Five of the Most Significant Decisions of the Courts in 1997-98[1]

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[1] And Two Other Important Cases Which Deserve "Honourable Mention"

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Introduction

Of the thousands of cases decided in our courts each year, a handful --- certainly more than five --- will have a lasting impact. The question for this paper is to identify which five cases were the most "significant" and to discuss why they should matter to you or your clients.

The process of identifying the top five cases of the year has been an interesting intellectual exercise. It requires interpretation of what is "significant" to lawyers --- not just as citizens of Ontario and Canada --- but in our professional lives.[3] Among the most important cases there are many which were not reported on the front page of *The Globe and Mail* but which may significantly affect the advice you give your client next week or the evidence you will call at your next trial.

In our "info-tech" society, we are bombarded with instant information from a myriad of electronic and conventional sources. Our task as lawyers is to cull the important from the mundane. Significance is measured by "change": what have the courts decided that makes things different from the way they were before? In researching this paper, "change" was our main barometer of "significance". In the process, we hope that we have selected the cases as wisely as the judges decided them.

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[3] Among the other cases we considered in the preparation of this paper were the following: *Hercules Managements Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165 (May 22, 1997) (negligent misrepresentation to non-clients); *R. v. Feeney* [1997] 2 S.C.R. 13 (May 22, 1997) (conviction based on warrantless search and failure to permit accused choice of counsel violated *Charter* rights); *Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada* [1998] S.C.J. No. 44 (May 29 1998) (restriction on publication of opinion polls three days before election struck down as violation of freedom of speech); *Reference re Remuneration PEI Provincial Judges* [1998] 1 S.C.R. 3 (Feb. 10/98) (independence of judges compromised by post-appointment salary reduction);

Overview

The Supreme Court of Canada's judgment in *Reference re Secession of Quebec*[4], may have such an overwhelming impact on the future of Canada that one cannot deny that it is one of the most significant cases of the year, or maybe of the century. In fact, Chief Justice Antonio Lamer has described the Quebec secession reference as the most important case ever to come before the Supreme Court of Canada.

The right of individuals to be treated equally while openly expressing their differences has been the subject of much judicial consideration during the last year. In *Vriend v. Alberta*[5], the majority of the Supreme Court of Canada struck down provisions of the provincial human rights legislation[6] which failed to identify "sexual orientation" as a "protected ground" of discrimination. The decision of the Supreme Court of Canada was not well-received by many Albertans, where right-wing political sentiment has a long history. In fact, Premier Ralph Klein threatened to invoke the "notwithstanding" clause[7] of the *Charter*[8] to prevent the application of the court's decision. A

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4 [1998] S.C.J. No. 61, (the full Court, released August 20, 1998).

5 [1998] S.C.J. 29 (SCC: Lamer C.J., L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major and Bastarache JJ., judgment released on April 2/98.) Sopinka J. took no part in the judgment.

6 *Individual's Rights Protection Act,* R.S.A. 1980, c. I-2 [am. 1985, c. 33; am. 1990, c. 23], preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).

7 On April 2, 1998, the Canadian Newswire reported that according to labour groups, "Premier Ralph Klein has talked out of both sides of his mouth on the court ruling. At one point he said that he would abide by the ruling of the court. Another time he said that he might invoke the notwithstanding clause . .." Alberta and PEI are the only provinces which don't protect sexual orientation as a ground of discrimination.

8 *Canadian Charter of Rights and Freedoms, 1982*, s. 33(1): "Parliament or the legislature of a province may expressly declare in an Act of Parliament or a legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

public outcry in favour of the judgment persuaded the Alberta government not to invoke s.33(1) of the *Charter* and that the time had come to accept sexual orientation as a protected ground of discrimination.

In a case which attracted much public attention, *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*[9], Madam Justice Jean McFarland of the Ontario Court of Justice (General Division) held that women are entitled to pro-active protection by the police and to fair warning of any gap in that protection when the police knew that a serial rapist was in the area and was likely to attack. In that case, the court found the police negligent in fulfilling their duty to protect the plaintiff. The court found that by failing to fulfill its private duty to protect the plaintiff from crime, the police infringed upon N.C's rights under sections 7 and 15 of the *Charter*.

Relationships between employers and employees will be impacted by the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Limited,*[10] which reminds employers that the employee's dignity is important even when the employee is being dismissed. The Court held that the manner of dismissal is a factor to be considered when calculating the notice period for employees who have been wrongfully dismissed. In addition to the main issue before the Court, it was also held that a dismissed employee has standing as a plaintiff in a claim for wrongful dismissal damages even while the employee is an undischarged bankrupt.

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9 [1998] O.J. 2681 (Ont. G.D., McFarland J. released July 13, 1998)

10 [1997] 3 S.C.R. 701, (SCC - Lamer C.J., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ., released October 30, 1997.

In the sphere of criminal law, in *R. v. Williams*[11], the Supreme Court of Canada emphasized that the potential racial bias of a juror will impact on the fairness of the trial. With a view to weeding out prospective jurors who harbour a racial bias, the court held that the accused may question a prospective juror about his or her racial bias when challenging for cause where there is evidence of discrimination or racial bias in the community against persons of the accused's class or group.

Two other cases decided during the last year deserve "honourable mention." *Delgamuukw v. British Columbia*[12] is a decision of the Supreme Court of Canada which addresses the scope of aboriginal title. *Ontario English Catholic Teachers' Assn. v. Ontario*[13] is a decision of Mr. Justice Peter Cumming of the Ontario Court (General Division) which struck down parts of the Ontario government's educational restructuring legislation (Bill 160)[14] as violating the rights of Roman Catholic schools under s.93(1) of the Constitution. In the hospital restructuring cases, which made the "Top Five" list last year,[15] the Divisional Court upheld legislation which reduced funding for hospital services. We understand that the Ontario government has appealed the judgment.

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[11] [1998] S.C.J. No. 49 (SCC - Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ., released on June 4, 1998)

[12] [1997] 3 S.C.R. 1010 (Lamer C.J., La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin and Major JJ., released December 11, 1997. Sopinka J., who died on November 22, 1997, took no part in the judgment.)

[13] [1998] O.J. No. 2939, released on July 22, 1998.

[14] *Education Quality Improvement Act*, S.O. 1997, c. 31 ("Bill 160"). Bill 160 was enacted December 1, 1997, resulting in various amendments to the *Education Act*, R.S.O. 1990, c. E.2.

[15] *Pembroke Civil Hospital v. Ontario (Health Services Restructuring Commission)* [1997] O.J. No. 3142, July 27, 1997 and *Wellesley Central Hospital v. Ontario (Health Services Restructuring Commission)* [1997] O.J. No.3645 - September 15, 1997.

This paper will analyze the scope of these cases and how they have changed the law.

