an active part or is otherwise being forced into participation by a forceful parent or other person. Otherwise, as I have already said, the system itself becomes abusive.

It must never be allowed to become the norm that children should be brought to see the Judge as a matter of course. There are surely far too many risks involved if this were ever allowed to happen. It is vital that the Judge is quite clear that the child genuinely has asked, of his own volition, to speak to the Judge before he grants permission for this to happen.

I have said that I do not engage very often in seeing and speaking to children directly in this context. I, like Mr. Justice McLaughlin, am mindful of the limitations on my current skills. I am trained as a lawyer, not as a Social Worker. I may be a father, but just as great football players do not often make great football managers, it does not follow that my (comparative) success at one would make me an automatic success at the other. The skills which I possess are not those which are directly pertinent to the interviewing or examination (in the context of Family Proceedings courts) of a child. Although these are entirely my own views and thoughts on this subject, I think that the following steps should be minimum requirements when attempting to carry out this extremely difficult task.

The first thing I ask myself is to reassure myself that this child does genuinely have the capacity, given his age and maturity, to want to see me for whatever the reason and that he genuinely in fact wants to do so. How, given my lack of training and skill in this situation do I satisfy myself? In fact, I rely very heavily on the Social Worker or Guardian ad Litem involved in the case to keep me right here, remembering that they are impartial, qualified and fully trained in the skill of recognising whether or not this is a request which really does emanate from the child himself, rather than from someone else, parent or otherwise, who is telling me that the child wants to see me. So far, I have never been let down by a trained professional in this operation. However, if ever I were to proceed to meet a

child and formed a strong impression that the child had only come under sufferance or because some-one had persuaded him that it would be a good idea to ask to see me, then I would have to be very wary that this might be taking place in the hope of a parent or other party securing some advantage to their own case. In that eventuality, I should feel constrained to terminate the interview very gently but promptly. Even if I were wrong in so doing, I feel that it is probably better to be safe than sorry.

Once I am sure that the child genuinely does want to see me, I enquire as to the reason for this. I have to say that in most, though not all cases, I find that the child, who knows the case is taking place and that he is the subject of it, merely wants to 'meet the Judge' and to see the courtroom. That is, it is usually merely a case of natural curiosity on the part of the child and nothing more. I do not need to talk with him about the case at all in that event. Indeed, I find that it is better not to.

In the event that I agree to see the child, I always insist that a responsible adult is present. This will not be an adult who has a stake in the outcome of the case. Rather, it will invariably be a Social Worker or Guardian ad Litem. This is obviously done to avoid any allegation of bias on my part and for clear and obvious child protection reasons.

Sometimes the child does actually want to discuss the case. In my experience, all that they really want to do in such event is to give a direct input into what they should like to see as the eventual outcome. They can be disquietingly frank, on occasions. What I do, in such cases, is to make it clear to them at the outset that whatever they tell me, I must pass on to their parents. I have already adverted to the reason for this.

Beyond that, I assure them that I shall listen very carefully to what they want to say and that I shall think equally carefully about that. I always tell them, at the same time, that I can

give them no promises as to the eventual outcome and that I cannot promise them that I shall do what they have asked of me. I think that it is of the utmost importance for a Judge, in those circumstances, to be absolutely honest with the child. He must not 'soft soap' them and must be absolutely explicit, so that there is no room for any misunderstanding.

Again, if I see a child in those circumstances, I make a very careful note both of what I have told the child and what he has told me and would even read it out to him. I would confirm to him that this would be the note of our meeting that I would be handing to the parties and their representatives at the hearing and ask him to confirm that he agrees that it is accurate.

Finally, it is absolutely vital that the child knows that the Judge is taking entirely seriously everything which he is being told. There is a place for levity and light-heartedness in talking to a child but this is not such an occasion.

This paper is all about listening to the children who are the subject matter of all Family Proceedings. I have adverted to my hope that all children may soon be able to be assessed as to their competence and, where competent and genuinely desirous of so doing, will receive separate representation and be able to participate in the Family Proceedings process to the extent, but only to the extent, that they so wish. As Gillen J put it in the case of *Re M and S*:

'Adults can be quite inept at understanding what children are in fact saying. It is one thing to accept that children's voices should be listened to when legal and administrative authorities are taking decisions about them, but quite another to get beyond the rhetoric legislative aspiration and international conventions so as to genuinely enable children to have a greater say in the processes that shape their future.'

CUSTOMARY LAW ISSUES IN THE COURTS OF GHANA

*The Hon Justice Nasir Gbadegbe, Court of Appeal, Ghana.
A paper at the CMJA triennial conference 2006*

This paper attempts to outline the role of the courts in Ghana in the determination of issues bordering on religion and culture. Ghana is a democratic state that is widely acclaimed as a model of democratic governance in Africa, of which the rule of law is one of the pillars. In this regard, the courts have a very important role to play in the determination of disputes between citizens and in some cases between the State and the citizen.

The nature of customary law

Customary law, or the law that traces its roots from the practices and usages of our people over the years, is part of the law of Ghana as provided in Article 11 of the 1992 Constitution, and may be applied in the determination of cases. Customary law is not an independent source of law but part of the common law. It is defined in Article 11(2) of the Constitution as ‘the rules of law which by custom are applicable to particular communities in Ghana’.

This definition recognizes the fact that customary law is not common as between the various communities in Ghana. Over the years, however, the courts have laid down certain principles of customary law that are of general application and not limited to particular communities only. An example is *Biney v Biney* ([1965] GLR 619) which laid down the general proposition that upon the death intestate of a person his self-acquired properties becomes family property. This statement of the common customary law position was declared earlier in the case of *Owoo v Owoo* ((1945) 11 WACA 81).

The particular communities may be geographical in scope or determined by ethnic or tribal backgrounds. Therefore when the content of customary law is in contention, the courts are often required to recognize and declare rules of customary law that are not of general application but limited to particular ethnic or tribal groups such as the Ewes, Akans, Fantes or

Gas. Thus, although Ghana is a unitary state under a common system of law, when it comes to customary law there are different rules depending on the origins of the parties.

The effect of increased mobility

As a result of the movement of people beyond their communal backgrounds, the incidence of parties to proceedings not being subject to the *same* customary law is very much on the increase. In order to help the courts deal with such cases, the various Court Acts since 1960 have provided the courts with what are in effect choice of law rules to resolve this type of internal conflict of laws. The current position is contained in section 54(1) of the Courts Act, 1993 (Act 459):

‘Subject to this Act and any other enactment, a court when determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law.’

