

CONTRACTS—INTERPRETATION—CREATION OF
LEGALLY BINDING RELATIONSHIP—

“COLD COMFORT LETTER”: *Kleinwort Benson Ltd. v. Malaysia Mining Corp. Bhd.*

Donald H. Clark*

*Kleinwort Benson Ltd. v. Malaysia Mining Corp. Bhd.*¹ is a tantalizing decision, destined to rate at least footnote mention in future texts on contracts. The case is of interest for a number of reasons: (1) exceptionally in disputes between commercial enterprises, the primary legal issue was simply whether an assurance given by the appellant to the respondent bank was “intended to create legal relations”, and thus had contractual force; (2) on the resolution of that issue turned an agreed quantum of £12 million, including interest; (3) the decision denying contractual status to the critical clause, which was contained in a “letter of comfort”, raises serious doubts about the utility of this new device as a means of procuring commercial loans.

Towards the end of 1983 Malaysia Mining Corp. Bhd. approached Kleinwort Benson Ltd. for what the trial judge described as an “acceptance credit/multi-currency cash loan facility”² in favour of the former’s newly created and wholly-owned subsidiary, Malaysia Mining Corp. Bhd. Metals (Metals), to finance the subsidiary’s trading operations on the London Metal Exchange. The loan sought was more than three times larger than Metals’ fully paid up capital of one and a half million pounds. Kleinwort Benson initially proposed that the facility be taken by Malaysia Mining Corp. and Metals jointly, with joint and several liability, at a rate of commission of 3/8% per annum. This was rejected by Malaysia Mining Corp., as was Kleinwort Benson’s next proposal, that Malaysia Mining Corp. guarantee the loan to Metals. At that point Malaysia Mining Corp. suggested instead that it provide Kleinwort Benson with a letter of comfort in support of the loan. Kleinwort Benson agreed to this arrangement on condition that the rate of commission be increased by 1/8%, and itself drafted such a letter for Malaysia Mining Corp.’s adoption. After an immaterial amendment by Malaysia Mining Corp., the substantive terms of the document that it ultimately signed, and on the strength of which Kleinwort Benson gave

* Donald H. Clark, of the College of Law, University of Saskatchewan, Saskatoon, Saskatchewan.

¹[1989] 1 W.L.R. 379, [1989] 1 All E.R. 785 (C.A.).

²[1988] 1 W.L.R. 799, at p. 800g, [1988] 1 All E.R. 714, at p. 716a (Q.B.D.).

Metals a facility to a maximum of £10 million, in early 1985, read as follows:

(1) We hereby confirm that we know and approve of these facilities and are aware of the fact that they have been granted to MMC Metals Limited because we control directly or indirectly MMC Metals Limited.

(2) We confirm that we will not reduce our current financial interest in MMC Metals Limited until the above facilities have been repaid or until you have confirmed that you are prepared to continue the facilities with new shareholders.

(3) It is our policy to ensure that the business of MMC Metals Limited is at all times in a position to meet its liabilities to you under the above arrangements.³

In October 1985 the tin market collapsed. Metals, indebted to Kleinwort Benson to the limit, ceased trading and went into liquidation. Malaysia Mining Corp. disclaimed any liability.

As the trial judge and the Court of Appeal agreed, the issue was whether paragraph (3) of the letter of comfort was objectively to be construed as a contractual promise to cover any future indebtedness of Metals arising out of loans made thereafter by Kleinwort Benson up to the agreed limit. Evidence of either party's subjective intention was clearly inadmissible; the answer had to be found in the meaning to be attributed to the wording of paragraph (3). That wording, however, had to be viewed in context, account being taken of the matrix of surrounding circumstances. For the Court of Appeal, earlier negotiations between the parties had demonstrated Malaysia Mining Corp.'s unwillingness to assume legal responsibility for its subsidiary's loan. Further, the consequential increase of 1/8% in the commission charged by Kleinwort Benson (putting up the cost of the loan by £50,000 per annum if the facility were to be revolved four times a year) was explicable as a recognition of a need for compensation for lack of security. Approached in that light, the language of paragraph (3) should, it was held, be given its natural construction as a mere representation of existing fact, and thus an assumption of purely moral substantive obligation for the future. "It is our policy to ensure" was a formulation contrasting with the admittedly promissory language of the immediately preceding paragraph, wherein Malaysia Mining Corp. "confirm[ed] that we will not reduce our financial interest" in the subsidiary until repayment had been made in full. This latter commitment would have been unnecessary, it was noted, if paragraph (3) had been intended to have binding legal effect as a contractual promise.

The trial judge had seen things very differently. On an objective interpretation, he stated, paragraph (3):⁴

... seems to me to be crystal clear without embellishment. It is an undertaking that, now and at all times in the future, so long as Metals are under any liability to KB under the facility arrangements, it is and will be MCC's policy to ensure that Metals is in a position to meet those liabilities.

³ *Ibid.*, at pp. 803c-d (W.L.R.), 718a-b (All E.R.).

⁴ *Ibid.*, at pp. 811d (W.L.R.), 724d-e (All E.R.).

In his view the question was not what the words meant, but whether they were to be taken as intended to have contractual force. As the undertaking was given in the context of a commercial banking transaction it was presumptively to be regarded as intended to create contractual obligations, on the authority of *Edwards v. Skyways Ltd.*⁵ There was nothing in the wording of paragraph (3) to discharge the onus thus placed on Malaysia Mining Corp., necessitating a clear expression of disclaimer such as the "binding in honour only" formula held to have such effect in *Rose & Frank Co. v. J.R. Crompton Bros. Ltd.*⁶ That Malaysia Mining Corp. had earlier refused to give a guarantee did not suffice. Not only did the calling in aid of the parties' immediately prior dealings come "perilously close to infringing the principle that the course of negotiations cannot be invoked in order to influence the construction of a written document",⁷ but it also overlooked the "very substantial difference between . . . a guarantee and . . . a paragraph like the one under consideration in the present case".⁸ It did not follow as a necessary inference from the bank's failure to secure a guarantee that it did not seek an enforceable obligation through the letter of comfort. Reinforcing the presumption of contractual force were the evident importance to Kleinwort Benson of being able to have recourse against the parent in the event of the subsidiary's default, and its equally manifest reliance on paragraph (3) in advancing the loan.

In essence the determination to be made here was how the parties had *allocated a clearly perceived risk* (third party default). To formulate the issue as being whether there was or was not an "intention to create legal relations" appears calculated to lead to an all or nothing outcome. Thus in the instant case the trial judge's affirmative decision placed the whole loss on the borrower's parent company, while the Court of Appeal's contrary conclusion, that the parent assumed and dishonoured only a moral obligation, put the entire risk on the lending bank. As between these stark alternatives, on the facts, the latter seems the more in accord with commercial reality, given the bank's reflexive raising of the commission rate on the loan in direct reaction to Malaysia Mining Corp.'s refusal to assume the obligations of a guarantor. From the standpoint of risk allocation, however, the mechanism of the letter of comfort raises some interesting questions going beyond the significance of the factual matrix of the particular instance. As one writer has observed in relation to this recent phenomenon, its

⁵[1964] 1 W.L.R. 349, [1964] 1 All E.R. 494 (Q.B.D.).

⁶[1923] 2 K.B. 261 (C.A.).

⁷*Supra*, footnote 2, at pp. 809d-e (W.L.R.), 722j (All E.R.).

⁸*Ibid.*, at pp. 809f (W.L.R.), 723a-b (All E.R.). What Hirst J. had in mind here was that the enforcement of a guarantee, involving a claim for a liquidated sum, would in principle be more straightforward than recovery of unliquidated damages subject to dispute as to quantum and mitigation. In the instant case, however, it was common ground between the parties that the amount recoverable via either route would be the same: see *ibid.*, at pp. 809e (W.L.R.), 723a (All E.R.).

terms are typically “woolly”.⁹ Opacity of language obscures intention, yet *some* intention has to be attributed to the parties and some construction placed on ambiguous language. Hence the invocation of presumptive leanings displaceable only on the establishment of counter-probability. Two such presumptions or approaches to construction were brought into play in *Kleinwort Benson v. Malaysia Mining*. In this instance they pointed in opposite directions, but it will be argued that in any event they are unreliable as indicators of risk allocation in comfort letters. Note will then be taken of the possibility of a *shared* distribution of risk, either as a matter of party intention or—more controversially—through arbitration.

Crucial to the decision at trial in favour of the bank was the application, on the authority of *Edwards v. Skyways Ltd.*,¹⁰ of the presumption that a commercial agreement is intended to be legally binding. To rebut this presumption a clear statement to the contrary must appear in the agreement. The language of paragraph (3), it was held, being at best ambiguous on this point, did not enable Malaysia Mining Corp. to discharge the onus resting upon it. In the view of the Court of Appeal, however, the *Edwards v. Skyways* presumption was inapplicable in the instant circumstances, since the wording of paragraph (3) was not *ex facie* promissory. *Edwards* was distinguishable on the basis that the agreement there between an airline and its pilots' union promised to pilots leaving the company's employ an “*ex gratia* payment” of stated amount, the issue being whether the words “*ex gratia*” negated the *prima facie* enforceability of the promise. Such a distinction is unconvincing. At issue in *Edwards* was whether the company had assumed a contractual (and therefore enforceable) or merely a moral obligation. In the instant case the issue was the same, as indeed the appellate court appeared to recognize in its conclusion that Malaysia Mining Corp. incurred no liability through its decision “not to honour a moral responsibility which it assumed”¹¹ to cover its subsidiary's indebtedness. The presumption is inapt here, but for a more substantial, context-sensitive reason. When properly applicable, as in *Edwards*, it simply recognizes that as a matter of common sense when commercial parties make a bargain it is a safe working hypothesis (that is, more likely than not) that it is intended to have contractual import. In normal arm's length dealings there is simply no good reason to question such a mutual intent unless it is clearly disclaimed. A comfort letter by its very nature does not fit that mould. It is a subsidiary, albeit important adjunct of an undoubtedly binding loan transaction. In the words of one authority, “[c]omfort letters are commonly taken where the ‘guarantor’ is not willing to accept a legal commitment”.¹² In the very nature of things, therefore, the parties cannot be presumed to be at one on the question of binding obligation.

⁹ P. Wood, *Law and Practice of International Finance* (1980), p. 307, para. 13.5.

¹⁰ *Supra*, footnote 5.

¹¹ *Supra*, footnote 1, at pp. 394f (W.L.R.), 797j (All E.R.).

¹² Wood, *op. cit.*, footnote 9, p. 307, para. 13.5.

Less open to objection in the circumstances of the instant case is the Court of Appeal's recognition that the *contra proferentem* principle of construction, applied to paragraph (3), militated against a conclusion that Metals gave thereby a legally enforceable security:¹³

... the defendants are entitled to rely upon the fact that, if the plaintiffs required a promise as to the defendants' future policy, it was open to them as experienced bankers to draft paragraph 3 in those terms.

