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Editorial

This volume of *Appeal: Review of Current Law and Law Reform* is the journal's fifth. In its short lifetime, *Appeal* has carved itself a distinct place in the world of law journals: it publishes submissions exclusively from students across Canada, and it is entirely student-produced. The journal aims to provide a unique perspective on current legal issues — the perspective of future lawyers and legislators.

In this volume, we are proud to present articles on a variety of emerging issues in the law. Our Feature Articles cover topics ranging from Islam and human rights to DNA data banks. The winner of the 1999 Cassels, Brock & Blackwell Paper Prize, Marie-Adrienne Irvine, surveys the Supreme Court of Canada's equality-rights jurisprudence, and draws attention to trends apparent in this complex body of law. Isha Khan considers the often conflicting relationship between Islamic law and international human rights standards; she considers a cultural relativist position as a response to this conflict. John Philippe Schuman examines a child's right to consent to medical treatment, and argues that parents should not be able to override their child's informed decisions. Christa Scowby, meanwhile, looks at the use of DNA evidence and canvasses the problems involved in the government's plan to store DNA evidence in a data bank, for use in criminal prosecutions.

In our Trends and Developments section, DNA evidence recurs as a topic. Richard Overstall tackles the "math phobia" of judges and lawyers, arguing that probability theorems present an avenue for evaluating DNA evidence. Gavin Last evaluates the controversial decision of the Alberta Court of Appeal in *Ewanchuk*, in relation to the feminist analyses suggested by Catharine MacKinnon and Robin West. This decision saw the Court acquit a man for sexual assault, in part on the basis that the complainant was a single mother who "did not present herself ... in a bonnet and crinolines." Conrad Nest, in an article intriguingly titled "From 'ABBA' to Gould," looks at the development of personality rights in Canadian law. Gavin Sinclair delves into the troubling attacks upon the judiciary in a new era of criticism and public visibility for the courts.

We hope you will enjoy this array of legal scholarship, and we look forward to continuing *Appeal*'s tradition of publishing the best of student writing.

The Appeal Editorial Board

The Courts Under Seige: How the New Charter Politics are Affecting the Judiciary

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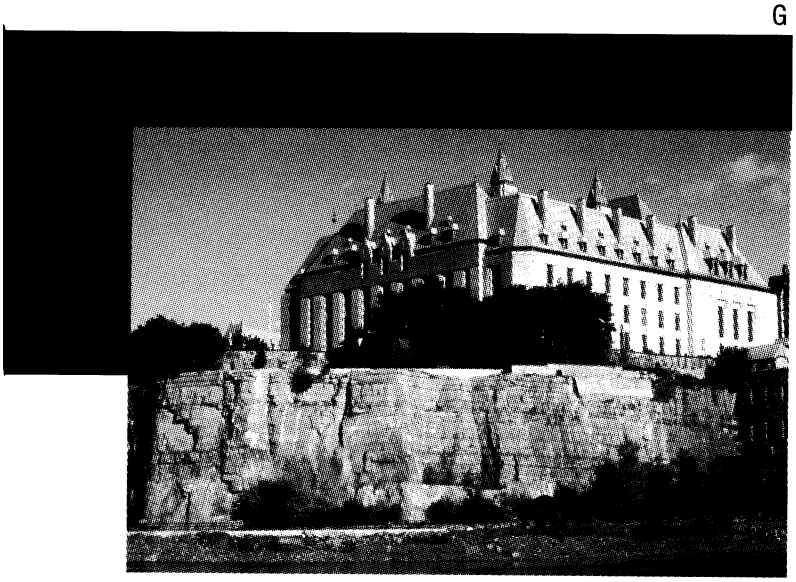
In the spring of 1998, Alan G. Gold, president of the Criminal Lawyers' Association wrote an open letter to the press. In it, the lawyer argued that recent criticism of the Supreme Court of Canada was an "ill-conceived and misguided application of parliamentary supremacy doctrine and an unfair attack on an institution that cannot as a matter of law defend itself."[1] Gold's letter was sparked by a Reform Party initiative in which the party conducted a systematic parliamentary examination of Supreme Court decisions based on the Charter of Rights and Freedoms[2] — an imperative of Reform's program to stop the growing usurpation of the role of elected politicians by judges.[3]

Such exchanges are growing more frequent as academics, the media and the public debate the role of the judiciary in Canada. In recent years, the enactment of the Charter and a shift in ideology among the Supreme Court justices have altered the role of the judiciary and increased the relative importance of policy considerations in litigation. However, despite the rhetoric of supporters of parliamentary supremacy and the often defensive posture of the courts, it is unlikely that the judiciary can or will revert to the less interventionist decision-making model of the past. The new judicial activism and the corresponding criticism that has been levelled at the courts are an inevitable result of the Charter and the broad, purposive approach that the judiciary has developed to aid in the protection of the rights that it enshrines.

The Supreme Court of Canada — Pre-Charter

Although the Supreme Court was created in 1875, it only replaced the Judicial Committee of the Privy Council as Canada's ultimate constitutional arbiter in 1949, when the Statute of Westminster was passed. At that time, the doctrine of parliamentary supremacy guided the decisions of the Supreme Court. Only procedural and administrative rules constrained the law-making powers of Parliament or the legislatures, as long as they stayed within their respective jurisdictions. Therefore, the majority of the Court's constitutional decisions involved striking down laws that violated the division of powers between Ottawa and the provinces, enumerated in sections 91 and 92 of the Constitution.[4] For the most part, this arrangement meant that the Supreme Court left evaluations of the substantive merits of legislation to elected legislators and concerned itself with "declaring" the law to interested parties.[5]

1 "Judge Not, Lest Ye Be Judged," *The Ottawa Sun* (July 5, 1998) C2.
2 Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11; hereinafter referred to as "the Charter."
3 Gabrielle St-Hilaire, "Constitutionally Ripe Entitlement: Chipping Away at the Definition of Spouse in *Rosenberg* v. *Canada*" (1997-98) 8 Canadian Current Tax 117 at 124.
4 Constitution Act,1982, see note 2.
5 Peter Hogg, *Constitutional Law of Canada* (Toronto, ON: Carswell, 1997) at 122.



SUPREME COURT OF CANADA

Two Models of Judicial Decision Making

In his renowned 1968 article, Paul Weiler describes two models of judicial decision making.[6] The "declaratory" model of judicial dispute resolution competes with the "policy-making" approach. The declaratory model embodies the traditional perspective Canadian courts had of their role in the legal process. The model conceives of the judge as an adjudicator of specific, concrete disputes. It mandates that judges decide cases by the mechanical application of legal rules, which they find already established in the legal system. These rules are binding on judges — a judge's personal opinion as to a rule's wisdom is irrelevant.[7] Inherent to the model is an acceptance that the judge's task is to settle present disputes, not engage in future oriented debates over general policy questions. For the model to function properly, it is essential that there be an existing framework of applicable standards. This ensures a consensus between the judge and the litigants that the judge, in settling the dispute, will apply only those rules that could reasonably be anticipated by the parties to govern their conduct. When these requirements are met, the parties can expect both a reasonable certainty in the law and the way in which it will be applied by courts.

The principles of certainty and judicial restraint are much less central in the "policy-making" approach. Instead, this second approach is founded on American legal realism which posits that the mechanical application of rigid, automatic rules (i.e. strict *stare decisis*) cannot adequately dispose of individual cases. The policy-making model contemplates judges as, "political actors, continuously engaged in the formulation of policy for society" and therefore judges make policy, or *legislate*, through essentially the same reasoning as other actors in the governmental system.[8] Moreover, at least for some judges, such political action is becoming their primary concern and, consequently, adjudicating specific disputes is subordinated.[9]

The trouble with the policy-making model is clear. The Legislature's policy-making power has traditionally been distinguished from that of the court because of the authority and legitimacy given to politicians by the electorate. The Anglo-Canadian parliamentary model of government stresses that only the representative legislator can "make law" because

6 Paul Weiler, "Two Models of Judicial Decision Making" (1968) 46 Canadian Bar Review 407.
7 See above at 410.
8 See above at 411.
9 See above.

only elected legislators have the consent of the people to govern.[10] For this reason, it is theoretically unjust for judges to engage in political decisions since they are neither representative of, nor responsible to, the Canadian citizen.

These issues were examined by the Supreme Court of Canada in *Harrison* v. *Carswell*.[11] In that 1976 case, the Court was asked to balance the traditional right to private property with the right to strike. The case raised fundamental questions as to the role of the Court under the Constitution and the extent to which it should decide policy questions. Justice Dickson, writing for the majority, expressed the view that:

> I do not for a moment doubt the power of the Court to act creatively. . . but manifestly one must ask — what are the limits of the judicial function? Cardozo, *The Nature of the Judicial Process* (1921) p. 141 recognised that the freedom of the judge is not absolute: A judge may not innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles.[12]

Justice Dickson went on to conclude that substantial changes in the law should be made by the enacting institution (the Legislature), which is a representative of the people and designed to manifest the political will, and not by the Court.[13] In a strong dissent however, Chief Justice Laskin wrote that the Supreme Court of Canada should not pay a mechanical deference to *stare decisis* but instead could play a progressive, balancing role, without yielding place to the Legislature. Justice Laskin argued, "this Court, above all others in the country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to them."[14]

It is interesting that the differences between Justice Dickson's majority opinion and Justice Laskin's dissent do not stem from legal issues but instead centre on the limits of the Supreme Court's authority. The two judges agreed that there was a serious legal problem raised by the *Harrison* case; however, Laskin argued that the Supreme Court should solve it, while Dickson maintained that law reform should be the business of the Legislatures, not the courts.[15] Despite the decision in *Harrison*, it is evident that Laskin's more interventionist approach eventually succeeded.[16] Courts now routinely decide difficult policy questions that may have significant political ramifications. In large part, the success of this approach may be attributed to the augmented powers conferred on the courts by the Charter.

The Supreme Court of Canada — Post-Charter

The Charter fundamentally altered the Supreme Court of Canada's constitutional mandate from mere interpretation of division of power disputes to the more complicated task of striking down legislation that violated the Charter rights of Canadians.[17] Section 52 of the Constitution states that it is the supreme law of Canada and that "any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[18] Section 52 has impelled the Supreme Court of Canada to declare that its paramount duty is to be the "Guardian of the Constitution."[19]

Guarding Charter values, that are often vaguely defined, has required the Supreme Court to rely much more heavily on policy considerations and consequently, ushered in a new era of "judicial activism." Constitutional scholar Professor Peter Hogg writes:

> The major effect of the Charter has been the expansion of judicial review. Not only

10 John Locke, *Of the Extent of Legislative Power*, The Second Treatise (Cambridge and New York: Cambridge University Press, 1960).
11 *Harrison* v. *Carswell*, [1976] 2 Supreme Court Reports 200; hereinafter referred to as "Harrison."
12 See above at 236.
13 See above at 236.
14 See above 206.
15 F.L. Morton, *Law, Politics and the Judicial Process in Canada*, (Calgary: University of Calgary Press, 1994).
16 Curiously, Dickson seems to have changed his mind in later years. After the enactment of the Charter, Dickson advocated a broad purposive approach rather than a narrow, restrictive interpretation. Perhaps he felt that the Charter could be interpreted in a way that embraced the canvassing of difficult policy issues. See "Dickson Discourages Mechanical Legalism" *Globe and Mail* (5 October, 1985).
17 So too for the other superior courts. Some commentators have suggested that the Charter has not resulted in a redistribution of power from the state to individuals, or from privileged groups in society to disadvantaged ones. Rather, the redistribution is institutional, from representative bodies to the courts. See Gareth Morley, "A Just Measure of Pain? Sentencing and Sentencing Reform in the Era of the Charter" (1997) 55 University of Toronto Faculty of Law Review 269 at 271.
18 Part VII of the Constitution Act, 1982, see note 2.
19 *Hunter* v. *Southam*, [1984] 2 Supreme Court Reports 145 at 169. It has been argued however, that the approach taken by some Supreme Court justices has so extended the reach of the Charter that the Court has in effect been acting as the "author of the Constitution." See Robert E. Hawkins & Robert Martin, "Democracy, Judging and Bertha Wilson" (1995) 41 McGill Law Journal 1 at 13.

> are Charter cases more numerous than federalism (division of power) cases were, they are also much more policy laden. This is because many of the Charter rights are expressed in exceedingly vague terms, and all of the rights come into conflict with other values respected in Canadian society. The result is that judicial review under the Charter involves a much higher component of policy than any other line of judicial work.[20]

Courts quickly applied the Charter to wield new authority. In November 1982, Jules Deschenes, then Chief Justice of the Quebec Superior Court, stated: "when lawmakers don't pass laws that are in keeping with changing social conditions, it is up to judges to exercise their legislative power and change the law to suit the time."[21] In the early years after the enactment of the Charter it seemed as if the courts' more interventionist approach would go unchallenged. Indeed, Professor Hogg comments:

> Curiously, judicial activism has not been accompanied by the public controversy that has now become the standard fare of politics in the United States. It is not clear whether this was because Canadians are more respectful of their Court or because they are less disturbed by the liberal outcomes.[22]

Recent events, however, suggest that the subject of judicial activism has become much more of a media and political issue. In particular, the Supreme Court's use of the controversial remedy of "reading-in" has precipitated considerable debate.

"Reading-in": A Reasonable Remedy for Unconstitutional Legislation?

Section 52(1) of the Constitution has overriding effect against any unconstitutional laws of Canada and is the chief source of remedies available for violations of the Constitution.[23] Read strictly, section 52(1) appears to contemplate that only a holding of invalidity will serve as a remedy for an inconsistency between the Constitution and a statute. In practice however, the Supreme Court has developed a number of variations on the simple declaration of invalidity.[24] These remedies range from nullification (striking down) and severance (removing the offending section without striking down the entire statute) to the most interventionist remedy of "reading-in."

The Supreme Court assumed the power to "read-in", or add words to a statute to make it constitutional, in *Schacter* v. *Canada*.[25] In *Schacter*, biological parents claimed child care benefits that were conferred only on adoptive parents by the Unemployment Insurance Act. The Act treated adoptive parents more generously than biological parents and the Court found that this violated section 15 of the Charter, the provision guaranteeing equality. The most obvious remedy was to strike down the Act; however, this would have resulted in the denial of benefits to all parents. Therefore, the Court held that it possessed the power not only to sever language from a statute but also to "read-in" new language in order to remedy a constitutional defect. The Court acknowledged that reading-in would constitute a substantial intrusion into the legislative domain and stated that the remedy would only be used in the clearest of cases such as:

1) where the addition of the excluded words were consistent with the legislative objective;
2) there seemed to be little choice as to how to cure the constitutional defect;
3) the reading-in would not involve a substantial change in the cost or nature of the legislative scheme;

20 See note 5 at 630.
21 *Globe and Mail* (12 November, 1982) A16.
22 See note 5 at 631.
23 The Charter possesses its own remedy clause (section 21(1)) but it is only applicable to Charter breaches while section 52(1) applies to the entire Constitution.
24 See note 5 at 745.
25 *Schacter* v. *Canada*, [1992] 2 Supreme Court Reports 679; hereinafter referred to as "*Schacter*."

4) the alternative of striking down the under-inclusive provision would be an inferior remedy.[26]

Ultimately in *Schacter*, the Supreme Court did not read-in, but instead declared the Unemployment Insurance Act invalid and suspended the application of the judgment for a sufficient time to enable Parliament to amend the Act.[27]

Perhaps the most controversial example of reading-in occurred in the recent decision of the Supreme Court of Canada in *Vriend* v. *Alberta*.[28] Vriend challenged the Alberta Individual Rights Protection Act. He argued that the omission of sexual orientation as a ground of discrimination violated section 15 of the Charter. The Supreme Court agreed that the Charter was violated but was divided over the appropriate remedy. Justice Iacobucci held:

> In my view, the process by which the Alberta Legislature decided to exclude sexual orientation from the IRPA was inconsistent with democratic principles. . . I believe that judicial intervention is warranted to correct a democratic process that has acted improperly. Therefore, I conclude that reading sexual orientation into the impugned provisions of the IRPA is the most appropriate way of remedying this underinclusive legislation.[29]

Justice Major disagreed on the remedy that was applied by the majority. Major was of the view that the reading-in was only appropriate where it could be safely assumed that the Legislature itself would have remedied the underinclusiveness by extending the benefit or protection to the previously excluded group. He found, however, that the Legislature's opposition to including sexual orientation as a prohibited ground of discrimination was abundantly clear on the record and concluded:

> Except in the clearest of cases, courts should not dictate how underinclusive legislation must be amended. . . I would therefore order that the declaration of invalidity be suspended for one year to allow the Legislature an opportunity to bring the impugned provisions into line with its constitutional obligations.[30]

The decision of the Court to read provisions into the Act came under intense criticism, especially by commentators who construed the decision as an example of the Court acting in a legislative capacity contrary to the intent of the provincial government.[31] The Edmonton Sun newspaper wrote that the decision demonstrated that:

> Judges are one of the most powerful forces in the country. . . . And they're getting more powerful by the day as a new wave of groovy '90s judges shed their solemn role as arbiters of the law to become bench crusaders for various left-wing and self-interest causes.[32]

Criticism of the Judiciary — The Judges React

Recent comments by Chief Justice Antonio Lamer show that the judiciary is well aware of the increasing attacks on the Supreme Court and its vulnerability to such criticism. In July 1998, Justice Lamer lamented that "judges have no voice and no champion to defend them against unfair criticism."[33] The Chief Justice stressed that the judiciary is very, very fragile and noted, "we must be careful not to bash it too hard. Criticize it, watch it, control it properly, yes. But judge-bashing must stop."[34] It is clear however, that while judges are concerned about ongoing public and media criticism, they have different opinions on how to deal with it.

Some judges assert that undue media criticism is taking an unfair toll. Justice Brossard of the Quebec Court of Appeal has stated that "judge-bashing has now become a national sport,"[35] and warned the media that by criticising the judiciary it only winds up

26 See above at 718.
27 This remedy can accomplish the same effect as reading-in to a statute although the result is delayed. It is unclear why the Supreme Court decides to read-in. There are a number of other cases where the Court has decided to temporarily suspend the application of an order as opposed to reading-in. See *Re Manitoba Language Rights*, [1985] 1 Supreme Court Reports 721; *R.* v. *Mercure*, [1988] 1 Supreme Court Reports 234; *Sinclair* v. *Paquette* [1992] 1 Supreme Court Reports 579.
28 *Vriend* v. *Alberta*, [1998] 1 Supreme Court Reports 493; hereinafter referred to as "Vriend."
29 See above at 592.
30 See above at 597.
31 Some commentators have posited that there is no conflict between judicial review and democracy when there are indications that a legislative decision was not reached in accordance with democratic principles. If so, there has been a systematic malfunction of the democratic process. Judicial intervention can be justified therefore, as a correction of that malfunction rather than as the overturning of a truly democratic choice. See W. Black, "Vriend, Rights and Democracy" (1996) 7 Constitutional Forum 126 at 128. Of course, this rationalization assumes that judges are better able then elected politicians to determine what is "truly democratic."
32 "Justice Takes a Giant Step Forward," *The Edmonton Sun* (29 September, 1998) p.11.
33 "CBA Moves to Battle 'Judge-bashing,'" *The Lawyers' Weekly* (14 September, 1998) XXX.
34 See above.
35 "Quebec Jurist Slams 'Judge Bashing' Media," *The Toronto Star* (23 February, 1994) A15.

hurting itself because ultimately, it is judges who safeguard press freedoms. Justice Brossard commented:

> If you destroy the Canadian judicial system by systemically attacking its integrity, you are, in the long term, and please don't ever forget it, destroying your own basic fundamental right to freedom of expression which encompasses freedom of the press.[36]

Brossard's opinions are in contrast to those of Justice Trafford of the Ontario Court of Justice, General Division. Trafford has commented that the freedom of individuals to discuss information about the institutions of government is crucial to democratic rule and the liberty to criticize and express dissenting views has long been regarded as a safeguard against state tyranny and corruption. Consequently, "as a result of the significant role the courts play in any democratic society, they and their processes must be open to public scrutiny and public criticism. Public review is critical to the rule of law."[37]

It is becoming evident, though, that judges, at least on an individual level, feel that the examination to which their decisions are subjected and their relationship with the public have become somewhat unbalanced. Indeed, Chief Justice Lamer has recently gone so far as to suggest the judiciary's strong tradition of silence may have to be revisited and that judges might begin to participate in public debate to defend their decisions.[38] According to Lamer, judicial silence sometimes means that the public misses out on a full understanding of what the courts are doing and why. Therefore, public debate on issues that come before the courts, and indeed on the role of the judiciary itself, is not as full as it should be because the perspective of the judiciary is usually absent.[39] Recently, the Chief Justice wrote:

> I don't blame anyone for the fact that the tradition of support for the judiciary has faded. It strikes me that it may be another inevitable by-product of the Charter. Perhaps as judicial decisions have become more entwined with political issues, the more difficult it has become for public figures and lawyers themselves to speak up [in order to defend the courts].[40]

Conclusion

It is unlikely that the judiciary will fully regain the deference that many of its members feel it has lost. The Charter has undoubtedly increased the authority of the courts and the extent to which their decisions reach into the lives of everyday Canadians. It appears however, that this new clout comes with a corresponding cost. In an article printed in *The Globe and Mail* weeks before his death, Supreme Court Justice John Sopinka examined the growing criticism of the courts. He remarked that the Charter had politicized the court and made it vulnerable on two main fronts: special interest groups who seek to influence the courts' decisions and elected politicians who, spurred on by public clamour, indulge themselves in public criticism of judges and even demands for discipline. Sopinka noted:

> The paradox created by the Charter is that it was adopted by means of a democratic process to protect the individual against an abuse of power by the majority, but many feel that it is undemocratic for unelected judges to overrule the majority. . . The unfortunate fact is that the Charter has turned the court into the messenger who is likely to get shot for bringing bad news.[41]

Ultimately, this paradox created by the Charter is probably intractable. Like so many of the decisions that it is applied to, the inherent process of even applying the Charter requires a weighing of disparate interests to achieve a reasonable balance. In the end, the new politics of litigation mean that politicians will have to get used to reduced authority and the judges will have to accept being treated like publicly accountable officials.

36 See above.
37 *The Toronto Star* (26 February, 1998) A22.
38 Other judges seem to disagree with Justice Lamer. Justice Esson of the British Columbia Court of Appeal has commented, "I agree with those who say that judges should stay out of public debates and should accept narrow constraints on their freedom of speech. We all come to the bench as captives, in some degree, of our backgrounds. . . our duty is to do justice according to the law. That requires that we decide the cases before us without allowing our personal views to enter into the process of making decisions. We will be better able to do that if we refrain from publicly expressing personal views." See "The Judiciary and Freedom of Expression" (1985) 23 University of Western Ontario Law Review 159 at 160.
39 See above at 35.
40 See above at 30.
41 *The Globe and Mail* (28 November, 1997) A21.

From 'ABBA' to Gould: A closer look at the development of Personality Rights in Canada

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* *The author would like to offer his sincerest thanks to Professor Robert Howell for his assistance on this paper.*

The commercial exploitation of the names and images of famous personalities, living and deceased, has become a highly lucrative practice in the 1990s. Key to the marketing potential of personality is the link in a consumer's mind between the celebrity and the product that he or she endorses.[1] The potential earnings from such exploitation of a celebrity's name or identity are almost unlimited with current advances in mass media information and communication technology. The emerging threat of unauthorized usurpation of personality rights has elicited concern regarding the uncertainty of the law protecting celebrity rights in Canada. When compared to the U.S., the intellectual property rights attached to living or deceased personalities in Canada have traditionally been less developed and adjudicated.

Recently, however, the situation has changed significantly. Three leading Ontario judgements and a Supreme Court of Canada decision have further developed the law relating to personality rights in Canada.[2] The disputes in these cases tend to focus on two central themes. The first is the balancing of the celebrity's right to control all uses of his or her persona against society's interest in free expression. The second is characterizing the action as a proprietary rather than a personal right such as privacy or libel. How much protection should be extended to celebrities or legates of the celebrity, where the impugned activity deals with thoughts, ideas, newsworthy events or matters of public interest? What is the current position on the tort of appropriation of personality in Canada, in light of the recent Ontario Court (General Division) and Appeal Court decisions in *Gould Estate* v. *Stoddart Publishing*[3] and that of the Supreme Court of Canada in *Les editions Vice-Versa* v. *Aubry*[4]? This essay will outline the development of the existing law in relation to personality rights in Canada, along with an analysis of the current trend in this field following the two leading cases, *Gould* and *Aubry*.

Development of Personality Rights in Canada

With relatively few exceptions, intellectual property is governed by federal law in Canada.[5] Federal statute law regulates patents, trademarks, copyright, moral rights, industrial designs and topography rights. The only provincially regulated aspects of intellectual property are the common law torts of passing off, appropriation of personality and confidential information, and the statutes in a few of the provinces[6] concerning privacy, including person-

1 Howell, Robert G. "Publicity Rights in the Common Law Provinces of Canada", 18 Loyola of Los Angeles Entertainment Law Journal 487.
2 *Gould Estate* v. *Stoddart Publishing* [1996], 15 Estates and Trusts Reports (2d) 167, hereinafter cited as "*Gould 1996*"; *Gould Estate* v. *Stoddart Publishing* [1998], 321 Dominion Law Reports (4th) 161 (Ontario Court of Appeal), hereinafter cited to Dominion Law Reports as "*Gould 1998*"; *Athans* v. *Canadian Adventure Camps Ltd. et al* [1977], 17 Ontario Reports (2d) 425, 80 Dominion Law Reports (3d) 583 (Ontario High Court), hereinafter cited to Dominion Law Reports as "*Athans*"; *Krouse* v. *Chrysler Canada Ltd. et al*, [1974] 1 Ontario Reports (2d) 225, 1974 40 Dominion Law Reports (3d) 15 (Ontario Court of Appeal); hereinafter cited to Dominion Law Reports as "*Krouse*".
3 *Gould 1996* and *Gould 1998*, See above.
4 *Les editions Vice-Versa* v. *Aubry* [1998], 1 Supreme Court Reports 591, 577 Dominion Law Reports (4th) 157; hereinafter cited to Dominion Law Reports as "*Aubry*"
5 The Copyright Act, Revised Statutes of Canada 1985, chapter C-42.

ality rights.[7] Traditionally, aggrieved celebrities seeking a remedy for an unauthorized appropriation of their persona have looked to the tort of passing off, registered trademarks, or legal protection of privacy under the provincial statutory torts of privacy.[8]

The statutory rights to privacy are primarily based on the protection of solitude and seclusion.[9] A privacy injury, as compared with an injury to publicity, is defined as, "the nature of infliction of mental suffering from a violation of seclusion."[10] An invasion of publicity rights, on the other hand, is an economic injury flowing from an unauthorized use of an asset.[11] It is unclear whether the statutes safeguard both privacy and publicity rights, or favour the protection of one over another. It has been argued that since there is a provision which extinguishes all statutory rights upon the death of the person whose privacy has been violated, this is more consistent with a protection of privacy.[12] The lack of judicial interpretation of the statutes makes the scope of statutory privacy protection uncertain and unpredictable.

Passing off actions and protections under trademark law do not provide complete immunity for celebrities wishing to safeguard their persona. Passing off is primarily a proprietary action, protecting the "business and goodwill" of the plaintiff.[13] The main requirement under the tort of passing off is the need to show an active misrepresentation that forseeably causes the public to be confused as to some association between the plaintiff's product and the defendant.[14] The problem for celebrities seeking to use this tort as a remedy for an appropriation may come with the strict test involved in the operation of the tort. The test, simply put, is that the parties must be in a common field of activity for the misrepresentation to be factual. Many celebrities are rarely, if ever, in the same field of activity as a supplier of the product marketed by use of the celebrity's personality, severely limiting passing off as a remedy for celebrities.[15] Additional difficulties for celebrities wishing to proceed under the tort are perhaps best highlighted by the case of *Lyngstad* v. *Anabas Products Ltd*, where the musical group ABBA was unable to obtain relief under the

6 British Columbia, Manitoba, Saskatchewan, Newfoundland and Civil Code protection in Quebec. Revised Statutes of British Columbia 1979 chapter 336, Revised Statutes of Saskatchewan 1978, chapter P-24; Revised Statutes of Manitoba1987, chapter P-125; and Statutes of Newfoundland 1981, chapter 6.

7 David Vaver, *Intellectual Property Law: Copyrights, Patents and Trade-marks* (Concord: Irwin Law, 1997) at 1-5.

8 See note 1 at 490-491.

9 British Columbia has added to the right to privacy and has created two separate torts: invasion of privacy and appropriation of personality. See note 1 at 7.

10 Robert G. Howell "The Common Law Appropriation of Personality Tort" (1986) Intellectual Property Journal 149 at 153-155.

11 See above.

12 This argument is based on the U.S. examples dealing with privacy rights, where it appears that privacy as a personal right is non-assignable and terminates upon death, *Lugosi* v. *Universal Pictures*, 603 Pacific 2d 4 25 Supreme Court of California (1979). See above at 161.

13 Smyth Lyons, "Legal Issues in the Creation, Management and Exploitation of Computer Databases". Found at http://www.smithlyons.ca/it/cme/pcs.htm on, November 1, 1998.

14 Howell, see note 1 at 490.

15 See the 'common field of activity' test originated in *McCulloch* v. *Lewis A. May Ltd.* [1947] 2 All England Reports 845 (House of Lords), though it was discredited in *Annabel's Ltd* v. *Schock* [1972] Reports of Patent Cases 838 (English Court of Appeal).

tort.[16] Recently, the test for passing off has become increasingly flexible. In *National Hockey League* v. *Pepsi-Cola Canada Ltd.,* Justice Harding of the British Columbia Supreme Court found that it is the product or business of the defendant that must be seen to be "approved, authorized or endorsed by the plaintiff."[17] The requirement of a misrepresentation, however, still presents a difficulty for celebrities wishing to proceed under this tort. At the same time, trademarks are difficult and expensive to establish, and have the additional capability of being challenged and struck out.[18] These inadequacies in alternate remedies led to the recognition and growth in the importance of personality rights at the common law level.

Personality rights in Canada, then, have come to be primarily protected by the tort of "appropriation of personality."[19] At common law, this tort has been seen as covering a person's commercial right to use their celebrated status as a source of income, or their "right to publicity".[20] The tort was first articulated by Justice Estey in *Krouse* v. *Chrysler Canada Ltd. et al.*[21] Estey held that the courts would be justified in finding a defendant liable for damages for appropriating a plaintiff's personality, where the appropriation amounted to "an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff."[22] The tort was limited to situations in which the name or image of the celebrity was used in advertising or promotion of a defendant's product or service, so as to imply that the celebrity endorsed the activity of the defendant.

It appears that the test for determining whether or not an appropriation has occurred is whether it would appear to the public that the plaintiff was endorsing the defendant's product. There does not appear to be a need to prove that the public is confused by a misrepresentation, as in the classic test for passing off.[23] The decision in *Athans* v. *Canadian Adventure Camps Ltd. et al*, following *Krouse*, adopted a similar test focusing more explicitly on misappropriations. The Court in *Athans* recognised that the plaintiff had a proprietary right "in the exclusive marketing for gain of his personality, image and name, and that the law entitles him to protect that right, if it is invaded."[24] The judgments in both cases appear to draw a distinction between circumstances in which the personality is used in some fashion and those in which the celebrity is the subject, (i.e. as in unauthorized biographies or plays offering insight into a celebrity).[25] This was a key issue in the *Gould* case, where the court dealt more fully with the public/proprietary versus private dimension of the tort.

Gould Estate v. Stoddart Publishing

It has been said regarding the *Gould* decision that, "no common law case or statute has breathed as much potential life into [personality rights] as the 1996 Ontario Court (General Division) summary judgment of Justice Sidney Lederman in *Gould* – at least until the Ontario Court of Appeal's ruling on the appeal of that decision."[26] The *Gould* decision, aside from being the only Commonwealth case regarding descendability of personality rights, is one of the most important judgments to develop and revive the tort of appropriation of personality in Canada. The facts in both motions were as follows: In 1956 Glenn Gould, a concert pianist not yet famous, was interviewed and photographed for an article in "Weekend Magazine" by a reporter. The meeting was arranged by Gould's publicist in the interest of promoting Gould. The interview took place at various venues over an extended

16 An illustrative case, *Lyngstad* v. *Anabas Products Ltd* [1977] Fleet Street Reports 62,68 (Chancery), highlights the limitation of passing off actions. The Court, in denying relief to the musical group "ABBA," noted that in order for passing off to provide effective relief, the element of association would need to be diminished in content to the level that the public believed that ABBA had given consent to have the group's image on the defendant's products. As quoted in Howell, see note 1 at 499-500. This same type of test was later adopted in Australia in *Pacific Dunlop* v. *Hogan* [1989] 87 Australian Law Reports 14, 45-46 (Federal Court of Australia); hereinafter cited as "Hogan."