In all there are seven rules. Where it is clear from the transaction which system of law that the parties intended to govern them, that system applies. Where there is no such agreement, then the law applicable in the devolution of a person’s estate is the personal law of the parties. In cases where the contest before the court turns on title and in which the parties trace their title from persons subject to the same personal law, then the applicable law is that personal law. Where, however they are not subject to the same personal law, then the court may apply their different systems of customary law to achieve a result that ‘conforms to natural justice, equity and good conscience’. The courts are also free in the determination of any issue to which the preceding rules do not apply to ‘apply such

principles of the common law, or customary law or both, as will do substantial justice between the parties, having regard to equity and good conscience'. Finally, the courts may in the resolution of disputes 'adopt, develop such remedies from any system of law (whether Ghanaian or non-Ghanaian) as appear efficacious and to meet the requirements of justice, equity and good conscience'.

The use of the terminology 'natural justice, equity and good conscience' is not accidental. Our courts have, from the time when colonial rule was formally introduced to the Gold Coast, been required by the various statutes that provided for their jurisdiction to mould rules of custom that were proved before them and declared as customary law to meet with conditions that were expressed in those same words.

Ghanaian society has from time immemorial been made up of various ethnic groups, and this diversity was reflected in the cultural rules that guide people's lives. In Ghana, we normally refer to the issues that turn on practices in our communities as customs and therefore I think it more appropriate to use this terminology. Customs in this context denotes usages and/or practices, some of which have, as a result of disputes turning on them, been recognized and declared by courts as customary law.

Historical development

Although customs were in their original form unwritten, they existed in the minds of the particular community to which they applied as the product of the totality of their experience as a people in their economic, social and political endeavours. Though unwritten, their existence and content was widely known to members of the various communities having been passed down from generation to generation in the form of a living law. Justice at the time was administered in the communities by chiefs, elders, headmen and family heads who were assisted in the enforcement of their decisions where necessary by groups of people called *asafo*, the equivalent of police personnel today.

Before the coming of any foreign influence, these rules constituted the standard of behaviour on the Gold Coast. According to foreign visitors at the time, the Gold Coast was a well-

organised society of people. Rules derived from communal or ethnic beliefs were used to determine whether one's conduct was right or wrong and formed the basis of decisions that were reached by the chiefs or elders in disputes that came before them. These practices are sometimes referred to by some writers as the embodiment of tradition. In fact, an eminent Ghanaian jurist, John Mensah, in his book *Fanti Customary Laws* (2nd edition, 1904) has an interesting account of how travellers to the Gold Coast saw it at the time, as far back as the 15th century, long before the advent of Portuguese seafarers and British merchants. They spoke of an organised society having kings, rulers, institutions, and a system of customary laws, most of which remained at the date of the publication of his book.

At that time conduct in our simple rural communities was regulated by customs or customary law which determined the incidents in institutions such as the family, chieftaincy, marriage, and the land tenure system. For example, marriage is in the eyes of customary law is not merely a contract between the two persons directly involved but one between the families to which the parties to the marriage belonged. This principle of general application was recognized and declared by Ollennu J (as he then was) in *Yaotey v Quarthey* [1961] 2 GLR 571 when he held as one of the essentials of a valid customary marriage the 'consent of the families of the man and woman to the marriage. Such consent may be implied from the conduct e.g. acknowledging the parties as man and wife or accepting drink from the man's family...'

Again, customary law perceived land as belonging to the community and as such the rules of land tenure were community based and the interest of members was indivisible (see *Vanderpuije v Botchway* (1954) 13 WACA 164). Similarly where family land was held by the family it was held by the head of the family in a way that could not ripen into personal ownership, the land being held on behalf of all the members. Accordingly, our courts did not recognize grants that were made by family heads without joining the principal members of the family (see *Kotey v Asare* [1962] 1 GLR 312). Similarly, the courts declared that upon the death of a person his successor did not thereby become the owner of the legal estate but that it always remained in the family. In

one case Ollennu J observed that to hold otherwise to ‘destroy the basic concept of family property’: *Amoako v Joseph Lagos* [1962] 1 GLR 317.

British jurisdiction

The process of integrating customary law into the fabric of our law came about with the assumption of British jurisdiction in the then Gold Coast. The first known legal relationship that our ancestors had with Europeans dates back to 1843, with contacts that British merchants had with our people along the coast and the subsequent extension of the applicability of the British Settlement Act 1843 and the Foreign Jurisdiction Act of the same year as the merchants sought to protect their business interests along the coastal belt of the Gold Coast. Later, in the Bond of 1844, the Fanti chiefs acknowledged the power and the jurisdiction of the British Crown, renounced their human sacrifices as well as other practices described as ‘barbarous’ and ceded to the British the trial of murder, robbery and other crimes. The customs of the natives were to be moulded ‘to the general principles of British law.’ This Bond marked the beginning of foreign jurisdiction in the Gold Coast.

The territory was proclaimed a British colony on 24 July 1874 and provided with its own executive and legislative councils. Subsequently the Supreme Court of the Gold Coast was created to apply not only English common law and the doctrines of equity as well as the statutes of general application but also native law and custom. From this date the development of our customary law took a new path, one that required it not to draw its validity from the core values that the indigenous people considered to be necessary to the maintenance of social equilibrium but to measure up to a new standard that was dependent on a foreign notion of law – of not being ‘repugnant to natural justice, equity and good conscience’. Section 9 of the Supreme Court Ordinance 1876 provided:

‘... shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any law or custom existing in the said colony and territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity and god conscience.’

The effect of this condition was that where a particular custom that was proved was found by the court not to be in tune with current social trends then it was not given effect to. An example may be found in the case of *Re Kofi Antubam (decd)* [1965] GLR 138 wherein Archer J (as he then was) refused to accept that children were not considered as members of their family for the purpose of sharing in their deceased father’s estate. In his speech at page 145 he said as follows:

‘Without committing heresy, I am also prepared to take the plunge and to assert that the proposition that children are not considered members of their father’s family is contrary to all biological principles, alien to well known doctrines of all accredited religions and opposed to common sense...’.

Proof of customary law

In the early stages, for a customary rule to be accorded the recognition of a customary law by the Courts the custom alleged had to be proved to have been in existence from a time ‘to which the memory of man runneth not to the contrary’: see *Welbeck v Brown* (1882) SarFCL 185; *Okwabi v Adom* (1957) 2 WALR 268 and Order 19 rule 31 of the High Court Rules, LN 140A that provided as follows:

‘In all cases in which the party pleading relies upon a native law or custom, the native law or custom relied upon shall be stated in the pleading with sufficient particulars to show the nature and effect of the native law or custom in question and the geographical area and the tribes to which it relates.’

