

CONSTITUTIONAL LAW—DIVISION OF POWERS—CRIMINAL LAW AND PROCEDURE IN CRIMINAL MATTERS—WHETHER MATTER OF ARBITRARY ARREST VALIDLY DEALT WITH IN PROVINCIAL HUMAN RIGHTS CODE: *Scowby v. Glendinning*.

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The recent six to three decision by the Supreme Court of Canada in *Scowby v. Glendinning*¹ sets a troublesome precedent for the exercise of broad, virtually uncontrolled, powers of arrest by the police in the criminal law area. The decision held section 7 of the Saskatchewan Human Rights Code² inoperative in relation to arrest or detention under criminal law, reversing a decision of the Saskatchewan Court of Appeal³ which would have upheld the award of compensation to complainants by a Board of Inquiry⁴ in respect of loss of self-respect. The decision takes an excessively rigid approach to the constitutional division of powers, and disregards the "double aspect" doctrine which would have left room for provincial human rights legislation to operate conjointly with criminal powers of arrest.

On September 27, 1980, a moose-hunting party of five native people had retired for the night in a cabin at Moose Range Lodge near Hudson Bay, Saskatchewan, when the appellants, who were R.C.M.P. officers, arrived to investigate a reported assault by one of the party,⁵

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¹ [1986] 2 S.C.R. 226, (1986), 32 D.L.R. (4th) 161.

² S.S. 1979, c. S-24.1 (hereinafter Code). Section 7 reads:

Every person and every class of persons shall enjoy the right to freedom from arbitrary arrest or detention, and every person who is arrested or detained shall enjoy the right to an immediate judicial determination of the legality of his detention and to notice of the charges on which he is detained.

³ (1983), 148 D.L.R. (3d) 55 (Sask. C.A.).

⁴ *Ibid.*, at p. 76.

⁵ See *supra*, footnote 1, at pp. 243-244 (S.C.R.), 174-175 (D.L.R.).

Frederick Runns, Sr. The officers awakened the complainants with a loudspeaker, declaring that Fred Runns was under arrest, and ordering him to come out with his hands behind his head. After he complied, the other occupants were given the same direction, and were told not to bother to dress. According to the complainants' testimony, when they emerged from the cabin in the glare of headlights, they were told to lie down on the ground. Their evidence was that they were subjected to ridicule by the officers, and were forced to remain on the ground, scantily clad, in sub-zero temperature, for half an hour. While they were lying prone, a barking police dog came near to their heads on several occasions. In addition, someone in the apprehending party was alleged to have stepped on the heads of two of the complainants more than once. Finally, they were told to get up, one at a time, asked for their names and addresses, and ordered back into the cabin. No member of the hunting party other than Runns was being sought, or was ever accused of having committed any offence.

After the above events had occurred, on March 13, 1981 (the circumstances having taken place before the Canadian Charter of Rights and Freedoms⁶ was proclaimed), the complainants sought redress from the Saskatchewan Human Rights Commission. The gravamen of their complaint was that except, possibly, as against one of their party, the conduct of the arresting officers was legally unjustified, since none of the others had committed, or was accused of having committed, any offence, nor had they done anything which would have elicited even reasonable suspicion. They considered the behaviour of the apprehending R.C.M.P. officers to be an outrageous violation of their human rights and dignity. Since there was in their view no conceivable or plausible pretext for an arrest (except in one case), the officers' conduct was groundless, unauthorized by law, and those making the arrest could not claim the freedom from legal liability extended by section 25 of the Criminal Code⁷ to those who "on reasonable and probable ground" were enforcing or administering the law.

The complainants contended, therefore, that, in the circumstances, they had been deprived of "freedom from arbitrary arrest and detention", under section 7 of the Code.⁸ After the complaint was investigated by commission staff, it was concluded that "probable cause" existed to infer that section 7 had been violated and an attempt was made to reach a resolution of the matter with the respondent R.C.M.P. officers. For such a resolution, however, concurrence between the complainants,

⁶ The Charter, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11.

⁷ R.S.C. 1970, c. C-34.

⁸ *Supra*, footnote 2, s. 7.

respondents and commission was necessary. In this case, the R.C.M.P. considered the matter to be beyond the commission's powers, and refused to negotiate with the other parties. Because of what they considered to be the aggravating circumstances of the "arrest", commission staff would have recommended that the complainants (who did not, of course, include Runns, senior) should receive \$5,000 each, the maximum amount allowable under section 31(8) of the Code for "willfully and recklessly" contravening the Act. The complainants were seen by the investigators as having been "arbitrarily arrested", contrary to section 7, with a consequent loss of "self-respect" (section 31(8)) as a result of the violation. In the light of the non-participation of the R.C.M.P. in the prior dispute-resolution process, the Attorney General set up a board of inquiry under Peter Glendinning to pursue a more formal investigation.

The six apprehending R.C.M.P. officers then applied for, and were granted, an order of prohibition by Maher J. of the Saskatchewan Court of Queen's Bench.⁹ Maher J. concluded that the relevant board of inquiry was an impermissible investigation into the administration and management, or the command function, of the R.C.M.P.,¹⁰ contrary to such authorities as *Attorney General of Quebec and Keable v. Attorney General of Canada*¹¹ and *Attorney General of Alberta v. Putnam*,¹² which situated the internal control and discipline of the force beyond the scope of investigation by boards of inquiry or other agencies established under provincial law. These authorities did not go so far as to immunize the R.C.M.P. entirely from provincial jurisdiction, but suggested that it was only in respect of specific offences by particular individual officers that provincial law could be applied. Maher J. observed that a possible court order enjoining the continuation or repetition of offences committed under section 38 of the Code could result in the designated R.C.M.P. officer being in violation of the relevant order "if he obeyed a lawful order of a superior R.C.M.P. officer as long as the enjoining order remained in force".¹³ Moreover, since Parliament has legislated respecting "the release or detention of persons detained or arrested by police officers" under the Criminal Code, "the doctrine of paramountcy would prevail and section 7 would not be applicable in such circumstances".¹⁴

The decision of Maher J. was unanimously reversed, however, by the Saskatchewan Court of Appeal.¹⁵ Tallis J.A. found that the provis-

⁹ *Re Scowby and Glendinning* (1983), 139 D.L.R. (3d) 44 (Sask. Q.B.).

¹⁰ *Ibid.*, at pp. 52-53.

¹¹ [1979] 1 S.C.R. 218, (1978), 90 D.L.R. (3rd) 161.

¹² [1981] 2 S.C.R. 267, (1981), 123 D.L.R. (3d) 257, [1981] 6 W.W.R. 217 (S.C.C.).

¹³ *Supra*, footnote 9, at pp. 52-53.

¹⁴ *Ibid.*, at p. 54.

¹⁵ *Supra*, footnote 3.

ions of the Code establishing a board of inquiry did not offend section 96 of the Constitution Act, 1867 since the board was not purporting to exercise, for example, a "superior court" function exercisable only by judges appointed by the Governor-in-Council.¹⁶ The commission was not concerned with a traditional *lis* between parties, but was forwarding a broad human rights policy unknown at Confederation and unexercised at that time by superior courts:¹⁷

... the proceedings are carried by the Commission which represents not only the interests of the complainants but also the interests of the public. While there is admittedly a judicial element in its operation, it is not the sole or central function of the board of inquiry so as to characterize it as operating in its institutional framework like a s. 96 court. The institutional setting of the board of inquiry, with the judicial element in its function, does not offend s. 96.

Nor did the doctrine of paramountcy render the provincial law inoperable.¹⁸

The subject matter of s. 7 of the Code is arbitrary arrest and detention—a matter which not only involves human rights but a potential claim for damages in the civil law context. . . . On the other hand, the subject matter of ss. 450 to 454, 457 and 459 of the *Criminal Code* of Canada is lawful arrest and matters ancillary thereto. I see no conflict with these provisions on which to invoke the paramountcy doctrine. Indeed, claims for false arrest, assault, false imprisonment and malicious prosecution have co-existed with the provisions of the *Criminal Code* for decades. A police officer who carries out his duties according to law has a defence to any civil claim or criminal charge. However, if he oversteps the bounds of his authority, he cannot erect his position as an absolute shield against civil or criminal liability. He cannot, under the guise of carrying out police duties, commit a tort.

Tallis J.A. emphasized, accordingly, the broad spectrum of provincial civil, or tortious, liability, involving wrongful, physical interference with the liberty of others, that could exist side by side with "freedom from arrest" in the collateral criminal sense.

The majority judgment of the Supreme Court of Canada¹⁹ reversed, in turn, the decision of the Saskatchewan Court of Appeal. For Estey J., who spoke for the majority, the issue was relatively straightforward. Referring to "freedom from arbitrary arrest and detention" in section 7 of the Code, he said:²⁰

If the section is in pith and substance "true criminal law" under s. 91(27) of the *Constitution Act, 1867*, then it is *ultra vires* the province and one need not pursue inquiry into the difficulties created by its coexistence with s. 25 of the *Criminal Code*.

Unlike such more typically "provincial" human rights provisions as those prohibiting discriminatory practices in the housing, employ-

¹⁶ *Ibid.*, at p. 70.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, at p. 78.

¹⁹ *Supra*, footnote 1, per Estey, Beetz, McIntyre, Chouinard, Lamer, and LeDain JJ.

