CHAPTER TWO

LEGAL THEORY IN RELATION TO PUBLIC LAW

This first part of the book sets the stage for the deep inquiry into public law that follows in Parts II and III. Here, we include four chapters. Chapters 3 and 4 focus on Canadian "legal pluralism"—that is, the synergy of different legal traditions that animate the modern Canadian legal system. We consider in Chapter 3 the legal relationship between the Canadian state and Indigenous peoples and Indigenous legal traditions. In Chapter 4, we focus on the reception into Canadian law of the common law traditions of the United Kingdom, as well as the influence of the French civil law system on Quebec. We also introduce students to the concept of statutory law and international law. Chapter 5 examines recurring constitutional themes that echo throughout the balance of the book.

But before reaching those matters, this chapter provides theoretical context for all that follows. It provides an overview of several schools of legal theory—positivism, natural law, feminism, critical legal studies, and law and economics—with the intent of showing how competing approaches to understanding the nature of law and its relationship to social and political factors can affect judicial decision-making. It should be stressed that these are a few selected examples from many approaches that could be taken. Those interested in learning more about legal theory will find hundreds of additional resources available in any good law library.

I. INTRODUCTION

Throughout history, those who have thought and written about law have developed a number of diverse theories related to law. At their heart, legal theories have tended to focus on several related questions. First, what is the relationship between law and morality? Is law necessarily derived from universal moral truths? Are morally repugnant laws nevertheless binding? Second, what is the relationship between law and power? Are laws simply rules backed by force? To what degree does law primarily reflect the preferences of powerful societal actors or dominant cultural forces? The answers to these questions not only allow us to differentiate law from non-law, but also shed light on the nature of the multiple sources of law within a society, and the relationship between laws among groups of societies. In considering these questions, we recognize that law is not a discrete set of principles without a context. Legal systems are built around ideas that are historically and culturally specific. Our Anglo-Canadian system of law, based largely on the English common law system, reflects our Canadian values. So too does the Quebec civil law.

In order to situate Canadian public law in relation to some broader social debates, this section looks at public law through the lens of several prominent schools of legal theory: positivism and natural law, feminism, critical legal studies, and law and economics. The study of legal theory is known as "jurisprudence" (the same term is often used inaccurately to refer simply to a body of law, as in "the Supreme Court of Canada's criminal law jurisprudence"). This section is not intended to be a comprehensive survey of jurisprudence, but rather seeks to illustrate how differing conceptualizations of law affect legal outcomes.

II. POSITIVISM AND NATURAL LAW

A principal inquiry in legal theory is the extent to which law should be identified with morality. Positivism and natural law theories, at least in their classical form, treat this fundamental notion very differently. Legal positivism reflects the belief that law is nothing more than the rules and principles that actually govern or regulate a society. Positivism insists on the separation of law and morality, and, as a result, focuses on describing laws without reference to justness or legitimacy. Natural law theory, on the other hand, is aspirational in the sense that laws, properly called, are not simply all those official rules and principles that govern us, but only those that adhere to certain moral truths, most often of a universal and immutable nature.

The basic contours of legal positivism were set out by the philosopher John Austin in the 18th century. He proposed three basic theories about law:

1. that law is a command issued by the "uncommanded commander"—the sovereign;
2. that such commands are backed by threats; and
3. that a sovereign is one who is habitually obeyed.

Although his theory has undergone refinements over the years, the basic idea remains, that law is created by humans.

Natural law, developed through such writers as Aristotle and St Thomas Aquinas, is based on the theory that law arises from "nature" or by beliefs accepted by people; it found some of its greatest proponents within the Catholic Church. In the natural law tradition, for a law to be a true law, it must comport with the values accepted by society. There is little doubt that, at one level, law and morality are linked. Many of our most basic criminal laws, for example, are based on traditional Judeo-Christian conceptions of morality. But law and morality can also part ways: many contract laws, for example, exist to facilitate commercial transactions and do not immediately seem connected to any conception of morality. Moreover, law must address specific and detailed problems and objects, whereas morality is usually framed in

general and open-ended concepts. For example, laws related to licensing automobile drivers must spell out specific information on different categories of licence and the age restrictions that might apply. Law is also generally thought to be determinate and certain, while morality can be contingent and relative. Moral disagreements and controversies are issues of great moment that have been debated and argued by philosophers for centuries. Legal disputes and controversies should be capable of resolution by lawyers and judges. In this regard, natural law does not deny the necessity of positive law, but where positive law contravenes natural law, the contravening positive law rules are held by natural law theorists not to be "true" law in the sense that a citizen (or a judge) owes no allegiance to them. Positivists, on the other hand, are not unconcerned with questions of justice, but rather maintain that the issue of what law is, is necessarily separate and distinct from the question of what law ought to be.

The two cases that follow, *Re Drummond Wren* and *Re Noble and Wolf*, arguably represent a natural law and positivist view, respectively, of legal theory. Note how the judge in *Drummond Wren* attempts to appeal to our moral conscience, while the judge in *Noble and Wolf* relies on the supposed certainty of positive law. As an exercise in legal reasoning, however, try to analyze *each* decision on the basis of a natural *and* a positive understanding of law.

Re Drummond Wren

[1945] OR 778, [1945] 4 DLR 674 (H Ct J)

[The Worker's Educational Association (WEA) had purchased a lot in East York (now part of Toronto), intending to build a house on it and then raffle it off for fundraising purposes. The land was restricted by a covenant pronouncing that it was "not to be sold to Jews or persons of objectionable nationality." The WEA applied to have the covenant declared invalid. One of the grounds argued was that the racially restrictive covenant was void as against public policy; another was that it contravened the provisions of the *Racial Discrimination Act*, SO 1944, c 51 passed by the Ontario legislature in 1944. This statute was designed to combat the once prevalent "Whites Only" and "No Jews Allowed" signs that were displayed in store windows, at beaches, and at other public places. Section 1 prohibited the publication or display of representations indicating an intent to discriminate on the basis of race or creed (the contemporary version is s 13 of the Ontario *Human Rights Code*, RSO 1990, c H.19).]

MACKAY J:

The applicant's argument is founded on the legal principle, briefly stated in 7 Hals. (2nd ed.), pp. 153-4, that: "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy." Public policy, in the words of Halsbury, "varies from time to time."

In "The Growth of Law," Mr. Justice Cardozo says:

> Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth.

And Mr. Justice Oliver Wendell Holmes, in "The Common Law" says:

> The very considerations which judges most rarely mention and always with an apology are the secret root from which the law draws all the juices of life. I mean, of course, what is expedient for the community concerned.

The matter of not creating new heads of public policy has been discussed at some length ... in *Naylor, Benzon & Co. v. Krainische Industrie Gesellschaft*, [1918] 1 KB 331, later affirmed by the Court of Appeal, [1918] 2 KB 486.

There he points out ... that "the Courts have not hesitated in the past to apply the doctrine (of public policy) whenever the facts demanded its application." "The truth of the matter," he says, seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the time. This view is exemplified by the decisions which were discussed by the House of Lords in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, [1894] AC 535. ... The principles of public policy remain the same, though the application of them may be applied in novel ways. The ground does not vary. As it was put by Tindal CJ in *Horner v. Graves* (1831), ... : "Whatever is injurious to the interests of the public is void, on the ground of public policy."

It is a well-recognized rule that courts may look at various Dominion and Provincial Acts and public law as an aid in determining principles relative to public policy ...

First and of profound significance is the recent San Francisco Charter, to which Canada was a signatory, and which the Dominion Parliament has now ratified. The preamble to this Charter reads in part as follows:

> We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... and for these ends to practice tolerance and live together in peace with one another as good neighbors. ...

Under Articles 1 and 55 of this Charter, Canada is pledged to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

In the Atlantic Charter to which Canada has subscribed, the principles of freedom from fear and freedom of worship are recognized.

Section 1 of the *Racial Discrimination Act* provides:

> 1. No person shall,
>
> (a) publish or display or cause to be published or displayed; or
>
> (b) permit to be published or displayed on lands or premises or in a newspaper, through a radio broadcasting station or by means of any other medium which he owns or controls, any notice, sign, symbol, emblem or other representation indicating discrimination or an intention to discriminate against any person or any class of persons for any purpose because of the race or creed of such person or class of persons.