This requirement, however, was limited to proof in the first instance. A custom could become so notorious as to pass from the realm of fact into that of law with the Courts taking judicial notice of it. As time passed by, however, it was no longer necessary to plead the existence of customary law and its proof was no longer one of fact but law. The legislation effecting this change was passed soon after Ghana attained Republican status. In particular, in section 67(1) of the Courts Act 1960 it was provided that:

‘... any question as to the existence or content of a rule of customary law is a question of law for the Court and not a question of fact.’

From the date of the change in the mode of proof judges are free to consult text books and, after listening to counsel in the matter when in doubt as to the existence of the customary rule that is alleged before them, may conduct an inquiry as part of the proceedings (see the Courts Act 1993 (Act 459), s 55 and *Billa v Salifu* [1971] 2 GLR 87 on the nature of inquiry that a judge may conduct).

I must add that having regard to its unwritten character and the fact that it is normally passed down in the form of oral tradition, our courts have relaxed the hearsay rule as far as proof of matters relating to custom are concerned. In *Bura and Amonoo v Ampima SarFCL* 214, Redwar J is reported to have observed:

‘A circumstance not to be overlooked in this case is that if the English rule be rigidly applied, evidence on both sides of this case would be rejected; and coupled with the circumstance that the defendant’s counsel has not objected to the admission of the plaintiff’s evidence weighs with the court. I hold therefore that a rigid adherence to English law in this respect would work injustice, the evidence in the nature of hearsay adduced in this case is admissible.....’

Our courts have over the years consistently allowed evidence on traditional matters to be tendered not according to the strict rules of evidence (see also *Dotwaah v Afriyie* [1965] GLR 257). But in all such cases of traditional evidence being allowed in a relaxed manner the evidence as a matter of practice is tested by the court in the light of recent events to ascertain that which is more probable (see *Aduweng v Domfeh* [1996–97] SCGLR 660).

Custom in changing circumstances

The role of the courts as far as the declaration of the existence and content of customary law has not changed over the years although they recognize the flexibility of custom and adapt the laws as previously declared to conform to modern trends. The essential feature of customary law, its communal nature, has continued to be recognized by the courts. While retaining its communal nature they have on occasions tried to be abreast with the times by making declarations that are clearly intended to mitigate harsh features of customary law.

Marriage

In the case of marriage for instance, in *Essilfie v Quarcoo* [1992] 2 GLR 180, Wood J (as she then was) distinguished between two forms of valid customary marriage. The first was where all the necessary customary rites and ceremonies were performed, the second one covered situations where although the marital rites were not performed the parties had lived as man and wife to the knowledge of their families and the whole world. This decision, giving recognition to de facto customary marriages, was affirmed by the Court of Appeal and represents in my view a bold attempt by the Courts to mitigate the difficulties that widows were going through in proving the fact of marriage particularly after the coming into force of the Intestate Succession Law 1981 that was passed to provide a uniform scheme of inheritance in Ghana upon intestacy irrespective of whether the deceased belonged to a matrilineal or patrilineal lineage. Before this decision, some married women, who come within the designation of spouse under the Intestate Succession Law and had adequate provision made for them, found it difficult to prove the fact of their marriage. Since these customary marriages were often performed by the family of their husbands in situations where the family was unwilling to accord the widow the recognition of a spouse they were left without benefiting from the provisions of the law.

Property

Although our Courts with the passage of time made judicial inroads into the content of customary law it took the enactment of the Head of Family Accountability Law 1985 to make it possible for members of the family to take action against the head of family to account in respect of assets and property in his possession. The attitude of the courts before this piece of legislation is best illustrated by the following observation of Korsah J (as he then was) in *Abude v Caesar* (1946) 12 WACA 102 at 104:

‘It is an accepted principle of Native Customary Law that neither a chief nor the head of a family can be sued for account either of state or family funds.’

The absolutism inherent in this pronouncement regarding heads of family was questioned in the case of *Ankrab v Hansen* [1981] GLR

847 in the light of modern trends and I venture to say that the subsequent enactment of the 1985 Law was a direct consequence of the position that the courts began to take of the immutability of the position of the head of family. Thus, our Courts have by their decisions sensitised law makers to make appropriate changes in the existing customary law rules.

Fetish

Although before colonial rule our customs recognized and applied sanctions to customary offences such as adultery, with the coming into force of the Courts Decree 1966 the only offences known to our jurisdiction are those created by the Criminal Code and other laws. Some of these offences such as the swearing of fetish and adultery were at custom both criminal and civil in nature but for as long as the new legal regime did not create them as offences they were not given effect to by the Courts.

The facts of the land dispute in *Obeng alias Nkobiahene v Dzaba* [1976] 1 GLR 172 illustrate the new approach. The plaintiff swore a fetish on the defendant and later went to the fetish priest to inform him that he had invoked his fetish and to lodge a complaint that the defendant was unlawfully interfering with his enjoyment of his land. The defendant also invoked the same fetish over the land to the effect that the fetish should kill all those who had unlawfully taken his land but had refused to attorn tenant to him. The parties thereafter agreed to submit the dispute to the fetish priest for determination. While the case was pending before the fetish priest the plaintiff asked for permission to complete the harvesting of his crops on his land. This was refused by the fetish priest, and a date was fixed for the inspection of the land. Before that date the plaintiff went and took out a civil summons in the District Court for damages on the ground that by swearing the fetish to kill anyone who ate crops from the disputed land the defendant had unlawfully prevented him from harvesting crops from his land. The trial magistrate accepted the plaintiff's claim and awarded him damages.

The defendant appealed to the High Court. In his judgment, the learned judge held that although in appropriate cases putting a person into fetish may found an action it would

depend on the community to which the parties belonged and the nature of the act that might put a person in fear and as such cause him to seek redress. The judge however allowed the appeal on the ground that in the circumstances of the case there was no proof of injury to the plaintiff that could be said to flow directly from the defendant's conduct. In his observations the learned judge said:

'Putting a person in a fetish is a common thing in this region. It is something which is dreaded and feared by the community. The efficacy of the fetish is traditionally believed by Africans and Ghanaians. However, in a court of law it is difficult if not impossible to adduce legally acceptable evidence to establish the efficacy of the fetish. The method by which the fetish works cannot be comprehended. It is shrouded in mystery, secrecy and darkness. The courts cannot stop people from resorting to fetish to settle their differences. Perhaps their brand is quicker than the courts, but it is doubtful whether their findings could found a cause of action in the law courts. In fact the method of adjudication if accompanied by threats or assault or harm may amount to 'trial by ordeal' which could be a criminal offence. In that case an injured person may probably found an action for injury suffered independently of any criminal prosecution...'

This decision appears to turn on the particular facts of the case but demonstrates that when a particular customary rule that derives its source from community beliefs is in issue the courts look at the matter within the context of the geographical location to see if the belief urged as the cause of action is reasonable.

