CRIMINAL LAW—FELONY MURDER—CONSTRUCTIVE MURDER—SECTION 7 OF THE CHARTER OF RIGHTS AND FREEDOMS—CRIMINAL LAW REFORM: *Vaillancourt* v. *The Queen*

Peter MacKinnon*

In December 1987 the Supreme Court of Canada rendered judgment in *Vaillancourt* v. *The Queen*.[1] The court considered the felony murder doctrine and employed the Charter of Rights and Freedoms[2] in judicial review of section 213 of the Criminal Code.[3] The decision puts in jeopardy other constructive murder provisions, and may have a notable impact on the potential for and direction of criminal law reform in this country.

Felony Murder[4]

Vaillancourt came to the Supreme Court on appeal from the Quebec Court of Appeal which had upheld Vaillancourt's conviction for second degree murder. In possession of a knife himself, and together with a confederate armed with a gun, he had committed robbery at a pool hall. During a struggle between a patron and the confederate, the gun discharged and the patron was killed, and it was with respect to this death that the murder charge was brought. Vaillancourt testified that he had believed the gun to be unloaded. By his account, he and his confederate were to have only knives with them and he objected when the latter appeared beforehand with a gun. After Vaillancourt insisted that it

* Peter MacKinnon, of the College of Law, University of Saskatchewan, Saskatoon, Saskatchewan.

[1] (1987), 60 C.R. (3d) 289 (S.C.C.).

[2] Constitution Act, 1982, Part I (hereafter the Charter).

[3] R.S.C. 1970, c. C-34 (hereafter the Criminal Code, or the Code).

[4] In our law the term is a collaquialism because we do not use the word "felony" in the classification of criminal offences. "Felony murder" is commonly employed, however, to identify the category of murder committed when death is caused during the commission of certain offences, as in s. 213 of the Criminal Code.

be unloaded, the confederate removed three bullets from the gun and gave them to Vaillancourt, whereupon he placed them in his glove, where subsequently they were found by the police.

Vaillancourt was convicted of murder by virtue of the combined operation of sections 21(2) and 213(d) of the Criminal Code. Section 21(2) provides:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

And section 213 states:[5]

> Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit. . . robbery. . . whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
>
> (a) he means to cause bodily harm for the purpose of (i) facilitating the commission of the offence, or (ii) facilitating his flight after committing or attempting to commit the offence,
> and the death ensues from the bodily harm;
>
> (b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a) and the death ensues therefrom;
>
> (c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
>
> (d) *he uses a weapon or has it upon his person*
>
> *(i) during or at the time he commits or attempts to commit the offence*, or
>
> (ii) during or at the time of his flight after committing or attempting to commit the offence,
> and the death ensues as a consequence.

Applied to the facts, these provisions decreed that Vaillancourt was guilty of murder because he and his confederate were engaged together in the commission of robbery when the latter committed murder, as defined in section 213(d), with a gun that Vaillancourt knew him to have. Vaillancourt did not have to participate in the possibly accidental killing. It did not matter if he thought the gun unloaded; it was immaterial that he may not have foreseen that death or even bodily harm might result from the venture.

This striking example of "accomplice felony murder"[6] was the inevitable result of expansive statutory definitions of murder[7] combined with a doctrine of common intent in section 21(2), which itself is

---

[5] (Emphasis added).

[6] The phrase is Burns and Reid's. See P. Burns and R.S. Reid, From Felony Murder to Accomplice Felony Attempted Murder: The Rake's Progress Compleat? (1977), 55 Can. Bar Rev. 75.

[7] Criminal Code, *supra*, footnote 3, ss. 212, 213.

troublesome.[8] The link between the two was established in *R.* v. *Trinneer*,[9] where the Supreme Court of Canada held that death or serious bodily harm did not have to be intended or foreseen by the parties to the common purpose for them to be liable for a murder committed by one of their number. The court implied that foresight only of whatever it was that made the principal guilty of murder under section 213, was sufficient. Because the confederate was liable for murder under section 213(d), Vaillancourt, too, was guilty if he knew or ought to have known that murder *as defined by that subsection* would be a probable consequence of carrying out the robbery. And murder, so defined, refers to the use or possession of a weapon, with death ensuing as a consequence, and not to an intention to cause death or to foresight that it might occur.

The second of two constitutional questions formulated in the *Vaillancourt* appeal to the Supreme Court focused on this combined operation of sections 21(2) and 213(d):[10]

> [I]s the combination of s. 21 and s. 213(d) of the *Criminal Code* inconsistent with the provisions of either s. 7 or s. 11(d) of the *Canadian Charter of Rights and Freedoms* and is s. 21 of the *Criminal Code* therefore of no force and effect in the case of a charge under s. 213(d) of the *Criminal Code*?

Only McIntyre J., in dissent, addressed this question and his answer was a summary "no". He cited what he felt to be rational policy considerations underlying both sections and indicated that he "would not interfere with the Parliamentary decision".[11] The remaining judges did not deal with the issue, and it was unnecessary for them to do so because of their decision on the first constitutional question raised in the appeal:[12]

> Is s. 213(d) of the *Criminal Code* inconsistent with the provisions of either s. 7 or s. 11(d) of the *Canadian Charter of Rights and Freedoms*, and, therefore, of no force or effect?

All judges, except McIntyre J., answered this question in the affirmative, thus putting an end to the forty year history[13] of one of the most notorious provisions in the Code.

The felony murder rule has been controversial because it compromises the normal culpability requirements for the crime of murder. Substituted for an intention to kill or to inflict life-threatening bodily harm is the mental element for the underlying felony (one of the listed

---

[8] See the discussion in D. Stuart, Canadian Criminal Law (2d ed., 1987), pp. 511-518; and in E. Colvin, Principles of Criminal Law (1986), pp. 320-325.

[9] [1970] S.C.R. 638, (1970), 10 D.L.R. (3d) 568.

[10] *Supra*, footnote 1, at p. 318.

[11] *Ibid.*, at p. 316.

[12] *Ibid.*, at p. 317.

[13] The history of s. 213(d) is summarized in the annotations to Martin's Criminal Code (1955), and by Stuart, *op. cit.*, footnote 4, pp. 222-224.

offences in section 213), and the intention to do one of the things enumerated in paragraphs (a) through (d). If death results the crime is murder. Implicit in the doctrine is the uncontroversial notion that one who commits an enumerated offence bears the risk should he cause the death of another in so doing. What is and has been controversial is the extent of that risk. Is it appropriately measured by liability for the crime of murder?

This question raises others about our conception of the crime of murder. Is it unique among unlawful homicides, or is it simply one among them, distinguishable from the others by unimportant features?[14] Our legal tradition has tended to emphasize the uniqueness of murder, particularly with respect to penalty. Though no longer punishable by death, murder stands alone among homicides because of the mandatory penalty of life imprisonment. The implication of this is clear. Because murder is unique in this very important sense, differences in the culpability requirements between it and other homicides really do matter. It is this fact that made section 213(d) so offensive in the minds of many commentators on the criminal law.[15] By imposing liability for murder with respect even to an accidental death caused during the commission of one of the listed offences, the section strayed too far from acceptable principles of culpability.[16] In this respect it was distinguishable from paragraphs (a), (b) and (c) of section 213 because liability under them contemplates at least the intent to cause bodily harm that is the common denominator of all serious crimes of personal violence. Section 213(d) did not require even that.

It was "the stigma and sentence attached to a murder conviction"[17] that so influenced Lamer J., writing for the Supreme Court majority in *Vaillancourt*. Because of them the principles of fundamental justice "require a *mens rea* reflecting the particular nature of that crime".[18] At the very least, he reasoned, the objective foreseeability of the likelihood of death is an essential element in the definition of murder. This requirement is, of course, fatal to section 213(d). And it is also fatal to sections 213(a), (b) and (c).[19]

---

[14] These questions are explored in P. MacKinnon, Two Views of Murder (1985), 63 Can. Bar Rev. 130.

[15] See I. Grant and A.W. MacKay, Constructive Murder and the Charter: In Search of Principle (1986-87), 25 Alta. L. Rev. 129. See also Burns and Reid, *loc. cit.*, footnote 6; Stuart, *op. cit.*, footnote 8, pp. 226-228.

[16] See, for example, *R.* v. *Joyce* (1978), 42 C.C.C. (2d) 141 (B.C.C.A.).

[17] *Supra*, footnote 1, at p. 326.

[18] *Ibid.*, at p. 325.

[19] S. 213(a), (b) and (c) require the intention to cause bodily harm or the willingness to engage in behaviour likely to cause bodily harm.

Section 213 also infringes the Charter restatement of the common law presumption of innocence because the definitions of murder contained therein do not include an element required by section 7. The defendant is therefore at risk of conviction under the section where there may be a reasonable doubt with respect to the essential element prescribed by section 7.