17 *National Hockey League* v. *Pepsi-Cola Canada Ltd.* [1992] 42 Canadian Patent Reporter (3d) 390 as quoted in Howell, see note 1 at 501. This test built on the formulation in *Paramount Pictures Corporation* v. *Howley* [1991] 5 Ontario Reports (3d) 573, which adopted the Australian decision in *Hogan*, see above.

18 See note 16 at 26.

19 Michael D. Andrews and Angela Fulanetto, "Canada Strengthens Rights in Personality," Law Journal Extra (March 1997). Found at http://www.ipww.com/mar97//p25canada.html on November 1, 1998. Hereinafter cited as "Law Journal Extra."

20 See note 1 at 488.

21 See note 2.

22 See above at 238.

23 See note 1 at 493.

24 Law Journal Extra, see note 19 at 1.

25 See note 2 at 167.

26 Elise Ornstein, "Gould rulings leave personality misappropriation muddled" The Lawyers Weekly (11 September, 1998) at 9. Hereinafter cited as "The Lawyers Weekly."

period of time. The journalist used informal settings and recorded some of their conversations, while also taking 400 photos of Gould in various poses. Certain photographs and comments were used in the article. About 40 years later, the journalist decided to publish a book using 70 of the photographs from the 1956 interview, as well as drawing heavily on the recorded conversations. The estate claimed unsuccessfully for alleged infringement of copyright.

The reporter Carroll was held to be the owner of copyright in the photographs and the notes he had made. The estate alleged that the use of the photos constituted the tort of appropriation of personality. At trial, the issue, as articulated by Justice Lederman, was whether Gould had "any proprietary rights in his image, likeness or personality which had been appropriated by the publication of the photographs in the book."[27] Neither Gould, nor his estate, were at the time of his death or in the following 14 years publicly making use of Gould's persona. In fact, Gould was well known as a recluse who preferred to stay out of the limelight. This raised the question of whether the tort was capable of protecting what was in essence Gould's right to privacy. The loss was essentially a violation of his seclusion.

The tort had already been applied in a merchandising context in *Athans* and *Krouse*, but could it be extended to non-merchandizing or a privacy context? The Court decided that it was open for it to decide to limit the tort on a contextual basis to the merchandizing sphere, on the basis that all previous cases dealt with an appropriation in the merchandizing context.[28] Professor Howell has noted that this may overlook another case dealing with this issue, *Dowell* v. *Mengen*, where the Ontario High Court recognized the tort in a non-merchandizing context.[29] The potential privacy element of this tort had thus been left open for future cases to decide. The Court in *Gould* preferred to deal with the matter as one of public interest.

The claim by the Gould estate was denied. Echoing the concerns of Justice Estey in *Krouse*, the Court agreed that the right of personality should be limited by balancing the scope of the individual's right of publicity against the societal interests in free expression.[30] This is to be accomplished by examining whether the use of the celebrity's property predominantly serves a societal function valued by the protection of free speech or merely constitutes a commercial exploitation of the celebrity's persona.[31] The Ontario Court of Appeal agreed with the disposition of the case but based its decision on conventional principles relating to copyright[32] and refrained from addressing the case on the basis of the breach of publicity rights, preferring to rule on the basis of public interest in free expression.[33]

Howell, drawing from the principles articulated in *Krouse* and from the decisions to date, has classified the basic elements necessary to the current successful maintenance of an action in the tort of appropriation:

1. The plaintiff must be identified in the depiction.
2. The usage made by the defendant of the plaintiff's persona should be more than incidental or *de minimis*.
3. There is no express requirement of an intent to misappropriate, but all cases to date in Canada have involved intentional conduct.

27 See note 2 at 171.
28 See above at 175.
29 See note 1 at 495.
30 Undeniably the U.S. prefers much stronger protection of celebrity personality rights, and this influence seems to have permeated some of the underlying rationale of the Canadian provincial statutes protecting the right to privacy, and informed some common law decisions on this subject. The growing importance of personality rights, especially in the field of character merchandizing, is evidenced by the increasing amounts of litigation worldwide and certainly there is an interest in maintaining uniformity of law globally for all countries.
31 See note 26 at 9.
32 The defendant owned the copyright in the photographs and the tape-recorded words, so there was no need to proceed further on other issues.
33 See note 26 at 9.

4. There must be damage.[34]
5. There must not be a public interest in publicity that would counter any action for misappropriation.[35]

This, however, is a mere list of factors a court is likely to consider in rendering its judgment, and is not to be taken as a matter of settled law. Had the decision in *Gould* been argued at the Supreme Court of Canada, it would have introduced certainty into this common law area. To complicate matters further, following the decision in *Aubry*, it appears that in a privacy context (under the Quebec Charter), the level of protection afforded is greater than the level of the publicity protection currently available under the common law tort of appropriation of personality. This results in two contrasting levels of protection for publicity/privacy rights within a single country.

Les Editions Vice Versa Inc. v. Aubry

In *Aubry*, the respondent brought an action in civil liability against the appellants, a photographer and publisher of a magazine, for taking and publishing a photograph of the respondent sitting on the steps of a building. The photograph was taken in a public place and was published without the respondent's consent. The trial judge held that the unauthorized publication of the photograph constituted a violation of privacy and ordered the appellants to pay $2,000 jointly and severally. The majority at the Quebec Court of Appeal affirmed the decision.[36] The Supreme Court of Canada upheld the judgement and dismissed the appeal. The majority held that if the purpose of the right to privacy under section 5 of the Quebec Charter is to protect a sphere of individual autonomy, it must include the ability to control the use made of one's image.[37]

The Supreme Court of Canada recognized the conflict with the right to freedom of expression, protected by section 3 of the Quebec Charter, but held that this is a question that depends on the context of the situation. In *Aubry,* the context was establishing a balance between the subject's right to privacy and the alleged public interest in publishing the photograph. Thus, the Court concluded that an artist's right to publish is not absolute and cannot include the right to infringe, without any justification, on the rights of the subject of the work. The injured party need not be a celebrity. They must merely demonstrate that there was no sufficient public interest, in the publishing of a work, to which they did not consent, using the injured party's image, conversations or performances.[38] In order to claim for damages, however, it seems the plaintiff must show some proof of prejudice resulting from the publication.

This decision has ramifications in Quebec, and in the rest of Canada, if followed in the common law provinces. In Quebec, it extends the protection of personality to a non-merchandizing and non-celebrity context. Whether such an extension is sensible is highly debatable. One important concern might be the tremendous potential for a flood of litigation. For example, any person wishing to reproduce a photograph of any individual, celebrity or not, without getting consent from each and every person in every photograph, would be liable for loss of privacy. Regardless of the consequences of this decision, there is no doubt that the Supreme Court of Canada has now created two distinct approaches to personality rights in Canada. Individuals in Quebec, whether celebrities or not, are seem-

34 In *Krouse*, see note 2, damage was held to be whether the prospects of the plaintiff selling his endorsement to other sources had been lost or diminished and if so the quantum of such a loss. In *Athans*, see note 2, the formulation was the amount the plaintiff "ought reasonably to have received in the market for permission to publish the drawings" as quoted in Howell, see note 10 at 179.

35 See note 1 at 494-495.

36 See note 4 at 591.

37 See above.

38 See above at 591-593.

ingly entitled to stronger protection of their right to privacy, and perhaps publicity, than those in the rest of Canada.

Conclusion

Celebrities wishing to restrain publication of photographs and statements collected during interviews and private appearances cannot rely on the current scope of personality rights in Canada. In light of the decision in *Gould,* which emphasized the perspective of copyright rather than personality rights of the subject, and given the onerous requirements of trademark law and the narrow interpretation of rights under the tort of passing off, famous individuals should establish express limitations to the use of these materials. The tort of appropriation of personality is still a relatively recent development and will require more time to evolve. There is still no clear consensus as to the parameters of this tort at common law. Issues left unsettled by the law include whether the tort incorporates privacy protection in addition to the proprietary protections against unauthorized merchandizing and whether the tort extends to the context of non-merchandizing appropriation. Both unresolved issues create a great uncertainty in the law.

The decision of the Supreme Court of Canada in *Aubry* may considerably influence the future growth of this tort. The decision appears to extend the scope of personality rights significantly. The context of the decision, however, was limited to the Quebec Charter and did not specifically evaluate the common law personality rights in the rest of Canada. Therefore, the decision is not readily applicable to the common law provinces in Canada.

The current position in Canada remains uncertain. It is difficult to piece together the complex case law to summarize the extent to which individuals can currently protect their public and private rights under the tort of appropriation of personality. It is even more difficult to have two conflicting systems of protection within the same country. Some of the blame for the awkward development of personality rights in Canada can be placed on the courts who have been left to develop the law without much guidance.

It would greatly clarify the law in this area if the applicants in *Gould* had appealed the decision to the Supreme Court. Furthermore, a greater development of the "public interest test" (the balance to be established between the protection of persona and public right to freedom of expression) would also enhance the clarity and predictability of the publicity rights currently enforced. As it stands, the decision in *Gould* should be well heeded by all Canadians outside of Quebec, or visiting celebrities, who need to be aware of the danger of not explicitly reserving the right of publicity during public conversations and appearances.

Advances Less Criminal than Hormonal: Rape and Consent in *R. v. Ewanchuk*

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POSTSCRIPT:

The Supreme Court of Canada sided with Chief Justice Fraser's view in a unanimous decision released February 25, 1999.

Feminist theorist Catharine MacKinnon shocked us in 1983 by declaring that hetero-sexual intercourse is rape. She said: "[p]erhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance."[1] For most people, this pronouncement is outrageous — even offensive — in its challenge to "normal" sexual experience. After outrage, the next likely response would be to wonder how bleak MacKinnon's personal experience must have been to foster such a bitter critique. Sixteen years later, the world is surely different. After all, sexual assault laws now recognize the injustices historically perpetrated against women. Courts are taking women's accounts of rape more seriously. MacKinnon's theory, premised on the virtual sexual slavery of women, no longer seems relevant given these improvements in the status of women. At the very least, society's consciousness about the reality of rape has risen to an awareness that "no means no."

Unfortunately, the process of social enlightenment is not yet complete. In *R* v. *Ewanchuk,* the Alberta Court of Appeal upheld the trial acquittal of a man accused of sexual assault. The lone dissent of Chief Justice Fraser could not have been more scathing. She would have allowed the appeal and entered a conviction. Justices McClung and Foisey in their majority decision simply refused to contradict the trier of fact. *R.* v. *Ewanchuk*[2] is a problem for which the work of feminist legal theorists Catharine MacKinnon and Robin West has relevant application. *Ewanchuk* illustrates the continuing role of the law as a means by which male hierarchy controls women's sexuality, and the failure of the law to address sexual assault as experienced by women.

In the case, the 17 year old complainant met with the accused for a job interview which took place at Ewanchuk's van and attached trailer, parked in the lot of a large shopping mall in Edmonton. They eventually moved into the trailer, which served as Ewanchuk's shop for his custom wood-working business, because the complainant wanted to smoke a cigarette.

The complainant alleged that after entering the trailer, the accused, a larger and older

1 C.A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence (1983)" in K. Bartlett & R. Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 181 at 187.

2 *R.v. Ewanchuk*, (1998), 212 Alberta Reports 81 (Court of Appeal).

man, locked the door behind them. Ewanchuk then gave the complainant $100 as a gift for herself and her baby. In conversation, she revealed that she was an "open, friendly, and affectionate person; and that she often liked to touch people."[3] They touched and hugged. While at trial Justice Moore characterized these events as mutual, Fraser in her dissent clearly found that the complainant simply responded "yes" to Ewanchuk when he asked whether she was open, friendly and affectionate, and that the hugging was also initiated and pursued by Ewanchuk alone.[4] Ewanchuk told her that he wanted a massage. She then massaged him and allowed him to return the massage. During the two and a half hours that they were in the trailer, he did three things that formed the basis of the complaint. He attempted to touch her breast, to which she clearly said "no." Ewanchuk also rubbed his pelvic area against hers, to which she clearly responded "no." He finally pulled down his shorts and placed his soft penis on her pelvic area, to which she again said "no." When she eventually told him that she wanted to leave, they left together.

The context in which the activity took place becomes clearer with examination of the transcript of the complainant's testimony.[5]

> Q. When he laid on top of you, what were you doing?
>
> A. I was just laying there. I was – I didn't say anything. I didn't move.
>
> .....
>
> Q. At the time he said to you, Don't be afraid, were you afraid?
>
> A. Very afraid. He said to me, I had you worried, didn't I? You were scared weren't you? And I said, Yes, I was very scared. And I had been holding myself from crying, and I knew that the expression on my face was fearful, and I did have tears in my eyes, and then he just said, it's okay. And he went to hug me, and he just laid on top of me again and continued what he was doing.

3 See above at 86.
4 See above at 93.
5 See above at 94.

A. This whole time I barely said anything except for the times that I said, No, stop.

At trial, Moore stated that the young woman was a credible witness and that he believed that she was afraid. After considering if there were any reasonable (objective) grounds for her to feel afraid, he noted that "she did not communicate that she was frozen to the spot, and that fear prevented her from getting up off the floor and walking out of the trailer."[6] Although the question of how one communicates when they are "frozen" with fear was not asked (let alone answered), Moore determined that the Crown had to prove lack of consent and the accused's knowledge of lack of consent beyond a reasonable doubt. He determined that the Crown failed to do this, and Ewanchuk was acquitted.

On appeal, McClung, in his majority decision, held firmly to the position that "[t]he facts revealed by the record establish that the accused had no proven intention of forcibly pursuing his way with the complainant during the two and one-half hours they were alone in his trailer."[7] McClung determined that the evidence was not clear as to whether the complainant's concerns were the result of Ewanchuk's actions or "influenced by what she had learned on television."[8] There was evidence that the complainant had formulated a plan of "display of bravura confidence"[9] inspired by something she had seen on television. The program had presumably suggested this strategy as a means of preventing the escalation of violence in a sexual assault. One of the concerns following the decision was why McClung minimized the value of this plan since it actually succeeded. The fact that she stated that she was afraid of Ewanchuk also seems to have been ignored. McClung held that the size and age disparity between the two parties was not a significant factor. This begs the question: are physical size and seniority not significant factors when the issue is one of consent in circumstances of power imbalance? McClung then went so far as to assert that:

> ...it must be pointed out that the complainant did not present herself to Ewanchuk in a bonnet and crinolines. She told Ewanchuk that she was the mother of a six-month old baby and that, along with her boyfriend, she shared an apartment with another couple. (*I must point out these aspects of the trial record, but with no intention of denigrating her or lessening the legal protection to which she is entitled)* [emphasis added].[10]

McClung characterizes the incidents of unwanted sexual touching variously as "clumsy passes,"[11] "romantic intentions,"[12] "overtures,"[13] a "performance...[which] would hardly raise Ewanchuk's stature in the pantheon of chivalric behavior"[14] and "advances . . . less criminal than hormonal."[15] He concluded that the criminal intent of the accused as a matter of fact was not established at trial, and that fact could not be made the subject of an appeal. How is it possible to believe that the three admitted incidents of sexual touching were wanted? How could they not therefore constitute an assault?

MacKinnon's work suggests explanations for this apparent break-down of the justice system. Her theory is based on the premise that society is created and organized by sexuality. Sexuality is as important to society in a feminist theory as the idea of work is in defining society in Marxist theory. She maintains that: "Sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away."[16]

6 See above at 85.
7 See above at 87.
8 See above at 87.
9 See above.
10 See above.
11 See above.
12 See above at 88.
13 See above at 89.
14 See above.
15 See above at 91.
16 C.A. MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7:3 Signs: Journal of Women in Culture and Society 515.

The parallels between Marxism and feminism[17] are extensive and underline the centrality of sexuality to MacKinnon's theory of feminism. She argues that "[a]s the organized expropriation of the work of some for the benefit of others defines a class —workers — the organized expropriation of the sexuality of some for the use of others defines the sex, woman."[18] The control of women's sexuality through the "erotization of dominance and submission" is achieved through objectification of women, a process that methodically creates inequality and male directed social power.[19] The major task of feminism is to reveal the male perspective that is presented to the world as objective:

> This defines [feminism's] task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality.[20]

This strategy of claiming objectivity has become what MacKinnon calls "the law of the law."[21] She contends that the law "institutionalizes the objective stance as jurisprudence."[22] The blatant disregard for the experience of the complainant in *Ewanchuk* may thus be partly explained by the reluctance to overturn the "objective" findings of the trier-of-fact that are not objective at all, but an exercise in maintaining male control over women's sexuality by applying a male standard.

MacKinnon's approach has been the focus of criticism by a number of different theorists. Criticism by Robin West in particular recognizes the reaction of outrage by many women to MacKinnon's theories by maintaing that her theory simply does not coincide with women's reported experience. West agrees with MacKinnon up to the point that "[t]he cause of women's disempowerment, as well as its effect, is the expropriation of [women's] sexuality."[23] West disagrees, however, with three assumptions of radical feminism: firstly, that equal distribution of sexual power is what makes all women happy, secondly, that the focus of the feminist agenda ought to be the hierarchical source of women's suffering (rather than the quality of the suffering itself), and thirdly, that any evidence indicating that women desire anything other than empowerment can be dismissed as "false consciousness."[24] This assertion of the definitional nature of objective — "equality-of-sexual-power-as-subjective-good" — contradicts the importance of consciousness raising in the effort to insure that all women's voices are heard. The problem, according to West, is that:

> Women report — with increasing frequency and as often as not in consciousness-raising sessions — that equality *in sexuality* is not what we find pleasurable or desirable. Rather, experience of dominance and submission that go [sic] with the controlled, but fantastic, "expropriation" of [women's] sexuality *is* precisely desirable, exciting and pleasurable — in fantasy for many; in reality for some . . . . The conflict between felt pleasure and stated ideal has become a dilemma for radical feminism, but it has created an unprecedented debacle for our very young radical feminist theory, and one which threatens to be fatal.[25]

West identifies two strategies by which the problem is avoided: MacKinnon's reliance on false consciousness, and a liberal position that "fantasies are private and beyond political analysis; the role of the law should be to expand, not shrink, the options available to women, including the option, if freely chosen, of masochistic desire, fantasy, practise and pleasure."[26]

17 Note that MacKinnon means "radical" feminism when she says "feminism." Liberal and socialist feminism are simply liberalism and Marxism applied to women. "Radical feminism is feminism. Radical feminism — after this, feminism unmodified — is methodologically post-marxist." See note 1 at182. See also note 8: "This feminism seeks to define and pursue women's interest as the fate of all women bound together. It seeks to extract the truth of women's commonalities out of the lie that all women are the same."

18 See note 16 at 516.

19 See note 1 at 181.

20 See above at 182.

21 See above at 186.

22 See above.

23 R.West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" in A. Fineman & N.S. Thomadsen, eds., *At The Boundaries of Law: Feminism and Legal History* (New York: Routledge, 1991) 115 at 124.

24 See above at 125.

25 See above at 127.

26 See above.

West's approach to feminist theory, while different from MacKinnon's, also offers valuable insight into the *Ewanchuk* decision. West identifies an uncritical acceptance of the "separation thesis"[27] by legal theorists as central to patriarchal systems. "Official" liberal legalism and cultural feminism, as well as "unofficial" critical legalism and radical feminism, all accept — in differing and often oppositional ways — that we are "physically separate from all other human beings . . . and that distinction . . . is central to the meaning of the phrase 'human being.'"[28] The separation thesis, according to West, describes what it means to be male rather than female. She observes that: "Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women distinctively, are quite 'connected' to another life when pregnant."[29] West also identifies the connective role of heterosexual penetration which may lead to pregnancy, the potential of pregnancy represented by menstruation, and post-pregnancy breast-feeding.[30] Women are thus not essentially separate from others as they experience material and existential connection in life. The separation theory as a basis for legal and feminist theory consequently excludes women in a real way. The accepted definition of "human" is either clearly wrong, or must be understood to mean that women are not "human."[31]

One notable extension of West's theory is her assertion that women experience pleasure and pain subjectively and qualitatively in a different way than men. Women, she contends, also experience more pain quantitatively because "women often find painful the same objective event or condition that men find pleasurable."[32] West points to oxymorons such as "date-rape" and "sexual harassment" to illustrate semantically the dichotomy in the experience of pleasure for men and pain for women. West also sees pornography, and the fact that men simply do not experience the pain and threat of sexual harassment, assault or domestic violence, as evidence of the difference in the experience of pain for women.[33]

West identifies four reasons for the neglect of women's experience of pain by feminist legal theorists: the inadequacy of language, the psychological transformation of experience through false consciousness, the politics of women in general who are unable or unwilling to recognize their different pain, and most significantly, the application of non-feminist normative models which ignore the significance of women's subjectively different experience of pain.[34] She maintains that "because of the normative models employed by modern legal feminists, the internal, phenomenological reality of women's hedonic lives — and its difference from men's — has become virtually irrelevant in feminist legal theory."[35] The consequence of this is that legal theory and the legal system are based on a model of human nature that does not represent women.

Critics of both MacKinnon and West, particularly the critical race theorists, claim that their work fails to account for the experience of all women. Critical race theorist Angela Harris rejects the "notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[36] She argues that in trying to describe the experience of all women, MacKinnon is in fact ignoring or merely reducing to footnotes the experiences of non-white women.[37] This marginalizing of the experience of women of colour is destructive to the interests of women in the same manner as is that of a patriarchal order presenting its white, privileged, and

27 R. West, "Jurisprudence and Gender [1988]" in K. Bartlett & R. Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 201 at 201.
28 See above.
29 See above at 202.
30 See above.
31 See above.
32 See note 23 at 115.
33 See above.
34 See above.
35 See above.
36 A. Harris, "Race and Essentialism in Feminist Legal Theory," (1990) 42 Stanford Law Review 581 at 585.
37 See above at 240.

heterosexual (male) view as an objective one. West also falls into the trap of gender essentialism by focussing on the connectedness of women and the assumption of women's "deep, unitary self...[that] is deeply and primarily gendered."[38] In order for feminism to speak for all women (as it must so as not to perpetuate the present and historical exclusion of some to the benefit of others), it is imperative that the experience of women who are simultaneously affected by racial, economic and social forces be considered.[39]

Although West has been criticized for assumptions of gender essentialism, there is some recognition in her theory that men are "connected" to some degree through heterosexual penetration, or with their mothers as babies in the womb. The qualification to her theory in the conclusion of "Jurisprudence and Gender" is confusing, but seems intended to suggest the possibility of "masculine jurisprudence" evolving into "humanist jurisprudence," and finally becoming "jurisprudence unmodified" echoing MacKinnon's "feminism unmodified."[40] The connection thesis and complementary hypothesis that women consent to sex for men's benefit as a protective mechanism against male sexual aggression assumes a fundamental and probably irreconcilable difference between men and women that suggests it is hopeless to seek common ground. The theory also proposes that women are controlled by social forces to which they react unknowingly in a way that constitutes their meaning as persons. This sounds very much like antique essentialist characterizations of women as "irrational." Although the theories of both West and MacKinnon no longer lead the critical discourse, they are still relevant in dealing with situations where sexuality and sexual ideologies demand examination. Less essentialist, more "point-of-view" oriented postmodern theories incorporate the experience of individuals for whom oppression is not rooted simply in sexuality, but derives from other sources such as class and race or a more complex mixture of any or all of these, including sexuality. Monolithic "grand" feminist theories that globalize women's experience can still reveal significant flaws in the male dominated legal system. The decision in *Ewanchuk*, to the extent that it is driven by inappropriate considerations of sexuality, is particularly vulnerable to critical analysis by grand theory.

In *Ewanchuk*, at trial, Justice Moore accepted that the complainant was genuinely afraid, but held that she failed to communicate her fear adequately to the accused, thus implying her consent. Fraser in her dissent correctly points out that the obsolete, judicially created theory of implied consent assumes that women are in a perpetual state of availability that must be expressly withdrawn in order to support an accusation of sexual assault. She states that: "Under this theory, because . . . the 'default' position was assumed to be consent, the focus was — wrongly — on whether the woman expressed her dissent rather than on whether she gave her assent."[41] The law of implied consent clearly does not have the protection of women's interests in mind: it favours men by taking control of women's sexuality out of the hands of women, as MacKinnon asserts:

> The organized expropriation of the sexuality of some for the use of others defines the sex, woman. Hetero sexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, *and control its issue"* [emphasis added].[42]

38 See above at 249.
39 See also P. Williams "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401; M. Matsuda "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rights Law Reporter 7; M. Kline "Race, Racism, and Feminist Legal Theory" (1989) 12 Harvard Women's Law Journal 115; P. A. Monture-Okanee "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992) 56 Saskatchewan Law Review 237.
40 See note 27 at 233.
41 See note 2 at 100.
42 See note 16 at 516.

Rape is a very specific location at which sexuality and control of power intersect. MacKinnon perceives that "calling rape violence, not sex, thus evades, at the moment it most seems to confront, the issue of who controls women's sexuality, and the dominance/submission dynamic that has defined it."[43] The control of power in this legal context reinforces the socially constructed woman. She makes the connection that femaleness is defined socially as "attractiveness to men, which means sexual attractiveness, which means sexual availability on male terms."[44]

While sexuality and application of grand theory is the focus here, there are also nagging questions that might be addressed by critical race theory: would Ewanchuk have been treated the same by the courts if he was not white and heterosexual as well as male? Could a lesbian of colour expect the same result in a similar situation?

The young woman in *Ewanchuk* was touched in a sexual manner against her will, but the sexual element of the incident is virtually ignored. The focus is instead diverted and therefore fails to reveal that sexuality and its control are at issue. This strategy maintains the illusion of sexuality as exclusively private: something that does not exist in the public, social, or political sphere. MacKinnon observes that "the issue in rape has been whether the intercourse was provoked/mutually desired, or whether it was forced: was it sex or violence?"[45] The distinction is often unclear in the context of rape because the male point of view wants it that way, and she says that "the defining theme . . . is the male pursuit of control over women's sexuality."[46]

The state itself is "male" in a feminist sense according to MacKinnon in that it constitutes social order in the interests of men as a gender to ensure control over female sexuality at all levels, including the legal level.[47] The primary method through which the liberal legal system legitimizes itself is by presenting its own view as objectivity.[48] In *Ewanchuk,* this strategy is apparent with McClung's refusal to question findings of fact made by the trial judge. The focus on the apparent lack of violence in the incidents of sexual touching once more shifts attention away from their sexual nature. McClung refuses to examine the events in question because he claims, in essence, that to do so would contaminate the "objectivity" of Moore's determination by introducing the subjective view of the appellate court. MacKinnon could have been referring to *Ewanchuk* when she stated:

> [w]hen [the state] is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied. When it most closely conforms to precedent, to 'facts,' to legislative intent, it will most closely enforce socially male norms and most thoroughly preclude questioning their content as having no point of view at all.[49]

Another consequence of male power in the law that is apparent in *Ewanchuk* is the defining of rape in male terms of acceptable levels of violence. At trial Moore asked: "are there any reasonable grounds for [the complainant] to fear that [the accused] would apply force?"[50] Why is Ewanchuk laying on top of the young woman and grinding his pelvic area on hers not considered an application of force? The law of rape as defined from a male point of view creates the problem of distinguishing rape from sex.[51] MacKinnon asserts that sex is something that men take from women who are socially defined by their sexuality as being "that which is for sex with men":

43 See note 1 at 189.
44 See note 16 at 531.
45 See above at 532.
46 See above.
47 See note 1 at 186.
48 See above.
49 See above at 195.
50 See note 2 at 86.
51 See note 1 at 189.

> Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or woman's point of violation.[52]

From the perspective of the law as male, the complainant's experience is just like normal sex. MacKinnon succinctly argues that "rape is a sex crime that is not a crime when it looks like sex."[53] Under the unequal protection of sexual assault laws, the dispute is reduced to a contest between the meaning as determined by the woman's experience, and the meaning of the man and the law as defined by men.[54] What the law does not recognize is that the injury of rape is in the meaning of the experience to the victim, yet the crime is defined in the meaning of the act to the attacker.[55] This contradiction is played out in *Ewanchuk* in the focus on the *mens rea* of the accused. McClung states that: "[t]here is no room to suggest that Ewanchuk knew, yet disregarded, her underlying state of mind as he furthered his romantic intent."[56] Yet, Ewanchuk did know that the complainant clearly said "no" three times, and that she was frightened to the verge of tears, and that he was responsible for her fear. Despite the court's recognition that the woman's experience was frightening, and that her personal integrity was violated, and that Ewanchuk knew that he was responsible for the emotional injury, he was acquitted. The major focus in the trial and the appeal is on the "fact" of his lack of intent. In this situation, MacKinnon explains that "because he did not perceive that she did not want him, she was not violated. She had sex. Sex itself cannot be an injury. Women consent to sex every day. Sex makes a woman a woman. Sex is what women are *for*."[57] Even though the facts clearly demonstrate that Ewanchuk was aware, or at least should have been aware of the complainant's distress, Moore's characterization of the events as something other than sexual assault remains unchallenged.

The need for the law to extract a single objective truth from the separate subjective accounts of the two parties often creates the situation of a woman who is raped by a man, who thought they were just having sex. There are obviously cases where intent to rape exists, but "many (maybe even most) rapes involve honest men and violated women."[58] When "no" means "yes," or "maybe" to a man, how reasonable is it to allow his perspective to determine whether a woman experiences injury?

The most offensive portion of McClung's decision is his disclaimer in paragraph four, which actually draws more attention to his focus on inappropriate details. He notes the trial judge's prior determination of the importance of the fact of what the complainant was wearing: "both [complainant] and [accused] were wearing shorts and T-shirts. *Underneath her shorts and T-shirt [the complainant] wore a brassiere and panties*"[emphasis added].[59] How is this relevant? Whatever the reason, McClung feels compelled to note that: "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines."[60] Exactly why this "must be pointed out" speaks more to the judge's state of mind than anyone else's. McClung clearly disapproves of her attire, and creates a sense of his belief that she consequently deserved what happened. This characterization of her sexuality is consistent with MacKinnon's analysis of how "the law of rape

52 See above.
53 See above.
54 See above at 190.
55 See above.
56 See note 2 at 88.
57 See note 1 at 190.
58 See above at 192.
59 See note 2 at 85.
60 See above at 87.

divides the world of women into spheres of consent according to how much say [they] are legally presumed to have over sexual access to [themselves] by various categories of men."[61] McClung, speaking for the patriarchal state, disapproves of the complainant's life style. She fails the test of the feminine stereotype. She is treated as "unrapable" since she has nothing to lose: she is a young single mother, she is unwed and living with another young couple, dresses inappropriately in the presence of men, and accepts gifts of money from strangers. MacKinnon observes that: "bad girls, like wives, are consenting, whores, unrapable."[62]

While MacKinnon's feminist theory illustrates the role of the patriarchal legal system in *Ewanchuk*, West's work provides an excellent basis for analyzing the behavior of the complainant and explaining the Court's failure to recognize her suffering. A major reason that the Court held that the complainant had implied her consent was that she remained in the trailer for two and a half hours without attempting to leave. During this time she admitted that she was an "open, friendly, and affectionate person; and that she often liked to touch people."[63] She demonstrated her willingness to touch people by giving Ewanchuk a body massage. The fact that she remained after the unwanted sexual touching began is reasonably explained by her fear, which the Court accepts. What the Court avoids discussing in any way, yet somehow seems to hold against her in the final tallying of evidence is that she made such "provocative" statements and actually touched Ewanchuk at all. The "separation thesis" underlying liberal legal theory would account for this as an attempt to support the needs of a pleasure maximizing and autonomous self.[64] This analysis is flawed according to West because women are not necessarily and essentially autonomous beings. What may be true for men (and West does not accept that men are autonomous either)[65] — is, however, not true for women.

West's "connection thesis" provides an alternative explanation for the young woman's behavior based on the premise that women are fundamentally different than men in that they do not consent for their own pleasure, but to increase the pleasure of others.[66] She argues that "women define themselves as 'giving selves' so as to obviate the threat, the danger, the pain, and the fear of being self-regarding selves from whom their sexuality is taken."[67] This is not to say that she did actually consent to Ewanchuk's advances. The facts, despite the decision, are clearly otherwise.

The complainant consciously adopting a strategy of silent non-consent after behaving much like a model of the "giving self" illustrates West's theory. West describes this reaction as: "[S]he embraces a self-definition and a motive for acting which is the direct antithesis of the internal motivational life presupposed by liberalism."[68] Thus, she believes that she is a "giving" kind of person and admits this to Ewanchuk. Whether the admission was coerced or not, she adopts this behaviour in her life, at first consciously and then without awareness, in order to protect herself and control the pervasive threat of male sexual aggression. This "reconstituting" of herself also manifests at a more conscious level in her defensive strategy of silent non-consent. She feared that if she struggled "he would force [her] to do something worse or he would force himself on [her] more."[69] Thus, the complainant in *Ewanchuk* creates herself as a giving person to increase the pleasure of others as a protective

61 See note 1 at 188.
62 See above.
63 See note 2 at 86.
64 See note 23 at 122.
65 "[M]aterial biology does not *mandate* existential value: men *can* connect to other human life." See note 27 at 232.
66 See note 23 at 121.
67 See above at 122.
68 See above at 123.
69 See note 2 at 94.

strategy against the threat of male sexual violence. The accused and the legal system — both driven by an ideal that is essentially masculine nature presented as human nature — fail to appreciate her need for protection and inevitably misinterpret her actions.

