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M v. *H*: Time to Clean Up Your Acts

Brenda Cossman and Bruce Ryder

In the 1990s, the Supreme Court of Canada twice found ways to avoid dealing with the implications of anti-discrimination law for the rights of gay and lesbian couples. In *Mossop*,[1] a majority of the Court fashioned a ruling that amounted to a postponement of an engagement with the question of whether the law requires the recognition of gay family status. In *Egan*[2] a 5-4 majority of the Court bought legislatures some additional time to come to grips with the "novel concept"[3] of conferring equality rights on same-sex couples. No doubt one reason for the Court's equivocation was the large gap that existed between the logical requirements of equality principles and the exclusion of gay and lesbian couples from a multitude of laws dealing with the rights and responsibilities of family members. By 1999, a pattern of favourable rulings from lower courts and administrative tribunals,[4] changes in the membership of the Court,[5] and a steady increase in public support for the recognition of the rights of gay and lesbian couples, combined to create the conditions in which the Court was emboldened to start closing the gap between constitutional promise and legislative reality. In *M* v. *H*,[6] the essence of the message the Court sent to legislators was: time to clean up your Acts.

The Majority's Ruling

By an 8-1 majority, the Court held in *M* v. *H* that section 29 of the Ontario *Family Law Act*[7] discriminated on the basis of sexual orientation by excluding lesbians and gay men from the right to seek spousal support from a same-sex partner with whom they have cohabited. Applying the framework for section 15 equality analysis that a unanimous Court had elaborated earlier this year in *Law* v. *Canada*,[8] the principal majority judgment of Cory and Iacobucci JJ.[9] found that section 29 of the Act violates the human dignity of lesbian and gay couples by promoting the view that they are "less worthy of recognition and protection" and "incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples . . . ." Moreover, "it perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence."[10]

In the section 1 analysis, the majority held that the exclusion was not rationally related to the objectives underlying the spousal support provisions in Part III of the *Family Law Act*, which they characterized as dealing equitably with the economic needs of persons in interdependent relationships and the alleviation of claims on the public purse by privatizing the costs of family breakdown.[11] The majority concluded that the appropriate remedy was to declare section 29 of the Act to be of no force and effect, with a suspension of the operation of the declaration of invalidity for six months

1 *Mossop* v. *A.-G. Canada*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*].

2 *Egan* v. *Canada*, [1995] 2 S.C.R. 513 [hereinafter *Egan*].

3 *Ibid.*, per Sopinka J. at 576.

4 The case law is thoroughly reviewed in Kathleen A. Lahey, *Are We 'Persons' Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 78-92.

5 Justice Sopinka's death in 1997, and Justice La Forest's retirement in the same year, deprived the Court of two members of the 5-4 majority who had voted to dismiss the *Charter* claim in *Egan*, *supra* note 2.

6 [1999] S.C.J. No. 23 (QL), (1999), 171 D.L.R. (4th) 577 [cited to S.C.J.].

7 R.S.O. 1990, c. F.3.

8 [1999] 1 S.C.R. 497.

9 Cory J. wrote the s.15 portion of the analysis, and Iacobucci J. dealt with the s.1 and remedial issues. Lamer C.J. and L'Heureux-Dubé, McLachlin and Binnie JJ. concurred with their joint judgment. Major J. and Bastarache J. each wrote separate concurring judgments. Gonthier J. dissented.

10 *M* v. *H*, *supra* note 6 at para. 73.

11 *Ibid.* at para. 93.

to enable the legislature to consider ways of bringing this provision, and other laws, into conformity with the equality rights in the *Charter*.[12]

Avoiding Charges of "Judicial Activism"

It is clear from the language of the decision that members of the Court were anxious to minimize the kind of controversy about judicial power ignited by the Court's earlier gay rights ruling in *Vriend* v. *Alberta*[13] and the ensuing trumped-up accusations of judicial activism emanating from the United Alternative, the *Alberta Report*, the *National Post* and other increasingly desperate voices of the waning forces of Canadian moral conservatism. The Court's caution was evident in the repeated emphasis it placed on the fact that the only issue before it was the constitutionality of section 29 of the *Family Law Act*, a provision which applies only to unmarried heterosexual couples. Justice Cory began his section 15 analysis by stating ". . . it must be stressed that the questions to be answered are narrow and precise in their scope;"[14] the appeal had nothing to do with the definition of marriage, nor with the bundle of rights and responsibilities that attach to married persons, nor with other laws that excluded same-sex couples from common law definitions of spouse.[15] Justice Iacobucci similarly emphasized that the ruling "does not challenge traditional conceptions of marriage"[16] and that laws other than the one at issue in a particular challenge must be evaluated individually by reference to their unique objectives and context.[17]

The Court's sensitivity to charges of judicial activism was also evident in its avoidance of the "reading in" remedy that had proven so controversial after the Court added the words "sexual orientation" to the list of prohibited grounds of discrimination in Alberta human rights legislation in *Vriend*. The reasons Iacobucci J. gave for declining to read same-sex couples into section 29, which was the remedy adopted by the Ontario Court of Appeal, were not particularly convincing.

He argued that if members of same-sex couples were read into the definition of spouse in section 29 of the Act, they could be subject to spousal support obligations without being able to opt out by entering a domestic contract under Part IV of the Act.[18] Common law couples can opt out of their statutory support obligations by signing cohabitation and separation agreements pursuant to sections 53 and 54 respectively. These provisions are expressly limited to contracts signed by "a man and a woman." However, the courts now recognize the enforceability of cohabitation contracts at common law, and it is highly unlikely that the terms of an agreement entered into by a same-sex couple would be ignored in considering a spousal support claim under Part III of the Act. Justice Iacobucci was also concerned that reading in is an inappropriate remedy when it would "have significant repercussions for a separate and distinct" part of an Act, in this case the dependants' tort claim in Part V, which incorporates the definition of spouse in section 29.[19] Why the majority could not have limited the application of its order to Part III of the Act was not explained.

The concerns Iacobucci J. raised about the reading in remedy seem modest and easily avoided, especially when considered in light of the deficiencies of the remedy he did adopt. By declaring section 29 invalid if it is not rectified within six months, the Court has created a situation where the right to claim spousal support will be limited to married couples as of November 20, 1999 if the Ontario government does not pass amending legislation. Such a situation would discriminate on the basis of marital status, as the Alberta Court of Appeal recently held.[20] The remedy Iacobucci J. chose thus violates his own warning that courts should not "remedy one constitutional wrong only to create another, and thereby fail to ensure the validity of the legislation."[21]

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[12] *Ibid.* at paras. 145-47.

[13] [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

[14] *M* v. *H*, *supra* note 6 at para. 7.

[15] *Ibid.* at paras. 52 and 55.

[16] *Ibid.* at para. 134.

[17] *Ibid.* at para. 75.

[18] *Ibid.* at para. 141.

[19] *Ibid.* at para. 142.

[20] *Taylor* v. *Rossu* (1998), 161 D.L.R. (4th) 266 (Alta. C.A.). Bill 12, the *Domestic Relations Amendment Act, 1999*, responded to the *Taylor* ruling by conferring spousal support rights and obligations on unmarried heterosexual couples. The Bill did not rectify the exclusion of same-sex couples. The amendment received Royal Assent on May 19, 1999, not coincidentally the day before the release of *M* v. *H*. It is now clear that the Alberta legislature remedied one constitutional wrong only to create another.

[21] *M* v. *H*, *supra* note 6 at para. 141.

TOSSING THE ISSUE TO THE LEGISLATURE

Unlike the reading in remedy, the suspended declaration of invalidity does have the important advantage of tossing the issue on to the legislative agenda where it ought to have been addressed in the first place. Clearly the majority was in no mood to give Ontario legislators further reasons for doing nothing, heaping the entire burden of law reform in this area on litigants and the courts, and thus continuing to invite the judicial activism they purport to abhor. Indeed, despite the fact that the Court was deciding the narrow issue of the constitutionality of one law, in truth the many other statutes containing spousal definitions that exclude same-sex couples raise constitutional issues that differ little from the issues addressed in *M* v. *H*. Justice Iacobucci acknowledged this when he closed his analysis of the remedial issue by noting that:

> ... declaring section 29 of the *FLA* to be of no force and effect may well affect numerous other statutes that rely upon a similar definition of the term 'spouse.' The legislature may wish to address the validity of these statutes in light of the unconstitutionality of section 29 of the *FLA*. On this point, I agree with the majority of the Court of Appeal which noted that if left up to the courts, these issues could only be resolved on a case-by-case basis at great cost to private litigants and the public purse. Thus, I believe the legislature ought to be given some latitude in order to address these issues in a more comprehensive fashion.

Gwen Landolt of REAL Women missed the mark in inimitable fashion when she alleged that the Court has "opened the gates to the pack-dogs to attack the traditional family."[22] Justice L'Heureux-Dubé succinctly dismissed this kind of paranoid familial fundamentalism with her remark in *Mossop* that "[i]t is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values."[23] Yet it is true that the Court has signaled to legislatures that there are broad implications to its ruling in *M* v. *H*. It has directed legislatures to examine all statutes with similar spousal definitions, and told them to "address these issues in a more comprehensive fashion." And ironically, it has done so in a judgment otherwise couched in the language of judicial deference.[24] Below the political packaging, however, the legal ramifications are broad. The Court has recognized the limitations of the judiciary in addressing these issues — the courts can proceed only on a case by case basis, deciding the narrow issue of law before them. Responsibility for bringing legislation into conformity with constitutional norms lies more appropriately with the legislatures who can address the issues in a comprehensive fashion. But, the underlying message is also clear — having failed to deliver earlier when the courts bought them time, the legislatures must now clean up their Acts. If they do not, then the courts will, at no small expense to all involved.

Immediately after *M* v. *H* was released, Premier Harris indicated that he would "comply" with the ruling and would not seek to invoke the notwithstanding clause of the *Charter* to preserve the legislative *status quo*.[25] Other governments — with the exception of Alberta, which is keeping its options open — made similar statements. But what exactly does complying with the ruling mean?

LEGISLATIVE IMPLICATIONS

(i) Section 29 of the *Family Law Act*

First, there is the narrow question of the implications of the ruling for spousal support under the Ontario *Family Law Act*. If the Ontario government fails to act within the six month period, the result will be that all unmarried couples — same-sex and opposite sex — will be excluded from the spousal support provisions in Part III of the Act. Given the increasing emphasis on privatizing support obligations, this is unlikely to be an attractive option for a government committed to fiscal conservatism. However, revising a definition of spouse to include same-sex couples is also unlikely to be an attractive option for a morally conservative government that has made it clear that bringing legislative definitions of family into conformity with its constitutional responsibilities is not a priority.[26]

Given this conservative dilemma, the Ontario government may adopt a minimalist approach — fix as little as possible. Such an approach would amend section

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[22] Quoted in Carmen Wittmeier, "Playing House: Politicians cower as the Supreme Court overrides the natural family order" *Alberta Report* (31 May 1999) 20 at 21.

[23] *Supra* note 1 at 634.

[24] See for example Justice Iacobucci's comments on judicial deference, *supra* note 6 at paras 78-81.

[25] Quoted in Kirk Makin, "Gay couples win rights" *Globe and Mail* (21 May 1999) A1.

[26] "It's not my priority. It's not my definition of family but it is others' . . . ." Premier Mike Harris quoted in Tonda MacCharles and Tracey Tyler, "Same-sex ruling to rewrite many laws" *Toronto Star* (21 May 1999) A1.

29 to include same-sex couples, as well as sections 53 and 54 to make explicit their ability to opt out of the support scheme through domestic contracts. The government would also need to consider the implications for Part V of the Act dealing with the dependants' tort claim for damages. Unfortunately, the six month time period for reform, unless it is extended by the Court, creates pressure towards a minimalist approach and a truncated legislative process involving little or no consultation with the gay and lesbian communities most affected by any amendments. Not only did the six month clock start running in the middle of an election campaign, but it also ran over the summer break, when the new legislature was not yet sitting.

In undertaking any reforms, the legislature will not be assisted by the majority's failure to clarify the meaning of the term "conjugal" and its relationship to the objectives underlying the legislative scheme. The word "conjugal" plays a central role in dividing "spouses" from other people living together. The extended definition of spouse in section 29 requires a couple to have cohabited. "Cohabit" is defined in section 1(1) of the Act as "to live together in a conjugal relationship." Conjugal is not defined, except in some rather anachronistic case law that Cory J. simply cited with approval.[27] All the majority judgment told us is that same-sex couples are capable of meeting the conjugality requirement. If section 29 is revised to include same-sex couples, then they too will be governed by the outdated, intrusive and vague common law test of conjugality — a test that is poorly related to the majority's characterization of the objectives of the legislation and one that comes perilously close to a 'I know it when I see it' definition.[28]

[27] Justice Cory cited *Molodowich* v. *Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) as setting out ". . . the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple." *M* v. *H*, *supra* note 6 at para. 59. He agreed with the lower court that these dimensions of family life will be present in varying degrees, and that it will not be necessary for a couple to satisfy all of these dimensions for their relationship to be conjugal: "neither opposite sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is 'conjugal'." *Ibid.* Justice Cory stated that the approach to determining whether a relationship is conjugal must be "flexible," since the "relationships of all couples will vary widely." *Ibid.* at para. 60. In other words, he provided virtually no guidance on how conjugality should be defined or applied.

[28] For a discussion of the problems with the notion of conjugality, see Brenda Cossman and Bruce Ryder, *Gay, Lesbian and Unmarried Heterosexual Couples and the Family Law Act: Accommodating a Diversity of Family Forms* (Toronto: OLRC, 1993) at 77-83.

(ii) All legislative definitions of common law spouse

The most obvious problem with the minimalist approach to reform is that it ignores the clear implications of *M* v. *H* for all common law spousal definitions, at both the provincial and federal levels. The Court, as it emphasized, was not addressing the constitutionality of all common law spousal decisions. However, the message in Iacobucci J.'s concluding words that the ruling on section 29 "may well affect numerous other statutes that rely upon a similar definition of the term 'spouse'" is not subtle. All of these definitions are now vulnerable to constitutional challenge. If left to the courts, these definitions are likely to fall, case by case.

This conclusion is bolstered by the fact that Iacobucci J. clearly rejected the view that "government incrementalism" ("the notion that government ought to be accorded time to amend discriminatory legislation") can provide the basis for a section 1 justification.[29] This reasoning had been central to Sopinka J.'s swing judgment dismissing the challenge to the exclusion of same-sex couples from eligibility for an old age spousal allowance in *Egan*. The Court in *M* v. *H*, however, did not explicitly overrule *Egan*. Instead, it emphasized that, unlike the claim in *Egan* which sought an extension of public funding, the claim in *M* v. *H* advanced the goals of fiscal conservatism by reducing claims on the public purse. Thus, a window has been left open to governments to argue that they are only obliged to extend equal rights to same-sex couples if it does not cost them anything. *M* v. *H* does ring the death knell for *Egan*'s moral conservatism, but it leaves *Egan*'s fiscal conservatism intact. While that fiscal conservatism has been eroded by recent decisions, including those that have extended pension benefits to the surviving members of same-sex couples, it still haunts equality jurisprudence in this and other areas.

At the very least, a government committed to following the implications of the Supreme Court ruling in this case, and avoiding unnecessary and expensive litigation, should undertake a serious examination and revision of all common law spousal definitions contained in its statutes. Passing amendments to include same-sex couples in statutes that apply to unmarried heterosexual couples was the approach adopted earlier this year in Quebec,[30] that was defeated on a free vote on Ontario's Bill 167 in 1994, that B.C. has embarked upon at least in

[29] *M* v. *H*, *supra* note 6 at para. 128.

[30] *Loi modifiant diverses dispositions législatives concernant les conjoints de fait*, S.Q. 1999, c. 14.

part,[31] and that the federal government is currently contemplating in response to *M* v. *H* and an omnibus challenge to federal statutes launched by the Foundation for Equal Families.[32]

(iii) Spousal Rights of Married Couples

However, an approach limited to giving same-sex couples the same legal status as common law couples is not likely to provide an enduring solution. It is a formulaic, "find and replace" approach to law reform that assumes there is a principled basis to current differences in the legal status of married and unmarried heterosexual couples when, in fact, this may not be the case. A number of laws, typically those dealing with property rights, continue to extend rights and responsibilities only to married couples. This is true of all provincial legislation dealing with the division of family property, of most provincial laws providing a right to exclusive possession of the family home, and of provincial laws dealing with intestate succession. It is true that the Court in *M* v. *H* was not dealing directly with marriage, nor with the legal rights extended exclusively to married couples. Yet, the combination of the Court's rulings in *M* v. *H* and *Miron* v. *Trudel*[33] means that the constitutionality of any distinctive legal status for married spouses must be demonstrably justified by governments. The majority in *Miron* held that legislation limiting automobile insurance benefits to married spouses was discriminatory because marital status was not a reasonable way of identifying persons in an economically interdependent relationship with insured persons. Unmarried heterosexual couples had to be included in the legislation. If *Miron* leans strongly towards merging the legal status of married and common law couples, and *M* v. *H* does the same for common law couples and same-sex couples, then the end result is momentum towards conferring the entire package of marital rights and responsibilities on same-sex couples.

(iv) The Definition of Marriage

M v. *H* also strengthens the argument that the exclusion of same-sex couples from the common law definition of marriage violates the human dignity of gay men and lesbians.[34] In the absence of any other means of relationship recognition, the opposite sex definition of marriage means that, unlike heterosexual couples, same-sex couples are denied any legally effective means of choosing to have their relationships recognized as spousal by their communities and the government. In an ineffectual response to the constitutional pall hanging over the law of marriage, on June 8 the House of Commons, by a vote of 216-55, approved a motion brought by the Reform Party stating that "marriage is and should remain the union of one man and one woman to the exclusion of all others" and that Parliament "will take all necessary steps" within its jurisdiction "to preserve this definition of marriage in Canada."[35] The motion itself has no legal force. To protect the common law definition of marriage from constitutional challenge in the courts, Parliament would have to reproduce the definition in legislation that included a notwithstanding clause. The public pressure necessary to goad Parliament into its first use of section 33 has not yet materialized. To the contrary, an Angus Reid poll released the day after Parliament debated the marriage motion indicated that a majority of Canadians (53%) are in favour of gay marriage.[36]

(v) Domestic Partnership

One way that governments may be able to placate the intense opposition of a minority of Canadians to gay marriage is to leave the common law definition of marriage intact and to put in place an alternative means of permitting couples to choose to have their relationships recognized by the state as spousal. If gay and lesbian couples had access to a legal status such as "domestic partner," legally equivalent to marriage in all but name, then the section 15 *Charter* challenge to the common law definition of marriage would likely founder on the absence of legal disadvantage. Even conservative governments and commentators have expressed support recently for the enactment of domestic partnership regimes.[37] For moral conservatives who believe they have lost the battle over gay rights,[38] domestic

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[31] By virtue of the *Adoption Act*, R.S.B.C. 1996, c. 5, s. 29(1), the *Family Relations Amendment Act*, S.B.C. 1997, c. 20 and the *Family Maintenance Enforcement Amendment Act*, S.B.C. 1997, c. 19, same-sex couples now have the right to apply to adopt a child, and the same rights as common law couples in relation to spousal support, child support, and custody and access issues.