²⁰ *Ibid.*, at pp. 233 (S.C.R.), 166 (D.L.R.).

ment, and education spheres (all of which unquestionably are anchored in provincial jurisdiction), "freedom from arrest and arbitrary detention" has a peculiarly criminal resonance and does not fit easily into a similar scheme of conceptualization.²¹ "Civil Rights" as contained in the catalogue of provincial powers in section 92(13) is not synonymous with "civil rights issues"²² or, Estey J. might add in a more Canadian idiom, with "civil liberties". "Civil rights" will not serve as a jurisdictional source for section 7. The rights appurtenant to "civil liberties", Estey J. seems to be suggesting, are essentially parasitic or peripatetic: the specific right or liberty in controversy may depend on either provincial or federal jurisdiction depending on the nature of the right statutorily defined and the ambit of the power on which it is supposedly based. Here, there is simply no jurisdictional peg for the asserted provincial power relating to freedom from arbitrary arrest. Insofar as section 7 purports to control the activities of arresting police officers, acting under federal authority, it rests exclusively on "criminal law and procedure" in section 91(27).²³ The scope of the criminal law power indeed is a very broad one, although Lord Atkin's definition in *Proprietary Articles Trade Ass'n v. Attorney General of Canada*²⁴ is probably too broad.²⁵ The federal criminal law power exclusively embraces the right asserted by the complainants in the present case:²⁶

I conclude that provincial legislative powers cannot sustain the measure before the Court as applied to arrest and detention under the criminal law.

A provincial enactment which is "essentially criminal in nature" is constitutionally invalid, despite its perceived need as seen by its framers, or any, perhaps lamentable, gaps in federal legislation.²⁷ Estey J. finds the language of section 7 redolent of "the ancient law of *habeas corpus*",²⁸ and connected inextricably with the exclusive federal area of criminal law and procedure. Section 7, read with section 35 of the Code "pur-

²¹ *Ibid.*, at pp. 233-234 (S.C.R.), 167 (D.L.R.).

²² *Ibid.*, at pp. 234 (S.C.R.), 167 (D.L.R.).

²³ *Ibid.*, at pp. 238-239 (S.C.R.), 170-171 (D.L.R.).

²⁴ [1931] A.C. 310 (P.C.).

²⁵ *Supra*, footnote 1, at pp. 237 (S.C.R.), 169 (D.L.R.), where Estey J. quotes Lord Atkin's definition of criminal law in the *P.A.T.A.* case (*supra*, footnote 24, at p. 324): "Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?" Of this definition Estey J. says: "Such a definition is necessarily too broad, as it would permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence."

²⁶ *Ibid.*, at pp. 238 (S.C.R.), 170 (D.L.R.).

²⁷ *Ibid.*

²⁸ *Ibid.*, at pp. 238-239 (S.C.R.), 170-171 (D.L.R.).

ports to create an offence of arbitrary arrest and detention".²⁹ Section 31, moreover, illuminates the characterization of section 7, in that subsection 8(a) purports to empower a provincially established body to award damages for an act performed "wilfully and recklessly".³⁰ This connotes "criminal law", insofar as what is created is an offence with penal consequences, which is a characteristic of criminal law.³¹

Since there is no provincial "aspect" here, the paramountcy question need not be addressed.³² (Paramountcy, of course, would arise only where there was a clear collision between valid provincial and valid federal law.) Nor is it necessary to deal with the section 96 issue since the criminal law power alone is controlling here, and there is simply no possibility of finding on these facts provincial legislative jurisdiction. The provision "may validly apply to arrest or detention under provincial offences",³³ but is inapplicable to the present case where the arrest is essentially a matter of federal criminal law.

Speaking also for Dickson C.J.C. and Wilson J., La Forest J. would have affirmed the decision of the Saskatchewan Court of Appeal.³⁴

First, there is no problem concerning the jurisdiction of the Saskatchewan Human Rights Commission. The Code brought the commission and its investigative agencies into a broad social policy framework emphasizing public education and amicable dispute resolution.³⁵ This removes the board of inquiry from the ambit of a possible "section 96 function" under the second and third prongs of the test in the *Residential Tenancies*³⁶ case. By a bargain at Confederation, according to La Forest J., the provinces were given jurisdiction over the constitution, maintenance, and organization of provincial county and superior courts, while the federal Crown, pursuant to section 96, was given the appointing power of judges of those courts. If the provinces, now, could vest "superior court functions" in their own tribunals, section 96 would become a dead letter since they, too, would then be appointing judges exercising the powers described by the cited term.³⁷ But is the Saskatchewan Human Rights Commission, or its agencies, exercising such superior court functions? It would appear that they are not, since such rights are peculiarly a more recent statutory creation; they were not protected at common

²⁹ *Ibid.*, at pp. 239 (S.C.R.), 171 (D.L.R.).

³⁰ *Ibid.*, at pp. 240 (S.C.R.), 171 (D.L.R.).

³¹ *Ibid.*

³² *Ibid.*, at pp. 241 (S.C.R.), 173 (D.L.R.).

³³ *Ibid.*, at pp. 242 (S.C.R.), 173 (D.L.R.).

³⁴ *Ibid.*, at pp. 242 ff. (S.C.R.), 173 ff. (D.L.R.).

³⁵ *Ibid.*, at pp. 255 (S.C.R.), 182 (D.L.R.).

³⁶ *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, (1981), 123 D.L.R. (3d) 554.

³⁷ *Supra*, footnote 1, at pp. 250 (S.C.R.), 179 (D.L.R.).

law.³⁸ Accordingly, in fostering such rights, the commission is not usurping a section 96 function. It is true that superior courts deal with the tort of "false imprisonment", but the provision in section 7 is somewhat different, since it emphasizes, in a way the former provision does not, the indignity to the victim.³⁹ The adjudicative function of the board of inquiry, moreover, is not the central one, since what is relevant in that context are education, persuasion, and conciliation.⁴⁰

La Forest J., for the dissenting minority, remained unconvinced that section 7 encroached on federal powers over "criminal law and procedure". The cases cited by federal counsel were unhelpful in that they did not derogate, really, from the provincial power to legislate on the civil consequences of arbitrary arrest and detention.⁴¹ Section 7 connoted, simply, a right not to be arrested in the absence of reasonable and probable cause.⁴² If the provision, construed broadly, impinged on the federal criminal law power, it could be saved by confining it to its appropriate provincial jurisdictional context, or, in La Forest J.'s words, "the presumption of constitutionality would favour the narrower interpretation".⁴³ It could be "read down", in other words.

While it is true that section 7 may refer to criminal investigations, and that the derivative standards would be established by federal law, mere reference to these standards in themselves does not invalidate provincial law. It all depends on how the provincial law deals with the standards, or what the provincial law aims at. La Forest J. seems to be saying that if an arresting officer, through arbitrary action, places himself outside the protective scope of the federal standards, then the provinces can define the civil consequences of such unauthorized action in terms of a violation of basic human rights, since such an officer is no longer acting pursuant to federal authority.⁴⁴ In the case before the court, significantly, nobody except Runns, senior, was involved in any offence, and there was no arrest at all.⁴⁵ The *Chartier*⁴⁶ case governs: there was no arrest in any *real* sense there, nor is there here, in any *real* sense, any arrest.

³⁸ *Ibid.*, at pp. 251-252 (S.C.R.), 180-181 (D.L.R.); cf., *Christie v. York Corporation*, [1940] S.C.R. 139, [1940] 1 D.L.R. 81, and *Seneca College v. Bhadauria*, [1981] 2 S.C.R. 181, (1981), 124 D.L.R. (3d) 193.

³⁹ *Ibid.*, at pp. 253 (S.C.R.), 181-182 (D.L.R.).

⁴⁰ *Ibid.*, at pp. 256 (S.C.R.), 184 (D.L.R.).

⁴¹ *Ibid.*

⁴² *Ibid.*, at pp. 257 (S.C.R.), 185 (D.L.R.).

⁴³ *Ibid.*, at pp. 258 (S.C.R.), 186 (D.L.R.).

⁴⁴ *Ibid.*, at pp. 259 (S.C.R.), 186 (D.L.R.).

⁴⁵ *Ibid.*, at pp. 261 (S.C.R.), 188 (D.L.R.).

⁴⁶ *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474, (1979), 104 D.L.R. (3d) 321.

There is not here, moreover, any investigation of the "management" or "administration" or the "internal discipline" of the R.C.M.P. The Board was not carrying out an investigation of police patterns or practices, which would offend against *Keable*⁴⁷ or *Putnam*,⁴⁸ but was investigating, rather, individual wrongdoing or specific wrongful conduct.⁴⁹ Moreover, although *La Forest J.* does not directly call it such, what is involved here is the principle of the rule of law: "... in the course of duty, individuals members of the R.C.M.P. are subject to provincial laws of general application in the same way as other citizens".⁵⁰

In *La Forest J.*'s words:⁵¹

The R.C.M.P. was created to enforce the law; it would be ironic if membership in the force constituted a shield for officers who infringed it. But that is not the case. Specific conduct of individual officers in breach of the law cannot be viewed as coming within the management and administration of the R.C.M.P., and provincial investigations into allegations of such conduct are permissible. In *Keable*, a provincial inquiry into allegedly illegal acts undertaken by various members of the force was not deemed unconstitutional. What that case held was invalid, we saw, was an investigation into the administration and management of the R.C.M.P.