The Court, in applying a male model of the autonomous liberal person, assumes the young woman's need for autonomy is only threatened by violent "criminal" harm. West contends that the official value of the rule of law is autonomy, not intimacy.[70] Women's values are not reflected in a law that does not recognize the importance of intimacy. According to West, the law of men determines that "[s]exual invasion through rape is understood to be a harm . . . only when it is accompanied by violence that appears in a form men can understand (meaning a plausible threat of annihilation)."[71] The young woman in *Ewanchuk* consequently does not meet the requirements for protection of the law since she was not harmed in a way that men and a patriarchal legal system recognize.

In closing, the work of MacKinnon and West, although somewhat outdated, still provides insight into patriarchal jurisprudence and the working of the legal system. Critical race theory can further provide the means for a more complex analysis of underlying issues of race, class and gender identity beyond a single focus on gender. The decision in *Ewanchuk* illustrates MacKinnon's assertion that control of women's sexuality by men is significant and needs to be recognized before any kind of equality can be achieved. West adds the proposal that women, unlike men in general, are not motivated to maximize their own pleasure, but have reconstituted themselves to increase the pleasure of others as a protective strategy in the face of potentially violent male sexual aggression. While this transformation is self-interested in the liberal sense, once the strategy becomes self-definitional, the woman is motivated by reasons antithetical to liberal self-interest, namely, the pleasure of others. The liberal male perspective of the trial and appellate courts lacks even internal consistency with sexual assault legislation, which is itself simply more liberal male legalism, according to West and MacKinnon. Perhaps the fact that a court acquitted Ewanchuk despite the facts and despite the law is the most sobering comment on the true meaning of patriarchy. In that context, controversial declarations challenging how "enlightened" we really are about sexual assault and sexual politics in patriarchal society are more difficult to dismiss.

70 See note 27 at 230.
71 See above.

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Mystical Infallibility: Using Probability Theorems to Sift DNA Evidence

At the height of the O.J. Simpson trial in March,1995, Alan Dershowitz, Harvard law professor and advisor to the defence legal team, stated on US television that only about one tenth of one per cent of wife batterers actually go on to murder their wives. In a case being litigated as much in the media as in the courtroom, Dershowitz was trying to put a favourable spin on the admitted evidence that Simpson had beaten his wife. But in a letter to the science journal *Nature*, Jack Good, a Virginia Polytechnic Institute statistics professor, called the statement "highly misleading for the woman in the street." By combining Dershowitz's statement with other uncontroversial facts about the case in a statistical device called Bayes Rule, Good went on to show that if a battered wife is murdered, there is a better than even chance the murderer is her husband. Good ends his letter with the admonition: "It shows once again, and dramatically, that the simple concept of the Bayes factor is basic for legal trials. It is also basic for medical diagnosis and for philosophy of science. It should be taught at the pre-college level!"[1]

Given that this degree of fervour is unusual in a mathematician, lawyers should perhaps take Good's advice seriously. That is the purpose of this paper. It will give a summary of the Bayes Rule, look at how the courts have dealt with it and suggest how it might be used to assess criminal trial evidence so the accused is not prejudiced or, more seriously, wrongly convicted.

First, it is worth looking at Good's reasoning on the Simpson case. He accepts that Dershowitz's statement is true, but argues it is more legally relevant to estimate the probability that a husband murdered his wife when we know she was battered by her husband *and* we know she was murdered in 1994 by someone who is unknown at this stage. Combining the 1/1000 probability that a batterer will murder his wife and the probability of 1/10 that he will do it in 1994 (Good does not provide the reasoning for this latter probability in his letter) gives a probability of 1/10,000 that a wife batterer will kill his wife in 1994. Using the overall US annual murder rate of 1 per 10,000, the probability of a woman being murdered by someone not her husband is also, coincidentally, 1/10,000. Thus it is equally probable that a woman will be murdered by her batterer husband as by any other person or,

1 I.J. Good, "When batterer turns murderer" (1995) 375 Nature 541.

to put it in another form, the probability that the husband is guilty is one out of two. This result can be refined by taking the 1994 US murder rate for women victims (1/25,000) [2] as opposed to Good's rate for all victims (1/10,000). This refinement means it is probable seven times out of ten that a batterer husband is guilty of his wife's murder in the absence, of course, of contradictory evidence.

Although Professor Good's statistical reasoning was not used in the Simpson trial,[3] it appears to be a useful tool for triers of fact to fairly consider numerical circumstantial evidence in criminal trials and in civil trials, such as the tort of negligence, where proof of causation is necessary. Mathematically, Bayes Rule is a conditional probability theorem, defined by the equation:

$$\Pr(B|A) = \frac{\Pr(A|B)\,\Pr(B)}{\Pr(A|B)\,\Pr(B) + \Pr(A|\underline{B})\,\Pr(\underline{B})}$$

where: $\Pr(B|A)$ means the probability of event B given that event A has occurred,
$\Pr(A|B)$ means the probability of event A given that event B has occurred,
$\Pr(B)$ means the unconditional probability that event B will occur,
$\Pr(A|\underline{B})$ means the probability of event A given that event B has not occurred,
$\Pr(\underline{B})$ means the unconditional probability that event B will not occur.[4]

It is important, however, that statistical evidence like Bayes Rule be properly presented by expert witnesses, by counsel in argument and by judges in their charge to the jury. Such care is especially critical when dealing with the probability issues inherent in the presentation of DNA profile evidence in criminal cases. Because the high probabilities usually associated with a positive DNA match between a crime sample and an accused are so

2 *Sourcebook of Criminal Justice Statistics 1997*, (Washington, D.C.: U.S. Dept. of Justice, Bureau of Justice Statistics, 1998).

3 Simpson's defence did attempt to undermine the prosecution's DNA match evidence by statistically combining estimates of the probabilities that the blood samples from Simpson's glove, sock and car were contaminated in the laboratory, planted by police and compared with an inappropriate DNA match database. See W.C. Thompson, "DNA Evidence in the O.J. Simpson Trial" (1996) 67:4 University of Colorado Law Review at 827, and J.J. Koehler, "On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates" (1996) 67:4 University of Colorado Law Review at 859.

4 D. Downing and J. Clark, *Statistics the Easy Way*, 3d ed. (New York: Barron's, 1997) at 69.

persuasive, cases are now being brought to court with little or no corroborating evidence. But, as statisticians David Balding and Peter Donnelly point out, while the consequences of erroneous reasoning can be most serious, "many studies show that untrained intuition is prone to error in reasoning with probabilities."[5] The particular error being warned about is the "prosecutor's fallacy," so named because it usually favours the prosecution in a criminal case.

To explain the fallacy, Balding and Donnelly propose that you are playing poker with the Archbishop of Canterbury (the authors are British and there the Archbishop is supposed to be an icon of honesty).[6] On the first hand of the game, the Archbishop deals himself a straight flush. There are two questions that could be asked of this unlikely occurrence:

1. What is the probability of the Archbishop dealing himself a straight flush if he were playing honestly?
2. What is the probability that the Archbishop is playing honestly, given that he has dealt himself a straight flush?

The answer to the first question is three in 216,580 — a small number. The answer to the second question, more relevant to assessing the probative value of evidence, would likely be higher, closer to one, if you think the Archbishop is honest. The authors make two points here: the low probability answer to the first question does not imply a low probability answer to the second, and, while the first answer is certain, the second will depend on your assessment of your playing companion's honesty.

Very small probabilities are also inherent in DNA identification evidence. A "crime sample" such as hair, blood, or semen is collected at the scene and compared with a sample taken from the defendant. The samples are said to "match" if the lengths of certain DNA (deoxyribonucleic acid) fragments are the same at three to five specific locations on each chromosome. An expert will usually calculate the probability that DNA from a randomly chosen innocent person, unrelated to the defendant, will match the DNA profile from the crime sample. Questions similar to those asked of the Archbishop's card-playing luck and ethics can then also be asked in connection with the DNA probability evidence:

1. What is the probability that the defendant's DNA profile will match the profile from the crime sample, if he or she is innocent?
2. What is the probability that the defendant is innocent, given that his or her DNA profile matches the profile from the crime sample?[7]

The first question assumes the defendant is innocent and asks about the chances of getting a match. The second question assumes the defendant's profile matches and asks about his or her innocence. The probability in the first question is usually low and can be ascertained with some certainty by experts in the field. This does not, however, ensure that the probability in the second question is low and it is this question which is of interest to the courts. The prosecutor's fallacy consists of giving the answer to the first question as the answer to the second. The authors add, "In general, statements which refer to the probability that the defendant is the source of the crime sample, or to the probability that the defendant is the culprit, are examples of the prosecutor's fallacy."[8] The role of the court, according to Balding and Donnelly, is to assess the DNA evidence along with all other

5 D.J. Balding and P. Donnelly, "The Prosecutor's Fallacy and DNA Evidence", [1994] Criminal Law Review 711.
6 See above at 713.
7 See above at 716.
8 See above at 716, footnote 18.

evidence and they suggest that to do this within the laws of probability requires the use of Bayes Rule. They note lawyers' concerns with numerically assessing the weight of court evidence, but say, "[i]n the present context, Bayes Rule seems to provide the only coherent method for combining other evidence with the numerical evidence associated with the DNA profiles."[9]

When used in this way, the logic of the Bayes Rule can be shown by weighing two alternative scenarios, each with two components:

1. a. The defendant is the culprit and
   b. the crime sample DNA profile matches that of the defendant.
2. a. Someone other than the defendant is the culprit and
   b. that person's DNA profile matches that of the defendant.

The authors say that the assessment of the probabilities of components 1.a and 2.a should be made on the basis of evidence other than the DNA evidence. If the jury assesses the probability of this evidence as low, for example if it tends to exonerate the defendant, or if the match was observed through a search of a DNA data bank or through a sample obtained for unrelated reasons, then the DNA evidence may not be sufficient to establish the defendant's guilt beyond a reasonable doubt.

Balding and Donnelly conclude that it is not possible to say that the defendant is the source of the crime sample, solely on the basis of the DNA evidence. It is also not appropriate for an expert witness to assess the other evidence. Therefore, the expert cannot give an opinion as to whether the defendant was the source of the crime sample. Such inferences are a matter for the trier of fact alone.

Both the prosecutor's fallacy and the other issue raised by Balding and Donnelly, that DNA evidence should be quantitatively combined with other evidence using Bayes Rule, emerged in two recent English Court of Appeal cases. One of them, *R.* v. *Adams*, was the first English case in which the Crown had relied exclusively on DNA evidence to establish identity.[10] The defendant was charged with rape and at his trial a prosecution expert testified that his DNA profile and one obtained from the crime scene matched. The chance of a randomly chosen unrelated man matching the profile was said to be one in 200,000,000. Professor Donnelly, co-author of the paper cited above, also testified. The decision reported him as saying that "it was logical and consistent for the jury to deal with the rest of the evidence in statistical terms and for the jury to do this using the Bayes Theorem."[11] Donnelly identified four areas of evidence that the jury could evaluate this way: the attacker had a local accent; the victim could not identify the defendant as her attacker; the defendant's own alibi evidence; and the alibi evidence of another person. Using his own probability assumptions about those areas of evidence and the Bayes Rule (or Bayes Theorem, as it is called here), Donnelly reduced the one in 200,000,000 chance that the attacker was not the accused to a one in 55 chance.[12] Revealingly, if the DNA match probability had been one in 2,000,000 and the same non-DNA probabilities were used, Donnelly calculated that the accused was twice as likely to be innocent as he was to be guilty.

9 See above at 717.
10 *R.* v. *Adams*, [1996] 2 Criminal Appeal Reports 467 (English Court of Appeal).
11 See above at 468F.
12 For details of this evaluation, see Appendix.

Adams was convicted at trial and appealed on the basis that the judge should have excluded the DNA evidence because it was no more than a rough estimate, inconclusive by itself and inadequate to found the prosecution's case. The Appeal Court had grave doubts as to whether the Bayes Rule was properly admissible, "because it trespasses on an area peculiarly and exclusively within the province of the jury, namely the way in which they evaluate the relationship between one piece of evidence and another." This trespass occurred, the Court held, because the items of evidence were assessed separately rather than "in the light of the strength of the chain of evidence in which it forms a part." More fundamentally, according to the Court, "[j]urors evaluate evidence and reach a conclusion not by means of a formula, mathematical or otherwise, but by the joint application of their individual common sense and knowledge of the world to the evidence before them."[13] Accordingly, the Court found that, "[t]o introduce Bayes Theorem, or any similar method, into a criminal trial plunges the jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper task."[14] The Appeal Court decided that the trial judge concentrated his efforts on attempting to explain the defence argument based on the Bayes Theorem to the jury, and did not give sufficient guidance on how to evaluate the prosecution case, which was based entirely on the DNA evidence. A re-trial was therefore ordered.

In *R.* v. *Doheny,*[15] the English Court of Appeal again addressed the role of expert evidence in assessing the statistical validity of DNA matches. Again, the defendant was convicted of rape and appealed on the basis that the forensic evidence was presented to the jury in a misleading and inaccurate manner. In arriving at a probability that the DNA match was random, the prosecution's DNA expert combined the results of a multi-locus probe test, from many DNA locations of unknown origin, with the results of single locus probe tests, from single known DNA locations. Because these two tests may not be independent, the Court found that the DNA expert inappropriately combined them and for that reason, allowed the appeal. But in coming to that decision, the Court offered the following *obiter* comments on the prosecutor's fallacy:

> The significance of the DNA evidence will depend critically upon what else is known about the suspect. If he has a convincing alibi at the other end of England at the time of the crime, it will appear highly improbable that he can have been responsible for the crime, despite his matching DNA profile. If, however, he was near the scene of the crime when it was committed, or has been identified as a suspect because of other evidence which suggests he may have been responsible for the crime, the DNA evidence becomes very significant.[16]

The Court endorsed Balding and Donnelly's contention that DNA evidence should not be used alone: "[T]he random occurrence data deduced from the DNA evidence, when combined with sufficient additional evidence to give it significance, is highly probative."[17] This task is one for the jury, the Appeal Court warned, and "the scientists should not be asked his [sic] opinion on the likelihood that it was the defendant who left the crime stain, nor when giving evidence should he use terminology which may lead the jury to believe that he is expressing such an opinion."[18] The Court, however, strongly endorsed the

13 See note 10 at 481E.
14 See above at 482D.
15 *R.* v. *Doheny*, [1997] 1 Criminal Appeal Reports 369 (English Court of Appeal).
16 See above at 373D.
17 See above at 373F.
18 See above at 374G.

comment in *Adams* deprecating the use of Bayes Theorem.

In the meantime, Adams was convicted on his retrial. Again, the Crown's case rested entirely on DNA evidence and again Adams's defence called Professor Donnelly to show how the Bayes Theorem could be used to integrate the non-DNA probabilities with the DNA probabilities. The trial judge allowed Donnelly to give the jury a questionnaire about the non-DNA evidence it had heard during the trial. The defence invited the jury to answer each of the 24 questions as a numerical probability and to substitute its answers in a formula at the end of the questionnaire to give the jury's view of the probability that the defendant committed the offence. While the trial judge left it open for the jury to use the questionnaire, he characterized it as a statistical approach and contrasted with the common sense approach, "which juries in this country have used for many, many years, pretty satisfactorily."[19]

Adams appealed on the grounds that the prosecution should not be allowed to adduce statistical evidence of DNA match probabilities unless the defence is allowed to call statistical evidence on the probabilities of non-scientific evidence, and that the trial judge should not have encouraged the jury to apply their common sense rather than applying the Bayes Rule. After calling reliance on Bayes Theorem evidence "a recipe for confusion, misunderstanding and misjudgment"[20] the Court held that "[i]n cases such as this, lacking special features absent here, expert evidence should not be admitted to induce juries to attach mathematical values to probabilities arising from non-scientific evidence adduced at trial."[21] The Court did not directly address the defence argument that if the numerical probabilities for non-scientific evidence were inadmissible, then numerical probabilities for the DNA match evidence should also be inadmissible. Instead, it merely described with approval the normal course in such trials of presenting only the DNA evidence numerically. The appeal was dismissed.

In Canada, courts have varied greatly in the attention they have paid to the issues of the prosecutor's fallacy or the use of the Bayes Rule to assess DNA evidence with other evidence. The three cases considered here come from the Courts of Appeal of three different provinces. In *R. v. Baptiste*, the defendant, an interior B.C. aboriginal man, was appealing a conviction of murder while committing sexual assault.[22] His appeal was based, in part, on the fact that there was no database of interior Indians with which to scientifically estimate the chances of a DNA match.[23] The British Columbia Court of Appeal appeared satisfied that as long as the results were expressed in qualitative rather than quantitative terms, the evidence could be admitted. As appears common in some Canadian cases, the prosecutor's fallacy was breached in *Baptiste* without any reported comment from the bench or counsel. For example, the prosecution's expert "testified that the possibility of the semen found in the victim's vagina coming from someone other than the appellant was remote."[24]

What is, perhaps, an extreme reaction to scientific and statistical evidence in a case involving DNA matches can be found in *R. v. Legere*.[25] The appellant was again an aboriginal man appealing a conviction of murder while committing a sexual assault. His appeal

19 *R. v. Adams (No. 2)*, [1998] Criminal Appeal Reports 377 at 381 (English Court of Appeal).
20 See above at 384D.
21 See above at 385C.
22 *R. v. Baptiste* (1994), 88 Canadian Criminal Cases (3d) 211 (British Columbia Court of Appeal).
23 See above at 222 to 223.
24 See above at 223.
25 *R. v. Legere* (1994), 35 Criminal Reports (4th) 1 (New Brunswick Court of Appeal).

argument largely focused on "whether or not the frequencies of genetic patterns might be different because of ethnic ancestry, regional variations or the fact that inter-breeding has occurred in any particular geographic area."[26] The New Brunswick Court of Appeal accepted, without discussion, the Crown's evidence on the scientific and statistical issues raised by the accused's argument, except to comment that the prosecution's population geneticist had experience with data from human populations while the defence's population geneticist worked with data from insect populations.

In *R. v. Terceira*, the Ontario Court of Appeal took a more careful approach to DNA match evidence.[27] First, the Court observed that "[i]n the absence of other qualification, a match is no more than a failure to exclude a suspect's DNA from the crime scene."[28] This obvious, but hitherto unremarked, point was perhaps prompted by the second Guy Paul Morin appeal, where DNA techniques, not available at the time of his original trial, found no match between Morin and the crime of which he was convicted. This fresh evidence resulted in the conviction being overturned and Morin being acquitted.[29] But when a match is found, *Terceira* said that probability statistics would have to be applied to determine its significance. The defence objected to the admission of actual figures for random match probability, arguing that the prejudicial effect of the high probability numbers would outweigh their probative value. The Court left this issue in the hands of the trial judge:

> I do not believe that there should be an absolute prohibition against the introduction of specific match figures. The appellant correctly notes that the case-law reflects conflicting conclusions as to the admissibility of DNA probability statistics. It was justifiable to admit the probability statistics in this case, and it might be in others. I would leave the matter to the discretion of the trial judge in the particular case.[30]

The use of numbers was justified in *Terceira* because "[t]he problem with qualitative modifiers such as rare, unlikely and remote is that they are awkward and fail to convey the potency of the match."[31] The Court pointed out that the defence was able to present the probability numbers of its own experts and to cross-examine the prosecution's experts and the trial judge had taken care to instruct the jury, "[n]ot to get bedazzled or unduly swayed by some of the large numbers used in the DNA evidence."[32]

But the statisticians did get one of their two main issues acknowledged by a Canadian court. *Terceira* did consider the concern "that the jury will be permitted to fall into what is referred to as 'the prosecutor's fallacy': equating the probability of a random match with the probability of the appellant's innocence."[33] In this case, the Court found that the judge had properly instructed the jury and that "there is no basis for an inference that the jury would have used the statistics as a predictor of the likelihood of guilt."[34] Leave has been granted to appeal *Terceira* to the Supreme Court of Canada.[35]

The introduction of DNA profile matching evidence over the last six years has added an enormously seductive weapon to the prosecutor's arsenal. One Ontario trial judge referred to its "mystical infallibility."[36] Unlike, say, fingerprints, a person's genetic code is impossible to cover up, can be identified in very small scraps of real evidence, and may be recovered long after the event. But it comes at a cost. Again, unlike fingerprints, it cannot

26 See above at 18.
27 *R. v. Terceira* (1998), 38 Ontario Reports (3d) 175 (Ontario Court of Appeal).
28 See above at 184.
29 *R. v. Morin* (1995), 37 Criminal Reports (4th) 395 (Ontario Court of Appeal).
30 See note 27 at 195.
31 See above at 200.
32 See above at 201.
33 See above at 200.
34 See above at 200.
35 *R. v. Terceira*, [1998] Supreme Court of Canada, Applications for Leave to Appeal No. 126 (Quicklaw).
36 *R. v. Melaragni* (1992), 93 Canadian Criminal Cases (3d) 348 at 354 (Ontario General Division).

absolutely match a crime scene sample with a particular defendant — almost, but not quite. The prosecutor has to allow that there are likely others out there with the same DNA characteristics as the person she wants to convict. The prosecution expert has to express this likelihood as a very small number, usually a one in several millions probability. These kinds of numbers and the science that produces them seem to unsettle the courts. Consider the trial judge's charge to the jury in *Legere*:

> Forget about discrete alleles, forget about Hardy-Weinberg theory equilibrium, forget about polyzygotes, monozygotes, even. I don't understand those things and you don't either and we're not expected to understand them, we're not scientists ... You may have understood Dr. Carmody's new equation that he devised when I didn't. [37]

There seem to be real fears being expressed there. The fear that courts may mechanically reach verdicts by formula is well founded. For example, a formulistic verdict was argued in the classic case that started the probability evidence debate, *People* v. *Collins*.[38] Prosecutors in California tried to convict a bearded black man and a white woman with a blonde ponytail driving a yellow car on the basis of the low probability that another couple of that description could have been in the vicinity of the purse-snatching with which they were charged.

The other fear, of having to explain ideas one doesn't understand, could perhaps have been alleviated if the judge's legal education had included the type of statistical instruction identified by Professor Good. Instead, judges retreat behind the jury's "common sense and knowledge of the world." And here we meet another fear — the real concern of Balding and Donnelly that untrained intuition is prone to error when reasoning with probabilities. The struggle to reconcile these two opposing fears is reflected in the cases surveyed in this summary paper. The courts have generally taken three approaches to resolving this dilemma:

1. *The experts give the answer.*

This approach was passively adopted in two of the Canadian cases noted above: *Baptiste* and *Legere*. It has been shown to be based on false statistical reasoning (prosecutor's fallacy) and has been rejected by the English courts, most firmly in *Adams (No 2)*, and by the Ontario Court of Appeal in *Terceira*.

2. *Don't use any numbers.*

In *Baptiste*, because of difficulties with the database, the expert could only describe the probabilities associated with the DNA matches as "remote" and "extremely remote." In *Terceira*, the argument for excluding quantitative statements of DNA match probabilities was based on admissibility rather than technical issues. In that case, the Appeal Court found that the jury was not overwhelmed by the magnitude of the numbers but left it open that a judge in another case might decide differently.

3. *Numbers are permissible for science but not for other evidence.*

This reflects the current position of the English Court of Appeal. It rejects instruction of juries on the use of statistical formulae, such as Bayes Rule, to evaluate DNA and non-scientific evidence together. The issue does not appear to have been raised in Canadian

37 See note 25 at 21.

38 *People* v. *Collins*, 438 Pacific Reporter 2d 33 (California 1968). This and subsequent cases prompted legal scholars to devise mathematical models that could be applied to judgments. Most of these models required the finder of fact to determine the probability of the event in question and compare it with a fixed standard. See for example: Neil Cohen, "Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge" (1985) 60 New York University Law Review 385.

courts. The strong possibility of an erroneous conviction is graphically illustrated by comparing two of the cases considered in this paper. Attaching reasonable numerical probabilities to the non-DNA evidence in *Adams*, Professor Donnelly used Bayes Rule to calculate that, had the DNA match probabilities been one in 2,000,000 instead of one in 200,000,000, the probability of the accused's innocence would have been twice as great as his guilt. Yet in *Terceira*, the lowest DNA match probability found by the Court was one in 1,800,000 and the highest, one in 1,500. Thus, it is quite possible that an innocent person could be convicted of a very serious crime based on a court's common sense consideration of seemingly compelling DNA evidence that, when looked at mathematically, could not prove guilt on a balance of probabilities, let alone beyond a reasonable doubt.

The real possibility of a serious miscarriage of justice requires that judges stop denying their math phobia and admit that, like most people, they and juries cannot reason well when presented with probabilities. As a matter of urgency, courts should adopt workable ways of quantitatively weighing evidence such as DNA matches where very low probabilities are expressed numerically. One approach might be to leave the decision to introduce numerical, as opposed to descriptive, probability evidence in criminal trials in the hands of the prosecution, with the provision that should it decide to go that route, the defence has the option of quantifying the non-scientific evidence. Before such a scheme is feasible, however, legal and statistics scholars will have to design an easily understood and manipulated explanation of the Bayes Rule and judges and lawyers will have to learn how to use and explain it. Thus in trials where probability evidence is being offered, either it and the non-probability evidence must be expressed qualitatively and evaluated in the normal way, or both must be expressed numerically and evaluated using the Bayes Rule.

There is a further possibility that the seductiveness of statistics could produce "evidence" on the basis of historical group behaviours. Compelling as Professor Good's example might be, it does rely on the argument that because wife-beaters are generally prone to murdering their wives, this particular wife-beating defendant is likely to have murdered his wife. The Supreme Court of Canada, however, may have opened the way for this type of expert opinion-based character evidence to be admitted. In *R. v. Mohan*, Justice Sopinka stated:

> Before an expert's opinion is admitted as evidence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has distinctive behavioral characteristics such that a comparison of one with the other will be of material assistance in determining innocence or guilt. [39]

Although the rule requires that the type of crime being prosecuted could only be committed by persons with distinctive behaviour characteristics, this was not established for the crimes with which Dr. Mohan was charged.[40] The rule here should be that statistical evidence should only be based on large populations and separated only into very broad categories such as by sex. In particular, the use of such evidence in small, isolated, intermarried communities, as in *Baptiste* and *Legere*, without well-documented databases for that community and without careful probability analysis could again lead to erroneous convictions.

39 *R. v. Mohan*, [1994] 2 Supreme Court Reports 9 at 37.
40 D.M. Paciocco & L. Stuesser, *The Law of Evidence*, (Concord: Irwin Law, 1996) at 122.

Appendix

Professor Donnelly's expert evidence as to the steps the jury might have taken if it had applied the Bayes Theorem to the evidence in *Adams* can be reconstructed from the transcript of his examination in chief reproduced in the Court of Appeal decision:[41]

1. Assuming a 75 per cent chance that the accent evidence meant the attacker was a local man, combined with a local male population between the ages of 18 and 60 of about 150,000, the chance the attacker was the accused is one in 200,000 (1/150,000 x 75/100).

2. Assuming a 90 per cent chance that an innocent man would not match the victim's description of her attacker and assuming a 10 per cent chance that the victim would describe someone who was not her attacker, the chance the attacker was the accused is one in 9 (10/100 x 100/90).

3. Assuming the accused's alibi evidence was neutral, the chance the attacker was the accused is one in one.

4. Assuming a 25 per cent chance a witness would give an alibi if the accused was guilty, and assuming a 50 per cent chance the witness would give an alibi if the accused was innocent, the chance the attacker was the accused is one in two (25/100 x 100/50).

5. As the four probabilities described above are independent of each other, they can be multiplied together to give a chance, based on the non-DNA evidence, that the attacker was the accused of one in 3,600,000 (1/200,000 x 1/9 x 1/1 x 1/2).

6. Assuming a 100 per cent chance that the crime scene DNA would match the accused's DNA if he were the attacker, and accepting the one in 200,000,000 chance that the DNA samples would match if he were *not* the attacker, and combining those with the one in 3,600,000 chance that the attacker was the accused based on the non-DNA evidence, gives an overall chance that the attacker was *not* the accused of one in 55 (1/200,000,000 x 100/100 x 3,600,000/1).

41 See note 10 at 470 to 477.

When Worlds Collide: The Legal Rights of Minors in Ontario to Direct Medical Treatment*

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I met Mark on a hot July day. I was working as an ambulance attendant in Ontario. I had been assigned to provide emergency coverage for a children's triathlon. Mark was one of the competitors at the event. He was 11 years old. His parents had placed him "on the circuit" and had equipped him like a professional.

The first time my partner and I saw Mark he was on the running course, approaching the hill before the finish. Even from a distance, we could both tell he was struggling. His parents were yelling "Faster! Faster! You won't win if you don't hurry up. Don't be so lazy! Get going!"

As Mark battled with the final hill, I decided it was time to position myself closer to where I anticipated the action would take place. I reached the finish line just before Mark. The young athlete staggered across the line and fell to the ground, face first. When he made no further attempts to move, I ran over.

I realized that Mark was very ill, one of the sickest children I had ever seen. His skin was red and dry and his body was limp. His eyes were cloudy. I picked up the small body and ran to the ambulance. One of the race officials ran off to find the boy's parents. This turned out to be a mistake.

In the back of the ambulance, I doused Mark with cold water. I noted that his pulse was faster than I had expected. His blood pressure was low and his breaths were neither deep, nor very frequent. I decided that Mark needed my assistance to breathe. Mark started to come around when I assisted his breathing. I asked him if he knew where he was or who I was. His answers "ambulance" and "paramedic" were both correct. It was then that Mark's father opened the back door of the still stationary ambulance.

To my surprise, Mark's father's response to finding his son lying in the back of an ambulance, not breathing for himself, was to yell at the boy: "Get out of there! You look like a wimp. No son of mine is going to be found in the back of an ambulance." He told me to stop what I was doing. In an effort to change the man's mind, I asked my patient if he wanted me to take him to the hospital. Mark responded with "Yes . . . Go . . . Hospital . . .

* *For Mark: Here's the answer I promised. With thanks to Professor Larry Wilson at the University of Windsor Faculty of Law and His Honour Judge D.W. Phillips for their encouragement. Also thanks to Bob Taylor, former manager of Northbrook Ambulance, for teaching me how to be a caring paramedic.*

Please." Mark's father countered with another order to stop treatment.

The Ontario Ministry of Health Emergency Health Services Branch's interpretation of the law was that for a person to give consent to medical treatment, he or she must be 18 years old, although consideration could be given to the wishes of a 16-year-old. The only exception to this rule was where the minor is married. In all other cases, the wishes of the parents, where ascertained, had to be respected.[1] According to my training I was required to stop treatment and turn Mark over to his father. This training on the law of consent to treatment was incorrect, but I did not know that at the time.

While these events were transpiring, my partner was outside implementing another of her inspired plans. She ripped the carbon paper from between the sheets of one of our

1 The textbook at the time of these events was: *Ambulance and Emergency Care Program: Legal and Ethical Issues* (Thunder Bay: Confederation College, 1990) at 96.

patient treatment records. Then she made Mark's father fill out the "Refusal of Service" section – four times. While he was engaged in this activity, the parent was not present in the ambulance actively refusing treatment for his son. I continued treatment. My partner sought the assistance of a police officer who was directing traffic around the sporting event. Large men with guns tend to be persuasive speakers. Mark's father was convinced that he should allow his son to be transported to the hospital.

We rushed Mark to the Emergency Department. There, the doctors perceived an emergency situation and started treatment without waiting for the boy's parents to arrive. The young athlete was diagnosed to be suffering from a combination of exhaustion and dehydration. No further objections were raised regarding Mark's continued treatment, or the requirement that he spend the night in the hospital. He was released the next day and recovered fully. I, however, was left with nagging questions about the rights of children to direct their own treatment.

This paper will demonstrate the need for children to be able to make their own health care decisions where they understand the nature and risks of the proposed treatments. It will examine the law in Ontario regarding the capacity of minors to provide valid medical consent. It will argue that no legal restrictions should be placed on that capacity. Finally, this paper will demonstrate the need to inform both children and health care providers about the law relating to medical consent of minors.

Unfortunately, Mark's situation is not unique. His story may represent the most dramatic expression of the problems related to minors' medical consent. It is not, however, the most common expression of this problem. Many children avoid seeking treatment for their medical problems when they believe their parents will become involved. This may be the result of a conflict of values with their parents, or it may be the result of fear or embarrassment. Whatever the reason, a minor may be denied the opportunity to receive necessary medical treatment. In addition, a child may not be able to receive medical treatment requiring parental consent if the parents cannot agree to provide that consent.

Adolescents are inherently reluctant to discuss their medical problems with their parents. As they become more self-conscious, adolescents are embarassed to talk to their parents about their bodies. They are often hesitant to discuss medical problems with their parents or with a health care provider in the presence of their parents.[2] Children may avoid seeking treatment for their ailments if they believe that treatment would require either parental consent or notification.[3] This situation may develop even where there are no conflicts in values between parent and child.