[32] A copy of the Foundation's notice of application can be found at <http://www.ffef.ca/>.

[33] [1995] 2 S.C.R. 418 [hereinafter *Miron*].

[34] In 1993, before the Supreme Court rulings in *Egan*, *Vriend* and *M* v. *H*, a majority of an Ontario court dismissed a constitutional claim by a gay couple seeking to marry. See *Layland* v. *Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658 (Gen. Div.). A new challenge, brought by Michael Hendricks and René Leboeuf, is underway in Québec.

[35] *House of Commons Debates* (8 June 1999) at 16069; 15960.

[36] Anne McIlroy, "Most in poll want gay marriages legalized" *Globe and Mail* (10 June 1999) A1.

[37] See, for example, Rainer Knopff, "The Case for Domestic Partnership Laws" *Policy Options* (June 1999) at 53.

[38] See Link Byfield, "So where's the party?" *Alberta Report* (31 May 1999) at 4: ". . . the gay rights war is over. We have been

partnership schemes, which could be open to any two persons living together in an interdependent relationship, offer a last-ditch means of avoiding legislation that explicitly validates gay and lesbian relationships and also of preserving the privileged legal status of marriage. As is the case with European domestic partnership laws,[39] conservatives no doubt would fight for the enactment of a regime that confers a second-class spousal status on partners, with less than the full package of rights accorded to married persons.

In principle, there are good reasons to explore the possibility of enacting domestic partnership regimes. Domestic partnership would provide an alternative to, not a displacement of, existing routes to spousal status.[40] As the widespread availability of birth control, abortion and reproductive technologies drives an increasingly large wedge between the coupling of heterosexuality and procreation, we are moving further away from limiting spousal status to marital or conjugal relationships, and more towards measuring spousal relationships by their duration and functional qualities of economic and emotional interdependence. In addition to its limitation to conjugal relationships, ascribed spousal status, such as the common law definition of spouse at issue in *M* v. *H*, has the further disadvantage of imposing legal rights and responsibilities on cohabitants that may or may not correspond to their own needs and expectations. A domestic partnership regime that, like marriage, enables any two persons living together to choose spousal status, rather than having it imposed upon them, and permits them to take on a full range of rights and responsibilities equivalent to those available to married couples if they so choose, has much to recommend it.[41]

CONCLUSION

The style of judicial reasoning in *M* v. *H* reflects the impact of the increasingly aggressive attacks directed by some politicians and the media at the exercise of judicial power required by the *Charter*. Caution was written all over the decision. The narrow focus on the challenged provision, the absence of lengthy discussions of the surrounding legal and social context, the employment of the language of judicial deference, and the avoidance of the "reading in" remedy – all signal a Court treading lightly in the face of the attacks on its legitimacy. But, despite the caution, the Court to its credit did not back down from fulfilling its basic democratic role of protecting minority rights. As politely as it could, the Court has sent a clear message to all legislatures: opposite sex definitions of spouse are discriminatory. If you don't change them, we'll have to do it for you, case by case, definition by definition.❑

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defeated. There is nothing left to lose, all that remains amounts to a mopping-up operation by the victors."

[39] See the discussion in Lahey, *supra* note 4, at 326-30.

[40] See Bruce Ryder, "Becoming Spouses: The Rights of Lesbian and Gay Couples" in Law Society of Upper Canada Special Lectures, *Family Law: Roles, Fairness and Equality* (Toronto: Carswell, 1994) 399 at 430-50.

[41] See Cossman and Ryder, *supra* note 30 at 154-56; Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants Under the Family Law Act* (Toronto: OLRC, 1993) at 53-56.

FARCE OR TRAGEDY?: JUDICIAL BACKLASH AND JUSTICE MCCLUNG

Hester Lessard

Lately I have been thinking about backlash.[1] I confess that within my interior world the term backlash has the same connotations as earthquake and cyclone, conjuring up images of a natural force smashing through villages. From work which theorizes backlash, I have learned backlash is "itself a cultural construction — a moment in the long history of the relationship between personal identity and civil rights — the interwoven fabric of economic production and social reproduction."[2] Yet images of a naturally occurring aberration of diabolical strength persist. In recent times, a general perception has taken hold within feminist and social activist communities that we are living through a period of extensive and prolonged backlash against social justice and equality in Canada. In this essay, my focus is one particular manifestation of the wider phenomenon, namely the backlash within judicial legal discourse against feminist legal analysis and argument. The eruption of anger earlier this year on the part of Justice McClung of the Alberta Court of Appeal against Justice L'Heureux-Dubé of the Supreme Court of Canada provides a flashpoint.

The story of Justice McClung's outburst takes the shape of a three act drama. The backdrop is provided in the first act by the litigation in *R.* v. *Ewanchuk*,[3] a controversial sexual assault prosecution in which, it seemed, feminist legal analysis was deployed to challenge the imbrication of criminal law, conservative sexual ideologies, and power. The main action clearly belongs to the second act which revolves around Justice McClung's bitter criticism in a letter to the press[4] of Justice L'Heureux-Dubé's judgment in *Ewanchuk*. The third act concerns a series of counter-claims of bias against both Justice McClung and Justice L'Heureux-Dubé before the Canadian Judicial Council. However, the climax of the story as it is presented in the media remains Justice McClung's intemperate letter. The other parts simply build and then fade away from that astonishing moment of popular attention to judicial decisionmaking.

Backlash, as others have pointed out, shifts our attention to the resistance to change and away from the change itself.[5] Part of what is lost in this realignment of public consciousness is an understanding of the fragility and tentativeness of the supposed change.[6] Indeed, Justice McClung's outburst obscured the tenuous status of feminist analysis in legal discourse more deftly, perhaps, than other instances of backlash for, at the end of the day, it appeared he failed to capture either popular or legal support for his views. Certainly, after tracing the story of Justice McClung's letter through to the eventual reprimand from the Canadian Judicial Council, one might conclude that this particular battle was won by those struggling to gain legitimacy for feminist arguments and perspectives in sexual assault trials rather than by those who, like Justice McClung, are affronted by feminist legal interventions. The *Ewanchuk* case itself, as well as the decision of the

[1] I would like to thank the Social Sciences and Humanities Research Council for providing research funds, Ros Salvador for her research assistance, and Christine Boyle for patiently answering questions about criminal law doctrine. I would also like to thank the students in my seminar on feminist legal theories whose insightful critiques and lively discussions of the controversy surrounding Justice McClung were crucial in shaping my own analysis.

[2] Ann Oakley and Juliet Mitchell, "Introduction" in Ann Oakley and Juliet Mitchell, eds., *Who's Afraid of Feminism. Seeing through the Backlash* (London: Hamish Hamilton 1997).

[3] [1999] 1 S.C.R. 330 [hereinafter *Ewanchuk*].

[4] *National Post* (February 26, 1999) A19.

[5] Olena Hankivsky, *Resistance to Change: Exploring the Dynamics of Backlash* (London, Ontario: Centre for Research on Violence Against Women and Children, 1996) at 6; Janice Newson, "'Backlash' against Feminism: A Disempowering Metaphor" (1991) 20 Resources for Feminist Research 93 at 93. Newson argues for eliminating the word 'backlash' altogether. *Ibid.*

[6] Hankivsky *supra* note 5; Ann Oakley, "A Brief History of Gender" in Oakley and Mitchell, eds., *supra* note 2, 29 at 54.

Canadian Judicial Council must be drawn more fully into the narrative in order to provide a different sense of where the drama lies.

The appeal in *Ewanchuk* centered on the trial judge's acquittal of an accused charged with sexual assault on the grounds that the complainant implicitly consented to the sexual activity in question. Justice McClung, in reasons for the majority at the Alberta Court of Appeal,[7] upheld the acquittal only to find himself unanimously overturned by the Supreme Court of Canada. The Supreme Court of Canada was united in result but not in approach. Justice Major wrote a set of reasons, joined by five of his colleagues, which elaborated on the ways in which the lower courts had misconstrued the doctrinal requirements regarding consent. Justice L'Heureux-Dubé, for herself and Justice Gonthier, wrote separate reasons in which she asserted that although she agreed generally with Justice Major: "[t]his case is not about consent since none was given. It is about myths and stereotypes."[8] Justice McLachlin endorsed both approaches in very short reasons, stating her agreement with Justice Major's analysis and with Justice L'Heureux-Dubé's argument "that stereotypical assumptions lie at the heart of what went wrong in this case."[9]

The encounter in *Ewanchuk* took place at a job interview in Ewanchuk's trailer in an Edmonton shopping centre parking lot in June.[10] The complainant, a 17 year old woman, became frightened when Ewanchuk, a man nearly twice her age and more than double her size, shut the trailer door which she had deliberately left open while they talked inside. Ewanchuk proceeded to make sexual advances; the complainant repeatedly asked him to stop. At each objection, Ewanchuk halted his activity briefly. As Ewanchuk's conduct intensified — ending with Ewanchuk lying on top of the complainant, grinding his pelvis against her, taking out his penis, and moving his hands inside her shorts — the complainant became frightened and immobile. She confessed to being worried that Ewanchuk would become violent if she showed vulnerability or refused to cooperate. Although she had tears in her eyes and, when asked by Ewanchuk directly, admitted that she was afraid, she tried to appear confident and said "no" at three separate points and "just please stop" at another. The scene ended with Ewanchuk desisting after the final "no," handing her $100 "for the massage," referring to the close friendly relations he had with another female employee, and directing her to tell no one about what had happened.

Justice Major for the majority directed his analysis at the legal errors in the trial judge's decision, in particular the baffling contradiction between the judge finding credible the complainant's testimony that she was fearful and that she expressly stated her lack of consent to Ewanchuk, and the judge concluding that the complainant implicitly consented to sex with Ewanchuk — in short, his finding that a clearly stated "no" implies "yes." Both the trial judge and Justice McClung for the majority at the Court of Appeal invoked the doctrine of implied consent to explain this contradiction. The trial judge went astray, Justice Major explained, because he overlooked the differences in the test of consent at the *actus reus* and the *mens rea* stages of analysis. Justice Major drew fine lines between subjective and objective tests, unambiguous mental states and ambiguous conduct, and reasonable and unreasonable mistakes. Importantly, he made it clear that nowhere in the multi-step analysis of a sexual assault trial is there room for the so-called doctrine of implied consent.[11] Justice Major's stance throughout his analysis was technical and economical, going only as far as required to correct the doctrinal errors in the courts below.

Justice L'Heureux-Dubé's concurring reasons placed the case on a very different footing. She opened with the assertion that the pervasiveness of violence against women is "as much a matter of equality as it is an offence against human dignity and a violation of human rights."[12] Both domestic and international human rights instruments, she argued, provide the normative context of the *Criminal Code* provisions on sexual assault.[13] For support, she referred to the explicit language in the preamble to the 1992 amendments linking Parliament's concern about sexual violence against women and children to the liberty, security, and equality rights of the Charter.[14] Only after having firmly characterized the case as one about women and children's human rights, did Justice L'Heureux-Dubé turn to the question of how the courts below went

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[7] *R* v. *Ewanchuk (S.B.)* (1998), 212 A.R. 81 (C.A.) [hereinafter *Ewanchuk*].

[8] *Ewanchuk*, *supra* note 3 at 369.

[9] *Ibid.* at 379.

[10] This summary of the facts is drawn from Justice Major's reasons, *ibid.* at 339-43 and from Fraser C.J.A.'s dissenting reasons at the Court of Appeal, *Ewanchuk*, *supra* note 7 at 92-95.

[11] *Ibid.* at 346-61.

[12] *Ibid.* at 362.

[13] *Ibid.* at 363-65.

[14] *Ibid.*

astray. The error of law, she wrote, is not so much the misapplication of legal rules regarding consent but Justice McClung's reliance on sexist myths and stereotypes which portray women who say no to sexual advances as "really saying 'yes,' 'try again,' or 'persuade me'"[15] and as "walking around this country in a state of consent to sexual activity."[16] In other words, Justice McClung's portrayal of women in his reasons fundamentally undermined women's constitutional and international entitlements to the dignity, respect, and protection accorded to individuals in liberal societies.

Justice L'Heureux-Dubé emphasized that Justice McClung's approval of the trial judge's conclusion that "no" means "yes" was explicitly rooted in mythical and denigrating assumptions about female sexuality and moral character. She quoted the opening statement in Justice McClung's reasons that "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines;"[17] his observations, as if relevant to the issue of consent, that "she was the mother of a six-month old baby and that, along with her boyfriend, she shared an apartment with another couple;"[18] his characterization of the accused's behaviour as simply "clumsy passes" and "far less criminal than hormonal,"[19] and his closing suggestion that a woman in the complainant's situation would be better advised "not only to express an unequivocal 'no' but also fight her way out of such a situation" before turning to the courts.[20]

On February 26th, the day after the release of the Supreme Court of Canada judgment, a letter from Justice McClung appeared in the *National Post* characterizing Justice L'Heureux-Dubé's reasons as a "graceless slide into personal invective" and as "personal convictions...delivered again from her judicial chair."[21] His letter also suggested that the inordinately high rate of male suicide in Quebec might be attributed to Justice L'Heureux-Dubé's judicial decisions, a remark that seemed abhorrent and cruel in light of the suicide of Justice L'Heureux-Dubé's husband some years ago.[22] An interview followed in the *National Post* on February 27th in which he reiterated his opinion of the sexual and moral character of the complainant in *Ewanchuk* with a characteristic choice of imagery. "She was not lost on her way home from the nunnery," he explained to the reporter.[23] A week later Justice McClung issued a formal apology via a news wire service.[24] He was particularly remorseful about the reference to suicide and its unintended connection with Justice L'Heureux-Dubé's personal experience. By then, however, numerous complaints against Justice McClung had been placed before the Canadian Judicial Council concerning the February 26th letter, the February 27th *National Post* interview, and his reasons in both *Vriend* v. *Alberta*[25] and *Ewanchuk*. *Vriend* concerned a constitutional equality challenge to the omission of protection against sexual orientation discrimination in the Alberta human rights regime. In a foreshadowing of the *Ewanchuk* litigation, Justice McClung's reasons denying the equality claim were thoroughly reviewed and rejected by a unanimous Supreme Court of Canada. Unlike *Ewanchuk*, however, no one at the Supreme Court directly engaged the issue of bias — here homophobic bias — in Justice McClung's reasons. The Canadian Judicial Council also received a complaint lodged by REAL Women of Canada against Justice L'Heureux-Dubé alleging judicial misconduct and lack of impartiality and objectivity in her reasons in *Ewanchuk*.[26]

A panel of three judges, chaired by Chief Justice Constance Glube of the Nova Scotia Supreme Court, conducted the preliminary investigation of the 24 complaints against Justice McClung. The panel concluded, on May 19th that a formal consideration of whether Justice McClung should be removed from office was not warranted.[27] In a lengthy memorandum, the panel reprimanded Justice McClung for the *National Post* letter and interview, aspects of his judgments in both *Ewanchuk* and *Vriend*, and aspects of his formal apology as well as of his letter to the Council

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[15] *Ibid.* at 372.

[16] *Ibid.*, quoting from the dissenting reasons of Fraser C.J.A. at the Court of Appeal, *Ewanchuk*, *supra* note 7 at 102.

[17] *Ibid.* at 372 quoting from McClung J.A., *Ewanchuk*, *supra* note 7 at 87.

[18] *Ibid.* at 374 quoting from McClung J.A., *Ewanchuk*, *supra* note 7 at 87.

[19] *Ibid.* quoting from McClung J.A., *Ewanchuk*, *supra* note 7 at 91.

[20] *Ibid.*

[21] *National Post*, *supra* note 4.

[22] *Ibid.*

[23] Shawn Ohler, "Judge Reiterates Belief That Teen Wasn't Assaulted" *National Post* (27 February 1999) A1.

[24] *Globe and Mail* (2 March 1999) A4.

[25] (1996), 184 A.R. 351 (C.A.), rev'd [1998] 1 S.C.R. 493 [hereinafter *Vriend*]. All three members of the panel of the Alberta Court of Appeal wrote separate judgments, with McClung and O'Leary JJ.A. allowing the appeal and Hunt J.A. dissenting.

[26] Canadian Judicial Council, Council File 98-129, March 31, 1999.

[27] Canadian Judicial Council, Council File 98-128, May 19, 1999.

itself acknowledging the inappropriateness of his behaviour. The panel's decision was a parsing of Justice McClung's stubborn refusal, even in his regretful later statements, to concede that he did more than injudiciously lose patience when provoked by Justice L'Heureux-Dubé's view of sexual assault. The panel criticized his reasons in *Vriend*, observing that some of his comments "could be interpreted as an assertion that gay people are inherently immoral" and "could perpetuate a stereotype which has led to violence against the gay community."[28]

With respect to his reasons in *Ewanchuk*, the panel found that here, also, he had crossed "the boundary of appropriate judicial expression."[29] The panel emphasized the relevance of Justice L'Heureux-Dubé's analysis in *Ewanchuk*, characterizing it as "merely one expression of the criticism by the Supreme Court of Canada of your approach to this case and not a personal attack as you suggest."[30] However, the panel based its decision to dismiss the complaint against Justice McClung on a finding that his offending remarks, although "flippant, unnecessary, and unfortunate," displayed neither "an underlying homophobia" nor an "underlying bias against women."[31] In addition, the panel did not think that a gay or lesbian person or a woman who had been sexually assaulted would be unable to expect fair and impartial treatment from Justice McClung in the future.[32] In a separate decision, the Canadian Judicial Council also dismissed the complaint by REAL Women of Canada against Justice L'Heureux-Dubé, finding that although her reasons in *Ewanchuk* contained "strong language," she did not fail to interpret the law impartially and objectively.[33]

Very few of the Canadian Judicial Council's points — other than its final conclusions on both matters — were covered in the press. In particular, the questionable assertion that gay and lesbian litigants and female sexual assault complainants would feel assured of fairness in Justice McClung's courtroom did not receive much discussion. Instead, the main aspect of the Council's decision which caught the media's eye was the Council's criticism of Justice McClung, described as a "severe reprimand."[34] Thus, in spite of the dismissal of the complaints, it seemed as if Justice McClung was identified as the one using his "judicial chair" to pursue his personal politics and to launch vitriolic attacks on judges with whom he disagreed. In contrast, feminist analysis in legal argument and judicial decisionmaking was identified as legal analysis rather than polemic. One possible message of the drama was that it is acceptable to be both a feminist and a judge. Thus, somewhat ironically, Justice McClung's ill-advised fury gave an otherwise easily ignored concurrence at least a momentary impact on our perception of the jurisprudential mainstream.