Section 213(d), at least, could not be saved by section 1. There was a sufficiently important objective in Parliament's intention to deter the use or possession of weapons in the commission of the listed offences, and section 213(d) was rationally connected to the objective. But it unduly impaired the rights and freedoms in question:[20]

> It is not necessary to convict of murder persons who did not intend or foresee the death and could not have have foreseen the death in order to deter others from using or carrying weapons. If Parliament wishes to deter the use or carrying of weapons, it should punish the use or carrying of weapons.

The Fate of Constructive Murder

Although *Vaillancourt* was concerned with subsection (d) of section 213, the decision has obvious implications for sections 213(a), (b) and (c), and it sounds a warning about the constitutionality of murder as defined in section 212(c). Lamer J. specifically concluded that all of section 213 fell short of the requirements of fundamental justice and infringed the guarantee of the presumption of innocence. This follows from his determination that liability for murder requires at least objective foreseeability of the likelihood of death, because none of paragraphs (a), (b), (c) or (d) requires this foresight. However, only paragraph (d) was tested and found wanting under section 1 of the Charter. It is not obvious that the same fate awaits (a), (b) and (c); their origins are distinct from those of (d),[21] and, as the discussion above indicates, liability for murder as therein defined is narrower than it is under (d). There is, though, a strong indication that for Lamer J., and for Dickson C.J.C., Estey and Wilson JJ.,[22] the disposition of (a), (b) and (c) would be the same as for (d). Given the *mens rea* requirement on which they were agreed, and given, too, their common view that sections 7 and 11(d) of the Charter were infringed, it is unlikely that they would see any of section 213 saved by section 1 of the Charter. Lamer J.'s reasoning with respect to paragraph (d) and section 1 would easily apply to the rest.

Section 212(c) of the Code provides that culpable homicide is murder:

> Where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

---

[20] *Supra*, footnote 1, at p. 330.

[21] Paragraphs (a), (b) and (c) were in the Code of 1892 and paragraph (d) was added by S.C. 1947, c. 55, s. 7. See Stuart, *op. cit.*, footnote 8, p. 226.

[22] And probably for La Forest J. as well. See his concurring reasons for judgment.

The history of this section has been reviewed elsewhere.[23] What is important here is that objective foreseeability (''ought to know'') satisfies the mental requirement for liability for murder under the provision. Lamer J. leaves no doubt about his thoughts on this, for he was ''of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight''.[24] His Lordship explicitly recognized the implications of his opinion for section 212(c) and thereby implied that its future may not be a promising one.

The scope of section 214 is also affected by the judgment. It provides for the distinction between first and second degree murder, a difference that is not rooted in intent but which depends instead on the presence of planning and deliberation, the identity of the victim, or the nature of the offence which is committed at the time of the murder.[25] Murder as defined in sections 212(c) and 213 may qualify as first degree murder if the victim is a law enforcement or a custodial officer, or another person who works in a prison.[26] And felony murder as defined in section 213 may become ''felony first degree murder''[27] depending on the underlying offence.[28] The *Vaillancourt* decision deletes one category of murder eligible for first degree status under section 214, and puts others in jeopardy.

Reform of the Criminal Law

From the standpoint of the scope of section 7 of the Charter, *Vaillancourt* follows naturally upon the decision of the Supreme Court in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*.[29] There the court held that absolute liability infringed the principles of fundamental justice if it coexisted with the availability of imprisonment as a penalty. Thus ended the debate as to whether the principles of fundamental justice in section 7 were simply procedural guarantees. In its place has come controversy about the extent of permissible substantive review. But one thing was clear: the courts could review the rules of criminal culpability to determine their conformity with the requirements of the Charter, and if they were found wanting, declare them to be of no force and effect.

---

[23] See Stuart, *op. cit.*, footnote 8, pp. 216-221.

[24] *Supra*, footnote 1, at p. 326.

[25] Stuart, *op. cit.*, footnote 8, p. 235.

[26] Criminal Code, *supra*, footnote 3, s. 214(4).

[27] The phrase is Stuart's: *op. cit.*, footnote 8, p. 236.

[28] Criminal Code, *supra*, footnote 3, s. 214(5).

[29] [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536.

Absolute liability with a possibility of imprisonment was an obvious target for a constitutional challenge. So was felony murder and constructive murder generally. And there are other vulnerable criminal law rules.

> What about the so-called offence of "statutory rape" where a male commits an offence when he has sexual intercourse with a female person not his wife and under the age of 14 years whether or not he believes that she is 14 years of age or more? Must the criminal negligence provisions of the Criminal Code be given a firmly subjective interpretation? Are any or all of the Criminal Code offences which impose liability in terms of objective standards of "reasonableness" now on constitutional thin ice?[30]

Initiatives by way of constitutional review to test these questions are welcome, but there is a danger that they may be seen as a substitute for comprehensive criminal law reform rather than as the catalyst for change that they should be. These are exciting days for Charter enthusiasts, and criminal lawyers have to keep up with the new constitutional implications of their subject. But this necessary preoccupation should not overshadow the fact that *Motor Vehicle Reference*, *Vaillancourt*, and more recently *Morgentaler*,[31] are selective and well aimed blows to a body of law that is in need of a general overhaul.

The most important movement in this direction has come from the Law Reform Commission of Canada in its Report on Recodifying Criminal Law.[32] Recodification implies comprehensive change, and this is what the Commissioners have in mind. Their efforts to produce a new Criminal Code should be the primary focus for reform of the criminal law. But here, too, the possible implications of *Vaillancourt* should not be missed. The decision is a reaffirmation of the fundamental principle of *mens rea* on a plane that gives it unprecedented force in this country, and it must be taken into account in the appraisal of reform proposals. The Commission's suggested crimes of negligence require second thought in light of *Vaillancourt*. The addition to our law of a crime of negligent homicide,[33] for example, would obviously be controversial both in policy and in law. It may be sustainable, given that negligent homicide would be a distinct crime and not a type of murder,[34] but negligence is not *mens rea* in the sense traditionally required in the criminal law.

---

[30] B. Archibald, A Glimpse on the Constitutionalization of the General Part in Canadian Criminal Law, abstract of paper delivered at the Conference on Reform of the Criminal Law, London, England, July 26-29, 1987.

[31] *Morgentaler* v. *R.*, unrep., S.C.C., Jan. 28, 1988.

[32] Law Reform Commission of Canada, Report No. 30: Recodifying Criminal Law, Vol. I (1986).

[33] *Ibid.*, p. 53.

[34] *Ibid.*

Conclusion

It is with respect to the law of murder that *Vaillancourt* has immediate importance. The definition of the offence has been changed for the better, and there are people serving sentences of life imprisonment because of the stricken section whose positions must be reconsidered. In the longer term the decision will be the basis for constitutional attacks on constructive murder generally, and upon other offences whose culpability requirements do not reflect the perceived stigma of the crime and the applicable penalty. Its potential impact on criminal law reform is less predictable. It is important that *Vaillancourt* and other leading Charter cases be seen as symptomatic of the need for reform rather than as all the reform that is needed.

* * *

EXPROPRIATION—INJURIOUS AFFECTION—NO LAND EXPROPRIATED —CONSTRUCTION OF HIGHWAY ON NEIGHBOURING LAND—WHETHER ECONOMIC LOSS CAUSED TO RESIDENCE BY PRESENCE OF HIGHWAY COMPENSABLE: *St. Pierre* v. *Ontario (Minister of Transportation and Communications)*

Eric C.E. Todd*

The Decision

In 1961 Mr. and Mrs. St. Pierre bought 125 acres of land in a rural area zoned "open space" backing onto the River Thames at the outer limits of London, Ontario. They built their retirement home close to the eastern boundary of the property and some 800 to 900 feet from the nearest neighbour.

In 1971 the Ontario Ministry of Transportation and Communications purchased a 250 foot wide strip of land to the east of, and immediately adjacent to, the St. Pierres' property. The acquisition was for a new four lane industrial access highway. The highway was commenced in 1976 and two lanes were opened to traffic in 1977. The closest part of the highway right of way was thirty-two feet from the St. Pierres' bedroom window.

The Ontario Land Compensation Board (now the Ontario Municipal Board) concluded that the mere presence of the highway, even if never used, had resulted in a $35,000 reduction in the market value of

*Eric C.E. Todd, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

the St. Pierres' property. It awarded that sum as compensation for injurious affection pursuant to section 21 of the Ontario Expropriations Act.[1] The Divisional Court affirmed the Board's award but the Court of Appeal held that no compensation was payable. For purposes of the appeals it was agreed that the market value of the property had decreased by $35,000 as a result of the mere presence of the highway.