(1) Reference re Secession of Quebec - S.C.C. - August 20, 1998

In the unanimous judgment of the Supreme Court of Canada in *Reference re Secession of Quebec*[16], the full Court held that the *Constitution Act, 1982* does not give the province of Quebec the unilateral right to secede from Confederation even if a majority votes "Yes" in a sovereignty referendum. The court determined that the *Constitution Act* does not confer such a right:[17]

> *Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have* ***no legal effect*** *on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole.* [our emphasis]

But the court also held that the *Constitution* does not give the rest of Canada the right to ignore a clear expression of the democratic will of a clear majority of the people of Quebec to secede from Confederation. The court held that the *Constitution* embraces the entire global system of rules and principles which govern the exercise of constitutional authority[18] and that negotiations and discussion are part of the process:[19]

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16 [1998] S.C.J. No. 61 (SCC - Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ., released on August 20, 1998)

17 [1998] S.C.J. No. 61 at 30.

18 *Reference re Secession of Quebec, supra.* [1998] S.C.J. No. 61 at 16. See also *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference*), at 874.

19 [1998] S.C.J. No. 61 at 16-17. The "Constitution of Canada" includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982, and also "embraces unwritten, as well as written rules" *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (*Provincial*

> *Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.*

The court therefore concluded that if there were a vote in favour of secession by "a clear majority responding to a clear question", Quebec and the rest of Canada would be obliged to negotiate what happens next. The court expressed these propositions in the following terms[20]:

> *The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.*
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> * * *
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> *The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.*

The Court held that it was for the "political actors" and not for the court to determine the

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Judges Reference), at para. 92.

[20] [1998] S.C.J. No. 61 at p.45 QL.

nature of a clear question and a clear majority. The Court avoided the question of whether Quebec had a unilateral right to secede from Confederation under international law by holding that, although much of the population of Quebec shares many of the characteristics of a "people", not all "people" have a right to self-determination by means of secession. It must first be determined that certain conditions apply before a "people" have the right to self-determination:[21]

> *It is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part.*

The Court held that where, as in the case of Quebec, there is no oppression, colonialization, domination or the other factors mentioned above, "peoples are expected to achieve self-determination within the framework of their existing state". The court recognized that the international community might react to a unilateral declaration of independence by Quebec but would be likely to respect the internal law of Canada and the conduct of Quebec and Canada. In light of this, there was no need for the court to address whether or not there was a conflict between international law and domestic law as to the legitimacy of a unilateral declaration of independence by Quebec.

Legal Significance

We submit that the *Reference re Secession of Quebec* is a very important exercise of the

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[21] *Reference re Secession of Quebec, supra.* [1998] S.C.J. No. 61 at pp. 35-39 QL

advisory role of the Supreme Court of Canada.[22] The Court used this opportunity to establish a legal framework for the realignment of the Canadian Federation in the event the "clear majority" of the people of Quebec, responding to a "clear question" vote in favour of secession. This has not been done by the Court in the 131 years since Confederation.

Professor Irwin Cotler of McGill University, the internationally-acclaimed constitutional law expert, considers that the judgment of the Supreme Court of Canada has changed the legal and political *status quo* of the secessionist option completely. Writing in a front page commentary in *The Canadian Jewish News*, Professor Cotler argues that the decision creates a "new political reality" underpinned by constitutional law, namely, "that Quebec can no longer claim that it has a right to unilaterally secede under Canadian constitutional law or that the *Constitution* does not prohibit it."[23]

Similarly, Professor Cotler points out that "Quebec can no longer claim, as it has continued to argue, that it has the right to secede under international law." Finally, by requiring a clear majority to a clear referendum question, Professor Cotler argues that the Court has made an explicit statement which seriously damages the sovereignist cause.[24]

While sovereignist politicians interpreted the obligation to negotiate following a Yes vote

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[22] *Constitution Act, 1867*, s.53 and see *Reference re Secession of Quebec, supra.* pp.13-15 QL

[23] *The Canadian Jewish News*, August 27, 1998, pp.1, 36

[24] Ibid., p. 36.

as a boost to their political cause, Professor Cotler argues that the legitimation of the secessionist option depends not only on the "procedural" legality of a clear majority to a clear question but also on a negotiated agreement which is anchored in four "substantive and fundamental principles," referred to in the judgment of the Supreme Court, namely:[25] [numbering is ours]

> *1) the federalist principle, the 'lodestar' of the constitutional system;*
>
> *2) democracy, "which includes not only the clear majority of the province of Quebec" but "the clear majority of Canada as a whole";*
>
> *3) constitutionalism and the rule of law, including "the principle that a Constitution is entrenched beyond the reach of simple majority rule";*
>
> *4) protection of minority rights as "an independent constitutional value," and especially, the "non-derogable" protection of aboriginal rights.*

Political Compromise

Beyond the important constitutional law issues, the court had to walk a fine line by crafting a "made in Canada" judgment that permitted each of the stakeholders to find a measure of satisfaction with it. The Canadian spirit of compromise is seen in this decision as it was in other decisions of the Supreme Court. In *Delgamuukw v. British Columbia*,[26] for example, Lamer C.J.'s judgment concludes with the words, "Let's face it, we're all here to stay." Presumably, the Court had similar sentiments in mind in advising upon the future of the Canadian federation.

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[25] Ibid., p.36 and *Quebec Secession Reference, supra.* [1998] S.C.J. ¶32

[26] [1997] 3 S.C.R. 1010

Has the Quebec Secession Reference Changed Anything?

In assessing the legal significance of the Supreme Court's judgment, we are inclined to ask the question, "Has anything changed?" Is it just a speculative exercise which might never be tested? These questions are political unknowns. Every constitutional analysis is fraught with political implications. It is impossible to assess what would happen internationally in the event of a Yes vote or how other governments, groups and individuals in Canada would react.

The Court's enumeration of the categories which might entitle a "people" to self-determination could have significant legal and political implications for aboriginal peoples living both in Quebec and elsewhere in Canada. In the context of the rights of aboriginal peoples, the Court made the following observation, which suggests that in negotiations over the terms of Quebec's secession, even the borders of the new Quebec would be an appropriate matter for negotiation:[27]

> *We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.*

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[27] [199] S.C.J. No. 61 ¶ 139

Political Reaction

On the political front, journalists of every medium and politicians of every stripe have already jumped into the fray. A front page article in the Sunday, August 23, 1998 *Toronto Star* proclaimed: "*Quebec: How court altered everything*"[28]. In noting that federal and provincial politicians have cautioned Quebecers that it will not be "business as usual" the day after a Yes vote, Robert McKenzie, a journalist in the *Toronto Star's* Quebec bureau, observes that the Supreme Court of Canada decision has altered the political waterfront:[29]

> *The judgment still provides plenty of ammunition for proponents of national unity: the court says it would take "a clear majority vote in Quebec on a clear question in favour of secession" to bring the rest of the country to the bargaining table; and it outlines a mind-numbing list of issues that would have to be negotiated - minority rights, native rights, the debt, and perhaps boundaries.*
>
> *But by ensuring there would be a bargaining process after a clear referendum victory, by establishing the constitutional doctrine of "the obligation to negotiate" the court has chopped one of the main cables holding up the national unity tent.*
>
> *Contrary to the impression often left by Chrétien and his Intergovernmental Affairs Minister Stéphane Dion, a negotiation with the rest of Canada has been a central proposal of Quebec sovereignists since the creation of the PQ in 1968 and even before. The national unity forces owe many of their victories in Quebec to their success in convincing Quebecers the negotiation would never happen.*

Sovereignist politicians in Quebec, including Premier Lucien Bouchard, whose government

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[28] *Toronto Sunday Star,* August 23, 1998, p.1.