The trial judge had held the *contra proferentem* principle inapplicable on two grounds: (1) the lack of any ambiguity in the wording of the critical clause; (2) the co-authorship of the clause resulting from the minor verbal amendments made by Malaysia Mining Corp. to the bank's initial draft. Both grounds seem weak. That language which at trial was viewed as clearly contractual was on appeal held to be devoid of promissory import even *without* the invocation of the *contra proferentem* principle¹⁴ hardly bespeaks clarity of meaning, while Malaysia Mining Corp.'s purely semantic contribution to the final form of paragraph (3) has no rational connection to the parties' allocation of risk thereby. It must be questioned, however, whether the *contra proferentem* principle is in any event appropriately applicable in this context. Suppose, for example, that Malaysia Mining Corp. had itself provided the initial draft of the comfort letter, as the bank had in fact invited it to do. Would that circumstance alone have justified a presumptive assumption of legal liability? Surely not. We are not here dealing with a quasi-legislative, take-it-or-leave-it standard set of terms including an exemption or limitation clause—the normal situation giving rise to *contra proferentem* construction. Again it must not be overlooked that the parties were engaged in arm's length negotiation directed expressly toward risk allocation. In the instant case, the facts that Malaysia Mining Corp. had unambiguously rejected the obligation of a guarantor and that the bank's response had been to increase the commission rate by one-third are far more reliable indicia of intent than the happenstance of which party was primarily responsible for the drafting of the clause ultimately agreed upon.

From whatever indicia of intent inferences may be drawn as to the parties' risk allocation, however, the more important *substantive* question arises whether a comfort letter may be presumed to embody a total victory for either party in terms of placing the entire burden on the other. In an unreported English decision in 1985, Staughton J. said of letters of comfort:¹⁵

Such documents are evidently designed as a *compromise* between, on the one hand, a guarantee by the parent company of the debts of its subsidiary, and, on the other, a placebo which gives no undertaking at all by the parent company.

¹³ *Supra*, footnote 1, at pp. 394c (W.L.R.), 797f (All E.R.).

¹⁴ *Ibid.*

¹⁵ *Chemco Leasing SpA v. Rediffusion Plc.* (19 July 1985), affd., C.A. (11 Dec. 1986), quoted by Hirst J., *supra*, footnote 2, at pp. 806c-d (W.L.R.), 720e (All E.R.). (Emphasis added).

Both the trial and appellate courts in *Kleinwort Benson* paid lip-service, but little more, to paragraph (3) as a compromise on risk allocation. On the spectrum between guarantee and assumption of no risk at all by Malaysia Mining Corp., the trial judge located the point of “compromise” so close to a guarantee by Malaysia Mining Corp. that it was indistinguishable from the latter in relation to the quantum recoverable for breach. Contemplation by the parties of a contractual liability differentiated from a formal guarantee only by “alleged differences in certainty or of the availability of summary judgment” was dismissed by the appellate court as highly implausible.¹⁶ Yet its own analysis of the risk allocation embodied in paragraph (3) seems equally artificial as a witting compromise. Whilst denying the critical provision any force as a contractual promise, the Court of Appeal articulated without disagreement the concession by counsel for Malaysia Mining Corp. that it constituted an actionable *representation of fact* that at the time the assurance was given the parent company’s policy was to cover its subsidiary’s liabilities. Further, the representation was a continuing one operative unless and until a change of policy were communicated to the bank. Had the representation been shown to be false at the time of its making, it was recognized, losses incurred by the bank in detrimental reliance would have been recoverable in damages for the tort of deceit. As for losses on loans advanced subsequent to an uncommunicated decision by Malaysia Mining Corp. no longer to cover its subsidiary’s liabilities, “a claim for negligent misrepresentation might be advanced”.¹⁷

It might be noted in passing that it is not easy to see why a failure to notify the representee that a statement of a continuing nature, accurate when made, but falsified by subsequent events, would not render the representation fraudulent.¹⁸ What is striking, however, in illuminating the extremely limited practical enforceability in this context of liability rooted in misrepresentation (whatever the qualifying epithet) is the court’s almost summarily dismissive observation: “no such claim, of course, has been advanced in this case.”¹⁹ For the bank to have established that Malaysia Mining Corp. had in paragraph (3) wilfully misstated its policy would have required compelling evidence of deliberate deception. Yet Malaysia Mining Corp.’s very resistance to the bank’s claim indicated that at some point its policy *had* changed. Equally clearly, the change had not been communicated to the representee. The assumption must be, then, that the decision not to cover the subsidiary’s debt was made at some point *after* the bank had made its last advance under the loan agreement, so that despite the lack of notice no *material* detrimental reliance could be made

¹⁶ *Supra*, footnote 1, at pp. 394e (W.L.R.), 797h (All E.R.).

¹⁷ *Ibid.*, at pp. 386c (W.L.R.), 790j (All E.R.).

¹⁸ *Cf. With v. O’Flanagan*, [1936] Ch. 575 (C.A.).

¹⁹ *Supra*, footnote 1, at pp. 386c (W.L.R.), 790j (All E.R.).

out. Potential liability in misrepresentation is thus so theoretical as to be illusory. Far from being a compromise, the allocation of risk derived from the comfort letter by the Court of Appeal is as one-sided as that of the trial court.

The final possibility that must be considered is that the parties, in agreeing to a letter of comfort typically "redolent of ambiguity"²⁰ have thereby recognized their inability to arrive at a consensual distribution of risk. Perhaps the language of a clause such as that in the instant case is advisedly equivocal, representing in effect a reference to curial arbitration should it become necessary to determine how a loss is to be borne. Such an analysis has received judicial articulation from Staughton J. in the following persuasive terms:²¹

When two businessmen wish to conclude a bargain but find that on some particular aspect of it they cannot agree, I believe that it is not uncommon for them to adopt language of *deliberate equivocation*, so that the contract may be signed and their main objective achieved. No doubt they console themselves with the thought that all will go well, and that the terms in question will never come into operation or encounter scrutiny; but if all does not go well, it will be for the courts or arbitrators to decide what those terms mean. In such a case it is more than somewhat artificial for a judge to go through the process, prescribed by law, of ascertaining the common intention of the parties from the terms of the document and the surrounding circumstances; the common intention was in reality that the terms should mean what a judge or arbitrator should decide that they mean, subject always to the views of any higher tribunal. *Those considerations are . . . particularly likely to apply to a letter of comfort*, which is a subsidiary part of the business transaction and one on which the parties, *ex hypothesi*, are likely to find difficulty in reaching agreement.

Examples of studied ambiguity are not hard to find, though they are normally encountered in the world of diplomacy in the form of communiques fashioned by bureaucratic wordsmiths to conceal disagreement beneath a veneer of accord which can be given different interpretations to different constituencies. In the nature of things, however, these documents do not have to be given an authoritative meaning from which concrete consequences will flow.²² Analogies in the contractual context are elusive. The closest that I have been able to find is Lord Denning M.R.'s characterization of the background to the issue presented for decision in *Ocean Tramp Tankers Corp. v. V/O Sovfracht, The Eugenia*.²³ A time charterparty for a voyage from the Black Sea to India had been entered into during the Suez crisis. The normal route, through the Canal, was taken notwithstanding the hostilities, and the vessel was trapped for almost two and a half months by the Canal's closure. The issue was whether the contract had been

²⁰ Per Staughton J., in *Chemco Leasing SpA v. Rediffusion Plc.*, *supra*, footnote 14, quoted by Hirst J., *supra*, footnote 2, at pp. 806d (W.L.R.), 720e (All E.R.).

²¹ *Ibid.*, quoted *supra*, footnote 2, at pp. 806e-h (W.L.R.), 720g-j (All E.R.). (Emphasis added).

²² The Meech Lake Accord, with its chameleon "distinct society" clause, was, at the time of writing, a potential exception to this norm.

²³ [1964] 2 Q.B. 226, [1964] 1 All E.R. 161 (C.A.).

frustrated. Lord Denning, *obiter*, alluded to the fact that the allegedly frustrating event had been foreseen:²⁴

The parties realized that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree . . . [I]f the canal were to be closed, they would "leave it to the lawyers to sort out".

Lord Denning accepted what he viewed as the parties' implicit invitation to the court to "sort out" the matter of risk allocation by applying the well-established test for frustration. Had he held the doctrine to be applicable on the facts, the loss would have been distributed in accordance with the relevant statutory provisions. Could a court likewise, on Staughton J.'s characterization of a deliberately equivocal comfort letter as an authorization of judicial arbitration, assert authority to, say, divide the loss on the subsidiary's loan default 50-50 between the bank and the parent company? It would surely take a bold spirit of Denningian proportions to carry judicial activism so far. Untrammelled by objective criteria (such as those provided by the law of frustration) to inform the distribution of risk, an exercise of this kind would constitute interest rather than rights arbitration. Rather, one would expect timorousness to be put before temerity, with the declining of any invitation to write for the parties an agreement that they had been unable to reach for themselves.

Even in the context of frustration Treitel has criticized Lord Denning's approach in *The Eugenia* as contemplating the "revers[al] [of] an allocation of risks deliberately made by the contracting parties".²⁵ With some force he had earlier argued that:²⁶

. . . when parties contract with reference to dangers of which they are actually aware, the normal inference seems to be that they accepted the risks inherent in those dangers.

Mutatis mutandis, this insight holds the key to determining the legal effect of equivocal letters of comfort. A lending bank takes such a letter in full cognizance of potential default by the borrower/subsidiary. The risk lies squarely on the bank unless in whole or in part the risk is consensually shifted to the parent company. Ethical questions apart, the lesson of *Kleinwort Benson Ltd. v. Malaysia Mining Corporation* is that woolliness and deliberate equivocation should be left to diplomats. In the real world of commercial relations they provide cold comfort.

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²⁴ *Ibid.*, at pp. 238-239, 234 (Q.B.), 166b-c, 163d (All E.R.).

²⁵ G.H. Treitel, *The Law of Contract* (7th ed., 1987), p. 699.

²⁶ G.H. Treitel, *The Law of Contract* (3rd ed., 1970), p. 761.

CRIMINAL LAW—STRICT AND ABSOLUTE LIABILITY OFFENCES—
THE ROLE OF NEGLIGENCE—PRESUMPTION OF INNOCENCE AND
REVERSE ONUS—CHARTER OF RIGHTS AND FREEDOMS, SECTIONS 7, 11;
COMPETITION ACT, SECTIONS 36, 37.3: *R. v.*
Wholesale Travel Group Inc.

Patrick Healy*

Before evidence of false or misleading advertising was called by the prosecution in *Wholesale Travel Ltd.*,¹ the defence moved that the following provisions of the Competition Act² are inconsistent with the Canadian Charter of Rights and Freedoms:³

36.(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) make a representation to the public that is false or misleading in a material respect. . . .

37.3(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

(a) the act or omission giving rise to the offence with which he is charged was the result of error;

(b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;

(c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and

(d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

The trial judge agreed and the charges were dismissed. This judgment was confirmed by a majority of the Ontario Court of Appeal.⁴ The Supreme

* Patrick Healy, of the Quebec Bar and Faculty of Law, McGill University, Montreal, Quebec.