• • •

Proceeding from the general to the particular, the argument of the applicant is that the impugned covenant is void because it is injurious to the public good. This deduction is grounded on the fact that the covenant against sale to Jews or to persons of objectionable nationality prevents the particular piece of land from ever being acquired by the persons against whom the covenant is aimed, and that this prohibition is without regard to whether the land is put to residential, commercial, industrial or other use. How far this is obnoxious to public policy can only be ascertained by projecting the coverage of the covenant with respect both to the classes of persons whom it may adversely affect, and to the lots or subdivisions of land to which it may be attached. So considered, the consequences of judicial

approbation of such a covenant are portentous. If sale of a piece of land can be prohibited to Jews, it can equally be prohibited to Protestants, Catholics or other groups or denominations. If the sale of one piece of land can be so prohibited, the sale of other pieces of land can likewise be prohibited. In my opinion, nothing could be more calculated to create or deepen divisions between existing religious and ethnic groups in this Province, or in this country, than the sanction of a method of land transfer which would permit the segregation and confinement of particular groups to particular business or residential areas, or conversely, would exclude particular groups from particular business or residential areas. The unlikelihood of such a policy as a legislative measure is evident from the contrary intention of the recently enacted *Racial Discrimination Act*, and the judicial branch of government must take full cognizance of such factors.

Ontario, and Canada too, may well be termed a Province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity. The common law courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our polity by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal. While courts and eminent judges have, in view of the powers of our legislatures, warned against inventing new heads of public policy, I do not conceive that I would be breaking new ground were I to hold the restrictive covenant impugned in this proceeding to be void as against public policy. Rather would I be applying well-recognized principles of public policy to a set of facts requiring their invocation in the interest of the public good.

That the restrictive covenant in this case is directed in the first place against Jews lends poignancy to the matter when one considers that anti-Semitism has been a weapon in the hands of our recently-defeated enemies and the scourge of the world. But this feature of the case does not require innovation in legal principle to strike down the covenant; it merely makes it more appropriate to apply existing principles. If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects, the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.

My conclusion therefore is that the covenant is void because [it is] offensive to the public policy of this jurisdiction. This conclusion is reinforced, if reinforcement is necessary, by the wide official acceptance of international policies and declarations frowning on the type of discrimination which the covenant would seem to perpetuate.

It may not be inexpedient or improper to refer to a few declarations made by outstanding leaders under circumstances that arrest the attention and demand consideration of mankind. I first quote the late President Roosevelt:

> Citizens, regardless of religious allegiance, will share in the sorrow of our Jewish fellow-citizens over the savagery of the Nazis against their helpless victims. The Nazis will not succeed in exterminating their victims any more than they will succeed in enslaving mankind. The American people not only sympathize with all victims of Nazi crimes but will hold the perpetrators of these crimes to strict accountability in a day of reckoning which will surely come.
>
> I express the confident hope that the Atlantic Charter and the just World Order to be made possible by the triumph of the United Nations will bring the Jews and oppressed people in all lands the four freedoms which Christian and Jewish teachings have largely inspired.

And of the Right Honourable Winston Churchill:

> In the day of victory the Jew's sufferings and his part in the struggle will not be forgotten. Once again, at the appointed time, he will see vindicated those principles of righteousness which it was the glory of his fathers to proclaim to the world. Once again it will be shown that, though the mills of God grind slowly, yet they grind exceeding small.

And of General Charles de Gaulle:

> Be assured that since we have repudiated everything that has falsely been done in the name of France after June 23rd, the cruel decrees directed against French Jews can and will have no validity in Free France. These measures are not less a blow against the honour of France than they are an injustice against her Jewish citizens.
>
> When we shall have achieved victory, not only will the wrongs done in France itself be righted, but France will once again resume her traditional place as a protagonist of freedom and justice for all men, irrespective of race or religion, in a new Europe.

• • •

I do not deem it necessary for the purpose of this case to deal with [the argument that the covenant violates s 1 of the *Racial Discrimination Act*], except to say that it appears to me to have considerable merit. My opinion as to the public policy applicable to this case in no way depends on the terms of the *Racial Discrimination Act*, save to the extent that such Act constitutes a legislative recognition of the policy which I have applied. ...

An order will therefore go declaring that the restrictive covenant attacked by the applicant is void and of no effect.

Re Noble and Wolf

[1948] OR 579, [1948] 4 DLR 123 (H Ct J)

[Individual cottage lots in the Beach O' Pines subdivision on the shores of Lake Huron contained a covenant that the lands shall not be sold or transferred to any person of the "Jewish, Hebrew, Semitic, Negro or coloured race or blood." Relying on the precedent established in *Re Drummond Wren* three years earlier, Bernard Wolf, an interested purchaser of a cottage lot, applied to have the covenant rendered invalid on grounds of public policy. This time, however, other property owners defended the covenant. The Beach O' Pines Protective Association argued that there was a congenial summer community among its members and cottage value would be lost if any change to its character occurred.]

SCHROEDER J:

Counsel for the vendor cites and relies upon the very able judgment of Mackay J in *Re Drummond Wren*, [1945] 4 DLR 674, rendered on a motion for a declaration that a restrictive covenant that the land was "not to be sold to Jews or persons of objectionable nationality" was void and of no effect. In a carefully considered judgment, Mackay J reached the conclusion, as summarized in the headnote in the Ontario Reports, that the particular covenant was contrary to public policy in that it "tends to create or deepen divisions between religious and ethnic groups, and is in conflict with prevailing public opinion, as exemplified in the *Racial Discrimination Act, 1944*, and other statutes and public documents."

The case cited is a decision of a Court of co-ordinate jurisdiction and I am not necessarily bound by it. Under s. 31 of the *Judicature Act*, RSO 1937, c. 100, I may, if I deem the decision to be wrong and of sufficient importance to be considered in a higher Court, refer this case to the Court of Appeal, but I do not propose to adopt that course. I have given careful consideration and study to the learned judgment of my brother Mackay and regret that I find myself in disagreement with it. It is with the utmost respect that I proceed to state the reasons which have led me to an opposite conclusion.

It may be observed at the outset that Mackay J did not have the benefit of opposing argument on the motion before him. In the case at bar I would have been left in the same position but for the intervention of the persons on whom notice of motion was served pursuant to the order of Mackay J hereinbefore mentioned, because both the vendor and the purchaser were ad idem in their attack upon the validity of the covenant in question. Let it also be stated that in the case before my brother Mackay he was not concerned with a summer colony as in the case under consideration, but with a residential subdivision on O'Connor Drive in the City of Toronto, where the residents sought shelter rather than recreation. Also, the restriction in that case was unlimited in point of duration.

[After describing the sources relied upon by Mackay J, Schroeder J continued:]

Mackay J would seem to have evolved what I regard as an entirely novel head of public policy.

In approaching this aspect of the problem the Court must bear in mind the frequent injunctions of higher tribunals as to the danger of allowing judicial tribunals "to roam unchecked in the field occupied by that unruly horse, public policy." No more enlightening pronouncement can be found, in my opinion, than in the judgment of Lord Atkin in *Fender v. St. John-Mildmay*, [1938] AC 1 ..., from which I quote:

> I propose in the first instance to say something upon the doctrine of public policy generally. My Lords, from time to time judges of the highest reputation have uttered warning notes as to the danger of permitting judicial tribunals to roam unchecked in this field. The "unruly horse" of Hobart CJ is commonplace. I will content myself with two passages both of which have the authority of the approval of Lord Halsbury. In *Jason v. Driefontein Consolidated Mines*, [1902] AC 484, 491, he cites this passage from Marshall on Marine Insurance:
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> > To avow or insinuate that it might, in any case, be proper for a judge to prevent a party from availing himself of an indisputable principle of law, in a Court of justice, upon the ground of some notion of fancied policy or expedience, is a new doctrine in Westminster Hall, and has a direct tendency to render all law vague and uncertain.

"Public policy," said Parke B in *Egerton v. Brownlow*, ... "is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expedience,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law only; the written from the statutes; the unwritten or common law from the decisions

of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognized law, and we are therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise." ...

• • •

To hold on the basis of Canadian treaty obligations and on the basis of the provincial legislation and regulations and other public documents, referred to in the judgment of Mackay J, that there is a public policy in Ontario which prohibits the use of and renders void any covenant such as the one under review, seems to me to involve an arbitrary extension of the rules which say that a given contract is void as being opposed to public policy. It is trite law that common law rights are not to be deemed to be abrogated by statute unless the legislative intent to do so is expressed in very clear language. It follows logically, it seems to me, that for a Court to invent new heads of public policy and found thereon nullification of established rights or obligations—in a sense embarking upon a course of judicial legislation—is a mode of procedure not to be encouraged or approved.