[29] Ibid. p.1

refused to participate in the reference to the Supreme Court,[30] have now embraced those parts of the Court's judgment which are seen as reinvigorating the sovereignist movement. They have already begun to emphasize that separation is no longer just *un beau risque* because now, the federal and provincial governments have a duty to negotiate the terms of secession.[31] On the day after the judgment, Mr. Bouchard was quoted as saying that the Supreme Court's judgment has "poisoned the federalist cause and destroyed many of the myths promoted by Ottawa to scare Quebecers away from voting for sovereignty"[32] and that "the next time, men and women will be able to vote Yes without worrying about a smooth transition to sovereignty".[33]

The political impact of the Supreme Court's judgment is bound to become even more complicated. For instance, on August 26, 1998, CBC Radio reported that federal Intergovernmental Affairs Minister Stéphane Dion had written to Premier Bouchard to indicate that negotiations following a Yes vote would encompass all issues, including the borders of Quebec.[34] The Supreme Court may have provided politicians with a framework to discuss what should occur if Quebec were to vote for sovereignty, but the decision certainly will do little to quell the rhetoric on both sides.

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[30] The position of Quebec was presented by a distinguished team of *amicus curiae* counsel who presented the "sovereignist" position eloquently and whose submissions have not been criticized by the Quebec government.

[31] *The Globe and Mail*, Saturday, August 22, 1998. page 1 "Federal Myths destroyed, Bouchard says"

[32] Ibid, p. 1.

[33] *Maclean's*, August 31, 1998, p.15

[34] See *Canadian Newswire* (QL), August 26, 1998, Story No. C5023 for the text of Minister Stéphane Dion's letter.

To the extent that the Supreme Court of Canada plays an important role in maintaining the social order and the rule of law in Canada, the Court's decision is a deft piece of judicial stick-handling. The Court recognized the sensitive balance between the political and legal issues:[35]

> *The observation we made more than a decade ago in* Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity".*

We submit that the Supreme Court's judgment maintains the political equilibrium between the overwhelming majority of Canadians (both in and out of Quebec) who are striving to keep Canada united and those in Quebec (who nearly reached a majority in the October 1995 referendum) who would redefine the political and economic make up of Canada. Moreover, by reaching a unanimous judgment, the Court avoided the political slings and arrows which would have flown had there been a difference of opinion, particularly between the anglophone and francophone judges. Undoubtedly, unanimity was not achieved without difficult compromise. This exercise in compromise should be a beacon of light for the political stakeholders in the debate over the future of Canada.

(2) Vriend v. Alberta[36] (S.C.C. - April 2, 1998)

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[35] [1998] S.C.J., ¶1

[36] [1998] 1 S.C.R. 493 (SCC- Lamer C.J., L'Heureux Dubé, Gonthier, Cory, Sopinka, McLachlin, Iacobucci, Major and Bastarache JJ.)

In this ground-breaking decision, eight judges of the Supreme Court of Canada[37] recognized that gays and lesbians enjoy a *Charter* right to protection from discrimination on the ground of sexual orientation under the Alberta *Individual's Rights Protection Act* (IRPA).[38] Major J., who is from Alberta, dissented in part, holding that the Court should give the government of Alberta a year to amend its human rights legislation to include sexual orientation as a protected ground of discrimination.

The facts were not complicated. Delwin Vriend was employed as a permanent, full-time laboratory co-ordinator by a college in Alberta. He was competent in his work and was well-regarded. Two years after he commenced employment, Vriend was asked by the president of the college whether he was a homosexual and admitted that he was. A few months later, the college's board of governors adopted a negative "position statement on homosexuality" and shortly thereafter, the president of the college requested Vriend's resignation. Vriend refused to resign, and his employment was terminated by the college. The sole reason given was his non-compliance with the college's policy on homosexuality. Vriend appealed the termination of his employment and applied for reinstatement, but was refused.

Vriend then attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation. The Alberta Human Rights Commission advised Vriend that he could not make a complaint under the

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[37] Sopinka J. died before the judgment was delivered and did not take part in it.

[38] R.S.A. 1980.

Alberta *Individual's Rights Protection Act* (IRPA)[39], because it did not include sexual orientation as a protected ground. Vriend then filed a motion in the Court of Queen's Bench for declaratory relief that the IRPA violated s.15(1) of the *Charter*.

The trial judge found that the omission of protection against discrimination on the basis of sexual orientation was an unjustified violation of s. 15 of the *Charter* and ordered that the words "sexual orientation" be read into ss. 2(1), 3, 4, 7(1), 8(1) and 10 of the IRPA as a prohibited ground of discrimination. The majority of the Court of Appeal allowed the Alberta government's appeal and Vriend appealed to the Supreme Court of Canada.

An important element in the decision of Cory J. is the treatment of the "notion of judicial deference" when a legislature refuses to legislate on a particular matter. In other words, does the *Charter* apply only to strike down legislation as it stands or can it also be used to read into legislation words which ought to be there? Cory J. holds that it is the "underinclusiveness" of the IRPA which is at issue and s. 32 of the *Charter* does not limit its application in these circumstances.[40] By reading in sexual orientation as a protected ground of discrimination of the IRPA, the Court avoided the serious legislative void which would have existed had it struck down

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[39] *Individual's Rights Protection Act,* R.S.A. 1980, c. I-2 [am. 1985, c. 33; am. 1990, c. 23], preamble, ss. 2(1), 3, 4, 7, 8, 10, 11.1, 16(1).

[40] [1998] S.C.J. ¶¶ 55-63. Section 32(1) of the *Charter* provides: This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

the impugned provisions of the IRPA completely.[41] Cory J. goes on to observe that "reading in" is an important tool in avoiding undue intrusion into the legislative sphere",[42] and justifies the process on the basis that it produces a better result than striking down the IRPA:

> *When determining whether reading in is appropriate, courts must have regard to the "twin guiding principles", namely, respect for the role of the legislature and respect for the purposes of the Charter.*
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> *The purpose of the IRPA is the recognition and protection of the inherent dignity and inalienable rights of Albertans through the elimination of discriminatory practices. Reading sexual orientation into the offending sections would minimize interference with this clearly legitimate legislative purpose and thereby avoid excessive intrusion into the legislative sphere whereas striking down the IRPA would deprive all Albertans of human rights protection and thereby unduly interfere with the scheme enacted by the legislature. It is reasonable to assume that, if the legislature had been faced with the choice of having no human rights statute or having one that offered protection on the ground of sexual orientation, the latter option would have been chosen.*

The majority judgment of Cory and Iacobucci JJ. (delivering joint reasons) is also instructive about Alberta's recent legislative history concerning sexual orientation as a protected ground of discrimination. Cory J. concludes that the failure to include sexual orientation as a protective ground was "deliberate and not the result of oversight".[43] The government of Alberta had debated the inclusion of sexual orientation but decided not to do so. Among the reasons for omitting sexual orientation as a protected ground of discrimination were that "sexual orientation was a 'marginal'

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41 [1998] S.C.J. ¶ 148

42 See also the judgment of Lamer C.J. in *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 700.

43 [1998] S.C.J. No. 29, ¶4,

ground" and that "human rights legislation is powerless to change public attitudes"[44].