In view of the pace of developments it is appropriate to note that this comment was completed on September 15, 1990. Thanks to Stephen Hamilton, Nick Kasirer, James O'Reilly and Robert Yalden for helpful comments.

¹ *R. v. Wholesale Travel Group Inc.* (1988), 22 C.P.R. (3d) 328 (Ont. Prov. Ct.).

² R.S.C. 1970, c. C-23, now R.S.C. 1985, c. C-34 (as am. by R.S.C. 1985, 2nd Supp. c. 19).

³ Constitution Act, 1982, Part I.

⁴ (1989), 63 D.L.R. (4th) 325, 70 O.R. (2d) 545 (Ont. C.A.). See also *Multitech Warehouse Direct (Ontario) Inc.* (1989), 52 C.C.C. (3d) 175 (Ont. C.A.).

Court of Canada has granted leave to appeal⁵ and at least six provincial attorneys-general have already sought to intervene.

The judgments of Tarnopolsky, Lacourcière and Zuber J.J.A. in *Wholesale Travel* all attempt to navigate between two swirling lines of authority. One concerns the ramifications of *Reference re Section 94(2) of the B.C. Motor Vehicle Act*⁶ and *R. v. Vaillancourt*.⁷ The other concerns interpretations of section 11(d) of the Charter in *R. v. Holmes*,⁸ *R. v. Whyte*⁹ and *R. v. Schwartz*.¹⁰ All three members of the Court of Appeal claimed that the results they reached fell squarely within existing authority of the Supreme Court. And still they split on the interpretation of section 11(d), proving only that the jurisprudence of the Supreme Court is unclear. It will be argued below, however, that the result on which the Court of Appeal was unanimous is not squarely within the existing authority of the Supreme Court.

On the appeal in *Wholesale Travel* two issues of importance will be put before the Supreme Court: the requirements of section 7 of the Charter, as applied to the offence of false advertising, and the consistency of the defence of due diligence with the presumption of innocence in section 11(d). A cluster of new cases involving sections 7 and 11(d) has recently been heard by the Supreme Court or will soon be heard, and the decisions in those cases might well determine some issues arising in *Wholesale Travel*. Final appeal in this case, however, will be important because it raises questions that have not yet been addressed.¹¹ Of great importance among these are implications concerning the constitutional validity of regulatory offences.

Reasons in the Court of Appeal

The principal opinion for the majority was given by Tarnopolsky J.A. and his reasons for judgment are twofold. First, paragraphs 37.3(2)(c)

⁵ Supreme Court File No. 21779. Leave granted 26 February 1990 (*coram* Wilson, La Forest, Sopinka, Cory and McLachlin J.J.): Supreme Court Bulletin, 2 March 1990, at p. 454.

⁶ [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536.

⁷ [1987] 2 S.C.R. 636, (1987), 47 D.L.R. (4th) 399.

⁸ [1988] 1 S.C.R. 914, (1988), 50 D.L.R. (4th) 680.

⁹ [1988] 2 S.C.R. 3, (1988), 51 D.L.R. (4th) 481.

¹⁰ [1988] 2 S.C.R. 443, (1988), 55 D.L.R. (4th) 1.

¹¹ No attention will be given here to the question whether the accused corporation could claim the protection of section 7. As stated by Tarnopolsky J.A., that question was seemingly settled in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, (1985), 18 D.L.R. (4th) 321: any person, natural or moral, enjoys the right to avoid conviction on the basis that the offence charged is constitutionally invalid. After *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, (1989), 58 D.L.R. (4th) 577, and a cluster of other cases, the ambit of protection afforded by section 7 to moral persons remains unsettled, but it is submitted that the point taken in *Big M Drug Mart* remains valid.

and (d) of the Competition Act require proof of a prompt retraction in addition to proof of due diligence (paragraphs (a) and (b)); in the absence of a proven retraction, proof of due diligence will not secure an acquittal. The result is absolute liability and, because false advertising carries with it a penalty of five years imprisonment on indictment, paragraphs (c) and (d) cannot survive the doctrine declared in *Reference re Section 94(2) of the B.C. Motor Vehicle Act*¹² and developed in *R. v. Vaillancourt*.¹³ With the exclusion of these two paragraphs, the offence that remains is strict liability. Second, the imposition of a legal or persuasive burden upon the accused to prove due diligence would require the accused to prove the basis for acquittal; that is, to prove its innocence in law. Tarnopolsky and Lacourcière J.J.A. conclude that the words creating the legal burden ("he establishes that") are of no force and effect because they require the accused disprove an essential element of the offence.¹⁴

Zuber J.A. dissented in part. He agreed that the effect of paragraphs (c) and (d) is to make the offence "tantamount to . . . absolute liability . . .".¹⁵ He dissented with respect to the constitutional validity of paragraphs (a) and (b) on the ground that the imposition of the legal burden was consistent with the position of the majority in *R. v. Holmes*¹⁶ and *R. v. Schwartz*,¹⁷ and therefore not inconsistent with section 11(d) of the Charter because it did not require the accused to disprove an essential element.

What survives, therefore, over Zuber J.A.'s dissent, is an offence of strict liability. The accused can escape liability if the court has a reasonable doubt on two points: that the conduct of the accused was the result of error or that the accused took reasonable precautions and was diligent in seeking to prevent the error. If there is no evidence in the prosecution's case to support a reasonable doubt on these grounds, the accused who calls evidence need only discharge an evidential burden in order for the defence to be considered by the trier of fact. As a reasonable doubt on due diligence would suffice for acquittal, the evidential burden is discharged if the judge concludes that the trier of fact, properly instructed, could find a reasonable doubt.¹⁸

¹² *Supra*, footnote 6.

¹³ *Supra*, footnote 7.

¹⁴ As prohibited in the decisions in *R. v. Oakes*, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200, and *R. v. Whyte*, *supra*, footnote 9.

¹⁵ *Supra*, footnote 4, at pp. 335 (D.L.R.), 555 (O.R.).

¹⁶ *Supra*, footnote 8.

¹⁷ *Supra*, footnote 10.

¹⁸ Judges are understandably reluctant to rule out exculpatory claims on the basis that the evidential burden has not been discharged. It does not follow, of course, that the threshold for reasonable doubt is low at the end of the case.

Fundamental Justice and Substantive Law

The first issue that the Supreme Court will have to address is the characterization of the offence in subsection 36(1) in relation to the exculpatory claims enumerated in subsection 37.3(2). The four paragraphs of subsection 37.3(2) are cumulative. The first two, particularly the second, contemplate the absence of negligence before or at the commission of the *actus reus*, while paragraphs (c) and (d) contemplate due diligence after the *actus reus*. It is odd, to say the least, that a statute would impose a subsequent duty to rectify the commission of the *actus reus* as a condition of acquittal. There is a problem of relevance between due diligence in a retraction and the *actus reus* of false advertising. It is a notion that plays havoc with the principle of contemporaneity. Tarnopolsky J.A. is correct in saying that in the absence of proof on all four paragraphs there might be a conviction, despite the absence of fault in the commission of the *actus reus*. Even if paragraphs (c) and (d) are taken as requiring due diligence in publishing a retraction, the inability or failure to prove that diligence will lead to conviction although it might be proved that the accused diligently sought to avoid false advertising. The double requirement of due diligence, that is before and after the *actus reus*, make this unlike typical offences of strict liability. The presence of the four provisions in subsection 37.3(2) make this quite unlike any offence of absolute liability.

It is appropriate to note here, if only in passing, that there is a certain oddity, verging on nonsense, about the relationship of the inculpatory part of the offence and the exculpatory part. That is the reference to "purpose" in section 36.1, which is neither noted nor discussed by the Ontario Court of Appeal. Any suggestion that this denotes intent, and thus *mens rea*, would lead to the absurd notion that due diligence will afford a good exculpatory claim to intent. The offence is not purposefully making a negligent statement but negligently making a false and misleading statement. The reference to purpose must be understood as a limitation on the kind of activity and thus in some peculiar sense as part of the circumstances in the *actus reus* rather than the *mens rea*.

Two issues are raised by the characterization of the offence advanced by Tarnopolsky J.A. and, seemingly, accepted by Lacourcière and Zuber J.J.A. These are fault in strict liability and the constitutional limits of strict liability.

Fault in Strict Liability

One issue arises from the gloss advanced by Lamer J. in *R. v. Vaillancourt*¹⁹ on his own opinion for the court in *Reference re Section*

¹⁹ *Supra*, footnote 7.

94(2) of the *B.C. Motor Vehicle Act*.²⁰ Both Tarnopolsky and Zuber J.J.A. quote this passage:²¹

In effect, *Re B.C. Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Re Motor Vehicle Act*, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. It thus elevated *mens rea* from a presumed element in *Sault Ste. Marie* . . . to a constitutionally required element. *Re B.C. Motor Vehicle Act* did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence, at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction.

This passage requires close scrutiny. To begin, of course, it is specifically confined to instances where imprisonment is provided as a possible penalty, and thus leaves open the question whether a measure of fault is also constitutionally required in some offences where imprisonment is not a possible sanction. But the passage raises more challenging questions.

One of these concerns a point of ambiguity left over from *R. v. City of Sault Ste. Marie*.²² There Dickson J. described the category of strict liability as offences of fault: the fault was negligence. But the precise relevance of negligence in his definition of strict liability was not made plain. Dickson J. said that proof of the *actus reus* "imports the offence"²³ unless the defence establishes on a balance of probabilities that there was no fault in the commission of the act, in which case there would be an acquittal. To succeed in cases where there is evidence to support a denial of negligence, the prosecution must therefore prove negligence (although logically it could not be required to do so at the standard of proof beyond reasonable doubt). According to this definition of strict liability, the point of ambiguity is whether negligence is an element of the offence.

It is submitted that there is only one practical test by which to confirm the elements of any offence.

An element of the offence is any matter on which the prosecution bears both an evidential burden in chief (*i.e.*, before half-time) and a legal burden at the end of the case, and thus it is any matter in respect of which the prosecution risks defeat by a motion for non-suit or directed verdict if it fails to discharge its evidential burden.²⁴

According to this test, Dickson J.'s definition of strict liability in *Sault Ste. Marie* does not allow the conclusion that negligence is an element

²⁰ *Supra*, footnote 6.

²¹ *R. v. Vaillancourt*, *supra*, footnote 7, at pp. 652 (S.C.R.), 414 (D.L.R.), quoted in *Wholesale Travel*, *supra*, footnote 4, by Tarnopolsky J.A. at pp. 339 (D.L.R.), 559 (O.R.), and by Zuber J.A. at pp. 331 (D.L.R.), 551 (O.R.). (Emphasis in original).

²² [1978] 2 S.C.R. 1299, (1978), 85 D.L.R. (3d) 161.

²³ *Ibid.*, at pp. 1326 (S.C.R.), 181 (D.L.R.).