In dismissing the St. Pierres' appeal[2] the Supreme Court followed a well worn path in English and Canadian jurisprudence by applying the so called "actionable rule". This rule states that where no land is taken from the claimant, a claim for compensation for injurious affection caused by the construction of public works on neighbouring land cannot succeed unless, in the absence of statutory authority authorizing the construction and use of works, a claim for damages in tort would have succeeded.

There are two different sets of rules for determining the compensability of injurious affection caused to a landowner by the construction and/or use of public works on adjoining land. One set of rules applies where some of the claimant's land is expropriated for the works. Another, much more restrictive, set of rules applies where, as in *St. Pierre*, none of the claimant's land is expropriated for the works. The rational bases of the two sets of rules may be explained as follows:

(1) If a portion of A's land is expropriated for, say, a new highway, A is entitled to be fully compensated for (a) the market value of the land expropriated and (b) any economic loss (injurious affection) caused to his remaining land as a result of the *construction or use* of that portion of the highway on the land which was originally his. The basis of this broad measure of compensation is the fiction that when A's property, or any part of it, is expropriated, he is deemed to be a willing seller and the expropriating authority is deemed to be a willing buyer. It follows that a prudent, informed and willing seller will only sell a portion of his land at a price that takes into account not only the market value of the portion sold but also any diminution in value caused to the remaining land by reason of the construction or use of works by the purchaser or his successors in title on the portion sold. The application of these vendor and purchaser based rules is illustrated in the leading cases *Sisters of Charity of Rockingham* v. *The King*[3] and *Edwards* v. *Minister of Transport*.[4]

---

[1] R.S.O. 1980, c. 148.

[2] *St. Pierre* v. *Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906, (1987), 38 L.C.R. 1.

[3] [1922] 2 A.C. 315, (1922), 67 D.L.R. 209 (P.C.).

[4] [1964] 2 Q.B. 134, [1964] 1 All E.R. 483 (C.A.). The law as applied in *Edwards* was reversed by the Land Compensation Act, 1973, c. 26, s. 44(1), but remains unchanged in Canada. See for example, *Indevco Management Ltd.* v. *City of Medicine Hat* (1987), 37 L.C.R. 132 (Alta. Land Compensation Board).

(2) If, as in *St. Pierre*, a highway is constructed on land purchased or expropriated from B, A's neighbour, A's recovery of damages or compensation from the highway authority for economic loss caused to A's land is limited to loss resulting from the *construction* (but not the *use*) of the highway.[5] The claim must be based on those principles of tort which relate to unauthorized interference with the use and enjoyment of land, that is the law relating to nuisance. However, if the highway's construction and use are authorized by statute, as is usually the case, the highway authority would have a complete defence (statutory authority) to any action brought by A to recover damages in nuisance. In that event A's only recourse is to claim compensation for injurious affection pursuant either to the express or implied provisions of the authorizing statute or to some general legislation providing for compensation in such cases.

As Scott L.J. said in *Horn* v. *Sunderland Corporation*[6] with reference to the English Lands Clauses Consolidation Act, 1845,[7] which was judicially construed as providing for compensation for injurious affection where none of the claimant's land has been expropriated,

> . . . that has nothing to do with compulsory acquisition. It is a remedy for injuries caused by the works authorized by the Act to the lands of an owner who has had none of his land taken in that locality. The remedy is given because Parliament by authorizing the works, *has prevented damage caused by them from being actionable, and the compensation is given as a substitute for damages at law.*

It follows that if the statutory compensation claim is given in substitution for damages at law it should only succeed if, but for the statute authoriz-

---

[5] The so-called "construction" rule originated in the decision of the House of Lords in *Hammersmith Ry. Co.* v. *Brand* (1869), L.R. 4 H.L. 171, which involved a claim to compensation pursuant to sections 6 and 16 of the Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. The sections were preceded by the heading "And with respect to the Construction of the Railway. . . be it enacted as follows". The majority regarded this heading as indicating that the Legislature only intended to provide compensation for injurious affection damage arising from the *construction* of the railway and not from its *use*. In later English and Canadian cases involving municipalities (for example, *Fletcher* v. *Birkenhead Corporation*, [1907] 1 K.B. 205 (C.A.), expressly followed by the Supreme Court of Canada in *Toronto* v. *J.F. Brown* (1917), 55 S.C.R. 153), the construction rule was not applied because the wording of the relevant statutes was different in providing compensation for injurious affection damages "necessarily resulting from the exercise of . . . powers . . .". Although the Report of the Ontario Law Reform Commission (1967), referred (at p. 47) to *Toronto* v. *J.F. Brown* and noted that the construction rule "may not be applicable in Ontario" it recommended that "authorities remain liable for damages caused by the construction of the work and *remain exempt* from liability where damage is caused by the use of the work" (p. 47, emphasis added). This recommendation was adopted in s.(1)(1)(e)(ii) of the Ontario Expropriations Act, 1968-69, c. 36 (now R.S.O. 1980, c. 148) which restricts the definition of injurious affection to damages "resulting from the construction and not the use of the works".

[6] [1941] 2 K.B. 26, at pp. 42-43. (Emphasis added).

[7] 8 & 9 Vict. c. 18.

ing the works, it would have succeeded as a claim for damages at law, that is only if the economic loss would have been actionable.

The actionable rule, conceived in the United Kingdom in the middle of the nineteenth century,[8] has been consistently applied by Canadian courts, including the Supreme Court of Canada in *The Queen* v. *Loiselle*.[9]

The governing legislation in *St. Pierre* was the Ontario Expropriations Act[10] which provides: "A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection." However, where the statutory authority does not expropriate part of the owner's land the Act[11] defines "injurious affection" as:

> (A) such reduction in the market value of the land of the owner, and
> (B) such personal and business damages,
> resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute.

The Act thus incorporates the actionable and construction rules. McIntyre J., delivering the judgment of the court,[12] agreed with Houlden J.A., in the Court of Appeal, when he said "[o]ur task is to interpret the language of the Expropriations Act",[13] namely sections 21 and 1(1)(e)(ii). Accordingly, "the sole question for determination [was] whether the construction of the highway with its resultant damage to the property of the appellants would have been actionable at common law".[14] In the circumstances of *St. Pierre* "the only basis for an action to recover damages . . . would be the tort of nuisance".[15]

After briefly reviewing the law of nuisance and denying any suggestion that the categories of nuisance are or ought to be closed, McIntyre J. concluded that the St. Pierres's economic loss was due to "the loss of prospect or the loss of view".[16] Before the construction their property was in a rural setting with a pleasant outlook. After the construction the property had a modern highway on one side. However, at common law "there can be no recovery for the loss of prospect".[17]

---

[8] The seminal case is *Caledonian Ry* v. *Ogilvy* (1856), 2 Macq. 229 (H.L. Scot.).

[9] [1962] S.C.R. 624, (1962), 35 D.L.R. (2d) 274.

[10] *Supra*, footnote 1, s. 21.

[11] S. 1(1)(e)(ii).

[12] McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ. Chouinard J. took no part in the judgment.

[13] *Supra*, footnote 2, at pp. 913 (S.C.R.), 6 (L.C.R.).

[14] *Ibid.*, at pp. 914 (S.C.R.), 7 (L.C.R.).

[15] *Ibid.*

[16] *Ibid.*, at pp. 916 (S.C.R.), 8 (L.C.R.).

[17] *Ibid.*

Finally, in denying recovery, the court espoused the "burden on the public purse" argument. Highways are necessary for the public good; inevitably the construction of highways causes disruptions but "their utility for the public good far outweighs the disruption and injury which is visited upon some adjoining lands".[18] If every landowner whose property was damaged "by reason only of the construction of a highway on neighbouring lands" was entitled to compensation that "would place an intolerable burden on the public purse".[19]

It has been noted that for purposes of the appeals the parties agreed that the $35,000 loss in market value resulted from the mere existence of the highway and that no claim was being made for any additional loss that might arise from the use by traffic after the highway was opened. Without this finding on the part of the Land Compensation Board at first instance and the subsequent agreement, the St. Pierres would have been faced with a second obstacle to recovering compensation, namely the common law "construction rule" which is incorporated in the definition of injurious affection in section 1(1)(e)(ii) of the Ontario Expropriations Act.[20] Where no land is expropriated from the claimant the section provides that the recovery of compensation for injurious affection is limited to damages "resulting from the construction and not the use of the works". In this context "construction" includes not only acts done in the course of construction but also the completed fact of construction but does not include, as was argued in *St. Pierre*, "the apprehension of the intended use of authorized works".[21] In the Court of Appeal Weatherston J.A. thought that the argument was "too fine a point".[22] In using the word "construction" the Ontario Expropriations Act employed the language of the case-law with the result that "[t]he reduction in the market value of the claimants' lands, caused by the apprehension that the new highway would be used for its intended purpose, was not 'injurious affection' within the meaning of the Act, and is not compensable".[23] If no land is taken, there is no claim for compensation based on reasonable apprehension of use.