We return to our seminal question: what does *Vriend v. Alberta* change? Before *Vriend,* the leading case on the Charter rights of homosexuals was *Egan v. Canada*,[45]. In that case, the Supreme Court was confronted with a s.15 challenge to the federal *Old Age Security Act*'s definition of "spouse", which presumed the existence of a heterosexual relationship.

LaForest J., writing for the majority in the result, held that the impugned provision did not violate the *Charter* because the distinction between homosexuals and heterosexuals was relevant to the purpose of the legislation. In other words, the purpose of the definition of "spouse" in the *Old Age Security Act* was to provide "the nature of the personal characteristic and its relevancy to the functional values underlying the law"[46]. In what is likely the last decision of the Supreme Court of Canada which upholds traditional heterosexual union as the only "spousal" relationship recognized by the law, LaForest J. justified the constitutional validity of the impugned legislation by recounting the importance of marriage:[47]

> *Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'être transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and*

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44 *Vriend v. Alberta, supra.*. [1998] S.C.J. No. 29 ¶ 4.

45 [1995] 2 S.C.R. 513

46 *Egan v. Canada, supra.* ¶ 13. See *Miron v. Trudel*, [1995] 2 S.C.R. 418 at 435-6 (per Gonthier J.).

47 *Egan v. Canada, supra.*. ¶ 21 et seq.

> *that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.*
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> * * *
>
> *But many of the underlying concerns that justify Parliament's support and protection of legal marriage extend to heterosexual couples who are not legally married. Many of these couples live together indefinitely, bring forth children and care for them in response to familial instincts rooted in the human psyche. These couples have need for support just as legally married couples do in performing this critical task, which is of benefit to all society. Language has long captured the essence of this relationship by the expression "common law marriage".*

The Court was seriously divided in *Egan*. In the final analysis, Sopinka J. had the "swing vote". Although he agreed with Cory, Iacobucci, McLaughlin and L'Heureux-Dubé JJ. that the definition of "spouse" violated s. 15 of the *Charter*, Sopkina J. was not prepared to strike down the impugned definition of "spouse" on the basis that the government could not be expected to solve all of the injustices at once but might do so over time[48].

> *Given the fact that equating same-sex couples with heterosexual spouses, either married or common law, is still generally regarded as a novel concept, I am not prepared to say that by its inaction to date the government has disentitled itself to rely on s. 1 of the Charter.*

Vriend demonstrates that Sopinka J's hesitancy in *Egan* to turn the tide in favour of equal treatment of homosexual couples has now swung in the 'right' direction. The Supreme Court will

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[48] *Egan v. Canada, supra.*. ¶ 111 et seq.

soon pronounce on this issue again in *M. v. H.*[49], where a heterosexual definition of "spouse" in ss.1 and 29 of the Ontario *Family Law Act*[50], is impugned. The case was heard and reserved in the Supreme Court of Canada on March 18, 1998. In that case, Doherty and Charron JJ.A. of the Ontario Court of Appeal (Finlayson J. dissenting)[51] upheld the judgment of Epstein J.[52] which determined that the definition of "spouse" violated s.15 of the *Charter* by excluding same-sex spouses and held that same-sex spouses should be read in. In light of the court's decision in *Vriend,* it is reasonable to expect that judgment of the Ontario Court of Appeal in *M. v. H*. will be upheld.

(*3*) *Jane Doe v. Toronto (Metropolitan) Commissioners of Police*[53] *Ontario Court (Gen. Div. - McFarland J.) - July 3, 1998*

The slogan of the Metropolitan Toronto Police is "To Serve and Protect". This case delineates the legal scope of that slogan and the consequences of failing to uphold it. On August 24, 1986, Ms. N.C. ("Jane Doe"), a 33-year-old woman who lived in downtown Toronto was raped and sexually assaulted in her own bed at knife point in the middle of the night. Her assailant was later identified by the police as one Paul Callow, a serial rapist, who had already raped four other

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49 [1997] S.C.C.A. No. 101 on appeal from 142 D.L.R. (4th) 1; 31 O.R. (3d) 417; 96 O.A.C. 173. See also *A-G Canada v. Moore* [1998] F.C.J. No. 1128 (MacKay J., released Aug. 14/98), which addresses a similar issue under federal public service legislation.

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

51 (1997) 142 D.L.R. (4th) 1; 31 O.R. (3d) 417

52 (1997) 132 D.L.R. (4th) 538; 27 O.R. (3d) 593

53 [1998] O.J. 2681 (Ont. G.D., McFarland J. released July 13, 1998)

women, all of whose living circumstances were very similar to N.C.'s. Callow became known as the "balcony rapist". Each of his victims lived in the Church-Wellesley area of Toronto and in each case, he entered their apartment from a second or third floor balcony.

At the time of the attack on N.C., Callow had not yet been apprehended. The police believed that he lived in the area and felt certain that he would attack again in the same area and with the same *modus operandi.* In their attempts to apprehend him, the Toronto police established a "stakeout" but they failed to persons like N.C., who fit the description of the "balcony rapist's" previous victims, of the danger so that she might have an opportunity to take precautions for her own safety. As noted by McFarland J., women in N.C.'s position, "unbeknownst to them, . . . were left completely vulnerable. . . the women were being used - without their knowledge or consent - as "bait" to attract a predator whose specific identity then was unknown to the police, but whose general and characteristic identity most certainly was."[54]

As a result of information received by the police from Callow's wife, who had been assaulted several months earlier, Callow was eventually arrested (more than two months after he had raped N.C.). The court found that the failure of the police to maintain records to connect the wife assault with the serial rape activities were acts of negligence on the basis that the police force had no co-ordinated efforts to keep track of acts of violence against women. McFarland J. also concluded that the evidence supported a finding of negligence against the Toronto police on the following

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[54] *Jane Doe v. MTPF, supra..* ¶ 118

grounds:[55]

> *1) that the investigation of the serial rapist was not competently conducted;*
>
> *2) that the police failed to warn women living in the area, for reasons which were not justifiable, namely, a concern that women living in the area would become hysterical and panic and their investigation would thereby be jeopardized.*
>
> *3) that the police was not motivated by any sense of urgency to apprehend the serial rapist because the police did not consider Callow's sexual assaults as "violent" as another serial rapist who had time to flee because warning of a stakeout was given to the neighbourhood.*
>
> *4) that the conduct of the police investigation and the failure to warn in particular, was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women and about women who are raped.*

As a result of these findings, McFarland J. concluded that the Toronto Police failed to meet its statutory duty as set out in section 57 of the *Police Act*[56], which provides that " ... members of police forces ... are charged with the duty of preserving the peace, preventing robberies and other crimes." Further, McFarland J. held that "the police are statutorily obligated to prevent crime and at common law they owe a duty to protect life and property."[57]

Violation of Charter Rights

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55 *Jane Doe v. MTPF, supra.*. ¶ ¶ 133-140

56 R.S.O. 1980, c. 381 (the governing statute at the time these events occurred)

57 Ibid. ¶149, and see *Schacht v. The Queen in right of Ontario et al.* (1973), 1. O.R. 221 at 231, aff'd sub nom. *O'Rourke v. Schact*, [1976] 1 S.C.R. 53, 55 D.L.R. (3d) 96, 3 N.R. 453, and *Beutler v. Beutler; Adams v. Beutler* (1983), 26 C.C.L.T. 229 (Ont. H.C.J.).