²⁴ In cases where the defence calls no evidence, of course, half-time and the end of the case are the same, save for argument.

of the offence. Nor has it been the practice of Canadian law since *Sault Ste. Marie* that the defence could defeat the prosecution on a motion for non-suit that alleges incompleteness in the Crown's case because it lacks sufficient evidence of negligence.²⁵ The validity of this proposition is not diminished by saying that in cases where the absence of negligence is raised upon the evidence the prosecution must disprove it. In that instance the prosecution bears a legal burden in respect of negligence; but that does not bring negligence within the elements of the offence because, according to the test above, an element is a matter on which the prosecution bears both an evidential and a legal burden before any evidence is called.

The passage quoted above from *R. v. Vaillancourt*²⁶ would appear to change this view of strict liability and to redefine its constitutional dimensions, at least in part. In that passage Lamer J. makes two central assertions in relation to offences for which imprisonment may be imposed. First, he says that section 7 of the Charter requires that all such offences must include a minimum mental state among their elements. Second, he says that this minimum mental state is at least negligence. If these two assertions are correct, it follows that the prosecution must discharge an evidential burden in relation to negligence; and therefore *Sault Ste. Marie* and subsequent practice are now wrong in so far as they suggest the contrary. If negligence is an essential element, Lamer J. can only mean that the prosecution is required to make a *prima facie* case for negligence. Accordingly, the quoted passage must mean that the prosecution can be stopped upon a motion for non-suit or directed verdict if its case in chief does not include sufficient evidence of negligence.

Hence a general question that should be put to the Supreme Court in *Wholesale Travel* is whether the proper construction of offences of strict liability is that their essential elements do not include negligence, as suggested in *Sault Ste. Marie*, or that they do, as stated by Lamer J. in *R. v. Vaillancourt*.²⁷ To say that fault is an essential element is not the same as saying that the absence of fault is sufficient for acquittal. The difference between the two is the difference between a defence that negates the inculpatory elements of the offence and an excuse that admits those elements but denies liability. Indeed, it is one of the objectionable aspects of strict liability, especially criminal offences of strict liability, that on the usual interpretation of *Sault St. Marie* the absence of fault is strictly an *excuse*, precisely because fault is not one of the elements of guilt.

An argument by which to defend the view that negligence is an essential element is that the element of fault is presumed: that is, proof of the *actus reus* is *prima facie* proof of the element of negligence. This is an argument

²⁵ As a matter of practice, however, the prosecution will typically adduce before half-time such evidence of negligence as it might have.

²⁶ *Supra*, footnote 7. See the passage from the case quoted in the text, *supra*, footnote 21.

²⁷ *Ibid.*

that might conceivably have been made before the Charter came into force, but it could then and now only be advanced at considerable risk. The logic of the argument would lead perilously close to a notion of *res ipsa loquitur* in criminal law. Such a presumption is, of course, a fiction. To begin, the proposition is quite possibly untrue. It is offensive to the presumption of innocence in a manner that is reminiscent of *D.P.P. v. Smith*,²⁸ where the House of Lords approved the dictum that proof of the act is *prima facie* proof of intent.²⁹ Nor could a theory that negligence is presumed be assisted or saved by the doctrine of substitution advanced by Lamer J. in *R. v. Vaillancourt*.³⁰ That doctrine is really a variation on proof by presumptions, as noted by Dickson C.J.C. in *R. v. Bernard*.³¹ For that doctrine to operate in relation to strict liability it would entail that the element of fault is presumed (that is, proven) upon sufficient evidence of the *actus reus*. But this merely restates the position in *Smith*, which is unquestionably inconsistent with the presumption of innocence. Even if one could accept the presumption as a basis for discharging the prosecution's evidential burden, which is also untenable, the presumption of negligence cannot of itself supply proof beyond reasonable doubt. There is, moreover, no room for any notion of substitution because there is no substitute.

The notion that negligence is a standard of fault is wholly unobjectionable, of course, but in the passage quoted above from *R. v. Vaillancourt*³² Lamer J. goes further to suggest that negligence is a mental state, a "minimum mental state". This is unfortunate because it leads to the notion that negligence is a mental state and thus a form of *mens rea*. It is an argument that has been made in the past, somewhat carelessly perhaps, but it distorts the distinction between fault and *mens rea*, which is the difference between *mens rea* as the actual mental state of the accused and fault as an actor's failure to meet a standard of conduct expected of a reasonable person in similar circumstances. Lamer J.'s suggestion that negligence is a mental state is novel in modern Canadian law. It is somewhat reminiscent of Lord Diplock's innovative idea that the absence of a mental state could be taken as the presence of *mens rea* (recklessness).³³ In short, some of the difficulty arising from the passage in *Vaillancourt* would be alleviated if the references to *mens rea* were read as references to fault. While this correction would help, it leaves many important questions to be resolved:

²⁸ [1961] A.C. 290, [1960] 3 All E.R. 161 (H.L.).

²⁹ Parliament corrected this howler in section 8 of the Criminal Justice Act 1967.

³⁰ *Supra*, footnote 7; see text at footnote 44, *infra*.

³¹ [1988] 2 S.C.R. 833, at p. 853 (Lamer J. concurring). In *R. v. Penno*, Supreme Court File No. 20234 (4 October 1990) Wilson J. describes the concept of substituted *mens rea* as "dubious" at page 6 of her reasons for judgment.

³² *Supra*, footnote 7, at pp. 652 (S.C.R.), 414 (D.L.R.).

³³ *R. v. Caldwell*, [1982] A.C. 341, [1981] 1 All E.R. 961 (H.L.); *R. v. Lawrence*, [1982] A.C. 510, [1981] 1 All E.R. 974 (H.L.).

the extent to which strict liability (with or without the possibility of imprisonment) or absolute liability (without imprisonment) is permissible in offences enacted under paragraph 91(27) of the Constitution Act, 1867; the extent to which *mens rea* offences can be enacted outside paragraph 91(27); and generally the range of penalties permissible in offences of *mens rea*, strict liability or absolute liability, whether enacted under paragraph 91(27) or some other competent head of legislative authority.

As understood to date, at least since *R. v. City of Sault Ste. Marie*,³⁴ the negligence contemplated by strict liability is manifestly not coextensive with criminal negligence or recklessness as it is understood in the interpretation of the Criminal Code.³⁵ If it were true, it must follow that all provincial offences and all federal offences of strict liability not grounded in paragraph 91(27) of the Constitution Act, 1867 are by definition offences of criminal negligence or recklessness. And if this were so it would also follow that the law on negligence in strict liability is governed by *R. v. Sansregret*³⁶ or *R. v. Tutton and Tutton*.³⁷ For all the ambiguity arising from *Tutton*, it has yet to be argued that the negligence contemplated by strict liability is the same as criminal negligence or recklessness.

There are, of course, problems in admitting an objective standard of negligence in determining proof of recklessness. That sometimes produces practical difficulties, particularly where a judge must instruct a jury, but it is a position that accepts criminal negligence or recklessness as a subjective mental state (or partly so on Lamer J.'s view in *Tutton*). But even if criminal negligence (or perhaps recklessness) were defined wholly by reference to an objective standard, as suggested by McIntyre J.,³⁸ it is quite another matter to say that such an objective standard is the same as negligence in offences of strict liability.

Constitutional Limits of Strict Liability

It is not possible now, nor will it ever be, to state fully the requirements imposed upon the substantive criminal law by section 7 of the Charter. To date, however, *Reference re Section 94(2) of the Motor Vehicle Act*³⁹ and *R. v. Vaillancourt*⁴⁰ declare a general doctrine of proportionality, quite

³⁴ *Supra*, footnote 22.

³⁵ R.S.C. 1985, c. C-46.

³⁶ [1985] 1 S.C.R. 570, (1985), 17 D.L.R. (4th) 577.

³⁷ [1989] 1 S.C.R. 1392. See also *Anderson v. The Queen* (1990), 75 C.R. (3d) 50 (S.C.C.).

³⁸ *Ibid.*, at p. 1429 *et seq.*

³⁹ *Supra*, footnote 6.

⁴⁰ *Supra*, footnote 7.

distinct from any notion of proportionality under section 1. The general doctrine is this:

Section 7 requires that the elements of any offence must be proportional to both the gravity or stigma of the offence and quantum of punishment.⁴¹

And *vice versa* in the sense that the quantum of punishment must be justified by the elements of the offence and by reference to the stigma connoted by the offence.

If, according to this general test, section 7 requires that the offence include an element of fault,⁴² it follows that no element of fault is constitutionally sufficient unless it too meets the same test. Correspondingly, where an offence includes alternative or "substituted" elements, the same doctrine of proportionality demands in effect that the alternatives be identifiable as normative equivalents. That, of course, was the deficiency of section 230(d),⁴³ as decided in *R. v. Vaillancourt*.⁴⁴

It is appropriate here to open another parenthesis for further elaboration of the notion of substitution within this general doctrine of proportionality. Suppose that Parliament creates an offence in which proof of B or C will suffice for proof of fault. On a challenge under section 7, as in *Wholesale Travel*, a court might be called upon to answer whether B and C, taken independently, are sufficient conditions of fault. Section 7 empowers a court to determine constitutionally sufficient conditions of fault.⁴⁵ Suppose, then, that the court determines that A is the element of fault required by section 7 for the offence. Given that B and C are thus *prima facie* inconsistent with the requirement for A, the court will then ask whether B and C are sufficient alternatives or substitutes for A. The answer will be yes or no for each of B and C. If the answer is yes it means that

⁴¹ This generalization is repeated in *R. v. Bernard*, *supra*, footnote 31, at pp. 839 (S.C.R.) per Wilson J.; *Reference re Section 94(2) of the B.C. Motor Vehicle Act*, *supra*, footnote 6, at pp. 532-534 (S.C.R.), 571-573 (D.L.R.); *R. v. Smith*, [1987] 1 S.C.R. 1045, (1987), 40 D.L.R. (4th) 435. More recently and more explicitly, it forms the essence of the decisions in *Reference re Criminal Code, ss. 193 & 195.1(1)(c)* (1990), 77 C.R. (3d) 1 (S.C.C.); *R. v. Martineau*, Supreme Court File No. 21122 (13 September 1990), p. 8 ff., per Lamer C.J.C. See also *R. v. Rodney*, Supreme Court File No. 21284 (13 September 1990); *R. v. Luxton*, Supreme Court File No. 21252 (13 September 1990); *R. v. James*, Supreme Court File No. 20758 (13 September 1990); *R. v. Arkell*, Supreme Court File No. 21076 (13 September 1990); *Hess v. The Queen*, *Nguyen v. The Queen*, Supreme Court File Nos. 20809, 21392 (4 October 1990).

The recent cases were decided after this comment was completed. In those cases, particularly *Martineau*, Lamer C.J.C. repeats his remark in *Vaillancourt* that the constitutional constraints upon constructive liability would apply to a "few" offences. The meaning or the justification for this limitation remain to be clarified in future cases.

⁴² As decided in *Reference re Section 94(2) of the B.C. Motor Vehicle Act*, *supra*, footnote 6.

⁴³ Formerly s. 213(d), R.S.C. 1970, c. C-34.

⁴⁴ *Supra*, footnote 7.