Houlden J.A. said[24] that it was regrettable that the damage suffered by the St. Pierres did not give rise to a cause of action in nuisance and was therefore not compensable as injurious affection under the Expro-

---

[18] *Ibid.*

[19] *Ibid.*

[20] *Supra*, footnote 1.

[21] (1984), 2 D.L.R. (4th) 558, at p. 564 (Ont. C.A.).

[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid.*, at p. 566.

priations Act. However, like McIntyre J., he subscribed to the "burden on the public purse" argument.[25]

The "public purse" reasoning is also to be found in the English cases. Thus, in *Argyle Motors Ltd.* v. *Birkenhead Corporation*[26] the House of Lords reaffirmed earlier cases and held that, because no land had been expropriated, the appellant company could not recover compensation for loss of profits attributable to the diversion of traffic which had formerly passed its car showrooms. Lord Wilberforce and Viscount Dilhorne said that the awarding of compensation in such cases was a matter of policy for Parliament and not the courts. Lord Wilberforce stated:[27]

> . . . though it might be said that a generous policy of compensation would favour compensation for losses through works of social benefit, a policy to this effect, however just it might appear in a particular case, involves too great a shift in financial burden and too many adjustments or qualifications (if it were to be workable) to be suitable for introduction by judicial decision.

Reform

In 1972 a United Kingdom Government White Paper[28] proposed a number of changes in the law to compensate the owners of properties depreciated in value by the use of public works. These changes were effected by the Land Compensation Act, 1973.[29] In certain circumstances provision is made for the payment of compensation for the depreciation in value caused to residential properties as a result of noise, vibrations, smell, fumes, smoke and artificial lighting from certain specified works, including highways. The Act does not provide compensation for loss of business caused by the diversion of traffic, as in *Argyle*, or for depreciation in value caused by the loss or impairment of prospect or view as in *St. Pierre*.

Canadian law reform agencies have either just nibbled at the injurious affection compensation problem or disclaimed any mandate to deal with it. In 1964 the British Columbia Clyne report recommended the retention of the "actionable rule" and concluded that the "construction" rule might not be the law in British Columbia.[30] However, the long awaited Expropriation Act[31] expressly provides that no amendments or repeals effected by the new Act "shall be deemed to change the law respecting injurious affection where no land of an owner is expropriated, and an owner whose land is not taken or acquired is, notwithstand-

---

[25] *Ibid.* He referred to the dictum of Nesbitt J. in *The King* v. *MacArthur* (1904), 34 S.C.R. 570, at pp. 576-577; also cited by McIntyre J., *supra*, footnote 2, at pp. 911 (S.C.R.), 4 (L.C.R.).

[26] [1975] A.C. 116 (H.L.).

[27] *Ibid.*, at p. 130.

[28] Cmnd 5124, Development and Compensation—Putting People First (1972).

[29] Land Compensation Act 1973, c. 26 (U.K.).

[30] British Columbia Royal Commission on Expropriation (1964), pp. 114, 166.

[31] S.B.C. 1987, c. 23, s. 40(2).

ing those amendments or repeals, entitled to compensation to the same extent, if any, had those enactments not been amended or repealed''. The 1967 Ontario report[32] recommended against abolishing the actionable rule or extending the ''construction'' rule to include ''use'' on the basis of the ''burden on the public purse'' argument which it considered needed further study. The 1971 British Columbia report[33] recommended the retention of the actionable rule pending the investigation of the economic consequences of its abolition but agreed with the Clyne report that the construction rule should include ''use''. The 1973 Alberta report[34] considered the restrictive rules but made no recommendations about them except that they should not be part of any expropriation statute.[35] Finally, at the Federal level a Working paper issued by the Law Reform Commission in 1975[36] stated that a review of the law relating to injurious affection was outside the scope of the paper but that the Commission was considering the preparation of a separate study. No such study appears to have been made to date notwithstanding that in 1976 the Commission reported that the common law of injurious affection was ''badly in need of reform but beyond the scope of this paper''.[37]

In *St. Pierre* the Supreme Court has indicated quite unequivocally that any liberalization of the bases of compensation for economic loss caused to landowners from the use of public works on adjacent land will not come, directly or indirectly, through judicial expansion of the law of tort but only through legislation or *ad hoc* administrative decisions.[38]

The actionable rule equates the liability of statutory bodies which cause injurious affection damage to adjoining land and the liability of private landowners who cause similar damage without the sanction of statutory powers. However, it has been argued[39] that this equation is

---

[32] *Loc. cit.*, footnote 5, pp. 48-49.

[33] Law Reform Commission of British Columbia, Report on Expropriation (1971), pp. 162-165.

[34] Institute of Law Research and Reform, Report No. 12 (1973), p. 100.

[35] The Alberta Expropriation Act, R.S.A. 1980, c. E-16, has no provisions for injurious affection damage where no land is expropriated.

[36] Law Reform Commission of Canada, Working Paper 9, Expropriation (1975), p. 100.

[37] Law Reform Commission of Canada, Report on Expropriation (1976), p. 30.

[38] For example, the British Columbia Ombudsman issued a report (Skytrain Report, Public Report No. 8, November 1987) recommending the expropriation at current value had the line not been built, of single-family homes most severely affected by proximity to ''Skytrain'', the Lower Mainland light rapid transit system. He also recommended a rebate proposal to reimburse homeowners for the double glazing of windows, insulation and landscaping. In February 1988 the British Columbia Transit Authority asked the Provincial Government for one million dollars to assist in effecting the recommendations.

[39] E.C.E. Todd, The Mystique of Injurious Affection in the Law of Expropriation (1967), U.B.C. Law Rev.—C. de D. (Centennial Edition) 127; and see the B.C. Report on Expropriation, *op. cit.*, footnote 33, pp. 161-163.

inequitable because, as a matter of public policy, it is preferable that the general public, rather than private landowners, should bear the burden of economic losses caused by the construction and use of public works. In short, the actionable rule should be abolished and all provable economic loss should be recoverable subject to the following limitations:

(1) The onus of proof of economic loss be borne by the claimant.

(2) The application of general rules of remoteness of damages.

(3) A limitation period for making a claim after the commencement of the use of the particular public work or after any substantial change in the nature or use of the work.

(4) An offset of the value of any economic benefit accruing to the claimant as a result of the public work, the onus of proving such benefit to be on the authority from whom damages are claimed.

* * *

ADMINISTRATIVE LAW—LABOUR LAW—JUDICIAL REVIEW—WHETHER CURIAL DEFERENCE IS DUE ARBITRAL INTERPRETATIONS OF HUMAN RIGHTS PROVISIONS IN COLLECTIVE AGREEMENTS: *St. Paul's Roman Catholic Separate School* v. *C.U.P.E. and Huber*

Ken Norman*

> In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems *except for the resolution of purely legal questions*.[1]

The Decision

Four years ago, Swan and Swinton asserted that the relationship between human rights legislation and collective agreements was not a happy one. They predicted that without some clear legislative action directed at producing coherence amongst human rights inquirers, arbitrators and courts, the then existing awkward situation could only worsen.[2] The Saskatchewan Court of Appeal has now demonstrated that Swan and Swinton's judgment has continuing currency. In *St. Paul's Roman*

---

*Ken Norman, of the College of Law, University of Saskatchewan, Saskatoon, Saskatchewan. A version of this comment was presented to the 5th Annual Labour Arbitration Conference, Labour Arbitration: Issues in Grievance and Interest Arbitration, in Calgary, on June 10, 1987. I am grateful for the research assistance of James Nugent.

[1] *Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act* (1987), 38 D.L.R. (4th) 161, at p. 235 (S.C.C.), per McIntyre J. (Emphasis added).

[2] K.E. Swinton and K.P. Swan, The Interaction Between Human Rights Legislation and Labour Law, in K.P. Swan and K.E. Swinton (eds.), Studies in Labour Law (1983), p. 142.

Catholic Separate School District v. *C.U.P.E. and Huber*,[3] a dismissed grievor found herself in the following fix. In August of 1979, Elaine Huber was hired by the Saskatoon Catholic School Board as a clerk-steno. She completed the job application form by filling in the space marked "marital status" with the word "married". Six months later she was fired when it came to her employer's attention that she was living "common-law". With the support of her union, a grievance was brought to arbitration alleging that the School Board had violated the anti-discrimination clause in its collective agreement with C.U.P.E., which specifically made reference to "marital status" as a protected category.