Issues of great importance in children's health are often those most likely to result in conflict between parent and child. Some of the more important medical issues are those relating to birth control, pregnancy, abortion, sexually transmitted infections, substance abuse and addiction, nutrition and psychological problems.[4] These are sensitive and embarassing issues. They can cause conflicts in a child's family. If parents must be involved, children may avoid treatment out of "fear of parental disapproval or even retribution."[5]

2 Joseph E. Simon and Aron T. Goldberg, *Prehospital Pediatric Life Support*, (St. Louis: C.V. Mosby, 1989) at 6.
3 Katherine Catton, Valerie Farrer, and Wendy Graham, *Adolescent Beliefs and Practices Regarding the Law of Minor's Medical Consent: A Pilot Study*, (Toronto: University of Toronto, 1990) at 7, 9-10.
4 See above at 11, 15-16.
5 See above at 12.

Many children are often not as innocent as society suggests. They live in a world where sex and drugs are real issues in their lives. In the United States, half of all teenagers engage in sexual activity before they turn 19. By March, 1993, 1,167 American teenagers had contracted AIDS. Between 24 and 30 per cent of gonorrhea cases are found among teenagers. Ninety per cent of high school students have used alcohol, 40 per cent have used marijuana, and at least ten percent have used cocaine.[6] Medical problems may result from these behaviours. However, these are subjects that minors are loathe to discuss with their parents.

Many children are aware of the importance of the major health issues for their age groups. They are frequently very aware of the importance of getting medical help for their health problems. However, even a perceived requirement of parental consent can be an effective deterrent against minors seeking the help they need. They frankly discuss health care issues and the difficulties arising from any requirement of parental involvement on the Kids Help Phone Web Site Discussion Forum:

> **Posting:** How can I find out the phone numbers of places that deal with testing of [sexually transmitted disease]? By this I mean without going to my normal doctor's office.
>
> **Response by "PJ. Knows":** you can get STD testing at many walk in clinics. if you are under age though you might get hassled. You might want to try a hassle free clinic. They don't ask for i.d. and you don't need parental permission. If you need a number children help phone has tones [tonnes].[7]

This example shows the importance some children attach to avoiding parental involvement in sensitive health care decisions. It also shows how difficult this can be. Children are genuinely reluctant to seek medical help for STDs without a guarantee that their parents will not be involved. It appears that the child in the posting will not even go to his or her regular physician out of fear that his or her parents will find out.[8] This is especially a concern where the youth is gay or lesbian.[9]

One strong argument against parental consent for medical care is the adverse effects such a requirement would have on abused children. Requiring abused children to seek the permission of their abuser to receive treatment for the abuse they have suffered is in some sense ludicrous. The following postings from the Kids Help Phone Web Site Discussion Forum on Birth Control illustrate this point:

> **Posting:** I'm 13 and pregnant by my dad. He doesn't know. Should I tell him? Should I get an abortion? What if he doesn't want me to because of what will happen? I love him so much and I don't want to hurt his feelings... The same thing happened to [my sister] 4 years ago but she won't help me. She had an abortion but now she's sterile. I want to have kids one day but if I get an abortion I might not be able to. Help me PLEASE!!!!!!!
>
> **Response by "pk":** it's ok people. I forced a miscarriage on myself so nobody has to know now. Thanks anyway.[10]

Custody and access disputes can lead to equally devasting results. The "best interests of the child", a supposed central objective, are often overlooked by parents preoccupied with gaining an advantage in court proceedings. In those situations, parents may dispute

6 William Adams, "'But Do You Have to Tell My Parents?' The Dilemma for Minors Seeking HIV-Testing and Treatment" (1994) 27 The John Marshall Law Review 493 at 494-495.

7 Kids Help Phone Discussion Forum. Found at Http://forums.sympatico.ca/forum.cgi?khp-13@^98@.ee6bd6a on March 16, 1997.

8 The existence of these types of concerns is noted: See note 3 at 65.

9 See note 6 at 496.

10 Kids Help Phone Discussion Forum. Found at Http://forums.sympatico.ca/forum.cgi?khp-7@1146@.ee6bb24/0 on March 16, 1997. Because these postings are anonymous, the facts cannot be verified.

each other's capacity to provide consent or they may express opposing wishes regarding treatment for their children. A health care provider may not get valid consent from anyone.

The Law in Ontario

Ontario has new legislation addressing issues of medical consent. The Health Care Consent Act [11] was enacted to clarify the law surrounding consent to treatment. Section 4(1) of the Act allows a "person" who is able to understand the proposed treatment and its consequences to make his or her own decision regarding that treatment. Furthermore, section 4(2) states that a "person" is presumed able to make his or her own decisions regarding treatment. Under sections 4(3) and 10(1), unless health care providers have reasonable grounds to believe that their patient does not understand the treatment or the possible consequences of giving or refusing consent, they must abide by the patient's expressed wishes. Health care providers may assume that they have obtained a valid consent or refusal from a "person" unless they have reason to believe otherwise.

It is important to note that the 1996 Consent Act does not define the term "person." There is no reason at law to interpret the term "person" as not including children. At common law, a human being becomes a "person" when it takes its first breath after birth. This was the holding of the Supreme Court of Canada in *R.* v. *Sullivan*.[12] In *Re "Baby R,"*[13] the BC Court of Appeal specifically held that the definition of person included children.[14] Furthermore, the term "person" in the Canadian Charter of Rights and Freedoms[15] was explicitly held to include children under age 16 in *R.* v. *J.(R.)*.[16] Therefore, at law, children are persons. As such they are presumed to be able to consent to their own medical treatment under the 1996 Consent Act. British Columbia has legislation giving children specific rights to direct their treatment.[17] While the Ontario legislation does not specifically give rights to children, it is clear this was one of the intentions behind passing the 1996 Consent Act.

Further support for the interpretation of the 1996 Consent Act giving children the right to consent to their medical treatment is found in the records of the Ontario Legislature. When the Act was debated, the question of whether children should be given this right was discussed. The Ontario Legislature supported the proposition.[18] Thus, the intent of the Ontario Legislature in enacting the 1996 Consent Act was to allow children to consent to their own medical treatment. The expressed intentions of the legislature should be respected when interpreting legislation.

Despite concerns regarding extending capacity to medical consent to children, the 1996 Consent Act did not change the law. The common law recognized that children could direct their own treatment. *Johnston* v. *Wellesley Hospital et al.*,[19] a case of medical malpractice involving a minor, is a leading case in this area. One of the issues decided in that case was whether a 20-year-old minor could consent to medical treatment. Mr. Justice Addy of the Ontario High Court of Justice held that there is no "age of consent." There is no specific age at which a minor becomes legally capable of making their own medical decisions. Children can direct their own treatment if they can appreciate fully the nature and conse-

11 Statutes of Ontario 1996, chapter 2, [hereinafter the 1996 Consent Act].
12 [1991] 1 Supreme Court Reports 489 at 503. See also the decision of Justice Robins in *Dehler* v. *Ottawa Civic Hospital* (1979), 25 Ontario Reports (2d) 748 at 757 (High Court of Justice).
13 (1988), 15 Reports of Family Law (3d) 225 (British Columbia Court of Appeal).
14 See above at 231.
15 Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, chapter 11 [hereinafter Charter].
16 (1982), 1 Canadian Rights Reporter 202 at 204 (Ontario Court of Justice (Provincial Division)).
17 Infants Act, Revised Statutes of British Columbia 1996, chapter 223, section 17.
18 Ontario, Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No.130 (28 November 1996) at 5420.
19 [1971] 2 Ontario Reports 103 (High Court of Justice) [hereinafter *Johnston*].

quences of the procedures in question.[20] According to this ruling, minors always had the right to consent or refuse treatment the nature and consequences of which they understood.

The Ontario Legislature entrenched the rule in *Johnston* in the Consent to Treatment Act, 1992,[21] which was repealed and replaced by the current statute, the 1996 Consent Act. Section 6(1) of the 1992 Act recognized that a "person" could consent to medical treatment if that person understood the "nature" and "possible consequences" of the proposed procedures. Under the old Act, children could consent to treatment that they understood. This does not suggest that because a child understands a simple procedure, that child has the authority to give consent for all procedures related to that child's heath care. At law, it is recognized that children may be able to consent to some treatments, but not others. The determining factor is how well they understand the treatment.

The 1996 Consent Act embodied many of the principles found in the 1992 Act. However, the 1996 Consent Act was able to expand on many of the rights given to patients in the old statute. Both the 1996 Consent Act and the 1992 Act recognize that capacity to consent to medical treatment depends on both the ability of the patient to understand the treatment proposed and the time that the treatment is received. Section 15(1) of the 1996 Consent Act recognizes that a person can consent to some procedures, but not to others. A child may consent to procedures that he or she understands, such as an ambulance ride, but not to those that he or she does not understand, such as surgical treatment for a brain tumor.

Section 15(2) of the 1996 Consent Act and section 6(3) of the 1992 Act, recognizes that a person may be able to consent to treatment at one time, but not at another. These sections recognize that as children grow older, they can give valid consent to an increasing range of treatment. The ability to understand the proposed treatment and its associated risks is the requirement for consenting to it under the 1996 Consent Act .

The 1996 Consent Act did expand on section 6 of the 1992 Act. Section 16 recognizes that during treatment, a pediatric patient may develop the level of understanding required to give consent. When this happens, health care providers must respect the young patient's choices, over those of the parents, regarding continued treatment. This section applies to children suffering from chronic diseases. At age six, they may not understand the treatment they are receiving. As they grow older, these children may develop a greater understanding of their diseases and their treatments. When a child understands both the nature of the treatment and the risks associated with continuing and ending it, that child is able to make his or her own decisions regarding that treatment. The old Act did not specifically give a person the right to make his or her own decisions regarding treatment after someone else provided the initial consent.

The 1996 Consent Act differs from the 1992 Act in one important aspect. It allows a health care provider to presume that a person, including a child, is competent unless there is reason to believe otherwise. This presumption did not exist for children before the 1996 Consent Act. According to the common law of the United States, minors are presumed to be

20 See above at 14-15.
21 Statutes of Ontario 1992, chapter 31 [hereinafter the 1992 Act].

incompetent to make their own treatment decisions.[22] The only exceptions to this rule are where children are married, legally emancipated from their parents, or have sufficient maturity to comprehend and understand both the nature and risks of the procedure.[23] The "Mature Minor Doctrine" allows a child to argue that he or she has sufficient understanding of the proposed procedure to allow him or her to give valid consent. At common law, a court must make the determination whether a minor's wishes can be respected.[24] Unless a statute provides otherwise, minors must be able to prove their understanding of proposed treatments before their wishes can be respected.

The New Brunswick Court of Appeal adopted the Mature Minor Doctrine in *Walker* v. *Region 2 Hospital Corp.*[25] The case involved a 15 year-old Jehovah's Witness who refused life saving treatment for his leukaemia because it involved blood transfusions, which are not premitted by the Jehovah's faith. In finding for the patient, Chief Justice Hoyt and Justice Angers held that he had "sufficient maturity" for his wishes to be respected.[26] Specifically, Justice Hoyt held that where minors can understand the nature and consequences of the proposed treatment, interference with their wishes cannot be justified.[27] However, the presumption was still that the minor was incapable of providing consent until proven otherwise.

In the *Walker* case, Mr Justice Ryan concurred in the result, but his reasons differed. He held that while mature minors could consent to medical treatment, they cannot always refuse it. The court should use its *parens patriae* jurisdiction to override the wishes of a parent or child to protect the child's life if that life is in peril.[28] According to the facts in *Walker,* the boy's life was not in immediate danger, so his wishes had to be respected. If his condition changed, Mr Justice Ryan would consider forcing him to undergo treatment. This opinion would give "mature" children the right to consent to medical treatment, but limit their right to refuse it.

The Mature Minor Doctrine was employed to interpret the 1992 Act in *Children's Aid Society of Metropolitan Toronto* v. *S.H.*[29] This case concerned a protection application to have a 13 year old Jehovah's Witness made a ward of the Children's Aid Society so that the hospital could administer a blood transfusion. The mother refused to consent to her daughter's treatment because of her daughter's opposition to it. The judgment of the Ontario Court (General Division) referred to "milestones" in other pieces of legislation to determine whether a minor has capacity to consent to medical treatment. Specifically, Justice Wilson looked to the age when people are allowed to drive and consume alcohol as an indication of their ability to make good decisions. The creation of such limits was interpreted as evidence that children cannot make decisions for themselves.[30] Further, Justice Wilson held that section 37(3) of the Child and Family Services Act[31] created a presumption that children do not have capacity to make their own decisions until they reach the age of 16. That section requires the court to take several criteria into account when making an order or determination of the "best interests of the child" in a protection application. The section applies to children under age of 16 and cites the "child's views and

22 Alexander Morgan Capron, "The Competence of Children as Self-Deciders in Biomedical Interventions" in Willard Gaylin and Ruth Macklin, eds., *Who Speaks for the Child: The Problems of Proxy Consent* (New York: Plenum Press, 1982) 57 at 59, 74.
23 See above at 70.
24 See above at 73-74.
25 (1994), 4 Reports of Family Law (4th) 321 at 333.
26 See above at para 31, 42.
27 See above at para 25, 29.
28 See above at para 66-70.
29 [1996] Ontario Judgments No 2578 (QuickLaw) (General Division) [hereinafter cited to QuickLaw as *S.H.*].
30 See above at para 95-96.
31 Revised Statutes of Ontario 1990, chapter C-11 [hereinafter *CFSA*].

wishes" as one criteria in the determination.[32] It does not specifically state that children lack capacity to make medical decisions. The Court used all these considerations to override the expressed wishes of the minor patient.

Under the 1996 Consent Act, children in Ontario are presumed to be able to consent to and refuse medical treatment. To dispense with that consent or refusal, a health care provider must determine, on reasonable grounds, that the child does not fully comprehend the nature or the possible consequences of the decision. If reasonable grounds for invalidating the child's instructions cannot be found, those instructions must be followed, even where the parent's wishes contradict those of the child.

Many health care providers are reluctant to respect the wishes of a child over those of a parent. The reasons are simple. Parents usually have more opportunities for recourse. They are more likely to complain to any available authority if health care providers have not respected their wishes. In addition, compared with their child, parents are much more likely to sue. Children have more difficulty in having their views heard by a court.[33] However, section 29 of the 1996 Consent Act gives health practitioners protection from legal sanctions for abiding by a child's wishes. Section 29(1) states that practitioners who reasonably believe valid consent has been given are not liable for providing treatment. Sections 29(2) and 29(3) give practitioners the same freedom from liability for not providing treatment because they reasonably believe there has been valid refusal. Health care providers have no need to fear legal sanctions for respecting the treatment wishes of a minor where there is no reason to defeat the presumption that minors understand the decision they are making.

Before being revoked in 1996, section 26 of Ontario Regulation 965,[34] made pursuant to the *Public Hospitals Act*,[35] was a significant limit on the ability for children to direct their own treatment. It made it impossible for children under the age of 16 to undergo certain forms of treatment without parental consent. Section 26 of that regulation stated that no surgical procedure and no diagnostic test or medical treatment requiring written consent could be performed on a patient under 16 years of age without the consent of a parent or other person with legal custody. The only exception to this rule was where the young patient was married. The regulation applied to all publicly funded hospitals including all other "places" operated by the hospital for the treatment of the sick and injured.[36] The term "place" has been held to include the "office where a duly qualified medical practitioner is engaged in the practice of medicine or surgery."[37] Presumably hospital-run clinics were subject to Regulation 965. As the word "place" has also been interpreted to include vehicles,[38] hospital "mobile clinics" also had to comply with it. This regulation is still significant because many hospitals have not changed their procedures to reflect the change in the law allowing children under age 16 to provide valid consent.

The effect of section 26 of Regulation 965 was, and continues to be, devastating for children seeking medical treatment without involving their parents. They cannot go to a hospital or a hospital clinic for many procedures. Testing for sexually transmitted diseases usually requires written consent. Testing for HIV always requires written consent because of

32 *CFSA*, section 37(3)(10).
33 In Ontario, a minor must have an adult litigation guardian to commence an action. Ontario, Rules of Civil Procedure, rule 7.04(1).
34 Revised Regulations of Ontario 1990, Reg. 965, section 26, as repealed by Ontario Regulation 17/95, section 4.
35 Revised Statutes of Ontario 1990, chapter P. 40, section 32(1).
36 See above at section 1.
37 *R.* v. *M.D.S. Laboratories Ltd.*(1985), 8 Ontario Appeal Cases 218 at 220 (Court of Appeal).
38 *R.* v. *Rao* (1984), 9 Dominion Law Reports (4th) 542 at 571 (Ontario Court Of Appeal). See also: *R.* v. *Thompson* (1990), 50 Canadian Rights Reporter 1 at 21 (Supreme Court of Canada).

the necessity of follow-up counselling. Children may not go to a hospital or a hospital clinic to have these tests done if parental consent was required. Abortions are not to be performed on a person under age 16 in Ontario hospitals without the consent of a parent. Not all children have access to private clinics to perform these types of procedures. Private abortion clinics exist in very few communities. To be admitted to a hospital for treatment, homeless children had to find a "parent" to give consent. This was often an insurmountable barrier. Regulation 965 significantly limited the ability of minors to consent to their own medical care. It was also an effective barrier to medical treatment for many children under age 16. Unfortunately for these children, many hospitals still require parental consent before treatment is supplied.

Under their right to security of the person under section 7 of the Charter, competent children may have a right to direct their own treatment. The majority of the Supreme Court in *R. v. Morgentaler* (1998) held that "the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger."[39] If children cannot be tested or treated for sexually transmitted infections without parental consent, they can be effectively prohibited from undergoing these procedures. The deterrent effect of requiring parental consent, described above, can clearly put a child's health in danger, even where there is no immediate emergency.

In *Morgentaler*, three justices went further in their reasoning. Writing for this group, Chief Justice Dickson held that forcing a woman to carry a foetus to term, for reasons unrelated to her own priorities and aspirations, is a "profound interference with a woman's body and thus a violation of security of the person."[40] *Morgentaler* struck down a law that required a woman to get consent from an abortion committee to undergo the procedure. It is not a large leap of logic to apply this reasoning to the issue of allowing children to consent to medical treatment. Where a child has expressed wishes regarding a treatment that he or she understands, ignoring that child's priorities and aspirations and forcing them, by law, to concede to the wishes of his or her parents is clearly an interference with that child's body.

Peter Hogg is a leading authority on the Canadian Constitution. He suggests that, based on *Morgentaler*, security of the person includes some "requirement of personal autonomy" with respect to medical treatment.[41] Under Chief Justice Dickson's reasons, any provision in law that deprives children from making their own health care choices is inconsistent with section 7 of the Charter and should be found to be of no force or effect. The law could only be saved by section 1 of the Charter if the limit it places on a child's security of the person can be demonstrably justified in a free and democratic society. However, as will be shown below, there are no compelling arguments against giving children the right to direct their own medical treatment.

There is also a Charter argument to be made under section 15(1), the guarantee of equal benefit and protection of the law. That section specifically lists age as a forbidden ground of discrimination. Under this section, it should be a patient's ability to understand

39 This holding was the bottom line for the five judgments of the majority. *R. v. Morgentaler (No. 2)*, [1988] 1 Supreme Court Reports 30 at 90, (Justice Beetz).
40 See above at 56-57.
41 Peter W. Hogg, *Constitutional Law of Canada*, 3d ed. (Scarborough: Carswell, 1992) at 1029.

the proposed treatment, not the patient's age, which determines whether the patient has the capacity to provide valid consent. In *Re: L.D.K.,* [42] the Ontario Provincial Court held that section 15(1) prevents government agencies from using age as a basis for excluding children from decisions about their own treatment. Under the Charter, the law should not prevent children from providing consent to treatment when they understand the nature and the risks associated with that treatment. Hospitals are not government agencies and are not subject to the Charter.[43] They are free to maintain policies that require parental consent for treatment of minors. Doctors in private practice are also unencumbered by the Charter. However, the provisions of the 1996 Consent Act bind both these agencies. Where a child who understands a medical procedure has expressed wishes regarding that procedure, health care providers must comply with those wishes. Physicians may only refuse to treat a minor without parental consent. However, such an action may be harmful to the health of the child.

Concerns About Minors Directing Their Own Health Care and Ontario Bill 91

Negative reactions concerning children's self-direction in securing medical treatment are rooted in two deeply held beliefs in our society. The first belief is that children do not have the ability to properly evaluate their options and make sound decisions. The second is that it is the parent's role in the family to guide and make decisions for their children. Anything that undermines that role is felt to undermine the institution of the family. However, neither of the two beliefs survive careful scrutiny. Neither justifies prohibiting minors from making decisions regarding their health care.

Are children incapable of making their own decisions? Kids Help Phone concluded that children are not inherently unable to make their own decisions, although children are often lacking in experience and information resources. When these factors are compensated for, children, especially adolescents, have few problems making rational decisions.[44] In the field of medicine, health care providers serving adolescents have not widely contested this perspective. The Windsor Teen Health Center's position on decision making capability is similar to that of Kids Help Phone.[45] In addition, many family physicians note that their pediatric patients with chronic illnesses understand their ailment better than they commonly believed. This is because those children are exposed to specialists and others who have an intimate knowledge of the condition, and the child has first-hand experience with the ailment. Many child care professionals believe that children who have good information make sound decisions. Psychological evidence supports the idea that many children can competently make their own decisions. While cognitive skills develop differently between individuals, generally it has been found that adolescents are as able as adults to make sensible decisions.[46] An Australian study found that children as young as nine years old could focus on "sensible and important reasons" in their decision making process. The study concluded that they could competently make health care decisions.[47]

Given this evidence, a presumption that children can make their own decisions is a

42 *Re: L.D.K.* (1985), 48 Reports of Family Law. (2d) 164 at 171 (Ontario Court of Justice (Provincial Division)).
43 See *Stoffman* v. *Vancouver General Hospital*, [1990] 3 Supreme Court Reports 483.
44 Kids Help Phone, *1993 Annual Report* (Toronto, 1993) at 3.
45 Teen Health Centre, *Helping Teens make the Right Choice*, pamphlet.
46 See note 6 at 503.
47 V. Dharmananda, *Informed Consent To Medical Treatment: Processes, Practices and Beliefs* (Law Reform Commission of Western Australia, 1992) at 12.

logical policy choice. No one suggests that children who do not understand the nature or risks of a proposed treatment should be able to provide consent. Only where physicians believe that their patient is not competent to provide consent should they seek direction from another person. This position is the law as found in the 1996 Consent Act. The argument that children should not be able to direct their own health care because they are not able to make sound decisions is valid, but not helpful against this legislation. Children unable to make sound decisions are still not required to make them. However, family values were the basis for much of the opposition to the 1996 Consent Act and its more explicit continuation of the extension of capacity for medical consent to children.

Much of the concern expressed about providing children with a legal right to direct their own health care is based on the belief that the existence of such a right will undermine the role of parents in the family to make decisions for their children. This belief is a vestige of paternalist family values. Historically in many western societies, wives and children were property. Men made all the important decisions for the rest of the family. The law did not recognize that conflicts could exist within families.[48] There is concern that allowing a child to ignore the wishes of a parent, in favour of his or her own desires, undermines the family unit. It is a basic value for many in Canadian society that children should honour their parents. People continue to believe that an important part of the child rearing responsibilities of parents is to make important decisions for their children.[49] Doing so is a form of guidance for the child. Allowing a child the legal right to ignore a parent's wishes, even as they pertain to that child's body, would promote conflicts within families and result in the dissolution of family units.

Nonetheless, there are many reasons why the family values argument cannot justify denying competent children the right to direct their health care. A study of treatment preferences among Australian adolescents showed that most children are willing to defer to their parents' judgment, or at least consider their opinion, when major health care decisions must be made.[50] Good parents do not need legislation to force their children to consult them on their health care problems. In ideal families, there is a "level of trust and confidence between parents and children that allows a free and open discussion of any matter."[51] These ideal families will not be affected if the law allowed children to direct their own health care.

The many children who do not live in ideal families need the right to consent to their health care. These children do not have the relationship with their parents that allows them to discuss sensitive health care issues with them. This situation may have developed as the result of abuse, communication problems, value differences between parent and child, or simply because of an embarrassing health problem. In all these circumstances, minors may not want to consult with their parents. Unfortunately, requirements of parental consent are not likely to force these children to consult their parents. Instead, they are likely to force the children to not get medical treatment for their health problems.

In 1996, a member of the Ontario Provincial Parliament, Mr. Klees, introduced Bill

48 See note 6 at 503.
49 See note 18 at 5419 (Mr. Klees, MPP).
50 See note 47 at 112-114.
51 See note 18 at 5421 (Elinor Caplan, MPP). Ms. Caplan worked on the drafting of the 1996 Consent Act as Minister of Health.

91, An Act to Provide for Parental Consultation Under the Health Care Consent Act, 1996.[52] This was an attempt to amend the 1996 Consent Act to restrict the rights of minors under that Act. Bill 91 did not deny competent children the right to consent to their own health care. It merely required that before health practitioners could treat persons under the age of 16, they must make reasonable efforts to consult with at least one of the patient's parents. Bill 91 provided exceptions to this rule where the child was married, the child was seeking treatment for abuse by a parent, or the child would be abused as a result of seeking the treatment.[53] In an emergency, a health care provider could still provide treatment without consulting the parents.[54] Bill 91 was defeated at first reading by a vote of 42 to 34.[55] The Hansard Reports on the debate on this Bill reveal not only the reasons for the Bill's defeat, but also the importance of not limiting the legal right of children to direct their own health care.

During the debate over Bill 91, several MPPs stood up to argue for defeat of the Bill. They argued that the proposed amendments to the 1996 Consent Act would not promote stability in the family unit, but would discourage children from seeking medical care. The opposition did not believe that health care providers would be consistently able to detect or predict abuse. The Bill would not promote family stability because stable families would not need its provisions. Where there were problems in the family, even minor ones, the proposed amendments would not protect the family; they would only discourage children from getting medical help. MPPs were particular concerned that they should not discourage minors from being tested and treated for sexually transmitted infections. The legislative reports reveal that the Hospital for Sick Children, the Windsor Teen Health Centre and the Yonge Street Mission all opposed Bill 91 for these reasons.

An absence of legal restrictions on children's ability to consent to health care is insufficient to address the concerns mentioned in the Ontario Legislature.

There is also a need for a legal presumption that children are able to direct their own health care. Laws that do not create this presumption, such as section 17 of the Infants Act of British Columbia,[56] do not adequately protect the rights of children to direct treatment that they understand. Children do not have the same access to legal resources that their parents do. They cannot direct their own litigation. They cannot afford to hire lawyers. It is still difficult for them to have their voice heard in court. Requiring children to legally prove that they have capacity to make treatment decisions is the same as denying them that capacity. The legal presumption of capacity allows children, who understand the decision they are making, to have their wishes respected.

The Impact of the Current Law on Minors

The law in Ontario is simple. Where a minor understands the nature of a proposed treatment and the risks involved in both undergoing and refusing that treatment, he or she is entitled to give valid consent or refusal to that treatment. Children can give consent to undergo medical procedures that they do understand, even if there are other treatments that they do not understand. If a child has the requisite level of understanding, that child's

52 1st session, 36th Legislature, Ontario, 1996.

53 See above at section 1.

54 1996 Consent Act, section 25(2).

55 See note 18 at 5426.

56 Under the British Columbia law, a health care provider cannot respect a child's treatment wishes unless that provider has been satisfied that the child understand the treatment. This places the onus on the child to demonstrate that understanding. See note 17.

wishes must be respected over those of the parents. Further, health care providers cannot incur liability for obeying the wishes of a child that they believe has provided valid consent or refusal. There is no legal reason to prevent a doctor from following the instructions of children who fully understand the instructions that they have given. This law seems to solve the specific problems of the children mentioned in this paper.

In the example I referred to earlier, Mark had clearly expressed his wish to have his treatment continued and those wishes should have been immediately respected. At the time I asked what his wishes were, the young athlete was fully oriented as to person, time and place. In other words, despite being lethargic, he was fully conscious. He understood that he was in an ambulance and that a paramedic was treating him. He also understood that the proposed continuation of his treatment was that he be driven to the hospital in an ambulance. The main risk involved in that treatment was the remote possibility of a motor vehicle accident involving the ambulance. It is a safe assumption that an 11-year-old could understand the concept of an accident. These facts provide no basis on which to rebut the presumption of capacity. With that level of understanding, Mark was free to direct me to take him to the hospital. The boy did in fact provide those instructions. I had no reason to disbelieve that I had received valid consent to treatment. As a health care provider, I was free to follow Mark's directions without fear of liability for respecting his wishes. The correct legal response to his father's continued protests would have been to close the back doors and take Mark to the hospital immediately.

Minors who understand that they need testing for sexually transmitted infections are likely mature enough to understand the tests. There is no reason, at law, for a doctor to refuse a request for these tests. In fact, allowing children to have access to these tests without parental consultation was one reason the Ontario Legislature enacted the 1996 Consent Act. Every clinic in Ontario should be a "hassle-free" clinic for teenagers.

Although the law is often on the side of all children consenting to treatment, it is often difficult for children to exercise their rights under that law. The law exists to allow children who understand a medical procedure to consent to it. However, children are still rarely able to have their medical directions respected. This is especially true where their wishes conflict with those of their parents. Very few children or health care providers know what the law is with respect to the ability of minors to consent to health care. Currently, the problem is more educational than legal.

Doctor's and Children's Understanding of the Law of Consent

Two studies have looked at how doctors and children understand the law concerning a minor's ability to consent to health care. The University of Toronto conducted one of these studies in 1979 and1980.[57] The Law Reform Commission of Western Australia conducted the other in 1992.[58] The law for both studies was essentially the common law rules for consent of minors as described above. Both studies concluded that there was a general misunderstanding of the law. Both doctors and children had almost no knowledge that the law allowed minors who understood the nature and risks of a procedure to provide

57 Katherine Catton, Wendy Graham and Eater Koulack, *Doctor's Understanding of and Practices Regarding the Law of Minors' Medical Consent: A Pilot Study* (Toronto: University of Toronto, 1979). Also see note 3 above.
58 See note 47.

a valid consent to that procedure.

In the Australian study, none of the physicians surveyed believed that minors could make the ultimate decision over their treatment. A large majority (73.3 per cent) felt that the decision in such cases should be made by the parent, the minor, and their physician. Where a minor's expressed wishes directly contradicted those of a parent, 53.3 per cent of responding doctors would try to convince the parent to accept the child's wishes, but only if they thought the child had made the correct choice.[59] None of the physicians tested their young patients to determine if they were capable of making their own treatment decisions.[60]

The Ontario study showed that only seven per cent of physicians understand the law of consent as it relates to minors. Most respondents to the study believed that age, living status and the nature of the presented problem determined whether a minor could give valid consent.[61] However, most of the doctors surveyed believed that the law should be what it in fact was. They wanted a law that allowed them to provide treatment to minors who understood the nature, risks and benefits of the proposed treatment. The doctors felt that this determination should be made on an individual, case-by-case, basis.[62] This was the law at the time of the study. Where the doctors did know the law, they were still reluctant to recognize the validity of a minor's consent. This apprehension grew out of fears of being held liable if they treated a child against the wishes of a parent.[63] Protection from this type of liability was a new addition to the law in the 1996 Consent Act.

The beliefs of minors in both studies mirrored those of the physicians. In Australia, 100 per cent of the responding minors were willing to concede to their parent's wishes regarding treatment.[64] However, 46.7 per cent of the responding minors expected doctors to follow the instructions of their parents when they contradicted their own. An additional third of the respondents did not know whose wishes would be respected.[65] In Ontario, only 10 per cent of responding minors could correctly state the law.[66] Most thought that they could not provide a valid consent until age 16.[67] For 62 per cent of the responding children, this incorrect belief caused them to hesitate before seeking treatment for a medical problem. They did not want their parents consulted or were afraid that such a consultation would be embarrassing.[68]

Clearly, neither health care providers nor minor patients understand the law as it relates to the validity of medical consent of minors. In order for children to take full advantage of their legal right to direct their health care, both they and their treatment providers will have to be educated regarding the state of the law. Informing all health care workers of the reasons for allowing children to direct their own treatment will be particularly important. It will also be important to inform those professionals that they cannot be held liable for respecting the wishes of minors where there are no apparent reasons to doubt the patient's capacity to consent. The Australian and Ontario studies show that without this education, the health care wishes of children will not be respected. The ruling in *S.H.* also suggests that the courts are not aware of the importance of allowing children to consent to their own medical treatment. In that case there was evidence that the child did fully

59 See above at 115-116.
60 See above at 112.
61 See note 57 at 58.
62 See above at 64.
63 See above at 65.
64 See note 47 at 112.
65 See above at 117.
66 Note that this is greater than the percentage of doctors (only seven per cent). See note 57 at 62.
67 See above at 64.
68 See above at 65.

understand the nature of the treatment she was rejecting and what the consequences of that rejection were.[69] However, the Court felt that the minor patient's wishes were a sufficiently important consideration to stop the treatment. This ruling had undesirable consequences for the patient. She was forced to flee the country and deplete all her family's money to get the treatment she desired.[70] It should be noted that in *Re: L.D.K.*,[71] an earlier case with identical facts save that the child was a year younger, the court decided to follow the wishes of the child. The court found that refusing the minor patient's wishes would be harmful to her.[72] Further, it found that ignoring her clearly stated wishes, solely because of her age, violated her section 15(1) Charter right to equality.[73] The 1996 Consent Act will have no effect if both health care providers and minors are not aware of the rights it gives to children to direct their own treatment. The courts must also realize the importance of enforcing those rights.