⁴⁵ *Ibid.*, at pp. 652, 654-655 (S.C.R.), 414, 415-416 (D.L.R.).

both B and C are normatively equivalent to A. This is the point taken by Lamer J.:⁴⁶

[T]he legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond reasonable doubt of the substituted element, then the substitution infringes ss. 7 and 11(d).

This is a tricky paragraph in that one might be forgiven for thinking at first blush that Lamer J. is speaking of C as a substitute for B, or *vice versa*; he is not, although in some cases that issue will also arise. He is speaking in this paragraph of B or C as substitutes for A, which is the element of fault required by section 7. The real difficulty with this passage, however, is that if the court concludes that B or C is a sufficient alternative it leads ineluctably to the conclusion that proof of B or C functions as a statutory presumption by which to prove A. The doctrine of substitution is thus a notion of normative equivalence.

Normative equivalence is a notion of policy. According to *Vaillancourt*, the calculus of equivalence depends on the gravity and stigma of the offence, neither of which is a concept with prescriptive power. Both of these factors compel a judicial declaration of public values, which must ultimately be a declaration *ex cathedra*. That, indeed, is the mandate of sections 7 and 52, and though there is nothing new in requiring judges to make substantive decisions on policy there is something quite new in empowering judges to define finally the supreme law of Canada. The challenge now, however, is that the judiciary must define factors such as gravity, stigma, and others in terms that have prescriptive or predictive value. The Supreme Court to date has not succeeded in this regard and the resulting difficulties are apparent.

According to the doctrine enforced in *Vaillancourt*, many provisions of the Criminal Code⁴⁷ and other statutes are in constitutional jeopardy. Assume, then, for a moment, the dilemma of a government committed to ensuring that the statutes of Canada conform to the requirements of the supreme law of the land. Can the Minister of Justice in such a government draw sufficient guidance from decisions of the Supreme Court of Canada to make necessary amendments to the law? The same problem affects the lower benches and the Bar with regard to litigation. The problem is an old one but it now raises a profound conundrum. The Supreme Court is rightly reluctant to embark upon expansive inquiries and even less inclined to offer prospective advice through *obiter dicta*. The conscientious Minister of Justice is reluctant to upset settled law without good reason, but a good reason would be guidance that the government can

⁴⁶ *Ibid.*, at pp. 656 (S.C.R.), 417 (D.L.R.).

⁴⁷ *Supra*, footnote 35.

apply or extend from one instance to any other instance of the same or similar problems. The result is some paralysis in the institutions of policy-making because the characteristic posture of both the Supreme Court and the Government is reactive. To date there has been little attention paid to this conundrum, which must involve some reevaluation of the division of labour between the judicial and legislative arms of government. From the Government's perspective, at least, it requires a thorough appreciation that litigation before the Supreme Court of Canada is as much concerned with legislative decision-making as is the order paper of Parliament.

The same cannot be said of proceedings before other courts, of course, because nothing they say can be final; and for this reason alone they are more circumspect. It is clear that the Ontario Court of Appeal in *Wholesale Travel* sought to confine its reasons for judgment as narrowly as possible, but it is not clear whether in argument counsel and the bench explored the limits of the doctrine of proportionality under section 7. Since the *Reference re Section 94(2) of the B.C. Motor Vehicle Act*,⁴⁸ a floating question is whether strict liability is constitutionally valid if it can be punished by imprisonment. The question is but one among the larger issues concerning the constitutional validity of absolute and strict liability. The challenge could have been mounted in *Wholesale Travel* in one of two ways: either that all strict liability is unconstitutional if it leaves the accused open to imprisonment upon conviction or, more narrowly, that strict liability with the possibility of imprisonment of more than a specified time or type, say anything over two years, is invalid. The essence of the argument in either case would be that imprisonment is disproportionate to strict liability. In the result, of course, the court in *Wholesale Travel* rested its conclusions on absolute liability rather than strict liability.

The Presumption of Innocence and Strict Liability

Assuming that subsection 36(1) creates an offence of strict liability with a possibility of imprisonment for five years, are the exculpatory claims provided in subsection 37.3(2) consistent with the presumption of innocence? The three opinions in the Ontario Court of Appeal reflect the judges' bafflement in dealing with the array of opinions that have emerged from the Supreme Court of Canada in *R. v. Holmes*,⁴⁹ *R. v. Whyte*⁵⁰ and *R. v. Schwartz*.⁵¹ All three opinions in the Court of Appeal claim to be consistent with the higher court's cases.

The crux of the matter is whether due diligence is correctly characterized as an affirmative defence that denies the prosecution's case in chief, or as an excuse, which like a justification does not negate guilt but supports

⁴⁸ *Supra*, footnote 6.

⁴⁹ *Supra*, footnote 8.

⁵⁰ *Supra*, footnote 9.

⁵¹ *Supra*, footnote 10.

an independent ground of acquittal. By styling due diligence as an affirmative defence in the sense just described, Tarnopolsky J.A. claims that authority compels the conclusion that subsection 37.3(2) is inconsistent with the presumption of innocence. The only authority necessary for this conclusion, if the characterization is correct, would be *R. v. Oakes*⁵² and *Whyte*. Conversely, by styling due diligence as an excuse, Zuber J.A. is able to claim with equal force that the majority position in *Holmes* and *Schwartz* compels the conclusion that there is no violation.

The cleavage between the two positions in the Supreme Court evolved thus. In *Oakes* the court declared a violation of the presumption of innocence where a mandatory presumption compels a finding of an essential element unless that element is disproved by the accused on a balance of probabilities. This result was not entirely clear because the violation could lie in the presumption, the reverse onus, or in the two together. The reason in each instance would be the same: there could otherwise be a conviction despite the possibility of reasonable doubt. This uncertainty was seemingly clarified, though largely in dicta, in *Whyte*. A violation would lie either in a mandatory presumption or in the imposition of a legal burden on any exculpatory claim that denies the prosecution's case in chief. There still remains a margin of ambiguity on the latter point as a result of the refusal of leave in *R. v. Godfrey*,⁵³ but the question should be settled when the Supreme Court rules on the constitutional validity of subsection 16(4) of the Criminal Code.⁵⁴

The general test is whether there can be a conviction despite the possibility of reasonable doubt. The split in the Supreme Court arises from different answers to one question: reasonable doubt on what? The majority in *Holmes* and *Schwartz*, stated by McIntyre J., is that any exculpatory claim that does not directly negate an inculpatory element⁵⁵ will allow the imposition of a legal burden upon the accused. Hence there is a fundamental distinction in the substantive law between exculpatory claims that deny guilt and those that do not deny guilt but preclude liability at the end of the case. The difference is that in McIntyre J.'s view guilt is defined as the inculpatory elements of an offence, whereas for Dickson C.J.C. liability is guilt that is neither justified nor excused. Of interest here is the relevance of that distinction to the content of the presumption of innocence. The position of the minority is that any substantive distinction between defences and justifications or excuses is immaterial to verdict and inconsistent with guilt or liability. A person is innocent in law if there

⁵² *Supra*, footnote 14.

⁵³ (1984), 39 C.R. (3d) 97 (Man. C.A.) (leave refused, 40 C.R. (3d) xxvi (S.C.C.)).

⁵⁴ *Supra*, footnote 35. Among the cases now on the docket of the Supreme Court are several concerning the constitutional validity of subs. 16(4), including its consistency with s. 11(d) of the Charter.

⁵⁵ *I.e.*, an essential element as defined in the text, at footnote 24, *supra*.

is a failure to prove the definition of guilt or sufficient evidence to raise a reasonable doubt on a claim of justification or excuse, and thus no exculpatory claim can bear a legal burden.

What about McIntyre J.'s concurrence in *Whyte*? The Chief Justice's opinion for the court restates the position he had taken in dissent in *Holmes* and later took in *Schwartz*. In particular, it includes the assertion that any exculpatory claim with a legal burden imposed upon the defence will violate the presumption of innocence because it would allow for conviction despite the possibility of reasonable doubt on the whole of the case. The answer is that McIntyre J. could subscribe to the result in *Whyte* without subscribing to these dicta in their widest amplitude. The provision impugned in *Whyte* was a mandatory presumption of an essential element of the offence with a reverse onus on that presumed element. It was logically identical to the provision struck down in *Oakes* and thus *Oakes* would govern. It was distinguishable from *Holmes* and from *Schwartz*, which did not involve mandatory presumptions but exculpatory claims encumbered with a legal burden. If this was indeed the basis for McIntyre J.'s concurrence in *Whyte* one might well have expected him to dissociate himself from the broader statements made by the Chief Justice about the invalidity of the legal burden on any exculpatory claim. The answer must lie in McIntyre J.'s acceptance of the result that the provision was saved under section 1 of the Charter.

The apparent inconsistency of McIntyre J.'s position, even thus explained, is nothing but a footnote to the larger controversy apparent in *Holmes* and *Schwartz*, particularly the latter. The two positions cannot be reconciled but each is theoretically coherent. The choice between them is one of policy. The Chief Justice's position is more consonant with general principles of the common law but McIntyre J.'s view is viable. It is supported, at least in part, by several decisions of the Supreme Court of the United States. A fundamental difference between Canadian and American constitutional law, however, is that the presumption of innocence in section 11(d) must bear the same meaning in every case in which it applies. In the United States there is no entrenched presumption of innocence in the Bill of Rights. The decision in *Re Winship*⁵⁶ that the requirement for proof of guilt is a guarantee of due process under the Fifth and Fourteenth Amendments has not yet been interpreted to give effect to the presumption of innocence as a comprehensive doctrine of general application on the burdens (as opposed to the standards) of proof. Thus the Supreme Court of the United States has ruled that the imposition of a legal burden on self-defence or duress, for example, is not a denial of due process.

There are many important questions of principle and practice that must be evaluated in resolving the cleavage in the Supreme Court. One difficulty arising from the position stated by McIntyre J. is that it would

⁵⁶ 397 U.S. 358 (1970).

force the courts to classify all exculpatory claims as being consistent or inconsistent with the elements required of the prosecution in chief. This could not be done unless the court undertook to formulate a coherent theory of exculpatory claims framed either as defences to the prosecution case or as claims that justify or excuse misconduct. Another is that it would allow for conviction on a charge of murder even where the evidence discloses a reasonable doubt with respect to, say, self-defence or duress. This not only augments the margin for factual error but it implies that the obligation of the prosecution at the end of the case is not to disprove any justification or excuse beyond reasonable doubt but only to ensure that it does not reach proof on a balance of probabilities. A third difficulty is that McIntyre J.'s position would oblige judges and triers of fact to make sophisticated, if not tortuous, calibrations among at least three standards of certainty and uncertainty: beyond reasonable doubt, balance of probabilities and reasonable doubt. Yet another difficulty, especially in trials by judge alone, is that on McIntyre J.'s view the motion for non-suit would require the judge to rule not only whether the prosecution's case meets the evidential burden but the legal burden of proof beyond reasonable doubt. This is not far from the position now as a practical and tactical matter, but it is certainly not the theory of the law. If it were, it would erase much of *Woolmington v. D.P.P.*⁵⁷

The position taken by Dickson C.J.C. is also a departure from established law, though in a different way. Not only would all statutory reverse onuses be invalid (unless redeemed under section 1 of the Charter), including insanity of course, but the entire class of offences of strict liability would require acquittals wherever there was a reasonable doubt with respect to negligence. (This would presumably extend to exculpatory claims, such as entrapment or abuse of process, that do not directly address culpability). The effectiveness of regulatory enforcement would be appreciably diminished. If this were the result of Dickson C.J.C.'s position, it is inconceivable that regulatory offences as a class could be saved under section 1, unless the court is prepared to accept that such offences *as a class* connote less stigma and should therefore not be construed as rigorously as criminal offences. The spectre of *ad hoc* litigation to save regulatory offences under section 1 is likewise frightful.