But was this vindication of Justice L'Heureux-Dubé's analytic approach more symbolic than real? In actual terms, the status quo was maintained. Justice McClung was not subjected to a formal investigation, much less removed from office. His genuine remorse over the unintended reference to Justice L'Heureux-Dubé's personal experience of suicide permitted the notion that his behaviour was objectionable primarily because it was rude and boorish, not because it displayed a deeply rooted sexism and homophobia in the application of the law. In addition, recall that his use of damaging stereotypes about gays and lesbians in *Vriend* was politely overlooked by the Supreme Court, his sexist bias in *Ewanchuk* similarly overlooked by the majority at the Supreme Court, and his attack in the media on Justice L'Heureux-Dubé's integrity as a judge was treated by Chief Justice Glube's panel, in the end, with considerable circumspection. The contrast with, for example, judicial responses to Judge Corinne Sparks' reasons in *R. v. R.D.S.*[35] raises the worrisome issue of whether the concept of judicial bias too often penalizes egalitarian perspectives and casts them as personal idiosyncratic political views while excusing anti-egalitarian perspectives simply because they are often difficult to distinguish from what counts as common sense knowledge.[36]

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[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

[33] Canadian Judicial Council, Council File 98-129, *supra* note 26.

[34] Robert Fife, "McClung Reprimanded for Critical Remarks Made at L'Heureux-Dubé" *National Post* (22 May 1999) A4. See also, Graham Fraser, "McClung Scolded by Judicial Council" *Globe and Mail* (22 May 1999) A3.

[35] [1997] 3 S.C.R. 484.

[36] Christine Boyle, Brenna Bhandar, Constance Backhouse, Marilyn MacCrimmon, and Audrey Kobayashi, "*R. v. R.D.S.*: An Editor's Forum" (1998) 10 C.J.W.L. 159.

Judge Sparks — the only African Canadian woman appointed to the Bench at the time of *R.* v. *R.D.S.*[37] — commented on the racialized nature of relations between white police officers and African Canadians in the course of explaining why she preferred the testimony of an African Canadian youth to that of a white police officer. Her observations subjected her to a lengthy appeal process in which — in contrast to *Vriend* and *Ewanchuk* — both counsel and the appellate bench treated as centrally significant the issue of whether she was biased and lacked impartiality. Both the Nova Scotia Supreme Court and a majority at the Court of Appeal found that her implicit reliance on personal knowledge of racism in police relations did give rise to a reasonable apprehension of bias, although this finding was overturned at the Supreme Court of Canada in a six to three split. There are a number of possible explanations — strategic and substantive — for the differences in judicial responses to the issue of bias in the decisions of Justice McClung, Justice L'Heureux-Dubé and Judge Sparks, but the underlying and troubling conundrum remains, namely the legal system's inability to distinguish meaningfully between racism and anti-racism, or sexism and anti-sexism, or homophobia and anti-homophobia.

In addition, the flurry of media attention stirred by Justice McClung's letter left the impression that the courts — for better or worse — *are* incorporating feminist, anti-racist, and anti-heterosexist analyses into their decisionmaking. The editorial pages were filled with views for and against this bold stance. However, John McInnes and Christine Boyle have observed that, in the context of criminal law practice, the "mere suggestion that gender equality is relevant to the delineation of the rights of the accused, or to the assessment of the relevance of evidence, sets one apart as an hysterical crusader, rather than a responsible and thorough advocate."[38] The authors' observation is borne out by the experience of Judge Donna Hackett, a criminal trial judge at the Ontario Court of Justice. Judge Hackett has written that in her seven years on the bench, during which she presided over approximately 7000 cases, she has never had an equality rights issue raised by counsel. On canvassing six of her colleagues, Judge Hackett found that their experiences were the same, meaning that no equality issues had been raised in approximately 120,000 criminal cases in their collective thirty six years of service since the Charter equality provision came into force.[39] As Judge Hackett put it: "Can one, therefore, conclude that there have not been any equality issues in our criminal courts since equality rights came in force? ...I think not."[40] Additionally, McInnes and Boyle point out that equality arguments in criminal trials and appeals are advanced, for the most part, by intervenor groups in a few pivotal cases. Consequently, rather than "routine and central," equality arguments are often viewed as "peripheral and adjunctive" or "as esoteric wool-gathering by so called 'special interest' groups."[41]

Furthermore, the notion that Justice L'Heureux-Dubé "won," deflects attention from the fundamental differences at the Supreme Court level between Justice L'Heureux-Dubé's concurrence and the majority reasons. As noted earlier, Justice L'Heureux-Dubé treated the case as one directly engaging women and children's fundamental human rights. On her account, Justice McClung's reliance on demeaning stereotypes was not simply "incorrect" or an unfortunate carryover from a more conservative era, but the central feature of a social, political, and ideological regime within which women's physical security and autonomy is fundamentally compromised. Perhaps her most powerful message was that it is not so much the Ewanchuks of the world who maintain this regime but the Justice McClungs. In other words, it is *legal* doctrines, practices, and institutions which provide state sanction and force to the regime.

From the standpoint of Justice L'Heureux-Dubé's remedial human rights approach, a women and children's rights-enhancing interpretation of the *Criminal Code* provisions on sexual assault is pivotal and the conservative minimalism of Justice Major's decision falls far short of what is required. The 1992 amendments to the *Code* are particularly important to her remedial stance. They not only formally acknowledge the link to individual liberty and equality rights in the preamble but also attempt to reverse the premises of the established order by enumerating circumstances in which, as a matter of law, there is no consent and by shifting some responsibility to the initiator of sexual contact for determining the issue of consent. Justice L'Heureux-Dubé, unlike Justice Major and indeed with his explicit disapproval, insisted that

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[37] *Ibid.* at 199 per A. Kobayashi.

[38] John McInnes and Christine Boyle, "Judging Sexual Assault Law Against the Standard of Equality" (1995) 29 U.B.C. L. Rev. 341 at 344.

[39] Donna Hackett, "Finding and Following 'The Road Less Travelled:' Judicial Neutrality and the Protection and Enforcement of Equality Rights in Criminal Trial Courts" (1998) 10 C.J.W.L. 129 at 131.

[40] *Ibid.*

[41] McInnes and Boyle, *supra* note 38 at 345.

the amended *Code* provisions be given full consideration in the analysis of the *Ewanchuk* facts. I will now turn to a more detailed analysis of the differences between the approaches of Major J.'s majority reasons and those of L'Heureux-Dubé J.

One of the key provisions — and the point of sharpest disagreement between the majority and concurring reasons — is the "reasonable steps" provision in section 273.2(b) of the *Criminal Code.* Section 273.2(b) comes into play in cases in which there is no evidence that the complainant clearly communicated consent to the sexual activity and in which the accused argues the defence of honest but mistaken belief in consent. The defence is a complete answer to the *mens rea* portion of the Crown's position, namely that the accused knew that the complainant had not consented. The mistake defence was first articulated in *R.* v. *Pappajohn.*[42] *Pappajohn* also imposed an "air of reality" requirement, namely that the defence of mistake must consist of something more than the mere assertion by the accused of an honest belief that the complainant consented.[43] The *Pappajohn* formulation of the mistake defence has been the subject of criticism because it stands for the proposition, in substantive terms, "that an honest belief in consent will excuse even if it is unreasonable."[44]

The 1992 Criminal Code amendments introduced section 273.2 along with a number of other amendments. Subsection 273.2(a) forecloses mistake defences based on recklessness and wilful blindness; subsection (b) imposes a quasi-objective standard on the determination of *mens rea* by also foreclosing the mistake defence where the accused cannot show that, in the circumstances, reasonable steps were taken to ascertain consent. It is important to point out that this latter section is a very qualified over-ruling of *Pappajohn.* It does not require that the accused's beliefs are reasonable, but only that reasonable steps were taken to verify consent.[45] In addition, it is only a *quasi*-objective standard: the reasonableness of the "steps" is determined in reference to circumstances actually known to the accused. However, despite their modesty, the reforms signalled a significant shift in public awareness of how orthodox and facially neutral legal constructs are systemically linked to the persistence of sexual violence to women and children.[46] As McInnes and Boyle have written of the provision, "[i]ts effect should be to target those who behave dangerously by persisting with sexual acts where consent, as it is legally defined, is not present in the form of a voluntary agreement."[47]

The introduction of a quasi-objective standard for determining *mens rea* is not generally controversial.[48] However, in the context of sexual assault law, it inspires wild and fearsome speculation about the end of romance and the need for written contracts on casual dates.[49] The notion of implied consent employed by the lower courts in *Ewanchuk* is, perhaps, one manifestation of judicial resistance to the introduction of even a narrow and qualified requirement of objectively reasonable conduct in sexual relations. Implied consent doctrine neatly side-steps the quasi-objective standard in section 273.2(b) as well as the "air of reality" requirement by, in effect, allowing triers of fact to dismiss the charge for lack of *actus reus.* This particular gambit is now foreclosed by the Supreme Court's decision in *Ewanchuk.* Once the trial judge, in determining *actus reus*, finds that the complainant did not in fact consent, it is not open to find, at the same time, that the complainant implied consent. At that stage, Justice Major clarified, the only defence is to argue that, because of an honest but mistaken belief in consent, the accused lacked the requisite *mens rea.* In *Ewanchuk*, Justice Major was willing to canvass the plausibility of a mistake defence even though it had not been specifically argued. After a brief review of the

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[42] (1980), 14 C.R. (3d) 243 (S.C.C.) [hereinafter *Pappajohn*].

[43] The evidential "air of reality" requirement was subsequently codified in s. 265(4) of the *Criminal Code.* The extent and constitutionality of the "air of reality" requirement has been the subject of some academic debate. See Don Stuart, "Sexual Assault: Substantive Issues Before and After Bill C-49" (1993) 35 C.L.Q. 241 and Emily Steed, "Reality Check: The Sufficiency Threshold to the Air of Reality Test in Sexual Assault Cases" (1994) 36 C.L.Q. 448.

[44] Don Stuart, "The Pendulum Has Been Pushed Too Far" (1993) 42 U.N.B.L.J. 349 at 352.

[45] Rosemary Cairns-Way, "Bill C-49 and the Politics of Constitutionalized Fault" (1993) 42 U.N.B.L.J. 325 at 330.

[46] Steed, *supra* note 43. See also, Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49" in Julian Roberts and Renate Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293.

[47] McInnes and Boyle, *supra* note 38 at 360.

[48] *Ibid.* at 359.

[49] Don Stuart quotes a defence counsel on the subject of the 1992 amendments with respect to consent as follows:

> Its ridiculous...this isn't contract law. She says "Let's have sex." They are having full sexual intercourse. She suddenly says: "That's it. I'm revoking my agreement." Now how long does the male have to withdraw before it's sexual assault?....It just denies the biological nature of human beings.

Stuart, *supra* note 43 at 244.

facts, he found that such a defence had no "air of reality" on the facts as found. Consequently, he overturned the acquittal and did not order a retrial.

Justice L'Heureux-Dubé, however, found that it would be an error of law — in considering the plausibility of the mistake defence — not to apply the "reasonable steps" provision now clearly mandated by the amended *Criminal Code*. As she put it:[50]

> In *Pappajohn*, the majority held that this defence does not need to be based on reasonable grounds as long as it is honestly held. That approach has been modified by the enactment of section 273.2(b).... Therefore, that decision no longer states the law on the question of honest but mistaken belief.

Justice Major made it clear he thought she was wrong, stating that the reasonable steps analysis is only required if the "air of reality" standard is met.[51] The disagreement seems slight and Justice L'Heureux-Dubé's insistence that the "reasonable steps" provision must be applied now that "it is the law of the land"[52] could be characterized as functionally unnecessary and overly technical. Why go on to consider "reasonable steps" when there is "no air of reality"? Why add to the complexities which already encumber the judicial task of determining guilt?

The answer lies in how the judicial task is viewed — either as an integral feature of a systemic regime of unequal social and political relations or as the impartial application of neutral legal rules and doctrines which are definitionally separate from social and political relations. In addition, behind the disagreement lies a fundamental difference in the legal construction of heterosexual sexual relations. Justice Major's approach contemplates the possibility that the accused's mistaken beliefs have an "air of reality" even though the accused acted unreasonably in the circumstances. Justice L'Heureux-Dubé's insistence that "air of reality" and the reasonable steps requirement must be linked together provides no space for judicial sanction of a "reality" which is unreasonable in light of the accused's actual knowledge. As she pointed out, Parliament, to this extent, has superseded *Pappajohn*. Thus, Justice Major's analysis, although thankfully free of the grotesque stereotypes that populated Justice McClung's reasons, preserves the structures and interpretive spaces which those stereotypes have typically inhabited.

The fundamental split in "realities" underlying the majority and concurring reasons manifested itself at two other junctures. Justice L'Heureux-Dubé took issue also with Justice Major's interpretation of section 265(3), the provision deeming non-consent in the face of force, threats or fear of force, fraud, or the exercise of authority. Justice Major, she argued, "unduly restricts" the section to "instances where the complainant chooses "to participate in, or ostensibly consent to, the touching in question."[53] The wording of the provision, she pointed out, states its application to cases in which the "complainant submits or does not resist" and thus "should also apply to cases where the complainant is silent or passive in response to such situations."[54] Finally, in closing her reasons, Justice L'Heureux-Dubé observed that section 273.1(2) restricts the circumstances in which an accused can claim a mistaken belief in consent. In particular, she emphasized, subsection (d) stipulates that no consent is obtained where "the complainant expresses, by words or conduct, a lack of agreement...."[55] Thus, on the *Ewanchuk* facts, the complainant's verbalized non-consent precluded "the accused from claiming that he thought there was an agreement."[56]

At each of these junctures, although the shadings of disagreement between majority and concurrence appear to revolve around issues of emphasis and of full rather than judiciously minimal analysis, the projected social worlds are vastly different. Justice L'Heureux-Dubé projects a world in which the autonomy of the liberal citizen belies the liberal commitment to equality and is, in fact, differently constituted by the social and historical constructions of men and women and of gender and sexuality. Both the silences contemplated by section 265(3) and the words contemplated by section 273(2)(d) are coded differently against this backdrop, requiring explicit and conscientious attention to the unstated "realities" which shape the interpretive politics of legal and judicial analysis. Justice Major's majority reasons project a world in which law and politics remain neatly separated and the "realities" invoked by judges and lawyers — save for a few correctable errors — reflect perfectly the tale of equality and liberty contained in the founding narratives of liberalism.

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[50] *Ewanchuk*, *supra* note 3 at 378-79.

[51] *Ibid.*

[52] *Ibid.* at 377.

[53] *Ibid.* at 371, quoting Justice Major at 352.

[54] *Ibid.* at 371.

[55] *Ibid.* at 379.

[56] *Ibid.*

In conclusion, by portraying decisions such as *Ewanchuk* as "graceless slides into personal invective" or "totalitarian," the alarmist rhetoric of conservative backlash often obscures the conservative character of the judgments themselves. As noted earlier, the critical literature on backlash describes this overshadowing of substantive questions as a shift in focus from change itself to resistance to change. The pressing issue becomes to correct Justice McClung and express public disapproval of his blatantly inappropriate language rather than to examine critically the role of criminal law doctrine and practices in constructing a vision of sexual and political relations which ratifies the behaviour of Ewanchuk and condones Justice McClung's portrait of women's sexual and moral character. Although Justice Major's majority reasons importantly reject the doctrine of implied consent, at a fundamental level they authorize the background "realities" which differentially frame the silences and words on which sexual assault trials so often turn.

Also lost in the commotion, is the chance to explore more fully the range of complexity demanded by a commitment to fundamental justice which integrates both liberty and substantive equality into its account of the liberal citizen.[57] An analytic lens which expands beyond the sexist stereotypes of sexual assault law invites much needed inquiry into the structural and ideological dimensions of legal reasoning and of the judicial institution. Among the questions that might be pursued, for example, is the extent to which the privilege extended to Ewanchuk by Justice McClung's portrait of sexual relations is a form of racial as well as gender privilege. Would the familiar tropes of rape law — the well intentioned if clumsy male and the 'wise beyond her years' and manipulative female — have played differently in Justice McClung's account if the victim/perpetrator dyad had spanned a racialized as well as gendered social divide? And why do the homophobic overtones of Justice's McClung's reasons in *Vriend* and the sexism of his portrayal of women in *Ewanchuk* — so clearly connected in the vision of social relations underpinning his analysis — remain so disconnected in the watertight categories of liberal equality discourse? And is there a pattern in judicial willingness to sometimes politely overlook and other times vigorously pursue questions of judicial bias depending on whether the orthodoxies of the judicial vision of our social and political world are challenged or affirmed? Finally, as several critical theorists have queried, is a commitment to fundamental justice which integrates both liberty and equality values possible in a system that relies so centrally on punishment and savage methods of correction, and that demands conformity with a rigid and oversimplified account of state and citizen, victim and offender, complainant and accused?[58] The fact that these questions are so rarely asked, much less answered, is one of the costs of backlash. Justice L'Heureux-Dubé's patient exegesis of the shape and dimensions of sexist bias in a little supported concurrence opened up welcome space for public debate of these issues, no doubt at considerable personal cost. The challenge is to broaden that space until it includes all the voices consigned to the margins of our conversations about justice.❑

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[57] Boyle and McInnes, *supra* note 38.

[58] Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 Canadian Journal of Law And Society 75, Elizabeth Sheehy, "Equality Without Democratic Values? Why Feminists Oppose the Criminal Procedure Reforms" (1999) 19 Canadian Woman Studies 6, and Boyle and McInnes, *supra* note 38.

