THE PRACTICE OF LAW: 1946-1993

Donald M. Gillis, Q.C.*

In marking the occasion of the 101st anniversary of this institution, it would be an appropriate exercise to compare the practice of law of the Province of New Brunswick in the 1940s with that of the 1990s. In doing so I will limit my remarks to the practice of civil law as opposed to criminal law. Let me first, therefore, deal with the composition of our courts in the 1940s and compare it with the composition in the 1990s.

The Structure of the Courts in the 1940s

In the 1940s, we had one Supreme Court of New Brunswick which was comprised of three divisions: the appeal division having three judges consisting of the Chief Justice of N.B. and two other judges; the Chancery Division consisting of three judges of the Appeal Division; and the Kings Bench Division having four Judges consisting of the Chief Justice of the Kings Bench Division and three other judges.

The Appeal Division had original and appellate jurisdiction in all matters. It held five sessions during each year, sitting in the City of Fredericton. The Chancery Division had original exclusive jurisdiction in civil matters assigned to it including the administration of estates and trusts, foreclosures of mortgages, partitions of real estate, dissolution of partnership, rectification of written instruments, a measurement of dower, wardship and adoption of infants. There were regular sittings of the Chancery Division each year. Seven sittings occurred in the City of Fredericton, ten sittings in the City of Saint John and three sittings in Dorchester which was the county seat of Westmorland County.

Sittings of the Kings Bench Division were held each year in all fifteen counties. Judges, like those in the United Kingdom, travelled on circuits around the province. There were five sittings of the Kings Bench Division in the county of Saint John, three sittings in York and Westmorland Counties and the remaining twelve counties had two sittings each year presided over by different judges of the Kings Bench Division. These sittings were referred to as sittings of the Circuit Court in all counties except York county. In York county the *Judicature Act* referred to the sittings as the *nisi prius* sittings. Historically, the term *nisi prius* referred to the court in which civil actions were tried at the assizes. The court of assizes was composed of judges sent by special commission of the crown. These sittings date back to the Statute of William IV in 1835 which ordered the *nisi prius*

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*Of Gilbert, McGloan, Gillis (Saint John). This lecture was delivered at the UNB Faculty of Law on 7 October 1993 to inaugurate a visiting practitioner program.

sittings in York.[1] In New Brunswick in the 1940s and thereafter until the rules of court were changed, notice of assignments of the circuit court judges were published in early January each year so that all practitioners knew which judges would be sitting on a particular circuit in each of the counties.

In the 1940s there was a court of divorce and matrimonial causes, dealing principally with divorce, annulment and maintenance. The court held sittings two to three times a year in the City of Fredericton. It was presided over by either a judge of the Kings Bench Division or the Appeal Division of the Supreme Court.

There was a county court for each of the fifteen counties presided over by six county court judges. One judge was assigned to the counties of Charlotte, Hartland, Victoria and Madawaska; one judge for the counties of York, Sunbury and Queens; one for the counties of King and Albert; one for the counties of Northumberland, Gloucester and Restigouche; one for the counties of Westmorland and Kent, and one judge for the county of Saint John. The jurisdiction of the county court judges was limited in matters of contract to $400 and in matters of the poor to $200.

There were the inferior courts where magistrates presided who had jurisdiction of up to $80 in debt and $32 in tort. Lastly, the justices of the peace had jurisdiction that was limited in debt to $20 and in tort to $8. Incidentally, witness fees for each day's attendance were fifty cents per diem.

The Structure of the Courts in the 1990s

Today there is no longer a Supreme Court nor are there County Courts. Presently, the court structure in New Brunswick consists of a Court of Appeal presided over by the Chief Justice of N.B. and five other judges. Beneath the Court of Appeal is the Court of Queen's Bench consisting of two divisions. The Trial Division has twenty-two judges, one being the Chief Justice of the Queen's Bench. The Family Division consists of eight judges. Finally, there is the Provincial Court of twenty-nine judges, one being the Chief Justice.