A little over a year later, the majority of the Board of Arbitration which heard the grievance sustained it on the ground that Elaine Huber had been discriminated against on the ground of her marital status and that, accordingly, the School Board did not have just cause to dismiss her. The arbitration award was taken up to the Court of Queen's Bench for review and was quashed by Estey J. on the ground that, by taking a common-law relationship to be included within the notion of "marital status", it displayed a "patently unreasonable" interpretation of what was included in that phrase. This judgment was appealed to the Saskatchewan Court of Appeal, which finally delivered two judgments on the matter on March 20, 1987.

Bayda C.J.S. and Matheson J. (*ad hoc*) had no difference of opinion as to the standard of judicial review to be applied to the case. They agreed that it was not a matter of "correctness" but rather one of "reasonableness", that the appropriate question for a reviewing judge was whether the interpretation given to the phrase "marital status" by the arbitrator was patently unreasonable. But an application of this test resulted in the two judges reaching polar opposite conclusions. The third member of this panel, Woods J.A. took no part in the judgment. Thus, with the Court of Appeal split 1/1/0, the quashing judgment of Estey J. stood.

Bayda C.J.S. noted that Canadian society has in recent years developed a greater concern with human rights through the enactment of statutory human rights codes, followed by the proclamation of the Charter of Rights and Freedoms.[4] He then looked to the way in which the Ontario and Saskatchewan human rights codes deal with common law status by including it in the definition of "marital status".[5] He concluded:[6]

---

[3] (1987), 55 Sask. R. 81. (Sask. C.A.).

[4] Constitution Act, 1982, Part I. (Hereafter the Charter).

[5] *Supra*, footnote 3, at p. 86, where it is noted that the Ontario Human Rights Code, 1981, S.O. 1981, c. 53, statutorily defines "marital status" to include "the status of living with a person of the opposite sex in a conjugal relationship outside marriage". Subsection 1(1) of the Saskatchewan Regulation 216/79 under The Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1, defines "marital status" so as to include the state of "living in a common-law relationship".

[6] *Ibid.*, at p. 87.

> Not only is the interpretation by the Board, of the human rights clause under scrutiny here, in conformity with the trend in human rights legislation, it is in tune with the social realism of the day . . .
>
> Whether legal logic recognizes it or not, the social realities of the day are that many persons of the opposite sex (we are not here concerned with any other situation) who have not gone through a ceremony of marriage recognized by law regard themselves as committed to each other in a relationship which in most respects resembles marriage and for all *de facto*, but not *de jure*, purposes is a marriage.

Accordingly, Bayda C.J.S. found that the arbitrator's interpretation of "marital status", being both in line with human rights legislation definitions and in tune with social realism, was not patently unreasonable.

Matheson J. considered neither of the factors relied upon by Bayda C.J.S. to be of much moment. He noted that the status of living with a person of the opposite sex in a conjugal relationship outside marriage no longer attracts social ostracism and that this state of affairs accounts for the inclusive definitions employed by statute in Ontario and by regulation in Saskatchewan. But this did not move him to conclude that reasonable people might differ as to whether "marital status" might be said to speak to relationships outside marriage under The Marriage Act.[7] Given what judges have said about the issue under the Criminal Code[8] and the Canada Evidence Act,[9] Matheson J. was of the opinion that:[10]

> . . . it is indeed a perversion of a phrase which has a significant meaning in our society to encompass therein something which is clearly the antithesis of the phrase. The concept of "marriage", which has a recognized legal meaning, was intended to exclude relationships which do not conform to "marriage".

Thus, for the arbitrator to have interpreted the contested phrase so as to include a common-law relationship was to have produced a patently unreasonable result, to have achieved a "complete distortion" of the phrase.[11]

The Proper Extent of Judicial Deference

What I find particularly remarkable about *Huber* is that two opinions purport to apply the same standard of judicial review of a consensual arbitrator, taking it to be beyond controversy that the arbitrator's interpretation of "marital status" called for deference from the judiciary. That this ought to be the case where a consensual arbitrator is engaged in an exercise of interpreting the meaning of a term within a collective agreement is now clear.[12] But I want to argue that there are terms and terms. Where the word or phrase to be interpreted does not

[7] R.S.S. 1978, s. M-4. See Matheson J., *supra*, footnote 3, at p. 89.

[8] R.S.C. 1970, c. C-34.

[9] R.S.S. 1970, c. E-10.

[10] *Supra*, footnote 3, at p. 89.

[11] *Ibid.*, at p. 90.

[12] Eleven years ago, the Saskatchewan Court of Appeal was not prepared to extend any deference to consensual arbitrators. In *City of Regina* v. *Amalgamated Transit Union*

amount to a general question of construction of the collective agreement, but rather precisely reflects a concept embedded in human rights legislation, there does not seem to me to be any persuasive case for deference. And the matter is not resolved by *Shalansky* v. *Board of Governors of Regina Pasqua Hospital.*[13] Indeed Laskin C.J.C. explicitly left open the issue as to whether any judicial deference is called for when an arbitrator interprets a general question of law.[14]

But in *Huber* the Saskatchewan Court of Appeal took it as settled that consensual boards of arbitration deserved the same sort of curial defence as did statutory administrative agencies whether or not protected by a privative clause. Authority for this proposition was said to be the court's decision four months earlier in *Prince Albert Pulp Company Ltd.* v. *Canadian Paperworkers Union.*[15] Sherstobitoff J.A., for the court, had this to say about the matter in a case involving a dispute as to whether a long term disability plan violated the provisions of a collective agreement:[16]

> . . . the distinction between standards of review for statutory boards as opposed to consensual boards, and boards protected by a privative clause as opposed to those not so protected, has in the labour relations context been largely, if not entirely, eliminated.

What must be noted is that Sherstobitoff J.A. did not address his mind to the sort of question posed by this comment. He was faced with a case that had simply to do with a general question of construction of the collective agreement. More recently, the Saskatchewan Court of Appeal has again employed the "patently unreasonable" test to a decision of a consensual arbitration board in *C.U.P.E. and The Saskatoon Gallery and Conservatory Corp.*,[17] which involved a question of whether to give a

---

Division No. 588 and Setter, [1976] 3 W.W.R. 681 the court simply chose to correct an error of law made by a board of arbitration. I argued that the cases cited and the reasoning employed by the court simply could not withstand close analysis; see (1977), 41 Sask. L. Rev. 331. The Supreme Court of Canada finally adopted the position that deference was due to consensual arbitrators in *Shalansky* v. *Board of Governors of Regina Pasqua Hospital* (1983), 145 D.L.R. (3d) 413, in cases where the arbitrator was faced with what Laskin C.J.C. called "a general question of construction of the collective agreement"; at p. 415. *Cf., Batten and Newfoundland Assoc. of Public Employees* v. *Bay St. George Community College* (1986), 58 Nfld. & P.E.I.R. 171 (Nfld. S.C.), where it is said to be patently unreasonable for a collective agreement to be interpreted on the footing of one of its purposes rather than its terms.

[13] *Ibid.*

[14] *Ibid.*, at p. 414. Laskin C.J.C. points out that "I do not find this a proper occasion upon which to consider whether the *Absalom* rule, *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.*, [1933] A.C. 592, should no longer be held to apply to consensual labour arbitration". More about the *Absalom* rule in due course, *infra*, at p. 369.

[15] [1987] 1 W.W.R. 628 (Sask. C.A.).

[16] *Ibid.*, at p. 634.

[17] Unreported judgment pronounced April 3, 1987 (Sask. C.A.) #8227.

subjective or objective reading to a qualification clause in a promotion article of a collective agreement. Bayda C.J.S., for the court, citing *Shalansky* and *Prince Albert Pulp Company*, said:[18]

> The authorities in this respect are well-settled. The test is the "patently unreasonable" test and not the "correctness" test.

Thus the doctrine of deference to arbitrators, when the issue is one of construing the terms of a collective agreement, has become sedimented. I want to argue that there is reason to reconsider it when the question is one of giving meaning to the concept of discrimination and all that goes with it in domestic human rights law, as the same is now tied-in to the equality protections of the Charter. My argument starts from the administrative law proposition that curial deference is due only when there is good reason for it to be paid. So far as most terms of a collective agreement are concerned there is every reason to give primacy to the reading given to them by an arbitrator, the parties' adjudicator of choice. However, this is not the case with regard to a human rights law category such as "marital status", which the parties have not coined. Rather they have simply seen fit to incorporate it into the terms of their collective agreement.

I begin then with the basic administrative law doctrine as to when judicial deference to the interpretive judgments of administrative agencies is called for. Evans has recently summed up the state of judicial review of statutory administrative tribunals.[19] The judiciary, led by Laskin C.J.C. and Dickson C.J.C. in the Supreme Court, within the last decade, have come to be persuaded that:[20]

> The composition and institutional structure of the agencies, together with the expertise and the wide range of procedural tools available to them. . . [warrant curial deference since] . . . these bodies had indeed been given the primary statutory responsibility for implementing and elaborating the legislative mandate within their area of regulation.