Conclusion

Children like Mark are fully able to direct their own treatment. This is true even when their wishes contradict those of their parents. The 1996 Consent Act allows health care workers to assume that children can provide valid consent or refusal to treatment. Children are presumed to be able to understand both the nature of the proposed treatment and the risks of consenting or refusing it. Only where a physician has reasonable grounds to believe that a child lacks that understanding is deference given to the wishes of that child's parents. The protection from liability for abiding by a child's wishes, where it is believed that the child has capacity to make health care decisions, allows health care workers to respect those wishes without fear of legal persecution. If a child understands the nature of the proposed treatment and the possible consequences of consenting or refusing it, that child's wishes must be respected.

Allowing competent children to make their own health care decisions is important for several reasons. First, children are free to seek treatment for all their problems without fear that their parents will be informed. Where there are requirements of parental involvement for treatment, children tend to avoid seeking that treatment. Such requirements lead to children not getting treatment for sexually transmitted infections, pregnancy, and drug addictions. Second, children are free to seek treatment for abuse they have suffered without fear that their abuser will have to be consulted. Lastly, and most importantly, it is recognized that children have an essential human right to have control over their own bodies.

Clearly, neither children nor health care providers understand the law of medical consent as it relates to minors. Both groups believe that the law is more restrictive on the rights of children than it actually is. Education programs are needed to inform children and health care providers of the state of the law in Ontario. Additional education is needed for the health care providers to ensure that they understand both the importance of allowing children to direct their own treatment and that they are not liable for respecting the wishes

69 See note 29 at 97.
70 Catherine Dunphy, "They Must Have Cared a Lot to Fight Me So Hard" (12 April, 1998) The Toronto Star F5.
71 See note 42.
72 See above at 11-12.
73 See above at 16-17.

of a minor they believe is competent. This education is essential for ensuring that the rights of children to direct their own health care are respected.

Winner 1999 Cassels Brock & Blackwell Paper Prize

A New Trend in Equality Jurisprudence?

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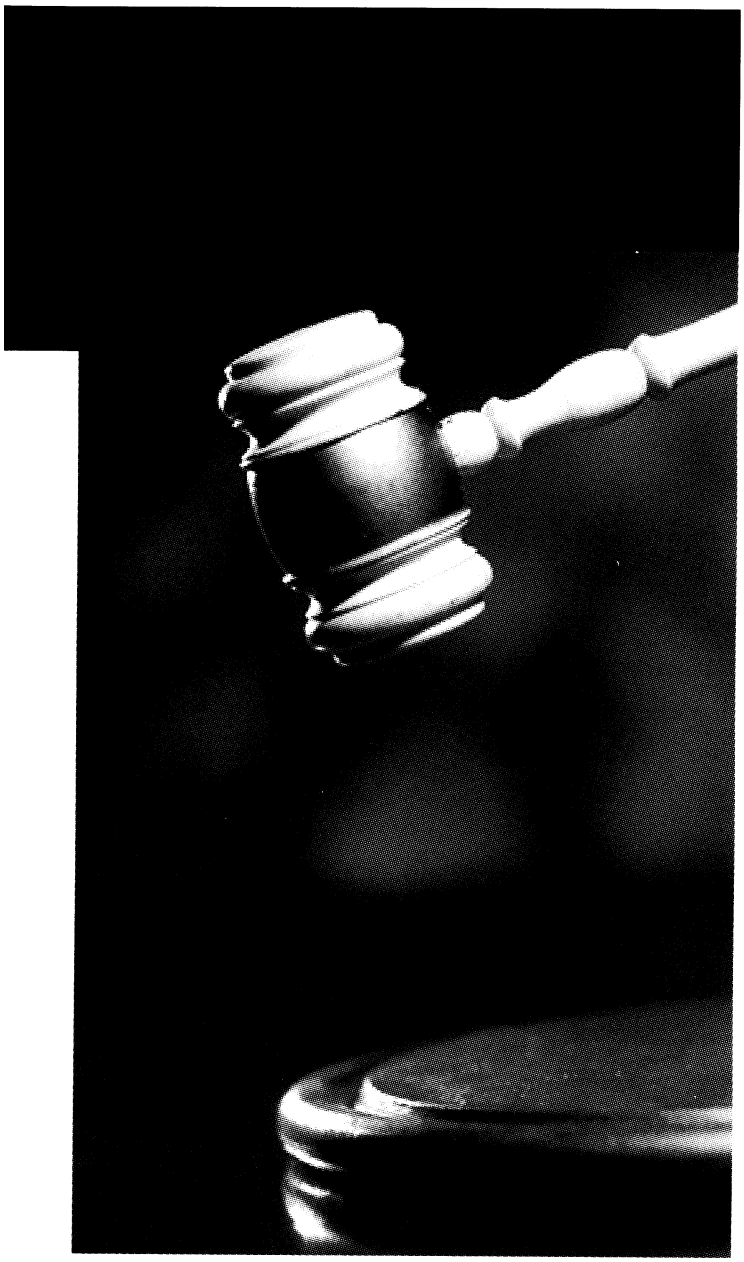
The equality rights protected by section 15(1) of The Canadian Charter of Rights and Freedoms[1] are among the most fundamental rights possessed by Canadians. Equality is so important because it defines our understanding of humanity and how people interact with one another. Although one can innately understand the higher meaning and ideals that equality embodies, the task of articulating a practical and effective test to decide when a person's equality rights have been violated is a very difficult one.

Since section 15 has been in effect, the judicial approach to equality rights has, unsurprisingly, altered over time. The Supreme Court of Canada's early interpretation of section 15(1) in *Andrews* v. *Law Society of British Columbia*[2] and *R.* v. *Turpin*[3] set out the "enumerated" and "analogous grounds" approach. This approach was considered to be the correct test (subject to minor variations in its application) until the 1995 "trilogy" of equality cases: *Egan* v. *Canada*,[4] *Miron* v. *Trudel*[5] and *Thibaudeau* v. *Canada*.[6] These cases dramatically shifted the understanding of section 15. The Supreme Court became badly fractured over the correct interpretation of section 15(1). As will be seen, some members of the Court adopted a much more restrictive interpretation of equality. Each Justice seemed fairly resolved in his or her position and this division was maintained until 1997.

Somewhat surprising to those interested in constitutional law were the Supreme Court's three unanimous equality decisions in 1997: *Benner* v. *Canada (Secretary of State)*[7], *Eaton* v. *Brant County Board of Education*[8] and *Eldridge* v. *British Columbia (Attorney General)*.[9] In 1998, the Supreme Court rendered its judgment in *Vriend* v. *Alberta*.[10] While the Court in *Vriend* was not unanimous,[11] the decision indicated a great deal more consensus on how to interpret section 15(1) than there had been in 1995.

In this paper, I will suggest that these four recent cases reflect a new trend in equality rights jurisprudence. This trend is marked by a return to the Court's early section 15(1) approach, which possessed a broad understanding of the equality rights. This paper will focus primarily on three factors that I believe characterize this more generous interpretation:[12] first, an expansive definition of discrimination; second, a renewed emphasis on the

1 Being Schedule B to The Constitution Act, 1982, enacted by The Canada Act 1982, U.K. Stats. 1982, c. 11; herinafter referred to as "the Charter."
2 [1989] 1 Supreme Court Reports 143, 56 Dominion Law Reports (4th) 1; herinafter cited to Dominion Law Reports as "*Andrews*."
3 [1989] 1 Supreme Court Reports 1296, 48 Canadian Criminal Cases (3d) 8; herinafter referred to as "*Turpin*," cited to Canadian Criminal Cases.
4 [1995] 2 Supreme Court Reports 513, 124 Dominion Law Reports (4th) 609; herinafter referred to as "*Egan*," cited to the Dominion Law Reports.
5 [1995] 2 Supreme Court Reports 418, 124 Dominion Law Reports (4th) 693; herinafter referred to as "*Miron*," cited to the Dominion Law Reports.
6 [1995] 2 Supreme Court Reports 627, 124 Dominion Law Reports (4th) 449; herinafter referred to as "*Thibaudeau*," cited to the Dominion Law Reports.
7 [1997] 1 Supreme Court Reports 358, 143 Dominion Law Reports (4th) 577; herinafter referred to as "*Benner*," cited to the Dominion Law Reports.
8 [1997] 1 Supreme Court Reports 241, 142 Dominion Law Reports (4th) 385; herinafter referred to as "*Eaton*," cited to the Dominion Law Reports.



importance of examining the broader context in which the rights claim takes place; and third, by the vigour of the effects-based analysis in which the Court engages.

Despite these trends, this paper will show that certain aspects of the trilogy's division remain. I will examine how the relevance factor (which relates to how one characterizes the purpose of the legislation) is treated in the recent cases. In addition, the Court does not seem to have resolved what should be predominant in the section 15(1) analysis: the notion of analogous grounds or the effects of the legislation on the group in question. Consequently, one may wonder whether the Court's unanimity in the three 1997 cases merely masks a deeper conceptual difference.

The *Andrews-Turpin* Enumerated and Analogous Grounds Approach

In 1982, the Charter — which guarantees certain fundamental rights and freedoms to

9 [1997] 3 Supreme Court Reports 624, 151 Dominion Law Reports (4th) 577; herinafter referred to as "*Eldridge*," cited to the Dominion Law Reports.

10 *Vriend* v. *Alberta*, [1998] Supreme Court Reports 493, 156 Dominion Law Reports (4th) 385; herinafter referred to as "*Vriend*," cited to the Dominion Law Reports.

11 The Court split 8-1 delivering three opinions.

12 This paper's focus is on the interpretation of section 15(1), consequently it does not examine the relationship of section 15(1) and section 1 of the Charter. However, it should be noted that as the Court's interpretation of the equality rights has evolved, so has its application of the section 1 justification test.

Canadians — was proclaimed to be part of the Constitution. Its equality provision, section 15, did not come into effect for five years in order to allow the federal and provincial governments to amend their legislation to ensure it complied. Section 15(1), over which there was great debate during its drafting, states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[13]

A law infringing a Charter right may be permissible under section 1 if the government can show that the infringement is demonstrably justified in a free and democratic society.

The Supreme Court's first opportunity to interpret section 15(1) arose in two 1989 cases: *Andrews*[14] and *Turpin*.[15] In these two cases, the Supreme Court adopts the enumerated and analogous grounds test since it "most closely accords with the purposes of s. 15 and the definition of discrimination ... and leaves questions of justification to s. 1."[16] Justice McIntyre takes a broad approach to equality in *Andrews*.[17] He determines that both the enumerated grounds and possible analogous grounds must be interpreted in a "broad and generous manner reflecting the fact that they are constitutional provisions."[18]

In *Turpin*, Supreme Court Justice Wilson emphasizes that in order to ascertain if legislation is discriminatory, one must consider the group in question and its place in the broader social context. Since this contextual analysis forms part of the basis for the transformation of section 15(1) jurisprudence, it is worth quoting at length:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. ... Accordingly, it is only by examining the larger context that a court can determine whether differential treatment results in inequality or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage.[19]

David Lepofsky articulates what I believe Justice Wilson attempts to suggest. An inquiry that does not consider the larger context "fails to recognize that there are certain insular groups in society who traditionally suffer disadvantage, and whom equality rights are intended to serve."[20] Furthermore, Wilson noted that "[i]f the larger context is not examined, the s. 15 analysis may become a mechanical and sterile categorization process conducted entirely within the four corners of the impugned legislation."[21]

The Court's generous approach to interpretation is also suggested by Justice McIntyre's statement, in *Andrews*, that not every legislative distinction will result in inequality; rather, "identical treatment may frequently produce serious inequality."[22] Thus, Justice McIntyre recognizes the difference between equal treatment and equal result. He insists that equal treatment is insufficient. When assessing a section 15(1) violation, a court must look at the result of the treatment on the rights claimant. He states: "To approach the ideal of full equality before and under the law ... the main consideration must be the impact of the law on the individual or the group concerned."[23]

13 Section 15(2) of the Charter ensures that affirmative action will not contravene section 15(1).
14 *Andrews* involved a challenge to British Columbia's Barristers and Solicitors Act, which prevented Andrews from practicing law in British Columbia until he became a Canadian citizen.
15 In *Turpin*, the accused was charged with first degree murder. The equality argument was based on the fact that accused persons in a similar position in Alberta, but not in any other province, could elect to be tried by a judge alone.
16 *Andrews*, see note 2 at 23. The *Andrews-Turpin* test is a two-step one: First, did the legislation create a distinction? Second, was this distinction discriminatory? This second step entails an inquiry into whether the legislation imposed a benefit or a burden, and whether it did so based on an enumerated or analogous ground.
17 Justice McIntyre was in the minority with respect to the application of section 1. However, the majority endorsed his approach to section 15(1).
18 See above at 19.
19 See note 3 at 34.
20 M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities After 10 Years — What Progress? What Prospects?" (1997) 7 National Journal of Constitutional Law 263 at 276.
21 See note 3 at 35.
22 See note 2 at 10.
23 See above at 11.

This understanding of equality is very important. It recognizes that one cannot merely accept formal equality (treating similar people similarly); one must instead examine the impact of a legislative distinction in order to determine if it operates to confer a discriminatory burden or advantage. The Supreme Court in *Andrews* identifies that a law appearing to treat everyone similarly may, in effect, create greater hardships or advantages for some. Consequently, it crafted discrimination to include both direct discrimination and adverse effects discrimination, although it did not explicitly use this language.

The Court's generous approach to equality in its early decisions is also reflected by its refusal to permit justificatory factors to be considered in the section 15(1) analysis. In *Turpin*, Justice Wilson writes: "In defining the scope of the four basic equality rights, it is important to ensure that each right be given its full independent content divorced from any justificatory factors applicable under s. 1 of the Charter."[24] Wilson rejects the Ontario Court of Appeal's test in *Turpin* of whether a distinction was "unreasonable," "invidious," "unfair," or "irrational" on the basis that importing these limitations into section 15 is unwarranted.[25] Wilson continues: "Balancing legislative purposes against the effects of legislation within the rights sections themselves is fundamentally at odds with this court's approach to the interpretation of Charter rights."[26] This is important because it can be argued that the factor of relevance developed in the trilogy can be equated with the justificatory factors identified and rejected in both *Andrews* and *Turpin*.

As Peter Hogg observes, the Court's early decisions do not provide much guidance for what constitutes an analogous ground.[27] In *Andrews*, McIntyre states:

> A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.[28]

Thus, it would appear that the main factor is whether the distinction imputes group characteristics to an individual without any inquiry into her or his particular attributes. Justice McIntyre, according to some critics, does not define "what constitutes a personal characteristic, except to classify citizenship as one."[29]

In addition to agreeing with McIntyre that a rule barring an entire class on the basis of a personal characteristic violates section 15(1), Justice Wilson, in *Andrews*, places greater emphasis on the "context of the place of the group in the entire social, political and legal fabric of our society."[30] She finds that non-citizens are a group lacking in political power similar to a "discrete and insular minority."[31]

It is more difficult to ascertain what Supreme Court Justice La Forest intends by his comments in *Andrews*. He states:

> I am in substantial agreement with the views of my colleagues. I hasten to add that the relevant question as I see it is restricted to whether the impugned provision amounts to discrimination in the sense in which my colleague [McIntyre] has defined it, *i.e.*, on the basis of "irrelevant personal differences" such as those listed in s. 15 and, traditionally, in human rights legislation.[32]

Is this an early expression of the relevance test, as La Forest and Gonthier later assert in the

24 See note 3 at 30.
25 See above at 32.
26 See above.
27 Peter Hogg, *Constitutional Law of Canada*, 4th ed., (Scarborough: Carswell, 1997) at 1255.
28 See note 2 at 24.
29 William Black and Lynn Smith, "The Equality Rights" in Gerald-A. Beaudoin and Errol Mendes, eds., *The Canadian Charter of Rights and Freedoms*, 3d ed., (Scarborough: Carswell, 1996) at 14-61.
30 See note 2 at 32.
31 See above. The "discrete and insular minority" criteria is borrowed from American constitutional law, which requires a person claiming equality to be part of such a group.
32 See above at 37.

trilogy, or does it show Justice La Forest accepting the enumerated and analogous grounds approach, with relevance pertaining more to the situation where a distinction may indeed be relevant to a person's actual capabilities (for example, the fact that a blind person will do poorly in a written test because she or he cannot see)? I am inclined to believe it is the latter, since La Forest does not engage in a discussion of the functional values underlying the British Columbia legislation. Furthermore, in subsequent cases such as *R.* v. *Swain*[33] and *Weatherall* v. *Canada (Attorney General)*[34] there is no discussion of relevance.

The *Andrews-Turpin* approach to section 15(1) is therefore characterized by a refusal to embrace formal equality. Rather, one must examine the effects of the legislation at issue. In addition, the Court in these early cases stresses the importance of a contextual examination to an equality-right violation. It recognizes that in order to effectively assess whether a distinction results in greater disadvantage to an individual or group, the historical, social, and political context in which that individual and that group are situated must form part of the section 15(1) analysis. William Black and Lynn Smith note that "having rejected identical treatment as the measure of equality, the courts have adopted a measure that assesses the impact of a law or conduct in relation to this broader context."[35] Finally, the Court refuses to restrict the meaning of equality by looking at justificatory factors at the section 15(1) stage.

In subsequent cases, the Supreme Court justices seemed largely in agreement that the test from *Andrews-Turpin* is the correct approach to section 15(1). This is not to say that the decisions were always unanimous. There was disagreement on the correct application of this test; however, the principles upon which it is premised were not questioned.[36]

A Court Divided: The 1995 Trilogy

1995 marks a turning point in section 15(1) jurisprudence. The Supreme Court's disagreement in *Egan, Miron,* and *Thibaudeau* does not represent a simple difference as to the application of an established section 15(1) test.[37] Rather, the Court was to become fundamentally divided as to the meaning of equality and the test for ascertaining a violation.

In the trilogy, the Court divides into three factions. The McLachlin, Cory, Iacobucci, and Sopinka group retains the analysis most resembling that developed in *Andrews*. Supreme Court Justices Cory and McLachlin outline this approach in *Egan* and *Miron,* respectively.[38] Both Cory and McLachlin emphasize that equality means recognizing the innate human dignity of every individual. Considering the individual's human dignity in a section 15(1) analysis assists in ensuring that the Court uses the right claimant's perspective. This subjective point of view lets the Court properly determine if the individual's dignity has been violated.

When deciding whether sexual orientation and marital status are analogous grounds, Cory and McLachlin examine the broader context of the group as outlined in *Turpin*. Justice Cory notes the historic disadvantage suffered by gay people, the physical and verbal harassment they endure, as well as the isolating and stigmatizing existence homosexuals may be forced to survive.[39] Similarly, in *Miron*, Justice McLachlin examines society's

33 [1991] 1 Supreme Court Reports 933, 63 Canadian Criminal Cases (3d) 481.
34 [1993] 2 Supreme Court Reports 872, 105 Dominion Law Reports (4th) 210.
35 Black and Smith, see note 29, at 14-24.
36 However, in *R.* v. *Hess* [1990] 2 Supreme Court Reports 906, 59 Canadian Criminal Cases (3d) 161, Justice Wilson seems to have slipped into reliance on biological characteristics. The two accused were charged under a provision of the Criminal Code which made it a crime for a male to have intercourse with a female under 14 years of age. The accused challenged this legislation on the grounds that it violated equality based on sex. Wilson does not engage in an examination of whether the distinction based on the biological capacity to commit the act of penetration constitutes a burden or a benefit, as is required by the second step of the *Andrews-Turpin* approach.
37 *Egan* involved a challenge by a homosexual couple to the definition of spouse (as a person of the opposite sex) in the federal Old Age Security Act. *Miron* also involved a challenge to the definition of spouse (since it excluded common-law couples) in the Ontario Insurance Act. *Thibaudeau* concerned a challenge to s. 56(1)(b) of the federal Income Tax Act which permitted a non-custodial parent to deduct his or her child maintenance payments when calculating personal income tax but required the custodial parent to include this amount in his or her tax assessment. Thus, *Egan*, *Miron* and *Thibaudeau* all involved section 15(1) challenges based on analogous grounds.
38 In *Thibaudeau*, this group split on the application of this approach. I will not be discussing *Thibaudeau* in detail because the new approaches are expressed in *Egan* and *Miron*. As well, the Court maintained the three separate approaches but split on its application.
39 See note 4 at 673-674.

treatment of unmarried partners as a group. She notes the historical disadvantage and social ostracism where the unmarried partner is regarded as being less worthy than the married partner.[40]

Supreme Court Justice L'Heureux-Dubé sets out a new variation of the approach to section 15(1) in the trilogy.[41] L'Heureux-Dubé believes that the Court has become too caught up in focusing on the grounds of discrimination (i.e., whether the ground is analogous), rather than viewing the grounds themselves as instruments for determining whether the effect of the legislation is discriminatory.[42] The Court has, in her opinion, misplaced the focus of the section 15(1) inquiry.

L'Heureux-Dubé adopts by far the greatest focus on the group as opposed to the individual. She states:

> A person or group of persons has been discriminated against within the meaning of s. 15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration.[43]

Justice L'Heureux-Dubé rightly points out that "groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable."[44]

It is curious that in the trilogy, none of the other eight justices comments on L'Heureux-Dubé's approach. Perhaps the Court does not see her interpretation as involving a fundamental change of course from the equality jurisprudence to date. It is possible that given the fact that she is writing only for herself, her approach may simply be considered less important given that the disagreement in the trilogy is largely focused on the two main positions of Cory-McLachlin and La Forest-Gonthier.[45]

Justice L'Heureux-Dubé is not alone in setting out a new approach to section 15(1) in the trilogy. Supreme Court Justice Gonthier outlines the La Forest-Gonthier coalition's new test in *Miron*.[46] Justice Gonthier attempts to justify the criterion of relevance by stating that it has been part of the Court's equality jurisprudence all along. He cites a passage from *Andrews* where Justices McIntyre and La Forest mention that the characteristic must be irrelevant. With all due respect to Justice Gonthier, I believe it is fallacious to suggest that this factor has formed part of the section 15(1) from the beginning. As Laura Fraser notes, Justice McIntyre probably did not intend so much emphasis to be placed on one utterance of relevance made in passing.[47]

Furthermore, McIntyre's only mention of relevance in *Andrews* was under his discussion regarding the concept of equality. It was not discussed under his section on discrimination, which would seem more appropriate if it, in effect, negates a finding of discrimination. Perhaps the most telling factor is that neither Wilson, La Forest nor Justice McIntyre himself applied any consideration of relevance when assessing whether citizenship was an analogous ground. Further, relevance did not surface as a criterion in any of the Court's other section 15(1) jurisprudence until the trilogy.

40 See note 5 at 749.
41 L'Heureux-Dubé proposes a new test considering: first, whether a legislative distinction exists; second, the nature of the group adversely affected by the distinction; and third, the nature of the interest adversely affected by the distinction.
42 See note 4 at 635.
43 See above at 632.
44 See above at 639.
45 Ironically, in the most recent section 15(1) case, *Vriend*, the rift between these two main factions has lessened and the Court is divided because Justice L'Heureux-Dubé maintains her unique interpretation.
46 The test consists of three steps: first, whether the law has drawn a distinction between the claimant and others; second, whether the distinction results in disadvantage; and third, whether the distinction is based on an irrelevant personal characteristic which is either enumerated or analogous. Justice Gonthier further elaborates on this third step, holding that, when assessing relevancy, one must consider the nature of the personal characteristic and its relevancy to the functional values underlying the legislation. Thus, if a characteristic is relevant to the underlying functional values this in effect negates the finding of discrimination.
47 Laura Fraser, "Rights Without Meaning: Failing to Give Effect to the Purpose of Section 15(1)" (1997) 6 Dalhousie Journal of Legal Studies 347 at 356.

The relevance criterion has been roundly criticized on primarily two grounds.[48] First, both L'Heureux-Dubé and McLachlin point out that a relevance inquiry does not address the problem of discriminatory effects. In this regard, it would seem to be a shift away from the substantive *Andrews-Turpin* approach, back to a more formal understanding of equality. The fact that relevance does not adequately address discriminatory effects is seen in both *Egan* and *Miron*, where neither La Forest nor Gonthier consider the impact of the legislation on homosexuals or common-law couples.

Secondly, on a conceptual level relevance does not fit well with the relationship between section 15(1) and section 1. "Irrelevancy" is closely aligned with other factors that would limit the breadth of section 15(1), such as unreasonableness or lack of justification. This sort of factor was explicitly and repeatedly rejected by the Supreme Court in *Andrews* and *Turpin*. As Brad Berg writes:

> Front-loading "relevancy" and "functional values" into section 15(1) as internal means by which discrimination can be justified represents nothing more than a return to the "reasonableness" theory of discrimination that was specifically rejected in *Andrews*.[49]

In addition to the issue of relevance, the La Forest-Gonthier approach presents a further difficulty in how one characterizes the purpose of the legislation. In both *Egan* and *Miron*, the characterization of the legislation as given by La Forest and Gonthier is rather unusual. Does Justice La Forest's examination of the legislative purpose in *Egan* constitute a contextual analysis? The purpose of a contextual analysis in equality jurisprudence is to identify the reality in which the rights claimant lives by looking at historical, economic, and societal treatment. Justice La Forest's examination is a contextual analysis, but not of the proper context. It is even more problematic because La Forest seems to derive the legislative purpose out of thin air.[50] Thus not only does he engage in a contextual examination of the wrong issue but he is also reading into the legislation a different context than was intended by the government at the time.[51] As Berg states:

> The problem is that the Gonthier/La Forest framework allows the wholesale importation of undefined and unarticulated considerations into section 15(1). Without evidence, and citing none, La Forest J. read in the capacity to procreate and raise children as a necessary condition for spousal allowance eligibility. This condition is not apparent in the Act itself.[52]

This has led several academic commentators to suggest that the Court was guided more by the judges' political and moral philosophies than by considerations of equality.[53]

The La Forest-Gonthier approach further diverges from the *Andrews-Turpin* approach since little consideration is given to the broader context of the group. Although Justice Gonthier mentions the importance of context in order to prevent a sterile inquiry, this was likely no more than "an obligatory nod to past jurisprudential warnings about the aridity of a decontextualized analysis."[54] Both Justices Gonthier and La Forest focus on the larger context surrounding the legislation when attempting to ascertain its purpose and functional values. However, as mentioned above, this is an examination of the incorrect context and there is little to no discussion of the position of homosexuals or unmarried couples in a

48 Relevance has also been criticized on the basis that it places the burden on the rights claimant to adduce evidence as to the legislation's purpose which it claims is irrelevant to the impugned distinction. The government is in a superior position to adduce evidence as to the purpose of its own legislation.

49 Brad Berg, "Fumbling Towards Equality: Promise and Peril in *Egan*" (1995) 5 National Journal of Constitutional Law 262 at 272.

50 When this legislation was first enacted, Minister of National Health and Welfare, Marc Lalonde, identified the legislation's objective as ensuring that once one member of a married couple retired they would continue to have an adequate income.

51 Although the Court does not treat legislative intent as decisive, it can nonetheless sometimes be of assistance.

52 See note 49 at 274.

53 David Beatty, "The Canadian Conception of Equality" (1996), 46 University of Toronto Law Journal 349 at 373 and Berg, see note 49 at 275.

54 Hester Lessard, Bruce Ryder, David Schneiderman and Margot Young, "Developments in Constitutional Law: The 1994-95 Term" (1996) 7 (2nd Series) The Supreme Court Law Review 81 at 91.

historical, political and social context. Lessard, Ryder, Schneiderman and Young write:

> The test adopted by Gonthier and La Forest in *Miron* and *Egan*, respectively, and concurred in by Lamer and Major in both cases, is clearest in its rejection of a substantive approach to equality doctrine and the accompanying contextualized understanding of the individual.[55]

The trilogy clearly shows that the Supreme Court is fundamentally split over the weight to be given to an examination of the larger context and the effects of the legislation in the application of section 15(1). The equality analysis is further complicated by the disagreement over the characterization of the purpose of the legislation as well as the addition of the factor of relevancy and whether or not it is appropriate.

Three Unanimous Decisions in 1997

In 1997, the Court delivered three unanimous decisions. Many wondered whether this new-found unanimity meant that the Court had resolved the issue of relevance or the factors to be considered in assessing a section 15(1) claim. The three decisions all involved grounds enumerated in section 15(1)[56]: sex discrimination in *Benner*[57] and discrimination against the disabled in *Eaton*[58] and *Eldridge*.[59]

In *Benner*, when deciding whether a legislative distinction based on parenthood constituted discrimination under section 15(1) of the Charter, Supreme Court Justice Iacobucci begins by outlining the three approaches taken by the Court in the trilogy. Justice Iacobucci affirms his support for Cory and McLachlin's test. However, before applying it, he goes on to briefly apply the other two tests to the facts of the case in order to demonstrate that each approach results in the same answer, that the legislation discriminates on the basis of sex. Justice Iacobucci's application of each test indicates that the judges have given up their differing approaches. The fact that these judges did not write separately suggests that the Court is beginning to agree on certain aspects of the approach to equality rights, such as how to characterize the legislation, a substantive interpretation of section 15(1), and a vigorous adverse effects analysis.[60] Justice Iacobucci looks at the effect of the Act's distinction between Canadian mothers and fathers and he engages in a contextual examination of sex discrimination. He states:

> This legislation continues to suggest that, at least in some cases, men and women are not equally capable of passing on whatever it takes to be a good Canadian citizen. In fact, it suggests that children of Canadian mothers may be more dangerous than those of Canadian fathers, since only the latter are required to undergo an oath and security check.[61]

The second unanimous equality rights decision was *Eaton* v. *Brant County Board of Education*. In *Eaton*, Supreme Court Justice Sopinka fashions an expansive definition of discrimination, although his application of it to the facts leaves something to be desired. Justice Sopinka begins by noting that: "While there has not been unanimity in the judgments of the Court with respect to all the principles relating to the application of s. 15 of the *Charter*, I believe that the issue in this case can be resolved on the basis of principles in respect of which there is no disagreement."[62] He finds that there is general agreement among the justices that the claimant must establish that the impugned provision creates a

55 See above at 90.
56 As the Supreme Court's decision in *Vriend* subsequently illustrated, this fact eased the Court's path to unanimity.
57 *Benner* involved a challenge to the federal Canadian Citizenship Act, which provided automatic citizenship to a child born outside Canada prior to 1977 only if she or he had a Canadian father or an unmarried Canadian mother.
58 *Eaton* was an appeal by the parents of a child with cerebral palsy from a decision of the Ontario Special Education Tribunal that Emily Eaton should be placed in a special education class.
59 In *Eldridge*, three deaf individuals sought a declaration that the failure to provide funding for sign language interpreters under the British Columbia Medical Services Plan violated section 15(1) of the Charter on the grounds of disability.
60 At the preliminary stage of whether Benner had standing, Justice Iacobucci adopts a generous approach. He rejects the respondents' argument that Benner's mother is the primary target of the sex discrimination and that Benner is attempting to rely on a violation of her rights. Iacobucci's broad approach to standing is also based on his examination of the effects that would result from finding that Benner could not make his own sex discrimination arguments. The effect would be to insulate legislation from Charter review simply because the legislation was geared at the applicant's parent.
61 See note 7 at 608.
62 See note 8 at 404.

distinction, based on an enumerated or analogous ground, that denies an advantage or imposes a burden upon the claimant.[63] It is interesting that, like Justice Iacobucci, Justice Sopinka outlines both the Cory-McLachlin and the La Forest-Gonthier approaches. However, we are left in suspense as to whether he would have applied the relevance step since he does not reach that stage of the analysis.

Justice Sopinka explains two of the interpretations from the trilogy, but neglects to mention or describe Justice L'Heureux-Dubé's analysis. It is interesting that her approach to section 15(1) is likewise absent in Justice La Forest's decision in *Eldridge*. I am not altogether sure why this is so. It might be taken as evidence that Justice L'Heureux-Dubé's approach was not conceptually distinct from that of *Andrews-Turpin*. Alternately, it might suggest that Justice L'Heureux-Dubé's approach only differs from the Cory-McLachlin approach when the matter is one involving analogous grounds and how they should be ascertained.

Justice Sopinka adopts a very broad understanding of equality rights. He accepts Justice McIntyre's statement in *Andrews* that equality requires the accommodation of differences, but he also moves beyond this:

> This emphasizes that the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society as has been the case with disabled persons.[64]

Justice Sopinka indicates that in order to ensure there are no invidious differences between people, the disabled must be assured not equality of treatment (since that would not recognize their true characteristics) but equality of result.