Death threats

I refer also to the allegation of defamation in *Togbui Hor II v Victor Agbanu*, an unreported High Court case from 1993. For several years there had been misunderstanding between the plaintiff, the chief in the community, and the defendant's family. An attempt was made to reconcile them by a process of mediation. In the course of the mediation the plaintiff threatened to kill the members of the defendant's family one after the other. Not long afterwards, a member of the defendant's family fell suddenly ill and died. The defendants wrote a

letter to the plaintiff that was copied to others referring to the threat of death that he had uttered and calling upon him if he thought he was not responsible for the death of their family member to publicly clear himself. The plaintiff took out a writ claiming damages for defamation contained in the libellous publication as well as an injunction restraining the defendants from publishing the said or similar libel of him. The action went to trial and the learned trial judge upheld the defendants' plea of qualified privilege.

This case is important for our purpose for by accepting the plea, the court took the position that, having regard to the community to which the parties belonged, the fact of the plaintiff having actually uttered words of threat of death to members of the defendant's family that was not long after followed by the death of a member meant that the defendants in writing the letter that sparked of the case had an honest belief in the truth of the statement alleged by the plaintiff. Acquah J (as he then was) observed:

'Thus death through juju, witchcraft or other supernatural forces is a phenomenon the Africans and Ewes in particular seriously believe in and fear. And in the instant case the seriousness with which the defendants took the threat of death is evidenced by their letter... I am therefore satisfied and do find as a fact that with the death of Nicholas Agbanu, the defendants genuinely believed that the plaintiff was carrying threat into action.....'

Chieftancy

One major institution of customary law is chieftancy. Today, issues concerning or affecting this institution are not tried by the ordinary courts but by special adjudicative bodies set up under the Chieftancy Act 1971. The cases are tried, depending upon the status of the chieftain position in respect of which the dispute arises, in the first instance either by a Judicial Committee of a Traditional Council, or the Judicial Committee of a Regional House of Chiefs. Appeals lie to the Judicial Committee of a Regional House (where the action originated below), to the National House of Chiefs and on to the Supreme Court, the highest Court in Ghana. There is a jurisdictional bar against courts determining causes or matters affecting chieftancy in section 57 of the Courts

Act 1993 but the jurisdiction conferred on these chieftancy tribunals may be amenable to the prerogative writs or judicial review in the nature of certiorari, prohibition, quo warranto mandamus and the like depending on the nature of complaint that is made about the proceedings. These chieftancy tribunals have the designation of lower courts (inferior courts) and as such applications in the nature of judicial review are determined by the High Court in the first instance.

Customary law and the Constitution

The Constitution of Ghana contains a number of provisions bearing on customary law. Article 39(2) of the 1992 Constitution provides:

'The State shall ensure that appropriate customary and cultural values are adapted and developed as an integral part of the growing needs of the society as a whole; and in particular that traditional practices that are injurious to health and well being of the person are abolished.'

Having regard to this cultural objective, our Courts may begin a gradual process of identifying common features in the various customary rules for the purpose of declaring rules of law that may be applicable to the entire nation as part of a process of integrating the entire society. This is a challenge that requires a lot of research to be undertaken by various bodies in order that in our pronouncements we may declare rules that cut across a large section of the country and thus begin the process of developing the common law of Ghana.

It is to be remarked that since customary law is part of the laws of Ghana and derives its legitimacy from the 1992 Constitution it must to be valid conform to the provisions of the fundamental law of the land. That this is so is plain from the unambiguous words of Article 1 (2) of the 1992 Constitution as follows:

'This Constitution shall be the Supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of its inconsistency, be void.'

Since customary law rules are developed to guide human conduct, certain other provisions of the 1992 Constitution may affect their

validity. I refer in this regard firstly to the very elaborate provisions made in the 1992 Constitution on fundamental human rights that are contained in Chapter 5. Then also are the provisions on Directive Principles of State Policy in Chapter 6. Chapter 5 guarantees to an individual the right to liberty, life and property as well as immunity from torture and inhuman punishment. The freedoms also provide for a fair and open trial, the right to counsel, the presumption of innocence in criminal trials, and prohibit slavery, forced labour and retroactive legislation, the freedom of association, religion and the right freely to assemble. It is thus plain that in determining the existence and content of customary law the Courts have to test the evidence placed before them against these constitutional provisions.

In *Abevi v Abeto* [1993-94] 1 GLR 512, the learned trial judge of the High Court refused to accept evidence in proof of a claim in slander that showed that the plaintiff had prior to commencing the action appeared before a customary panel that conducted a trial by ordeal and sought to rely on his exoneration

by that body. In his judgment, Acquah J, basing himself on section 1 of PNDC Law 42 that made provision for Directive Principles of State Policy that included respect for fundamental human rights and the dignity of the individual, refused to give recognition to that practice. He said:

‘Now trial by ordeal of whatever form is an affront to human dignity, and since we are enjoined by section 1(1)(b) of PNDC Law 42 to cultivate respect for the dignity of the human person, it will be a contradiction in terms to hold that the courts should recognize and validate those trials by ordeal wherein no bodily injury is likely to be caused to the participant.’

Our courts must accept the challenge in a process of the gradual transformation of rules that were originally developed by small communities to meet the demands of a rapidly changing society in which certain features which shaped those rules have been eroded. I am hopeful that as judges we are able to rise to the challenge.

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LAW REPORTS

JUSTICE DELAYED: GLIMPSES OF THE CANADIAN EXPERIENCE

In the December 2005 issue of the *Journal*, we published an article on delays in the administration of justice by Carl Barr. There are serious problems of delay in many Commonwealth jurisdictions. Two cases, decided within a few weeks of one another in February 2007 in two different Provinces of Canada illustrate some aspects of the situation there. Printing shortened versions of the judgments here is not to pillory the courts concerned, or to suggest that the problems are unique to those jurisdictions: would that it were so! There is lavish reporting of cases in Canada (and cases like these might well pass unreported in many Commonwealth countries) and delay can attract, as in the first case, *R v Card*, the relief offered by the Canadian Charter of Rights and Freedoms. The fear is that, in many countries, the delays illustrated would be unsurprising, and would pass unnoticed and unremedied. Although slightly shortened, the cases are set out at some length, for it is from the detailed facts that the full picture emerges.

In *R v Card*, the trial of the accused was to take place 32 months after the alleged offence;

26 months of that period was identified as delay attributable to the Crown or to institutional problems. That is plainly excessive. To observers in some other jurisdictions, however, what is surprising is that the Canadian cases treat delay of between 14 and 18 months as acceptable.