The *Putnam* case stands simply for the proposition that a province cannot prescribe a disciplinary code for the R.C.M.P., and there is no suggestion of such a code here.⁵²

The minority, therefore, would have dismissed the appeal, since they held that the provincially established board of inquiry was empowered to investigate and adjudicate upon a complaint concerning arbitrary arrest and detention under section 7 of the Code.

The majority judgment is somewhat delphic in character. Estey J. at first says with regard to section 7: "If the section is in pith and substance 'true criminal law'. . . then it is *ultra vires*", and certain cognate matters need not be considered.⁵³ Or if a provincial statute is "essentially criminal in nature" it is invalid.⁵⁴ In the end, however, he does not consider section 7 to be "true criminal law" or "essentially criminal" in character because it can validly apply to provincial arrest or detention.⁵⁵ It simply does not extend to the federal criminal arrest power. Such a weak conclusion after such strong premises, however, concedes much of the provincial Human Rights Commission's case. Unless

⁴⁷ *Supra*, footnote 11.

⁴⁸ *Supra*, footnote 12.

⁴⁹ *Supra*, footnote 1, at pp. 267 (S.C.R.), 192 (D.L.R.).

⁵⁰ *Ibid.*, at pp. 267-268 (S.C.R.), 192 (D.L.R.).

⁵¹ *Ibid.*, at pp. 269-270 (S.C.R.), 194 (D.L.R.).

⁵² *Ibid.*, at pp. 270 (S.C.R.), 194 (D.L.R.).

⁵³ *Ibid.*, at pp. 233 (S.C.R.), 166 (D.L.R.).

⁵⁴ *Ibid.*, at pp. 238 (S.C.R.), 170 (D.L.R.).

⁵⁵ *Ibid.*, at pp. 242 (S.C.R.), 173 (D.L.R.).

one adopts Lord Haldane's now discredited "domain" theory of criminal law,⁵⁶ or Lord Atkin's inflexible "watertight compartments"⁵⁷ approach, which leave little or no scope for a close relationship between federal and provincial jurisdictional categories, the majority judgment should have shown with greater clarity why certain aspects of the still valid section 7 did not apply to the circumstances in question. For once it is conceded that the section does apply to provincial human rights offences the task of reconciling provincial and federal aspects of the arrest power is necessary. When apprehending officers purport to make a federal criminal arrest but without "reasonable and probable" cause, they encroach on the area of "arbitrary arrest and detention" in section 7 of the provincial Code. At that point legal immunity dissipates and civil fault arises. There is a co-relativity between what is allowed federally and what is not allowed provincially, and having conceded the continuing validity of section 7, further attention should have been given to the matters that Estey J. left unaddressed in the earlier part of his judgment, presumably on the assumption that the section as a whole was invalid.

The majority decision takes an excessively rigid approach to the division of powers by suggesting that a whole spectrum of law and fact can be transformed into a federal enclave where provincial human rights legislation or the civil aspects of wrongful arrest have no application.

According to the majority, necessarily, even where the arresting officers have committed abuses or excesses, which would ordinarily render them liable under provincial law, the whole transaction, with all its attendant features, takes on a "criminal law" texture, which excludes the operation within its context of any provincial "aspect". The particular facts present an unusually broad amplification of arrest powers, because here, in respect of the complainants, the uncontroverted evidence is that there was no criminal "arrest" under federal law at all, but the apprehending officers were still held exempt from the application of provincial law.

Ordinarily, the same physical facts, as set out in the evidence, can be classified either under provincial or federal law according to their respective "aspects". It is not clear here why the hypothetical exercise of powers of arrest should shield the arresting police officers from the civil consequences of their acts, under provincial law, if they act improperly or excessively. And in what sense does federal criminal law apply at all if there is no "arrest"? The majority, however, tend to concentrate on examining the "law" and not to enquire into the facts in any detail.

⁵⁶ Cf. *Re Board of Commerce Act, 1919*, [1922] 1 A.C. 191, at pp. 198-199 (P.C.), and the refutation of the "domain" theory in *Proprietary Articles Trade Ass'n v. Attorney General of Canada*, *supra*, footnote 24, at p. 324.

⁵⁷ *Attorney General of Canada v. Attorney General of Ontario*, [1937] A.C. 326, at pp. 353-354 (P.C.).

There is some implication in the majority decision that the whole context of "arrest" in the circumstances cited is essentially criminal in nature or, as Estey J. suggests, that section 7 may be characterized as "in pith and substance 'true criminal law' under section 91(27)".⁵⁸ Even if something is "true criminal law", the attendant facts may leave room for the operation of a provincial aspect involving "false imprisonment", "false arrest", or "human rights offences". Should the mere occurrence of an arrest (*sed quaere*) pre-empt the whole contextual area of fact and law for exclusive federal jurisdiction? This is assuredly a rigid form of federalism.

Surely, if an arresting officer broke an unresisting complainant's arm or wrongfully deprived him of his property in the course of a criminal arrest, the complainant would be entitled to a civil remedy under provincial law. Why, then, would persons in the position of the complainants not be entitled to a civil remedy in tort for police excesses or for the infliction of indignity under provincial human rights legislation? Section 7, in its provincial extension, is not invalid, and would appear to apply. The majority never satisfactorily addresses these questions.

The majority, indeed, never grapples with what precise criminal conduct the complainants had performed, or even what criminal conduct might "reasonably and probably" be imputed to them. They were charged with nothing and never even arrested. Their only "fault" appears to have been their presence in the same hunting party as Runns, senior. To attach importance to this, however, as a pretext for "arrest" would be to countenance "guilt by association", which is an obnoxious thing in Anglo-American criminal jurisprudence. Insofar as the matter is one of law, the majority arbitrarily excludes the operation of any provincial "aspect", and insofar as the facts are concerned, there is no empirical justification for the conclusion reached. The complainants had performed no culpable act.

The result would seem to provide sweeping discretionary authority to investigating police officers, even in the absence of an arrest. Is it reasonable, in such circumstances, that they should not be called to answer for abuses of authority or excess of power? The case seems to be out of kilter with other decisions. The whole tenor of recent case law is to provide a more hospitable framework for the coexistence of provincial law in both the civil⁵⁹ and criminal⁶⁰ areas.

⁵⁸ See *supra*, footnote 21, and accompanying text.

⁵⁹ Cf. *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, (1982), 138 D.L.R. (3d) 1.

⁶⁰ Cf. *Attorney General of Canada v. Dupond*, [1978] 2 S.C.R. 770, (1978), 84 D.L.R. (2d) 420; *Nova Scotia Board of Censors and McNeil*, [1978] 2 S.C.R. 662, (1978), 84 D.L.R. (3d) 1; see also Kerwin C.J.C. in *Lord's Day Alliance v. Attorney General of British Columbia*, [1959] S.C.R. 497, at p. 503, (1959), 19 D.L.R. (2d) 97,

La Forest J. refers to *Chartier v. Attorney General of Quebec*⁶¹ where the province as an employer of police officers who had committed actionable wrongs was held liable under provincial law where a false arrest was made on a wrongful charge of manslaughter.⁶² It is difficult to see why this is not a persuasive authority here.

On the logically prior questions of jurisdiction, there does not seem to be any problem of the board of inquiry exercising a "section 96 function", for it is acting in a "novel human rights" area not classifiable as traditional "superior court" jurisdiction, nor is there a problem of paramountcy or an impermissible provincial inquiry into the administration or command function of the R.C.M.P.

The most troublesome feature of the judgment in a liberal democratic state is its concession of such broad powers of "arrest" to police officers that they are rendered virtually immune from liability for excesses or abuses. Surely this is not a healthy state of affairs.

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COMPANY LAW: DEFENCES AGAINST TAKE-OVER BIDS—SALE OF ASSETS
—DUTIES OF DIRECTORS—REMEDIES: *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.*

R.L. Simmonds*

The fiercely contested bid by Gulf Canada Corporation (Gulf), a company controlled by Olympia & York Enterprises (O & Y Enterprises), for Hiram Walker Resources Ltd. (HWR) in the early spring of 1986 led to proceedings before the Ontario and Quebec securities commissions, before a court in the United States and before the Supreme Court of Ontario. In the set of court proceedings that is the subject of this comment, *Re Olympia & York Enterprises Ltd. and Hiram Walker Resources Ltd.*,¹ the opinions of Montgomery J. in Toronto Weekly Court, and of Reid, Craig and Ewaschuk JJ. in the Divisional Court have a number of interesting things to say on a number of fundamental corporate law issues. But the analysis is unfortunately rather incomplete.

at p. 102: "In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation must be looked at."

⁶¹ *Supra*, footnote 46.

⁶² *Supra*, footnote 1, at pp. 261-263 (S.C.R.), 187-189 (D.L.R.).

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¹ (9 April 1986), Ont. S.C. Tor. Wkly Ct. No. 10456/86 (unrep.), aff'd (9 July 1986), [1986] O.J. No. 679, 38 A.C.W.S. (2d) 293 (Ont. Div. Ct.) (unrep.). There was at least one other set of proceedings before the court: see *infra*, footnote 5.

At the time of the bid² Gulf was a company whose primary business was exploration for and development and production of oil and gas. HWR was a company widely held in both Canada and the United States that controlled three well-known Canadian businesses—the distiller, Hiram Walker-Gooderham & Worts (the distiller); the natural gas distributor, Consumers Gas; and an oil explorer and developer, Home Oil. In addition, HWR controlled thirty four per cent of Interprovincial Pipe Lines Limited (IPL), which also was the largest shareholder of HWR, with about fifteen per cent of the voting shares. The distiller represented forty-three per cent of HWR's assets at market value, and contributed forty per cent of its annual earnings and thirty per cent of sales. Gulf's parent, O & Y Enterprises, at the beginning of 1986 held in excess of ten per cent of the voting shares of HWR.