Sopinka maintains his broad, substantive interpretation of section 15(1) by looking at how the disabled have been affected by mainstream society. He finds that "[e]xclusion from mainstream society results from the construction of a society based solely on 'mainstream' attributes to which disabled persons will never be able to gain access."[65] This is an important interpretation of disability since it defines disability as being socially constructed rather than as being caused by the particular characteristic of the disabled person.[66] Justice Sopinka expresses this, writing that "it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them."[67] As Lepofsky writes:

> This is a seminal repudiation of any attempt by a government facing a *Charter* claim, or business facing a human-rights complaint, to rebuff efforts by persons with disabilities to participate fully in society's mainstream by contending that people with disabilities must take that mainstream setting just as they find it.[68]

Justice Sopinka observes that with respect to discrimination on the basis of disability, an inquiry into stereotypical attributions is inappropriate. Instead, he finds that it is "recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability."[69] Thus, Justice Sopinka elevates the section 15(1) inquiry to a more substantive form of equality by combining the

63 See above.
64 See above at 405.
65 See above at 405-406.
66 The disability itself is therefore not the cause of a disabled person's exclusion from society, rather it is caused by society's inability to move beyond able-ist norms and mainstream attributes.
67 See note 8 at 406.
68 Lepofsky, see note 20 at 409-410.
69 See note 8 at 406.

importance of a contextual inquiry with a focus on the importance of assessing the individual's particular characteristics in order to decipher disability-based discrimination.

However, when assessing Emily Eaton's actual characteristics, Isabel Grant and Judith Mosoff suggest that Sopinka "failed to take into account the socially constructed evaluative dimension to the range of differences [between Emily and her more 'able' peers]."[70] Unfortunately, the Court's inquiry into whether segregated education constituted a burden or a benefit to Emily is also problematic. Sopinka finds that the Tribunal's recommendation of special class placement cannot be considered a burden imposed upon Emily.[71] Lepofsky believes that the benefit/burden discussion was unnecessary to the case's disposition. He thinks the Court could have upheld the Tribunal's factual findings under section 1 and therefore the Court "need not have treated this as a section 15 issue."[72] Furthermore, he argues that the Supreme Court inappropriately placed the burden of proof under section 15(1) on Emily's family, requiring them to establish that segregation constituted a disadvantage to her before a breach of her section 15(1) rights could be shown.[73]

The last decision of 1997, and perhaps most generous interpretation of section 15(1), is *Eldridge*. Unlike his *Egan* decision, in *Eldridge* Justice La Forest engages in an examination of the proper context in order to be able to determine whether the legislative omission is discriminatory. When examining the broader context, Justice La Forest finds:

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions....[74]

Upon analyzing the position of deaf people in particular, Justice La Forest notes that they "have not escaped this general predicament."[75] He recognizes that society is based on ableist norms such that it is organized as though all can hear.[76] He writes: "Not surprisingly, therefore, the disadvantage experienced by deaf persons derives largely from barriers to communication with the hearing population."[77]

With respect to the appropriate definition to be given to equality, the Supreme Court takes a much more generous approach than did the British Columbia Court of Appeal. The Court of Appeal judgment accepts that section 15(1) does not "oblige governments to implement programs to alleviate disadvantages that exist independently of state action."[78] This is an expression of the "natural forces" view of disability — that is, the disadvantage results from biological differences inherent in the individual. The Supreme Court explicitly rejects the "natural forces" argument and strongly reaffirms that the correct understanding of disability is that of the social construct. *Eldridge* reflects a move toward a more substantive understanding of equality and away from the more narrow, formal equality.

Justice La Forest observes that although the Court has not adopted a uniform approach to section 15(1), he believes there is "broad agreement on the general analytic framework."[79] He outlines the approach of Justices Cory and McLachlin and goes on to state that some members of the Court have held the distinction must also be shown to be based

70 Isabel Grant and Judith Mosoff, "Hearing Claims of Inequality: *Eldridge* v. *British Columbia (A.G.)*" (1998) 10 Canadian Journal of Women and the Law (No.1) 229 at 235. This article also provides interesting insights into why the Court reached a different conclusion in *Eldridge*.
71 See note 8 at 409.
72 See note 20 at 423.
73 See above.
74 See note 9 at 613
75 See above.
76 See above.
77 See above at 614.
78 See above at 620.
79 See above at 614.

on an irrelevant personal characteristic. Justice La Forest finds that regardless of which test is applied the same result is attained. He briefly states that "[t]here is no question that the distinction here is based on a personal characteristic that is irrelevant to the functional values underlying the health care system."[80] The relevance analysis in all three cases from 1997 is very compact and much less involved than that in the trilogy.[81]

Having defined the test for section 15(1), Justice La Forest goes on to examine the effect of the legislation on deaf persons. This is a striking difference from his approach in *Egan*, where the effect of the legislation on homosexuals was never considered. In *Eldridge*, the Court rejects the formal equality argument that deaf people were not discriminated against on the face of the legislation, and endorses a fairly generous adverse-effects approach. The Supreme Court agrees unreservedly that for cases of discrimination on the basis of disability, one must examine the effects of the legislation.[82] By adopting the disadvantaged person's perspective, the Court is saying that simply providing medical services to everyone is not enough. The consideration must be that everyone subjectively receive the same level of medical services. This provides much greater scope to section 15(1)'s guarantee of equality.

The respondents had argued that the government was providing the same medical services to everyone. Justice La Forest rejects their position as "bespeak[ing] a thin and impoverished vision of s. 15(1)."[83] La Forest provides a much more substantive vision of section 15(1), where he states: "This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner."[84] The Supreme Court could have held that the State was granting the same medical services to everyone; instead it takes a more generous approach and holds that everyone must *receive* the same level of medical services. Consequently, Justice La Forest writes:

> In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons ... Moreover, it has been suggested that, in taking this sort of positive action, the government should not be the source of further inequality.[85]

If one takes the Court's decision in *Eldridge* seriously, this could have very broad implications. The Court can now be seen as imposing a positive requirement on the State to remedy disadvantage that would prevent someone from enjoying a benefit equally. Governments now have a constitutional duty to "change the world, which was and is frequently designed on the false and unfair premise that persons with disabilities have no place in it."[86] This duty is significant since merely treating the disabled the same as the larger population will not be sufficient to pass a section 15(1) challenge. The obligation of positive action will require the government to dismantle barriers to equality so that there is equality of result; otherwise section 15(1) may be infringed.

If, in the course of subsequent cases, the Court does not retreat from this idea, it may be entering an era of a much more generous approach to section 15. This generous approach is reflected by the Court's endorsement of a more substantive understanding of equality, one where there must be equality of result not simply equal treatment. The

80 See above at 614-615.
81 The possible reasons for this will be discussed below.
82 See note 9 at 617.
83 See above at 621.
84 See above.
85 See above.
86 See note 20 at 409-410.
87 See note 9 at 623. Although Justice La Forest uses conditional language ("if we accept") an examination of the decision indicates that he accepts the concept of adverse effects discrimination and treats section 15(1) as though the Court does not have a choice in whether to employ such an analysis or not.
88 See above at 624.
89 In both *Eldridge* and *Vriend*, the Supreme Court's broad approach to equality is translated into a generous interpretation of section 32 of the Charter. In *Eldridge*, the Court finds that hospitals and the Medical Services Commission are part of "government" and thus the Charter applies to them. In *Vriend*, the Court finds that a legislative omission constitutes government action. For a more detailed discussion of the interaction between section 15(1) and section 32 see Margot Young, "Change at the Margins: *Eldridge* v. *British Columbia (A.G.)* and *Vriend* v. *Alberta*" (1998), 10 Canadian Journal of Women and the Law (No. 1) 224.
90 *Vriend*, see note 10. *Vriend* involves a challenge to the Alberta Individual's Rights Protection Act (IRPA), since the human-rights act did not include sexual orientation as a protected ground.

language of the judgment would certainly provide a basis for a more expansive interpretation. For example, Justice La Forest states:

> If we accept the concept of adverse effects discrimination, it seems inevitable, at least at the s. 15(1) stage of analysis that the government will be required to take special measures to ensure that disadvantaged groups are able to benefit equally from government services.[87]

The Supreme Court translates this positive duty into the human-rights principle of reasonable accommodation. Justice La Forest held that "[r]easonable accommodation, in this context, is generally equivalent to the concept of 'reasonable limits.' It should not be employed to restrict the ambit of s. 15(1)."[88] It is particularly interesting that Justice La Forest finds that this should be a component of the section 1 test, rather than considering it within the section 15(1) analysis, since it could be used to justify the government's conduct. The similarities to relevance are not insignificant, yet in the trilogy Justice La Forest allows relevance to be employed to restrict the ambit of section 15(1).[89]

Concurring Judgments with respect to section 15(1) in *Vriend*

In April 1998, the Supreme Court delivered its eagerly anticipated decision in *Vriend* v. *Alberta*.[90] Although the Court agreed that the omission of sexual orientation in Alberta's Individual's Rights Protection Act (IRPA) violated section 15(1), the complete unanimity from the 1997 decisions had disappeared.[91]

In *Vriend*, Justice Cory first addresses two preliminary issues: standing and the Charter's application.[92] As with the three 1997 decisions, Justice Cory outlines both his approach in *Egan* and Justice McLachlin's approach in *Miron*.[93] Interestingly, Cory does not cite either Justices Gonthier's or La Forest's description of the relevance inquiry from the trilogy. Instead, he refers to Justice Iacobucci's formulation of it in *Benner*. Justice Cory finds that the relevance approach is "to a certain extent, compatible with the notion that discrimination commonly involves the attribution of stereotypical characteristics to members of an enumerated or analogous group."[94] He thus seems to indicate that relevance can be reconciled with the more individualistic understanding of equality that focuses on stereotyping individuals based on shared characteristics. However, Justice Cory glosses over how it is compatible with the Cory-McLachlin test for equality from the trilogy. This is quite a shift from the trilogy, where Justices Cory, McLachlin, and L'Heureux-Dubé seemed vehemently opposed to relevance. They, and many commentators, thought that relevance was conceptually out of line with the section 15(1) test as developed in *Andrews* and *Turpin*.

Justice Cory in *Vriend* states that the Cory-McLachlin approach is the correct one for section 15(1). In addition, unlike in *Benner* and *Eldridge*, Justice Cory does not engage in a summary relevance inquiry. Does this suggest that relevance no longer constitutes a third step? Most likely not, Cory writes: "In this case, as in *Eaton*, *Benner* and *Eldridge*, any differences that may exist in the approach to s.15(1) would not affect the result, and it is therefore not necessary to address those differences."[95] This would seem to imply that differences do remain and thus relevance must not have disappeared altogether.

91 Justices Cory and Iacobucci wrote the majority decision (for seven judges). Justice L'Heureux-Dubé agreed in the result but wrote separately. Supreme Court Justice Major was the only judge to dissent. He agreed that the exclusion of sexual orientation violated section 15(1) and was not justified under section 1, but he dissented on the appropriate choice of remedy.

92 The Supreme Court's recent broad approach to equality rights is reflected in its approach to standing. In the past, the Court had articulated a more narrow conception of standing, whereby the appellant had to be the person most affected by a legislative provision or the Court would decline to give him or her standing on the grounds that there could be someone more directly affected (see, for example, *Canadian Council of Churches* v. *Canada*, [1992] 1 Supreme Court Reports 236, 88 Dominion Law Reports (4th) 193). However, in *Vriend*, Justice Cory states that waiting for someone to be directly affected by each individual provision would be wasteful of judicial resources and would be unfair since it would impose burdens of delay, cost and personal vulnerability to discrimination for the individuals involved. The majority's renewed enthusiasm for equality rights seems to have spilled over into a less restrictive approach to standing in order to facilitate appellants' ability to challenge legislation. The second preliminary issue is the Charter's applicability under section 32. Again, the majority refuses to adopt a narrow understanding. It holds that the language in section 32 is broad enough to encompass legislative omissions.

93 He notes that this approach stems from the two-step test expressed in *Andrews* and *Turpin*.

94 See note 10 at 418.

95 See above at 419.

Furthermore, Justice Cory's belief that relevance is reconcilable with the Cory-McLachlin understanding of equality suggests that it has not been completely discarded. Instead, it appears that the Supreme Court has redefined its understanding of relevance and the conceptual place it holds in equality rights jurisprudence.

The Court's substantive vision of equality is reinforced by its refusal to accept that the IRPA does not discriminate since it makes no distinction between homosexuals and heterosexuals. Justice Cory indicates that this understanding of equality would be "based on that 'thin and impoverished' notion of equality referred to in *Eldridge*."[96] He affirms the Court's rigorous effects-based analysis by refusing to allow the particular manner in which the exclusion is drafted to disguise the real effect of that exclusion.[97]

Justice Cory addresses the issue of which shared characteristic must be included in the IRPA. The respondents had argued that homosexuals were not discriminated against as they could seek redress on other protected grounds (i.e. sex or race).[98] However, Justice Cory essentially finds that lesbians and gay men share a characteristic, their particular sexual orientation. Cory finds that the protection afforded to homosexuals based on their other shared characteristics is not sufficient since "[l]esbian and gay individuals are still denied protection under the ground that may be the most significant for them, discrimination on the basis of sexual orientation."[99]

The Supreme Court's move along the spectrum of equality rights to an increasingly rich understanding is reflected in Justice Cory's opinion. He finds that the IRPA's underinclusiveness creates two distinctions. The first is the distinction between homosexuals and other disadvantaged groups that are protected by the IRPA. He notes that "[g]ays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included and they are not."[100] Thus, the Court recognizes that homosexuals are not afforded even the more minimal protection of formal equality. The second distinction created by the IRPA is between homosexuals and heterosexuals. Cory notes that neither sexual orientation is explicitly protected by the IRPA, but by engaging in an examination of the context and effects of this omission, he recognizes that it has a disproportionate impact on gays and lesbians because heterosexuals do not (or very rarely) find themselves discriminated against on the basis of their sexual orientation.[101] Consequently, Justice Cory holds that "the IRPA in its underinclusive state denies substantive equality to the former group."[102] Cory places *Vriend* in the context of the Court's equality jurisprudence stating: "This case is similar in some respects to the recent case of *Eldridge* ... There the Charter's requirement of substantive, not merely formal, equality was unanimously affirmed."[103]

Finally, the Court once again rejects a natural forces argument. The respondents had argued that discrimination against homosexuals exists independently of the IRPA. Justice Cory notes that "[t]his reasoning has been emphatically rejected" by the Court, most recently in *Eldridge*.[104]

Turning to the question of whether these distinctions are discriminatory, the Court

96 See above.
97 See above.
98 In other words, the characteristics they share with other groups that are covered by the IRPA were protected, therefore there was no discrimination based on sexual orientation.
99 See note 10, at 420. I think it is difficult (and possibly undesirable) to attempt to rank which of an individual's characteristics are of greatest significance to them. People have multiple characteristics and different aspects are dominant in different contexts; which attribute is dominant in any given situation is not a stable category (except when the individual is being discriminated against based on that characteristic). In addition, many people conceive of themselves as the larger whole of their characteristics — unable to separate being a Christian from being a homosexual, for example. However, Justice Cory is quite correct that when one is discriminated against based on a particular characteristic, that characteristic attains an emotional significance whereby the redress from discrimination must also be based on that characteristic. Otherwise, one's dignity will not be made whole.
100 See above at 421.
101 See above.
102 See above.
103 See above at 422.
104 See above at 423.

finds that they are. Justice Cory comes to this conclusion based upon the Court's examination in *Egan*[105] of the social, historical, and political context and the economic disadvantage experienced by homosexuals. Cory does not spend a great deal of time recounting the larger context in which discrimination against homosexuals exists. This is most likely due to the fact that the Court had already unanimously agreed in *Egan* that sexual orientation was an analogous ground. Cory notes that this would be sufficient to establish a violation of section 15(1). However, he goes further than strictly necessary in order to demonstrate the particularly invidious nature of the discrimination by engaging in a rigorous effects-based analysis, as the Court did in the 1997 cases, whereupon he finds that "the discriminatory effects of the legislation are sufficient in themselves to establish that there is discrimination in this case."[106]

Justice Cory notes that in order to be able to identify the effects of the exclusion of sexual orientation from the IRPA, the Court must examine not only the social context but also the context of the legislation.[107] Justice Cory finds that the IRPA is meant to be a comprehensive Act affirming and giving effect to "the principle that all persons are equal in dignity and rights."[108] Cory identifies two principal effects stemming from the exclusion of homosexuals from this comprehensive protection afforded to others. First, homosexuals are denied recourse to the mechanisms established in order to make a formal complaint of discrimination and seek a legal remedy.[109] Second, Justice Cory goes beyond an examination of the legal effects to a consideration of the effect of this omission on society at large. He finds that the omission in the IRPA may encourage a belief that anti-gay discrimination is "not as serious or as deserving of condemnation as other forms of discrimination."[110] Justice Cory also discusses the impact of this exclusion from the subjective point of view of the homosexuals affected. He notes the psychological harm, loss of confidence, and lower self-esteem that results from fear of discrimination.[111] The Supreme Court thus finds that the omission of sexual orientation from the IRPA constitutes discrimination on the analogous ground of sexual orientation.

Interestingly, in contrast to the 1997 cases, Justice L'Heureux-Dubé chose to write separately in *Vriend*. She remarks that she is in general agreement with the outcome reached by Justices Cory and Iacobucci, but "wish[es] to reiterate the position which [she has] maintained throughout with respect to the approach to be taken to s. 15(1)."[112] L'Heureux-Dubé then proceeds to outline her group-based approach from the trilogy. She states: "I do not agree with the centrality of enumerated and analogous grounds in Cory J.'s approach to s. 15(1).... Of greatest significance to a finding of discrimination is the effect of the legislative distinction on that individual or group."[113] However, the Cory-McLachlin approach, as with any good equality analysis, examines the effect on the complainant because this is necessary in order to give meaning to equality. Thus, it is unclear why Justice L'Heureux-Dubé believes a distinct approach is necessary.

Justice L'Heureux-Dubé also disagrees with Cory's reliance on sexual orientation being a deeply personal characteristic, changeable only at an unacceptable personal cost.[114] She

105 See above at 424.
106 See above at 425.
107 Justice Cory's examination of the context of the IRPA is not problematic, as was Justice La Forest's in *Egan*, since this examination is in addition to (not instead of) an analysis of the larger context in which the rights claimant is situated.
108 See note 10 at 425.
109 See above at 426.
110 See above at 427-428.
111 See above at 428.
112 See above at 449.
113 See above at 450.
114 See above at 451.

finds that this is much too narrow an approach to defining analogous grounds and that the Court has endorsed a more comprehensive approach in the past by considering the group's historical position and treatment by society, whether the group constituted a discrete and insular minority, stereotyping, and immutable characteristics.[115]

It is difficult to know what Justice L'Heureux-Dubé means when she says that she has consistently maintained the same position throughout her equality rights jurisprudence. This statement lends credence to the idea that she concurred in the 1997 judgments since they focused significantly on the position of the particular group in the larger context, and articulated a forceful effects-based analysis — the two key factors of Justice L'Heureux-Dubé's approach. It is true that in *Vriend*, Justice Cory adopts a more individual focused analysis. He only discusses the larger societal treatment of homosexuals superficially, citing *Egan*.[116]

Is there a new trend in section 15(1) jurisprudence?

This is a difficult question to answer. The answer seems to be yes and no. The Court does seem to have adopted a more generous interpretation of equality rights in the recent cases. This is illustrated by the broad definition of discrimination; the greater emphasis placed on situating the rights claim in the larger social, historical, and political context; and also by the rigorous effects-based analysis. However, the Court does not seem to have resolved the precise test for section 15(1) and the significance of the relevance inquiry remains unknown for future litigants.

The new trend is characterized by an expansive definition of discrimination. In *Benner* and *Vriend* this interpretation spills over into a less restrictive approach to standing. In *Benner*, the Court refuses to be dissuaded from the fact that it was not Benner's own gender that was the source of the discrimination. It would have been perfectly plausible for the Court to have maintained a strict approach to standing and to have found that Benner's rights were not directly infringed. Likewise, in *Vriend*, the Court could have restricted its analysis solely to the employment provisions of the IRPA. This approach makes sense: if one wants to provide a more substantive understanding of equality, one must ensure that appellants are able to pass the preliminary stage of standing in order to challenge potentially discriminatory legislation.

Similarly, the Court's broad definition of discrimination is reflected in *Eaton* and *Eldridge*. There, the Court could have accepted that it was the disability itself that caused the burden rather than society creating a disadvantage. The Court's new understanding may have broad implications if legislation cannot be upheld because the disadvantage was "inherent to the disabled person." Possibly even more important is what this says to the disabled. The Court has now recognized that it is society that caused the hardship endured by disabled people. It is important that the Court has recognized that the ultimate goal should be a society that is no longer organized on able-bodied norms. The result is an enhanced understanding of the breadth of equality rights and the meaning of discrimination.

115 See above.

116 As noted above, one can understand this to be due to the Court's having already established that sexual orientation is an analogous ground.

One can only surmise why the Court has opted to define equality rights more broadly. It is possible that the Court feels more comfortable taking an expansive view of the enumerated grounds. The judges might consider this to be less of an impingement on the legislative role (i.e., less like "judicial legislation") than deciding what constitutes an analogous ground. This could explain the 1995 and 1997 results. However, some of the Court's earlier generous interpretations pertained to analogous grounds.[117] Furthermore, it cannot explain the Court's strong protection for the analogous ground of sexual orientation in *Vriend*. As much as one may resist mingling law and politics, the difference would seem to be due to the more conservative judicial appointments of the Mulroney Government. Interestingly, the Mulroney Court seems to have come full circle to a more activist approach and a more generous interpretation.

The new trend also seems to be characterized by an examination of the broader context in which a rights claim is situated. This is significant since it enables the Court to understand the rights claimant's perspective by acknowledging the historical, economic and societal treatment that people with this particular shared attribute have encountered. The broader context allows a court to appreciate more fully the precise impact that legislation has on a particular group since all people's reactions are based upon their personal experiences. Those who have been disadvantaged historically will experience legislation differently than those who have not been similarly disadvantaged. Analyzing the larger context ensures that a court engages in a meaningful section 15(1) inquiry. Without looking at the broader context, it becomes much more difficult to assess a claim of discrimination. Furthermore, a court would be more susceptible to revert to a formalistic inquiry, which accepts that there is no discrimination, provided that individuals do not appear to be treated differently.

The Court's renewed focus on the effects of legislation is reflected in all three of the 1997 cases and in *Vriend*. The Supreme Court's willingness to engage in a broad adverse-effects approach enriches the guarantee of equality. While the Court has been willing to consider whether the effects were discriminatory in the past, Justice La Forest's clear statement in *Eldridge* that the examination of adverse effects must be from the rights claimant's perspective will be applauded by all equality seeking groups. This will ensure that the Court does not make La Forest's mistake in *Egan* where the gay population's perspective was completely absent from his considerations. Equality has little meaning if it does not include an inquiry into whether the rights claimants felt they were discriminated against. The Court's shift is nicely illustrated in *Vriend*, where Cory goes beyond what was necessary to establish discrimination in order to outline the discriminatory impact of the IRPA's omission. Furthermore, he discusses both the legal effects on homosexuals and the emotional effects on how society and homosexuals perceive themselves as a result. Thus, Justice Cory gives effect to Justice La Forest's statement that it is the perspective of the rights claimant that must be employed. As with an examination of the larger context, a meaningful effects analysis will route the Court away from the formal equality lure.

Thus, there does seem to be a new trend in the recent cases as to which factors should

117 See, for example, *Andrews* and *Turpin*.

be considered in an equality rights claim. However, there remains some confusion surrounding the considerations involved in assessing whether a particular characteristic constitutes an analogous ground. This does not seem to be a fundamental disagreement between Justices L'Heureux-Dubé and Cory.[118] With great respect, Justice L'Heureux-Dubé is most likely mistaken when she asserts that Cory is adopting a more narrow test for establishing analogous grounds. It would be quite surprising if he were adopting a new approach that relied primarily on this factor and relinquished the use of factors like historic treatment, since in *Egan*, Cory based his finding mostly on the historical and societal disadvantages and hardships suffered by gay men and lesbians. It is more likely that Cory referred to immutability as simply another indicator that sexual orientation constitutes an analogous ground. Justice Cory's statement resembles Justice Iacobucci's reference to immutability in *Benner*. Iacobucci stated that the citizenship of one's parent was of a highly personal nature, being something "so intimately connected to and so completely beyond the control of an applicant."[119] It seems inconsistent for Justice L'Heureux-Dubé to object in *Vriend* but not in *Benner*. However, the fact that Justice L'Heureux-Dubé felt the need to write individually indicates that the Court continues to be uncertain as to exactly which factors should be employed as indicators of analogous grounds, as well as the larger question of exactly how much to focus on whether a characteristic is an analogous ground. The three 1997 decisions, since they pertained to enumerated grounds, masked this disagreement on the Court.

Justice L'Heureux-Dubé's opinion in *Vriend* may reflect a more fundamental division as to the correct approach to section 15(1). It is ironic that when the approaches were being outlined in the trilogy and the 1997 cases, the conflict appeared to be between the Cory-McLachlin approach and that of Justices Gonthier and La Forest.[120] However, in *Vriend* the division with respect to the correct approach is not centred on relevance, but is focused on which factor should be accorded greater emphasis — the notion of analogous grounds or the larger context in which the group is situated and the effects they suffer. In the 1997 cases, it appeared that Justice L'Heureux-Dubé had forsaken her approach in favour of that of Cory-McLachlin, especially where it employed a more group-focused analysis. Apparently she has not done so. It is unclear why L'Heureux-Dubé has chosen to reiterate her approach from the trilogy in *Vriend* but not in the 1997 cases. While it is true that Justice Cory's approach in *Vriend* does focus more on the individual than the group, it is unclear that it is much more individualistic than the 1997 cases. Consequently, one is left with the conclusion that the Court has an easier time achieving consensus when the discrimination involves an enumerated ground. *Vriend* indicates that the unanimity of approach by the Supreme Court Justices in 1997 simply masked remaining underlying differences.

I believe this is further demonstrated by the fact that the three 1997 unanimous judgments do not reflect a broad agreement on the approach to relevance. The relevance factor was summarily applied in all three 1997 cases but was not applied at all in *Vriend*. Due to the hostility expressed by McLachlin, Cory, and L'Heureux-Dubé toward this criteria in the trilogy, I find it extremely unlikely that they have now come to adopt it as a third

118 Justice Cory does not even comment on Justice L'Heureux-Dubé's analysis.
119 See note 7 at 606.
120 The issue of relevance will be discussed below.

step. Since relevance continues to be mentioned, one must assume that Justices Gonthier and La Forest have not rejected its application altogether. The Court does not seem overly concerned about reconciling the Cory-McLachlin approach with the La Forest-Gonthier approach. Unanimity in 1997 was achieved since the law was discriminatory based on either interpretation.[121] The issue is further complicated by the Court's treatment of relevance in *Vriend*. Justice Cory does not engage in even a summary relevance analysis, nor does he suggest that the Court has agreed to dispense with relevance altogether. Rather, he implies that differences still do exist with respect to the proper approach to section 15(1).

The Court's unanimity with respect to relevance stems more from an agreement as to how to characterize the legislation at issue. Since the Court agreed on the purpose of the legislation, it could further agree that the personal characteristic at hand was irrelevant. It is possible that a consideration of relevance that is not as badly manipulated as it was in the trilogy could be reconciled with the Cory-McLachlin approach (as Cory himself mentioned in *Vriend*). The criteria of relevance, properly applied, could be seen as consistent with the idea of preventing stereotyping or attributing characteristics from a group to an individual. Often a stereotype based on a particular characteristic will be quite irrelevant to a legislative distinction. Where it is relevant, as Justice McLachlin wrote in *Miron*:

> Proof that the enumerated or analogous ground founding a denial of equality is relevant to a legislative goal may assist in showing that the case falls into the class of rare cases where such distinctions do not violate the equality guarantees of s. 15(1), serving as an indicator that the legislator has not made the distinction on stereotypical assumptions about group characteristics.[122]

Thus, Justices McLachlin, Cory, and L'Heureux-Dubé seem willing to accept a decision which briefly considers relevance as one factor, provided that the law is characterized in what they consider to be an appropriate manner.[123]

Unfortunately, the Court does not seem to have reached a consensus on how to properly characterize a law. The purpose of the legislation in each of the 1997 cases and in *Vriend* seems fairly clear. However, the legislation in *Egan* and *Miron* also appeared obvious to this observer, yet the La Forest-Gonthier coalition read it differently. It is difficult not to think that the judges in the trilogy were influenced by their political and philosophical leanings when deciding how far to extend section 15(1)'s protection. The judiciary may simply be more comfortable dealing with discrimination based upon more "traditional" (i.e., enumerated) grounds. As a result, I am not convinced that relevance has been entirely laid to rest. It is possible that certain members of the Court may choose to resurrect it should the judges have moral difficulty accepting a particular new ground on which to find discrimination. This may be less likely with the departure of La Forest and Sopinka from the Court. There has been considerable turnover on the bench recently, with the appointments of Supreme Court Justices Bastarache and Binnie, and the imminent retirement of Justice Cory. This shift could fundamentally alter the Court's interpretation of section 15(1), especially since the Court was very closely divided in the trilogy. However, should the Court continue to take an expansive approach with respect to the definition of discrimination, the broader

121 This leads one to ask whether the 1997 cases are so clearly discriminatory that they constitute more of an aberration in the Supreme Court's jurisprudence? I do not think they were so obviously discriminatory since the Supreme Court reversed the Federal Court of Appeal in *Benner*, the British Columbia Court of Appeal in *Eldridge* and the Ontario Court of Appeal in *Eaton*.

122 See note 5 at 741-742.

123 However, this does not resolve the difficulty of considering justificatory factors at the section 15(1) stage which was rejected in *Andrews*, *Turpin* and by Justices Cory, McLachlin and L'Heureux-Dubé in the trilogy.

context, and the effects of a law, a clear consensus may emerge as to how the legislation and group in question should be characterized. This is because the Court will have paid greater heed to all the substantive factors involved in assessing an equality rights claim.

Conclusion

Equality rights are tremendously significant in shaping society as well as in promoting and protecting a sense of individual dignity. Consequently the manner in which they are interpreted is of fundamental importance. The Supreme Court's understanding of section 15(1) has altered over time. The Court began with an approach in *Andrews* and *Turpin* that recognized the importance of assessing the impact of the legislation on the individual as well as stressing the significance of an examination of the historical, economic, and societal context in order to fully appreciate the rights claimant's situation. However, in the 1995 trilogy of cases, certain members of the Court were derailed from this approach and the Court split as to the appropriate meaning of equality as well as to the proper test for establishing a violation of section 15(1). Instead of the *Andrews-Turpin* approach, the La Forest-Gonthier coalition substituted a more formal and less contextual interpretation, and also created a further qualifier on section 15(1) – namely the relevance inquiry.

In 1997, the Supreme Court was able to find enough common ground to produce three unanimous judgments. *Benner*, *Eaton* and *Eldridge* reflect a consensus at the Supreme Court with respect to the meaning of equality. Equality means equality of result, therefore section 15(1) should be interpreted in a substantive manner. The Court's recent understanding of equality is characterized by a broad definition of discrimination as well as a renewed emphasis on a contextual and effects based analysis. The Supreme Court's decision in *Vriend* is the best illustration of the increasing comfort of most of the judges with respect to their more activist role in assuring a substantive interpretation of equality. One can see the Court's confidence in its rigorous section 15(1) analysis increase with the progression of judgments from *Benner* to *Vriend*. Consequently, this jurisprudence does seem to constitute a trend and not simply an activist whim.

However, the Court's new substantive trend is not without difficulties. The Court remains unsure of how and what role relevance is to play in the section 15(1) inquiry. The decision in *Vriend* seems to illustrate that the Court is reconciling relevance with the Cory-McLachlin approach by limiting it to the very rare situation where a personal characteristic is relevant to a legislative distinction (such as having an oral, rather than a written, examination for a blind person). Also, Justice L'Heureux-Dubé reiterated her separate group-based analysis of section 15(1) in *Vriend*. It is unclear why she chose to write separately; however, this indicates that the Court is still divided as to the proper test for determining whether a characteristic is an analogous ground and to the primacy that should be given to the analogous grounds inquiry.

I welcome the Supreme Court of Canada's new section 15(1) trend since the Court has progressed along the spectrum of equality rights to a more substantive understanding of

equality which guarantees equality of result. I hope that this type of interpretation ceases to be a mere trend and becomes the lasting norm.