In the second case, *R v Baldwin*, the substantive charge of assault was not proceeded with, and the case concerns two informations for breach of court orders. A failure to attend a bail supervisor had already led to eleven court appearances; a failure to attend one court hearing led to seven court appearances; eight months into the story, the court was ready to proceed. The case is notable on three counts: the use of criminal charges, with the full panoply of pre-trial hearings, for such breaches; the attempts made by the judiciary to address the problem that caused; and the fierce attack on those attempts made by counsel.

We hope in a future issue to publish an account of how such cases would be handled in jurisdictions which seem to have tackled the problems more successfully.

R v CARD

IN THE ONTARIO SUPERIOR COURT OF JUSTICE

Stinson J

6 February 2007

Mr Card was charged on 10 June 2004 on six firearm-related charges, including possession of a loaded prohibited firearm. His trial in Superior Court did not commence until 5 February 2007, when he brought an application under section 24(1) of the Canadian Charter of Rights and Freedoms, seeking an order staying the proceedings on the ground that his right under section 11(b) of the Charter to be tried within a reasonable time had been violated.

D G STINSON J set out a chronology of the proceedings:

15 July 2004 — Mr. Card appeared with counsel, Mr. Bawden, in set date court in the Ontario Court of Justice in Scarborough. The matter was put over to 26 August 2004, to set a date for a preliminary inquiry. Disclosure was not provided at this time.

26 August 2004 — Mr. Card and Mr. Bawden again appeared in set date court. Disclosure

was still not available, and Crown counsel indicated that he would look into the availability of disclosure. The matter was put over to a new set date, 20 September 2004. Prior to the latter date, disclosure was delivered to Mr. Bawden's office.

20 September 2004 — Mr. Bawden appeared on behalf of Mr. Card and requested a Crown pretrial that day. The Crown pretrial did not take place on that occasion because Crown counsel did not have the brief. The matter was adjourned to 6 October 2004 again to set a date for the preliminary inquiry.

6 October 2004 — Prior to appearing in court, Mr. Bawden participated in a Crown pretrial. Pursuant to a practice direction, all Ontario Court of Justice matters at the Scarborough courthouse that are anticipated to require half a day or more of court time for trial or for preliminary inquiry purposes, must be the subject of a judicial pretrial before a hearing date can be set. During the course of the Crown pretrial, it was agreed by counsel that, in light of the practice direction, a judicial pretrial would be needed in this case. A judicial pretrial was set for 1 November 2004 and the matter was adjourned to be spoken to on that date.

14 October 2004 — Despite the fact that 1 November had been designated as the next appearance date, the judicial pretrial took place on this date. Following the judicial pretrial, Mr. Bawden appeared in set date court, and obtained the date of 21 June 2005 for the preliminary inquiry. That was the earliest available date.

21 June 2005 — The preliminary inquiry commenced before Foster J. The preliminary inquiry could not be completed in the allotted time. The first available date for completion of the preliminary inquiry was 15 November 2005, and the matter was adjourned to that date.

15 November 2005 — The preliminary inquiry on the firearm charges was completed, and Mr. Card was committed for trial. Prior to leaving the courthouse, counsel arranged for a judicial pretrial and first appearance in the Superior Court on 6 December 2005.

6 December 2005 — The Superior Court judicial pretrial was held. A trial date of 5 June 2006 was set, for a five day trial.

5 June 2006 — Although this was the designated date upon which the trial was to commence, no judge was available to hear it. Crown counsel, Mr. Kerr, and Mr. Bawden attended to speak to the matter before McWatt J., the judicial team leader responsible for the team of Superior Court judges assigned to hear matters originating in the Scarborough courthouse. McWatt J. was informed that Mr. Bawden had an obligation to appear before another Superior Court judge on the subsequent Monday in a continuing matter, also set to continue for five days. ...[Later] Mr. Kerr met with the senior Crown attorney to determine available dates. He then re-attended before McWatt J. and advised that 11 December 2006 was the first open date, but it was not a date that was available to the officer in charge, who was also a necessary witness. The next date that was available and agreeable to all parties was 5 February 2007. At the suggestion of Mr. Bawden and with the concurrence of Mr. Kerr, to be on the safe side, the matter was noted for seven days for trial. On this basis the trial date was adjourned to 5 February 2007.

Positions of the parties

The position of the defence is that the 32 month delay between Mr. Card's arrest and the commencement of his trial is prima facie excessive and requires consideration by the court. The defence argues that Mr. Card has never waived the delay at any point in the proceedings. On the contrary, he has appeared personally or by counsel on every appearance and has accepted the earliest dates offered for all material appearances. It is Mr. Card's position that none of the delay is attributable to the defence. Rather, it is largely attributable to systemic factors or to the conduct of the Crown. The total delay of 970 days between charge and trial has been excessive and unreasonable and Mr. Card has suffered prejudice as a result. His rights under s. 11(b) have been violated and as a consequence the proceeding should be stayed.

The position of the Crown is that there has been no violation of Mr. Card's s. 11(b) rights. The Crown argues that, in relation to the progress of the matter at the Ontario Court of Justice level, the timing of the preliminary inquiry was consistent with the principles enunciated by the Supreme Court of Canada,

having regard to the complexity of the case. As regards the adjournment before McWatt J., the position of the Crown is that Mr. Card waived his s. 11(b) rights. The Crown further argues that Mr. Card has suffered no prejudice. On this basis the application should be dismissed.

Analysis

Under s. 11(b) of the Charter, ‘any person charged with an offense has the right to be tried within a reasonable time’. The analysis to be undertaken in determining whether a defendant’s s. 11(b) rights have been infringed is set out in *R v Batte* (2000) 145 CCC 93d) 498 (Ont CA) where Rosenberg J said, at pp. 518-519:

In *R v Morin* [1992] 1 SCR 771 at 788, Sopinka J held that the determination of whether the accused’s right to a trial within a reasonable time had been infringed could not be made by the application of a mathematical formula. Rather, the court is required to balance the interests the section is designed to protect against the factors that either inevitably lead to delay or are otherwise the cause of the delay. The balancing ‘requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable’.

[having identified the relevant factors, the judge then examines their application in the instant case:

1. The length of the delay

The total overall delay in this case between the laying of the charges and the commencement of the trial is 32 months. I agree with the submission of the defence that a delay of this magnitude is prima facie excessive and warrants inquiry by the court.

2. Waiver of time periods

[Having examined the facts, the judge held:]

It follows that in my view there was no waiver of any time periods by the defence.

3. Reasons for the delay

(a) Inherent time requirements of the case

[The judge found that the 77 day period between Mr. Card’s arrest and the second appearance in set date court on 26 August 2004 was a reasonable intake time at the

Ontario Court of Justice, and part of the inherent time requirements of the case. He also found that the 21 day period after committal for trial and the judicial pretrial in the Superior Court was also part of the inherent time requirements of advancing the case towards trial at the Superior Court level.]