On March 19, 1986, and pursuant to the rules of the Toronto Stock Exchange and the Montreal Exchange, Gulf provided notice of its proposal to make a take-over bid through the exchanges for all of one series of voting shares (the Class D Preference Shares, First Series, or the preference shares) of HWR, and part of its common shares, at \$28.625 per preference share and \$32 per common share. In an endeavour to avoid having United States federal securities regulation (here the Williams Act) apply to the bid, it was expressed, in the way increasingly customary for this purpose, not to be made to residents, citizens or nationals of, nor to be made in, the United States. Both exchanges accepted the bid notice.

The bid represented a low premium (over early March Canadian exchange trading highs) of eight per cent, in the case of the preference shares, and 11.3 per cent in the case of the common. The board of HWR, a majority of whose members were outside directors, strongly opposed the bid on the basis that it represented inadequate value to HWR shareholders. HWR initially asked the exchanges to lengthen the duration of the interval before the bid was to be opened for acceptance, and also expressed its concern about the bid's United States restriction as well as certain disclosures in the bid notice. The exchanges refused to interfere with the bid. An appeal of their acceptance of the bid notice, and of their subsequent refusal to interfere with the bid, to the Ontario Securities Commission and to the Commission des valeurs mobilières du Québec was unavailing. So, too, were proceedings in the United States to have the bid arrested for violation of the Williams Act. It was now March 27, 1986, and Gulf's bid was due to be opened for acceptance on the two stock exchanges on April 4, 1986.

On March 31st the transaction which gave rise to the proceedings in the Supreme Court of Ontario took place. On that day HWR entered

² The facts are taken from the judgment, from publicly filed offer documents and other documents filed in the case, and from reports in the financial press.

into an agreement to sell the business of the distiller to Allied-Lyons PLC (Allied), a large British food and drink company, for \$2.6 billion. There was then to be an exchange take-over bid to purchase forty-eight per cent of the outstanding voting shares of HWR at forty dollars a share (a two billion dollar expenditure) by a third corporation, Fingas Investment Corporation (Fingas). Fingas was a previously dormant corporation activated as a vehicle to facilitate a bid for HWR shares at a higher price than Gulf's offer. Fingas was to fund the offer by issuing for \$200 million non-voting, participating Class A Preference Shares to Allied, and for \$1.8 billion non-voting, participating Class B Preference Shares to a subsidiary of HWR. In addition Fingas was to issue for a nominal consideration forty-nine per cent of its voting shares to HWR, twenty-nine per cent to Allied, eleven per cent to a corporate vehicle of a former director of HWR, and eleven per cent to the corporate vehicle of a former consultant to HWR.

On April 2nd, O & Y Enterprises, which by this time had become formally associated with Gulf in an announced higher priced bid for more of the HWR voting stock, and IPL, which had sided with these two offerors in the battle, applied for interlocutory and final relief under the oppression remedy, compliance order, and derivative action provisions of the Ontario Business Corporation Act (the Act).³ The main relief sought was the enjoining of the sale of the distiller business to Allied, of HWR's \$1.8 billion investment in Fingas, and of Fingas' offer for HWR voting securities. The case was heard over five days, between April 3rd and 9th, 1986, on the basis of affidavit evidence and counsel's arguments. In a judgment delivered orally on April 9, Montgomery J. dismissed all of the proceedings.⁴ On the same day, as he acknowledged, an intention to make a bid for all of HWR's common, convertibles and warrants at a price equivalent to \$36.50 a common share was announced by Trans Canada Pipe Lines Limited, whose interest in HWR was its Home Oil business, an offer conditional on the support of HWR's directors and the withdrawal of the Fingas offer.

O & Y Enterprises and IPL appealed the decision to the Divisional Court. By the time judgment was rendered, on July 9, 1986, by Reid J. in one opinion, and by Craig and Ewaschuk JJ., in another, Gulf and O & Y Enterprises had succeeded in acquiring all of the voting shares of HWR and the Fingas offer had been withdrawn. The remaining substantial issue was thus the sale of the distiller business to Allied. On that, the court dismissed the appeal.⁵ In the course of so doing, there is some

³ S.O. 1982, c. 4.

⁴ *Supra*, footnote 1. The portions of the judgment addressed to the issues of "balance of convenience" and "irreparable harm", apposite to the interlocutory relief sought, are not dealt with here.

⁵ Craig and Ewaschuk JJ.'s judgments suggest that a trial might still occur. This may be a reference to still other proceedings in the Supreme Court of Ontario in which the validity of the asset sale contract was in issue on contract law grounds.

comment on other aspects of Montgomery J.'s judgment. No further judicial consideration of this story is likely. O & Y Enterprises and Allied reached an agreement whereby they will share control of the distiller business in the proportion of forty-nine per cent to fifty-one per cent.

From Montgomery J.'s judgment, four major legal issues can be identified in the original proceedings. The first was whether the sale of the distiller business against the Fingas context represented an improper use of HWR assets by its directors contrary to their fiduciary duties in section 134 of the Act. The second was whether the sale was a sale of "all or substantially all the property of a corporation" so as to require shareholder approval under section 183(3) of the Act. The third was whether the Fingas arrangement was to be treated in substance as a case of a subsidiary proposing to hold shares in its holding body corporate, or a corporation proposing to hold shares in itself, contrary to section 28. The fourth was whether any or all of these matters represented conduct that was oppressive and unfairly prejudicial to HWR's shareholders generally, or to the shareholders of O & Y Enterprises or of IPL in particular, within section 247. Assuming that there was a breach in each of issues one, two and three, a subsidiary matter was whether compliance order relief under 252 was to be given, and whether O & Y would be granted leave on a *nunc pro tunc* basis so as to warrant relief in a "derivative" (more properly termed, as Professor Welling has argued,⁶ a representative) action under section 245. Assuming oppressive or unfairly prejudicial conduct was shown, a subsidiary matter was whether relief would be granted under section 247.

The Divisional Court's judgment assumed for the purposes of argument that there was a violation by HWR or its board in respect of the Fingas arrangement. The members of the court concerned themselves principally with whether the material pointing to a violation adduced before Montgomery J. was such as to warrant the court interfering with the contract of sale to Allied.

The issue of breach of the duties of the directors was addressed both by Montgomery J. and by Reid J. in the Divisional Court. One aspect of the issue was whether the sale of the principal division of HWR in the heat of a takeover battle without an opportunity for the shareholders to pass on the matter was consistent with the directors' duties to act in good faith and in the best interests of the corporation under section 134. Montgomery J. cited as the appropriate test that of the honest and reasonable belief of the directors that what they were doing was in the best interests of the corporation, rather than having as its primary purpose the entrenchment of management, citing *Teck Corp.*

⁶ B. Welling, *Corporate Law in Canada: The Governing Principles* (1984), pp. 517-519.

*Ltd. v. Millar*⁷ and the approval of that case's test in Reid J.'s judgment in *First City Financial Corp. Ltd. v. Genstar Corp.*⁸

Montgomery J. had little difficulty with finding the test satisfied where he had affidavits from both the president of HWR and an experienced independent outside director of the company that the sale decision was taken by the board to maximize value to their shareholders. This decision was taken against the background of clear injunctions to the board by its chairman to consider the interests of the corporation, and the recommendations of the Canadian securities dealer, Dominion Securities Pitfield, and the United States investment banker, Morgan Guaranty Trust Company, based on their assessment of the Gulf offer and of the price offered for the distiller business by Allied. Reid J. did not directly address this aspect of the issue, except to express his unease about deciding an issue like this one on the limited material Montgomery J. had before him.⁹

Montgomery J.'s judgment is in effect the first Canadian consideration of an asset sale as a major part of a defence against a takeover bid.¹⁰ The judgment refers to cases on defensive share issuances—*Howard Smith Ltd. v. Ampol Petroleum Ltd.*,¹¹ *Teck* itself, and the decision of the Second Circuit Court of Appeals in *Norlin Corp. v. Rooney, Pace Inc.*¹²—a defensive tactic which, as Reid J. points out in his judgment, has attracted particular opprobrium. Neither Montgomery J. nor Reid J. viewed the asset sale and the Fingas arrangement as meriting the same criticism. However, Reid J.'s position is based more on the lack of plain illegality in these tactics. Montgomery J.'s conclusion, on breach of the fiduciary duties, is reached seemingly because the board acted throughout, at least on the face of it, consistently with their professional advice, and because the proceeds of the sale were in effect to be used for an offer to the shareholders.

Whether Montgomery J.'s is a reasonable position depends in part on one's view of how closely the court should examine the *appropriateness* of the tactics chosen by the directors. Recent United States cases, a number of which were cited to Montgomery J., suggest a greater willingness than before to enter into such an examination, particularly where the board has determined on an auction for the company.¹³ However, it is not clear that application of these cases, only one of which, *Norlin*, is

⁷ (1972), 33 D.L.R. (3d) 288, [1973] 2 W.W.R. 385 (B.C.S.C.).

⁸ (1981), 125 D.L.R. (3d) 303, 33 O.R. (2d) 631 (Ont. H.C.).

⁹ He expressed similar views in *Genstar*, *ibid.*, at pp. 319 (D.L.R.), 646 (O.R.).