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[1]These sittings occurred on the third Tuesday in February (Hilary term); after the fourth Tuesday in June (Trinity term); and after the fourth Tuesday in October (Michaelmas term). The legal year was formally divided into four terms: The Michaelmas sitting which began on a day appointed by an order in council – usually the 1 October and ending on 21 December; the Hilary sitting which began on 11 January and ended on the Wednesday before Easter; the Easter sitting which began on the Tuesday after Easter week and ended on Friday before Whitsuntide (Whit being the 7th Sunday after Easter); and the Trinity sitting which began on the Tuesday after Whitsun week and ended on 31 July.

The Practice in the Courts in the 1940s

The nature of civil litigation in the 1940s involved for the most part, matters concerning contractual disputes, tortious actions involving negligence, usually arising out of motor vehicle accidents, occupiers liability and actions for trespass.

The practice of law was regulated by rules of court that followed the English rules very closely. These rules were regulations made pursuant to the *Judicature Act*. These regulations contained some seventy-two orders and each order contained a number of rules. Actions were commenced either by writ of summons or by originating summons. These writs were tested in the name of the Registrar of the Supreme Court.

All writs, pleadings and other court documents were filed in the Registrar's Office in the City of Fredericton. The mailing of documents to the Registrar's Office was not permitted. They were required to be delivered personally. As a result, all practitioners who had offices in cities other than the City of Fredericton were required to have a Fredericton agent to file pleadings and act as a go-between for the out-of-town solicitors and the Registrar. Indeed, there were some Fredericton law firms that possessed rather large agency practices.

The procedures at trial differed little from those followed today. Normally, only one counsel appeared for each party. However, the duration or length of the trial was significantly shorter than today. Usually the hearing of the evidence and arguments took one or two days. A trial that lasted five days or more was most unusual. No pre-trial briefs were required given the fact that virtually the only law reports that were available for legal research were the *Dominion Law Reports* and the *Maritime Provinces Law Reports*. At this time the *Maritime Provinces Law Reports* contained only the judgments of the appeal and chancery division of the Supreme Court of New Brunswick. They were edited by a court reporter who, pursuant to the *Judicature Act*, was both a member of the legal profession and an officer of the court. This court reporter, along with the Registrar, attended all sittings of the Appeal Division of the Supreme Court. One of the court reporters at this time was the late Cedric T. Gilbert, Q.C.

Perhaps the best way to impart a sense of what the practice of law was like during this period is to reproduce a portion of a letter written on 7 February 1956 by Gerald Teed, the senior partner in the Saint John law firm of Teed, Palmer, O'Connell, to an acquaintance, John Rankine, in Australia. In the letter Mr. Teed is attempting to convey a sense of the legal community in Saint John at the time:

> Things here, while seeming very much the same, are actually very different. It used to be that Saint John could not support a two-man legal firm of say, two men and a boy, with the exception of Weldon MacLean. We now have four men in this office, as you will see from the letterhead, and no less than 8 girls as against 3 that

were here when I first entered Messrs. Sanford & Harrison. Adrian Gilbert has four others with him and there are considerably more two-man outfits than there used to be. The character of the legal business in this provinces has changed considerably, particularly in larger centres. Commerce is more active than it was and I find myself doing a fair amount of estate planning, plus income tax and succession duty work, where 20 years ago there weren't any substantial estates to plan. While I had nothing to do with the estate, you might be interested to hear Sir James Dunn, formerly of Bathurst and more recently living in Saint Andrews and whose most recent work, Algoma Steel, died in January leaving some $70 million dollars, having been foiled in his dreams that he might take it with him. Our fortune, of course, was not generated in New Brunswick and we are far from a booming community, but we are also far from the hard days of the 1930s. I know the office overhead here with us, without anything for the lawyers, is somewhat larger than the total take was in 1929-30. In short, New Brunswick is sharing to some extent, but in a very modest way, in the boom conditions which prevail generally in Canada.

The Practice of Law in the 1990s.