The current policy of judicial deference[21] entails a recognition that the complex doctrines of judicial review which Canadian courts adopted

---

[18] *Ibid.*, at p. 7. Bayda C.J.S. also cited *Sollars* v. *C.U.P.E.*, [1984] 4 W.W.R. 44 (Sask. C.A.), as authority for this assertion. But *Sollars* was a case involving judicial review of the decision of the Saskatchewan Labour Relations Board, not the award of a consensual arbitrator. Thus, it does not serve as any sort of support for the broad proposition that consensual arbitrators must be deferred to by judges even when they are engaged in an external interpretation of statute or an interpretation of language in a collective agreement which mirrors statutory provisions such as tends to be the case in human rights arbitrations.

[19] J.M. Evans, Developments in Administrative Law: The 1984-85 Term (1986), 8 Sup. Ct. Law Rev. 1.

[20] *Ibid.*, at p. 27.

[21] Which flows from *C.U.P.E.* v. *New Brunswick Liquor Commission*, [1979] 2 S.C.R. 277, which sets forth the "patently unreasonable" test. The test has recently been undercut somewhat by *Syndicat des employés de production du Québec et de l'Acadie* v. *C.B.C.*, [1984] 2 S.C.R. 412.

from the British judiciary amounted to a *carte blanche* for a reviewing judge to correct errors as he found them as if he were sitting on appeal. It also involves a retreat from the common law conceit that all questions of interpretation were best left to the judges to get right:[22]

> With an increasing recognition of the range of interpretative choice often available as a result of the open texture and ambiguities of statutory language, the courts have seemed more prepared to allow the interstices to be filled by the agency's expertise rather than by the common law.

What this might mean in the field of non-statutory consensual labour arbitration emerged in the *Volvo Canada Ltd.* v. *United Auto Workers*.[23] As George Adams[24] has noted, *Volvo* amounted to a rejection of the impossible distinctions required by the two-pronged rule in *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.*,[25] which saw all the difference being made by the reviewing court between a so-called specific question of law being given a consensual arbitrator and a general question of law. Deference was due only in the former case. In effect, *Volvo* brought a doctrine of curial deference into play for consensual arbitrators which looks pretty much like the "patently unreasonable" test for specialized statutory tribunals established in *C.U.P.E.* v. *New Brunswick Liquor Commission*.[26] Laskin C.J.C. was the boldest of the judges in *Volvo*. He argued that:[27]

> . . . there is a good case for affirming a hands-off policy by the Courts on awards of consensual arbitrators, subject to bias or fraud or want of natural justice and, of course, to jurisdiction in the strict sense and not to the enlarged sense which makes it indistinguishable from questions of law.

Laskin C.J.C. would have this apply to almost every issue of interpretation arising out of the language of a collective agreement, in a way which was tantamount to the first branch of the *Absalom* rule with regard to specific questions of law.[28] But, in any case, some sort of judicial restraint was called for:[29]

---

[22] Evans, *loc. cit.*, footnote 19, at p. 28.

[23] (1980), 99 D.L.R. (3d) 193 (S.C.C.).

[24] George Adams, Canadian Labour Law: A Comprehensive Text (1985), pp. 205-206. For a discussion of the principles of judicial review in the field of labour relations generally, see, Michael MacNeil, Recent Developments in Canadian Law: Labour Law (1986), 18 Ottawa Law Rev. 83, at pp. 100-106.

[25] [1933] A.C. 592 (H.L.).

[26] *Supra*, footnote 21.

[27] *Supra*, footnote 23, at p. 211.

[28] He did not carry any of his brethern with him this far.

[29] *Supra*, footnote 23, at p. 211. For Laskin C.J.C.'s consistent efforts to curb the enthusiasm of the judiciary for giving primacy to common law doctrine and values over those of the legislative branch of government in his labour and administrative law opinions see, special issue of University of Toronto Law Journal, Chief Justice Bora Laskin: A Tribute (1985), 35 U.T.L.J. 321, especially H. Janisch, Bora Laskin and administrative law: An unfinished journey, p. 577; David Beatty and Brian Langille, Bora Laskin and labour law: From vision to legacy, p. 672.

> In other cases of a reference to consensual arbitration, the approach to review ought also to be marked by caution in the light of the fact that the parties to a collective agreement have thereby established their own legislative framework for the regulation of the work force engaged in the enterprise, have designated their own executive and administrative officers to apply the agreement on an ongoing basis and have provided for their own enforcement machinery to resolve and, if need be, to effect a final and binding settlement of all differences arising under the terms of the agreement.

Four years prior to *Volvo* the Supreme Court of Canada handed down its judgment in *McLeod* v. *Egan*.[30] This was a case where certain provisions of a collective agreement were at odds with The Employment Standards Act[31] of Ontario. The Ontario Court of Appeal had deferred to the interpretation of the statute which the arbitrator had offered. Laskin C.J.C. thought that they were wrong to do so:[32]

> Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but *a general public enactment* of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator.

The argument which I want to make hinges upon the question whether, given *McLeod* v. *Egan*, it makes any sense to draw a sharp distinction between the interpretation of a "general public enactment" by an arbitrator and the interpretation of a word or phrase in a collective agreement which precisely mirrors language used in a "general public enactment". To bring the discussion back to my point of departure in the *Huber* judgments, why should it be that curial deference is due to an arbitrator who interprets the phrase "marital status" contained in an anti-discrimination clause of a collective agreement when, under the doctrine of *McLeod* v. *Egan*, no such restraint would be warranted should

---

[30] (1974), 46 D.L.R. (3d) 150 (S.C.C.).

[31] S.O. 1968, c. 35 (see now R.S.O. 1980, c. 137).

[32] *Supra*, footnote 30, at pp. 151-152. (Emphasis added). Laskin C.J.C. made it plain that he was not saying that arbitrators had no business interpreting statutes. Rather, he said that they must do so, when such a statute bears upon the dispute before them. His point was only that there is no good reason to defer to their interpretation. The courts, ultimately the Supreme Court, have the responsibility to correct them if they err. For an example of an arbitration award which looks to the provisions of the Canada Labour Code, R.S.C. 1970, c. L-1, in order to declare certain contradictory clauses in the collective agreement to be null and void, see *Re C.N.R. and Canadian Telecommunications Union* (1978), 17 L.A.C. (2d) 142 (Adams). See also, *Re Wentworth County Board of Education and C.U.P.E.* (1984), 14 L.A.C. (3d) 366 (Kennedy). Just a week prior to its *Huber* judgment, the Saskatchewan Court of Appeal authored a bench judgment in *C.U.P.E.* v. *Integ Management*, [1987] Sask. Labour Rep. (Oct.) 33 upholding Scheibel J.'s judgment (1987), 52 Sask. R. 305 (Sask. Q.B.), applying the "correctness" test of *McLeod* v. *Egan* to an arbitral reading of s. 33 of the Trade Union Act, R.S.S. 1978, c. T-17.

the arbitrator find herself required to interpret the phrase "marital status" as it is to be found in The Saskatchewan Human Rights Code?[33]

It may be said that there are two answers to this question. First, there is a sort of institutionally progressive argument which holds not only that arbitrators are likely to do a better job than judges but also that they are similarly advantaged over human rights inquirers.[34] Second, there is the situation in *Huber* where one might well argue that the arbitrator's interpretation deserves far more respect than two of the three superior court judges who reviewed it were prepared to give. After all, he showed himself to be in step with the times by looking to what human right codes said about the phrase and to current societal mores.

Neither of these pragmatic points is persuasive. On principle there is just no good reason why a consensual arbitrator has any special claim to expertise in the matter of the meaning to be given to concepts of human rights, such as the protected category "marital status". Nor do the parties to the collective agreement, when they incorporate a statutory human rights concept into their collective agreements, provide any sort of argument from contract which might attract the sort of judicial deference which has become the judicial rule of the day in the aftermath of *Volvo* and *Shalansky*. The plain fact of the matter is that human rights codes exist in this country because there is no common law protection of human rights at all.[35] It is precisely for this reason that Laskin C.J.C., for the court, in *The Board of Governors of the Seneca College of Applied Arts and Technology* v. *Bhadauria*,[36] rejected the attempt by Wilson J.A. in the Ontario Court of Appeal to extend the common law to cover discriminatory practices as being:

> . . . foreclosed by the legislative initiative which overtook the existing common law in Ontario and established a different regime which does not exclude the Courts but rather makes them part of the enforcement machinery under the Code.

---

[33] S.S. 1979, c. S-24.1. It will be remembered that the only reason that the statute did not come into play in *Huber* is the special exemption given to religious schools in the Saskatchewan statute. Thus, one need only consider a case where no such exemption exists in order to confront the question which I pose.