What renders *Jane Doe* such an important decision is that McFarland J. does not treat the conduct of the Toronto Police merely as acts of negligence, calling for ordinary tort damages. Her Honour held that the failure of the police amounted to discrimination against N.C. by reason of her gender which amounted to a violation of her rights under s.15 of the *Charter*:[58]

> *In my view the conduct of this investigation and the failure to warn in particular, was motivated and informed by the adherence to rape myths as well as sexist stereotypical reasoning about rape, about women and about women who are raped. The plaintiff therefore has been discriminated against by reason of her gender and as a result the plaintiff's rights to equal protection and equal benefit of the law were compromised.*

As a result of the failure to warn N.C. of the impending danger to her person, McFarland J. concludes that there was also a violation of her rights under section 7 of the *Charter*[59] and expresses herself as follows:[60]

> *The defendants chose, or at least adopted a policy which favoured the apprehension of the criminal over her protection as a targeted rape victim. By using Ms. Doe as "bait" without her knowledge or consent, the police knowingly placed her security interest at risk. This stemmed from the same stereotypical and therefore discriminatory belief already referred to. According to the plaintiff, she was deprived of her right to security of the person in a manner which did not accord with the principles of fundamental justice. These principles, while entitled to broad and generous interpretation, especially in the area of law enforcement, could not be said to embrace a discretion exercised arbitrarily or for improper motives.*

McFarland J. concluded that the Toronto Police Force had systemic discriminated against

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58 *Jane Doe v. MTPF, Supra.. .* ¶162

59 Section 7 provides that "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

60 Jane Doe v. MTPF, ¶ 186. See also *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387, 36 C.R.R. 90, 45 C.C.C. (3d) 57, 66 C.R. (3d) 97, 55 D.L.R. (4th) 481, 88 N.R. 205, 71 Sask. R. 1, [1989] 1 W.W.R. 97.

women in the investigation of sexual offences. The evidence disclosed that as long ago as 1975 and continuing to 1986, when N.C. was raped, a systemic problem existed in the Toronto Police Force in respect of sexual crimes against women and that the Police Force knew of and had publicly conceded that such a problem existed but failed to take steps to correct it.[61]

Charter Remedy and Breach of Private Law Duty of Care

A finding of discrimination in violation of s.15 of the *Charter* usually results in legislation being struck down but there was no legislation to strike down here. However, the *Charter* is more elastic. Section 24 affords a court of competent jurisdiction to grant "such remedy as the court considers appropriate and just in the circumstances."

The court held that N.C. was owed a "private law duty of care" by the Toronto Police and that the duty of care was breached. The elements of such a duty were set out in earlier proceedings in the same case when the police attempted to strike out N.C.'s pleadings. As set out by Moldaver J. (as he then was) in the Divisional Court:[62]

> *To establish a private law duty of care, foreseeability of risk must coexist with a special relationship of proximity. In the leading case of* Anns v. Merton (London Borough)*, [1978] A.C. 728, [1977] 2 All E.R. 492, 121 Sol. Jo. 377 (H.L.), Lord Wilberforce defined the requirements of this special relationship as follows at pp. 751-52 A.C.*

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61 *Jane Doe v. Metro Toronto Police Force supra* ¶ 154

62 *Jane Doe v. Metro Toronto Police Force* (1990) 74 O.R. (2d) 225 at 230 (Div. Ct) referred to by McFarland J. at ¶ 169-170. The principle enunciated by Moldaver J. has been approved by the SCC in *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, 66 B.C.L.R. 273, 10 D.L.R. (4th) 641.

> *First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises.*

Damages

Medical evidence was led concerning N.C.'s damages. McFarland J. awarded $220,000 in damages and made a declaration that N.C's *Charter* rights (under ss. 7 and 15) had been violated. The result might have been even more novel if a separate amount had been awarded *at large* for the breach of the Plaintiff's *Charter* rights.

(4) Wallace v. United Grain Growers Limited [63] *(SCC - October 30, 1997)*

In April 1972, Jack Wallace took a sales position at Public Press, a subsidiary of United Grain Growers, in Manitoba. He had been lured to this position from a similar job when he was already 45 years old. Over the next 14 years, he was an excellent salesman, indeed the best Public Press had. Nonetheless, Wallace's employment at Public Press came to an abrupt end in August 1986, when he was summarily dismissed. The company claimed that Wallace was dismissed for just cause and maintained this allegation until just prior to the trial. As an added complication, at the time he made his claim, Wallace was an undischarged bankrupt.

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[63] [1997] 3 S.C.R. 701, (SCC - Lamer C.J., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.)

The majority of Supreme Court of Canada (Iacobucci J., with whom Lamer C.J., Sopinka, Gonthier, Cory, and Major JJ. concurred) first addressed whether an undischarged bankrupt could maintain an action for wrongful dismissal, or whether such a right vested in the trustee in bankruptcy. Under s. 68(1) of the *Bankruptcy and Insolvency Act,* certain assets are outlined which the bankrupt may receive and keep, including, "salary, wages or other remunerations from a person employing the bankrupt". The Court held that damages for wrongful dismissal could be characterized as salary[64], or more accurately as salary that the employee could have earned had the employee worked during the period of notice to which he or she was entitled: [65]

The Court then dealt with the significant issue, namely, whether "bad faith" on the part of an employer should affect the compensation awarded to the dismissed employee. Iacobucci J. repeats the oft-cited *Bardal v. Globe & Mail Ltd.*[66] as authority for the list of factors which should be considered in calculating the appropriate notice period. This is a continuation of the existing law. So too is Iacobucci J's recognition that inducements and job security guarantees are factors which lengthen the period of notice.

Iacobucci J. rejects the notion urged by Wallace's counsel that the employee has a cause of

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[64] The "flip-side" of the issue has also recently been determined by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27. In that case, a unanimous judgment of Iacobucci J. (Gonthier, Cory, McLachlin, Iacobucci and Major JJ.), the Court held that the bankruptcy of an employer is an act of dismissal which entitles employees to severance, termination or vacation pay under the *Ontario Employment Standards Act.*

[65] [1997] S.C.R., *supra.* p.731, ¶ 66. See also *Sylvester v. British Columbia*, [1997] 2 S.C.R. 315.

[66] (1960) 24 D.L.R. (2d) 140 (Ont. H.C.)

action both in breach of contract for wrongful dismissal and in tort for bad faith discharge. However, His Lordship does observe that "bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period."[67]

This determination is a departure from the earlier position taken by the Court, notably in *Vorvis v. Insurance Corporation of British Columbia*,[68] where McLachlin J. (who dissented in *Wallace*) wrote the majority judgment and held that "damages for wrongful dismissal are confined to damages for breach of the implied obligation of the employer to give reasonable notice. Unless the manner of termination increased the time required to find new employment and hence the notice period, damages for manner of dismissal must be grounded in an independent cause of action."[69]

Counsel should have the judgment in *Wallace* in mind when advising their clients. It is already having an effect on recent decisions.[70]

Further, in their recent publication, *Just Cause: The Law of Summary Dismissal in Canada*,

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67 *Wallace, supra.*, S.C.R. p. 740, ¶88, per Iacobucci J.