¹⁰ See A. Fleischer, Jr., *Tender Offers: Defenses, Responses, and Planning* (2d ed., 1983), vol. 1, p. 329, n. 115 (U.S. precedent).

¹¹ [1974] A.C. 821, [1974] 1 All E.R. 1126 (P.C.) (N.S.W.).

¹² 744 F.2d 255 (2d Cir., 1984).

¹³ See *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. Supr., 1986), discussed with other authorities in H. Wander and A. LeCoque, *Boardroom Jit-*

referred to by Montgomery J., would have led him to a different conclusion. In this case the HWR board were attempting to cause the benefit of valuable assets, sold at what appeared to be a very good price, to flow to shareholders, in circumstances where, because of the particularly short time intervals involved, the board could reasonably believe that the market for control for HWR could not be relied upon to produce the same results. Further, the board's actions appeared both to have produced an enrichment of the original bid, and to have contributed to the entry of another bidder.¹⁴

The other aspect of the duty issue was the structuring of Fingas whereby fifty-one per cent of the votes in the company were given to Allied, and the two individuals, for what was in the case of the individuals a nominal consideration. Montgomery J. did not address this aspect, but Reid J. did, concluding that this was apparently a breach of the section 134 duty (whether the duty of care or the fiduciary duty is not clear), if one accepted HWR's argument that it did not indirectly control Fingas through these individuals. The various judgments do not show whether this point was argued at all at first instance and at any length on appeal. In the absence of at least a share valuation, the point does not seem, with respect, quite as self-evident as Reid J. suggested. Of course, Reid J. might be suggesting that the failure to obtain a share valuation pointed to breach. Such a failure does not appear to have been in evidence, however, and Reid J.'s view would suggest that the burden of showing it rested on HWR. One would have thought that the burden rested with the appellants, unless Reid J. was suggesting that the nature of the transaction created an aura of suspicion that HWR had to dispel. This would have been at odds with his apparent conclusion that the sale transaction in its context was not clearly such a transaction.

Only Montgomery J. addressed the issue whether the sale of the distiller business was a sale of "all or substantially all of the property of the corporation". He had little difficulty with this point also. After noting the paucity of Canadian decisions on the point, he referred to *Vanalta Resources*¹⁵ and the United States decision on which that case relied, *Gimbel v. Signal Oil Companies, Inc.*¹⁶ He accepted the view in the latter case that a largely quantitative test must be used, even if that strips section 183(3) of application to the sale of a single division of a multi-divisional corporation like HWR. This is in line with the bulk of the relevant United States case law.¹⁷

ters: Control Transactions and Today's Business Judgment Rule (1986), 42 Bus. Law. 29.

¹⁴ Thus *Revlon, ibid.*, is readily distinguishable on these two bases. See also Wander and LeCoque, *ibid.*, at pp. 51-56.

¹⁵ *Re Vanalta Resources Ltd.* (17 Dec. 1976, B.C.S.C., Legg J.) (unrep.).

¹⁶ 316 A. 2d 599 (Del. Ch., 1974), *aff'd* 316 A. 2d 619 (Del. Supr., 1974).

¹⁷ See Fleischer, *op. cit.*, footnote 10, p. 329, n. 118.

Again, only Montgomery J. addressed at length the issue whether the Fingas arrangement was a case of a company proposing to hold shares in its holding body corporate. He rejected as insufficient the evidence adduced to show that at least one of the two individuals with an eleven per cent holding was a "nominee" of HWR, and thus impliedly concluded that there was insufficient evidence that more than fifty per cent of the votes in Fingas were held by "or for the benefit of" HWR, as is required by the Act's definition of a "holding body corporate" in section 1(3) when read with sections 1(2) and (5). He also concluded that Fingas was not a "mere sham" or a "colourable device" that should be stripped away to reveal a corporation seeking to hold shares in itself contrary to section 28, and rendering it takeover proof. He relied on the value to shareholders it could reasonably be seen to promise, together with the tax saving to HWR it ought to have facilitated, by comparison with an issuer bid. Of course, in an issuer bid, which in Ontario must be made to all shareholders,¹⁸ the shares acquired would have been cancelled, leaving O & Y with a controlling interest if it did not tender, and added value if it did. One can readily sympathize with Montgomery J.'s concern not to have to evaluate precisely the balance of advantage between alternative ways of structuring transactions to maximize share values, especially in a comparatively summary proceeding. But one can also ask, with respect, whether the analysis he did perform on the reasons for the structuring of the Fingas arrangement did not call for greater circumspection on the issue of HWR's control of Fingas.

On the issue of relief under the rubric of the "derivative" action, Montgomery J. indicated he was not disposed to grant leave as there had been no fourteen days' notice to HWR's directors of intention to seek leave as required by section 245(2), and there was no allowance for *nunc pro tunc* leaves in section 245 such that the preliminary proceeding to seek leave could be collapsed into the substantive claim for which leave would have been sought. A rather better ground for Montgomery J.'s position, one he adopted in the alternative, was that, as Reid J. in *Genstar*¹⁹ had concluded, the offeror in a hostile takeover bid who was seeking to interdict a competing offer was not a suitable litigation manager on behalf of the corporation. However, *Genstar* was arguably distinguishable, as there the relief sought could in large part be obtained through the Ontario Securities Commission, which could safeguard the interests of all shareholders. It is unfortunate that Reid J. did not address this matter in the present appeal.

On the matter of the appropriateness of relief by compliance order, Montgomery J.'s judgment had nothing to say, and neither did that of

¹⁸ See Securities Act, R.S.O. 1980, c. 466, s. 89(1), prov'n 1. Compare the selective self-tender in the United States, discussed in Wander and LeCoque, *loc. cit.*, footnote 13, at pp. 56-58.

¹⁹ *Supra*, footnote 8.

the Divisional Court. In the former case this was presumably because he found no violations. In the latter case this was presumably because the argument was focused on the matter of whether the alleged violations warranted interference under any remedial head with the contract of sale to Allied.

It was on the oppression remedy in its application to the sale of assets to Allied that the first instance and appeal judgments best converged. Montgomery J. accepted the admonition of the Ontario Court of Appeal in *Re Ferguson and Imax Systems Corp.*²⁰ that section 247 is to be construed broadly. But he said that the section was not meant to permit a shareholder to attack a transaction between the corporation and a third party. As Reid J. pointed out in the Divisional Court, that proposition appears to be unsustainable, in the light of paragraph (h) of section 247(3).

It is of course another matter whether a transaction involving a third party *ought* to be set aside. In Montgomery J.'s view it should not be set aside at the instance of a complainant like O & Y Enterprises, which was seeking relief *qua* bidder, not *qua* shareholder. The Divisional Court did not comment on this. But Montgomery J.'s view is difficult to accept. It is reminiscent of the approach to the English progenitor of section 247, an approach that the drafters of the Canadian progenitor of the section wished to reject.²¹ In this context, O & Y Enterprises' argument could have been seen as the concern about the "rules of the game" of a shareholder with a block position in a corporation which it ultimately hoped to control through the mechanisms of corporate law. Seen this way, that argument would have required the court to ask whether effect should be given to that concern where a third party was involved, and ultimately shareholders as a whole stood to benefit from a competitive auction.

Montgomery J. did address the question whether the sale contract with Allied could not be set aside because of section 19 of the Act, the Act's restatement of the indoor management rule. However, he addressed this point in connection with the section 183(3) argument. Montgomery J. disposed of section 19 apparently on the basis that Allied did not have, and did not have a position or relationship with HWR such that it ought to have had, knowledge of the facts constituting any violation. In the Divisional Court Craig and Ewaschuk JJ. seem to have been disposed to agree with Montgomery J., while Reid J. concluded that the point could not be disposed of that way, as Allied knew too much, at least as to the activation of Fingas.

²⁰ (1983) 150 D.L.R. (3d) 718, 43 O.R. (2d) 128 (Ont. C.A.).

²¹ See F.H. Buckley and M.Q. Connelly, *Corporations: Cases, Texts and Materials* (1984), pp. 646-647.

At this point the Divisional Court asked whether the nature of the violations in the activation of Fingas was such that the courts should treat the asset sale as illegal and void or voidable. Craig and Ewaschuk JJ. were not prepared to assume that activation was inseverable from the sale of the distiller business. Reid J., who was prepared to make that assumption for the purposes of argument, concluded after citing several authorities on illegality of contracts at common law that the nature of the violations alleged was not sufficiently plain or gross so that the courts should treat the asset sale as void or voidable on the basis of illegality. This seems a sensible conclusion. But analytically it does not end the matter.

With respect, the issue was not whether the sale contract with a third party was void or voidable at common law for illegality, but whether it ought to have been set aside as part of an oppressive scheme. On this there was no direct authority at all. In starting to fill this gap the courts could have usefully considered, as well as section 19, not simply the authorities on illegality of contracts, but also the effect of the asset sale and Fingas scheme on the operation of the market for control of HWR. There was at least one apposite Canadian source, which Montgomery J. cited in his judgment. It was the then proposed Ontario Securities Commission policy statement on defence tactics in takeover bids, now a "National Policy", that some particular tactics, such as sales of assets of "a material amount", might come under "scrutiny", to see if they might have the effect of "denying to shareholders the ability to make a decision and of frustrating an open takeover bid process".²²

In the battle for HWR, of course, the first bidder persevered, and succeeded. Shareholders as a whole gained the benefit of a better bid as a direct result of the actions of HWR's board. And the first instance judge was under enormous time pressures in a rapidly changing situation. It is understandable, then, but regrettable that the securities administrators and corporate lawyers generally did not receive the benefit of fuller judicial analysis of how the major remedial provisions of Canadian corporate law applied to some of the measures²³ resorted to by the HWR board.