While it may fairly be assumed that the public policy of this country is opposed to the taking of affirmative action by any competent legislative authority which would be inconsistent with the sentiments or ideals expressed in these treaties or enactments, it would, in my view, constitute a radical departure from established principle to deduce therefrom any policy of the law which may be claimed to transcend the paramount public policy that one is not lightly to interfere with the freedom of contract. It is no doubt desirable that freedom of contract should be reconciled with other public interests which are regarded as of not less importance—something which cannot always be accomplished without difficulty; nevertheless, if there is any doubt as to the prevailing public policy or its effect, I should deem it to be the duty of the Court to extend the benefit of the doubt to the contract which the supposed public policy is claimed to supersede. The notion of any danger to public interests involved in the use of restrictive covenants such as the one in question seems to me fanciful and unreal. Whatever view I may entertain, based upon my conception of justice, morality or convenience, I must always have present to my mind the proper conception of the judicial function, namely, to expound and interpret the law and not to create the law based on my individual notion or opinion of what the law ought to be. I cannot conceive of any established principle of law or any principles recognized in the Courts or by the State as part of our public law which enables me to conclude that the covenant under review should be struck down as offending against the policy of the law. Lord Roche, who was one of the dissentient Lords in the case of *Fender v. St. John-Mildmay*, but who did not differ from the majority of the House in the views expressed by them as to the function of the Courts in relation to the matter of public policy, stated ... :

> Now to evolve new heads of public policy or to subtract from existing and recognized heads of public policy if permissible to the Courts at all, which is debatable, would in my judgment certainly only be permissible upon some occasion as to which the legislature was for some reason unable to speak and where there was substantial agreement within the judiciary and where circumstances had fundamentally changed.

> In my view it is within the province of the competent legislative bodies to discuss and determine what is best for the public good and to provide for it by the proper enactments. Such matters can with greater propriety and safety be left to the duly elected representatives of the people assembled in Parliament or in the Legislature.
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> For the reasons set forth, I hold that the said covenant is valid and enforceable and that the vendor has not satisfactorily answered the purchaser's objection thereto.
>
> The motion will, therefore, be dismissed. The vendor shall pay the costs of the third parties who intervened after being served with notice of these proceedings but no costs are awarded to the purchaser who supported the vendor's motion.

An appeal by Wolf to the Ontario Court of Appeal was dismissed—*Noble v Alley*, [1949] OR 503, [1949] 4 DLR 375 (CA). On further appeal to the Supreme Court of Canada, the appeal was allowed and the racially restrictive covenant struck down, but on technical grounds resulting from the application of well-established common law rules—*Noble v Alley*, [1951] SCR 64. There was no discussion on the public policy implications of restrictive covenants.

From the vantage point of the 21st century, discriminatory covenants are obviously unforgivable, and the *Re Noble and Wolf* decision unsatisfactory. But consider this point: after the Ontario Court of Appeal decision in *Re Noble and Wolf*, and before its hearing at the Supreme Court of Canada, the Ontario legislature passed the following provision (now s 22 of the *Conveyancing and Law of Property Act*, RSO 1990, c C.34):

> Every covenant made after the 24th day of March, 1950, that but for this section would be annexed to and run with land and that restricts the sale, ownership, occupation or use of land because of the race, creed, colour, nationality, ancestry or place of origin of any person is void and of no effect.

Similar provisions have been enacted in other provinces in Canada. The legislatures, in other words, acted to correct a deficiency that at least some judges (applying the common law) were unprepared to correct. In our democratic system, how assertive should judges be in applying "public policy" or other grounds to graft new moral positions onto the law? Is that their proper role? Should it matter whether the law in question being applied by the court is a piece of legislation or a common law principle?

As is discussed later in these materials, debates on the proper role of judges in our democratic system are commonplace in Canada, especially following the enactment of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11). It is commonly agreed that, absent a constitutional justification, courts apply (rather than strike down or question) legislation. In so doing, they respond to the "supremacy" of Parliament (or the provincial legislatures) in law-making. But what if the law in question is not a statute, but is instead a common law doctrine—judge-made law? Why should contemporary judges with contemporary moral beliefs defer to the (sometimes quite dated) morality of prior judges? Keep this question in mind when reviewing the next section, which deals with the evolution of law's treatment of women.

Both positivism and natural law are descriptive theories in that they are principally concerned with identifying what law is, as opposed to what law ought to be. (Natural law approaches, while they identify law with reference to normative criteria, are nevertheless engaged in describing law as it exists.) The remaining approaches in this section are normative theories in that they seek to describe how existing laws fail to achieve an external objective, be it gender or class equality or the efficient distribution of scarce societal resources. Feminism, critical legal studies, and law and economics approaches are often critical in their posture and oriented toward reform.

III. FEMINIST PERSPECTIVES ON LAW

A. INTRODUCTION

Feminist perspectives on law look at the extent to which women are disadvantaged by legal rules and institutions that arise in societies that are patriarchal. It is accepted that such societies, to a greater or lesser extent, subordinate the interests of women and fail to account for their experiences in the creation of legal rules. The earliest feminist movements in law, beginning in the late 19th century, centred on gaining the voting franchise for women and the reform of marriage laws. These were largely successful. Once that occurred, the next stage of feminism involved attacks on discriminatory employment practices and criminal laws. It was not until the 1960s, however, that feminism matured into a defined movement and developed more widespread currency.

Much of feminist legal philosophy reflects a critique (and oftentimes a rejection) of liberalism as a political ideology. Laws that existed from the 17th century, even those based on liberal ideals such as individualism and liberty, did not typically respond to the needs of women and more often than not aided in their oppression. So-called liberal laws often contributed to the gross inequality between genders. Despite the ideals of liberalism, many of these laws had existed for centuries (and in some cases still do).

B. EARLY FORMALIST FEMINISM

In its early manifestations, feminism was largely concerned with seeking women's formal equality with men. This required an examination of laws to determine whether there was any express bias against women. The goal was to replace laws that favoured men with more neutral laws. The suffrage movement in the early part of the 20th century (focusing on the vote) followed such an approach.

Prior to 1916, election laws throughout Canada did not allow women to vote. In that year, women in Manitoba, Saskatchewan, and Alberta became enfranchised through political struggle. Laws in those provinces were revised to allow women to vote. Other provinces soon followed suit. In 1918, Parliament passed the *Women's Suffrage Act*, SC 1918, c 20, which gave every female British subject over age 21 the right to vote, as long as she possessed the same qualifications required for men under the provincial franchise.

Despite these political advancements, women remained barred from holding a seat in the Senate; successive federal governments refused to extend women's rights that far. They relied on s 24 of the *British North America Act* of 1867 (now the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5), which stated that only "qualified Persons" were eligible to be appointed to the Senate. Governments argued that women would not have been considered to be "qualified persons" at the time the 1867 Act was passed. By 1926, frustrated at continued government inaction, five women—Judge Emily Murphy, Nellie McClung, Louise McKinney, Irene Parlby, and Henrietta Muir Edwards—petitioned to have the government direct the Supreme Court of Canada to rule on the constitutional question whether, based on s 24, women could be considered candidates for the Senate. The Supreme Court of Canada found that "qualified persons" did not include women, basing its judgment on a formulaic and traditional interpretation. An appeal was launched to the Judicial Committee of the Privy Council—the highest level of appeal for Canada at that time. The decision, known as the *"Persons"* case, is excerpted below. The approach the Privy Council took to interpreting the Canadian Constitution, treating constitutions as evolving documents that could respond to changes in society over time, remains an important guide to constitutional interpretation today.

Edwards v AG Canada

[1930] AC 124, 1 DLR 98 (PC) (footnotes omitted)

LORD SANKEY LC:

By s. 24 of the *BNA Act, 1867*, it is provided that, "The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the Province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said province; Emily F. Murphy is a police magistrate in and for the said province; and Irene Parlby is a member of the Legislative Assembly of the said province and a member of the Executive Council thereof.

[An account of the judgments of the Supreme Court of Canada is omitted.]

Their Lordships are of the opinion that the word "persons" in s. 24 does include women, and that women are eligible to be summoned to and become members of the Senate of Canada.

In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points—namely: (i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases. (ii) The internal evidence derived from the Act itself. As the counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their argument they propose to do so and accordingly turn to the first of the above points—namely: (i) The external evidence derived from extraneous circumstances.

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms. "*Nihil autem neque publicae neque privatae rei, nisi armati, agunt*": Tac. Germ., c. 13. Yet the tribes did not despise the advice of women. "*Inesse quin etiam sanctum et providum putant, nec aut consilia earum aspernantur aut responsa neglegunt*": Germ., c. 8. The likelihood of attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times upon which opinion grounded on experience may move one way or another in different circumstances. This exclusion of women found its way into the opinions of the Roman jurists, Ulpian (AD 211) laying it down. "*Feminae ab omnibus officiis civilibus vel publicis remotae sunt*": Dig. 1.16.195. The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.

In England no woman under the degree of a Queen or a Regent, married or unmarried, could take part in the government of the State. A woman was under a legal incapacity to be elected to serve in Parliament and even if a peeress in her own right she was not, nor is, entitled as an incident of peerage to receive a writ of summons to the House of Lords.