Islamic Human Rights: Islamic Law and International Human Rights Standards

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The Islamic faith has been a source of considerable international interest and debate in the latter part of the twentieth century. Today, Muslims make up one fifth of the world's population and Islam is presently the fastest growing religion in the world.[1] Tens of thousands of Islamic immigrants from abroad have settled in Canada and the US in the past 35 years and there are at least 35 countries in the world where Islam is the majority religion.[2] Images of Islam pervade the Western world. The bombings of American embassies in Kenya and Tanzania allegedly by Saudi terrorist, Osama bin Ladin and the US' subsequent retaliation, the Persian Gulf War and the recent US air strikes on Iraq, are among the many recent world events involving Islam that have been profiled in the media. Other incidents, such as the *fatwa* issued on Salman Rushdie, the revival of fundamentalism in Algeria forcing all women to veil themselves, and the struggle in the Middle East between Israel and Palestine, are perpetual sources of international contention and international media coverage.[3]

It is rarely noted that many of these incidents involve the actions of radical groups that are no more representative of Islam than the actions of David Koresh, who died in the confrontation between law enforcement authorities and the Branch Davidians in Waco, Texas, are representative of Christianity.[4] The Western media often obscures the line between common practice and extremism by being selective in the publicity given to incidents involving Muslims and Islams. The media's portrayal of Islamic law as being restrictive of individual rights, patriarchal and demeaning to women is consistently shrouded by political strategizing, inherent bias and the fear that Islam will threaten the current global power structure. The media has accordingly responded to the revival of Islam by pushing Islam to the forefront of international human rights dialogue. This has allowed the West to suppress the Islamic revivalist movement and the rise of radical Islamic fundamentalism by rallying the international human rights community, which itself is largely grounded in Western rights and values, to assert its abhorrence for the human rights violations taking place in parts of the Islamic world. Because human rights in these Islamic

1 Whereas the term *Islamic* is used to designate matters pertaining to the religion of Islam, the term *Muslim* is used to designate its adherents.

2 Peter J. Riga, "Islamic Law and Modernity: Conflict and Evolution" 36 American Journal of Jurisprudence (1991),103 at 103.

3 *Fatwa* refers to a religious decree, such as that issued by the Iranian head of state, Ayatullah Ruhollah Khomeini on February 14, 1989 ordaining the death penalty for the author, Salman Rushdie. Khomeini rallied the support of fundamentalist Muslim groups throughout the world to condemn Rushdie's novel, *The Satanic Verses* on account of its blasphemous nature. On March 7, 1989, Iran cut its diplomatic ties with Britain when Britain did not condemn the book. Although the Iranian government officially lifted the *fatwa* in an attempt to repair relations with Great Britain, other prominent Iranian *imams* (leaders) have reinforced the *fatwa*. A British citizen, Salman Rushdie continues to live in hiding.

4 Constance Neyer, "Equal in the Eyes of God; Koran Gives Genders Same Status, Muslim Women Say, Despite Stereotypes", February 7, 1997, *The Hartford Courant*.

countries are rooted in Islamic theology but are also tempered by political and economic relations with the West, the West has used this means to assert its power in the international community, and to protect its secular, socio-democratic power structure.[5]

Human rights violations in Islamic countries have become a legitimate and pressing issue in interstate relations and are based on fundamental discrepancies between Islamic law and the universally accepted standards of our international human rights instruments. The resolution of this issue requires an examination of Islamic law, including its tenets and historical foundations, and an evaluation of the defences forwarded by Islamic countries to legitimize their actions and defend their faith. Most importantly, it is necessary to correct the inaccuracies and misconceptions promulgated by the media about Islam, or at least to recognize that they colour the human rights debate.

I have chosen to write this paper in order to expose the breadth of misinformation

5 Donna Arzt, "The Application of International Human Rights Law in Islamic States", 12 Human Rights Quarterly (1990) 202 at 204.

and misguided opinions surrounding this issue. My intention is to provide an informed overview of the different perspectives and factors at play in this complex debate. As any debate involving religion usually is, the legal and academic sources that I have canvassed are sometimes grounded in personal or ethnocentric bias, and often go to the defensive or offensive extreme. However, by adopting a moderate cultural relativist perspective and considering the range of the vested interests and ideologies of the international human rights community, the Western media and the Islamic world, I have found some means of reconciling Islamic law with international human rights standards. I recognize both that change is usually gradual, and must be achieved with the cooperation of the Islamic world, and that the Western countries which champion universal standards must also apply them in practice. To date, the West's failure to consistently apply these human rights standards in its own countries has weakened the legitimacy of the standards themselves, and has rendered the force of our international human rights instruments questionable.

This paper will highlight the tension between Islamic law and international human rights standards with particular reference to the role of politics and the Western media. It will also discuss the cultural relativist perspective as a possible means to resolve this tension and will examine the inherent reluctance of Islamic countries to compromise their adherence to divinely ordained law and the liberal reform movement's resolution to that impasse.

The Tension: Islamic Law and International Human Rights Standards

1. The Foundations of Islamic Law

In Islam, there is only one reality, ruled by Islamic law, under which the government must rule and the faithful must live.[6] *Shari'a,* the Arabic word for Islamic law, literally means "the way to follow." The *Shari'a* developed as a universal system of law and ethics in the second and third centuries of Islam.[7] Its purpose was to direct Muslims, in their daily lives, to live in accordance with God's law as it is revealed in the *Qur'an*. The *Shari'a* distinguishes itself from most of the world's other legal systems by imposing legal and religious obligations on its adherents. Islamic law:

> both articulates the transcendent Will of God, and provides an opportunity for righteous action in every occasion faced by human. Not merely a framework in which life is conducted, or solely a bound for permissible action, the *Shari'a* itself is an expression of divine truth. Submission to *Shari'a* – following the path of God – is Islam.[8]

Therefore, any Muslim who lives in an Islamic state who deviates from the *Shari'a* is not only subject to legal reprobation, but also to spiritual damnation.

Islamic law derives from four main sources. These include the *Qur'an*, the literal and final word of God; the *Sunna,* or the traditions based on the life of the Prophet Muhammed which describe model behaviour; the *giyas,* or juristic reasoning by analogy; and *ijma,* or consensus of Muslim scholars.[9] These sources work in conjunction with one another to create a comprehensive moral and legal ordering.

As with other legal systems, the scope and interpretation of Islamic law has been a

6 See note 2, at 105.
7 The Prophet Mohammed began to propagate the Islamic faith in approximately 560 AD.
8 Kimberly Schooley, "Cultural Sovereignty, Islam and Human Rights: Toward a Communitarian Revision" (1994), 25 Cumberland Law Review 652 at 660.
9 See note 5 at 204.

contentious issue for centuries. At the time of the Prophet "differences of opinion within the community were recognized as a sign of the bounty of Allah,"[10] and were used as a starting point from which to assert critical reasoning and dialogue. During the early years of Islam, critical writings on the four main religious sources were considered integral to the evolution and establishment of *Shari'a*. Legal jurists supplemented the four primary sources by expressing their opinions on how various aspects of the *Qur'an* and the Sunna should be interpreted and applied in practice (*ijtihad*). By the tenth century, the jurists had completed the development and institutionalization of the *Shari'a* and the *ijtihad* as a source of Islamic law that was considered exhaustive.[11] Independent interpretation or critique was subsequently discouraged, as any attempt at modification or innovation was viewed as an unwarranted deviation from the established sacred norms.[12] In fact, today, judges are still limited in their authority to engage in *ijtihad*, and must adhere almost exclusively to the established interpretations of ancient jurists.

The scope of application of Islamic law has therefore diminished considerably since the middle of the nineteenth century; today, the *Shari'a* has been replaced in most countries with European law governing commercial, criminal and constitutional matters. International concern for human rights largely focuses on those countries that have retained or reintroduced Islamic penal law and the traditional *Shari'a* principles governing family law and inheritance matters.

2. International Human Rights Standards

Human rights constitute political and legal standards which require both effective implementation and thorough monitoring mechanisms.[13] The Charter of the United Nations indicates that the UN was created:

> To save succeeding generations from the scourge of war;
>
> To reaffirm the 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
>
> To practice tolerance so that we may live together in peace with one another as good neighbours.[14]

In addition to ensuring international security and peace, one of the UN's key mandates is to ensure that all human beings are equal in worth and dignity, regardless of gender, religion, or race.[15]

The UN established itself a little more than 50 years ago in the aftermath of World War II, as a global institution to, among other things, promote and enforce human rights by investigating political and legal claims to freedom and equality. Legal concepts such as "crimes against humanity" were litigated for the first time during the Nuremberg Trials, and had begun to permeate the international dialogue concerning human rights.[16] The United Nations reacted to the new human rights rhetoric by putting forth the Universal Declaration of Human Rights ("UDHR").[17] When the UDHR was approved by the United Nations General Assembly in 1948, its principles were incorporated into public international law, and its standards were set as primary normative rules for the human community to follow.

10 See note 8 at 665.
11 See note 5 at 204.
12 See note 8 at 664.
13 Heiner Bielefeldt, "Muslim Voices in the Human Rights Debate", (1995), 17 Human Rights Quarterly 58 at 588.
14 Sami A. Aldeeb Abu-Sahlieh, "Human Rights conflicts Between Islam and the West" (1990), annual 1990 Third World Legal Studies 257 at 275.
15 Abdullah Ahmed An-Nai'im, "Human Rights in the Muslim World" (1990), 13 Harvard Human Rights Journal 210 at 217.
16 See note 8 at 653.
17 Universal Declaration of Human Rights, UNGA Res. 217(III), UN Doc.A/810 (1948). Today, the UDHR is only one part of the International Bill of Rights ("Bill of Rights") which is the UN's conglomerate human rights instrument. The Bill of Rights also consists of the International Covenant on Civil and Political Rights [UNGA Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16) 49, U.N. Doc A/6316 (1966)] and the International Covenant on Economic, Social and Cultural Rights [UNGA Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966)]. The three documents can be ratified individually and many countries have been reluctant to accept it in its entirety. The UDHR is a declaration and as such is not legally binding. However, the UDHR has evolved to become customary international law which binds states through "*opinio juris.*"

The international community eagerly accepted the UN's initiative, celebrating it as championing the most basic rights of all human beings, making individuals the world over conscious not only of their own rights but of the rights of other people as well."[18] The international community now had a vantage point from which to evaluate the state practices of other countries, and a universal measure from which to aspire to a basic level of moral, political and legal obligation.

3. Establishing the Tension

The resistance to the UDHR and its counterparts and the broader tension between Islamic law and international human rights standards has resulted in the widespread popular condemnation of Islamic state practice. The tension stems from different philosophical and spiritual conceptions of human rights and freedoms. While Western countries may suggest that the countries applying traditional or conservative Islamic law have no regard for human rights, the Islamic world asserts itself as a champion of the human rights provided for by God, in the *Shari'a*. It is difficult to determine whether there is a means of reconciling the two positions as they both operate on different principles.

Much of the Islamic world is firm in its belief that *Shari'a* law, in its true form, addresses the fundamentals of human rights. Majid Khadduri, a leading Islamic law scholar, identifies the most important human rights principles in Islam to be: dignity and brotherhood; equality among members of the community without distinction on the basis of race, colour, or class; respect for the honour, reputation, and family of each individual; the right of each individual to be presumed innocent until proven guilty and individual freedom.[19] This position suggests, at least superficially, that Islamic law encompasses the basic principles of human rights. However, upon closer examination these same human rights appear to be limited by the very nature of the Islamic philosophy.

Although concepts such as "freedom," "dignity," and "brotherhood" are essential to a discussion of human rights, they can be culturally differentiated, as philosophical ideologies vary between countries depending on their reliance on Euro-Western or Islamic philosophy. Each philosophy bases itself on particular assumptions which can work to limit or enable one another. For example, the Western philosophical and political notion of free will is inherently limited by the Islamic presupposition that all human acts are subject to God's will. The *Shari'a* prescribes a finite freedom that is much narrower in its scope than the European- based, secular notion of free will. This example epitomizes the tension between human rights in Islam as they exist in relation to obligations toward God, fellow humans and nature, and the human rights adopted by international human rights institutions which are devoid of any religious coercion.[20]

Perhaps the most publicized tension between Islamic law and international human rights norms concerns the allegedly unequal treatment of women. Muslims who denounce this inequality defend the *Shari'a* by attesting that women are given a "special rank" in the Islamic order. They argue that the *Shari'a* makes special provisions for women to provide them with the financial security and stability that they were historically unable to achieve on

18 See note 5 at 215. Taiwan delegate to the UN General assembly at the time of the inception of the UDHR.
19 See above., at 205.
20 See above.

their own. They base their position on *Qur'anic* provisions which state that:

> Men have *qawama* [guardianship and authority] over women because of the advantage that they have over them [women] and because they [men] spend their property in supporting them [women].[21]

For many Western human rights advocates, it is precisely this type of advantage allegedly given to men, that threatens the fundamental right to equality for all people.

Further examples that fuel the tension include Islamic restrictions on family law and inheritance matters. In this area, women lack the capacity to initiate a marriage contract or to obtain a unilateral divorce and their legal right to inherit property entitles them to only one half the share that a man is entitled to. In addition, a woman's testimony in a court of law must be corroborated by male testimony to the same effect[22] and women are legally disqualified from holding general political or judicial office, because that would require them to exercise authority over men.[23] Human rights advocates particularly emphasize the restrictions on women's access to public life as one of the greatest injustices under Islamic law.

Finally, the most glaring conflict between Islamic law and Western ideals of equality is manifested in the *Shari'a* provision that allegedly gives husbands the right to chastise their wives for "disobedience" which includes "light beating."[24] Prominent Western human rights institutions have used this *Qur'anic* provision to conclude that the existence of gender inequities implies that women are inferior to men in Islam. Unfortunately though, the justification or legitimization of these contentious Islamic provisions is consistently treated with indifference or complete disregard by the international human rights community. The treatment of women has accordingly become the most celebrated inequality in Islam and the primary source of tension between Islamic law and internationally accepted human rights principles.[25]

The Legitimization: A Muslim Perspective

The Islamic world has responded to the obvious tension between the *Shari'a* and international human rights standards by attempting to legitimize the contentious practices of its countries. Islamic reformers, scholars and fundamentalists have challenged the existence and validity of our universal human rights standards. These challenges are largely bound to notions of cultural relativism as it relates to the liberal reform theory, the perception of the *Shari'a* as divine law, and the roles that politics and the Western media play in this debate.

Many Muslims use the concept of cultural relativism to legitimize their adherence to *Shari'a* law. These Muslims believe that it is difficult, if not entirely impossible, to create universal human rights standards that will apply equally to all members of the human community. Their position generally suggests that given the diversity of cultural traditions, political structures, and levels of development in the world, it is virtually impossible to define a single distinctive and coherent human rights regime.[26] Cultural relativists may vary in terms of the degree to which they find the universal ideal to be an impossible feat. For example, strict cultural relativists view the world in relative terms. They believe that it is

21 *Qur'an* 4:34--Abdullah Ahmed An-Nai'm, See note15, at 212.
22 *Qur'an* 24:31, 33:53, 33:59.
23 *Qur'an* 4:34.
24 *Qur'an* 4:34.
25 See note 5 at 208.
26 Bilhari Kausikan, "Asia's Different Standard" (1993), 92 Foreign Policy Journal 224 at 227.

impossible to attain a universal human rights standard that would meet the needs of the world's diverse cultural scheme, without imposing ethnocentric biases. Moderate cultural relativists also maintain a relative perspective of the world but recognize the need for some minimal standards of protection. These standards are to be evaluated and implemented without completely abandoning cultural considerations. Finally, the universalists value Western concepts of rights and fundamental ideas of autonomy, equality and freedom and believe that the entire global community should adopt standards based on these ideals. [27]

The moderate cultural relativist position is the only one that may realistically serve to legitimize some contentious Islamic state practices. The strict cultural relativist position is strong in its conviction but pragmatically weak. The fact that the international community, including Islamic nations, has already recognized the merits of the UN and its human rights monitoring mechanisms implies an obvious acceptance of universal human rights standards. Therefore, to effectively deny the UN's function in this regard and adopt a completely opposite approach seems paradoxical and counter-productive. The universalist position is at the other extreme as it frequently expresses ethnocentric bias. Universalist ideals are often a blatant affront to cultural diversity and bear the marks of colonial attitudes of Western superiority.

Modern Islamic reformers have also attempted to legitimize contentious *Shari'a* principles by advocating a contemporary and liberal interpretative approach, consistent with the moderate cultural relativist perspective. These reformers argue that the sources of *Shari'a* law should be examined from a strictly historical perspective, and that much of the literal interpretation of *Qur'anic* scripture should be contextualized, and in some cases abandoned. Many leading Islamic reformers agree that contextualizing the *Shari'a* is necessary for a fair assessment of its treatment of human rights. They advocate a new understanding of *Shari'a* law, "informed by contemporary social, economic and political circumstances in the same way that the old understanding was informed by the then prevailing circumstances."[28] Furthermore, they encourage a perusal of pre-Islamic mores and the prevailing Roman and Persian laws of the period. This approach reveals that the Islamic treatment of human rights was revolutionary. For example, historical evidence affirms that the *Shari'a* disposed of the practice of infanticide and blood feuds which were prevalent in the 6th century, and relatively improved the status of women.[29] The liberal reform movement, therefore, opens the door to interpretation of the *Shari'a* which has been closed since just after the death of the Prophet and encourages enlightened re-interpretation and re-evaluation of the writings of ancient Islamic jurists.

The reformers legitimize Islamic law by selectively highlighting aspects of the *Shari'a* that were progressive and revolutionary for its time. To do this, the reformers index some of the same provisions that Western critics index as celebrating inequality. By employing a historical perspective, the reformers depict the contentious provisions as innovative *Qur'anic* concessions made with the noble intention of protecting women in the event of marriage

27 See note 8 at 678.
28 See note 15 at 217.
29 See note 5 at 209.

breakdown while Western critics counter with the suggestion that the provisions reflect unfounded gender inequity. The reformers use the example that, under pre-Islamic custom, the bride was regarded as an object to be purchased, but explain that with the advent of the *Qur'an*, a woman's status was altered so that a bride was to be considered a person whose consent must be obtained to validate a marriage contract.[30] They also bring attention to other *Qur'anic* concessions which include improving the financial status of women in the event of divorce or widowhood through the alteration of the dower concept.[31] In pre-Islamic times the dower was owed to the father, but the *Qur'an* changed things by mandating that the dower be paid to the bride. This would entitle the woman to dispose of her own property, and in turn provide herself with some independence and basic social security.[32]

Another attempt by liberal reformers to defend contentious aspects of the *Shari'a* centred around the fact that it is virtually inconceivable that there could have been complete equality between men and women during the 8th and 9th centuries in the Middle East, when the idea of complete equality had not yet been introduced anywhere. It should be understandable, therefore, that the jurists initially formulating the *Shari'a* would be more apt to confirm the existing power relationships of the day, rather than repudiate them completely.[33]

Although the liberal position provides an interesting perspective and is historically informative, it does not effectively resolve the glaring conflicts between the *Shari'a* and modern conceptions of human rights. The fact that the *Shari'a* was progressive 1,400 years ago and that it was revolutionary in its treatment of human rights at the time of its inception does little to eradicate the current discrepancies with international human rights standards. At best, this position loses itself in a game of semantics by selectively de-emphasizing certain tenets and by emphasizing others. Further, although it superficially reconciles Islamic law and international human rights standards, it is unlikely to meet with enough support from the Islamic world to remedy the actual tension. Given the resurgence of traditional conceptions of Islam and the recent politics surrounding this rise in fundamentalism, it is unlikely that a liberal approach will be embraced by the world's Islamic authorities.

1. The *Shari'a* as Divine Law

Muslims attempt to legitimize their contravention of international human rights principles by asserting their belief that Islamic law is universal and that God is considered to be the sovereign ruler of the universe. Therefore "to break the law is a transgression against both society and God, a crime and a sin; the guilty are subject to punishment in this life and the next."[34] However, applying the moderate cultural relativist perspective and granting the Islamic world this difference in spiritual mentality negates any possibility of imposing universal human rights standards. The universal standards encompass Western legal conceptions of freedom and justice. These Western conceptions defy and offend Muslims who view the imposition of international standards as interference with a divine ordinance. The threat of international reproof is insignificant in the face of spiritual condemnation and

30 *Qur'an* 4:4.
31 The dower refers to money paid by the husband to either the father of the bride or to the bride herself. The money was historically provided as security, in the event of the husband's death, so that the woman would be financially provided for. Western critics have interpreted the dower to be indicative of a woman's worth in monetary terms, viewing it as a "price" for the "sale" of their daughter.
32 See note15 at 596.
33 See note15 at 216.
34 See note 8 at 671.

allows many Muslims to unabashedly justify their actions.

There is also a strong contention by Islamicists that Islamic law does protect human rights, but according to its own set of values. These values are fixed in divine law and are considered to be superior to any law that has been created by humans and established by international institutions.[35] King Fahd of Saudi Arabia was quoted in Jeddah, speaking on the issue of Western condemnation of Saudi human rights violations:

> Our people's make up and unique qualities are different from those of the rest of the world. We cannot import methods used by people in other countries and apply them to our people. Amnesty officials are secularists and atheists. They could not infiltrate into the Kingdom to spread their venomous ideas. Now they want to tarnish the image of the *Shari'a*. Let the enemies of Islam die of rage.[36]

Although this view is particularly extreme, it represents the difficulty many Muslims have with contravening the Word of God, even in the face of international reproach.

2. The Role of Politics and the Media

Many Islamic countries have responded to the need to justify their actions to the international community by adopting an extreme, defensive attitude towards the Western world. Although international attention or pressure can be facilitative in provoking change, it often works to the opposite effect, suggesting that the West deplores Islam not only for the actions of its adherents, but also for its political clout and its fervent support.

For example, the Western media has used its power in the international community to rally international outcry for the alleged mistreatment of women in Islam. The western media is often calculative and exploitative in its effort to confuse the uninformed public. The media is not subtle in its negative portrayal of this issue and is often quick to pin the blame associated with human rights violations on the religion itself, rather than on the misogynists who use it as a pretext for persecution.[37] The media conflates the contentious issue of the treatment of women in Islam by actively highlighting images of rape, polygamy, genital mutilation, the beating of girls and women, and the segregation of the sexes.[38] Westerners then equate these violations of human rights with one another so that the segregation of men and women or the requirement for women to veil is viewed equally as horrific as female genital mutilation and rape. Western critics are often guilty of the same faulty analysis and adopt an arithmetical means of universalizing the subjugation of Muslim women. They argue that the greater the number of women who wear the veil, the more universal is the sexual segregation and control of women. The media's ability to persuade the public to make this analytical leap and "assume that the mere practice of veiling women in a number of Muslim countries indicates the universal oppression of women through sexual segregation, is...analytically reductive."[39] Unfortunately, the media's strategic focus on particular aspects of Islamic practice and incidents of oppression, often taken out of context, has precluded the development of a legitimate means of reconciling Islamic law with international human rights standards on the basis of educated and informed attitudes and ideas.[40]

35 Ann Elizabeth Mayer, "Universal Versus Islamic Human Rights: A Clash of cultures or A Clash with a Construct?" 15 Michigan Journal of International Law 307, at 316.
36 See above at 319.
37 Leila P. Sayeh and Adriaen M. Morse Jr., "Islam and the Treatment of Women: An Incomplete Understanding of Gradualism" (1995) 30 Texas International Law Journal 311 at 333.
38 Fran Hosken, "Female Genital Mutilation and Human Rights", (1981) Feminist Issues 1, no.3 at 15 .
39 Ann Deardon, *Arab Women*, (1975) London: Minority Rights Group Report No. 27 as cited in C.T. Mohanty, "Under Western Eyes: Feminist Scholarship and Colonial Discourses," in Power Representation and Feminist Critique 52 (1984) at 66.
40 See above at 67.

Relieving the Tension: Questioning our Universal Standards

The Islamic requirement that women dress modestly, sometimes to the extent of veiling themselves in public by donning a *hijab, burqa* or *chador* epitomizes the onerous task of reconciling the Islamic human rights debate and provides a useful means of testing the legitimacy of our human rights instruments.[41] Recently, Muslim women in Canada, the US and the United Kingdom have exercised their freedom to wear the veil, in the face of institutional restrictions. The ensuing court actions have called into question the application of international human rights norms and the political motivation fuelling the broader debate over the treatment of women under Islamic law. In November of 1994, Emily Ouimet was sent home from her high school for wearing a *hijab*, because it offended the school's dress code, which prohibits attire that allegedly marginalizes students. The school rationalized this policy out of a fear that distinctive clothing would polarize aggression among young people.[42] A year before, a Quebec municipal court judge had expelled a woman who was wearing the Islamic head-covering from his courtroom. And a few months later, two Montreal school boards allowed schools to ban the *hijab* along with all other religious headgear. Civil libertarians, multicultural organizations and Muslim groups denounced these events as the product of racism, discrimination and an outright violation of Canada's Charter of Rights and Freedoms.[43] Jewish and Sikh groups similarly protested the ban on religious headgear in anticipation of the impact that it would have on their children's right to wear skull caps and turbans in schools. On the other hand, the same school boards who banned the wearing of the *hijab* by students, also prohibited Muslim school boards from instituting a requirement that all teachers wear the *hijab*. In fact, Quebec Deputy Premier Bernard Landry addressed the challenge that these events were clear denials for fundamental freedoms, by stating that: "Religious freedom, like all others, has its limits. Our role is not simply to allow the exercise of these freedoms but also to establish limits."[44]

At first glance, these statements represent the provincial government's position that the state must have some control over human rights – both in upholding them and in maintaining them within the Canadian socio-democratic governmental structure. However, Islamic advocates looked beyond the surface of the government's position, asserting that it was the product of political strategizing in the face of Islamic revivalism. Muslim groups suggested that the prohibition on Islamic religious garb in schools was a disguised attempt to suppress Islamic revivalism and promote assimilation to Western values in Canadian society. Jean Pare, editor of the bi-weekly magazine *L'Actualite* went so far as to defend the government's actions by characterizing the *hijab* as "a rallying symbol for Muslims in their struggle against the Western Satan."[45] He further justified his position by relying on Western notions of freedom and equality. He said that the wearing of the *hijab* was perceived by most Quebecois to clearly represent the oppression of women.

The issues surrounding the Montreal school board incident represent religious discrimination in its truest form. Although there was a furore among domestic human rights organizations, Western governments and international human rights institutions were hard

41 A *chador* is usually a long black cloth covering the whole female body. A *burqa* is also a long black manteau and attached scarf with covers the figure from head to toe, leaving only a slit or crudely poked holes for the eyes to see through. *Hijab* is the Arabic word for "covering"(most common and is just a scarf which covers the hair). For the purposes of this paper, I will use *hijab*, as it is most common in the Muslim world.

42 Barry Came, "Veiled threats in Quebec," (28 November 1994) *Maclean's*.

43 Part 1, Constitution Act, 1982 enacted as schedule B to the Canada Act 1982 c. 11.

44 See note 43 at 112.

45 See above.

pressed to show their concern for the Muslim women being denied their right to freely practice their religion. The failure of the international human rights community to condemn Western governments for their violation of international human rights standards is questionable.

Conclusion

Exploring the values behind the contentious practices and considering the various factors at play is the best means of developing an informed opinion on the Islamic human rights issue. Adopting a moderate cultural relativist perspective as it works in conjunction with the ideals of the liberal reform movement is a particularly effective means of relieving the tension. As these advocates suggest, an enlightened interpretation of Islam is one that would enable Muslims to "speak the language of human rights in their own tongue."[46] Furthermore, questioning the legitimacy or universality of our international human rights instruments is not only effective in the quest to reconcile the debate, it challenges the meaning of freedom.

The notion of freedom is consistently tempered by the role of the Western media and its political strategizing. In turn, the media often controls the degree of misinformation about human rights issues propagated in the international community by selectively highlighting world events involving Islamic terrorist groups or Islamic fundamentalist rhetoric. With this in mind, the task of reconciling Islamic law and our international human rights norms is not impossible. There may be an opportunity for international dialogue beyond the impasse by working with our existing human rights enforcement mechanisms.[47] Working within the existing framework and employing the universal standards set by the international human rights community, as already indexed in the UN human rights documents, is likely the most efficient means of resolving this issue.

But the ultimate test of legitimacy and efficacy is, of course, acceptance and implementation by Muslims throughout the world.[48] The results of this test however will probably not materialize for some time. Just as the Western world struggled in the sixteenth and seventeenth centuries to adapt its social and economic theories to accept innovation and change, the Islamic world may follow a similar pattern by incorporating the West's secular conception of human rights within its legal systems. To do this, the realm of religious interpretation and Islamic political culture needs to reach a level of modernity where a modified approach to human rights can be extracted from the ancient wisdom of religious jurists. Because it appears that the Islamic world is content with the strength of its position as an emerging international force, a firm belief in gradualism is the only hope for resolution of this debate. As the global power-play changes to meet the challenges of the twenty-first century, the fundamental human rights of all people must not be abandoned. International human rights advocates should continue to work with Islamic governments and Islamic countries should continue to put forth their own initiatives to resolve the tension between the traditional interpretation of the *Shari'a* and international human rights

46 Reza Afshari, "An Essay on Islamic Cultural Relativism in the Discourse of Human Rights" (1994) 16 Human Rights Quarterly 235 at 272.
47 See note 8 at 714.
48 See note15 at 218.

standards. Islam does contain within it the genesis for change and it is from within Muslim society itself that change ultimately will come.[49] But change is often gradual, especially if it is to endure.

49 See note 38 at 332.

Private Costs of "Safer Communities": DNA Evidence and Data Banking in Canada

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DNA evidence is a wonderful thing; just ask Gregory Parsons. In 1994, a jury convicted Parsons of the second degree murder of his mother who was stabbed more than 50 times in her home in 1991.[1] In February of 1998, DNA evidence exonerated the 26-year-old Newfoundlander of the crime.[2] You might also ask David Milgaard[3] or Guy Paul Morin,[4] both cleared of murder convictions by DNA testing that proved their genetic makeup did not match that of the real culprit. These and other recent criminal cases featuring DNA evidence have been given front page prominence by the media in this country.[5] In many ways, the celebrity DNA testing has earned has been well-deserved: DNA evidence has been responsible for pardoning the falsely accused and for punishing the genuinely guilty. But the portrayal of the role of DNA evidence in our criminal justice system as the great liberator and the great condemner has blinded the public to the inherent problems of science in the courtroom. Not only are the methods and techniques used in DNA testing rife with inconsistencies, but the collection and storage of DNA samples themselves raise issues of individual privacy and human rights which extend beyond the parameters of criminal law.

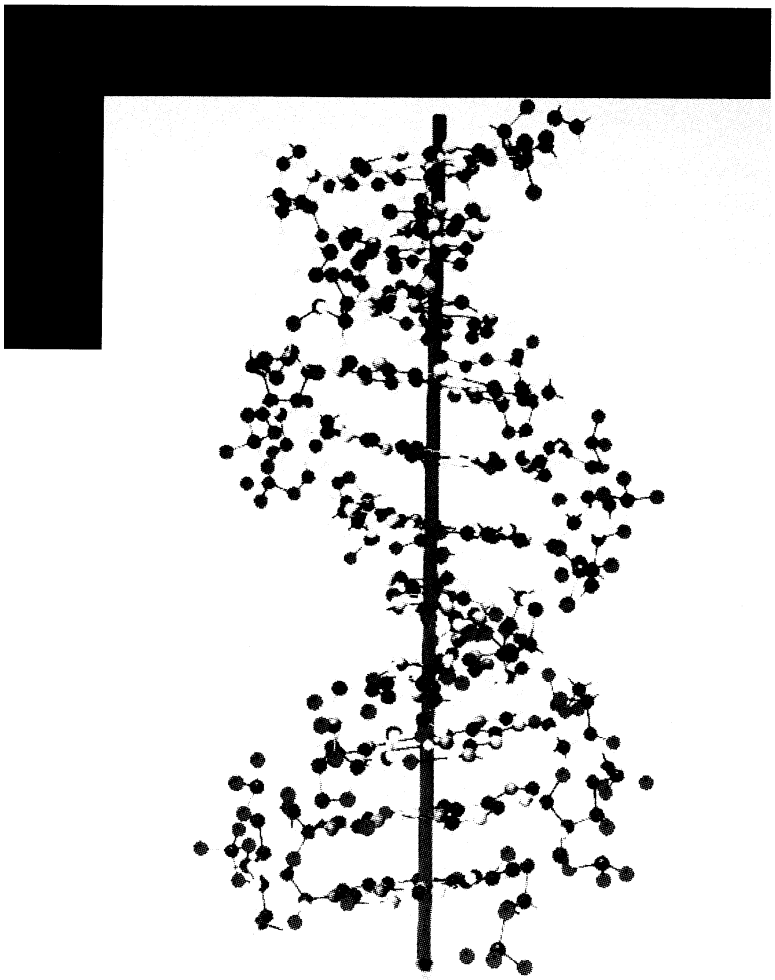
The federal government has attempted to prevent the abuses that can arise from the use of DNA evidence in the courtroom by adopting a two-step approach to the legislation of DNA testing. This paper will examine the second stage of that two-step approach, the DNA data bank. In particular, the following will evaluate the government's objectives in establishing a data bank, investigate the proposed structure of a bank, explore the potential problems that may accompany such a project, survey public reaction to the proposed DNA data bank, and test the constitutionality of the data bank itself. Ultimately, there are grave consequences in adopting a DNA data bank in Canada, especially where civil liberties are concerned. The government should not rush headlong into such a project without thoroughly considering the short and long term implications for the Canadian public.