(b) Actions of the accused

[Having examined the facts, the judge held:]

This, then, is plainly not a case in which an accused person ‘played the system’ in the hopes of creating a section 11(b) argument. To the contrary, both Mr. Card and his counsel took all reasonable steps to advance the matter to trial early as possible.

(c) Actions of the Crown

The defence argues that the matter was delayed from 26 August 2004 to 6 October 2004 because (a) disclosure was not available on 26 August and (b) the Crown was not in a position to proceed with the Crown pretrial at the next appearance, 20 September. The defence submits that the this one and a half month delay is therefore attributable to the actions of the Crown. Crown counsel did not disagree.

(d) Limits on institutional resources

Limits on institutional resources played a part in the delay of this case at both the Ontario Court of Justice level and in the Superior Court.

Dealing first with the Ontario Court of Justice, at the judicial pretrial held on 14 October 2004 it was determined that a half day was required for the preliminary inquiry. The earliest available preliminary inquiry date for a half-day hearing was 21 June 2005, some 250 days or over eight months later. As events unfolded, the half day set aside on 21 June 2005 proved to be insufficient. The next date available for completion of the preliminary inquiry was 15 November 2005, approximately 5 months later. On the latter date the preliminary inquiry was completed and Mr. Card was committed for trial.

In the result, the institutional delay at the Ontario Court of Justice level ran from 14 October 2004 (when the judicial pretrial was conducted) to 15 November 2005 (when the preliminary inquiry was completed) — a total

of 13 months. Crown counsel submits, however, that the period of five months between the first and second dates for the preliminary inquiry should be treated as neutral time. He argues that the original allocation of one half day of court time for the preliminary inquiry was based on the input of all participants at the judicial pretrial held on 14 October 2004. As not infrequently occurs, that estimate was low, and a second date became necessary. Had the original time estimate been more accurate, a full day could have been set aside in advance of the 15 November 2005 date.

Defence counsel submits that the inability of the Ontario Court to schedule the completion of a preliminary inquiry on a more timely basis should be treated as institutional delay, just like the delay between the initial set date and the commencement of the preliminary inquiry. The reason the second delay occurred was because the court was unable to accommodate the matter sooner, something over which Mr. Card had no control. He argues that responsibility for the insufficiency of the estimate cannot be laid at the feet of Mr. Card, since the end result of the judicial pretrial was that only half a day was allocated for the preliminary inquiry. An accused person cannot be held responsible for the allocation of judicial resources. Defence counsel conceded, however, that a reasonable amount of inherent delay time to rearrange and schedule the continuation of the preliminary inquiry might be appropriate, say, approximately 1 month.

In my view, there is merit to the submissions made by both sides on this issue. I agree with the submission of defence counsel that Mr. Card cannot be held responsible for the allocation of insufficient time to complete the preliminary inquiry on the first scheduled date. There is no suggestion or evidence that defence counsel deliberately or negligently underestimated the amount of time required to conduct the preliminary inquiry. That said, it is the case that time estimates are just that — estimates — and sometimes they prove to be inaccurate. Where that happens, however, I do not agree that any and all further delays should be treated as neutral time.

In the final analysis, the state remains responsible for providing adequate resources to try cases on a timely basis. In my view this should

include some element of elasticity in judicial scheduling, so as to permit the timely completion of preliminary inquiries, such as this one, where the original time estimate proves to be insufficient. ...

In *Morin* Sopinka J suggested a period of institutional delay between eight and 10 months as a guide to provincial courts. Here the arrest took place on 10 June 2004 and the preliminary inquiry was completed on 15 November 2005, over 17 months later. If one subtracts the inherent intake time of approximately 2½ months, and a further two months to allow for the rescheduling of the continuation of the preliminary, the combination of delay attributable to the Crown and institutional delay leading up to the completion of the preliminary inquiry adds up to more than 12 months. This exceeds the upper range of acceptable delay at the provincial court level.

Against the foregoing backdrop at the Ontario Court of Justice level, I turn now to the delay experienced at the Superior Court level. At the first appearance in Superior Court on 5 December 2005, a trial date of 5 June 2006 was set, precisely 6 months later. As previously discussed, the case had to be adjourned on 5 June 2006. The next available date was 5 February 2007, precisely 8 months later. I consider all 14 months to be institutional delay, resulting from insufficient judicial resources at the Superior Court level. I note that this compares to the *Askov-Morin* guidelines of between six and eight months after committal for trial. This delay, of course, is in addition to the delay prior to committal.

Balancing

I turn finally to the question of balancing the problems that delay causes for the accused person against the community's interest in seeing that criminal charges are disposed of in a proper manner. As was recently said by Nordheimer J in *R v Osei* (released January 30, 2007):

It is accepted that the community's interest in seeing that persons are properly tried on any criminal charge increases as the seriousness of the charge increases. At the same time, it must be recognized that all criminal charges are serious and, by definition, this court only sees the more serious charges. In this case, for example, the

charges revolve around the possession of a prohibited weapon together with the possession of a significant quantity of marijuana for the purpose of trafficking. The seriousness of the charges does not, however, exempt this court from the requirements of s. 11(b). As the Supreme Court of Canada has made clear, the obligation to move a matter forward expeditiously applies throughout the process and in both provincial and superior courts.

In *R v Morin*, McLachlin J described the balancing of the competing interests under s. 11(b) as follows (at p. 810):

The task of a judge in deciding whether proceedings against the accused should be stayed is to balance the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis the judge, before staying charges, must be satisfied that the interest of the accused and society in a prompt trial outweighs the interest of society in bringing the accused to trial.

To recap, Mr. Card was arrested and charged on 10 June 2004. The preliminary inquiry in this matter was not concluded until 15 November 2005. The total period of time that elapsed from arrest to the completion of the preliminary hearing was more than 17 months. Delay attributable to institutional delay and to the Crown were responsible for more than 12 months of that delay, two to four months in excess of the *Askov-Morin* guidelines. In addition, there is the more serious delay in the trial commencing in this court. I calculate it to be 14 months, six to eight months greater than the *Askov-Morin* guidelines, which themselves contemplate a delay of only six to eight months between committal and trial. In the result, Mr. Card has experienced institutional delay and delay attributable to the Crown totaling more than 26 months. This compares to the range suggested in the *Askov-Morin* guidelines of between 14 and 18 months in total, at the upper range. He now faces a trial in February 2007 on charges that were laid in June 2004, two years and eight months ago. He is responsible for none of the delay.

In relation to the allocation by government of resources sufficient to meet its s. 11(b) consti-

tutional obligations, I respectfully repeat and adopt what was said by Nordheimer J on that subject in *R v Osei* as follows:

On the issue of the failure of the trial to proceed in the Superior Court as scheduled due to a lack of judicial resources, the decision in *Askov* also makes it clear that delay caused by the lack of institutional resources is delay for which the Crown must bear the responsibility since it is the Crown that is responsible for the provision of those resources.