Various authorities are cited in the recent case of Viscountess Rhondda's Claim, where it was held that a woman was not entitled to sit in the House of Lords. Women were, moreover, subject to a legal incapacity to vote at the election of members of Parliament: Coke, 4 Inst., p. 5; *Chorlton v. Lings*; or of town councillor: *Reg. v. Harrald*; or to be elected members of a County Council: *Beresford-Hope v. Sandhurst*. They were excluded by the common law from taking part in the administration of justice either as judges or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy: Coke, 2 Inst. 119, 3 Bl. Comm. 362. Other instances are referred to in the learned judgment of Willes J in *Chorlton v. Lings*.

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word "person" different considerations arise.

The word is ambiguous and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word "person" could not include females but because at Common Law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive.

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Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman Law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the *BNA Act, 1867*. ...

Their Lordships now turn to the second point—namely, (ii) the internal evidence derived from the Act itself.

Before discussing the various sections they think it necessary to refer to the circumstances which led up to the passing of the Act.

The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution.

His Majesty the King in Council is the final Court of Appeal from all these communities and this Board must take great care therefore not to interpret legislation

meant to apply to one community by a rigid adherence to the customs and traditions of another. ...

The *BNA Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention": Canadian Constitutional Studies, Sir Robert Borden, (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board and it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs. "The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the *British North America Act* by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony": Clement's Canadian Constitution, 3rd ed., p. 347.

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It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its provinces which arises under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its provinces their respective spheres of Government. Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country. Nor are their Lordships deciding any question as to the rights of women but only a question as to their eligibility for a particular position. No one either male or female has a right to be summoned to the Senate. ...

Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate. [A close textual review of various provisions of the *BNA Act* is omitted.]

• • •

If Parliament had intended to limit the word "persons" in s. 24 to male persons it would surely have manifested such intention by an express limitation as it has done in ss. 41 and 84. The fact that certain qualifications are set out in s. 23 is not an argument in favour of further limiting the class, but is an argument to the contrary because it must be presumed that Parliament has set out in s. 23 all the qualifications deemed necessary for a Senator and it does not state that one of the qualifications is that he must be a member of the male sex. ...

A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration, but having regard: (1) To the object of the Act—namely, to provide a constitution for Canada, a responsible and developing State; (2) That the word "person" is ambiguous and may include members of either sex; (3) That there are sections in the Act above referred to which show that in some cases the word "person" must include females; (4) That in some sections the words "male persons" is expressly used when it is desired to confine the matter in issue to males, and (5) To the provisions of the *Interpretation Act*; their

> Lordships have come to the conclusion that the word "persons" in s. 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly.
>
> *Appeal allowed.*

C. CONTEMPORARY FEMINISM

As feminist analysis became more sophisticated through the 20th century, feminism and feminist legal theory evolved. More theoretical frameworks and disciplines were scrutinized. Areas of law previously thought to be immune to gender discrimination were examined. The disciplines of sociology and criminology were applied to issues such as violence against women. At the same time, the movement also became more fractured. Some strands became radicalized. Others remained more conservative: see Patricia Smith, ed, *Feminist Jurisprudence* (New York: Oxford University Press, 1993).

Today, it is seen as simplistic to argue that there is a monolithic group of "feminist scholars"—like any well-developed philosophy, feminism is now filled with complexity and richness. There are "liberal feminists" who argue that it is possible to have gender equality within a liberal conceptual framework: see Margaret Davies, *Asking the Law Question* (Sydney: Law Book Company Limited, 1994) at 179-90. Other, more radical feminists are not so sure, as divisions between men and women are seen as fundamental and attributable to the very notion of liberal society: see Kate Millet, *Sexual Politics* (New York: Simon & Schuster, 1990). Some would argue that Western law is partial: law's rules and structures are premised on a belief system that prefers men and their view of the world. The legal system is thus paternalistic and male-centred—for example, the idea of "rights" can be seen as a masculine concept. Rights-based cultures create a society where many people care only about their own rights and feel threatened by others who are equally self-absorbed. A male focus on the rights of disconnected individuals ignores the human element of law: see Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Sydney: Allen & Unwin, 1990). Others view law as fostering social practices that are combative and litigation-oriented—where the idea of a dispassionate judge handing down decisions is also cast as male-centric. Vague notions of "policy," "common sense," or "human nature" have also found their way into law, and been used by judges to preserve male privilege: see Catherine McKinnon, "Feminist Discourse, Moral Values and the Law" (1985) 34 Buff L Rev 21.

Regardless of whether one subscribes to a liberal or radical vision of feminism, implicit in many of feminism's central themes is that women, given the ability to reconstruct society, could do better. The subject of abortion provides a good forum to examine how feminist theory may translate this into practice.

Over the past five decades or so, rights surrounding abortion have been one of the most contentious areas of public debate. Prior to that time, many countries had criminalized or restricted most, if not all, forms of abortion. Canada was no different. In 1988, in the case of *R v Morgentaler*, the Supreme Court was asked to determine whether s 251 of the *Criminal Code*—criminalizing the procurement of an abortion unless properly authorized by a physician—was contrary to s 7 of the *Canadian Charter of Rights and Freedoms*, which provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The facts are straightforward. Three male doctors, Henry Morgentaler, Leslie Frank Smoling, and Robert Scott, were charged with the offence of procuring a miscarriage contrary to s 251(1). The majority of the Court found the provision to offend the Charter because of

the complicated procedures put in place under the law. Justice Bertha Wilson, who agreed with the majority in the end result, rendered a separate opinion. Her decision is an example of a more modern feminist approach to a public law concern—note how her opinion takes a woman's point of view, in finding that a woman should not be required to carry a fetus to term if she does not want to.

R v Morgentaler

[1988] 1 SCR 30, 44 DLR (4th) 385, 62 CR (3d) 1

[Drs Morgentaler, Smoling, and Scott were each charged with conspiracy to procure a miscarriage contrary to ss 251(1) and 423(1)(d) of the *Criminal Code*. They were acquitted at trial, but a Crown appeal against that acquittal was allowed and a new trial ordered. On appeal by the accused to the Supreme Court of Canada it was argued that s 251 of the *Criminal Code* was unconstitutional on the basis that it offended the guarantee to life, liberty, and security of the person found in s 7 of the *Canadian Charter of Rights and Freedoms*. Section 251(1) of the *Criminal Code* prohibits abortions except in circumstances described in s 251(4)—in effect, subsection (4) requires a woman to obtain a certificate from a therapeutic abortion committee and then requires that the abortion be carried out by a physician other than a member of the committee in an accredited or approved hospital. There must be at least three physicians on the committee. Evidence was led at trial as to delays encountered by women attempting to comply with the committee procedure and concerning access to abortion services in many parts of Canada. The majority held that these complicated procedures violated s 7 of the Charter.]

WILSON J:

At the heart of this appeal is the question whether a pregnant woman can, as a constitutional matter, be compelled by law to carry the foetus to term. The legislature has proceeded on the basis that she can be so compelled and, indeed, has made it a criminal offence punishable by imprisonment under s. 251 of the *Criminal Code*, RSC 1970, c. C-34, for her or her physician to terminate the pregnancy unless the procedural requirements of the section are complied with.

My colleagues, the Chief Justice and Justice Beetz, have attacked those requirements in reasons which I have had the privilege of reading. They have found that the requirements do not comport with the principles of fundamental justice in the procedural sense and have concluded that, since they cannot be severed from the provisions creating the substantive offence, the whole of s. 251 must fall.

With all due respect, I think that the Court must tackle the primary issue first. A consideration as to whether or not the procedural requirements for obtaining or performing an abortion comport with fundamental justice is purely academic if such requirements cannot as a constitutional matter be imposed at all. If a pregnant woman cannot, as a constitutional matter, be compelled by law to carry the foetus to term against her will, a review of the procedural requirements by which she may be compelled to do so seems pointless. Moreover, it would, in my opinion, be an exercise in futility for the legislature to expend its time and energy in attempting to remedy the defects in the procedural requirements unless it has some assurance that this process will, at the end of the day, result in the creation of a valid criminal offence. I turn, therefore, to what I believe is the central issue that must be addressed.

1. The Right of Access to Abortion

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I agree with the Chief Justice that we are not called upon in this case to delineate the full content of the right to life, liberty and security of the person. This would be an impossible task because we cannot envisage all the contexts in which such a right might be asserted. What we are asked to do, I believe, is define the content of the right in the context of the legislation under attack. Does section 251 of the *Criminal Code* which limits the pregnant woman's access to abortion violate her right to life, liberty and security of the person within the meaning of s. 7?

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The idea of human dignity finds expression in almost every right and freedom guaranteed in the Charter. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty ... is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

This view is consistent with the position I took in the case of *R v. Jones*, [1986] 2 SCR 284. One issue raised in that case was whether the right to liberty in s. 7 of the Charter included a parent's right to bring up his children in accordance with his conscientious beliefs. In concluding that it did I stated at pp. 318-19:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric—to be, in today's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way." This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it."