Conclusion

In *Wholesale Travel* all three judges attempt to chart a path through the four principal cases in the Supreme Court that deal with the interpretation of the presumption of innocence in section 11(d). In the end, however, Tarnopolsky and Lacourcière J.J.A. concluded that due diligence negates the prosecution's case in chief and disposed of the case under *Oakes* and *Whyte*. On this basis anything that either of them said about *Holmes* and

⁵⁷ [1935] A.C. 462, [1935] All E.R. Rep. 1 (H.L.).

Schwartz is *obiter*. This position, however, departs from established substantive law on offences of strict liability because it cannot be taken without also asserting that the prosecution's case in chief must include a sufficient case for negligence or be defeated on a motion for non-suit or directed verdict. It is also a position that would commit its proponents to subscribe to the reasoning in *Vaillancourt*: the offence is substantively defective for not requiring an element of fault (*viz.*, negligence) and therefore there is a violation of the presumption of innocence if the prosecution does not prove that missing element. The second part of this argument, which is also apparent in *Bernard*, cannot be sustained. The reason is this: if under section 7 it is a requirement of substantive law that the offence is not valid because it does not include an element X, it cannot be claimed simultaneously that the prosecution is bad for not proving X.⁵⁸

The precise reasons for the conclusions of Tarnopolsky and Lacourcière J.J.A. avoid the problems of having to characterize due diligence as an affirmative defence to the prosecution's case in chief or as an excuse. Thus they did not have to consider the competing merits of the two positions in *Holmes* and *Schwartz*. If the Supreme Court endorses their view of the matter, however, they are committed also to the position that proof of negligence would have to be made by the prosecution in chief.

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DROIT CRIMINEL—PROCÈS PAR JURY ET TÉMOIGNAGE D'EXPERT:
UNE COMBINAISON GAGNANTE POUR LA FEMME BATTUE: *Lavallée c. R.*

Louise Viau*

Introduction

Depuis quelques années, nous constatons une sensibilité nouvelle des tribunaux face à certaines réalités sociales, telle la violence conjugale, mises en lumière par la littérature féministe et largement publicisées par les médias. L'affaire *Lavallée*¹ nous en fournit un bon exemple.

⁵⁸ The same criticism can be made against recent decisions of the Supreme Court (see *supra*, footnote 41) in which constructive murder under section 229 and 230 of the Criminal Code, *supra*, footnote 35, is adjudged inconsistent with both sections 7 and 11(d) of the Charter. This can only be the case if section 11(d) is considered to have substantive content, in which case it is at least partly redundant in relation to section 7. For further discussion of this theme, see P. Healy, *R. v. Bernard: Difficulties with Voluntary Intoxication* (1990), 35 McGill L.J. 610, at pp. 625-632.

* Louise Viau, membre du Barreau du Québec et professeur titulaire à la Faculté de droit de l'Université de Montréal.

¹ *Lavallée c. R.*, [1990] 1 R.C.S. 852.

Ce qui frappe à la lecture de l'opinion majoritaire de l'arrêt de la Cour suprême du Canada, rédigée par l'honorable juge Bertha Wilson, c'est le fait que les seules autorités doctrinales citées sont des écrits de psychologues portant sur le syndrome de la femme battue² ainsi que de juristes qui soutiennent que de telles études devraient amener les tribunaux à faire preuve de plus d'ouverture d'esprit à l'endroit des femmes battues qui en viennent à tuer leur conjoint.³ Pour saisir toute l'importance de l'arrêt *Lavallée*, il est utile de l'analyser en parallèle avec l'arrêt *Whynot*,⁴ un arrêt de la Cour d'appel de la Nouvelle-Écosse rendu en 1983.

L'affaire Whynot

Madame Whynot, à qui la juge Wilson fait référence sous le nom de Jane Stafford—du nom de son compagnon de vie—a assassiné son conjoint abuseur alors qu'il était ivre mort mais après une journée où il s'était montré particulièrement menaçant à l'endroit, non pas de sa compagne, mais plutôt du fils de cette dernière. Tout comme dans l'affaire *Lavallée*, une preuve abondante a été présentée faisant état du caractère violent de la victime à l'endroit de l'accusée tout autant que de ses enfants. Une preuve psychiatrique a également été présentée afin d'expliquer que, pour l'accusée, la situation paraissait sans issue. Tout comme madame *Lavallée*, Jane Whynot Stafford a été acquittée de l'accusation de meurtre prémédité qui pesait contre elle. Là s'arrête cependant le parallèle entre les deux histoires car, comme nous le verrons, madame *Lavallée* a été beaucoup plus chanceuse que sa compagne dans l'adversité. La comparaison mérite tout de même d'être poursuivie car elle permet de cerner dans toute son ampleur le changement d'attitude des tribunaux d'appel.

Jane Stafford, dont le geste s'est produit en 1982, a vu son acquittement contesté par le ministère public qui plaidait que le verdict du jury allait à l'encontre des témoignages et que le juge du procès avait erré en droit en permettant, eu égard à la preuve présentée, la défense des tiers prévue à l'article 37 du Code criminel.⁵ Sur le premier point, la Cour d'appel de la Nouvelle-Écosse a donné tort à la Couronne en lui rappelant que la Cour suprême du Canada avait tranché qu'il ne s'agissait pas là d'une

² Lenore E. Walker, *The Battered Woman* (1979); Lenore E. Walker, *The Battered Woman Syndrome* (1984); Charles Patrick Ewing, *Battered Women Who Kill* (1987). Ce dernier auteur, nous apprend la juge Wilson, est psychologue et avocat.

³ Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women who Kill* (1986), 9 *Women's Rights Law Reporter* 227; Phyllis Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense* (1985), 8 *Harv. Women's L.J.* 121; M.J. Willoughby, *Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?* (1989), 38 *Kan. L. Rev.* 169.

⁴ *R. c. Whynot* (1984), 9 C.C.C. (3d) 449 (C.A.N.E.).

⁵ L.R.C. (1985), c. C-46.

question de droit.⁶ En effet, l'état d'esprit de l'accusée étant en cause, un jury pouvait fort bien en arriver à une conclusion opposée à la thèse soutenue par la Couronne sans que l'on pût pour autant conclure que son verdict fût totalement déraisonnable. Mais encore faut-il que le juge du procès ne laisse pas à la considération du jury des moyens de défense auxquels la preuve ne donne pas ouverture. Dans un jugement unanime la Cour d'appel a conclu que ce fut effectivement le cas, la légitime défense de l'article 27 du Code criminel ne pouvant exister en l'absence d'une attaque imminente. La preuve ayant révélé que la victime était ivre morte au moment de l'attentat, il y avait là erreur de droit justifiant la tenue d'un nouveau procès puisque la directive a pu permettre au jury d'en arriver à une conclusion qui autrement n'aurait pas été possible.⁷

L'affaire Lavallée

Madame Lavallée a pour sa part été accusée de meurtre au second degré pour avoir abattu son conjoint d'une balle de carabine tirée à l'arrière de la tête. Lors de son procès devant jury, madame Lavallée n'a pas témoigné mais sa confession a été mise en preuve par le ministère public et le juge du procès a permis que soit établi par la défense, au moyen du témoignage des amis et des voisins, que les relations du couple étaient pour le moins tumultueuses. Une preuve médicale a permis de confirmer le fait que l'accusée avait subi de nombreux sévices et un psychiatre a été autorisé à expliquer au jury ce qui est désormais connu sous le nom de "syndrome de la femme battue" afin de soutenir un plaidoyer de légitime défense.

Rien ne laisse croire, à la lecture des arrêts de la Cour d'appel du Manitoba puis de la Cour suprême du Canada, que la Couronne ait argué du caractère déraisonnable du verdict d'acquiescement prononcé en faveur de madame Lavallée. Néanmoins, l'honorable juge Huband conclut sa dissidence en réitérant sa foi dans le jury formé des pairs de l'accusée:⁸

This accused was acquitted by a jury of her peers on the basis of self-defence, which might strike one as being somewhat fanciful. We should not, however, search out semantic excuses to order a new trial, at high public cost, in the belief that the jury should have been more skeptical and arrived at a different verdict.

⁶ R. c. *Whynot*, supra, note 4, aux pp. 450-451. La cour cite les arrêts suivants de la Cour suprême du Canada: *Sunbeam Corp. (Canada) Ltd. c. R.*, [1969] 2 C.C.C. 189 et *Lampart c. R.*, [1969] R.C.S. 373.

⁷ *Ibid.*, à la p. 465. L'honorable juge Hart rendant le jugement de la Cour conclut ainsi:

Since the jury was improperly instructed on the law relating to the offence alleged against the respondent, and since that improper instruction may well have permitted them to reach a conclusion that would not otherwise be open to them, I would allow the appeal, set aside the verdict of the jury and order a new trial upon the original indictment.

⁸ R. c. *Lavallée* (1988), 65 C.R. (3d) 387, à la p. 392 (C.A. Man.).

Le procès par jury, garanti constitutionnellement par l'alinéa 11f) de la Charte canadienne des droits et libertés,⁹ offre aux femmes battues l'espoir de voir une certaine compassion s'exercer à leur endroit. Ce n'est que justice car, comme l'a fait remarquer la juge Wilson:¹⁰

La maison d'un homme est peut-être son château, mais c'est aussi le foyer de la femme, même si elle peut lui paraître davantage comme une prison dans les circonstances.

Pourtant le simple fait d'être une femme battue ne confère aucune défense à celle qui met fin dramatiquement à une relation qui la laisse meurtrie dans sa chair et qui lui fait perdre toute confiance en elle-même.¹¹ Il faut absolument que l'accusée suscite un doute raisonnable à partir d'un moyen de défense reconnu en droit¹² et le syndrome de la femme battue n'en est pas un!¹³

Le syndrome de la femme battue et le plaidoyer de légitime défense

L'affaire *Lavallée* illustre toute l'importance que revêt le témoignage d'un expert lors d'un procès par jury. L'attaque de la Couronne à l'endroit

⁹ Loi constitutionnelle (1982), partie I.

¹⁰ *Lavallée c. R.*, *supra*, note 1, à la p. 889. Pour connaître l'ampleur du phénomène au Québec, voir les statistiques annuelles préparées depuis 1987 par la Direction générale de la sécurité et de la prévention du Ministère de la Sécurité publique du Gouvernement du Québec.