68 [1989] 1 S.C.R. 1085

69 *Wallace, supra.,* S.C.R. p.754 ¶ 127 per McLachlin J. See also *Makarchuk v. Mid-Transportation Services Ltd* (1985) 6 C.C.E.L. 169 (Ont. H.C.J.), where Rosenberg J. awarded increased damages, punitive damages and damages for competition position in the employment market in respect of a succesful truck salesman who had been dismissed upon an unsubstantiated allegation of fraud and was denied a letter of reference. The allegation of fraud was maintained until trial.

70 See *Haggart Construction Ltd. v. CIBC* [1998] A.J. No. 20, *Cassady v. Wyeth-Ayerst Canada Inc*. [1998] B.C.J. No. 1876 (BCCA), (ManCA); *Whiting v. Winnipeg River Brokenhead Comm.Futures Dev.Corp.* (1998) 159 D.L.R. (4th) 18 (Man. C.A.) *Giovanatti v. Plummer Memorial Public Hospital* [1998] O.J. No. 2152 (Ont G.D.) and many others in QL Quickcite database

R.S. Echlin and M. Certosimo observed that the effect of the Supreme Court's decision in Wallace is that "greater exposure may visit employers who fail to assert cause in a forthright, honest and candid fashion." The decision to dismiss for just cause should not be taken lightly. Frivolous allegations of just cause will not meet with acceptance from the trial judge and may well lead to the court imposing further sanctions on the employer for so doing. Echlin and Certosimo also note that the grounds justifying the dismissal should made clear both during the exit interview and in correspondence confirming the dismissal;[71]

(5) R. v. Williams[72] (SCC - June 4, 1998)

Victor Daniel Williams, an aboriginal, was charged with robbery. He elected a jury trial at which he pleaded not guilty. His defence was one of mistaken identity but the jury convicted him.[73] On appeal, Williams argued that his rights under the *Charter*, particularly, ss.7, 11(d) and 15(1)[74] had been violated because he was denied the right to challenge potential jurors for cause to determine whether they held a racial basis against aboriginals which might impair their impartiality.

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71 Canada Law Book, Aurora, Ontario, January 1998, ¶ 20:280, referring to Iacobucci J. in *Wallace v. United Grain Growers Ltd.* (1997) 152 DLR (4th) at 34

72 [1998] SCJ No. 49 (SCC - Lamer C.J., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.)

73 As noted by McLachlin J., the first trial was a mistrial and the conviction took place at the second trial. [198] S.C.J. ¶¶ 3-6

74 Section 7 of the *Charter* provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 11 provides" Any person charged with an offence has the right . . .(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. Section 15(1) provides:: 15. (1) 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.

Section 638 of the *Criminal Code*[75] provides that "an accused is entitled to any number of challenges for cause on the ground that . . .a juror is not indifferent between the Queen and the accused." As noted by McLachlin J.[76], the *Code* gives the trial judge discretion to permit challenges for cause and provides that the judge should permit such challenges where there is a realistic potential of juror partiality. The trial judge did not permit Williams to ask potential jurors questions as to their racial bias against aboriginals. Williams appealed.

Esson C.J. of the Supreme Court of British Columbia did not accept the argument that widespread bias against aboriginals created "a reasonable possibility of partiality sufficient to support a challenge for cause."[77] He did not consider that a juror would be influenced by any such bias when carrying out the "solemn duty of deciding whether the accused is guilty of the crime charged". The B.C. Court of Appeal held that "there is a presumption of juror impartiality which is not discharged by evidence of general bias in the community against persons of the accused's race."[78]

In analyzing the issue, McLachlin J. summarized the effect of bias as follows:[79]

> *Knowledge or bias may affect the trial in different ways. It may incline a juror to believe that the accused is likely to have committed the crime*

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75 R.S.C. 1985, c. C-46

76 198] S.C.J. ¶ 2

77 (1994) 90 C.C.C. (3d) 194 at p.206

78 (1996) 106 C.C.C. (3d) 215 at 228, referred to by McLachlin J. in [1998] S.C.J. No. 49 ¶ 7

79 [1998] S.C.J. No. 49 ¶ 11

> *alleged. It may incline a juror to reject or put less weight on the evidence of the accused. Or it may, in a general way, predispose the juror to the Crown, perceived as representative of the "white" majority against the minority-member accused, inclining the juror, for example, to resolve doubts about aspects of the Crown's case more readily. See Sheri Lynn Johnson, "*Black Innocence and the White Jury*" (1985), 83 Mich.L.Rev. 1611.*
>
> *When these things occur, a juror, however well intentioned, is not indifferent between the Crown and the accused. The juror's own deliberations and the deliberations of other jurors who may be influenced by the juror, risk a verdict that reflects, not the evidence and the law, but juror preconceptions and prejudices.*

Unlike the American approach where every juror is "suspect", the Canadian approach is that jurors are presumed to be indifferent and impartial as between the Crown and the accused. The effect of this distinction is that the right to question a prospective juror about racial bias arises only where the Crown or the accused "raise concerns which displace" the presumption of juror impartiality. This is done by evidence "substantiating the basis of the concern" or by the judge taking judicial notice of "notorious" discrimination in the community against the group of which the accused is part. In determining whether to exercise discretion to allow challenges for cause under s.638, the trial judge should apply the "realistic potential of partiality" test laid down by the Supreme Court of Canada in *R. v. Sherratt*[80] as expressed by McLachlin J. in these words:[81]

> *To guide judges in the exercise of their discretion, this Court formulated a rule in* Sherratt, supra*: the judge should permit challenges for cause where there is a "realistic potential" of the existence of partiality. Sherratt was concerned with the possibility of partiality arising from pre-trial publicity. However, as the courts in this case accepted, it applies to all requests for challenges based on bias, regardless of the origin of the apprehension of partiality.*

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[80] [1991]1 S.C.R. 509 and see *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (Ont. C.A.)

[81] *R. v. Williams, supra.,* ¶¶ 14-15

Does *R. v. Williams* change or add anything to the principle laid down in *R. v. Sherratt*? We submit that it does. The importance of *R v. Williams* is that McLachlin J. substantially lowers the evidentiary threshold for challenges for cause. The Court accomplishes this by analyzing the mind set which underlies racial prejudice and the stereotyping which underlies it. McLachlin J. notes that "to suggest that all persons who possess racial prejudices will erase those prejudices from the mind when serving as jurors is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it."[82] The Supreme Court holds that "racial prejudice interfering with jurors' impartiality is a form of discrimination"[83], and by doing so, raises the denial of the right to question prospective jurors about systemic racism to a violation of the *Charte*r rights (under ss. 7 and 15) of the accused.