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The question then becomes whether the decision of a woman to terminate her pregnancy falls within this class of protected decisions. I have no doubt that it does. This decision is one that will have profound psychological, economic and social consequences for the pregnant woman. The circumstances giving rise to it can be complex and varied and there may be, and usually are, powerful considerations militating in opposite directions. It is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well. Her response to it will be the response of the whole person.

It is probably impossible for a man to respond, even imaginatively, to such a dilemma not just because it is outside the realm of his personal experience (although this is, of course, the case) but because he can relate to it only by

objectifying it, thereby eliminating the subjective elements of the female psyche which are at the heart of the dilemma. As Noreen Burrows, Lecturer in European Law at the University of Glasgow, has pointed out in her essay on "International Law and Human Rights: The Case of Women's Rights," in *Human Rights: From Rhetoric to Reality* (1986), the history of the struggle for human rights from the eighteenth century on has been the history of men struggling to assert their dignity and common humanity against an overbearing state apparatus. The more recent struggle for women's rights has been a struggle to eliminate discrimination, to achieve a place for women in a man's world, to develop a set of legislative reforms in order to place women in the same position as men. It has not been a struggle to define the rights of women in relation to their special place in the societal structure and in relation to the biological distinction between the two sexes. Thus, women's needs and aspirations are only now being translated into protected rights. The right to reproduce or not to reproduce which is in issue in this case is one such right and is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being.

Given then that the right to liberty guaranteed by s. 7 of the Charter gives a woman the right to decide for herself whether or not to terminate her pregnancy, does s. 251 of the *Criminal Code* violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee. Furthermore, as the Chief Justice correctly points out ... the committee bases its decision on "criteria entirely unrelated to [the pregnant woman's] priorities and aspirations." The fact that the decision whether a woman will be allowed to terminate her pregnancy is in the hands of a committee is just as great a violation of the woman's right to personal autonomy in decisions of an intimate and private nature as it would be if a committee were established to decide whether a woman should be allowed to continue her pregnancy. Both these arrangements violate the woman's right to liberty by deciding for her something that she has the right to decide for herself.

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[T]he present legislative scheme for the obtaining of an abortion clearly subjects pregnant women to considerable emotional stress as well as to unnecessary physical risk. I believe, however, that the flaw in the present legislative scheme goes much deeper than that. In essence, what it does is assert that the woman's capacity to reproduce is not to be subject to her own control. It is to be subject to the control of the state. She may not choose whether to exercise her existing capacity or not to exercise it. This is not, in my view, just a matter of interfering with her right to liberty in the sense (already discussed) of her right to personal autonomy in decision-making, it is a direct interference with her physical "person" as well. She is truly being treated as a means—a means to an end which she does not desire but over which she has no control. She is the passive recipient of a decision made by others as to whether her body is to be used to nurture a new life. Can there be anything that comports less with human dignity and self-respect? How can a woman in this position have any sense of security with respect to her person? I believe that s. 251 of the *Criminal Code* deprives the pregnant woman of her right to security of the person as well as her right to liberty.

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I believe, therefore, that a deprivation of the s. 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice.

[Wilson J next went on to determine that the *Criminal Code* provisions also offend a woman's freedom of conscience and religion under s 2(a) of the Charter (regardless of whether such conscientiously held beliefs are grounded in religion or a secular morality).]

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Section 251 of the *Criminal Code* takes the decision away from the woman at all stages of her pregnancy. It is a complete denial of the woman's constitutionally protected right under s. 7, not merely a limitation on it. It cannot, in my opinion, meet the proportionality test in *Oakes*. It is not sufficiently tailored to the legislative objective and does not impair the woman's right "as little as possible." It cannot be saved under s. 1. Accordingly, even if the section were to be amended to remedy the purely procedural defects in the legislative scheme referred to by the Chief Justice and Beetz J it would, in my opinion, still not be constitutionally valid.

One final word. I wish to emphasize that in these reasons I have dealt with the existence of the developing foetus merely as a factor to be considered in assessing the importance of the legislative objective under s. 1 of the Charter. I have not dealt with the entirely separate question whether a foetus is covered by the word "everyone" in s. 7 so as to have an independent right to life under that section. The Crown did not argue it and it is not necessary to decide it in order to dispose of the issues on this appeal.

Compared with the other justices in the *Morgentaler* decision, Wilson J looks at the very heart of the matter—whether a pregnant woman can be compelled by law to carry a fetus to term. The judgment is in keeping with her philosophy. Justice Wilson was a Supreme Court of Canada judge during the formative years of the Charter, from 1982 to 1991. She was the first woman appointed to the Supreme Court and participated in many groundbreaking Charter decisions. Feminists, for the most part, heralded her judgments as showing, for the first time, a true understanding of the plight of women in Canadian law: see e.g. Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: University of British Columbia Press, 2010). Critics saw her as using the Charter to expand the role of a judge beyond principles established by liberal democratic theory and constitutional adjudication. She has been said to be as much a legislator for women's rights as a judge: see Robert E Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill LJ 1.

IV. CRITICAL LEGAL STUDIES

A. INTRODUCTION

Like some forms of feminism, critical legal studies (CLS)—a school of legal theory developed largely during the 1980s in the United States—is a radical alternative to established legal theories. CLS adherents reject that there is any kind of "natural legal order" discoverable by objective means. As described by Alan Thomson:

> While traditional jurisprudence claims to be able to reveal through pure reason a picture of an unchanging and universal unity beneath the manifest changeability and historical variability of laws, legal institutions and practices, and thus to establish a foundation in reason for actual legal systems, critical legal theory not only denies the possibility of discovering a universal foundation for law through pure reason, but sees the whole enterprise of jurisprudence ... as operating to confer a spurious legitimacy on law and legal systems.

(A Thomson, "Critical Approaches to Law: Who Needs Legal Theory?" in I Grigg-Spall & P Ireland, eds, *The Critical Lawyers' Handbook* (London: Pluto Press, 1992) at 2.)

CLS is a direct descendent of legal realism, an approach that rose to prominence in the 1920s and lasted until the 1940s. Legal realism attacked two fundamental axioms of the traditional, formalist understanding of the common law: that common law legal rules were neutral and objective, and that the rules themselves could be determined with sufficient certainty. Realists maintained that all legal rules were indeterminate in the sense that any articulation of a rule was subject to multiple interpretations. As a consequence, when judges decided cases, they were not involved in an objective exercise of discovering the meaning of some pre-existing rule or mechanistically applying a rule to a set of facts (because the indeterminate nature of legal rules conferred discretion on judges to choose from a variety of alternative interpretations), but rather the result would reflect the unstated public policy preferences of the judge. The inconsistent results in the contrasting cases of *Re Drummond Wren* and *Re Noble and Wolf* provide an example of the way in which a judge's predisposition may affect legal outcomes. In essence, legal realism called into question the autonomy of law from broader social and political considerations.

Legal realists also believed in the importance of interdisciplinary approaches to law (given their understanding of law's contingency on social, economic, and political conditions), a view that became even more important to CLS scholars. Because of law's subjectivity, and its connection to other disciplines, the Realists sought to use the law as a tool to change society.

CLS takes this approach further. It is a direct attack on traditional legal theory, scholarship, and education. According to its main precepts, law, far from attempting to symbolize justice, institutionalizes and legitimates the authority and power of particular social groups or classes. The rule of law is not a rational, quasi-scientific ordering of society's norms, but is indeterminate, full of subjective interpretation and a large degree of incoherency.

Much of CLS theory is post-Marxist and usually associated with the left. Three key stages (posited by Trubek) govern the application of CLS ideas to legal thought: "hegemonic consciousness" (a concept derived from the Italian Marxist scholar Antonio Gramsci); "reification" (a Marxist term meaning to convert into something material); and "denial" (the psychoanalytical term as used by Freud). At the first stage, its proponents argue that many, if not most, Western laws are maintained by a system of beliefs that have their foundation in a liberal, market-driven economy. While many see these laws as natural and commonsensical, in fact, they reflect only the transitory, arbitrary interests of a dominant class: see David Trubek, "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 Stan L Rev 575.

In the second stage, these beliefs are reified into a material thing: they are presented as essential, necessary, and objective. The laws that prop up this belief system necessarily follow suit, becoming equally incontrovertible.

In the final phase, laws and legal thinking aid in the denial of real truths: they assist in our coping with a vast storehouse of contradictions that would be too painful for us to hold in our consciousness. In other words, for a CLS scholar, the denial occurs between the promise of a certain state of law—such as equality—and the reality—such as the vast amounts of discrimination or racism that can be found so readily in society if only we look.