Public School Boards' Association of Alberta v. *Alberta*
THE ARGUMENTS FAVOURING CONSTITUTIONAL PROTECTION FOR ALBERTA'S PUBLIC SCHOOL BOARDS: WOLVES IN SHEEP'S CLOTHING

Barbara Billingsley

What protection, if any, does the Canadian Constitution provide for public school boards in Alberta? As illustrated by the Alberta Court of Appeal's recent decision in *Public School Boards' Association of Alberta* v. *Alberta (Attorney General)*,[1] this deceptively simple question has potentially profound procedural and substantive implications for Canada's constitutional law. First, resolving this question necessarily requires decisions to be made about how far the Courts should go in interpreting the written words of the constitution regarding government institutions. In other words, should the Courts read the provisions as written or infuse the provisions with meaning which reflects current practices or values? Second, the determination of what constitutional protections are available to Alberta public schools has serious implications for the constitutional status of all local government authorities in Canada.

The *Alberta Public School Boards Case* concerns various constitutional challenges raised on behalf of the Alberta Public School Boards Association and others [collectively the "PSBA"] to the Alberta government's decision to replace the province's localized school fund-raising system with a centralized funding system. The PSBA's overriding concern with the new program is a familiar and typical one: namely, the perceived loss of local control. Two innovative constitutional arguments utilized by the PSBA to bring this matter before the Courts make this case especially notable, however. In particular, the PSBA argued that the Constitution guarantees school boards "reasonable autonomy" over their operations such that the province cannot unilaterally restructure school board funding mechanisms. The PSBA also argued that the Constitution guarantees "mirror equality" to separate and public school boards in Alberta: that is, that all school boards in the province are constitutionally guaranteed identical powers and privileges.

No doubt, these arguments are inspired, creative and intellectually appealing. From a legal perspective, however, the arguments ignore the fundamental distinction between what constitutional protections arguably *should* be afforded to public school boards and what constitutional protections *are* presently provided to public school boards. Accordingly, as a closer examination of these arguments will show, the Court of Appeal correctly rejected the PSBA's arguments and properly concluded that the Constitution does not support the protections sought for public schools.

BACKGROUND TO THE ALBERTA PUBLIC SCHOOL BOARDS CASE

In 1994, the Government of Alberta substantially amended certain provisions of the *School Act*,[2] via the *School Amendment Act, 1994*[3] and the *Government Organization Act*.[4] With the expressed intention of removing fiscal inequity in the school system, the amendments restructured the funding system for school boards in the province. In brief, the new system includes the following features:[5]

- the replacement of direct taxation by each school board with the pooling of education revenues from a province-wide property assessment base into a government fund called the Alberta School Foundation Fund [the "ASFF"], with ASFF dollars

[1] (1998), 158 D.L.R. (4th) 267, hereinafter referred to as the "*Alberta Public School Boards Case.*" Leave to appeal to the Supreme Court of Canada granted November 19, 1998 (without reasons). *S.C.C. Bulletin*, 1998, at 1767.

[2] S.A. 1988, c. S-3.1.

[3] S.A. 1994, c. 29.

[4] S.A. 1994, c. G-8.5.

[5] Summarized from the Queen's Bench and Court of Appeal decisions in the *Alberta Public School Boards Case.*

being dispersed to school boards on an equal amount per student basis;

- the right of separate school boards to opt out of the ASFF system and to continue to requisition funds through the direct taxation of separate school supporters. Opted-out separate school boards are entitled to receive a "top-up" payment from the ASFF if their direct taxation revenues are less than the per student amount received by school boards operating under the ASFF. On the other hand, opted-out separate school boards are required to pay to the ASFF any funds received from direct taxation in excess of the per student amount received from school boards operating under the ASFF;

- in addition to the ASFF, funds for school boards are available through a system of grants from the province's General Revenue Fund, which grants are distributed in accordance with the government's "Framework for Funding School Boards in the 1995-96 School Year" [the "Framework"]. The Framework provides for funding allocation to school boards depending on several factors pertaining to the distinct needs of the students served by the school boards (for example, the number of severely disabled students, transportation requirements, etc.). The amount of grant dollars available from the General Revenue Fund is determined by subtracting the amount available from property assessments (either under the ASFF or the opted out system) from the amount of the total funding allocation or entitlement under the Framework. The Framework also contains a series of restrictions on a school board's use of funds and these restrictions are enforced through penalties levied against future grants.

- an increased role for the Minister in supervising board senior staff and the addition of provisions compelling boards to meet certain Ministerial standards.

Unhappy with the loss of local control caused by this new system, the PSBA challenged the constitutionality of the statutory amendments giving rise to this system.[6]

Specifically, both at trial and before the Court of Appeal, the PSBA argued that:

1. The amendments violate the constitutional right of local school boards to "reasonable autonomy" as provided for by constitutional law, by constitutional convention, or by sections 2(b) and 7 of the *Canadian Charter of Rights and Freedoms*.[7]

2. The amendments discriminate between public and separate school boards contrary to section 17(2) of the *Alberta Act*[8] which provides that:.

> In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. The amendments violate the principle of "mirror equality," which would require public and separate school boards to have identical powers and privileges. According to the PSBA, "mirror equality" is implicitly guaranteed to both types of

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[6] The Alberta Catholic School Trustee's Association, the Board of Trustees of Lethbridge Roman Catholic Separate School District No. 9, and others [collectively the "ACSTA"] intervened at both court levels, arguing that, whatever the Court's ultimate finding on the issues raised, the Court's decision should not expressly or implicitly reduce or define the rights and privileges currently enjoyed by separate school boards under the *Alberta Act*, S.C. 1905, c.3..

[7] As per Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. These *Charter* arguments were dismissed by both the Alberta Court of Queen's Bench and by the Alberta Court of Appeal for lack of evidence supporting the alleged *Charter* breaches. Accordingly, since neither Court considered the substantive question of whether "reasonable autonomy" could be part of the s. 2(b) and s. 7 guarantees, the merits of the *Charter* arguments will similarly not be dealt with in this paper.

[8] Supra, note 6.

school boards by section 17(1) of the *Alberta Act*[9] which provides that:

> Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the North-west Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

The trial decision of Smith J. was issued on November 28, 1995. Justice Smith rejected the reasonable autonomy and discrimination arguments but accepted the mirror equality argument, finding the amendments to be invalid to the extent that they did not allow public boards to opt out of the ASFF funding scheme.[10] On March 31, 1998, the Alberta Court of Appeal unanimously rejected all of the PSBA's arguments.[11]

THE SIGNIFICANCE OF THE REASONABLE AUTONOMY AND MIRROR EQUALITY ARGUMENTS

This paper will focus on the merits of the first and third issues raised by the PSBA, namely, whether the Canadian Constitution guarantees reasonable autonomy and mirror equality to Alberta's public school boards. As noted at the outset, these arguments hold profound implications for the future application of Canada's constitution. The discrimination argument really only requires the Court to evaluate the fairness of the new funding system in light of the express protection against discrimination found in section 17(2) of the *Alberta Act*. In contrast, the reasonable autonomy and mirror equality arguments call upon the Court to recognize, interpret and give constitutional authority to public school board rights which are not expressly set out in the Constitution and which have not been specifically recognized by the Courts to date. Accordingly, these two arguments have the potential to significantly change the impact of the Constitution on school boards and numerous other municipal institutions. Moreover, the reasonable autonomy and mirror equality arguments beg for resolution because they are being raised with increasing frequency by various municipal institutions seeking judicial recognition of their independent constitutional status.[12]

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[9] *Ibid.* As Alberta's provincial constitution, the *Alberta Act* established Alberta as a province of Canada in 1905. Generally, pursuant to s. 3 of the *Alberta Act*, the provisions of the *Constitution Act, 1867* apply to the province. One exception is the replacement of s. 93 of the *Constitution Act, 1867* with s. 17(1) of the *Alberta Act*. Section 93 provides that:

> Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union.

Prior to Alberta becoming a province, schools in the area operated pursuant to chapters 29 and 30 of the *Ordinances of the Northwest Territories, 1901*. Section 45(1) of chapter 29 provided that:

> After the establishment of a separate school district under the provisions of this Ordinance such separate school district and the board thereof shall possess and exercise all rights, powers, privileges and be subject to the same liabilities and method of government as is herein provided in respect of public school districts.

[10] The declaration of invalidity was suspended until June 15, 1996. In February 1996, a stay of Smith J.'s finding was granted pending appeal and a contemplated additional stay of six months was granted if the Government's appeal on mirror equality was unsuccessful.

[11] The Court of Appeal issued two judgments, one written by Russell J.A. for the majority of the Court, and one written by Berger J.A.. The difference between the judgments is that Berger's reasoning includes an analysis of the scope of existing separate school board rights whereas Russell's decision complies with the ACSTA's request that such an analysis not be undertaken in this case.

[12] For example, in *East York (Borough)* v. *Ontario (Attorney General)* (1997) 34 O.R. (3d) 789 (Ont. Ct. Gen. Div.); aff'd (1997) 36 O.R. (3d) 733 (Ont. C.A.); leave to appeal to S.C.C. refused April 2, 1998 (the "*Megacity Case*"), several parties challenged the provisions of the *City of Toronto Act*, 1997, S.O. 1997, c. 2 which reorganized several municipalities into a single corporate municipal body called the "City of Toronto." In part, this challenge was brought on the basis that Canadian municipalities were guaranteed a certain level of reasonable autonomy by Canadian constitutional law or convention. (This argument was rejected by both courts). Similarly, in *Ontario English Catholic Teachers' Association et. al.* v. *Ontario (Attorney General)* (1998), 162 D.L.R. (4th) 257 (Ont. Ct. Gen. Div.), rev'd in part *(1999), 172 D.L.R. (4th) 193* (Ont. C.A.) [hereinafter the "*OECTA Case*"], both separate and public schools sought declarations that parts of a proposed statute which would remove the ability of school boards to directly tax were unconstitutional. The trial court accepted the argument that s. 93 of the Constitution provided separate school boards with autonomy over taxation but this finding was overturned on appeal. Both court levels rejected the notion that school boards were empowered by constitutional convention to tax their supporters. (It is notable that the Court decisions in this case do recognize a certain degree of autonomy of Ontario school boards, however, this autonomy is found in the legislation which governed Ontario school boards at the time of Confederation). Both court levels also rejected the argument that s. 93 provided equal powers or "mirror equality" to public

REASONABLE AUTONOMY

The PSBA's reasonable autonomy argument suggests that "there is implicit in the Constitution of Canada, particularly in the term 'municipal institutions' as used in section 92(8) of the Constitution, a law or convention of the Constitution guaranteeing and requiring preservation of, and respect for, reasonable autonomy of local government institutions including local school boards, in Canada."[13] According to the PSBA, local school boards exercised a high degree of local democratic autonomy in 1867 and 1905 when the *Constitution Act* and the *Alberta Act* were respectively initially enacted and therefore this autonomy must be implicit in the Canadian Constitution. Further, since Alberta school boards continued to exercise a high degree of local democratic autonomy up to 1994, this autonomy must constitute a constitutional convention.

Two points are notable with respect to the source and implications of the PSBA's reasonable autonomy argument. First, of all the contentions raised by the PSBA, this argument appears to be the only one which truly reflects the motivation of the PSBA in bringing this action: specifically, public school boards regaining their local control. Unlike the mirror equality or discrimination arguments, the reasonable autonomy argument expressly recognizes that, at the end of the day, public school boards do not just want to be treated like separate Boards, they want the ability to control their own activities. Second, of all the arguments raised by the PSBA, the reasonable autonomy argument carries the greatest implications for fundamental and broad-ranging changes to our current understanding of Canada's local government institutions. While the discrimination and mirror equality arguments pertain to provisions of the Constitution which specifically address the topic of education, the reasonable autonomy argument can be easily expanded beyond school boards to virtually any municipal institution or delegate of the provincial government that has historically exercised local decision-making authority.

In addressing this reasonable autonomy argument for the Court of Queen's Bench, Justice Smith noted that current law characterizes municipal institutions, such as school boards, according to either the "traditional approach" or the "dual character approach." The traditional approach describes municipal institutions as mere creatures of provincial legislatures, with powers entirely subject to the control of the legislatures. According to this view, school boards only have the powers which are expressly provided by statute or which are necessarily implied by statute. The dual character approach also considers municipal institutions to be delegates of the provincial legislatures but acknowledges that municipal institutions may have inherent powers over local needs when the legislatures have expressly conferred discretion upon these institutions. Ultimately, however, given the applicable Alberta legislation regarding school boards, Justice Smith concluded that neither of the above two characterizations of school boards supports the PSBA reasonable autonomy argument. According to Justice Smith, the relevant legislative provisions do not provide school boards with an express or implied guarantee of autonomy. Further, Alberta school boards are and have always been dependent on the province for their existence and powers.[14] Any school board structures which may have existed in the past "were designed and created in response to the needs and expectations" of the times and are not "engraved in stone" or otherwise endowed with constitutional status.[15]

Affirming Justice Smith's conclusion that the wording of the Constitution does not expressly or implicitly support the notion of reasonable autonomy of school boards, the Court of Appeal emphasized the fact that sections 93 and 92(8) of the Constitution reflect a historical compromise between national and regional interests. This compromise provides for local control over education at the provincial level but does not expressly or implicitly empower school boards or other municipal delegates of the provinces to exercise this local control:[16]

> [A]cademic and judicial authorities have consistently adopted the view that neither the legal status nor the powers of municipal institutions are constitutionally guaranteed, and that they are provincial statutory bodies with only those powers conferred upon them by the legislatures ... It was conceded that there are no precedents to the contrary. Section 92(8) of the *Constitution Act, 1867* authorizes a province to create municipal governments and delegate to them certain powers. But it does not entrench those

and separate school boards.

[13] *Public School Boards Association (Alberta) et. al.* v. *Alberta (Attorney General et al.)* (1995), 198 A.R. 204 at 210 (Q.B.).

[14] *Ibid.* at 220.

[15] *Ibid.* at 220.

[16] *Supra* note 1 at 289.

creations, or restrict the province's right to change them.

Further, while the Court acknowledged that the provinces have historically utilized local school boards to deal with education matters, the Court of Appeal noted that this voluntary action by the provinces does not give constitutional status to the school boards.[17]

The reasoning of both the trial and appeal courts recognizes that, in order to accept the proposition that school boards are constitutionally guaranteed reasonable autonomy as a matter of law, the Courts would have to go beyond the wording of the Constitution itself. The courts would have to find a reason, substantiated by compelling evidence, to interpret the applicable constitutional provisions as recognizing or including the notion of reasonable autonomy. As effectively demonstrated by both court decisions, there is simply no support for reasonable autonomy in the wording of the Constitution or in the evidence presented. In fact, "school boards" are not expressly recognized as entities in any part of the Constitution: the applicable provisions refer only to "education" and "schools." The Constitution empowers the provinces to legislate with respect to education and, utilizing this power, the province of Alberta has created school boards as part of its educational structure. As conceded by the PSBA, the province still has the constitutional power to do away with the school board system in its entirety. If the province has this ultimate power, it seems illogical to suggest that, as long as the province continues to operate its education system through school boards, the province has a constitutional obligation to allow those school boards to exercise any level of autonomy. How can the Constitution offer a legal guarantee of autonomy to an institution it does not even recognize?

The Court of Appeal also refused to find that local school board autonomy is guaranteed by constitutional convention, finding instead that the three part constitutional convention test established by the Supreme Court of Canada in *Reference re Resolution to Amend the Constitution*[18] is not satisfied in this case. In particular, the Court of Appeal found that the historical evidence does not offer a single precedent indicating that relevant political actors felt bound by a high level of autonomy of school boards, either prior to Confederation or since.[19] Key to the courts' finding on this point is the fact that the convention test not only requires proof of a precedent, but also proof that the applicable political actors felt bound by the precedent. In any event, the Court of Appeal pointed out that conventions are not legally binding and "should not be used in any manner to override explicit constitutional guarantees"[20] such as the provincial power over education.

A fundamental question not expressly addressed by either the trial or appeal court is whether a constitutional convention can exist with respect to the activities of an entity which is not expressly recognized by the Constitution or implicitly necessary to the operation of the Constitution. It seems logical (if not tautological) that the convention test should necessarily apply only to an inherently constitutional matter. Hence, a question pertaining to constitutional amendment may support the finding of a convention because constitutional amendment has an express or necessarily implied constitutional character. On the other hand, the fact that the Constitution empowers the provinces to legislate on local matters does not expressly or implicitly give local governments or regulations constitutional import. For example, while the provinces are constitutionally empowered to legislate on traffic control as a matter of local concern, this constitutional power does not explicitly or implicitly transform traffic practices into constitutional matters. Thus, even though "red light means stop" has been a long-standing rule or practice established by the provinces pursuant to their constitutional authority, "red light means stop" cannot be a constitutional convention because traffic control is not expressly or implicitly a constitutional matter. Similarly, the fact that provinces have, to date, exercised their power over education through school boards does not transform the operations or control of school boards into constitutional matters capable of supporting a constitutional convention.

Another point which was not raised in the *Alberta Public School Boards Case* but which might be used in support of the reasonable autonomy argument is the notion that reasonable autonomy for school boards is supported by the "underlying principles" of our constitution which were recently recognized by the Supreme Court of Canada in *Reference re Secession of*

[17] *Ibid.* at 291.

[18] [1981] 1 S.C.R. 753. The test established by this case requires the following elements to be proven in order to find a constitutional convention: (1) at least one precedent for the practice in question must exist (2) the actors in the precedent(s) must believe that they were bound by a rule to follow the practice and (3) there must be a good reason for the rule.

[19] *Supra* note 1 at 294.

[20] *Ibid.* at 295.

Quebec.[21] In the *Secession Reference*, the Supreme Court noted that Canada's constitution consists of the written constitutional texts as wells as "supporting principles and rules, which include constitutional conventions."[22] This comment suggests that, if constitutional authority for a given practice (such as the autonomy of school boards) cannot be found in the written constitution or in constitutional conventions, this authority may still be found in the underlying principles and rules of the Constitution. Arguably, then, the reasonable autonomy of school boards may be authorized by one of the Constitution's underlying principles, such as that of minority protection which the Supreme Court of Canada recognized as being the motivating factor behind section 93's protection of denominational schools.[23] Once again, however, closer examination reveals that this argument is flawed. Taken as a whole, the Supreme Court's comments about underlying principles deal with the legitimacy of constitutional practice and not with the constitutional status of institutions which are not expressly created or recognized by the written constitution. In fact, the Court's comments in the *Secession Reference* clearly indicate that Canada's constitution only empowers two orders of government (federal and provincial) and that the mere ability of a group or organization to act in a certain manner does not necessarily give that action legal or constitutional authority.