²² See Request for Comments: Take-over Bids—Defensive Tactics (1986), 9 O.S.C.B. 1024; and National Policy No. 38, Take-over Bids -Defensive Tactics (1986), 9 O.S.C.B. 4255, which differs in some respects, not material here.

²³ Not all of those used were in issue in the case. The total cost of the measures used has been put at \$35 million: see Company News, *Financial Post*, 16 August 1986, p. 16; and see also *Periscope*, *Financial Post*, 16 August 1986, p. 1 (claim by management of Trans Canada Pipelines for \$10 million allegedly promised by HWR management if TCP made thirty-six dollars per share bid which failed).

MENTAL HEALTH—STERILIZATION OF MENTALLY RETARDED PERSONS—
PARENS PATRIAE POWER: *Re Eve*

Margaret A. Shone*

Introduction

On October 23, 1986 the Supreme Court of Canada delivered judgment in the case of *Re Eve*.¹ The effect of the judgment is to deny mentally incompetent persons access to the leading means of birth control chosen by Canadian women aged eighteen to forty-nine.² The denial prevails even where other forms of birth control can be shown to be unsatisfactory. The class of persons encompassed by the denial is made up of the most seriously afflicted of mentally disabled persons, those who may be put to the greatest suffering by conceiving children.

The method of birth control in question is, of course, sterilization.³ The use of sterilization for contraception is referred to in the *Eve* judgment as "non-therapeutic sterilization", or sterilization for "social purposes". The persons primarily affected are women⁴ in an enduring

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¹ (1986), 31 D.L.R. (4th) 1 (S.C.C.).

² According to a 1984 Canadian Fertility Study conducted by Karol Krotki, of the 68.4% of Canadian women aged eighteen to forty-nine who are using contraceptives, 48% are using sterilization—35.3% having been sterilized themselves and another 12.7% having a male partner who has been sterilized. Other figures for the same year indicate that 41.5% of married women of reproductive age in Canada are protected from pregnancy by sterilization, 28.3% having been sterilized themselves and 13.2% having a male partner who has been sterilized: John A. Ross, Douglas H. Huber and Sawon Hong, *Worldwide Trends in Voluntary Sterilization* (1986), 12 Int'l. Fam. Planning Perspectives 34, at p. 35.

³ The usual sterilization procedures—tubal occlusion for females and vasectomy for males—are simple, safe and effective.

The risks of complication and death from another method of female sterilization—hysterectomy—far exceed those associated with either tubal occlusion or childbirth. Hysterectomy is usually reserved for serious medical indications. However, because hysterectomy puts an end to menstruation, it has been used to sterilize mentally disabled women who are unable to manage their own menses: J.D. Keeping, A. Chang and J. Morrison, *Sterilization: A Comparative Review* (1979), 19 Aust. N.Z. J. Obstet. and Gynaecol. 193.

⁴ The majority, by far, of the reported cases brought to court in the United States, Canada and England involve the issue of the authority to sterilize a mentally incompetent female. Cases involving the sterilization of a mentally incompetent male are extremely

condition of mental incompetence to consent to sterilization.⁵ Abuses perpetrated in the past make the issue particularly delicate to deal with.⁶

The Eve Facts

Eve, an at least mildly to moderately mentally retarded adult woman, had developed a relationship with a young man who attended the same training school. Eve's mother sought a sterilization to prevent any risk of Eve's becoming pregnant.

Assessment in Eve's case was complicated by the fact that she also suffered from extreme expressive aphasia, a condition that rendered her unable to communicate outwardly thoughts arising from her perceptions.

rare. This is not particularly surprising given that it is females who face the risks of pregnancy and delivery, miscarriage, or abortion; it is females who thereafter, either themselves or with the assistance of their caregivers, bear the brunt of the burden of child care; and it is females who are apt to suffer the psychological consequences of separation if the child is removed.

⁵ "Mental incompetence" is, of course, a legal concept, the test for which varies with the function to be performed (e.g. testamentary capacity, competence to testify, capacity to contract, competence to consent to medical treatment). The finding is specific to a particular individual at the relevant point in time. A determination of competence to consent to sterilization would include consideration of the person's ability to understand the relationship between intercourse, pregnancy and birth, the responsibilities of parenting, and the risks associated with sterilization including its likely permanence.

The term "mental incompetence" is not synonymous with expressions such as "mental disability" or "mental retardation". As a general guide, however, it probably cuts in somewhere near the boundary between mild and moderate mental retardation on the standard classification system propounded by the American Association on Mental Deficiency: Herbert J. Grossman (ed.), *Classification in Mental Retardation* (AAMD: 1983 Revision). The classification into one of four categories is based on a combined assessment of general intelligence and functional ability. The categories are: mildly retarded (I.Q. 50-55 to 70, functional age 9-12 years); moderately retarded (I.Q. 35-40 to 50-55, functional age 6-9 years); severely retarded (I.Q. 20-25 to 35-40, functional age 3-6 years); and profoundly retarded (I.Q. below 20-25, functional age below 3 years). Approximately 75% of persons in the roughly 3% of the population affected by mental retardation are mildly retarded and would be competent to make their own sterilization decisions.

⁶ In the words of La Forest J., "... the decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human": *Re Eve*, *supra*, footnote 1, at p. 29. The issue is one of obvious sensitivity and concern to mentally disabled persons and those who champion their rights. Until the advent of the "normalization" theory in the early 1970s, the normal sexual behaviour of mentally disabled persons was suppressed, and sterilizations were performed for the convenience of institutional caregivers or under eugenic sterilization laws, now discredited and repealed. Looked at by today's standards, some of the persons sterilized would have been mentally competent to make their own reproduction and birth control decisions.

To prevent any repetition of such abuses, before a non-therapeutic sterilization is authorized by substituted consent it should be shown that the person is mentally incompetent to consent personally to sterilization *and* that she is unlikely ever to become competent to make her own decision.

It was, however, accepted that she was incapable of giving an informed consent to sterilization and her mental incompetence for this purpose was not contested.

When the matter came to trial, Eve was twenty-four years of age. The facts found by the trial judge are as follows:⁷

[Eve] has some learning skills, but only to a limited level. She is described as being a pleasant and affectionate person who, physically, is an adult person, quite capable of being attracted to, as well as attractive to, the opposite sex. While she might be able to carry out the mechanical duties of a mother, under supervision, she is incapable of being a mother in any other sense. Apart from being able to recognize the fact of a family unit, as consisting of a father, a mother, and children residing in the same home, she would have no concept of the idea of marriage, or indeed, the consequential relationship between intercourse, pregnancy and birth.

The trial judge further concluded:⁸

. . . that her moderate retardation is generally stable, that her condition is probably non-inheritable, that she is incapable of effective alternative means of contraception, that the psychological or emotional effect of the proposed operation would probably be minimal, and that the probable incidence of pregnancy is impossible to predict.

Limiting the Parens Patrie Jurisdiction to Therapeutic Sterilizations

The case was determined on the basis of the *parens patriae* jurisdiction, that broad inherent supervisory jurisdiction exercised by superior courts to protect the well-being of persons who are incapable of looking after themselves.⁹ The Supreme Court held, in a unanimous judgment written by La Forest J., that non-therapeutic sterilizations are excluded from the reach of the *parens patriae* jurisdiction, which is limited to therapeutic sterilizations. Eve's sterilization was characterized as non-therapeutic. Permission for it was consequently refused. In so holding, the Supreme Court reversed the decision of the Prince Edward Island Supreme Court sitting *in banco*^{8a} and restored the decision of the trial judge.

The critical passage in the judgment is this:¹⁰

The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it

⁷ Quoted in *Re Eve*, *supra*, footnote 1, at p. 4.

⁸ *Ibid.*

^{8a} (1980), 115 D.L.R. (3d) 283 (P.E.I.S.C. *in banco*).

⁹ The judgment contains an extensive, and useful, examination of the origin, scope and limits of the *parens patriae* jurisdiction. To summarize, the jurisdiction exists for the benefit of the protected person, is founded on necessity, and should at all times be exercised with caution. Consideration of the interests of others is foreclosed. The jurisdiction is to be determined in accordance with the best interests of the person for whose benefit it exists. Incompetence provides a threshold test for its exercise.

¹⁰ *Re Eve*, *supra*, footnote 1, at p. 32.

can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.

In the absence of legislation to reopen them, the doors of superior courts across the country are now closed to argument, on the facts of a particular case, that a non-therapeutic sterilization would be in the best interests of a mentally incompetent person. A parent or guardian can consent to a therapeutic sterilization. No one, not even a superior court, can consent to a non-therapeutic sterilization.

The judgment provides limited guidance on the placement of the line between "therapeutic sterilization" and "non-therapeutic sterilization", a matter that is clearly of utmost importance.