[34] See, Swinton and Swan's contention in this latter regard, *op. cit.*, footnote 2, p. 36 *et seq.*, where an argument is made that human rights inquirers ought to defer to arbitrators on human rights cases so long as the procedure followed by the arbitrator was fair, the discrimination issue was fully argued, and the result was not inconsistent with the policies of the statute. See, Sandy Goundry, Sexual Harassment in the Employment Context: The Legal Management of Working Women's Experience (1984-85), 43 U.T.L. Rev. 1, at pp. 35-37, for an argument that a broad range of fora should be looked to by those who would have the rights of sexually harassed women vindicated, that one's focus ought not to be fixed on human rights inquirers even primarily.

[35] The best example is *Christie* v. *York Corporation*, [1940] S.C.R. 139, where the Supreme Court of Canada found nothing in the common law to support a claim by a black consumer to be free from discrimination at the hands of a tavern proprietor.

[36] (1981), 124 D.L.R. (3d) 193, at p. 203 (S.C.C.).

The courts are now institutionally involved in human rights law enforcement by being given appellate authority over the decisions of human rights tribunals and inquirers. And, given the anti-discrimination provisions of the equality rights sections of the Charter, it will ultimately be up to the Supreme Court of Canada to develop interpretations of equality comporting with the inherent dignity of the human person which, in short, fit with human rights definitions under human rights legislation and jurisprudence. There is coherence to all of this. And it is especially important that this be recognized in light of the "quasi-constitutional" status of human rights legislation. Human rights codes are not merely "general public enactments" in *McLeod* v. *Egan* terms, they are paramount over all other statutes. In *Re Winnipeg School Division No. 1 and Craton*,[37] McIntyre J., for the Supreme Court of Canada, said:

> Human rights legislation is of a *special nature* and declares public policy regarding matters of a general concern . . . It is . . . of such a nature that it may not be altered, amended, or repealed, nor may exceptions be created to its provisions, save by clear legislative pronouncement. To adopt and apply any theory of implied repeal by later statutory enactment to legislation of this kind would be to rob it of its special nature and give scant protection to the rights it proclaims.

Recently, in *Action Travail des Femmes* v. *Canadian National Railway Co.*,[38] Dickson C.J.C. quoted the first two sentences of this passage from *Craton*, with approval, and added:

> The emphasis upon the "special nature" of human rights enactments was a strong indication of the court's general attitude to the interpretation of such legislation.

Against this backdrop the argument for continued curial deference to arbitral interpretations of human rights words and phrases rings more than a little hollow. This is especially so given the present standards of judicial scrutiny employed with regard to decisions of human rights tribunals and inquirers. A recent case in point is *Central Alberta Dairy Pool* v. *Alberta Human Rights Commission*.[39] Here an appeal on a question of law was taken by the Central Alberta Dairy Pool from a decision

---

[37] (1986), 21 D.L.R. (4th) 1, at p. 6 (S.C.C.). (Emphasis added). This statement amounts to an endorsement by the full court of views expressed by Lamer J. in *Insurance Corp. of B.C.* v. *Heerspink*, [1982] 2 S.C.R. 145. See, Dale Gibson, The "Special Nature" of Human Rights Legislation: *Re Winnipeg School Division No. 1 and Craton* (1985-86), 50 Sask. Law Rev. 175.

[38] (1987), 40 D.L.R. (4th) 193, at p. 208 (S.C.C.).

[39] (1987), 8 C.H.R.R. D/3639 (Alta. Q.B.). The Manitoba Court of Appeal's judgments in *Platy Enterprises Ltd.* (1987), 8 C.H.H.R. D/3831 might also be looked to in this regard. The court simply disagreed with the line of inquiry and court decisions which have treated sexual harassment as a form of prohibited sex discrimination under human rights legislation. In the court's opinion, sex discrimination must be held to incidents of discrimination on the clear ground of gender. Sexual harassment occurs according to the personal characteristics of a particular woman, not simply because of her gender. The analysis of *Central Alberta Dairy Pool*, which follows, applies equally to *Platy Enterprises Ltd.*

of a Board of Inquiry under the Individual's Rights Protection Act[40] to MacNaughton J. of the Court of Queen's Bench. The issue was whether it was a *bona fide* occupational qualification for the Dairy Pool to have required an employee to attend work on March 29 and April 4, 1983, holy days under the tenets of the World Wide Church of God. What was in question entailed interpreting three judgments of the Supreme Court of Canada in human rights cases.[41] The Board of Inquiry found that the Dairy Pool had a duty to accommodate reasonably the employee's religious tenets with regard to these two holy days. MacNaughton J. simply disagreed, ruling that once it is established that a *bona fide* occupational qualification exists, there is no duty on the part of the employer to accommodate reasonably an employee.

Now, there will be those who will criticize MacNaughton J. for taking a point made in *Re Bhinder and Canadian National Railway Co.*[42] under the unique wording of the Canadian Human Rights Act[43] and unquestioningly transplanting it into Alberta's Individual Rights Protection Act.[44] They may also make the point that MacNaughton J. ought to have paid at least some deference to the board of inquiry on the largely factual finding concerning the central issue of *bona fide* occupational qualification and/or the duty to accommodate reasonably in the particular circumstances at hand on the work floor of the Alberta Dairy Pool's plant.[45] And the fora of first the Alberta Court of Appeal and then the Supreme Court of Canada are available for such arguments.

Given this open state of affairs, as between human rights inquirers and courts on appeal, the central question posed by this note is to ask why would it be right in a human rights case for a reviewing court to defer simply to an arbitrator on a test of "patent unreasonableness", without giving any reason why it would be appropriate in the circumstances to do so? In an effort to put this question into some further perspective one might look to the practices of arbitrators when they are

---

[40] S.A. 1980, c. 1-2.

[41] The cases were *Re Ontario Human Rights Commission and Simpson-Sears Ltd. (O'Malley)* (1985), 23 D.L.R. (4th) 321 (S.C.C.); *Re Bhinder and Canadian National Railway Co.* (1985), 23 D.L.R. (4th) 481 (S.C.C.); *Ontario Human Rights Commission* v. *Borough of Etobicoke* (1982), 132 D.L.R. (3d) 14 (S.C.C.).

[42] *Ibid.*

[43] S.C. 1976-77, c. 33, as amended.

[44] *Supra*, footnote 40.

[45] In *Iris McKinn* v. *Sault Ste. Marie Firefighters Assoc.* (1986), 8 C.H.R.R. D/3458 (Zemans) there is a good discussion of the reasons why a court on appeal from a human rights inquirer ought to exercise some deference. At para. 27639, the inquirer says: "As an administrative (as opposed to a strictly judicial) process, the human rights process in Ontario acquires a certain autonomy which the courts have evidenced a desire to protect and foster." See also, *Bahjat Tabar and Chong Mon Lee* v. *David Scott and West End Construction Limited* (1983), 3 C.H.R.R. D/1083.

invited by the parties to a collective agreement to give meaning to a human rights word or phrase contained in the agreement.

Two general approaches are available. On the one hand, the arbitrator, faced with the need to interpret human rights language or to consider whether a proffered reading of the collective agreement offends the provisions of human rights legislation, might look to the human rights statutes and jurisprudence as was done by the arbitrator in *Huber*. On the other hand, the arbitrator either explicitly or, as is more likely to be the case, implicitly could take a strictly contractual or private ordering theoretical stance and look only to arbitral doctrine. In the former category, the easy case is where a collective agreement contains an explicit non-discrimination clause. In *Re Canada Post Corporation and Canadian Union of Postal Workers*[46] the issue was whether an isolated act of unwanted intimate physical contact between a male supervisor and a postal worker amounted to sexual harassment within the meaning of those words as employed in the collective agreement. In answering that question in the affirmative, the award looked to the decisions of human rights inquirers on the matter of what sort of behaviour amounted to sexual harassment, beginning with Owen Shime's decision in Ontario in *Re Bell and Korczak*.[47] It also took guidance from a policy statement on sexual harassment published by the Canadian Human Rights Commission in February of 1983:[48]

> For the purposes of this award, I adopt the policy statement issued by the Canadian Human Rights Commission on harassment. Although it represents a regulatory interpretation of harassment under federal statute, it seems to me to properly capture the state of adjudicative analysis on the subject that we have now reached in this country.

A similar approach in looking to human rights definitions was taken in *Re Province of Saskatchewan and Saskatchewan Government Employees' Union*.[49] There a senior employee within a year of retirement was passed over in favour of a junior employee on an application for funding to attend a conference on the ground that the teaching institute's best interests would be served by funding the employee who would be with it the longest. The arbitrator looked to human rights cases and in particular an American federal court decision in order to establish whether this action by the employer constituted age discrimination as prohibited by

---

[46] (1983), 11 L.A.C. (3d) 13 (Norman). Foll'd in *Re Canada Cement Lafarge Ltd. and Energy and Chemical Workers' Union* (1986), 24 L.A.C. (3d) 202 (Emrich). See also, *Re Sunnyside Home for the Aged and London and District Service Workers' Union* (1986), 21 L.A.C. (3d) 85 (Picher); *Re Toronto Public Library and C.U.P.E.* (1985), 17 L.A.C. (3d) 22 (Pollock).