In the 1980s, the composition of our courts was radically changed. The rules of court that had been in place since 1909 were replaced by new rules. There are no more county courts and judges no longer travel on circuits. There are now six judicial districts in which documents are filed with the Clerks. Crown practice has disappeared and the crown writs have been succeeded by judicial review. Actions are no longer commenced by writs of summons but by a notice of action. Moreover, in the past the summons to a witness was referred to as a *subpoena ad testificandame*, or a *habeas corpus ad testificandum* if the witness was incarcerated. Today this has been replaced by the Notice to Witnesses. Discovery procedures have also been broadened under the new rules of court.

The nature of civil litigation has undergone radical changes as well. During the 1940s cases involving human rights, aboriginal rights or medical malpractice were virtually unknown. Today the various sections of the *Charter of Rights and Freedoms*[2] are frequently raised by either plaintiff or defendant. The number of professional malpractice cases as well as products liability and construction contract cases have also increased dramatically. Corporate litigations such as anti-trust complaints in the last few years in the United Kingdom have increased as much as sixty percent. In the United States, products liability cases have grown five-fold and the number of medical malpractice cases has soared.

Today's cases, in contrast to previous years, are complex and require months of preparation. Extensive discoveries and long trials have caused the costs of

[2]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

litigation to soar beyond the means of the average individual. The causes of these changes in our practice are at least two-fold: 1) The changes in our practice and procedure of law; 2) Changes in the available tools and technology.

Changes in the Practice and Procedure of Law

The first major change in this area has been the abolition of the principle of Crown immunity. Traditionally, the crown was protected from liability since suits against the Crown could only be instituted by a petition of right. Later, various statutes were enacted to limit proceedings against the Crown or its servants. Presently, however, this principle of crown immunity has undergone considerable erosion. Today, for all intents and purposes, an action can be brought against the Crown or its servants, both federally or provincially, in the same manner as against an individual or a corporation.

The second important change has been the enactment of the *Charter* in 1982. The *Charter*, in my view, has been one of the most profound changes in our practice within the last decade. The provisions of the Charter are frequently raised as either as a sword or a shield in cases involving the rights or obligations of an individual. Recently, the Chief Justice of the Supreme Court of Canada referred to the profound changes brought on by the *Charter* as an:

> [h]istorical event like a discovery of penicillin, it was like a discovery of Pasteur. We completely revolutionized our legal system. Our legal equations are no longer the same. From the legal standpoint, Canada was put on the map by the *Charter*. In the first years of its existence, it was mainly in criminal law that was a vehicle of *Charter* challenges and that is normal because criminal law is about restricting liberty. We have now moved to s. 2 and s. 15 and equality of rights have started coming out.

Moreover, since the enactment of the *Charter* the Supreme Court of Canada is no longer strictly dealing with legal questions and the interpretation of law. Since the *Charter*, the Supreme Court is looked on as a powerful protector and agent of social change dealing with civil rights and consumer protection.

The third major change in practice and procedure has been the adoption of new *Rules of Court* in New Brunswick in 1982. One of the major changes in the rules affecting the practice of law has been the provisions concerning discovery procedures. I am convinced that one of the principal causes for the high cost of litigation today is the misuse or abuse of the discovery procedures permitted by our current rules. Prior to the enactment of the new *Rules of Court* it was very rare to request an opposite party to provide an affidavit of documents, let alone ask to inspect such documents. It is now routine in virtually every case to make such demands from the opposite party. With modern photocopying equipment, documents are generated by the hundreds and thousands. The preparation of an affidavit of documents has become a monumental task that is extremely costly and

often unnecessary. The production of such documents invariably spills over into the trial and results in voluminous exhibits that are also often unnecessary and redundant.

Akin to the discovery of documents is the oral examination for discovery. This procedure is now followed in virtually all civil cases and knows few limits. Previously, as a general rule, only the parties to an action could be examined on discovery. Today the *Rules of Court* give great latitude to oral examination. Discovery not only includes examination of the parties to an action, but extends to witnesses who possess some knowledge of the facts, and expert witnesses who have specialized knowledge that may assist the court in coming to a decision.