The liberal belief that law should be certain and neutral is, for CLS scholars, illusory. Law reproduces the oppressive characteristics of contemporary Western societies. Moreover, law is not independent or instrumental—it is simply another form of politics. Lawyers and the legal profession are part of this pretense. But there is nothing special about legal reasoning to distinguish it from other forms of reasoning—nothing about lawyers that should give them a monopoly on reason or justice. In other words, they are neither exceptional nor should they be privileged.

Finally, CLS questions another of law's central assumptions, that the individual is an autonomous agent. While the law assumes that individuals can make decisions based on reason that

is detached from political, social, or economic constraints, CLS holds that individuals are tied to, and part of, such things as their communities, socio-economic class, gender, and race, such that they are not truly autonomous actors. Rather, their circumstances determine and therefore limit the choices presented to them.

B. JUDGING WITH CLS: A CASE STUDY

The CLS movement can be very theory-driven and densely philosophical. Along with its post-modernist offshoots, it is still considered radical, avant-garde, and outside most mainstream legal thought. Because of this, the movement was never likely to garner wholesale acceptance outside academia. However, it would be naïve to think that some lawyers and judges who attended law school during the 1970s and 1980s were not influenced by it. In the following excerpt from *R v S (RD)*, compare the judges' approach to questions of race and equality with that of the judges in *Re Drummond Wren* and *Re Noble and Wolf* excerpted above. Consider whether the differing opinions of the judges in *R v S (RD)* arise from different conceptions of the practice of judging itself. Also, examine the differences in approach of the two majority decisions with the approach of the dissent. Which, if any, reflects the insights of CLS scholarship regarding the impossibility of objectivity and the law's lack of autonomy from the social and political context in which law operates?

R v S (RD)

[1997] 3 SCR 484, 151 DLR (4th) 193, 10 CR (5th) 1

(emphasis in original)

[A white police officer arrested a Black 15-year-old youth who had allegedly interfered with the arrest of another youth. The accused was charged with three offences dealing with unlawfully assaulting and unlawfully resisting a police officer. The police officer and the accused were the only witnesses and their accounts of the relevant events differed widely. The Youth Court judge weighed the evidence and determined that the accused should be acquitted. While delivering her oral reasons, the judge remarked in response to a rhetorical question by the Crown, that, although she wasn't saying the specific police officer had misled, police officers had been known to mislead the Court in the past, that they had been known to overreact particularly with non-white groups, and that that would indicate a questionable state of mind. The Crown challenged these comments as raising a reasonable apprehension of bias. The Crown appealed to the Nova Scotia Supreme Court (Trial Division); the appeal was allowed and a new trial was ordered on the basis that the judge's remarks gave rise to a reasonable apprehension of bias. This judgment was upheld by a majority of the Nova Scotia Court of Appeal, and this decision was appealed, in turn, to the Supreme Court of Canada. A majority of the Court favoured Cory J's articulation of the applicable legal standards, although the members of the Court then added separate concurring views, and there were significant differences in the precise application of the legal standard between several concurring and a dissenting decision.]

CORY J:

[61] In this appeal, it must be determined whether a reasonable apprehension of bias arises from comments made by the trial judge in providing her reasons for acquitting the accused.

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B. Ascertaining the Existence of a Reasonable Apprehension of Bias

(i) Fair Trial and the Right to an Unbiased Adjudicator

[91] A system of justice, if it is to have the respect and confidence of its society, must ensure that trials are fair and that they appear to be fair to the informed and reasonable observer. This is a fundamental goal of the justice system in any free and democratic society.

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[95] Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the Charter. Section 27 provides that the Charter itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians. Yet our judges must be particularly sensitive to the need not only to be fair but also to appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin. This is a far more difficult task in Canada than it would be in a homogeneous society. Remarks which would pass unnoticed in other societies could well raise a reasonable apprehension of bias in Canada.

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[97] The question which must be answered in this appeal is whether the comments made by Judge Sparks in her reasons give rise to a reasonable apprehension that she was not impartial as between the Crown and the accused. The Crown's position, in essence, is that Judge Sparks did not give the essential and requisite appearance of impartiality because her comments indicated that she prejudged an issue in the case, or to put it another way, she reached her determination on the basis of factors which were not in evidence.

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(iii) What Is Bias?

[103] It may be helpful to begin by articulating what is meant by impartiality. In deciding whether bias arises in a particular case, it is relatively rare for courts to explore the definition of bias. In this appeal, however, this task is essential, if the Crown's allegation against Judge Sparks is to be properly understood and addressed. ...

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[115] ... [I]n the context of the current appeal, it is vital to bear in mind that the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

(v) Judicial Integrity and the Importance of Judicial Impartiality

[116] Often the most significant occasion in the career of a judge is the swearing of the oath of office. It is a moment of pride and joy coupled with a realization of

the onerous responsibility that goes with the office. The taking of the oath is solemn and a defining moment etched forever in the memory of the judge. The oath requires a judge to render justice impartially. To take that oath is the fulfilment of a life's dreams. It is never taken lightly. Throughout their careers, Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them. Their rate of success in this difficult endeavour is high.

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[118] It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.

[119] The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial

> does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
>
> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. ...

It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging. ...

[120] Regardless of their background, gender, ethnic origin or race, all judges owe a fundamental duty to the community to render impartial decisions and to appear impartial. It follows that judges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations.

(vi) Should Judges Refer to Aspects of Social Context in Making Decisions?

[121] It is the submission of the appellant and interveners that judges should be able to refer to social context in making their judgments. It is argued that they should be able to refer to power imbalances between the sexes or between races, as well as to other aspects of social reality. The response to that submission is that each case must be assessed in light of its particular facts and circumstances. Whether or not the use of references to social context is appropriate in the circumstances and

whether a reasonable apprehension of bias arises from particular statements will depend on the facts of the case.

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[123] Certainly judges may, on the basis of expert evidence adduced, refer to relevant social conditions in reasons for judgment. In some circumstances, those references are necessary, so that the law may evolve in a manner which reflects social reality. ...

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(vii) Use of Social Context in Assessing Credibility

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[129] ... [I]t is ... the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour. On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence.

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[131] At the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics. It is only after an individual witness has been tested and assessed that findings of credibility can be made. Obviously the evidence of a policeman, or any other category of witness, cannot be automatically preferred to that of accused persons, any more than the testimony of blue eyed witnesses can be preferred to those with gray eyes. That must be the general rule. In particular, any judicial indication that police evidence is always to be preferred to that of a black accused person would lead the reasonable and knowledgeable observer to conclude that there was a reasonable apprehension of bias.

[132] In some circumstances it may be acceptable for a judge to acknowledge that racism in society might be, for example, the motive for the overreaction of a police officer. This may be necessary in order to refute a submission that invites the judge as trier of fact to presume truthfulness or untruthfulness of a category of witnesses, or to adopt some other form of stereotypical thinking. Yet it would not be acceptable for a judge to go further and suggest that all police officers should therefore not be believed or should be viewed with suspicion where they are dealing with accused persons who are members of a different race. Similarly, it is dangerous for a judge to suggest that a particular person overreacted because of racism unless there is evidence adduced to sustain this finding. It would be equally inappropriate to suggest that female complainants, in sexual assault cases, ought to be believed more readily than male accused persons solely because of the history of sexual violence by men against women.

[133] If there is no evidence linking the generalization to the particular witness, these situations might leave the judge open to allegations of bias on the basis that the credibility of the individual witness was prejudged according to stereotypical generalizations. This does not mean that the particular generalization—that police officers have historically discriminated against visible minorities or that women have historically been abused by men—is not true, or is without foundation. The difficulty is that reasonable and informed people may perceive that the judge has

used this information as a basis for assessing credibility instead of making a genuine evaluation of the evidence of the particular witness' credibility. As a general rule, judges should avoid placing themselves in this position.

[134] To state the general proposition that judges should avoid making comments based on generalizations when assessing the credibility of individual witnesses does not lead automatically to a conclusion that when a judge does so, a reasonable apprehension of bias arises. In some limited circumstances, the comments may be appropriate. Furthermore, no matter how unfortunate individual comments appear in isolation, the comments must be examined in context, through the eyes of the reasonable and informed person who is taken to know all the relevant circumstances of the case, including the presumption of judicial integrity, and the underlying social context.

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C. Application of These Principles to the Facts

[142] Did Judge Sparks' comments give rise to a reasonable apprehension of bias? In order to answer that question, the nature of the Crown's allegation against Judge Sparks must be clearly understood. At the outset, it must be emphasized that it is obviously not appropriate to allege bias against Judge Sparks simply because she is black and raised the prospect of racial discrimination. Further, exactly the same high threshold for demonstrating reasonable apprehension of bias must be applied to Judge Sparks in the same manner it would be to all judges. She benefits from the presumption of judicial integrity that is accorded to all who swear the judicial oath of office. The Crown bears the onus of displacing this presumption with "cogent evidence."