¹¹ Outre l'excellente description du syndrome de la femme battue que l'on retrouve dans l'opinion de madame la juge Wilson, le lecteur pourra consulter: Rapport fédéral-provincial territorial sur les femmes battues, présenté à la réunion des ministres responsables de la Condition féminine, Niagara-on-the-Lake, 28-30 mai 1984, ministère des Approvisionnement et Services Canada, 1984; Conseil consultatif canadien sur la situation de la femme, et Linda McLeod, Pour de vraies amours... prévenir la violence familiale, Ottawa, ministère des Approvisionnement et Services, Canada, 1987.

¹² Dans l'affaire *Whynot*, le juge Burchell avait soumis pas moins de quatre défenses: l'aliénation mentale, l'intoxication volontaire, la défense des tiers et la provocation. Il avait par ailleurs donné son opinion à l'effet que les deux premiers moyens étaient difficiles à justifier à partir de la preuve faite. L'essentiel des directives du juge Burchell est reproduit dans l'arrêt de la Cour d'appel: *R. c. Whynot*, *supra*, note 4, aux pp. 457-461.

¹³ Il ne saurait être question d'aliénation mentale dans les circonstances étant donné que, telle que décrite à l'article 16 du Code criminel et telle qu'interprétée par les tribunaux, cette défense ne peut être reçue qu'en cas de désordre mental affectant les facultés cognitives de l'accusé: voir Anne-Marie Boisvert, *Psychanalyse d'une défense: "Réflexions sur l'aliénation mentale"* (1990), 69 R. du B. can. 46. On connaît par ailleurs les hésitations manifestées par la Cour suprême du Canada à admettre ouvertement une défense de responsabilité atténuée: voir M. Gannage, *The Defence of Diminished Responsibility in Canadian Criminal Law* (1981), 19 Osgoode Hall L.J. 301; J.C. Jordan, *Diminished Capacity* (1983), 25 C.L.Q. 480. Cela s'explique en partie par la codification de la défense d'aliénation mentale mais aussi par la réticence de la Cour à créer de nouvelles défenses, malgré le pouvoir quasi législatif que lui confère le paragraphe 8(3) C.cr. Sur ce dernier point, rappelons simplement les hésitations qui ont précédé la réception de la défense de nécessité (de l'arrêt *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616, à l'arrêt *Perka c. La Reine*, [1984] 2 R.C.S. 232) ou le plaidoyer de provocation policière (de l'arrêt *Kirzner c. La Reine*, [1978] 2 R.C.S. 487 à l'arrêt *Mack c. La Reine*, [1988] 2 R.C.S. 903).

de l'acquiescement de madame Lavallée portait essentiellement sur l'admissibilité d'une telle preuve et sur les directives données au jury relativement à l'opinion de l'expert psychiatre, étant donné que celle-ci reposait en partie sur des faits n'ayant pas été établis par preuve indépendante. Dans un jugement partagé, la Cour d'appel du Manitoba lui donne raison.¹⁴ Signant l'opinion majoritaire,¹⁵ l'honorable juge Philp ordonne un nouveau procès tout en suggérant néanmoins au ministère public de porter une accusation d'homicide involontaire coupable et non de meurtre au second degré car il croit que,¹⁶

... it is unlikely that the jury, properly instructed, would have found the accused guilty of second degree murder.

Cette suggestion paraît pour le moins étonnante compte tenu de l'arrêt *Faid*¹⁷ dans lequel la Cour suprême a catégoriquement rejeté la possibilité d'un verdict d'homicide involontaire coupable en cas d'excès de force en légitime défense. Vu la preuve présentée dans la présente affaire et compte tenu de l'utilisation d'une carabine face à un agresseur non armé, pour l'abattre d'une balle à l'arrière de la tête, on peut difficilement conclure à l'application du paragraphe 1 de l'article 34 du Code criminel. Le plaidoyer de légitime défense doit donc susciter un doute raisonnable en fonction des critères plus rigoureux du paragraphe 2,¹⁸ lequel admet l'intention de tuer ou à tout le moins de blesser, ce qui ferait de la conduite un meurtre aux termes du paragraphe 229a) du Code n'eût été la justification découlant de la dangerosité de l'attaque et de l'impossibilité de s'y soustraire par un moyen moins violent. La remarque du juge Philp avalise donc la thèse selon laquelle le jury rend parfois des jugements de sympathie sans égard à la preuve présentée devant lui.¹⁹

Vu la dissidence du juge Huband, madame Lavallée a pu bénéficier d'un appel de plein droit au plus haut tribunal du pays. Les juristes strictement intéressés à connaître le sort réservé par la Cour suprême du Canada à son arrêt antérieur dans l'affaire *Abbey*²⁰ se contenteront de lire l'opinion

¹⁴ R. c. *Lavallée*, *supra*, note 8.

¹⁵ À laquelle a souscrit le juge en chef Monnin.

¹⁶ R. c. *Lavallée*, *supra*, note 8, à la p. 400.

¹⁷ R. c. *Faid*, [1983] 1 R.C.S. 266, à la p. 271.

¹⁸ D'ailleurs seul ce paragraphe est reproduit dans le jugement de la Cour suprême du Canada sous la rubrique "Les dispositions législatives pertinentes".

¹⁹ On se rappellera que le criminaliste Morris Manning avait expressément invité le jury à rendre un verdict selon sa conscience dans l'affaire *Morgentaler*. On se rappellera également qu'il avait été vertement critiqué tant par la Cour d'appel d'Ontario (R. c. *Morgentaler* (1986), 48 C.R. (3d) 1, aux pp. 90-91) que par la Cour suprême du Canada (R. c. *Morgentaler*, [1981] 1 R.C.S. 30, aux pp. 76-79 (J. en chef Dickson), 130 (J. Beetz), 157 (J. McIntyre), 184 (J. Wilson).

²⁰ R. c. *Abbey*, [1982] 2 R.C.S. 24.

du juge Sopinka qui ne traite que de ce point.²¹ Cependant, nous les invitons fortement à lire l'opinion majoritaire signée par la juge Wilson car il s'agit d'une opinion riche de promesses d'une saine évolution de la common law.

La juge Wilson résume en un paragraphe l'argumentation du ministère public:²²

Les faits essentiels du présent litige, lesquels, je crois, sont largement appuyés par la preuve, sont que l'appelante a été brutalisée à maintes reprises par Rust, mais ne l'a pas quitté (quoiqu'elle ait à deux occasions braqué un fusil sur lui), et qu'elle a finalement tiré sur lui à l'arrière de la tête alors qu'il quittait sa chambre. Le ministère public soutient que ces faits révèlent tout ce qu'un jury a besoin de savoir pour décider si l'appelante a agi en légitime défense.

Elle la rejette tout aussi rapidement et sans hésitation, dit-elle:²³

Une preuve d'expert relative à l'effet psychologique que peut avoir la violence sur les épouses et les conjointes de fait doit, me semble-t-il, être à la fois pertinente et nécessaire dans le contexte du présent litige. En effet, comment peut-on juger de l'état mental de l'appelante sans cette preuve? On peut pardonner au citoyen (ou au juré) moyen s'il se demande: Pourquoi une femme supporterait-elle ce genre de traitement? Pourquoi continuerait-elle à vivre avec un tel homme? Comment pouvait-elle aimer quelqu'un qui la battait tellement qu'elle devait être hospitalisée? On s'attendrait à ce que la femme plie bagage et s'en aille. N'a-t-elle aucun respect

²¹ On se rappellera que l'arrêt *Abbey* portait sur la pertinence et la valeur probante d'un témoignage expert fondé sur des faits qui n'ont pas été établis par preuve indépendante. Dans l'arrêt *Lavallée*, *supra*, note 1, tous les juges acceptent les propositions suivantes comme résumant l'arrêt *Abbey*:

1. Une opinion d'expert pertinente est admissible, même si elle est fondée sur une preuve secondaire.
2. Cette preuve secondaire (oui-dire) est admissible pour montrer les renseignements sur lesquels est fondée l'opinion d'expert et non pas à titre de preuve établissant l'existence des faits sur lesquels se fonde cette opinion.
3. Lorsque la preuve psychiatrique consiste en une preuve par oui-dire, le problème qui se pose est celui de la valeur probante à accorder à l'opinion.
4. Pour que l'opinion d'un expert puisse avoir une valeur probante, il faut d'abord conclure à l'existence des faits sur lesquels se fonde l'opinion: *ibid.*, aux pp. 893 (J. Wilson), et 898 (J. Sopinka).

Le juge Sopinka tente de résoudre l'apparente contradiction entre ces diverses propositions en affirmant qu'un expert peut être bien avisé de se former une opinion à partir d'informations qui ne font pas l'objet d'une preuve directe si elles présentent de fortes garanties circonstancielles de crédibilité (p. 899), mais non lorsqu'il s'agit de données provenant d'une partie au litige ou d'une autre source fondamentalement suspecte (p. 900). Dans ce dernier cas, le tribunal devrait exiger que ces données soient établies par une preuve indépendante. Il souscrit toutefois à l'opinion de la juge Wilson à l'effet que lorsque, comme en l'espèce, l'expert se fonde pour partie sur des faits établis et pour partie sur l'information fournie par l'accusée, il s'agit d'une question de valeur probante et non d'admissibilité de son témoignage. Pour une critique de cet aspect de l'arrêt *Lavallée*, voir R.J. Delisle, *Lavallée: Expert Opinion Based on "Some Admissible Evidence"—Abbey Revisited* (1990), 76 C.R. (3d) 366.

²² *Lavallée c. R.*, *supra*, note 1, à la p. 871.

²³ *Ibid.*, aux pp. 871-872.

de soi? Pourquoi ne part-elle pas refaire sa vie? Telle serait la réaction de la personne moyenne devant ce qu'il est convenu d'appeler [traduction] "syndrome de la femme battue". Nous avons besoin d'aide pour le comprendre et cette aide, nous pouvons l'obtenir d'experts compétents en la matière.

S'attardant plus spécifiquement sur l'utilité d'un témoignage d'expert relativement aux deux éléments constituant la légitime défense, la juge Wilson dit:²⁴

Il y a d'abord le lien temporel qu'établit l'al. 34(2)a) entre l'appréhension de la mort ou de lésions corporelles graves et l'acte qu'on prétend avoir commis en légitime défense. . . . En second lieu, il y a l'appréciation, prévue à l'al. 34(2)b), du degré de force employé par l'accusée.

La juge Wilson constate que ces deux éléments imposent:²⁵

. . . une norme objective du raisonnable à l'appréhension de la mort et à la nécessité de recourir à la force meurtrière pour repousser l'attaque.

La juge Wilson conteste la capacité de l'homme ordinaire à se placer dans la situation de la femme battue:²⁶

S'il est difficile d'imaginer ce qu'un "homme ordinaire" ferait à la place du conjoint battu, cela tient probablement au fait que, normalement, les hommes ne se trouvent pas dans cette situation. Cela arrive cependant à certaines femmes. La définition de ce qui est raisonnable doit donc être adaptée à des circonstances qui, somme toute, sont étrangères au monde habité par l'hypothétique "homme raisonnable".