The following light is shed on the meaning of "therapeutic sterilization". A "therapeutic sterilization" includes a surgical operation that is necessary to the health of the person.¹¹ "Health" includes mental as well as physical health.¹² Although sterilizations are not ordinarily performed for medical treatment,¹³ a sterilization may be performed as "an adjunct to treatment" of a serious medical condition.¹⁴ This, however, "does not allow for subterfuge or for treatment of some marginal medical problem".¹⁵ Caution must be used because sterilization is "in every case a grave intrusion on the physical and mental integrity of the person".¹⁶ The performance of a hysterectomy on a pre-menstrual retarded girl to save her from the risk of experiencing a phobic reaction to blood "came dangerously close to the limits of the permissible".¹⁷ The performance of a hysterectomy for the purpose of menstrual hygiene is excessive.¹⁸

Much less is said about "non-therapeutic sterilization". A "non-therapeutic sterilization" is not undertaken out of necessity, but instead may have a "purely social" purpose.¹⁹

Evidential and procedural standards are specified for borderline cases, which are to be brought to court: the onus of proof that sterilization is in the best interests of the mentally incompetent person lies with the person seeking the sterilization; the burden of proof, "though a civil one, must be commensurate with the seriousness of the measure proposed"; and the mentally incompetent person is entitled to independent representation.²⁰

¹¹ *Ibid.*, at pp. 28-29.

¹² *Ibid.*, at p. 29.

¹³ *Ibid.*, at p. 30.

¹⁴ *Ibid.*, at p. 34.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.* The reference here is to *Re K*, [1985] 4 W.W.R. 724 (B.C.C.A.).

¹⁸ *Ibid.*, at p. 32.

¹⁹ *Ibid.*, at p. 34.

²⁰ *Ibid.*, at p. 37.

The effect of the distinction is to fragment the person. In separating physical and mental health from social considerations, the Supreme Court has implicitly rejected the World Health Organization definition of "health" as a "state of complete physical, mental *and social* well-being and not merely an absence of disease or infirmity".²¹

Reasons for the Limitation

(1) Procreation a Great Privilege

The judgment is riddled with statements emphasizing the high value placed on the "privilege of giving birth" and warning about the physical intrusiveness of sterilization, its irreversibility (for practical purposes), and the near impossibility of correcting an error of decision.²²

There can be little doubt but that the privilege of procreation is highly valued by mentally competent persons, and that the right of reproductive choice should be carefully protected and preserved. But does the thesis hold true for mentally incompetent persons?

In a recent English case, *In Re B (A Minor) (Wardship: Sterilization)*,²³ the trial judge, three judges of the Court of Appeal and five members of the House of Lords had no difficulty in authorizing the sterilization of a seventeen-year-old moderately retarded girl, Jeanette, for an essentially contraceptive purpose. Jeanette had a mental age of five or six and spoke in sentences of only one or two words. Eve, it will be recalled, was unable to communicate her thoughts. Like Eve, Jeanette could not understand the relationship between intercourse, pregnancy and the birth of children and would be incapable of giving a valid consent to contracting a marriage. But the evidence disclosed further complexities.²⁴

[Jeanette] would not understand, or be capable of easily supporting, the inconveniences and pains of pregnancy. As she menstruates irregularly, pregnancy would be difficult to detect or diagnose in time to terminate it easily. Were she to carry a child to full term she would not understand what was happening to her, she would be likely to panic, and would probably have to be delivered by caesarian section, but, owing to her emotional state, and the fact that she has a high pain threshold she would be quite likely to pick at the operational wound and tear it open. In any event, she would be "terrified, distressed and extremely violent" during normal labour. She has no maternal instincts and is not likely to develop any. She does not desire children, and, if she bore a child, would be unable to care for it.

The decision was taken in the exercise of the court's wardship, or *parens patriae*, jurisdiction. The issue, according to the Lords, was not

²¹ Preamble to the World Health Organization (WHO) constitution adopted by the International Health Conference held in New York in 1946 and ratified by Canada on August 29 of the same year: WHO, *The First Ten Years of the World Health Organization* (1958), p. 459. (Emphasis added).

²² *Supra*, footnote 1 at pp. 29, 32 and 34.

²³ [1987] 2 W.L.R. 1213 (H.L.).

²⁴ *Ibid.*, at p. 1215, per Lord Hailsham.

whether the sterilization was therapeutic or non-therapeutic but whether it would be in Jeanette's best interests. The distinction adopted by the Supreme Court of Canada in *Re Eve* was expressly rejected.²⁵ The strongest indictment of the reasoning in *Re Eve* is embodied in the following passage:²⁶

... whilst I find the court's history of the *parens patriae* jurisdiction of the Crown. . . extremely helpful, I find, with great respect, their conclusion that the procedure of sterilisation should *never* be authorised for non-therapeutic purposes totally unconvincing and in startling contradiction to the welfare principle which should be the first and paramount consideration in wardship cases. Moreover, for the purposes of the present appeal I find the distinction they purport to draw between "therapeutic" and "non-therapeutic" purposes of this operation in relation to the facts of the present case above as totally meaningless, and, if meaningful, quite irrelevant to the correct application of the welfare principle. To talk of the "basic right" to reproduce of an individual who is not capable of knowing the causal connection between intercourse and childbirth, the nature of pregnancy, what is involved in delivery, unable to form maternal instincts or to care for a child appears to me wholly to part company with reality.

Instead of putting the "privilege" of procreation on a higher plane, the Supreme Court could have looked at it in conjunction with other factors that affect the quality of human existence, whether a person is mentally incompetent or not: the chance to gain maximum control over one's immediate environment; the chance to lead a freer, less supervised life, to pursue a course of training or engage in productive labour to the limit of one's abilities; the freedom to form satisfying human relations and experience sexuality without risking pregnancy or paternity.

(2) *Justifications "Demonstrably Weak"*

None of the justifications advanced in support of Eve's sterilization—birth trauma, parental fitness, menstrual hygiene, interests of caregivers—satisfied the court that sterilization would be in Eve's best interests. The judgment describes these justifications as "the ones commonly proposed" and "demonstrably weak".²⁷

On birth trauma, the court was persuaded that it would be difficult to prove that the stress of delivery is greater for mentally handicapped persons than for others.²⁸ But would Eve, any more than Jeanette, be able to understand the bodily changes associated with pregnancy, the process of delivery, the discomfort and the pain, its purpose? Is her fear

²⁵ *Ibid.*, at p. 1216, per Lord Hailsham; at p. 1217, per Lord Bridge; at pp. 1223-1224, per Lord Oliver. It should be noted that Lord Bridge did say there was no reason to doubt the correctness of the *Eve* decision on its own facts: *ibid.*, at p. 1217.

²⁶ *Ibid.*, at p. 1216, per Lord Hailsham.

²⁷ *Re Eve*, *supra*, footnote 1, at p. 31.

²⁸ *Ibid.*, quoting from Law Reform Commission of Canada, Working Paper No. 24: Sterilization: Implications for Mentally Retarded and Mentally Ill Persons (1979), p. 60.

and propensity to panic likely, any more than Jeanette's, to be alleviated by verbal explanation?

On parental fitness, the court stated that studies "conclude that mentally incompetent parents show as much fondness and concern for their children as other people", and cautioned that human rights considerations "should make a court extremely hesitant about attempting to solve a social problem like this" (for example, the financial burdens involved) by sterilization.²⁹ But are mentally incompetent persons not capable, like normal adults, of exhibiting a range of attitudes towards children including dislike or loathing? Jeanette, for example, had "displayed no maternal feelings and indeed [had] an antipathy to small children".³⁰ Should her sterilization have been refused anyway?

On menstrual hygiene, few would disagree with the court that hysterectomy "is clearly excessive" for the purpose.³¹

The interests of caregivers are unquestionably inappropriate for consideration in the exercise of the *parens patriae* jurisdiction.³² But the nature of the caregivers available and the extent of their commitment to care for the mentally incompetent person and any offspring produced may influence the determination of her best interests.

(3) *Imagination Stretched*

The Supreme Court found it difficult "to imagine a case in which non-therapeutic sterilization could possibly be of benefit to the person on behalf of whom a court purports to act, let alone one in which that procedure is necessary in his or her best interests".³³ And yet it is of benefit to nearly half the women between the ages of eighteen and forty-nine choosing birth control.³⁴

Might not some of the reasons why mentally competent persons are choosing sterilization be relevant to the consideration of the best interests of a mentally incompetent person? One writer gives the example of a mentally incompetent woman with children who repeatedly insisted that she wanted "no more babies".³⁵ What of Jeanette with her demon-

²⁹ *Ibid.*, referring to Law Reform Commission of Canada, *ibid.*, pp. 33 *et seq.*, 63-64.

³⁰ *In Re B (A Minor)*, *supra*, footnote 23, at p. 1230, per Lord Oliver.

³¹ *Re Eve*, *supra*, footnote 1, at p. 32. Hysterectomy is the method of sterilization authorized in an addendum to the judgment of the Prince Edward Island Supreme Court sitting *in banco*; *ibid.*, at p. 8.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Supra*, footnote 2.

³⁵ Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, [1986] *Duke Law Journal* 806, at p. 852, fn. 149.

strated dislike of children? What of sparing a woman the painful emotions of loss associated with the removal, by child welfare authorities, of a child she would never be able to care for? What of avoiding the risks associated with the long-term use of oral contraceptives or hormonal suppressants?

(4) *Lack of Adequate Knowledge*

The Supreme Court is daunted in the exercise of the *parens patriae* jurisdiction by its opinion that courts do not know enough about mental incompetence and about the birth control alternatives to sterilization. In the words of the judgment:³⁶

Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform.