McLachlin J. identifies the scope of the violation of the accused's Charter rights by describing the manner in which juror bias could affect the impartiality of the trial:[84]

> *The link between prejudice and verdict is clearest where there is an "interracial element" to the crime or a perceived link between those of the accused's race and the particular crime. But racial prejudice may play a role in other, less obvious ways.*
>
> *Racist stereotypes may affect how jurors assess the credibility of the accused. Bias can shape the information received during the course of the trial to conform with the bias: see* Parks, supra*, at p. 372. Jurors*

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82 *R v. Williams, supra.*, ¶ 21

83 *R v. Williams, supra.*, ¶ 21

84 *R v. Williams, supra.*, ¶ ¶ 28 and *see* Kent Roach, *"Challenges for Cause and Racial Discrimination"* (1995), 37 Crim. L.Q. 410, at p. 421.

> *harbouring racial prejudices may consider those of the accused's race less worthy or perceive a link between those of the accused's race and crime in general. In this manner, subconscious racism may make it easier to conclude that a black or aboriginal accused engaged in the crime regardless of the race of the complainant.*

The Supreme Court's decision in *R. v. Williams* resembles the decision of Doherty J.A. in *R. v. Parks*[85] in the Ontario Court of Appeal, which permitted limited questioning of a prospective juror as to racial prejudice where there was notorious systemic bias against the accused's race. We submit, however, that Doherty J.A. did not go far enough. The question permitted in *Parks* extracts limited information. The question essentially asks jurors if their racist attitudes would cloud their judgment. A person may honestly believe that he or she does not have racist attitudes or that his or her racist attitudes would not affect his or her judgment. Subtle biases are often subconscious and as McLachlin J. states "insidious in nature".

The judgment in *R. v. Williams* makes the matter clearer. Although McLachlin J. does not provide a list of questions which may be asked of a potential juror, the Court's determination makes it possible for counsel for the accused to cross-examine a prospective juror sufficiently to root out most racial biases. The result will not be perfect but the goal of juror impartiality will be enhanced.

McLachlin J. sums up the core issue succinctly: "The object of s. 638(1)(b) must be to prevent persons who may not be able to act impartially from sitting as jurors. This object cannot

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[85] (1993), 84 C.C.C. (3d) 353 (Ont. C.A.)

be achieved if the evidentiary threshold for challenges for cause is set too high."[86] The evidentiary threshold an accused must meet to be entitled to question prospective jurors about their racial prejudices is simply that "absent evidence to the contrary, where widespread prejudice against people of the accused's race is demonstrated at a national or provincial level, it will often be reasonable to infer that such prejudice is replicated at the community level."[87]

Delgamuukw v. British Columbia[88] (S.C.C. - December 11, 1997)

Just six months before deciding *R. v. Williams*, the Supreme Court of Canada confronted fundamental issues relating to the rights and interests of aboriginals in Canada --- the nature and scope of aboriginal title. Although many decisions[89] have dealt with the land claims and rights of aboriginals, *Delgamuukw*[90] is important because it defines the nature and scope of the protection afforded by s. 35(1) of the *Constitution Act, 1982* to common law aboriginal title. The majority judgment (Lamer C.J. and Cory, McLachlin and Major JJ.)[91] held that[92]:

> *Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures. The protected uses must not be*

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86 *R. Williams, supra.* [1998] S.C.J. ¶ 37

87 *R. Williams, supra.* [1998] S.C.J. ¶ 41

88 [1997] 3 S.C.R. 1010

89 Aboriginal title was considered by the Supreme Court of Canada in previous cases: R. v. Sparrow, [1990] 1 S.C.R. 1075, R. v. Van der Peet, [1996] 2 S.C.R. 507, R. v. N.T.C. Smokehouse Ltd., [1996] 2 S.C.R. 672, and R. v. Gladstone, [1996] 2 S.C.R. 723), R. v. Pamajewon, [1996] 2 S.C.R. 821, R. v. Adams, [1996] 3 S.C.R. 101, and R. v. Côté, [1996] 3 S.C.R. 139.

90 [1997] 3 S.C.R. 1010

91 LaForest and L'Heureux-Dubé JJ. agreed in the result but considered that there were procedural impediments to consideration of the merits. Sopinka J. died before the judgment was released.

92 [1997] 3 S.C.R. 1010

irreconcilable with the nature of the group's attachment to that land.

The decision of the Court is significant because it recognizes that evidence of aboriginal title should not be based only on deeds or grants from the Crown but also on the basis of 'traditional uses' of the land by aboriginals. Further, the court held that the nature of aboriginal title has different dimensions than the title to other land in Canada. Among the characteristics of aboriginal title identified by the Court were these:[93] (numbering and presentation are not quoted from the judgment)

1) Aboriginal title is *sui generis*, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown.

2) Another dimension of aboriginal title is its sources: its recognition by the Royal Proclamation, 1763 and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty.

3) Aboriginal title is held communally.

4) The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture.

5) Canadian jurisprudence on aboriginal title frames the "right to occupy and possess" in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition.

6) The nature of the Indian interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs.

7) Aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.

8) The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants'

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93 [1997] 3 S.C.R. 1010, 1017 et seq.

attachment to those lands. This inherent limit arises because the relationship of an aboriginal community with its land should not be prevented from continuing into the future.

9) Occupancy to aboriginal land is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture.

10) Land held by virtue of aboriginal title may not be alienated because the land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.

11) The importance of the continuity of the relationship between an aboriginal community and its land, and the non-economic or inherent value of that land, should not be taken to detract from the possibility of surrender to the Crown in exchange for valuable consideration.

These factors will be instructive to lawyers in understanding the nature of title held by First Nations in Canada.

***Ontario English Catholic Teachers' Assn. v. Ontario*[94]**
(Ontario Court (Gen. Div. - Cumming J. - July 22, 1998)

The government of Ontario Premier Mike Harris was elected in 1995 to implement "The Common Sense Revolution" ---a legislative program which would reduce the cost of government and the provincial taxes paid by residents of the province. The government sought to accomplish these objectives by reducing the funding for infrastructure in nearly every sector of the government, including health care, social services, justice and education. As noted earlier, the government's program to reduce the cost of hospital services heard loud voices of objection but the Court did not

[94] [1998] O.J. No. 2939

strike down the legislation.[95]

In 1997, a major plank of the government's restructuring agenda was a "new funding model" to amalgamate school boards throughout the province, including Roman Catholic schools, with the objective of streamlining services, reducing duplication and controlling the revenues and costs of education from Queen's Park rather than locally. Bill 160, the *Education Quality Improvement Act*,[96], was the legislative vehicle to accomplish these objectives.

The Ontario Catholic Teachers Association, a number of separate school boards and several separate school teachers challenged the constitutionality of the government's program. The protest was rooted in the applicants' deeply-held belief that the cost-cutting measures would have exactly the opposite effect on education, namely that both students and teachers would receive less--- both in terms of educational experience and teachers' salaries.

Cumming J. of the Ontario Court (Gen. Div.) put a historical perspective on the issue confronting the court and how Bill 160 changed the educational landscape:[97]

> *For more than 150 years, until Bill 160, locally elected school trustees, acting collectively as school boards, had the legal power to supplement provincial education grants through local property tax levies. The*

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95 *Pembroke Civil Hospital v. Ontario (Health Services Restructuring Commission)* [1997] O.J. No. 3142, July 27, 1997 and *Wellesley Central Hospital v. Ontario (Health Services Restructuring Commission)* [1997] 3645 - September 15, 1997.