Thus, on all grounds, the unavoidable problem with the reasonable autonomy argument is that reasonable autonomy cannot be constitutionally guaranteed to school boards by law, convention, or underlying principles because school boards themselves are not constitutionally recognized. In commenting on the Court's rejection of the reasonable autonomy argument raised by various municipalities in the *Megacity Case,* John McEvoy notes that:[24]

> ... opponents of amalgamation marshalled the legal arguments available to them but could not prevail against the fundamental weakness of their own case — the complete lack of constitutional recognition of the status of municipal corporations as a local constituent unit of democratic government.

This comment applies equally to the PSBA's argument of reasonable autonomy.

MIRROR EQUALITY

The "mirror equality" argument advanced by the PSBA suggests that, by indicating that separate school districts should have the same powers, privileges and rights as public school districts, section 17(1) of the *Alberta Act* effectively stands for the proposition that separate and public school boards must be treated equally or that they must "mirror" each other in terms of rights and privileges. In other words, if separate school districts are entitled to the same powers, privileges and rights as public school districts under section 17(1), then public schools must be entitled to all of the same powers, privileges and rights as separate school districts. In the context of the new funding system, mirror equality would require the public school boards to share the ability of separate school boards to opt out of the centralized funding program. In support of this argument, the PSBA placed heavy reliance upon *Adler* v. *Ontario*,[25] in which the Supreme Court of Canada held that a province's refusal to fund private religious schools does not violate freedom of expression or equality under the Charter. In particular, the PSBA relied upon the majority judgment in *Adler*, in which Justice Iacobucci stated that public schools are impliedly part of the regime established by section 93.[26]

The trial judge accepted the PSBA argument of mirror equality and found that the opt-out provision of the new system, available only to separate school boards, violated the principle of mirror equality inherent in section 17(1). Although the judge noted that prevailing case law supports the view that section 17(1) only protects separate school boards, he concluded that the overall intention was always for public and separate schools to have the same rights and privileges. The trial judge also concluded that section 17(1) must be read in light of section 17(2) which prohibits financial discrimination against either public or separate schools.

As Justice Smith's comments illustrate, the mirror equality argument is very appealing to one's intellectual sense of fairness and equality. Initially, it seems sensible to conclude that, since section 17(1) expressly provides separate schools with all of the rights and privileges of public schools, by definition public schools should be entitled to all of the rights and

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[21] [1998] 2 S.C.R. 217 [hereinafter the "*Secession Reference*"].

[22] *Ibid.* at 240.

[23] *Ibid.* at 261.

[24] J.P. McEvoy, "Democracy, the Constitution and Municipal Reorganization: *Borough of East York* v. *Attorney General of Ontario*" (1997) 36 Alta. L. Rev. 237 at 244.

[25] [1996] 3 S.C.R. 609 [hereinafter *Adler*].

[26] *Ibid.* at 646.

privileges of public schools. Upon closer examination, however, this "mirror equality" conclusion does not logically or necessarily flow from the wording of section 17(1). Accordingly, this argument was appropriately rejected by the Court of Appeal.

The Court of Appeal's finding is primarily based on the fact that section 17(1) does not expressly provide any protection for public school boards even though it could easily have been worded to do so. The Court of Appeal noted that both section 17(1) of the *Alberta Act* and the relevant provision of *Ordinance 29* mentioned in section 17(1) only expressly reference the rights of separate schools. Accordingly, the Court found that, "[b]y its clear wording, section 17(1) applies to constitutionalize only the rights and privileges with respect to separate schools that existed under chapters 29 and 30."[27]

The Court of Appeal also rejected the suggestion that the mirror equality principle is accepted or recognized by the *Adler* case. First, the Court pointed out that in *Adler*, four of the nine Supreme Court of Canada Justices "disagreed with the notion that public schools receive any protection under the terms of section 93(1)."[28] Second, the Court of Appeal refused to interpret the majority reasons of Justice Iacobucci in *Adler* as necessarily supporting the mirror equality argument, noting instead that the *Adler* decision should be limited to its facts: that is, a consideration of the interaction between the provisions of the Charter and section 93:[29]

> In summary, there is nothing in Iacobucci J.'s decision that breathes any life into the mirror equality argument. A close reading of the decision reveals that whatever the nature of the constitutional protection granted to public schools under section 93, it is far more limited in scope than the protection given to denominational schools.

Finally, the Court of Appeal noted that section 17(1) only expressly refers to rights or privileges pertaining to religious instruction. According to the Court of Appeal, the singling out of religious instruction indicates that, even if section 17(1) does provide some protection to public schools, this protection only applies with respect to religious instruction considerations.

In summary, the Alberta Court of Appeal based its findings on the reasoning it had expressed earlier in *Calgary Board of Education* v. *Alberta (Attorney General)*,[30] wherein the Court found that the intention of section 17(1) of the *Alberta Act* was to protect the interests of the minority, "leaving the majority to protect themselves through the use of the democratic instrument, the ballot box."[31] Ultimately, then, the Court's rejection of the mirror equality argument turned primarily upon the express wording of section 17(1). In the words of the Court, "[h]ad the drafters of the provision intended to grant public schools the same rights they granted to separate schools, they would have said so."[32]

In the end, the Court of Appeal's analysis of section 17(1) is simply more logical than the analysis suggested by the mirror equality argument. On its face, section 17(1) is not worded in terms of complete equality. Therefore, rather than trying to draw the inference of complete equality from this section, it makes more sense to determine what the plain words of section 17(1) mean. Taking this approach, section 17(1) plainly requires separate schools to have all of the rights and privileges of public schools and allows separate schools to have additional rights and privileges specific to denominational schools. In other words, rather than necessarily providing for complete equality between the school systems, section 17(1) requires that, *at a minimum*, separate schools must have all of the rights and privileges of public schools. The guaranteed rights in section 17(1) are only a subset of all of the rights and privileges which may be available to denominational schools,[33] preventing public school boards from

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[27] *Supra* note 1 at 308.

[28] *Ibid.* at 309.

[29] *Ibid.* at 310.

[30] [1981] 4 W.W.R. 187 (Alta. C.A.).

[31] *Supra* note 1 at 311.

[32] *Ibid.* at 311.

[33] The logical fallacy of the mirror equality argument is further explained by Justice Cumming at the trial level of the *OECTA Case*, *supra* note12 at 310-311.

> The choice of the word 'reciprocity' illustrates the reasoning the applicants rely on: the separate school system uses the public school system as a frame of reference, to determine if it is receiving appropriate treatment by the majority ... Put even more crudely, the reciprocity argument says that because what we get you get, what you get we get. I mean no disrespect to the very able arguments of counsel when I phrase things in this fashion. It is simply that by framing the argument in these terms, it demonstrates how the applicants are relying on a false syllogism....

obtaining greater privileges than separate school boards.

This latter interpretation of section 17(1) certainly seems consistent with the fact that the education provisions of the *Constitution Act, 1867* were initially designed to protect the interests of religious and linguistic minorities within the provinces. Again, as indicated by Justice Cumming in the *OECTA Case*:[34]

> The constitutional existence of separate schools versus the constitutional non-existence of public schools is merely a recognition that constitutional protection of one system was deemed necessary while constitutional protection of the other was not.

In any event, the Courts should not define the rights of public schools under section 17(1) pursuant to the principle of mirror equality where section 17(1) does not necessarily or easily give rise to that interpretation. While our modern day ideals may suggest that fairness requires public and separate schools to receive equal constitutional protection, the fact is that such equal protection is not expressly or implicitly provided by section 17(1) of the Constitution.

Conclusion

If the education provisions of Canada's constitution were being written today, they would probably take a substantially different form than we currently find in section 17 of the *Alberta Act* or in section 93 of the *Constitution Act, 1867*. For example, given the various protections offered and the values expressed by the *Charter of Rights*, it might seem most reasonable and fair for the Constitution to be written in a manner that would provide equal rights and privileges to all schools. Looking at the PSBA's arguments in this benevolent light, it is tempting to give in to the intellectual appeal of the reasonable autonomy and mirror equality arguments in order to grant constitutional status to public school boards. Unfortunately, this approach does not recognize the inherent constitutional dangers involved in accepting the PSBA's arguments.

A desire for section 17 of the *Alberta Act* or section 93 of the *Constitution Act, 1867* to be written differently does not change the way that these provisions are currently written and should not change the way these provisions are interpreted and applied. In their current form, these sections provide a very limited and specific protection for denominational schools only. Attempting to broaden the application and meaning of these provisions through the concepts of reasonable autonomy or mirror equality threatens to take these constitutional provisions far beyond their expressed intentions. Accepting the reasonable autonomy argument advocated by the PSBA potentially endows every local authority with constitutional status. Similarly, accepting the mirror equality argument opens the door for Courts to grant broad-ranging powers to any institution mentioned in the Constitution. Surely, endowing any entity with this type of constitutional status and power should only be done via a constitutional amendment rather than through an implied reading of existing constitutional provisions.

Ultimately, there is a fine but distinct line between a "large and liberal" interpretation of the Constitution and a fundamental misinterpretation of the Constitution. In the *Alberta Public School Boards Case*, the Court of Appeal recognized this distinction and rightly avoided misinterpreting the constitutional provisions at issue, even though the results of this finding may be somewhat disappointing, given modern day values and social structures. The proper resolution of this case requires one to keep in mind the fundamental distinction between what the law should be and what the law is. As noted by the Ontario Court of Appeal in the *Megacity Case*: "what is politically controversial is not necessarily constitutionally impermissible."[35]❑

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In this case, the first premise of the applicants is that the separate school system has constitutional recognition. The second premise is that the public school system has constitutional recognition ... (... solely for the purpose of present analysis, I assume without deciding that *Adler* constitutionally protects *a* right of public funding for a public school system.) The deduction which follows, in the applicants' argument, from these two premises, is that because both school systems have a constitutional existence, they both have exactly the same constitutional rights. In my view, this is an invalid deduction, and therefore the syllogism is a false one.

[34] *Ibid.* at 313.

[35] *Supra* note 12 at 738.

CLASS ROOMS, COURT ROOMS, WAR ROOMS, CELLS: MADAM JUSTICE LOUISE ARBOUR, CANADA'S NEWEST COURT JUSTICE

Wayne Renke

> "Her record speaks for itself . . . . It's an outstanding appointment. She is a woman of brilliance, integrity – she is a woman who has dealt with some of the most difficult and challenging issues of our modern time:" The Honourable Anne McLellan.[1]
>
> "It's a magnificent appointment . . . . She's just so highly regarded in this province. She's got expertise in criminal law, and we just think that's a wonderful appointment:" Alan Gold.[2]
>
> "I hate to disappoint you . . . but I haven't even heard anything negative about her:" Robert Martin.[3]

On June 10, 1999, the Honourable Anne McLellan, Minister of Justice and Attorney General of Canada, announced the appointment to the Supreme Court of Canada of Madam Justice Louise Arbour of the Ontario Court of Appeal, effective September 15, 1999.[4] Judging a judge — as opposed to a judgment — is a difficult and somewhat presumptuous undertaking, especially when the judgment concerns not so much the judge that was, as the judge that will be. Yet giving some thought to what we can expect from the latest addition to the Supreme Court is natural and prudent, particularly given the recent rapid turnover of Supreme Court personnel, including the very recently announced resignation of Chief Justice Antonio Lamer.[5] What kind of Supreme Court judge will Justice Arbour be? Elevation may effect transmutation, but some clues may be gleaned from her curriculum vitae and from some of her work.

LIFE[6]

Justice Arbour's eventually bilingual, bicultural life began in Montréal, Québec on February 10, 1947. Her early education was in a convent. She received a Bachelor of Arts degree in 1967, and an LL. L. from l'Université de Montréal in 1970. During law school, Chief Justice Lamer was one of her mentors.[7] The young Justice Arbour became involved in Québec nationalist politics. Although she "always loved street politics,"she "spent more time playing poker and dancing in discotheques than being consumed by political discourse. We partied our way though law school until we were hit by the cold shower of the War Measures Act."[8]

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1 L. Eggertson, "Arbour quits U.N. to join Supreme Court" *The Toronto Star* (11 June 1999), online: The Toronto Star Online <http://www.thestar.com/back issues.../news/990611NEW01b NA-COURT11.html>.

2 J. Quinn, "Lawyers applaud Arbour's selection" *The Toronto Star* (11 June 11 1999), online: The Toronto Star Online <http://www.thestar.com/back issues...11/news/990611NEW07 NA-REAX11.html>.

3 K. Makin, "From Bench to Bosnia" *Canadian Lawyer* 20:8 (September, 1996) 18 at 20.

4 Department of Justice Canada, News Release: "Madam Justice Louise Arbour Appointed to the Supreme Court of Canada" (10 June, 1999), online: Department of Justice Canada Home Page <http://canada.justice.gc.ca/News/Nominations/1999/int0610 en.html>.

5 K. Powell, "Supreme Court chief justice hangs up robe" *The [Edmonton] Journal* (22 August 1999) A1.

6 Most of the biographical materials have been assembled from the following sources: *Canadian Who's Who* (Toronto: University of Toronto Press, 1999) 30; Department of Justice Canada, News Release, *supra* note 4; Convocation Materials, Spring Convocation of Osgoode Hall Law School of York University, (17 May 1995); Makin, *supra* note 3; J. Geddes, "A star for the Supreme Court" *Maclean's* 112:25 (21 June 1999) 21; Minister of Justice and Attorney General (Canada) News Release: "Ontario Court of Appeal Appointment Announced" (16 February 1990), online: QL (JUDG); University of New Brunswick 170th Encaeia, May 19 and 20, 1999, Highlights, online: University of New Brunswick Home Page <http://www.unb.ca/graduation/honorary.html>; W. Walker, "Arbour takes on job of a lifetime" *The Toronto Star* (11 June 1999), online: The Toronto Star Online <http://www.thestar.com/back issues.../news/ 990611NEW07 NA-ARBOUR11.html>.

7 Lamer C.J.C., "Remarks of the Right Honourable Antonio Lamer, P.C., Chief Justice of Canada to the Council of the Canadian Bar Association" (Edmonton, Alberta, 21 August 1999), online: QL (LNET).

8 Makin, *supra* note 3 at 19.

Justice Arbour articled with the Legal Department of the City of Montréal, and was admitted to the Québec bar in 1971. She clerked for Mr. Justice Louis-Phillipe Pigeon of the Supreme Court in 1971-1972.[9] She subsequently completed graduate work at the University of Ottawa Faculty of Law (Civil Section).

Justice Arbour joined the Faculty of Osgoode Hall Law School of York University in 1974, and taught there until 1987. She received tenure and promotion to the rank of Associate Professor in 1977, the same year that she was admitted to the Ontario bar. She taught Criminal Law, Criminal Procedure, Evidence, and Civil Law, and served as Associate Dean of the Faculty. Her publications output was modest. In addition to some brief case annotations in the *Criminal Reports* (for which she served as Québec editor),[10] she wrote four main articles.[11] Her work was concise, scholarly, and well-researched. It was doctrinal rather than theoretical. She and Larry Taman, her partner for many years, produced (by its publisher's account) Canada's first commercial casebook on criminal procedure – *Criminal Procedure: Cases, Text and Material*.[12] The collection pushed no envelope.

Justice Arbour was Vice-President of the Canadian Civil Liberties Association in the 1980's, and with Alan Borovoy presented its brief to the Special Committee on Pornography and Prostitution.[13] Additional pre-appointment activities included serving as a Research Officer for the Law Reform Commission of Canada (she was a colleague of Chief Justice Lamer),[14] and as a Member of the Canadian Law Information Council Advisory Committee to Reference Centre for French Language Common Law Documentation. She was also a member of the editorial boards of the *Osgoode Hall Law Journal* and *La Revue Général de Droit* of the University of Ottawa.

In 1987, Justice Arbour was appointed to the Supreme Court of Ontario (High Court of Justice). In 1990, she was elevated to the Ontario Court of Appeal.

In 1995, she was appointed under the *Inquiries Act* (Canada) as Commissioner "to investigate and report on the state and management of that part of the business of the Correctional Service of Canada that pertains to the incidents that occurred at the Prison for Women in Kingston, Ontario, beginning on April 22, 1994 and on the responses of the Correctional Service of Canada thereto . . . ."[15] Her *Kingston Report* is impressive on many levels. The process she adopted was commendable. To familiarize herself with prison issues, Justice Arbour visited women's prisons across Canada; met with administrators, front-line workers, and federally-sentenced women; consulted with academics; and utilized the University of Toronto's Centre of Criminology Library to track down scholarly work. In addition to the traditional inquiry techniques of investigations, interviews, and hearings, the policy consultation phase of the inquiry relied on Roundtable discussions.[16] The *Kingston Report* is sound in principle: "[a] guilty verdict followed by a custodial sentence is not a grant of authority for the State to disregard the very values that the law, particularly criminal law, seeks to uphold and to vindicate, such as honesty, respect for the physical safety of others, respect for privacy and for human dignity."[17] Her recommendations were wide-ranging and sensible – concerning issues such as cross-gender staffing, the use of force and emergency response teams, the availability and use of healing lodges for aboriginal women, limitations on the use of administrative segregation, improving the accountability of correctional services, improving the prisoner complaints and grievances system, and the creation of institutions and rules appropriate to the realities of women's imprisonment.[18]

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[9] Justice Arbour is the first former Supreme Court law clerk to return to the Supreme Court as a judge: Lamer, *supra* note 7 at 3.

[10] See, for example, Justice Arbour's annotations to *R.* v. *Charron* (1985), 46 C.R. (3d) 267 at 268 (Que. Ct. S.P.) [hereinafter the "*Charron* Annotation"]; *R.* v. *Manuel* (1986), 50 C.R. (3d) 47 (Que. Ct. S.P.); *Chartrand* v. *Quebec (Minister of Justice)* (1986), 55 C.R. (3d) 97 (Que. S.C.); *Quebec (A.G.)* v. *Dubois* (1987), 61 C.R. (3d) 159 (Que. C.A.).

[11] "Comparative Judicial Styles: The Development of the Law of Murder in the Quebec and Ontario Courts of Appeal" (1980), 11 R.D.U.S. 197; "Developments in Criminal Law and Procedure: the 1981-82 Term" (1983), 5 Supreme Court L. Rev. 167; "The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression" in J. M. Weiler and R. M. Elliot eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 294; and "Canadian Criminal Law: Bicultural Accomplishments and Tensions Before and After the *Charter*" (1987) Cambridge Lect 125. "The Oracle of the Criminal Code" (1975) 13 Osgoode Hall L. J. 315 is a short contribution to a review symposium of Paul Weiler's *In the Last Resort*.

[12] (Toronto: Emond-Montgomery, 1980). For, respectively, a critical and a luke-warm review, see S. A. Cohen (1980-81) 23 Crim. L. Q. 266 and J. F. Harris (1982-83) 12 Man. L.J. 253.