Pre-trial discovery can stretch for weeks and involve several dozen witnesses or more. As an extreme example, the IBM anti-trust suit involved five years of discovery and generated some sixty-four million pages of documents. With each page of transcript costing roughly $2.50, a trial involving lengthy pre-trial discovery that generates thousands of pages of transcript can translate into huge costs. Statistics indicate that pre-trial discovery accounts for sixty percent of the time and money spent on a law suit. These costs have placed the option of litigation beyond the means of the majority of potential litigants. I recall my first involvement in a civil action tried in the Supreme Court in the City of Moncton in the 1940s when the court award was $750. Today many counsel will seek to avoid litigation unless the amount is $10,000 or more because they do not feel the hazard and cost of litigation warrant the legal expense created by these new procedures. Moreover, discovery is being used as a weapon to delay an action as well as to increase costs of the trial beyond the means of the other side. Unfortunately, some members of the profession are also using discovery as a delaying tactic to drive up their own billings. These are all unfortunate and unacceptable consequences of the new discovery procedures.

Another misuse or abuse of our present practice resulting in excessive costs of litigation is the tendency of counsel to call expert witnesses, even in the simplest of cases. It used to be the rule that a party would call an expert to express an opinion on some complex matter to assist the court in understanding the evidence so that it could come to a conclusion on an issue beyond its knowledge. Today this practice has been abused to the extent that trials are deteriorating into a battle of experts. Personally, I do not think our judges are of a lower intellect or that today's issues are so complex that we need expert witnesses in the majority of cases. It has been said that an expert is someone who was not there when it happened but will, for a fee, gladly imagine what it must have been like. Indeed, the calling of experts may well make the task of the trial judge more onerous since the outcome of the issues will depend on the testimony of the expert he or she accepts.

I believe the extensive use of discovery and the calling of numerous experts are unnecessary and, to a large extent, responsible for excessive costs, proliferation of litigation and the present congestion of our courts. In my first civil case the trial lasted only one and a half days and included the taking of evidence and argument. Today it is not unusual for a trial of a civil action to run one to two months or even longer, especially, if there are three or more parties to the litigation involving numerous counsel, which is normally the situation.

The final major change in the practice of civil law relates to the role played by the Supreme Court of Canada. When I was admitted to the Bar in 1940, appeals from Canadian courts to the Judicial Committee of the Privy Council in London were permitted and were at times selected in preference to appeals from the Supreme Court of Canada. Appeals to the Privy Council were abolished in 1950 and the Supreme Court of Canada was made the highest court of appeal. Thus, in 1952, a party in a civil action could appeal from the Provincial Court of Appeal to the Supreme Court of Canada as a right if the amount in controversy exceeded $2,000. In 1956 this was changed. Leave to appeal was now required unless the amount in controversy exceeded $10,000. Since 1985, leave must be obtained regardless of the amount involved and will only be granted if the issue is one of public importance and an important question of law. It has been my experience that leave to appeal to the Supreme Court of Canada in recent years on a question of law in a civil action is not easy to come by. The result has been that often the Provincial Court of Appeal is the court of last resort.

Changes in Office Technology and Equipment

In the 1940s, in order to practise law, about all one needed was a telephone, typewriter and a small library consisting of perhaps a dozen or so textbooks, the *Maritime Provinces Law Reports* and the *Dominion Law Reports*. Copies of documents were made by carbon paper. The duplicating machine, or Gestetner as it was called, arrived in the 1950s. We did not have an adding machine, let alone a calculator.

Today we have computers, fax machines, legal databases such as Quicklaw and Canadian Law on Line, photocopiers, calculators and other technological advances. A modern law office requires such equipment for the sake of efficiency and competitiveness. There has been limited use of video for motions to the Supreme Court of Canada. On 20 May 1993 one such motion originating in Vancouver was show on national television. I predict in the not to distant future, most motions and perhaps even appeals to the Supreme Court of Canada may be made through the use of video and audio equipment and without the necessity of counsel appearing in person before the court.

This will result, of course, in the saving of substantial cost by the parties. In the 1940s, lawyers often travelled by train from the Atlantic and the Pacific to Ottawa for the hearing of an appeal in the Supreme Court, and then ended up waiting there until the appeal was called for hearing. Indeed, the way things seem to be going in Atlantic Canada today, with the deterioration of the highways and the cancellation of passenger rail service, video presentation may soon be a necessity.