The point bears restating for the purpose of emphasis: the denial of any possibility of a person's "best interests" being served by non-therapeutic sterilization is made without knowledge of either the difficulties faced by mentally incompetent persons or the comparative gravity of the risks posed by the birth control alternatives. This admission makes the blanket barring of cases from the *parens patriae* jurisdiction all the more extraordinary.

The observation that a case can only "partially inform" is obviously not limited to non-therapeutic sterilization cases. It is true of any case that comes before the court. And yet courts daily make decisions that affect individual citizens in particular cases in significant ways, not to mention decisions that affect the governance of citizens collectively or that are commercially important. They do so on the basis of the evidence parties put before them. The lack of complete information is not offered as a reason for shirking jurisdiction.

The assumption of jurisdiction over non-therapeutic sterilizations has not been beyond the capability of courts in other jurisdictions. Several American state courts have been able to fashion criteria for the exercise of their general statutory jurisdiction or the *parens patriae* power.³⁷ A succession of English courts took jurisdiction over Jeanette in *Re B (A Minor)*. The British Columbia courts took jurisdiction in *Re K*,³⁸ as did the Prince Edward Island Supreme Court sitting in banco on appeal from the trial judgment in *Re Eve*.³⁹ Some of the judges in these courts also set out criteria for decision.

³⁶ *Re Eve*, *supra*, footnote 1, at p. 32.

³⁷ The leading examples are *Re Guardianship of Hayes*, 608 P. 2d 635 (Wash. S.C., 1980); *Re Grady*, 426 A. 2d 467 (N.J.S.C., 1981).

³⁸ *Supra*, footnote 17, rev'g. [1985] 3 W.W.R. 204 (B.C.S.C.).

³⁹ *Supra*, footnote 8a.

The high value attached by the Supreme Court to the privilege of giving life gives rise to questions about the limits of decision-making authority with regard to the use of other methods of birth control. Should any tampering with the reproductive capacity of mentally incompetent persons be permitted for social purposes? That is, should birth control ever be imposed? If yes, on whose decision and in what circumstances? "Reversible" methods of birth control—the pill, intra-uterine devices, even hormonal suppressants like Depo-provera—are routinely introduced by caregivers for the "social purpose" of managing sexually active mentally incompetent persons. The practice has not been the target of objection, even though potentially serious risks attend the use of some of these methods of birth control, particularly over the long term.⁴⁰ These issues are neither acknowledged nor examined by the court in *Re Eve*.

(5) *Best Interests: An Imprecise Test*

The Supreme Court expresses reservations about the ability of the court "to weigh the best interests of a person in this troublesome area, keeping in mind that an error is irreversible".⁴¹

At the same time it rejects the alternative "substituted judgment" test that has been adopted in recent years by some American courts. In applying the "substituted judgment" test, the decision-maker attempts to put himself in the place of the mentally incompetent person, apply his values, and make the decision that he would make if he were competent. To the Supreme Court this is "obviously fiction".⁴²

According to the court, the correct question was identified in the American case of *Re Guardianship of Eberhardy*:⁴³

... the question is whether there is a method by which others, acting in behalf of the person's best interests and in the interests, such as they may be, of the state, can exercise the decision. Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, that is, the state's intrusion into the determination of whether or not a person who makes no choice shall be allowed to procreate.

⁴⁰ Abortion lies at the opposite end of the birth control spectrum. In Canada, a physician who induces an abortion is protected from criminal liability where a "therapeutic abortion committee" has certified in writing that the continuation of the pregnancy would or would be likely to endanger the life or health of the mother: Criminal Code, R.S.C. 1970, c.C-34, s. 251(4). According to the Badgley Report (Report of the Committee on the Operation of the Abortion Law, Robert F. Badgley, Chairman (1977)), the meaning ascribed to "therapeutic" varies widely from committee to committee. It is therefore likely to depart, in many cases, from the meaning the Supreme Court intends for "therapeutic" sterilization.

⁴¹ *Re Eve*, *supra*, footnote 1, at p. 32.

⁴² *Ibid.*, at p. 35.

⁴³ 307 N.W. 2nd 881, at p. 893 (Wis. S.C., 1981), quoted in *Re Eve*, *supra*, footnote 1, at p. 35.

The fact that "best interests" provides an imperfect measure is no reason for courts to refrain from decision altogether. It is the best way that we have got; no better test is available. Moreover, the course of children's lives is daily determined by the application of this imprecise test in child custody disputes and child welfare decisions, notwithstanding that a wrong decision could lead to a child's irreparable harm.

Invitation to Legislators

The judgment does not foreclose the possibility of legislation to permit the performance of non-therapeutic sterilizations in appropriate cases. On the contrary, the Supreme Court has passed the burden of responsibility for dealing with this controversial subject matter to the legislators:⁴⁴

If sterilization of the mentally incompetent is to be adopted as desirable for general social purposes, the legislature is the appropriate body to do so. It is in a position to inform itself and it is attuned to the feelings of the public in making policy in this sensitive area.

The judgment goes on to quote with approval the following passage from *Eberhardy*:⁴⁵

. . . there has been a discernible and laudable tendency to "mainstream" the developmentally disabled and retarded. A properly thought out public policy on sterilization or alternative contraceptive methods could well facilitate the entry of these persons into a more nearly normal relationship with society. But again this is a problem that ought to be addressed by the legislature on the basis of factfinding and the opinions of experts.

Taken by themselves, these statements give the appearance of inviting the enactment of legislation on non-therapeutic sterilizations. Other statements in the *Eve* judgment, however, place several impediments in the way of legislators who dare the attempt.

First, having rejected both the "best interests" test (at least in the unguided exercise of its *parens patriae* jurisdiction) and the "substituted judgment" test, the Supreme Court has left legislators with the problem of divining an acceptable standard of decision-making for sterilization cases.

Second, the court reminds legislators that any legislation enacted will be "subject to the scrutiny of the courts under the *Canadian Charter of Rights and Freedoms* and otherwise".⁴⁶ The judgment, however, provides little assistance on the Charter limits. Arguments were introduced in reliance on sections 7 and 15 of the Charter. Section 7 did not apply because no government infringement was involved.⁴⁷ The court

⁴⁴ *Re Eve*, *supra*, footnote 1, at pp. 32-33.

⁴⁵ *Supra*, footnote 43, at p. 895, quoted in *Re Eve*, *supra*, footnote 1, at p. 33.

⁴⁶ *Re Eve*, *supra*, footnote 1, at p. 33.

⁴⁷ *Ibid.*, at p. 35.

held that section 15 does not oblige a court exercising *parens patriae* jurisdiction to make a choice, on behalf of a mentally incompetent person, between the right to procreate and the right not to procreate.⁴⁸

Third, because it is socially and politically sensitive, the issue is not likely to be attractive to legislators. Moreover, as one commentator has observed, the Supreme Court "has created a climate that would make it very difficult for any government to proceed in this area".⁴⁹ Legislators are therefore unlikely to legislate.

Conclusion

On the positive side, the judgment emphasizes the seriousness of the sterilization issue for mentally incompetent persons. It establishes the therapeutic limits of the decision-making authority of parents and guardians, and sets out some sensible evidentiary and procedural requirements for the borderline cases that must be brought to court.

Looked at over all, however, the judgment is disappointing. The rigid restriction of the *parens patriae* jurisdiction to therapeutic sterilizations is disturbing. Swayed by the arguments presented and, one is tempted to speculate, by unspoken influences—perhaps overreaction to the abuses of the past,⁵⁰ the role played by intervenors,⁵¹ a predilection against unnatural interference with the reproductive process—the court has closed the door on the judicial consideration of best interests on the facts of individual cases where the purpose of the sterilization is non-therapeutic. The impediments in the way of legislation make the legislative reopening of the door an unlikely alternative.

The sterilization issue is not going to evaporate with *Re Eve*. Sexually active mentally incompetent persons will continue to be exposed to the undesirable side effects of other birth control methods; and they will be obliged to run the higher risk that the method employed will fail to prevent conception. If conception occurs, mentally incompetent women who lack the ability to parent will face, needlessly, the medical risks of

⁴⁸ *Ibid.*, at p. 36.

⁴⁹ G. Sharpe, Casenote: "Eve" v. Mrs. "E", and the Canadian Mental Health Association, the Canadian Association for the Mentally Retarded, the Public Trustee of Manitoba, and the Attorney General of Canada (intervenors) (1987), 7 Health Law in Canada 90, at p. 91.

⁵⁰ See *supra*, footnote 6.

⁵¹ Two strong, well-organized national lobby groups for mentally disabled persons—the Canadian Mental Health Association and the Canadian Association for the Mentally Retarded, by its Consumer Advisory Committee—argued against sterilization in the *Eve* case. During argument before the Supreme Court of Canada, the court room was "packed with scores of handicapped people who had been brought in by the busload": W. Gifford-Jones, Hammering Another Nail into the Coffin of Common Sense, *The Toronto Globe and Mail*, February 2, 1987.

pregnancy and delivery, miscarriage or abortion. Fundamental human rights and privileges going beyond procreation are at stake for the persons affected by the judgment. In ignoring the fuller dimensions of life, the Supreme Court has done a disservice to mentally incompetent persons and their caregivers. It has left us with another "issue that won't go away".⁵²

⁵² Compare Anne Collins, *The Big Evasion: Abortion, The Issue that Won't Go Away* (1985), in which the author explores the inability of politicians, jurists, activists and Canadian society in general to address, effectively, the controversial issue of abortion.