[13] Weiler and Elliot, *supra* note 11 at iii ("Contributors List").

[14] Lamer, *supra* note 7 at 3.

[15] Order in Council PC 1995-698, April 10, 1995, reproduced in the *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) viii - x [hereinafter the *Kingston Report*].

[16] *Ibid.* at xvii.

[17] *Ibid.* at xi.

[18] *Ibid.* at 251 - 259.

In August, 1996, the United Nations' Security Council appointed Justice Arbour Chief Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and of the International Tribunal for Rwanda [the "War Crimes Tribunal"].

Justice Arbour has received numerous awards and distinctions, including honorary degrees from Osgoode Hall Law School and the University of New Brunswick in Fredericton; the University Medal of l'Université de Montréal; the G. Arthur Martin Award, awarded by the Criminal Lawyers Association (Ontario);[19] and the 1999 Louise Weiss Foundation prize.[20]

Justice Arbour has three children.

WORK[21]

To gauge a judge's trajectory, we should consider not only experience but also his or her work product or record. As a global comment on her record, I think it fair to observe that none of Justice Arbour's judgments or publications represent a legal "breakthrough;" she has not reconceptualized any area of law; she has not shifted any paradigms. But what we do see in her work is an intelligent, thorough, sincere, sympathetic attempt to apply the law in particular cases.

Her record discloses three main dispositions: an acceptance of the pre-eminence of the rule of law and a correlative willingness to criticize state initiatives and actions; an acceptance of the importance of *all* of the interests protected by the *Canadian Charter of Rights and Freedoms*;[22] and a leavening of modesty about what the law, by itself, can accomplish.

The Rule of Law

Justice Arbour has demonstrated in word and action a commitment to the "rule of law", in the sense of governance of social activities according to valid legal norms, as opposed to arbitrary actions of the powerful. A commitment to the rule of law is more a duty than a virtue for a judge; but Justice Arbour has displayed tenacity, initiative, and courage in applying that rule to the powerful.

Justice Arbour's work as Prosecutor for the War Crimes Tribunal has been, through and through, an effort to bring the rule of law to bear on the lawless acts of lawless men. She submitted and received confirmation for an indictment charging, *inter alios*, Slobodan Milosevic, the President of the Federal Republic of Yugoslavia, with crimes against humanity — murder, deportations, and persecutions — and with violations of the laws and customs of war.[23] Michael Ignatieff has described Justice Arbour's action as a "watershed in the history of international law – the first indictment of an incumbent head of state."[24] Justice Arbour had to overcome some significant international pressure, particularly from American elements, to go forward with the indictment. She demonstrated a profound understanding of responsibility. As Michael Ignatieff has observed, "guilt means nothing unless a crime can be traced back to a single individual. That is why justice is about the naming of names."[25] She has proven herself capable of marching up the chain of command and assigning responsibility to the powerful.

The *Kingston Report* exposed the breakdown in the rule of law at the Prison for Women. She denounced the failure of prison officials to respect constitutional rights, legislated rules, or even their own correctional policies.[26] Although she generally refrained from attributing personal responsibility in the *Kingston Report*,[27] she did hold CSC Commissioner John Edwards to account in several instances.[28] He subsequently resigned.

Like many other judges in the *Charter* era, she has held Parliament, legislatures, and, thereby, democratic majorities accountable to the standard of the rule of law,

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[19] *Criminal Lawyers Association Newsletter* 20:1 (17 May 1999) 25.

[20] *Bench and Bar Daily News Digest*, Vol. IX - Issue 120, citing *Ottawa Le Droit* 20 22/6 (23 June 1999), online: QL (BBDN). "Previous winners of the prize include Médecins sans Frontièrs, Helmut Schmidt and Anwar El Sadat:" *ibid.*

[21] My review is necessarily highly selective. A "judges' field" search of Quick Law's Canadian Judgments database yielded 1020 judgment "hits," indicating judgments which she authored or participated in.

[22] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

[23] Justice Louise Arbour, Press Release, JL/PIU/404 -E, "Statement by Justice Louise Arbour, Prosecutor ICTY" (27 May 1999), online: International Criminal Tribunal for the Former Yugoslavia Homepage <http://www.un.org/icty/pressrel/p404-e.htm>; and International Criminal Tribunal for the Former Yugoslavia, Press Release, JL/PIU/403 - E,"President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo" (27 May 1999), *ibid.* at p403-e.htm.

[24] M. Ignatieff, "Arbour's Wake-Up Call" *Time* (31 May 1999), online: Time Magazine International <http://www.pathfinder.com/time/magazine/articles/intl/0,3266,27031,00.html>.

[25] *Ibid.*

[26] *Kingston Report*, *supra* note 15 at 179.

[27] *Ibid.* at xiii.

[28] For example, *ibid.* at 173.

striking down legislation that violates constitutional norms. Such decisions are hardly remarkable. Somewhat more remarkable was Justice Arbour's constitutional review of school legislation in the *Eaton* case — in the absence of statutorily required notice to the Attorneys General.[29] A tribunal constituted under the Ontario *Education Act* confirmed that a child with certain disabilities should be moved from a neighbourhood school to a "special education class." Justice Arbour found that the Act discriminated against the child on the basis of disability, without justification under section 1 of the *Charter*. She declared that the Act must be "read up" to include a direction that, unless the parents of a disabled child consent to the placement of that child in a segregated environment, the child must have a placement that is the least exclusionary from the mainstream, that is reasonably capable of meeting the child's needs.[30] In the course of allowing the appeal from her judgment on the grounds that the Tribunal's decision imposed no burden or disadvantage, Sopinka J. criticized Justice Arbour for embarking on a constitutional review without due notice to the governmental authorities.[31] Justice Arbour's pursuit of justice was perhaps too enthusiastic.

Yet another example of enthusiasm occurred in the *Leroux* case,[32] in which Justice Arbour put the rule of law ahead of *stare decisis*. The case turned on whether restricting the term "spouse" in the Ontario *Insurance Act* and Standard Automobile Policy to only legally married persons would deny common law spouses equal protection and benefit of the law and amount to discrimination on an "analogous ground" under section 15(1) of the *Charter*. Justice Arbour – then of the Ontario High Court of Justice – *en route* to expanding the denotation of the term "spouse" to include common law spouses (a result dictated, in her view, by section 15 of the *Charter*), declined to follow an Ontario Court of Appeal decision. On the appeal, the Court of Appeal chided Justice Arbour. She was not free to follow her own *Charter* lights, but should have abided by binding authority. It was for the Court of Appeal to modify its earlier ruling, not a lower court judge, and it was not prepared to find an infringement of section 15(1) in this case. *Leroux* was not further appealed, but a companion case was. Justice Arbour's conclusions were vindicated by the Supreme Court in *Miron* v. *Trudel*.[33] The majority of the Supreme Court held that the exclusion of common law spouses from coverage was discriminatory, and read appropriate inclusionary language into the benefit provisions.

In the *Barrett* case,[34] Justice Arbour attempted to hold trial judges to the rule of law, by requiring reasons in cases involving evidential gaps or conflicting testimony on important issues. Reasons give appellate courts a better foundation for assessing the reasonableness of judicial fact-finding. Her sound approach has been largely rejected by the Supreme Court, on appeal from *Barrett* and in other cases.[35]

Justice Arbour has criticized police lawlessness and abuses. She added her voice in *Barrett* to a chorus of criticism of the evidential procedures of the Toronto police hold-up squad. She recommended that the police videotape interviews with accuseds. In her opinion, videotape evidence "proves immensely superior to the recollection of . . . witnesses, even of those who took notes, as an evidentiary tool."[36] She recommended that officers at an interview take contemporaneous, independent notes.[37] Videotaping and proper note-taking discourages the invidious practice of intentionally leaving accuseds without independent evidence of alleged police misconduct. Justice Arbour emphasized that where the voluntariness of an accused's confession is in issue, the Crown must prove the voluntariness beyond a reasonable doubt and that evidential gaps caused by failing to videotape interviews or to keep proper notes may preclude the satisfaction of this burden of proof.

Acceptance of the Importance of All *Charter*-Protected Interests

A key feature of Justice Arbour's decisions is an acceptance of the importance of *all* of the interests protected by the *Charter*. This broad commitment distinguishes her from the wide variety of advocates who emphasize or prioritize certain *Charter* rights, at the expense of others. Positions like Justice Arbour's require the balancing of relevant interests in particular circumstances. A balancing approach makes abstract predictions of results difficult.

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[29] *Eaton* v. *Brant County Board of Education* (1995), 22 O.R. (3d) 1 (C.A.), rev'd [1997] 1 S.C.R. 241 [hereinafter *Eaton*].

[30] *Ibid.* at 21 (C.A.).

[31] *Ibid.* (S.C.C.) at 265.

[32] *Leroux* v. *Co-operators General Insurance* (1991), 4 O.R. (3d) 609 (C.A.) [hereinafter *Leroux*].

[33] *Miron* v. *Trudel* (1995), 124 D.L.R. (4th) 693 (S.C.C.). See R. E. Somerleigh (counsel for the plaintiff Leroux), Letter to the Editor, *Canadian Lawyer* 21:1 (January 1997) 5 for some illuminating comments on the *Leroux* appeal.

[34] *R.* v. *Barrett* (1993), 82 C.C.C. (3d) 266 (Ont. C.A.), rev'd (1995) 96 C.C.C. (3d) 319 (S.C.C.) [hereinafter *Barrett*].

[35] *R.* v. *Burns* (1994), 89 C.C.C. (3d) 193 (S.C.C.).

[36] *Barrett*, *supra* note 34 at 275. The Supreme Court did not comment on these matters.

[37] *Ibid.*

Three sets of overlapping interests protected by the *Charter* are especially relevant to Justice Arbour: (a) individual liberty; (b) state institutions necessary for an ordered democratic society; and (c) the interests of vulnerable groups.

(a) Individuals, Liberty, and the State

Justice Arbour has defended individual liberty from state interference through her opposition to censorship and her protection of the rights of suspects and accuseds.

In an early article, Justice Arbour argued that pornography is constitutionally-protected expression.[38] She accepted that pornography is political and discriminatory. Nonetheless, she rejected attempts to censor pornography through the *Criminal Code*.[39] She would countenance censorship, as a reasonable limit on expression in a free and democratic society, only if pornography could be shown to constitute a "clear and present danger" to the welfare of women. In her view, the evidence did not safely permit such a conclusion.[40] Justice Arbour responded to censorship advocates such as Catharine MacKinnon with the counterclaim that state censorship is the true threat requiring minimization: "When feminists argue that pornography 'chills women's expression,' they should not forget the very real chill of censorship and how it has attempted to silence them in the past."[41] "Injunctions chill expression," she wrote; "to say that pornography silences women is merely a figure of speech in comparison. Women can be silenced much more effectively by law makers than pornographers."[42]

Justice Arbour comes closest to defence counsel advocacy in her decisions concerning the rights of suspects and accuseds. She has observed in the criminal law the key conflict between the coercive power of the state, which must be monitored and controlled, and the liberty of the accused individual:

> Criminal law . . . is a body of law that is coercive, authoritarian, and, yet, in a sense, ironically, highly suspicious of state power, particularly of state abuse of power . . . . [A] fundamental assumption [of the criminal law] . . . is that the prosecution must be kept under a very strict regime of checks and balances, because it has behind it the might of the state, and, that the accused must be given instruments to resist the possible abuses that come from the state power backing up the prosecution.[43]

In keeping with this orientation, Justice Arbour has protected suspects from unreasonable search and seizure, defended accuseds' rights to make full answer and defence, shielded accuseds from improper evidence, and upheld the presumption of innocence against legislative incursion. As will be seen, however, she is not simply defence counsel in other robes.

(i) search and seizure

In *Johnson* v. *Minister of Revenue for the Province of Ontario*,[44] an accused challenged section 15(3) of Ontario's *Tobacco Tax Act*,[45] which permitted any authorized person to stop and search any commercial vehicle in Ontario and to seize anything that may be evidence of a violation of that Act, all without reasonable and probable grounds. Justice Arbour characterized the legislation as "regulatory." She held – quite properly – that persons have constitutionally-protected privacy interests in commercial vehicles and their various cargos and contents, and that section 15(3) permitted serious intrusions on those interests. She acknowledged the line of Supreme Court cases upholding the constitutionality of random vehicle stops, but distinguished the *Tobacco Tax Act* circumstances. Tax collection is not an objective as pressing and substantial as preventing highway carnage. Furthermore, the subsection dictated more than (e.g.) the production of a driver's licence or insurance certificate – it authorized extensive search and seizure. Finally, the subsection had an overly broad effect. It applied to any commercial vehicle, regardless of whether grounds existed for the belief that the vehicle was connected with the tobacco trade. The government did not attempt to support the subsection under section 1 of the *Charter*. Justice Arbour struck it and a connected subsection down.[46]

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[38] "The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression" in Weiler and Elliot, *supra* note 11 at 294.

[39] R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*].

[40] *Supra* note 38 at 298.

[41] *Ibid.* at 304 [footnote omitted].

[42] *Ibid.* Along the way to upholding the *Criminal Code's* obscenity provisions, the Supreme Court dealt with the difficulties of proof of social harm. It did not adhere to Justice Arbour's high liberal standard of "clear and present danger," but a lesser, more socially-protective standard of "rational link" or "rational connection" between obscenity and harm: *R.* v. *Butler*, [1992] 1 S.C.R. 452, Sopinka J. at 501 - 502.

[43] "Remarks of the Honourable Louise Arbour upon Receiving the G. Arthur Martin Criminal Justice Award" *Criminal Lawyers Association Newsletter*, *supra* note 19 at 27.

[44] (1990), 75 O.R. (2d) 558 (C.A.) [hereinafter *Johnson* v. *M.N.R.*].

[45] R.S.O. 1980, c. 502.

[46] Had the search and seizure provisions contained a reasonable and probable grounds requirement, she would have supported the constitutionality of the subsection: *Johnson* v. *M.N.R.*, *supra* note 44 at 574.

Justice Arbour also demonstrated a willingness to find police conduct in violation of section 8 of the *Charter*, although – by way of balancing – she ultimately supported the admissibility of the illegally-gathered evidence under section 24(2). In *Mercer*,[47] the accuseds were registered hotel guests. A chambermaid entered their room (despite a duly posted "do not disturb" sign), and, in the course of her explorations and rummaging, found a pillowcase containing money. She notified the manager (who had suspected all along that the accused were up to no good). The manager entered the room, viewed the money, and also found a "brown, waxy brick." The manager called the police. On arrival, the police entered the room with the manager but *sans* warrant. The accuseds were subsequently charged with possession of a narcotic for the purposes of trafficking. The accused, Justice Arbour ruled, had a reasonable expectation of privacy in the hotel room. The fact that cleaning staff may enter a room does not eliminate this expectation – although Justice Arbour imported a sort of "plain view" exception: "[o]bjects *not left in plain view or stored in areas which do not require daily maintenance*, such as inside drawers, closets, toiletry bags, briefcases and suitcases, can be reasonably expected to remain private despite access to the room by hotel staff for cleaning purposes."[48] She held that the consent of the hotel manager did not constitute a waiver of the accused's section 8 rights or transform the police officers' search into a consent search. Despite finding that the accuseds' section 8 rights had been violated, Justice Arbour did not exclude the evidence: it was not conscriptive; the police officers made a good faith mistake of law in relying on the manager's purported authority; the evidence was important to the proof of guilt of the accuseds and its exclusion would work greater damage to the administration of justice than its admission.

(ii) full answer and defence

The *Charron* case[49] concerned a preliminary inquiry on a charge of first degree murder. Defence counsel sought to cross-examine a crown witness respecting crimes the witness may have committed to lay a foundation for impugning the witness' credibility. Dutil J.S.P. sustained the Crown's objection that credibility is irrelevant to a preliminary inquiry and the questioning was improper. In the *Charron* Annotation, Justice Arbour conceded that Dutil J.S.P.'s decision was consistent with certain Supreme Court authority. However, she pointed out that separating credibility and other facts in issue is difficult. Justices should not be quick to block cross-examination simply because it appears to be relevant to credibility. She conceded that the primary function of preliminary inquiries must be to determine whether there is sufficient evidence to commit the accused for trial, but argued that a secondary function is to provide discovery of the Crown's case to the defence. The defence should be entitled to collect foundational evidence at the preliminary inquiry, for use at trial.[50] Justice Arbour's responses rested on her appreciation of the rights of accuseds to make full answer and defence and the need for broad rights of cross-examination. She referred to the "nearly untouchable character of the right to cross-examine, which goes to the very foundations of the adversary system."[51]

Consistent with her views on full answer and defence, Justice Arbour tackled the *Seaboyer* case[52] as counsel (with Daniel MacDonald) before the Ontario Court of Appeal on behalf of the intervener the Canadian Civil Liberties Association. *Seaboyer* concerned *Criminal Code* restrictions on accuseds' abilities to adduce evidence (through cross-examination or otherwise) of complainants' sexual activity with any person other than the accused. The Association supported the accused in arguing that the restrictions offended sections 7 and 11(d) of the *Charter*, the conclusion ultimately arrived at by the Supreme Court.[53]

Justice Arbour's approach to full answer and defence is balanced. She recognizes that female victims of sexual offences have privacy rights that must be protected: "We are continuing to advocate that it is absolutely critical that we shelter sexual assault victims from intense and futile scrutiny into their medical

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47 *R.* v. *Mercer* (1992), 7 O.R. (3d) 9 (C.A.), leave to appeal ref'd [1992] 2 S.C.R. viii (*sub nom. R.* v. *Kenny*).

48 *Ibid.* at 15. It is constitutionally prudent to clean up.

49 *Supra* note 10.

50 *Charron* Annotation, *supra* note 10. Justice Arbour's approach has been followed in subsequent cases: *R.* v. *George* (1991), 69 C.C.C. (3d) 148 (Ont. C.A.); *R.* v. *Giles* (1992), 75 C.C.C. (3d) 315 (B.C.S.C.); *R.* v. *Dawson* (1998), 123 C.C.C. (3d) 385 (Ont. C.A.); *R.* v. *Garofoli*, [1990] 2 S.C.R. 1421; *R.* v. *Alibhai* (1998), 123 C.C.C. (3d) 556 (Ont. Ct. (Gen. Div.)). For the view that discovery has eclipsed the proper purpose of preliminary inquiries and rendered them unmanageable, see *R.* v. *O' Connor*, [1995] 4 S.C.R. 411, per L'Heureux-Dubé J. at 509.