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[149] The history of anti-black racism in Nova Scotia was documented recently by the *Royal Commission on the Donald Marshall Jr. Prosecution* (1989). It suggests that there is a realistic possibility that the actions taken by the police in their relations with visible minorities demonstrate both prejudice and discrimination. I do not propose to review and comment upon the vast body of sociological literature referred to by the parties. It was not in evidence at trial. In the circumstances it will suffice to say that they indicate that racial tension exists at least to some degree between police officers and visible minorities. Further, in some cases, racism may have been exhibited by police officers in arresting young black males.

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[150] However, there was *no* evidence before Judge Sparks that would suggest that anti-black bias influenced *this particular police officer's reactions*.

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[152] [Her] remarks are worrisome and come very close to the line. Yet, however troubling these comments are when read individually, it is vital to note that the comments were not made in isolation. It is necessary to read all of the comments in the context of the whole proceeding, with an awareness of all the circumstances that a reasonable observer would be deemed to know. ...

[153] ... A reasonable and informed person observing the entire trial and hearing the reasons would be aware that Judge Sparks did not conclude that Constable Stienburg misled the court or overreacted on the basis of the racial dynamics of the situation.

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V. Conclusion

[160] In the result the judgments of the Court of Appeal and of Glube CJSC are set aside and the decision of Judge Sparks dismissing the charges against R.D.S. is restored. I must add that since writing these reasons I have had the opportunity of reading those of Major J. It is readily apparent that we are in agreement as to the nature of bias and the test to be applied in order to determine whether the words or actions of a trial judge raise a reasonable apprehension of bias. The differences in our reasons lies in the application of the principles and test we both rely upon to the words of the trial judge in this case. The principles and the test we have both put forward and relied upon are different from and incompatible with those set out by Justices L'Heureux-Dubé and McLachlin.

L'HEUREUX-DUBÉ and McLACHLIN JJ:

I. Introduction

[27] We have read the reasons of our colleague, Justice Cory, and while we agree that this appeal must be allowed, we differ substantially from him in how we reach that outcome. As a result, we find it necessary to write brief concurring reasons.

[28] We endorse Cory J's comments on judging in a multicultural society, the importance of perspective and social context in judicial decision-making, and the presumption of judicial integrity. However, we approach the test for reasonable apprehension of bias and its application to the case at bar somewhat differently from our colleague.

[29] In our view, the test for reasonable apprehension of bias established in the jurisprudence is reflective of the reality that while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality. It therefore recognizes as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence.

[30] We find that on the basis of these principles, there is no reasonable apprehension of bias in the case at bar. Like Cory J we would, therefore, overturn the findings by the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal that a reasonable apprehension of bias arises in this case, and restore the acquittal of R.D.S. This said, we disagree with Cory J's position that the comments of Judge Sparks were unfortunate, unnecessary, or close to the line. Rather, we find them to reflect an entirely appropriate recognition of the facts in evidence in this case and of the context within which this case arose—a context known to Judge Sparks and to any well-informed member of the community.

II. The Test for Reasonable Apprehension of Bias

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A. The Nature of Judging

[38] As discussed above, judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a

transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

[39] It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function. ...

[40] At the same time, where the matter is one of identifying and applying the law to the findings of fact, it must be the law that governs and not a judge's individual beliefs that may conflict with the law. Further, notwithstanding that their own insights into human nature will properly play a role in making findings of credibility or factual determinations, judges must make those determinations only after being equally open to, and considering the views of, all parties before them. The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.

[41] It is axiomatic that all cases litigated before judges are, to a greater or lesser degree, complex. There is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces. In short, they must be aware of the context in which the alleged crime occurred.

[42] Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and the Challenges to Law" (1997), 42 *McGill LJ* 91, at p. 107, offers the following comment:

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncrasies and preferences, is our capacity to achieve an "enlargement of mind." We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective ... . It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible. ...

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IV. Application of the Test to the Facts

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[56] While it seems clear that Judge Sparks *did not in fact* relate the officer's probable overreaction to the race of the appellant R.D.S., it should be noted that if Judge Sparks *had* chosen to attribute the behaviour of Constable Stienburg to the racial dynamics of the situation, she would not necessarily have erred. As a member of the community, it was open to her to take into account the well-known presence of racism in that community and to evaluate the evidence as to what occurred against that background.

[57] That Judge Sparks recognized that police officers sometimes overreact when dealing with non-white groups simply demonstrates that in making her

determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities. ...

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V. Conclusion

[60] In the result, we agree with Cory J as to the disposition of this case. We would allow the appeal, overturn the findings of the Nova Scotia Supreme Court (Trial Division) and the majority of the Nova Scotia Court of Appeal, and restore the acquittal of the appellant R.D.S.

MAJOR J (dissenting):

[1] I have read the reasons of Justices L'Heureux-Dubé and McLachlin and those of Justice Cory and respectfully disagree with the conclusion they reach.

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[3] This appeal should not be decided on questions of racism but instead on how courts should decide cases. In spite of the submissions of the appellant and interveners on his behalf, the case is primarily about the conduct of the trial. A fair trial is one that is based on the law, the outcome of which is determined by the evidence, free of bias, real or apprehended. Did the trial judge here reach her decision on the evidence presented at the trial or did she rely on something else?

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[5] In view of the manner in which this appeal was argued, it is necessary to consider two points. First, we should consider whether the trial judge in her reasons, properly instructed herself on the evidence or was an error of law committed by her. The second, and somewhat intertwined question, is whether her comments above could cause a reasonable observer to apprehend bias. The offending comments in the statement are:

(i) "police officers have been known to [mislead the court] in the past";
(ii) "police officers do overreact, particularly when they are dealing with non-white groups";
(iii) "[t]hat to me indicates a state of mind right there that is questionable";
(iv) "[i]t seems to be in keeping with the prevalent attitude of the day"; and,
(v) "based upon my comments and based upon all the evidence before the court I have no other choice but to acquit."

[6] The trial judge stated that "police officers have been known to [mislead the court] in the past" and that "police officers do overreact, particularly when they are dealing with non-white groups" and went on to say "[t]hat to me indicates a state of mind right there that is questionable." She in effect was saying, "sometimes police lie and overreact in dealing with non-whites, therefore I have a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused." This was stereotyping all police officers as liars and racists, and applied this stereotype to the police officer in the present case. The trial judge might be perceived as assigning less weight to the police officer's evidence because he is testifying in the prosecution of an accused who is of a different race. Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that this particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.

[7] Our jurisprudence has repeatedly prohibited the introduction of evidence to show propensity. In the present case had the police officer been charged with

assault the trial judge could not have reasoned that as police officers have been known to mislead the Court in the past that based on that evidence she rejected this police officer's credibility and found him guilty beyond reasonable doubt.

[8] In the same vein, statistics show that young male adults under the age of 25 are responsible for more accidents than older drivers. It would be unacceptable for a court to accept evidence of that fact to find a defendant liable in negligence yet that is the consequence of the trial judge's reasoning in this appeal.

[9] It is possible to read the trial judge's reference to the "prevalent attitude of the day" as meaning her view of the prevalent attitude in society today. If the trial judge used the "prevalent attitude of society" towards non-whites as evidence upon which to draw an inference in this case, she erred, as there were no facts in evidence from which to draw that inference. It would be stereotypical reasoning to conclude that, since society is racist, and, in effect, tells minorities to "shut up," we should infer that this police officer told this appellant minority youth to "shut up." This reasoning is flawed.

[10] Trial judges have to base their findings on the evidence before them. It was open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied. This was not done. For the trial judge to infer that based on her general view of the police or society is an error of law. For this reason there should be a new trial.

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[13] The life experience of this trial judge, as with all trial judges, is an important ingredient in the ability to understand human behaviour, to weigh the evidence, and to determine credibility. It helps in making a myriad of decisions arising during the course of most trials. It is of no value, however, in reaching conclusions for which there is no evidence. The fact that on some other occasions police officers have lied or overreacted is irrelevant. Life experience is not a substitute for evidence. There was no evidence before the trial judge to support the conclusions she reached.

[14] The trial judge could not decide this case based on what some police officers did in the past without deciding that all police officers are the same. As stated, the appellant was entitled to call evidence of the police officer's conduct to show that there was in fact evidence to support either his bias or racism. No such evidence was called. The trial judge presumably called upon her life experience to decide the issue. This she was not entitled to do.

[15] The bedrock of our jurisprudence is the adversary system. Criminal prosecutions are less adversarial because of the Crown's duty to present all the evidence fairly. The system depends on each side's producing facts by way of evidence from which the court decides the issues. Our system, unlike some others, does not permit a judge to become an independent investigator to seek out the facts.