96 S.O. 1997, c. 31 enacted December 1, 1997, am. the *Education Act*, R.S.O. 1990, c. E.2.

97 [1998] O.J. No. 2939, ¶¶ 16-18

> *perceived need to have such power to supplement central funding was twofold. First, communities could respond to local educational priorities without compromising other areas of expenditure. Second, some communities were seen to have unusually high costs in delivering a basic level of education. School boards could go to the local tax base to make up shortfalls in revenue because of exceptional needs or to meet high costs.*
>
> *With Bill 160, the central provincial Government now exclusively controls all school board revenues and, hence, it exclusively funds the separate and public school systems. By new s. 234 of the Education Act, the Government provides grants out of general revenues for educational purposes. By new s. 257.12, the Government raises property taxes by the establishment of provincial tax rates. (By s. 257.7 the property taxes are levied and collected by the municipalities or by the district school boards in areas without municipal organization.) These two components now compromise the totality of the source of public funding of elementary and secondary education of public and separate schools in Ontario.*

Under s. 93(1) of the *Constitution*, there are special guarantees for denominational rights. Section 93(1) states in part:[98]

> "In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union."

Cumming J. summarizes the issue before the court as "whether or not the authority upon which the separate school boards to levy rates on taxpayers as a means of financing must necessarily be maintained in legislation because of the constitutional guarantee seen in s. 93(1)". Bill 160 effectively eliminated the right of Roman Catholic school boards to raise additional revenues --- a right enjoyed by Roman Catholic school boards since before Confederation and protected by s. 93(1).

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[98] See also *Reference Re Education Act (Ontario) and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.) at 43.

Cumming J. holds that Bill 160 is insufficient to meet the protections of s.93(1) by concluding as follows:[99]

> *. . .Bill 160 is not sufficient to meet these constitutional obligations. The Government's approach makes the Roman Catholic community hostage to the provincial government as to the extent of financing of the separate school system. Theoretically, the provincial government could slash funding substantially to the point that the Roman Catholic community held the view that there was inadequate funding in providing the educational opportunity sought by them for their children. However, so long as there was proportional funding and consequential equality of educational opportunity with the public system there would be no independent means to enhance the financial resources of the separate school system.*
>
> *. . .the concept of a "separate" education system implies not only the need for financing but also the need for a means of financing from within the Roman Catholic community. A "separate school system" truly responsive to its own religious community of interest is not one that is captive to a government-imposed ceiling upon its expenditures through preventing access to local financing.*

The Court struck down Bill 160 on the basis that its terms contravened s.93(1) of the *Constitution Act*, with special regard to the following findings:

1) There were serious financial implications and impacts of the new funding model and it was implemented in haste.

2) The prohibition through the new funding model upon school boards being able to raise any revenues at all by local property taxes runs counter to the countless studies done in respect of financing the Ontario education system.

3) The *Scott Act of 1863* guaranteed to separate school supporters the right to establish separate school boards managed by elected trustees, the right to levy taxes upon separate school supporters to meet expenditure needs, and the right to have elected trustees with the same powers as common school trustees.

4) These powers included the right to determine the level of expenditures required to

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[99] [1998] O.J. No. 2939 ¶¶ 95-96

> support the schools and ensure their denominational character, the right to be exempt from paying taxes to support the common school system, and the right to a proportional share of provincial funding for education within the province.

The effect of Cumming J.'s decision is to emphasize that the constitutional protection afforded to Roman Catholic schools since Confederation cannot be eroded by new legislation. It is clear, however, that the final chapter of this story has yet to be written. The Ontario government has appealed the decision of Cumming J. The issues raised in the case are undoubtedly contentious and important enough that the case is likely to eventually reach the Supreme Court of Canada.

The affirmation of the protections afforded to Roman Catholic education under the *Constitution* recalls the recent decision of the Supreme Court of Canada in *Adler v. Ontario,*[100] In that case, the majority (Lamer C.J., LaForest, Gonthier, Cory and Iacobucci JJ.) held that s.93(1) of the *Constitution Act* represented a historical compromise that was crucial to Confederation. The majority further held that the funding of "separate education could not be enlarged by the *Charter* to require funding for non-Roman Catholic denominational schools.[101]

If the *Ontario Catholic Teachers* reaches the Supreme Court of Canada, it will give the Court an opportunity to consider afresh the issue of funding for non-public schools. Bill 160 proposed to limit funding for separate schools. The Ontario government has done nothing to relieve continuing unfairness, whether constitutionally sanctioned or not, by its failure to fund other

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[100] [1997] 3 S.C.R. 241; (1996), 140 D.L.R. (4th) 385 (S.C.C.).

[101] *Adler v. Ontario* was one of the five most significant cases in 1996-97 and is discussed by Dean M. Pilkington and Mitchell Flagg in Operation Update 97 at pp.3-5

denominational schools.

Conclusion

These significant decisions of the courts of the last year disclose a more aggressive approach by the Supreme Court of Canada and by lower courts to protect the personal and property rights of individuals. No longer is the Supreme Court using s.1 of the *Charter* to maintain a tenuous *status quo*. The cases discussed in this paper are compelling testimony to the fact that the courts have recognized that our society is undergoing important changes in the acceptance of individual differences. This is a welcome trend which should continue.

The Courts have shown a new enthusiasm to assist victims of systemic prejudice. In the important cases we have reviewed, violations of *Charter* rights have been found in respect of (1) aboriginals, (2) sexual minorities, (3) female victims of sexual offences and (4) persons whose groups are "notoriously" objects of prejudice in their community. Further, the constitutional rights of Roman Catholic school boards in Ontario were held to have been violated when revenue-generating powers guaranteed since prior to Confederation were withdrawn

More than ever before, Canada "from sea to sea" is a rich tapestry of minority groups. To preserve harmony among many diverse cultures (based on race, religion, native status, place of origin, gender and sexual orientation) human rights and equality must be vigilantly protected. The Canadian "free and democratic society" at the dawn of the new millennium promises to be much

more sensitive to rights of minorities than ever before. As a matter of law, minorities no longer have to assimilate or 'join the crowd' to be accepted. On the contrary, they have a constitutional right to demand equality in the face of their differences. If the current trend continues, it is reasonable to expect that the years ahead will witness court decisions striking down legislation for *Charter* violations of minority rights more aggressively and more frequently than occurred during until now. After 15 years, the *Canadian Charter of Rights and Freedoms* is no longer an infant: it is about to come of age.

But the larger and as-yet-unanswered question is "What do you mean by Canada?" Will it Canada as we know it today, or is it some new political arrangement --- the result of bitter negotiations between the "majority" of Canadians who favour unity and a "clear majority" of Quebecers who wish to secede (following a "clear result to a clear question in a sovereignty referendum")? As political and legal events unfold, we will learn whether the judgment in *Quebec Secession Reference* is a blueprint for the break up of the Canadian federation or as we hope, the legal "glue" which helps keep it together.

Toronto, September 1, 1998.