51 *Charron* Annotation, *supra* note 10 at 269. She also pointed out that preventing cross-examination on credibility would undermine the availability of s. 715 of the *Criminal Code*, which allows evidence taken at preliminary inquiries to be read into evidence if, *inter alia*, the accused had "full opportunity to cross-examine the witness."

52 *Re Seaboyer and the Queen* (1987), 37 C.C.C. (3d) 53 (Ont. C.A.), rev'd (1991), 66 C.C.C. (3d) 321 (S.C.C.) [hereinafter *Seaboyer*].

53 *Ibid.* at 395, 398 (S.C.C.).

records."[54] For her, the issue is (as it properly should be) the degree of probative value of the evidence, weighed against the prejudicial effect of the violation of a complainant's privacy:

> We are going to take very vigorously the position that the court must scrutinize the probative value of that kind of [medical history] evidence with respect to the credibility of the witness. For instance, if the medical evidence discloses severe instances of completely repressed memory or profound amnesia, you could say that this might have some significance. Our position will be that the fact that someone is traumatized – after being tortured, for instance – is not necessarily grounds to suggest that his or her identification of the perpetrator or recollection of what happened is not reliable.[55]

(iii) evidence — similar fact

One of the most dangerous species of evidence for an accused is similar fact evidence. Such evidence puts past bad acts of the accused before the trier of fact, with all of the attendant potential prejudice. Similar fact issues are frequently troublesome for accuseds in sexual offence cases. They may face allegations of multiple alleged offences against a single complainant, against multiple complainants, or against the complainant and other witnesses; multiple allegations may form separate counts against the accused in one trial.

Justice Arbour confronted the similar fact problem in *Huot*.[56] The accused was charged with a number of counts of sexual offences against two complainants. The alleged acts occurred over 30 years before trial. The trial judge considered the evidence respecting each count to be admissible respecting the others. Justice Arbour disagreed. The trial judge correctly stated the applicable principles drawn from *C.R.B.*,[57] but misapplied them. Very generally, similar fact evidence is admissible only if it tends to establish some relevant matter other than merely bad character or propensity and if its probative value outweighs its prejudicial effect. According to Justice Arbour, the evidence in question tended to establish only the accused's propensity to commit homosexual acts with adolescents. Numerous dissimilarities existed between the acts alleged by the two complainants. The evidence disclosed no plan or system and did not show the improbability of the complainants' separate allegations resulting from chance or coincidence. By resisting admissibility, Justice Arbour, if only by way of illustration, pushed the admissibility bar back up. It had sagged too low in Justice McLachlin's majority judgment in *C.R.B.*, which had allowed significantly dissimilar evidence to be admitted under the similar fact rules. Justice Arbour rejected the Crown's argument that the evidence was admissible to "corroborate" the complainants' accounts, i.e., because it bolstered their credibility – an argument wrongly accepted by McLachlin J. in her *C.R.B.* majority.[58] Justice Arbour found that the prejudicial effect of the evidence was great. Not only was the evidence tainted by the repugnancy of the acts alleged, but "one cannot ignore the special prejudice resulting from the passage of time."[59] She observed that "[d]ue to the fact that these allegations go back more than 30 years, the prejudicial effect of cumulating these allegations each serving as evidence for the other, seems to me to be insurmountable."[60] Defending oneself is difficult enough when allegations are fresh; defence may be even more difficult when the evidence relates to events alleged to have taken place decades ago. Nonetheless, in all of the circumstances of the case, Justice Arbour found that the trial judge's error occasioned no substantial wrong or miscarriage of justice, so she dismissed the appeal. She did comment that had the error occurred in a jury charge, it would have been fatal. In excessively short reasons, the Supreme Court dismissed the appeal. The majority declined to consider the similar fact issue.[61]

(iv) the presumption of innocence

Justice Arbour dealt with legislation limiting the presumption of innocence in the *Fisher* case.[62] Paragraph 121(1)(c) of the *Criminal Code* prohibited a government employee from taking a gift from a person dealing with the government, "unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him." Justice Arbour, properly and without much ado,

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[54] J. Llewellyn and S. Raponi, "The Protection of Human Rights Through International Criminal Law: A Conversation with Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda" (1999) 57 U. T. Fac. L. Rev. 83 at 92.

[55] *Ibid.*

[56] *R.* v. *Huot* (1993), 16 O.R. (3d) 214 (Ont. C.A.), aff'd [1994] 3 S.C.R. 827 [hereinafter *Huot*].

[57] *R.* v. *C.R.B.* (1990), 55 C.C.C. (3d) 1 (S.C.C.).

[58] *Ibid.* at 27 - 28. Sopinka J. identified the error in his minority judgment: *ibid.* at 13 - 14.

[59] *Huot*, *supra* note 56 at 220 (C.A.).

[60] *Ibid.*

[61] *Ibid.* at 829 (S.C.C.), Sopinka J., joined by La Forest, Cory, McLachlin, and Iacobucci JJ. In an even shorter separate concurring judgment, Gonthier J., joined by L'Heureux-Dubé J., found no error by the trial judge.

[62] *R.* v. *Fisher* (1994), 17 O.R. (3d) 295 (Ont. C.A.), leave to appeal ref'd [1995] 1 S.C.R. x.

rejected an argument that the provision was void for vagueness because of its lack of an express reference to a fault requirement: "As presently drafted, many *Criminal Code* provisions do not refer explicitly to any or all of the requisite fault elements. The courts, applying established common law principles to the language used by Parliament, must determine appropriate fault requirements."[63] She also rejected an overbreadth argument. The provision, as interpreted by the courts, gives adequate guidance to the persons whose behaviour it regulates and limits law enforcement discretion. She then turned to the presumption of innocence. She found, again properly, that the provision imposed on an accused a burden of proving, on a balance of probabilities, that he or she had written consent to receive a gift; and that this imposition allowed for conviction despite the presence of reasonable doubts about guilt. The provision limited an accused's constitutional right to be presumed innocent.

Justice Arbour rejected the Crown's attempt to support the provision under section 1 of the *Charter*. She doubted whether the provision promoted an objective that warranted limiting constitutional rights. Regardless, the imposition of a persuasive burden on the accused was not reasonably necessary. An "evidential" burden (the burden of adducing some evidence) might have been imposed on the accused; or the burden could have been left on the Crown. Her remedy was to declare the words "the proof of which lies on him" to be of no legal effect, but otherwise to preserve the provision.

(b) Supporting State Institutions

As we have seen, Justice Arbour has been prepared to make decisions that support the criminal justice apparatus, in the right circumstances.

As a further example of Justice Arbour's support for state institutions, she did not translate her *Huot* recognition of the dangers of the passage of time into an automatic assumption of prejudice against accuseds. In the *Bennett* case,[64] she anticipated the Supreme Court's clarification of *Askov*[65] in the *Morin* decision.[66] She held that *Askov* did not establish an eight month time limitation for bringing a matter to trial. She emphasized that a stay based on a violation of an accused's section 11(b) right to trial within a reasonable time would only be granted following a careful balancing of the length of the delay, the explanation for the delay, any waiver by the accused, and any prejudice to the accused arising from the delay demonstrated by the evidence. She rejected the argument that a 13 ½ month delay by itself violated the accused's right to be tried within a reasonable time. She pointed out the need for relevant comparable evidence in assessing whether a particular local jurisdiction's delays are unreasonable, and rejected the notion of an abstract cross-jurisdictional temporal standard of reasonableness.[67]

Justice Arbour has also interpreted accuseds' "substantive due process" rights favourably to the state. She has rejected defence arguments that would have made establishing *actus reus* and fault difficult in homicide prosecutions.

Her *Cribben* decision[68] resolved two causation issues. First, *Harbottle*[69] had established an elevated test for causal responsibility for first degree murder offences: the accused must be found, beyond a reasonable doubt, to have been a "substantial" (or integral or active) cause of the victim's death. There had been speculation that the *Harbottle* approach would be adopted for other homicide offences. Justice Arbour blocked that development. The test for causal responsibility for homicide offences other than first degree murder remains the *Smithers* test: the accused must be found beyond a reasonable doubt to have been "a contributing cause of death, outside the *de minimis* range."[70] Second, Justice Arbour held that the *Smithers* test is constitutional. It is not void for vagueness. Neither does it violate constitutional fault requirements. Justice Arbour recognized the basic principle that the morally innocent should not be held criminally liable. The *Smithers* test does not impose a standard of causal responsibility so low that it sweeps the morally innocent into liability. Even if the accused is a legal cause of some prohibited consequence, if the accused is not shown to have had the constitutionally requisite fault, he or she cannot be convicted. The fault rules, then, impose the limits that prevent the *Smithers* causation rule from casting the net of liability too widely.

Justice Arbour visited the constitutional fault standards in the *Durham* case,[71] which concerned the offence of careless use of a firearm under section 86(2) of the *Criminal Code*. The offence employed "without lawful excuse" language and required proof only of negligence for conviction. The issue was whether this level of fault was constitutionally sufficient, or whether

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[63] *Ibid.* at 300 (C.A.).
[64] *R.* v. *Bennett* (1991), 3 O.R. (3d) 193 (Ont. C.A.), aff'd (1992), 9 O.R. (3d) 276 (S.C.C.) [hereinafter *Bennett*].
[65] *R.* v. *Askov et al.* (1990), 59 C.C.C. (3d) 449 (S.C.C.).
[66] *R.* v. *Morin* (1992), 71 C.C.C. (3d) 1.
[67] *Bennett, supra* note 64 at 215 (C.A.).
[68] *R.* v. *Cribben* (1994), 17 O.R. (3d) 548 (Ont. C.A.).
[69] *R.* v. *Harbottle* (1993), 84 C.C.C. (3d) 1 (S.C.C.), Cory J.
[70] *Smithers* v. *The Queen*, [1978] 1 S.C.R. 506 per Dickson J. at 519 [hereinafter *Smithers*].
[71] *R.* v. *Durham* (1992), 10 O.R. (3d) 596 (Ont. C.A.).

proof of subjective awareness of risk was required. Justice Arbour held that the offence was a "regulatory offence" and not a true crime. Furthermore, the stigma attached to conviction was not sufficiently severe to require proof of subjective fault. She upheld the offence. In *Finlay*,[72] the Supreme Court agreed. Without employing Justice Arbour's distinction between regulatory offences and true crimes, Lamer C.J.C., writing for the court on these points, held that objective liability is (generally) a constitutionally sufficient minimum fault requirement for an offence punishable by imprisonment. He expressly accepted and quoted Justice Arbour's opinion that the stigma attaching to conviction for a section 86(2) offence was not sufficient to draw the offence out of the general rule and to require proof of a subjective mental element.[73]

(c) Protecting the Vulnerable

Law may put people at risk not merely because of their alleged actions or inactions, but because of traits they share with a class or group of people singled out by the law. Justice Arbour has protected members of targeted and vulnerable groups, as we saw in the *Eaton* and *Leroux* cases.

Justice Arbour's arguments respecting the censorship of pornography and her advocacy in the *Seaboyer* case put her at odds with at least some women's rights advocates. She has taken steps, however, to protect women – witness her position on accuseds' access to complainants' medical records. One of her foremost efforts has been to ensure that sexual violence against women is not minimized or officially ignored. As leader of the War Crimes Tribunal prosecutorial team, Justice Arbour has pressed for a broad approach to sexual offences, conceived as offences of violence and as being acts of genocide, crimes against humanity, torture and persecution, and war crimes. (Her stance may presage a broad approach to sexual offences under domestic criminal law.) Her approach to sexual offences finds expression in the *Akayesu* case.[74] The *Akayesu* Tribunal (Judges Laïty Kama (Presiding), Lennart Aspegren, and Navanethem Pillay) described rape as follows:

> The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts . . . . Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.
>
> The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact . . . . The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances . . . .[75]

The *Kingston Report* is located at the intersection of women's rights and prisoners' rights. Its main concerns are with the treatment of female prisoners, in relation to the specific incident involving the deployment of the male emergency response team, strip searches, and subsequent violations of law and policy; broader issues of institutional nonfeasance and malfeasance at the Prison for Women; and systemic issues of the treatment of women in the correctional setting. The *Kingston Report* is of exceptional importance for women prisoners, but it also is relevant and useful to the understanding of male imprisonment. Her digests and explications of prison law are extremely helpful.

Justice Arbour has also addressed political discrimination against prisoners. In *Sauvé*,[76] she examined the validity of section 51(e) of the *Canada Elections Act*, which disqualified prison inmates from voting – a conceded limitation of the *Charter*-protected right to vote. The Attorney General sought to justify the disqualification under section 1. Justice Arbour rejected the arguments that voting rights should only be recognized for "decent and responsible citizenry" and

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[72] *R.* v. *Finlay*, [1993] 3 S.C.R. 103 [hereinafter *Finlay*].

[73] *Ibid.* at 119.

[74] Llewellyn and Raponi, *supra* note 54 at 90.

[75] *The Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, online: International Criminal Tribunal for Rwanda Homepage <http://www.ictr.org/english/judgements/akayesu.html> paras. 129-131.

[76] *Sauvé* v. *Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.), aff'd [1993] 2 S.C.R. 438.

that the "integrity of the voting process" required the exclusion of prisoners' votes. In her view, the strongest argument supporting the disqualification was that voting rights should be forfeited as punishment. Nevertheless, the legislated voting disqualification was both overinclusive and underinclusive, being based on residence – prison – rather than on conduct. The legislation lumped together all of those who are imprisoned, regardless of the seriousness of their crimes. It did not apply to offenders not serving prison time. Justice Arbour declared section 51(e) invalid.

Institutional Modesty

Justice Arbour displays a fit institutional modesty in her comments about the criminal law.

She is realistic about deterrent effects of punishment. She understands that the quantum of punishment is but one factor in a deterrence mechanism – and not necessarily even the most important factor. Deterrence "is directly proportional to the perception of the likelihood of being apprehended, tried, convicted and punished. Until the potential offenders have a full appreciation of their exposure to that whole process, I don't think it will have much of a deterrent effect."[77] Punishment, of course, may have some deterrent effects: "it dehabilitates those currently in prison, so they are not out committing other crimes, and it deters those whose criminal mind is sufficiently analytical to consider the risk of exposure in their decision – but I don't think it can eradicate completely the commission of war crimes during times of tremendous turmoil."[78]

Justice Arbour has also conveyed a startling, remarkable vision of the criminal law as an expression of *shame* – not the shame that the offender is to feel as part of his or her atonement, but our shame at our failures, our bit of responsibility for the criminal behaviour of others (although the second last sentence of the quotation suggests that we should not feel *too* ashamed):

> Q: [University of Toronto Faculty Law Review:] Many have charged that the [War Crimes] Tribunal is simply a way for Western nations to address their own guilt for failing to take action before the conflict escalated to such an extreme level . . . .
>
> A: Arbour: Let me address the first question, whether we are the by-product of shame. I think that the answer is probably yes. But that is what criminal law is all about domestically as well. Each time you bring a rapist or murderer to trial, it is an indictment against our other institutions. It means that our education system failed, our mental health system, our social agencies, and maybe the correctional system – it is usually a history of failure by the time the criminal system gets involved. There is nothing to be particularly startled or ashamed about being a part of this late corrective measure. That is what criminal law is all about.[79]

The criminal law is almost always too late. This realization blocks a certain *hubris* on the part of justice system actors, and forces critics and members of the public to be coldly realistic about the limited social benefits and changes that can be achieved through the blunt instrument of the criminal law.

Conclusion: A Profile?

What can we conclude about Justice Arbour, based on her curriculum vitae? Her experience has well prepared her for the country's highest court. In the words of the *Toronto Star*, "[s]he is a mother, a legal scholar, a teacher and a judge."[80] She knows classrooms, courtrooms, war rooms, and cells. She has walked through circles of hell on earth that most of us would be happiest to avoid. She should have a ready and practical understanding of the wide variety of facts and arguments that will wind their way to the Supreme Court.

What can we conclude about Justice Arbour, based on her record? She is a legal technician, not a bold judicial activist. She is a judge, rather than an advocate or ideologue. She appreciates the legal interests of individuals, groups, and the state. Because she is not an advocate or an ideologue, her decisions are not predictable in the abstract. We can expect her to decide in light of argument, after a full consideration of all of the facts. She is not afraid to make tough calls.

Justice Arbour should be an excellent Supreme Court judge.❑

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[77] Llewellyn and Raponi, *supra* note 54 at 93.
[78] *Ibid.*
[79] *Ibid.* at 95.
[80] Editorial, "Judge Arbour" *The Toronto Star* (11 June 1999), online: The Toronto Star Online <http://www.thestar.com/backissues...pinion/990611NEW01b_ED-ARBOUR.html>.

CONSTITUTIONAL DECISIONS:

R. v. DeSousa (1990), 1 O.R. (3d) 152 (C.A.)

The issue in this case was whether a *Criminal Code* section (namely section 269) required a specific *mens rea* requirement with respect to each and every essential element of the *actus reus*. The trial judge found that section 269 of the *Criminal Code* violated section 7 of the *Charter* because the unlawful act causing bodily harm could be an absolute liability offence. The Court of Appeal, writing as a whole, found the trial judge to be in error and concluded that the section did not need a specific *mens rea* requirement. The Court found instead that it is only when a section cannot bear an interpretation compatible with the *mens rea* requirements essential to find criminal guilt that the constitutional validity must be examined under sections 7 and 1 of the *Charter*.

This case was appealed to the Supreme Court ([1992] 2 S.C.R. 944) and Justice Sopinka (Gonthier, Cory, McLachlin, and Iacobucci JJ concurring) delivered a unanimous decision. The reasoning regarding the issue of section 7 violation closely resembled that of the Ontario Court of Appeal. Subsequently the appeal was dismissed as Justice Sopinka held that section 269 does not violate section 7 or section 11(d) of the *Charter*.

Johnson v. Ontario (Minister of Revenue) (1990), 75 O.R. (2d) 558 (C.A.)

This case focused on the issue of reasonable search and seizure. Under section 15(3) and (4) of the *Tobbaco Tax Act* a person authorized by the Minister of Revenue can detain and search any commercial vehicle for any purpose related to the administration or enforcement of the Act. The section contains no requirement of reasonable and probable grounds or even reasonable suspicion, nor is it limited to searches of commercial vehicles connected with the trade of tobacco products.

Justice Arbour stated that there is a lower degree of privacy interest in vehicles and cargo than in residencies or personal offices; however, she still found that the intrusion was serious. She supported this claim by relying on numerous precedents that illustrated how such an unlimited search and seizure power (i.e. one allowing random stops of a large target group) is unreasonable in the context of section 8. Justice Arbour found that the Act could be sufficiently limited by including the requirement of having reasonable grounds to justify the search and seizure and that this limitation would not greatly diminish the effect of the law. She held that the sections 15(3)(4) of the *Act* unjustifiably violated section 8 of the *Charter*.