The Canadian government has undertaken a two-stage approach to provide a legislative framework for the collection, use and storage of DNA evidence. The first stage

1 *R. v. Parsons* (1996), 146 Newfoundland & Prince Edward Island Reports 210 (Newfoundland Supreme Court Appellate Division); [1997] Supreme Court of Canada Applications for Leave to Appeal No. 43 (QuickLaw). Parsons's 1994 conviction by jury was overturned by the Supreme Court of Canada. His new trial was to begin in March of 1997.

2 "DNA Proves man innocent of mother's brutal murder" *The [Saskatoon] StarPhoenix* (4 February 1998) B7.

3 Milgaard was convicted of the murder of Gail Miller in 1969. His appeal of that trial was dismissed in 1971. See *R. v. Milgaard*, [1971] 2 Western Weekly Reports 226 (Saskatchewan Court of Appeal). Milgaard spent 23 years in prison before being released in 1992. See *Reference re Milgaard*, [1992] 1 Supreme Court Reports 866. DNA tests exonerated him of the killing in the summer of 1997.



was concerned with obtaining DNA evidence from suspects; the second stage involved the collection of DNA information in a national data bank. Parliament took its first step toward regulating the use of DNA evidence in the courtroom in June of 1995 with Bill C-104.[6] The purpose of this legislation was to clarify under what circumstances a court could issue a warrant to obtain samples of bodily substances from a person,[7] the procedures under which suspects could be compelled to provide such samples for DNA analysis,[8] and how those samples could be taken.[9] Police would have to show that there are reasonable grounds to believe that the suspect committed a designated offence before applying for a warrant.[10] In the execution of the warrant, the peace officer would have to respect the privacy of the individual and carry out the search in a reasonable manner.[11] The samples obtained would be used in the course of an investigation for the designated offences.[12] Where the accused has been acquitted, the DNA sample and the information obtained from it would be destroyed.[13] Parliament left the court the option of ordering that the substance be preserved. Preservation may be ordered if the court is satisfied that the bodily substance might reasonably be required in the investigation of the person for another designated offence or of another person for the same or any other designated offence.[14]

This prospect of preserving a DNA sample has prompted the government to expand

4 Morin was found not guilty on February 7, 1986 of the sex slaying of his nine-year old neighbour, Christine Jessop. The appeal of the Crown for a new trial was allowed and affirmed by the Supreme Court of Canada. *R.* v. *Morin* (1987), 36 Canadian Criminal Cases (3d) (Ontario Court of Appeal); aff'd [1988] 2 Supreme Court Reports 345. At his second trial in 1992, Morin was convicted of the murder of Christine Jessop. Fresh DNA evidence was allowed in the appeal of his second trial and his name was subsequently cleared. See *R.* v. *Morin* (1995), 37 Criminal Reports (4th) 395 (Ontario Court of Appeal).

5 For example, Steven Truscott, convicted in the 1959 sex slaying of a 12 year old girl in Clinton, Ontario, has recently lobbied to have DNA testing done on evidence to prove his innocence. Truscott, who was 14 years old at the time of the murder, was sentenced to hang and spent four months on death row before his sentence was postponed. He was subsequently committed to life in prison. In 1967, the Supreme Court of Canada upheld the verdict. *Reference Re Truscott*, [1967] Supreme Court Reports 309. See also "Truscott seeks DNA test to clear name in 1959 murder" *The [Saskatoon] StarPhoenix* (13 September 1997) A19. Whether Truscott will his get his chance at a DNA exoneration is unclear. As of October, 1997, the Ontario government had yet to locate the semen samples recovered from the victim's body that could clear Truscott. A Canadian Press story reported that the Centre for Forensic Sciences had lost the samples. The centre's records indicate that the samples would have been returned to the Crown. See "Ont. unable to find semen to test for Truscott's DNA" *The [Saskatoon] StarPhoenix* (4 October 1997) A14.

its undertaking to regulate DNA evidence beyond Bill C-104. Phase two of Parliament's plan, the creation of a DNA data bank to house collected samples and information on bodily substances, is the main focus of this paper. The steps taken by the government toward establishing a data bank have been recent: a Commons committee only started to address what to do with DNA evidence after it was collected in February of 1998.[15] As a result, the scholarly literature on a DNA bank in Canada is scarce. Government documents singing the praises of data banks are plentiful; American academic works on the problems of DNA data banking are also abundant.

The government's objective in legislating DNA evidence, particularly in creating and regulating a data bank, is to protect Canadians from crime. In August of 1995, the Department of Justice released a report entitled "Towards Safer Communities: A Progress Report on the Safe Homes, Safe Streets Agenda."[16] The report, written in response to a 1993 pledge to "protect the basic right of all citizens to live in peaceful and safe communities,"[17] included the government's purpose in implementing, among other things, DNA legislation:

At the heart of the Government's approach is the belief that traditional measures to deal with crime – law enforcement, the courts, and incarceration – must be supported by strong crime prevention efforts. The communities that resist crime best are those that actively address the social and economic factors that can lead to crime. Strong, healthy communities must be our first line of defence against crime.[18]

This same report included a brief summary of the government's initiative in the collection and storage of DNA evidence. Few details of the program were revealed. In a later news release, however, the government stated that a DNA data bank will help the police in the following ways:

1. It will assist the police in identifying and arresting repeat offenders by comparing DNA information from the crime scene to the convicted offender index;
2. It will assist in determining whether a series of offences was committed by a serial offender or whether more than one perpetrator was involved;
3. It will assist in linking and solving cases across jurisdictional lines by providing access to information that might otherwise not be obtainable;
4. It will help focus investigations by eliminating suspects whose DNA profile is in the data bank in a case where no match with crime scene DNA is found; and
5. It will provide a measure of a deterrence factor by increasing the certainty of detection.[19]

While the government's objectives in establishing a DNA data bank are noble, its perceptions of how the data bank will help solve crimes are based on misconceptions. First, the government's objective is coloured by its perception of the infallibility of DNA evidence and testing. DNA testing is not a sure thing in a criminal prosecution and it does have its limitations. For example, there are practical difficulties that arise in DNA testing such as insufficiency of material and the length of time to obtain results.[20] Additionally, a lack of uniform standards and quality controls allows problems that arise during testing to go unnoticed.[21] All of these factors contribute to the unreliability of DNA testing in general. Second, the government assumes that data bank samples and information will be properly

6 Bill C-104, An Act to Amend the Criminal Code and the Young Offenders Act, 1st Session, 35th Parliament, Canada, 1994-95.
7 Criminal Code, Revised Statutes of Canada 1985, c-46, section 487.05
8 See above, section 487.07.
9 See above, section 487.06.
10 See above, section 487.05.
11 See above, section 487.07(3).
12 See above, sections 487.05, 487.08, and 487.04 for a list of designated offences.
13 See above, section 487.09.
14 See above, section 487.09(2).
15 "DNA data bank goes to committee" *The [Saskatoon] StarPhoenix* (4 February 1998) B7.
16 Canada Department of Justice and Solicitor General Canada, "Towards Safer Communities: A Progress Report on the Safe Homes, Safe Streets Agenda" (Ottawa: August, 1995) (QuickLaw).
17 See above at 1.
18 See above at 1-2.
19 Government of Canada, News Release 1997-008, "Herb Gray and Allan Rock Introduce Bill to Establish a National DNA Data Bank" (10 April 1997).
20 M.Lussier, "Tailoring the Rules of Admissibility: Genes and Canadian Criminal Law" (1992) 71 Canadian Bar Review 319 at 324-25.
21 J.C. Hoeffel, "The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant" (1990) 42 Stanford Law Review 465 at 468-69.
22 Solicitor General of Canada, "Establishing a National Data Bank: Summary of Consultations" (Minister of Supply and Services Canada: Ottawa, 1997) at 19.
23 See above.

disclosed and not abused. The objective ignores the personal costs that must be paid by the individual for "safer homes" and "safer streets" as civil liberties may be lost in the name of crime prevention and the establishment of a DNA data bank. Finally, the government presumes that a data bank will have a direct affect on our communities by reducing crime – an attractive selling point to any voting member of the public. This argument is hard to swallow. For example, women's groups have argued that the government's focus should be on supporting women who are the victims of violent crimes and not data banks since most offenders who commit these kinds of crimes against women are known by their victims.[22] Women's groups "question the federal government's investment in a DNA data bank in these 'socially regressive times, as expenditures on all social infrastructure and support for basic social justice are massively reduced.'"[23] The government's objective projects an ideal situation – where DNA evidence and testing is reliable and where data bank information will have limited purposes. If this is to be a reality, safeguards must be incorporated into the legislation.

The proposed structure of the DNA bank is outlined in Bill C-3, the DNA Identification Act, which is not yet in force.[24] The purpose of the legislation, as referred to in the earlier 1995 "Toward Safer Communities" report, is "to establish a DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act."[25] The legislation recognizes that DNA evidence will play a role in the early detection, arrest, and conviction of offenders which will in turn aid in the protection of society and in the administration of justice.[26] The federal government has proposed that the DNA data bank will be established and maintained by the Royal Canadian Mounted Police, which currently operates six forensic laboratories across the country.[27] The data bank will consist of two indices: a crime scene index and a convicted offenders index.[28] The crime scene index will contain DNA profiles that are found at a crime scene, on or within the body of a victim, or on anything worn or carried by the victim at the time an offence was committed.[29] The convicted offenders index will contain DNA profiles derived from the bodily substances obtained pursuant to section 487.071(1) of the Criminal Code.[30] The data bank will be established by the Solicitor General of Canada and, as stated earlier, maintained by the Commissioner of the R.C.M.P.[31]

Bill C-3 also contains safeguards to protect the privacy of individuals.[32] Limitations on the communication of information in the data bank is one such precaution. Where the Commissioner is given a DNA profile for entry into the bank, he or she may communicate that the profile is already contained in the bank and may add any relevant information, other than the profile itself, that is in the bank.[33] Provisions are made for the communication of information with governments of a foreign state.[34] This is to facilitate the apprehension of suspects committing crimes in numerous jurisdictions. Limitations are also imposed on who can use the information in the DNA bank and on the use they can make of the information. The Commissioner has the discretion to grant access to information contained

24 Bill C-3, An Act Respecting DNA Identification and to Make Consequential Amendments to the Criminal Code and Other Acts, 1st Session, 36th Parliament, Canada, 1997 to Present. Bill C-3 was first introduced in April of 1997 but died on the Order Paper at the dissolution of Parliament. A few minor amendments have been made to clarify specific provisions of the Bill. See Solicitor General of Canada, News Release 1997-023, "Solicitor General Andy Scott Introduces Bill to Establish a National DNA Data Bank [Bill C-3]" (25 September 1997).

25 Bill C-3, see above, section 3.

26 See above, section 4(a).

27 See note 19.

28 See note 24, section 5. In the United States, the framework of data banks is somewhat different. The F.B.I. operates a national DNA data banking system known as CODIS (Combined DNA Index System). That system contains three main indices: a convicted offender index, a forensic index (or crime scene index), and a missing persons index. The missing persons index contains genetic profiles of unidentified bodies or body parts in hopes that that information could be searched against profiles of relatives of missing persons in order to make an identification. See Department of Justice Canada Criminal and Social Policy Sector, "Obtaining and Banking DNA Evidence: Consultation Paper" (21 September 1994) 3 at 7-8. In addition to CODIS, 43 American states have passed legislation to establish a DNA data bank as of October, 1995. See K. Inman & N. Rudin, *An Introduction to Forensic DNA Analysis* (CRC Press: New York, 1997) at 133.

29 See note 24, sections 5(3)(a),(b),(c),(d).

in the data bank to individuals for the maintenance and operation of the bank and to personnel of any laboratories for training purposes.[35] The use of the information received from the data bank is limited to the administration of the DNA Identification Act only.[36]

Precautions were also taken with regard to the storage of information and samples. Generally, information on DNA samples will be kept indefinitely.[37] Information will be inaccessible, however, in some cases such as where an offender has been acquitted.[38] Moreover, samples of bodily substances will also be stored.[39] These samples may be subjected to further forensic analysis if technology has advanced since the time when the DNA was first analysed.[40] Access to the samples themselves is also limited.[41] Destruction is at the discretion of the Commissioner[42] except in some cases, such as an acquittal, where destruction will be mandatory.[43]

Without a doubt, the prospect of a Canadian DNA data bank is appealing. The question is will it reduce crime as the government claims? And if so, at what cost? One major criticism of DNA data banks is that while they "will undoubtedly prove useful in solving crimes, their primary shortcoming is that criminals must first commit a crime before their DNA can be collected and later used to identify them in subsequent crimes."[44] Several cases have been documented in the United States where the banking of DNA information has led to arrests and convictions. The first case solved by searching convicted offender DNA records was in Minnesota in 1991.[45] The semen recovered from the crime scene was searched against 1,200 DNA records on file at the Minnesota Bureau of Criminal Apprehension. A match was made and the suspect was later convicted of rape and homicide. The second case also involved a rape in Minnesota, however, there were no suspects in that crime. A search of the Bureau's records resulted in a match and a suspect was arrested.[46] The DNA banks in the U.S.A. have also worked to eliminate suspects in a crime. In April of 1993, the Illinois State Police, using the F.B.I.'s national data bank, found a match between a suspect and evidence left at a crime scene. The two suspects in this crime, who were initially identified by police, were released. American DNA banks have also linked crimes together. In Miami, Metro-Dade County Police ran a sample from an unknown suspect in a rape case. It matched DNA evidence from another rape that had already been solved by police. The suspect pleaded guilty to both crimes.[47] The Minnesota Bureau of Criminal Apprehension was able to link 18 unknown suspect rape cases together. The two men initially arrested were released after being eliminated as suspects through DNA testing. Two other suspects were subsequently apprehended and a positive DNA match resulted. All of these examples include suspects who had committed previous crimes and whose DNA was on file with a law enforcement agency. Legal scholar Jennifer Sue Deck recommends that "[i]f the government wishes to protect its citizens by using DNA to identify criminals the first time they commit a crime, it will have to look to other measures."[48]

Critics have also condemned DNA data banks for the same flaws that they criticize DNA evidence: uncertainty. The use of DNA evidence in a legal setting poses questions about the reliability of testing procedures themselves. Deck contends that DNA data

30 See above, section 5(4). In Bill C-3, section 487.071 reads as follows: "487.071 (1) There shall be transmitted to the Commissioner of the Royal Canadian Mounted Police for entry in the convicted offenders index of the national DNA data bank established under the DNA Identification Act the results of forensic DNA analysis of bodily substances that are (a) provided voluntarily in the course of an investigation of a designated offence by any person who is later convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act of the designated offence or another designated offence in respect of the same transaction and who, having been so convicted, discharged or found guilty, consents to having the results entered in the convicted offenders index; (b) taken in execution of a warrant under section 487.05 from a person who is later convicted, discharged under section 730 or, in the case of a young person, found guilty under the Young Offenders Act of the designated offence in respect of which the warrant was issued or another designated offence in respect of the same transaction and who, having been so convicted, discharged or found guilty, consents to having the results entered in the convicted offenders index; (c) taken from a person in execution of an order under section 487.051 or 487.052; or (d) taken from a person under an authorization under section 487.055 or 487.091."

31 See above, section 5(1).

32 See above, section 4(b).

33 See above, section 6(1)(a) and (b).

34 See above, section 6(3) and (4).

35 See above, section 7.

banking should be prohibited given the reservations about testing procedures and the legal context in which DNA evidence is used:

> First, DNA profiling procedures are subject to multiple sources of error which distort the likelihood that two samples will be declared to match. Second, lack of industry and laboratory standards renders detection of any errors practically impossible. Third, studies show that once scientific testimony is received in the courtroom, jurors are incapable of assigning the proper weight to forensic evidence. Together, these factors suggest that it would be very difficult for a suspect identified through a national DNA databank to refute evidence of a match. Because suspects would be initially identified through a databank, which could itself contain erroneous test results, the risk of false conviction is too great to support the creation of a national DNA databank for criminal prosecution.[49]

Beyond the issues that surround the content of the data banks themselves lie the larger problems that are associated with the use of such information. The mass storage of material as sensitive and as revealing as DNA samples brings privacy issues to the forefront of the debate over DNA data banks. The very nature of the information that is being collected and stored in DNA data banks makes it necessary for governments to incorporate safeguards into their legislation in order to protect individual privacy. Genetic testing is far more sensitive than other types of medical testing for the following reasons:

1. Genetic testing can reveal much more personal information than other types of medical testing and evaluation methods;
2. Genetic testing can reveal future medical predictions;
3. Genetic disorders generally affect people throughout their lives and thus, knowledge of genetic information can have a dramatic impact on individuals;
4. The development and availability of genetic information could have potentially serious adverse financial, emotional, and social consequence;
5. Genetic testing may reveal information about other family members as well as information about the individual tested;
6. Genetic information is itself unique from other types of medical information in that it has its own social, historical, and political perspective.[50]

Legal scholars, such as E. Donald Shapiro and Michelle L. Weinberg, have argued that the abuses that can arise from the stockpiling of such sensitive information and material should caution, if not stop, governments in their bid to create data banks. Governments should be concerned with both current and future uses of genetic information. Shapiro and Weinberg write that:

> The DNA profile or so-called DNA fingerprint holds information which describes an individual's entire genetic makeup, including physical characteristics and predisposition to disease. Because of the sensitivity of this genetic information, there are grave concerns about individual privacy and civil liberties. It is important that the law realize it is simply not a matter of what we can currently read from the DNA profile analysis, but what we will be able to read from this genetic information in the very near future.[51]

The potential for the misuse of genetic information stored in data banks is enormous. Shapiro and Weinberg contemplate that if criminal DNA data banks become the accepted norm in society, it is not far fetched to imagine that other aspects of our lives could also be touched by DNA data banks.[52] If data banks are successful and relatively uncontroversial in fighting crime, society will view them with high regard. It is not unforeseeable that

36 See above, section 6(6).
37 See above, section 9(1).
38 See above, section 9(2)(a).
39 See above, section 10(1).
40 See above, section 10(2).
41 See above, section 10(4).
42 See above, section 10(6).
43 See above, section 10(7) and 10(8).
44 J. S. Deck, "Prelude to a Miss: A Cautionary Note Against Expanding DNA Databanks in the Face of Scientific Uncertainty" (1996) 20 Vermont Law Review 1057 at 1058.
45 Department of Justice Canada Criminal and Social Policy, see note 28 at 23.
46 See above.
47 See above.
48 See note 44.
49 See above at 1078.
50 Ontario Law Reform Commission, *Report on Genetic Testing* (Toronto: The Commission) at 201.
51 E. D. Shapiro & M. L. Weinberg, "DNA Data Banking: The Dangerous Erosion of Privacy" (1990) 33 Cleveland State Law Review 455 at 472.
52 See above at 478-79.

data banks could incorporate the genetic material of the non-criminal element of society to increase the effectiveness of the data bank as a crime fighting technique.[53] What if this information was made available for non-criminal purposes? Insurance companies could use genetic testing to detect future diseases and deny coverage to "tainted" applicants. Employers could refuse to hire employees based on their genetic make-up.[54] Society may deny an individual a right to have children because of his or her genetic predisposition. "[I]f the government is allowed to control the recordation and preservation of human genetic data through the use of computerized DNA data banks...the government will have a degree of power over the individual that is unprecedented and obviously subject to abuse."[55]

The potential power of the government to invade genetic privacy and the willingness with which the public may embrace DNA banking as an effective crime-solving technique is already evident. On October 10, 1997, the majority of the male population in a French farming village "willingly" submitted their DNA samples to aid in the investigation of a murder.[56] The victim, a 13-year-old British girl on a visit to northwestern France with school mates, was raped and strangled in her youth hostel bed. There were no suspects in her death. It was a scene of "a remarkable process" where local authorities requested that all consenting male villagers between the ages of 15 and 35 submit for DNA testing in order to eliminate a large group of possible suspects. Investigators admitted that there was no evidence that the killer was a local man or that he belonged to the age group being tested. Testing was voluntary and all negative samples were to be destroyed. The French League of Human Rights stated that "[t]he voluntary aspect is a total illusion...What attitude will there be toward those who don't volunteer?...Pressure and enormous suspicion."[57]

A similar DNA "roundup"[58] took place in Britain in 1988. An investigation by Leicestershire police into the murder of two 15-year-old girls over a two and one half year period involved the taking of more than 5,500 blood and saliva samples from men in three villages near the crime scene.[59] Colin Pitchfork was eventually convicted of the crime but was not apprehended through the DNA roundup: a woman overheard a conversation in a local pub about Pitchfork's attempts to convince another man to submit a DNA sample for him. She reported the incident to police and Pitchfork was arrested. Later DNA tests implicated him. One of the law enforcement officials in charge of the investigation stated that "a strong sense of community outrage among close-knit villagers and an effective police public relations campaign effectively overcame apprehension among some residents that the tests were an invasion of their personal rights."[60]

Canada's federal privacy watchdog agency, the Office of the Privacy Commissioner, has also expressed concern about the impact of DNA fingerprinting and data banks on the public. In a report published by the agency, the Office argued that DNA fingerprinting could lead to discrimination by employers, insurance companies, mortgage-lenders, or immigration officials.[61] DNA technology could also lead governments to hand-pick students for entrance into costly university programs.[62] "The Genetics Testing and Privacy report says the temptation for abuse may be so great that the government will have to legislate controls

53 Hoeffel notes that "Lifecodes [a commercial DNA testing laboratory in the United States] is already planning to bank DNA information on newborns for parents who want to be able to trace and identify their children in case of kidnapping or runaways. In addition, immigration authorities have expressed an interest in participating in a DNA databank for their purposes." See note 21 at 535. See also Shapiro & Weinberg, above at 472.
54 Shapiro and Weinberg write that genetic screening is already taking place in the workplace. In a review of genetic screening in the workplace, the United States government found that 75 of the country's largest firms either already had screening in place or planned to initiate it in the near future. The authors write that "[t]hese tests would obviously be used to exclude some individuals from employment and to determine job assignments for others." See above at 481.
55 See above at 479.
56 J. Noveck, "Desperate Village Tries DNA Dragnet" Associated Press (10 October 1997) (QuickLaw) [DNA Developments I: French Village Tested, ADGN/97-1126.]
57 See above.
58 See above.
59 See note 51 at 464-65.
60 See above at 464.
61 No author, "Genetic Watchdog" (1993) 2:1 Forensics, Policing and the Law (QuickLaw).
62 No author, "DNA and the Invasion of Privacy"(1994) 2:1 Forensics, Policing and the Law (QuickLaw).

on the collection, storage, and use of genetic information."[63]

In January 1996, the federal government decided to consult several groups on DNA data banking. A series of consultations took place with Members of Parliament, provincial and territorial governments, police services, correctional institutions, privacy officials, women's organizations, the legal community, victims' groups and forensic science and genetic organizations. Support for a DNA data bank was, in the government's words, "strong" but concerns were expressed over the scope of a data bank, its effect on privacy, and how it would be funded.[64] Provincial and territorial governments were in favour of the data bank, so long as the federal government assumed all costs for its maintenance and operation.[65] Support from organizations such as the Privacy Commissioner of Canada, the Canadian Human Rights Commission, and the Canadian Bar Association was contingent on "adequate limits and protections" being put in place.[66] These same organizations expressed a concern over the retention of biological samples in the data bank. It is the view of these organizations that the sample should be destroyed once the genetic identification information has been extracted from it. "These intervenors argue that the complexities of ensuring the security of the information and the long range protection of personal privacy would overshadow the value of retaining the samples."[67] If samples are to be retained, it was widely expressed that strict criminal sanctions should be incorporated into the legislation for the use of the samples for any purpose other than forensic DNA identification.[68]

Some political reaction to the DNA data bank has been less cautious than that of privacy advocates. The Reform Party believes that the federal government's current DNA data bank proposal does not go far enough. In a Canadian Press news report, Reform MP Jack Ramsay was quoted as saying that the proposed legislation was "'nonsense."[69] He argued that the legislation does not allow police to use science to its full potential. Ramsay thought that anyone accused of a crime should be required to give a DNA sample at the time of arrest, similar to the current practice of taking fingerprints.[70] Ramsay was also unhappy with the provisions in Bill C-3 that give a court the discretion to exempt a convicted offender from giving samples if his or her privacy or security would be grossly violated.[71]

If a national DNA data bank is to be established, should we leave it to the federal government to strictly police the data bank and protect our rights to privacy? Some academics argue that history tells us not to. Hoeffel reminds her readers, that in the past, the United States government has dabbled in "'genetic redlining' – the experience of differentiated treatment based on apparent or perceived human variation."[72] She notes, for example, the eugenics movement of the 1920s which called for compulsive sterilization of "social undesirables."[73] In upholding a Virginia law compelling sterilizations, U.S. Supreme Court Justice Oliver Wendell Holmes stated that those "who already sap the strength of the state" owe it to public welfare not to reproduce "in order to prevent our being swamped with incompetence."[74] Hoeffel also cites state laws identifying carriers of the sickle cell anaemia gene as a more recent example of the American government implementing genetic screening

63 See above.
64 See note 22 at ii. The annual cost of operating the DNA data bank is estimated at $3 million per year. See note 19. For more information on the proposed funding of the data bank see note 22 at 15-19.
65 See note 19 at ii.
66 See above at iii.
67 See above at 11.
68 See above at 13.
69 See note 15.
70 See above.
71 See above.
72 See note 21 at 534.
73 See above.
74 *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) as quoted in above at 534.

legislation.[75] The pre-marital screening was done to discourage individuals with the gene from bearing children. Shapiro and Weinberg contend that "the history of governmental protection of individual privacy and autonomy [in the United States] is inconsistent with the aims of a free and democratic society."[76] They argue that there are plenty of "examples of the [American] government running amok in violation of the privacy of information collected for other purposes."[77] One cited example is the 1930s U.S. Social Security Act. When the Act was passed, Congress assured the American public that confidentiality and privacy of information would be protected. Even in a Canadian context, "[o]ne hardly needs to comment on how this protection has been rigidly enforced."[78]

While we may not be able to trust the federal government to protect our right to privacy with respect to a DNA data bank, it may be that the courts of this country will come to the rescue. The current legal trend with respect to the collection of DNA evidence has been to protect the rights and privacy of the individual from whom a biological sample is obtained. In *Hunter* v. *Southam*,[79] the Supreme Court of Canada held that the right to be free from unreasonable search and seizure means that an individual is entitled to a reasonable expectation of privacy. A court must balance an individual's right to privacy with the government's interest in intruding on that privacy. In circumstances where a bodily substance is required for DNA testing, the privacy interests of the individual have been the paramount concern of the courts when the individual's Charter rights have been violated in the collection of the samples. For example, in *R.* v. *Dyment*,[80] a blood sample collected by a physician for medical purposes was passed to police without any legal requirement to do so. The Crown used the sample to secure the accused's conviction in an impaired driving charge. The Supreme Court of Canada held that the "use of a person's body without his consent to obtain information about him, invades an area of privacy essential to the maintenance of his human dignity."[81]

The Supreme Court of Canada has more recently affirmed its commitment to protecting individual privacy in cases such as *R.* v. *Stillman*[82] and *R.* v. *Feeney*.[83] In *Stillman*, the accused's right to privacy outweighed the Crown's right to have DNA evidence admitted at trial. The accused in that case was charged with murder. Despite Stillman's resistance to provide bodily substances for DNA testing, the authorities were successful in obtaining samples from him. After his lawyer had left and under threat of force, Stillman (a young offender) gave up scalp and pubic hair samples, a saliva sample, buccal swabs, and teeth impressions. The police also seized a tissue discarded by the accused containing his mucous. All of the items were used for DNA testing. The Supreme Court held that the bodily samples (with the exception of the tissue) were obtained in violation of Stillman's section 8 Charter rights (his right to be free from unreasonable search and seizure) and thus were not admissible as evidence. Supreme Court Justice Cory, writing for the majority, concluded that "the taking of the bodily samples was highly intrusive. It violated the sanctity of the body which is essential to the maintenance of human dignity. It was the ultimate invasion of the appellant's privacy."[84] Justice Cory emphasized that the privacy of

75 See note 21 at 534. This legislation began to be implemented in the early 1970s.
76 See note 51 at 477.
77 See above.
78 See above.
79 [1984] 2 Supreme Court Reports 145.
80 [1988] 2 Supreme Court Reports 417.
81 See above at 431-432.
82 [1997] 1 Supreme Court Reports 607.
83 [1997] 2 Supreme Court Reports 13.
84 See note 82 at 644.

an individual's body is to be respected in all instances:

> Canadians think of their bodies as the outward manifestation of themselves. It is considered to be uniquely important and uniquely theirs. Any invasion of the body is an invasion of the particular person. Indeed, it is the ultimate invasion of personal dignity and privacy. No doubt this approach was the basis for the assault and sexual assault provisions. The body was very rightly seen to be worthy of protection by means of criminal sanctions against those who assault others. The concept of fairness requires that searches carried out in the course of police investigations recognize the importance of the body.[85]

The Court ultimately decided that the admission of Stillman's bodily substances as evidence would violate his right to a fair trial and would bring the administration of justice into disrepute.

The Supreme Court of Canada continued its commitment to the right to privacy in *R. v. Feeney*.[86] During a murder investigation, the police entered Feeney's residence without permission. Upon waking the accused and observing blood on his shirt, police officers arrested him. Subsequently, several pieces of evidence were seized from Feeney's home including his shirt, shoes, cash, and cigarettes. Feeney was later convicted of second degree murder. On appeal, the accused challenged the conviction based on the argument that his right to be free from an unreasonable search and seizure and his right to retain and instruct counsel had been violated. The Court held that the arrest was unlawful as the police did not have reasonable grounds to arrest prior to forcible entry into the accused's home. Supreme Court Justice Sopinka sought to show in his judgment for the majority that "the emphasis on privacy in Canada has gained considerable importance."[87] He wrote that "Charter values...significantly increase the importance of the legal status of the privacy of the home. In general, the privacy interest now outweighs the interest of the police and warrantless arrests in dwelling houses are prohibited."[88]

Both *Feeney* and *Stillman* illustrate that the current members of the Supreme Court of Canada have a strong commitment to protecting the privacy rights of individuals in this country. These cases demonstrate, however, that this commitment is limited to a criminal context. It is not certain that the same rights will be extended beyond the scope of criminal law. For example, would the regard for privacy extend to a constitutional challenge to a national DNA data bank? American academics have hypothesized that a national DNA data bank could withstand a constitutional challenge. Deck argues that a U.S. data bank would not violate the Fourth Amendment. She says that in order for the government in that country to establish a DNA data bank under the DNA Identification Act of 1994, samples would have to be obtained from every citizen of the United States. Procuring those samples would trigger the Fourth Amendment, which, like section 8 of the Charter, protects citizens from unreasonable search and seizure. Deck argues, however, that given the Fourth Amendment interpretations by the United States Supreme Court over the last 30 years, the data bank would withstand a constitutional challenge. She writes:

> Rather than focussing on the requirement that there be probable cause and procurement of a warrant before a search or seizure occurs, the Court has limited its inquiry

85 See above at 658.
86 See note 83.
87 See above at 45.
88 See above at 15.

> in certain cases to whether the search or seizure is reasonable. The Court's current framework weighs the public interest in a certain procedure against the individual interest at stake and typically rules in favour of the public interest. The result is a string of cases that could enable a national DNA databank to withstand a Fourth Amendment challenge.[89]

Robert Astroff speculates that the fate of a Canadian DNA data bank in the face of a constitutional challenge would be much different than its American counterpart.[90] He argues that a data bank will likely violate section 8 and section 7 of the Charter. He also notes that "the establishment of a DNA data bank is inconsistent with the notions of privacy, liberty and personal security that exist in Canadian society."[91] Given the recent course the Supreme Court of Canada has taken in regard to privacy issues, it is probable that a DNA data bank will be rendered unconstitutional unless strict safeguards are implemented to ensure the restricted and confidential use of the information it would store.

Legal scholars have argued that the debate about DNA evidence and data banking should be conducted in the legislature and not the courtroom.[92] This conclusion may flow from the judiciary's limited understanding of DNA testing and analysis. Certainly the complexity and multitude of the issues surrounding DNA evidence and data banking would make the legislature the more appropriate forum in which to regulate these matters. Whether legislators will possess the knowledge necessary to legislate responsibly remains to be seen. Clearly, the establishment of a DNA data bank will lead to the erosion of our right to privacy in one sense or another. It is not unreasonable to foresee that a DNA bank established as a crime fighting tool could be expanded to include the genetic material of those who have not been implicated in any criminal activity. Therefore, the government must keep the potential for abuse of DNA technology and its impact on individual privacy at the forefront of the debate. Furthermore, it must implement its legislation cautiously, without violating the fundamental rights and freedoms of Canadian citizens.

89 See note 44 at 1064-1068.
90 R. E. Astroff, "Identity Crisis: The *Charter* and Forensic DNA Analysis in the Criminal Justice System" (1995-96) 4-5 Dalhousie Journal of Legal Studies 211 at 234.
91 See above at 234.
92 See note 21 at 355-56.