[16] Canadian courts have, in recent years, criticized the stereotyping of people into what is said to be predictable behaviour patterns. If a judge in a sexual assault case instructed the jury or him- or herself that because the complainant was a prostitute he or she probably consented, or that prostitutes are likely to lie about such things as sexual assault, that decision would be reversed. Such presumptions have no place in a system of justice that treats all witnesses equally. Our jurisprudence prohibits tying credibility to something as irrelevant as gender, occupation or perceived group predisposition.

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[18] It can hardly be seen as progress to stereotype police officer witnesses as likely to lie when dealing with non-whites. This would return us to a time in the

history of the Canadian justice system that many thought had past. This reasoning, with respect to police officers, is no more legitimate than the stereotyping of women, children or minorities.

[19] In my opinion the comments of the trial judge fall into stereotyping the police officer. She said, among other things, that police officers have been known to mislead the courts, and that police officers overreact when dealing with non-white groups. She then held, in her evaluation of this particular police officer's evidence, that these factors led her to "a state of mind right there that is questionable." The trial judge erred in law by failing to base her conclusions on evidence.

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[23] I agree with the approach taken by Cory J with respect to the nature of bias and the test to be used to determine if the words or actions of a judge give rise to apprehension of bias. However, I come to a different conclusion in the application of the test to the words of the trial judge in this case. It follows that I disagree with the approach to reasonable apprehension of bias put forward by Justices L'Heureux-Dubé and McLachlin.

[24] The error of law that I attribute to the trial judge's assessment of the evidence or lack of evidence is sufficiently serious that a new trial is ordered.

[25] In the result, I would uphold the disposition of Flinn JA in the Court of Appeal (1995), 145 NSR (2d) 284, and dismiss the appeal.

V. LAW AND ECONOMICS

A. INTRODUCTION

Both positivism and natural law are concerned with concepts of law and justice, even if they diverge as to how the two relate to one another. Both are also based largely on Western, liberal ideas about law and society. In contrast, feminism and critical studies take issue with the liberal basis of law and its relationship to justice; both attempt to establish alternative visions of what justice might be. Law and economics theories look at law from another perspective, grounded less in moral theory and more in ideas about efficiency. As with the other theories, however, law and economics seeks to explain law in operation.

Law and economics scholars have applied economic analysis to explain contract law, crime, torts, family law, property, legislation, abortion, and more: see generally, Ronald Coase, "Economics and Contiguous Disciplines" (1978) 7:2 J Legal Stud 201 and Richard Posner, *The Economic Analysis of Law*, 9th ed (New York: Wolters Kluwer Law & Business, 2014). As in other perspectives on law, there is no single approach to linking law and economics. However, most of the work in this area originated out of the "Chicago School" in the 1970s, which had a strong free-market, neo-liberal, philosophical base.

A traditional law and economics approach applies economics methodology to legal rules in order to assess whether the rules will result in outcomes that are efficient. Efficiency tends to be defined in terms of an ideal where the welfare of each of the relevant parties can no longer be maximized except at the expense of other parties, referred to as a state of "Pareto optimality." In this regard, law and economics is sometimes criticized as ignoring questions respecting distributive justice. Central to all economic analysis is the assumption that human beings are rational actors. Individuals have preferences and act in order to achieve those preferences; they act as if they were rational maximizers of their welfare. This form of analysis was first applied on common law rules developed in private law areas such as torts and contracts. (It is worth noting that behavioural economists have more recently critiqued the very idea of individual rational actors: see e.g. Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).)

B. PUBLIC LAW AND ECONOMIC THEORY

1. Overview

Like law and justice, however, justice and efficiency are often interrelated. For one, governments have to consider the costs of providing and maintaining the institutions of justice. But more broadly, to the extent that justice involves considerations of utility, efficiency can be seen as a concept concerned with maximizing justice.

An economic approach similar to that employed for private law can therefore be used to understand policy goals in the public realm. The economic theory of regulation, or public choice theory, applies basic economic theory in an attempt to understand public policy. It attempts to explain government intervention as a "corrective" to market failure. The theory seeks to understand why some government programs seem to run counter to the public good, or at least do not maximize the public good. In its pure form the economic theory of public law begins at the same place as the economic theory of private law: policy-makers are assumed to act in order to maximize political support. They are not necessarily attempting to maximize social welfare, therefore, but are motivated largely by self-interest: see J Buchanan & R Tollison, eds, *The Theory of Public Choice—II* (Ann Arbor, Mich: University of Michigan Press, 1984) and Arthur Pigou, *The Economics of Welfare*, 4th ed (London: Macmillan, 1932).

A basic proposition of public choice theory is that diffuse and fragmented groups are less effective than more focused and concentrated groups in achieving success in the political arena and in influencing legislators and regulators: see I McLean, *Public Choice: An Introduction*, 2nd ed (Oxford: Blackwell, 1996) and D Mueller, ed, *Perspectives on Public Choice* (New York: Cambridge University Press, 1997).

If both these expectations are true, one might expect legislation to favour the self-interest of legislators and/or the interests of powerful social groups. There is an echo, therefore, in the public choice critique of the complaints voiced by the CLS and feminist scholars. Ask yourself, as you progress through these materials, whether Canadian public law sufficiently guards against these predicted outcomes.

2. Time Value of Money: An Example

One of the themes in public law is to show how common law has been displaced by policy formulation (in the form of legislation) as the primary means of social regulation: see E Rubin, "Law and Legislation in the Administrative State" (1989) 89 Colum L Rev 369. A number of important questions, therefore, lie at the heart of this analysis: What, in economic terms, is the problem that a legal rule or structure is attempting to resolve? What effect does this rule have on society? Why do we have the laws that we have? Should we have different laws?

Consider how the Supreme Court of Canada relies on some basic economic theory about the value of money and its relationship to contractual breaches in the following decision.

Bank of America Canada v Mutual Trust Co

2002 SCC 43, [2002] 2 SCR 601

[The appellant, Bank of America Canada, had advanced money to a developer, and the respondent, Mutual Trust, had undertaken to advance money to the purchaser of houses being built by the developer in a device called a "Takeout Mortgage Commitment" (TOC). The developer assigned its rights against Mutual Trust to Bank of America Canada. The funds advanced by Mutual Trust under the TOC would have discharged the loan made by Bank of America Canada to the developer. Mutual

Trust backed out of the deal when the real estate market collapsed in the early 1990s. The amount of Bank of America Canada's loss was about $10 million—the difference between what it was owed and what it recovered when it sold the development after Mutual Trust's default.

The trial judge awarded interest on this amount at a compound rate that reflected the interest rate charged in the agreement between the parties. Mutual Trust appealed. The Ontario Court of Appeal allowed its appeal, relying on s 128 of the *Courts of Justice Act* in substituting a simple interest rate for the compound rate allowed by the trial judge. The difference between the two amounts was in the order of $5 million. Bank of America Canada appealed. The Supreme Court upheld the trial court's original approach, contemplating in a part of the judgment the economic concept of the "time-value" of money.]

MAJOR J:

VI. Analysis

A. Jurisdiction

(1) The Time-Value of Money

[21] The value of money decreases with the passage of time. A dollar today is worth more than the same dollar tomorrow. Three factors account for the depreciation of the value of money: (i) opportunity cost (ii) risk, and (iii) inflation.

[22] The first factor, opportunity cost, reflects the uses of the dollar which are foregone while waiting for it. The value of the dollar is reduced because the opportunity to use it is absent. The second factor, risk, reflects the uncertainty inherent in delaying possession. Possession of a dollar today is certain but the expectation of the same dollar in the future involves uncertainty. Perhaps the future dollar will never be paid. The third factor, inflation, reflects the fluctuation in price levels. With inflation, a dollar will not buy as much goods or services tomorrow as it does today ... The time-value of money is common knowledge and is one of the cornerstones of all banking and financial systems.

[23] Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.

[24] Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard practice of both the appellant and respondent.

(2) Contract Damages

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(b) Restitution Damages

[30] The other side of the coin is to examine the effect of the breach on the defendant. In contract, restitution damages can be invoked when a defendant has,

as a result of his or her own breach, profited in excess of his or her expected profit had the contract been performed but the plaintiff's loss is less than the defendant's gain. So the plaintiff can be fully paid his damages with a surplus left in the hands of the defendant. This occurs with what has been described as an efficient breach of contract. In some but not all cases, the defendant may be required to pay such profits to the plaintiff as restitution damages. ...

[31] Courts generally avoid this measure of damages so as not to discourage efficient breach (i.e., where the plaintiff is fully compensated and the defendant is better off than if he or she had performed the contract) ... Efficient breach is what economists describe as a Pareto optimal outcome where one party may be better off but no one is worse off, or expressed differently, nobody loses. Efficient breach should not be discouraged by the courts. This lack of disapproval emphasizes that a court will usually award money damages for breach of contract equal to the value of the bargain to the plaintiff.