Leroux v. Co-operators General Insurance Co. (1990), 17 O.R. (2d) 641(H.C.J.)

The constitutional issue that arose in this case was whether discrimination, on the basis of marital status, had occurred in the context of section 15 of the *Charter*. The plaintiff in the case was injured by an uninsured vehicle. At the time of the accident the plaintiff was a minor and residing with his mother and her common law spouse, who was insured by the defendant under an Ontario Standard Automobile Policy. The insurance company claimed that the defendant was not covered as the spouse in question was a common law spouse and, therefore, her dependants were not covered by the policy.

Justice Arbour decided that this unequal treatment based on marital status was discrimination in the context of section 15 of the *Charter*. The provisions of the Ontario Standard Automobile Policy are subject to the *Charter* as they are both prescribed and required by section 231 of the *Insurance Act*. Justice Arbour found that martial status was analogous to the enumerated grounds in section 15. The argument that marital status is a question of choice and, therefore, not an analogous ground was found to have no merit due to the existence of choice-related grounds enumerated within section 15 (i.e. religion) and due to the fact that the argument could not be applied to the son. Justice Arbour held that the proper interpretation of "spouse" included common law spouses, and subsequently the plaintiff, as a dependant relative of the insured's spouse, was entitled to coverage under the policy.

R. v. Bennett (1991), 3 O.R. (3d) 193 (C.A.)

The issue in this case was the right to trial in a reasonable time. The defendant appealed on the basis that he was denied trial within a reasonable time as set

out in *R.* v. *Askov* [1990] 2 S.C.R. 1199. Justice Arbour authored the majority opinion and claimed that *Askov* did not require a mechanical computation of the period of systematic pre-trial delay, but rather the precedent required a balancing of four factors (length of delay, explanation of the delay, waiver of the right, and prejudice to the accused) in determining whether an infringement has occurred. Arbour J.A. found that an overall period of thirteen and a half months did not, in itself, amount to a violation. However, such a delay did invite scrutiny regarding the other factors. Given the reason behind the delay, the minimal prejudice to the accused, the acceptable overall time frame, and that a preliminary inquiry was held, Justice Arbour found that no infringement occurred and allowed the matter to go to trial.

Justice Arbour applied this same reasoning to the cases of *R.* v. *White* (1991), 3 O.R. (3d) 247 (C.A.), and *R.* v. *Rabba* (1991), 3 O.R. (3d) 238 (C.A), and concurred with Osbourne J.A. when he applied these principles to young offenders in *R.* v. *M.* (1991), 3 O.R. (3d) 223 (C.A.), and to complex cases in *R.* v. *Atkinson* (1991), 5 O.R. (3d) 301 (C.A.). Justice Arbour later concurred with the Court in deciding *R.* v. *Frazer* (1992), 8 O.R. (3d) 57 (C.A.), and *R.* v. *G.(M.)* (1992), 8 O.R. (3d) 337 (C.A.), both of which served to further loosen the strict restriction created by the *Askov* fiasco by placing more emphasis on the balancing of factors rather than the application of a set time limit.

R. v. Finta (1992), 92 D.L.R. (4th) 1 (Ont. C.A.)

The accused was charged with unlawful confinement, robbery, kidnapping and manslaughter pursuant to the War Crimes provisions found in section 7(3.71) of the *Criminal Code* as a result of his actions in Hungary during the Second World War. Justice Arbour wrote the majority opinion for the five-member panel (Dubin C.J.O and Tarnopolsky J.A. dissenting). At trial the accused was acquitted of all charges, and the Crown appealed on twelve grounds; three of which were extensively considered.

The first significant issue dealt with was the respective functions of the judge and jury with regards to war crimes cases. Basically, the trial judge held that war crimes constituted unique jurisdictional circumstances and, therefore, it would be for the jury to decide whether Finta's acts amounted to a war crime. On this issue Juistice Arbour reasoned that there was significant overlap between factual questions and questions of jurisdiction to make it reasonable to have the entire question dealt with by the jury. It was also held that section 7(3.71) was an exception to the general rule of territoriality (*Criminal Code* section 6(2)) and as such the question of territoriality became an essential factual element of the crime. It was, therefore, reasoned that the issue was factual and should be decided by the jury.

The second major issue was whether the defence counsel's address to the jury constituted a violation of the right to a fair trial. Basically, the Crown contended that the defence counsel's jury address was improper and that the judge's attempt to correct these improprieties was inadequate. Justice Arbour found that the statements made by counsel were highly inappropriate. However, she determined that the trial judge was in the best position to correct the problem and the charge was deemed sufficient correction.

The third issue of significance was the admissibility of evidence introduced by the trial judge himself. The trial judge called testimony from persons in Hungary and previous testimony given as part of Finta's 1947-48 trial in Hungary. The Crown argued that the evidence was inadmissible and even if admissible it was not proper for the judge himself to call it. Justice Arbour reasoned that the evidence was admissible because of the uniqueness of the hearing and that fairness required the evidence be admitted in favour of the accused. However, she held that the trial judge erred in calling the evidence himself rather than leaving it for the defence to call. In addition to calling the evidence himself the trial judge held that the calling of the evidence, which was favourable to the accused, did not amount to "defence evidence" and did not affect the order in which the jury was to be addressed. Justice Arbour found that this, too, was in error. Even given these errors, Justice Arbour found that no substantial wrong or miscarriage of justice was established by the Crown. A new trial was not warranted because the improperly called evidence was not significantly compelling.

Justice Arbour concluded that none of the twelve grounds warranted allowing the appeal. This case was further appealed to the Supreme Court ([1994] 1 S.C.R. 701). In a rather complex decision a majority of the Supreme Court (Lamer C.J. and Gonthier, Cory, and Major JJ), following reasoning similar in many regards to that of Justice Arbour, held that the appeal should be dismissed (La Forest, L'Heureux-Dubé, McLachlin JJ dissenting). A subsequent cross appeal dealing with the issue of whether sections 7(3.74) and 7(3.76) of the *Criminal Code* violated sections 7, 11(a), (b), (d), (g), 12 or 15 of the *Charter* was brought forth. The unanimous Court found no violations. In essence, the judgment of Justice Arbour in this complex case was followed by a majority of the Supreme Court.

R. v. Durham (1992), 10 O.R. (3d) 596 (C.A.)

The main issue in this case was whether section 86(2) of the *Criminal Code*, which creates the offence of careless use or storage of firearms, has the required *mens rea* to make it valid under section 7 of the *Charter*. Justice Arbour authored the decision of the Court and found that the section could be upheld if it was either deemed to create a regulatory offence rather than a true crime or if the crime did not carry a special stigma sufficient to compel a subjective *mens rea*. Arbour J.A. held that section 86(2) is a regulatory offence and, therefore, nothing more than a defence of due diligence is constitutionally required. Abour J.A. also concluded that the stigma surrounding a conviction for careless use or storage of a firearm is not such as to warrant a higher standard of mental culpability than the civil standard for negligence. In essence, it was found that section 7 of the *Charter* does not require a specific *mens rea* for all offences, namely those which are regulatory in nature, or do not carry a special stigma upon conviction.

Sauve* v. *Canada (Attorney General) (1992), 8 O.R. (3d) 481 (C.A.)

This case dealt with prisoners' right to vote. The appellant sought a declaration that section 51(e) of the *Canada Elections Act*, which disqualified prison inmates from voting, violated section 3 of the *Charter*. The trial judge found that the section did violate the *Charter*, but was justified under section 1. Justice Arbour delivered the decision of the Court which focused solely on the section 1 justification, as it was conceded that section 51(e) was in violation of section 3. Given the fact that this case dealt with the pitting of state power against the individual, with the state being the single antagonist, Arbour J.A. claimed that very pressing and substantial state objectives would need to be identified in order for a justification to be found.

The respondent presented three main objectives to support the violation. The first was to affirm and maintain the sanctity of the franchise. Justice Arbour held that this objective was too abstract and also claimed that she doubted anyone could be deprived of the right to vote on the basis that he or she were not decent or responsible. The second was to preserve the integrity of the voting process, which requires informed, participative voters. Justice Arbour reasoned that prisoners have access to the necessary information and in many cases may be more informed than other citizens. The third was to sanction offenders. This objective was also found unacceptable as Justice Arbour reasoned that if section 51(e) was meant to impose punishment, it was only imposing punishment for being imprisoned and not for the commission of a crime, as it only restricted inmates and not all people convicted of serious crimes. In, essence this third objective made the section both under- and over-inclusive. In conclusion, Justice Arbour found that none of the objectives presented were sufficiently pressing to justify the violation of section 3 of the *Charter* and she struck down the offending provision.

This case was appealed to the Supreme Court ([1993] 2 S.C.R. 438.) where Justice Iacobucci handed down the decision of the Court orally. The Supreme Court dismissed the appeal on the same grounds as the Appeal Court, namely that section 51(e) was drawn too broadly and failed to meet the proportionality test required by section 1.

R. v. Mercer (1992), 7 O.R. (3d) 9 (C.A.)

The accused were guests at a hotel where a maid, ignoring the do not disturb sign, found a pillowcase full of money in their closet. The hotel called the police, who then entered the room without a warrant and found the money and a brick of narcotics. Justice Arbour wrote the unanimous decision of the Court.

Two constitutional issues were raised. The first issue of was whether there was a violation of right to a trial within a reasonable time. Arbour J.A. held that it was up to the trial judge to find that the agreement by the defence counsel to a date for the preliminary inquiry eleven months in the future constituted a waiver of any claim that that portion of the delay was unreasonable. The second issue dealt with unreasonable search and seizure. Justice Arbour reasoned that a hotel guest's awareness that cleaning staff may enter does not remove any expectation of privacy, especially when objects are not in plain view and/or stored in areas not requiring regular cleaning (i.e. the closet). She further found that consent by the manager is not an acceptable substitute for prior judicial authorization. Finally, Justice Arbour declared that there was no urgency compelling the warantless search and that the police should have investigated using less intrusive methods. Even though the search was a violation of section 8, Justice Arbour held that the admission of this evidence would not bring the administration of justice into disrepute. It was reasoned that the police were acting in an uncertain area of law and made a reasonable and good faith mistake in entering the hotel room. Basically, she concluded that the violation was not flagrant and, therefore, the exclusion of the evidence was not warranted in the context of section 24(2) of the *Charter*.

R.* v. *Huot (1993), 16 O.R. (3d) 214 (C.A.)

The main issue dealt with in this case was the application of the evidentiary doctrine of similar fact. Justice Arbour delivered the majority opinion. She reasoned that the similar fact evidence at trial was inadmissible. However, it was found that the error did not bring about a serious miscarriage of justice, as the trial judge had only used the evidence to strengthen the convictions she already held. Justice Arbour further reasoned that the holding would be different if a jury had been involved.

R.* v. *Cribbin (1994), 17 O.R. (3d) 548 (C.A.)

The accused was convicted of manslaughter. He appealed on the grounds that the jury charge was defective and that the *de minimus* standard for causation violated section 7 of the *Charter*. Justice Arbour wrote the unanimous decision. Justice Arbour found that the jury charge was improper and that the errors were substantial enough to warrant a new trial. In regard to the section 7 violation, the accused claimed the causation standard was too remote and that it was void for vagueness. Justice Arbour reasoned that causation cannot be determined with mathematical precision and that none of the suggestions given by the accused would provide any greater precision. She held that the *de minimus* range standard was not void. Justice Arbour dealt with the argument that the test was too remote by noting that it was similar to the tests in other countries. She further reasoned that the fault element and the causation element are linked and that manslaughter combines the requirement that harm must be objectively foreseeable with the *de minimus* standard. Therefore, there is no danger that the morally innocent will be convicted. Thus, it was held that the principles of fundamental justice were not infringed by the *de minimus* standard. Justice Arbour allowed the appeal based on the defective charge, while she rejected the arguments based on causation issues.

R.* v. *Fisher (1994), 17 O.R. (3d) 295 (C.A.)

This case dealt with the constitutionality of section 121(1)(c) of the *Criminal Code*, which makes it an offence for a government official to receive a benefit from a person who has dealings with the government. Justice Arbour wrote the decision for the Court. The first constitutional issue raised was whether the section was so vague as to violate section 7 of the *Charter*. Justice Arbour reasoned that judicial interpretation must be considered in determining vagueness, and that while section 121(1)(c) was overbroad, this was insufficient as overbreadth has no independent standing under the *Charter*. From this she concluded that, given previous interpretations, section 121(1)(c) provided sufficient guidance for government employees and, therefore, the section was not void for vagueness. The second issue addressed the validity of the reverse onus clause that required the employee to prove he or she obtained written consent from their superior. Justice Arbour held that this shift of burden left the possibility open that a conviction may result regardless of reasonable doubt and, as a result the clause violates section 11(d) of the *Charter*. With regard to section 1 analysis, Justice Arbour reasoned that the objective must relate to the reverse onus clause rather than to the section generally. Justice Arbour held that placing the burden on the accused was not necessary to meet the objective of preserving the integrity of the public service and, as a result, the violation was not proportional to the objective. In conclusion, Justice Arbour held that section 121(1)(c) unjustifiably violated section 11(d) and, in order to remedy this, she struck the reverse onus clause from the section.

Eaton* v. *Brant (County) Board of Education (1995), 22 O.R. (3d) 1 (C.A.)

The basic constitutional issue in this case was whether section 8 of the *Education Act,* which regulates the placing of disabled children in special classrooms, violated section 15 of the *Charter.* Justice Arbour authored the opinion of the Court and held that the section did constitute an unjustifiable violation of section 15 equality rights. It was reasoned that, when analyzed in a social, historical, and political context, the decision to place the child in a special classroom constituted a disadvantage based on an enumerated ground and was, therefore, discriminatory. She further concluded that while this discrimination may be easier to justify than, for example, one based on race, there is no hierarchy of discrimination within section 15 and, therefore, any analysis along this line must be done in the context of section 1. Based on the claimants' argument that did not propose to outlaw segregation, but rather advocated a presumption of inclusion rather than segregation, Justice Arbour found that the section did not infringe the child's right as little as possible, and was, therefore, not justifiable. Justice Arbour chose to remedy the section by reading it to include a direction that, unless the parents consent to placement in a special classroom, the school board must provide a placement that is the least exclusionary while still being reasonably capable of meeting the special needs of the student.

Eaton* v. *Brant, [1997] 1 S.C.R. 241 was appealed to the Supreme Court where two concurring decisions were handed down. The main decision was delivered by Justice Sopinka (LaForest, L'Heuruex-Dube, Cory, McLachlin, Iacobucci, and Major JJ. concurring). Regarding the issue of a section 15 violation, it was held that purpose of section 15(1) of the *Charter,* in relation to disability, is to recognize the actual characteristics of the disabled person and the reasonable accommodation of these characteristics. Justice Sopinka further reasoned that segregation can serve to promote equality as well as violate it, depending on the person in question. Also, he decided that a test of the child's ability would be best done without the encumbrances of any presumptions. Finally, Justice Sopinka concluded that the view that a presumption as to the best interests of the child is a constitutional imperative is rendered questionable due to the fact that the parents can displace this presumption. Chief Justice Lamer (Gontheir J. concurring) fully agreed with Justice Sopinka reasoning but wished to add that Justice Arbour improperly applied a precedent. Basically, the Supreme Court, on the whole, was unable to find sufficient merit in any of the reasoning presented by Justice Arbour in the Ontario Court of Appeal decision.

OTHER CASES OF INTEREST:

Ontario Highway Transport Board v. *Ontario Trucking Assn* (1988), 66 O.R. (2d) 193 (C.A.).
R. v. *Chase* (1990), 56 C.C.C. 3(d) 521 (Ont. C.A.)
R. v. *M. (G.C.)* (1991), 3 O.R. (3d) 223 (C.A.)
R. v. *White* (1991) , 3 O.R. (3d) 247 (C.A.).
R. v. *Rabba* (1991), 3 O.R. (3d) 238 (C.A.).
R. v. *Deavitt* (1991), 2 O.R. (3d) 150 (C.A.).
R. v. *G.(M.)* (1992), 8 O.R. (3d) 337 (C.A.).
R. v. *Pugliese* (1992), 8 O.R. (3d) 259 (C.A.).
Weber v. *Ontario Hydro* (1992), 11 O.R. (3d) 609 (C.A.).
R. v. *Frazer* (1992), 8 O.R. (3d) 57 (C.A.).
R. v. *G.(M.)* (1993), 8 O.R. (3d) 337 (C.A.).
R. v. *Pierman* (1994), 19 O.R. (3d) 704 (C.A.).
R. v. *Simard* (1995), 27 O.R. (3d) 116 (C.A.).

BIBLIOGRAPHY

L. Arbour, "The Oracle of the Criminal Code" (1975) 13 Osgoode Hall L.J. 315.

L. Arbour, "Comparative Judicial Styles: the Development of the Law of Murder in the Quebec and Ontario Courts of Appeal" (1980) 11 Revue de Droit, Faculte de Droit de l'Universite de Sherbrooke. 197.

L. Arbour and Larry Taman, *Criminal Procedure: Cases, Text and Materials* (Toronto: Edward-Montgomery Ltd., 1980).

L. Arbour, "Developments in Criminal Law and Procedure: the 1981 – 1982 Term" (1983) 5 Supreme Court L.R. 167.

L. Arbour, *R.* v. *Charron* (1985), 46 C.R. (3d) 26: Annotation, 46 C.R. (3d) 268.

L. Arbour, *R.* v. *Manuel* (1986), 50 C.R. (3d) 47: Annotation, 50 C. R. (3d) 48.

L. Arbour, "The Politics of Pornography: Towards an Expansive Theory of Protected Expression" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) 294.

L. Arbour, *Chartrand* c. *Quebec* (1986), 55 C.R. (3d) 97 (C.S. Que.): Annotation, 55 C.R. (3d) 98.

L. Arbour, "Canadian Criminal Law: Bi-cultural Accomplishments and Tensions Before and After the Charter" (1987) Cambridge Lect. 125.

L. Arbour, *Que. (A.G.)* v. *Dubois* (1987), 61 C.R. (3d) 159 (Que. C.A.): Annotation, 61 C.R. (3d) 159.

L. Arbour, *Commission d'enquête sur certains événements survenus à la Prison des femmes de Kingston* (Ottawa: Minstre des approvisionnments et services Canada, 1996).

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