[47] (1980), 27 L.A.C. (2d) 227 (Shime).

[48] *Supra*, footnote 46, at pp. 18-19.

[49] (1986), 25 L.A.C. (3d) 1 (Ish).

the collective agreement or was justified.[50] In the end, the arbitrator not only found the employer's preference of the junior employee to be a breach of the collective agreement but went so far as to declare it to be a violation of The Saskatchewan Human Rights Code.[51]

In *Re United Steelworkers of America and Office and Professional Employees International Union*,[52] the arbitrator declined to adopt a narrow definition of "age" under the Ontario Human Rights Code, 1981.[53] Instead, he took the unlimited protection against age discrimination contained in an anti-discrimination clause of the collective agreement to mean what it says. A similar point was made in *Re Oshawa Times and Toronto Newspaper Guild*.[54] In these cases the arbitrators did not deny that they ought to strive to harmonize their reading of human rights words and phrases with the provisions of human rights legislation. But, in cases such as the ones before them, where the collective agreement was open to an interpretation which extended protection against discriminatory conduct beyond the reach of the legislated definitions, they saw no reason to import into the collective agreement the more restrictive definition.[55]

It would be quite another matter if the collective agreement's definition undercut the protections given by the human rights statute.

> For example, there would be no difficulty in applying the Code to find that a collective agreement provision which provided for mandatory retirement at age 55 was discriminatory, illegal, and therefore not binding upon individual employees.[56]

In *Re Stelco Wire Products Co. and United Steelworkers Union*[57] an arbitrator was faced with the question as to whether there was a duty on an employer to take steps to reasonably accommodate an employee

---

[50] *Ibid.*, at p. 4, where *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (C.A. 5th c.; 1976), is cited for the proposition that such a justification by an employer must be reasonably necessary to the essence of the business such as to undermine the business were the practice not to be followed.

[51] *Supra*, footnote 33.

[52] (1982), 8 L.A.C. (3d) 71 (Swan).

[53] S.O. 1981, c. 53.

[54] (1977), 14 L.A.C. (2d) 375 (McLaren).

[55] A great deal turned on the question before the arbitrators because the human rights legislation in Ontario did not protect those over the age of sixty-five from age discrimination whereas the collective agreements simply took their stand against age discrimination without any such limitation.

[56] *Re United Steelworkers of America, supra*, footnote 52, at p. 78. See also *Re Sunnyside Home for the Aged and London & District Service Workers' Union, supra*, footnote 46, for another endorsation of the proposition that anti-discrimination clauses of collective agreements ought to be construed by arbitrators in harmony with human rights legislation.

[57] (1986), 25 L.A.C. (3d) 427 (Brent).

who joined the Seventh Day Adventist Church with the consequence that he could not work from sundown Friday to sundown Saturday.[58] The collective agreement before her did not contain a non-discrimination clause, which led her to conclude:[59]

> As a consequence, we cannot automatically import into the agreement and its interpretation all of the Code [the *Ontario Human Rights Code*] and the relevant body of jurisprudence which has been built up by boards of inquiry and the courts in considering the meaning of specific provisions of the Code.

But, even so, the arbitrator took the position that it would be wrong for an arbitrator to be persuaded by an employer's argument in support of just cause for discipline if such an argument amounted to a violation of a human rights code.[60] This amounts to the same analytical process as is followed by an arbitrator faced with interpreting a non-discrimination clause. Human rights legislative, regulatory and adjudicative definitions count and will be looked to.

Set against this is the analysis of human rights issues, by arbitrators, which restricts itself to arbitral jurisprudence. In *Re Wire Rope Industries Ltd. and United Steelworkers*,[61] an arbitrator was presented with a case where the union alleged that a demotion amounted to discrimination against an employee on the ground of his union activity. The arbitrator cites a number of arbitral awards for the following proposition:[62]

> Discrimination is not a breach of a collective agreement. It is an inevitable consequence in the exercise of managerial prerogatives. It is discrimination in response to a prohibited motive, such as union activity, which raises discrimination to the level of a breach of the agreement. *It is because discrimination achieves its characterization by reason of its motivation rather than its result that it poses difficult problems of proof.*

Now, at the time of this award, five years ago, whether or not discriminatory conduct needed to be intentional was a rather large question in

---

[58] Such an obligation rests upon employers under provincial human rights codes in the aftermath of *O'Malley, supra*, footnote 41. For a recent example of an arbitrator taking up the *O'Malley* contribution to human rights law, see, *Re Chrysler Canada Ltd. and U.A.W.* (1986), 23 L.A.C. (3d) 366 (Kennedy).

[59] *Supra*, footnote 57, at p. 441.

[60] A similar position was adopted by the Ontario Court of Appeal in a wrongful dismissal case. In *MacDonald* v. *283076 Ontario Inc.* (1979), 102 D.L.R. (3d) 383 (Ont. C.A.), the court held that where a female employee claimed she was dismissed in order to make way for a male employee, she could rely on the Ontario Human Rights Code, R.S.O. 1970, c. 318, to show that her dismissal on the basis of sex could not amount to just cause. Arbitrations which have taken the same position are: *Re Brass Craft Canada Ltd. and International Association of Machinists and Aerospace Workers* (1984), 11 L.A.C. (3d) 236 (Roberts); *Re Algonquin College and O.P.S.E.U.* (1985), 19 L.A.C. (3d) 81 (Brent). In *Re Ontario Council of Regents for Colleges of Applied Arts and Technology* (1986), 24 L.A.C. (3d) 144 (Teplitsky), a preliminary arbitral award goes so far as to purport to apply directly s. 15 of the Charter to a mandatory retirement grievance.

[61] (1983), 13 L.A.C. (3d) 261 (Hope).

[62] *Ibid.*, at p. 265. (Emphasis added).

human rights law. There were decisions on both sides of the question, although the weight of the opinions of human rights inquirers and courts was on the side of extending the definition of discrimination beyond intention to include adverse effects.[63] We now know that the arbitrator got it dead wrong without even referring to that debate amongst human rights law adjudicators. In *Re Bhinder and Canadian National Railway Co.*,[64] the Supreme Court of Canada made it clear that it meant what it said in *O'Malley*,[65] that it was a mistake to restrict the definition of discrimination to intentional conduct.[66]

In conclusion there is reason to draw back from the choice made in *Huber* to exercise curial deference with regard to arbitral interpretation of a human rights provision in a collective agreement, at least in those cases where the words in question precisely mirror statutory human rights code language. I have argued that arbitrators possess no special claim to expertise in the field of anti-discrimination law. On top of this they are under no constraint to look to human rights doctrine when they are invited by the parties to construe a human rights provision which reflects a statutory concept. Thus *Huber* takes a false step by applying the "patently unreasonable" standard of review precisely because it makes no sense to take arbitral opinions on human rights to be more authoritative than those fashioned by human rights tribunals, inquirers or courts. The result of so exercising curial deference, willy nilly, in respect of all arbitral interpretations, save those covered by the *McLeod* v. *Egan*[67] statutory interpretation exception, may be something like this: victims of discriminatory conduct might find themselves denied a remedy on judicial review of an errant arbitrator's award whereas had they but chosen the forum of a human rights inquiry, their entitlement, on appeal, to challenge the correctness of the inquirer's interpretation would be unquestioned.[68]

---

[63] The Supreme Court of the United States had endorsed the broader definition of discrimination thirteen years earlier in *Griggs* v. *Duke Power Co.*, 420 F. 2nd 1225 (1970), 401 U.S. 424 (1971).

[64] *Supra*, footnote 41.

[65] *Supra*, footnote 41.

[66] *Supra*, footnote 41, at p. 498.

[67] *Supra*, footnote 30.

[68] See, Note, Arbitration After Communications Workers: A Diminished Role? (1987), 100 Harv. Law Rev. 1307 for a discussion of the preference for private ordering, for contractualism, as the sole basis for arbitral authority in the United States, in the aftermath of *Communications Workers* v. *Western Electric Co.*, 751 F. 2d 203 (7th Cir.; 1984). The student editors of the Harvard Law Review take this development to be a signal that the role of the arbitrator needs to be more modestly defined in order to recognize the hard fact that "arbitration's role in expanding the power of employees seems to be on an inexorable wane". They argue that employees must increasingly press for statutory guarantees of their rights rather than hope to make gains within the contractual constraints of *Communications Workers*.