The Practice of Law Beyond the 1990s

I have already mentioned the changes in what I term office technology, but it is probable that future communication techniques will render today's office technology obsolete.

Wireless pocket phones, linked to personal communication networks (PCN) will enable calls to be made to individuals at their prescribed number regardless of their location, whether at work, on the road or on vacation. As technology develops, the costs of such a service will drop so dramatically that calls across the ocean will be almost as inexpensive as calling to a neighbouring province today.

Generally speaking, technological innovations will make it possible for a member of the legal profession to conduct his or her practice virtually anywhere. With the assistance of a lap-top computer, a fax machine and a cellular phone, an office can be situated at home, in a car, in a boat, at a cottage or at a winter home.

Technological changes will also affect the practice of law in the courtroom. Dramatic changes resulting from computer, video and laser disc technology are imminent. Court reporting and optical imaging will replace a lawyer's paper file. They will be used to provide a transcript on a disc which permits 225 words per minute to be simultaneously transcribed. As many as 15,000 to 20,000 full pages of documents will be able to be stored in a computer and then transferred onto a compact disc to be taken to court by the lawyer. This will replace a crippling amount of paper generated by a lawsuit and provide counsel with the ability to search for and find information quickly when needed rather than scrambling to find a document in a sea of paper.

The day of the "judgeless trial" may soon be near as well. This has been used as a new trial technique in some United States courts. The evidence is prerecorded and presented to the jury by a TV monitor without a judge present. Only the opening statements, closing arguments, and jury instruction are done live before the judge. In the future one can expect computer generated displays or demonstrations in the way of exhibits or demonstrative evidence principally in malpractice and other tortious actions. Using 3-D computer technology a scene or an object can be viewed from any perspective and explored by moving through

it or around it. This could be used to illustrate the inner workings of piece of machinery, the growth of a toxic plume in a underground water supply or the diagnostic techniques in a medical malpractice case.

Presently, the legal profession is feeling the financial strains and pressures caused by a deep recession, the collapse of real estate markets and a pronounced slump in commercial transactions and trading. While in the heady days of the 1980s we witnessed a trend towards national and international mergers between law firms, this has now tended to stabilize. During the last two years, some 40% of 250 of the largest American law firms have dramatically reduced their size cutting partners and associates adrift. Others have dissolved and a number of senior partners, once secure in life tenure, have now been ordered to depart.

As a result, the practice of law, once a staid profession, has insofar as litigation and corporate law are concerned, turned into a savage and competitive business. One only has to turn their television to a American station to witness the marked increase in advertising attorneys in the United States. This trend is likely to be followed by our profession in Canada and in this province.

The economic pressure on the legal profession today is compounded by legal reformers, regulators and clients. Increasingly, corporations are employing in-house counsel who scrutinize large legal firms retained by the corporation for routine abuses such as over-lawyering, pointless meetings and needlessly long breaks. Recently, a medium-sized American law firm retained in the defence of some six-hundred cases involving asbestos claims, who had based their fees on value added billings, were audited at the request of the client. The partners set about preparing time sheets to support their charges, but it turned out that some of these time sheets were showing charges for more hours than there were in a day. The senior partner was convicted and imprisoned for several years and the other partners incurred several million dollars in losses.

These trends that the legal community has been experiencing – a slow economy or recession, growing competition from national and international firms, the proliferation of in-house counsel, expanding technology and spiralling overhead costs and client expectations – are indications that draw me to conclude that the practice of law has changed more fundamentally in the last fifty years than in all its prior history.

Accordingly, we should forget about the days when a laid-back legal practice could be guaranteed to be profitable. The changes in the legal profession in the last fifty years outlined above make it a necessity for all members of the legal profession to become more efficient, more competitive, more accountable and less counter-productive. We must now recognize the grim realities of an increasingly competitive market and be prepared to adopt profound social, economic and

technological change to ensure the economic survival of our respective firms in the 1990s and beyond.