In addition to all of these considerations, of course, is the fact that the guidelines in *Morin*, following on the decision in *Askov*, have now been with us for about fifteen years. We are not then faced with a situation that is unknown to the Crown or one for which the Crown is not on notice respecting the consequences if the directives of the Supreme Court of Canada are not respected. Notwithstanding that fact, here we have a fairly straightforward case where the preliminary hearing and the trial both occur outside of those guidelines. They both result from a lack of institutional resources.

The guidelines were established to give some fairly clear direction to government as to what constitutes the outer limits of tolerable delay in the justice system. Governments have now had many years to adjust their priorities in order to ensure that the justice system receives sufficient resources to match their results against these guidelines. Indeed, I would note that the Supreme Court of Canada observed that, as time passed, it expected that cases would have to conform to the lower end of the guidelines: see *R v Sharma* (1992) 71 CCC (3d) 184 (SCC) at p 194.

As was the situation in *Osei*, this is a relatively straightforward case. Also like *Osei*, it is not a case that would be unusual to find within the criminal justice system in this city. Nonetheless, this case took 32 months to get to trial. That amount of time far exceeds the guidelines set out in *Askov* and *Morin*. In addition, as I have found, Mr. Card has suffered prejudice as a result.

The principal cause of the most significant period of delay in this case was the lack of

sufficient judicial resources to try all of the criminal cases that were scheduled to proceed in the Toronto Superior Court courthouse on 5 June 2006. Regrettably, this is not an unfamiliar or uncommon phenomenon; rather, the inability of the available judicial resources to cope with the volume of cases is an all-too-frequent situation. This is an unsatisfactory state of affairs for all concerned. It certainly raises the spectre of the violation of the constitutional rights of accused persons to trial within a reasonable time. It also results in serious inconvenience and hardship for victims and other witnesses who have arranged their affairs so that they can come to testify, in the hope and expectation that they can put the matter and their involvement in the criminal justice system behind them. It causes an unnecessary drain on the resources of the police and Crown prosecutors involved in the proceedings, who have set time aside and prepared to prosecute the case. It also causes significant inconvenience and, potentially, economic hardship for members of the defence bar, who have set time aside and prepared to defend the case, only to find that it cannot proceed and they must later prepare once again to go to trial. It raises questions in the minds of the public concerning

the ability of the criminal justice system to deal with cases on a timely basis. Ultimately, if this situation is not remedied, it will erode public confidence in the justice system.

The issue of the adequacy of the judicial complement in the Superior Court of Justice and the strain imposed on existing judicial resources due to the increase in the population of Ontario and delays in the timely appointment of new judges to fill judicial vacancies is not a novel one. It has been the subject of express comment by the Chief Justice of the Superior Court in her Opening of the Courts speech in 2006 and again in 2007, and on other occasions in open court. The problem persists. This case is not the first to be a casualty of the lack of sufficient judges to process the volume of criminal cases coming before this court.

Conclusion and Disposition

In these circumstances, I am satisfied that, by reason of the amount of delay, the reasons for the delay and the presence of prejudice to the accused arising from that delay, the interests of a prompt trial outweigh the societal interests in having these charges tried. A stay of proceedings is therefore granted.

R v BALDWIN

IN THE BRITISH COLUMBIA PROVINCIAL COURT

Brecknell ProvCtJ

20 February 2007

Mr Baldwin was originally charged with an assault in June 2006. That charge was effectively dropped in August 2006. On his arrest, Mr Baldwin was released by the police on an undertaking to, among other things, report to Prince George Community Corrections (the Bail Supervisor) on 19 June 2006 by 12:00 noon. An information was sworn that he did not report to Prince George Community Corrections as required by his undertaking. It led to eleven Court appearances and two applications to adjourn the trial.

One part of the proceedings on that information was a Trial Confirmation hearing fixed for 6 September 2006. The Accused failed to attend and a further information was sworn, leading to seven court appearances and two applications to adjourn the trial.

The trials of these two informations were fixed for 19 January 2007. The Accused did not appear but his counsel obtained an adjournment. A third information was then laid alleging the failure to attend for trial.

The trials on the first two informations were fixed for a date in late February 2007, but on 7 February counsel for the Accused applied for an adjournment, complaining of the manner in which the trials were scheduled.

M J BRECKNELL ProvCtJ, having summarised the history of the case, continued as follows:

Over one year ago the Executive and Management Committees of the Provincial Court of British Columbia (the Court) identified a number of difficulties and concerns in the scheduling and conduct of criminal cases

coming before the Court. Those difficulties and concerns were resulting in an alarming increase in case backlog. As part of the Court's overall efforts to improve management of criminal cases coming before it the Court decided in early Spring 2006 to establish a number of Court committees to examine present criminal processes and procedures and to bring forward reforms where appropriate.

Of the several areas of concern identified, one involved the class of cases alleging breaches of Court Orders and Directions to an Accused once the initial substantive charge had been laid and bail arranged for, or once the Accused had been sentenced and probation had been ordered.

Some of the issues identified by the Court surrounding these types of cases included:

- (a) The sheer volume of the number of charges being preferred by the Crown. In some areas of the province they amount to 20% of the total number of Informations laid;
- (b) The perception of both the public and many inside the justice system that the system itself, be it the Court, Crown Counsel, Community Corrections, Defence Counsel, the Accused or sentenced persons, were not treating breaches of Court orders with a consistent level of seriousness leading to the perception that breaching of Court orders were of no consequence and that persons on bail and probation orders could breach those orders with impunity;
- (c) Logistical difficulties in processing and dealing with multiple appearances for these types of offences both from a judicial scheduling and Court Services Branch information management perspective; and
- (d) The regular use of outstanding breach charges as bargaining chips between Crown and Defence counsel to arrive at conclusions on substantive offences leaving outstanding breach charges to be dealt with by Stays of Proceeding.

The Court considered pilot projects to address breach cases in a variety of communities around British Columbia including Prince George.

Some of the reasons for selecting the class of cases involving breaches of court orders for the pilot projects included:

- (a) allegations of breach of court orders or directions to an Accused are a direct attack

on the rule of law and strike at the core of the very authority of the Court to ensure compliance with its orders by the very persons who the Court has a direct legal control over as a result of their release pending disposition of lead criminal charges or their permission to remain in the community as part of their sentence;

- (b) the evidence necessary to prove breach allegations is relatively easily gathered by the Crown and can be quickly disclosed to the Accused allowing for a timely decision by an Accused and counsel as to whether the Crown has proof of its case and whether the Accused can present the lawful excuse required to be exonerated; and
- (c) a growing volume of breach cases coming before the Courts and then, rather than being resolved, simply accompany the lead charges until those charges are concluded leaving the breach charges unresolved on the merits of the allegations.

[The judge gave an account of a pilot project in Victoria in the latter part of 2006, and of the consultations with both Crown and Defence Counsel in respect both of that project and a new pilot project in Prince George commencing in January 2007].

The timelines and procedures adopted in January 2007 under the authority of the Chief Judge delegated to the Administrative Judge include the following:

- (a) from the time an Accused first appeared before the Judicial Case manager (JCM) they would be given one or (if permitted) two weeks to obtain counsel;
- (b) if counsel was engaged counsel would be given a further week or (if permitted) two weeks to obtain necessary disclosure from the Crown and to receive instructions from their client;
- (c) at the next appearance before the JCM the accused or counsel would be expected to indicate a plea;
- (d) there are no arraignment hearings or trial confirmation hearings held as contemplated by the Criminal Caseflow Management Rules;
- (e) if there was a guilty plea a date would be set before a judge of the accused's or counsel's choice to dispose of the matter within thirty to forty five days;

- (f) if the plea was not guilty or if an accused or counsel refused to enter a plea the JCM would fix a date for trial within thirty to forty five days attempting to accommodate the accused's and counsel's schedule while at the same time ensuring the trial is fixed on the date scheduled for such trials by the Administrative Judge (Tuesdays);
- (g) in only the most extraordinary circumstances would the JCM be permitted to fix Trial dates outside the parameters set down for the pilot project and even then it must be done with the consent of the Administrative Judge.

It is as a result of the implementation of this pilot project and the arguments advanced by the Accused's counsel in opposition to it that an adjournment of the trial date for the two trials is sought. ... The Accused's counsel engaged in a wide ranging argument assailing both the manner in which the Accused's trial dates were fixed and the purported authority of the Court to do so. In doing so the Accused's counsel addressed a number of themes and topics surrounding the manner in which breach cases were being fixed for trial within the pilot project.

The Accused's counsel asserts that the Chief Judge of the Provincial Court of British Columbia:

- (a) lacks the legal authority to direct on what schedule cases should be dealt with;
- (b) could not direct a judge on how to decide a particular case and that such independence extended to the Judicial Case Manager when dealing with procedural matters and any attempt to do so would be fettering of the JCM's independence and authority;
- (c) should not and cannot direct that more of a certain type of case be brought before the Court in preference to other cases;
- (d) has not put the scheduling of the breach cases in the pilot project into writing and as such is in gross violation of one of the fundamental principles of the rule of law and thereby deprives the Accused and counsel the opportunity to examine and if necessary test the limits or argue the exceptions to the policy.

The Accused's counsel also submitted that the present pilot project involving scheduling of breach cases on an expedited basis:

- (a) would have a chilling affect on the Crown Counsel by encouraging more of such charges to be laid lest the Court would think that the Crown is not assisting in maintaining the dignity of the Court in compliance with its orders;
- (b) is usurping the authority of the Crown to determine when cases should proceed;
- (c) would have the affect of depriving many Accused of their choice of counsel because the present scheduling ignores counsel's calendar and obligations to other clients;
- (d) without counsel to assist many unrepresented Accused would simply plead guilty rather than face a trial unassisted;
- (e) is petty oppression by the Court of the most vulnerable persons involved in the justice system – those who as a result of a number of circumstances or disabilities are much more prone to be unable to comply with court orders and directions;
- (f) improperly attempts to circumscribe the ability of the JCM and judges to give independent, individual consideration to an Accused's circumstances;
- (g) if done to enhance or ensure the dignity of the Court, will end up having just the opposite effect;
- (h) will interfere with and delay the resolution of other cases before the Courts including serious criminal cases and important family litigation.

[The judge held that the authority of the Chief Judge to determine in what manner cases are scheduled was well established and was confirmed by both statute and case law. he referred to the Provincial Court Act and to cases in the Supreme Court of Canada which had confirmed not only the individual independence of judges but the administrative independence of the Courts and the legal underpinnings to that independence, citing *R v Valente* [1985] 2 SCR 673 and *Ell v. Alberta* 2003 SCC 35 .]

...The experience in the Victoria pilot project so far has been that early resolution of breach cases actually allows for more scheduling time for other criminal matters and in some cases also results in resolution of the initial substantive charges at an earlier date.

In setting aside a dedicated time and schedule to deal with a certain class of cases the Court

is in no way directing that more cases be brought forward or in any way encouraging or dissuading the Crown from pursuing individual cases. The Crown decides whether there is evidence sufficient to prove a case and hence if a case will proceed. What the Court is doing, as it is entitled to do, is recognizing the necessity to address a certain class of cases in a different fashion from before in order to conclude them in a fair but expeditious fashion on their merits rather than having them languishing for months and months with repeated court appearances to no avail. ...

Counsel's suggestion that the pilot project is an petty oppression of the disenfranchised and will result in many accused persons improperly pleading guilty is an unfortunate and unfounded attack on the professionalism and integrity of the members of the Court be it the Chief Judge, the Judges or the Judicial Case Managers. Breach cases are relatively easy to prepare and present as they are normally decided on the determination of clearly ascertainable facts. The suggestion that judges would permit someone to plead guilty in circumstances where a lawful excuse is offered at any point in the proceeding and the judge has made the necessary inquiry under section 606(1.1) of the Criminal Code is not worthy of further comment. ...

The circumstances by which the Accused here comes before the Court do not in the least

persuade me that another adjournment of his trials is fair or reasonable in the circumstances. There is a strong *prima facie* case to suggest that the Accused has little if any regard for the authority of the Court or his duty to recognise and abide by that authority. The multiplicity of offences he faces for the same alleged behaviour of not attending where he was directed to attend clearly points in that direction.

In addition the slow meandering of these cases through the court system, the Accused's multiple appearances that accomplished little, has alleged non-attendance at important appearances resulting in lost trial dates, and his alleged non-appearances at trial typify why breach cases are putting enormous strain on judicial and other court related resources and require urgent attention. ...

The Defendant's Application to adjourn the two trials presently scheduled for February 27, 2007 is denied. Even if the scheduling of breach cases under the pilot project were not in existence I would in any event deny the adjournment request. These matters have been set for trial on two separate occasions and on each occasion a trial could not proceed due to the Defendant's alleged failure to comply with Court direction. He is not entitled to further indulgences or forbearance from the Court.

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The CMJA and the family of Dorothy Winton want to thank those who have already contributed to the this fund and which was used to assist participation of three magistrates from Malawi, Uganda and the Solomon Islands at the CMJA's 14th Triennial Conference.

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