Cette dernière affirmation nous rappelle celle qui lui avait valu tant d'éloges et de critiques dans l'arrêt *Morgentaler*.²⁷ Ce qui différencie fondamentalement les deux arrêts, c'est qu'aucun juge n'avait alors souscrit à son opinion tandis qu'elle a su rallier ici cinq des six juges qui ont siégé sur l'appel de madame Lavallée.

Après avoir cité un arrêt américain reconnaissant que le sexe puisse être un facteur pertinent dans la détermination de ce qui est raisonnable,²⁸ la juge Wilson constate que les juges canadiens ont ajouté aux éléments déjà exigeants du paragraphe 34(2) du Code criminel le critère du danger imminent, critère qui a scellé le sort de Jane Stafford. Il lui paraît capital d'écarter ce critère dans le contexte des tentatives d'une femme battue de repousser une agression,²⁹ critère qui, nous dit encore madame la juge

²⁴ *Ibid.*, à la p. 873.

²⁵ *Ibid.*, à la p. 874.

²⁶ *Ibid.*

²⁷ *R. c. Morgentaler*, [1988] 1 R.C.S. 30, à la p. 171. La juge Wilson avait alors déclaré qu'il était difficilement concevable qu'un homme puisse comprendre le dilemme de la femme enceinte qui songe à recourir à un avortement:

Il est probablement impossible pour un homme d'imaginer une réponse à un tel dilemme, non seulement parce qu'il se situe en dehors de son expérience personnelle (ce qui, bien entendu, est le cas), mais aussi parce qu'il ne peut y réagir qu'en l'objectivant et en éliminant par le fait même les éléments subjectifs de la psyché féminine qui sont au coeur du dilemme.

²⁸ *State v. Wanrow*, 559 P.2d 548 (1977).

²⁹ *Lavallée c. R.*, *supra*, note 1, à la p. 877.

Wilson, reviendrait "... à la condamner au [traduction] 'meurtre à tempérament'",³⁰ ce qui n'apporterait rien à la société, si ce n'est peut-être le risque accru que la femme battue soit elle-même tuée.³¹ L'opinion d'un expert est donc cruciale afin d'expliquer l'état d'esprit dans lequel se trouvait la femme battue au moment de passer à l'acte. Les études de la psychologue Walker³² sur le syndrome de la femme battue peuvent ainsi être vulgarisées pour le jury qui comprendra mieux la dynamique de la violence conjugale, ses cycles et la sensibilité toute particulière de la femme battue face aux changements d'humeur de son partenaire et aux risques qu'ils représentent pour elle. Le jury comprendra également l'incapacité de la femme battue de mettre fin à la relation et pourra ainsi, plus objectivement, appliquer au cas devant lui les éléments de la légitime défense car, comme le rappelle encore la juge Wilson:³³

... il n'appartient nullement au jury de porter un jugement sur le fait qu'une femme battue inculpée est restée avec l'homme qui l'agressait. Encore moins lui est-il permis d'en conclure qu'elle a renoncé à la légitime défense.

Conclusion

Témoin expert compétent et procès par jury sont donc les gages de la meilleure justice possible pour la femme battue. On objectera que si cette combinaison a bien fonctionné pour madame Lavallée, l'issue a été moins heureuse pour madame Whynot Stafford. Mais ce n'est pas à ce niveau que les choses se sont gâchées pour cette dernière! C'est en appel que l'affaire *Whynot* a connu des ratés. Mais c'était il y a sept ans. Qu'est-ce qui, depuis lors, a pu entraîner un tel changement dans la réponse judiciaire face aux homicides commis par les femmes battues? Dans son opinion, l'honorable juge Wilson nous indique quelques pistes de réponse:³⁴

Heureusement, on constate depuis quelques années une conscience accrue qu'aucun homme n'a dans aucune circonstance le droit de brutaliser une femme. Des initiatives législatives destinées à sensibiliser les policiers, les officiers de justice et le public, ainsi que des politiques plus agressives en matière d'enquête et d'inculpation témoignent toutes d'un effort concerté dans le système de justice criminelle de prendre au sérieux la violence conjugale.

On est tenté d'ajouter à ces éléments de réponse que désormais la Cour suprême du Canada compte des femmes dans ses rangs. Lors d'une conférence donnée à la Faculté de droit de l'Université York,³⁵ la question

³⁰ *Ibid.*, à la p. 883.

³¹ *Ibid.*

³² *Op. cit.*, note 2.

³³ *Lavallée c. R.*, *supra*, note 1, à la p. 888.

³⁴ *Ibid.*, à la p. 872. À titre d'illustration, voir: Politique d'intervention en matière de violence conjugale, Québec, ministère de la Justice, ministère du Solliciteur général, 1986.

³⁵ Dans le cadre de The Fourth Annual Barbara Bertcherman Memorial Lecture qui eut lieu le 8 février 1990. Cette conférence lui valut une plainte au Conseil de la magistrature logée par le groupe féministe de droite REAL (Realistic, Equal, Active for Life) Women

posée par madame la juge Wilson était la suivante: "Will Women Judges Really Make a Difference?". Dans son propos elle soutenait que la loi n'était pas neutre et que la common law ayant été interprétée par des hommes cadrait mal avec les préoccupations féminines, notamment dans certains domaines du droit criminel qui appellent des changements car:

... they are based on presuppositions about the nature of women and women's sexuality that in this day and age are little short of ludicrous.

Mais les femmes, même celles siégeant à la Cour suprême du Canada, tant qu'elles n'en constitueront pas la majorité, seront impuissantes à changer le droit à moins qu'elles ne parviennent à convaincre leurs collègues masculins.³⁶ Madame la juge Wilson terminait sa conférence en affirmant que:

If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision-making process, perhaps they will make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.³⁷

À ce titre, l'arrêt *Lavallée* est, à ce jour, le plus beau fleuron de la carrière de l'honorable juge Wilson à la Cour suprême du Canada.

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of Canada: voir C. Gwendolyn Landolt, Wilson's feminist talk will come back to haunt S.C.C., *The Lawyers Weekly*, vol. 10, no 4, p. 4 (25 mai 1990). Il est heureux que le Conseil de la magistrature ait rejeté cette plainte.

³⁶ Le clivage qu'on a pu constater parmi les juges de la Cour suprême du Canada dans le *Renvoi relatif au code criminel (Manitoba)*, [1990] 1 S.C.R. 1123 et dans *Stagnitta c. R.*, [1990] 1 S.C.R. 1226 et *R. c. Skinner*, [1990] 1 S.C.R. 1235 en est une illustration des plus explicites, les trois femmes siégeant à la Cour suprême ayant signé l'opinion minoritaire sur une question qui touche au premier titre les femmes. Ces trois jugements portaient sur la validité constitutionnelle des dispositions du Code criminel concernant la tenue d'une maison de débauche et la sollicitation aux fins de prostitution. Historiquement et jusqu'à récemment la prostitution des femmes aura été prédominante: Comité sur les infractions sexuelles à l'égard des enfants et des jeunes, *Infractions sexuelles à l'égard des enfants*, vol. 1 et 2, Ottawa, ministère des Approvisionnements et Services Canada, 1984 (Rapport Badgley). Vu l'augmentation importante qu'a connue ces dernières années la prostitution masculine, il est difficile de dire si la prostitution reste un problème principalement féminin.

³⁷ (Mot mis en italique par la juge Wilson).

REAL PROPERTY—LAND USE CONTROL—PROTECTION OF AGRICULTURAL LAND—VESTED RIGHTS: *Veilleux v. Québec* (*Commission de protection du territoire agricole du Québec*); *Gauthier v. Québec* (*Commission de protection du territoire agricole du Québec*); *Venne v. Québec* (*Commission de protection du territoire agricole du Québec*); *Lebel v. Winzen Land Corporation Ltd.*

Jane Matthews Glenn*

In a tetralogy of cases, the decisions in which were handed down by Beetz J. on 20 April 1989, the Supreme Court of Canada dealt with the question of vested, or acquired, rights under Quebec's *Act to preserve agricultural land*.¹ Of the four, the decision in *Venne v. Québec* (*Commission de protection du territoire agricole du Québec*)² is probably the most important (and the most difficult), with the decisions in the first two, *Veilleux v. Québec* (*Commission de protection du territoire agricole du Québec*)³ and *Gauthier v. Québec* (*Commission de protection du territoire agricole du Québec*),⁴ and the last, *Lebel v. Winzen Land Corporation Ltd.*,⁵ providing the necessary preludes and postlude to it.

The *Act to preserve agricultural land*, first adopted in 1978,⁶ provides for the establishment of agricultural zones within which no one can use a property unit for any purpose other than agriculture,⁷ or subdivide or sever it (by selling part while retaining part), without permission of the provincially appointed *Commission de protection du territoire agricole du Québec*.⁸ As a general rule, the Commission must base its decisions on factors relating to the protection of agricultural land, with consideration of other factors (such as conflicting land use needs in the municipality) being extraneous to its mandate.⁹ The Commission takes this mandate seriously, as the four cases under review attest.

* Jane Matthews Glenn, of the Faculty of Law, the Institute of Comparative Law and the School of Urban Planning, McGill University, Montreal, Quebec.

¹ R.S.Q., c. P-41.1.

² [1989] 1 S.C.R. 880.

³ [1989] 1 S.C.R. 839.

⁴ [1989] 1 S.C.R. 859.

⁵ [1989] 1 S.C.R. 918. The order in which the reasons for judgment were written is set out by Beetz J. in *Venne, supra*, footnote 2, at p. 885.

⁶ S.Q. 1978, c. 10.

⁷ This also includes not using a sugar bush for any other purpose or removing topsoil for the purpose of sale.

⁸ Also within the Commission's discretion are applications to be excluded from, or included in, an agricultural zone.

⁹ It will be interesting, however, to see how the Commission interprets the requirement, added by S.Q. 1989, c. 7, to consider "the impact on the economic development of the

All four deal with the extent to which vested rights are preserved by section 101 of the Act, the first paragraph of which reads in part as follows:

A person may, without the authorization of the commission, alienate, subdivide and use for a purpose other than agriculture a lot situated ... in an agricultural zone, to the extent that that lot was being used or was already under a permit authorizing its use for a purpose other than agriculture when the provisions of this act requiring the authorization of the commission were made applicable to that lot.

At issue in *Veilleux* was the meaning of the phrase "being used ... for a purpose other than agriculture". The applicants maintained they had a right to subdivide and build a residence on a portion of a lot because, when the legislation came into force in regard to the lot, there still existed on the portion in question the stone foundations and wood flooring of a house originally built in 1945 and demolished in 1976. Such a non agricultural use could be lost, still according to the applicants, only if the surface had been covered by vegetation¹⁰ for over a year, as the succeeding section 102 on interruption or abandonment of acquired rights set out.¹¹ These ruins were not yet overgrown. This argument was accepted at trial,¹² but rejected by both the Court of Appeal¹³ and the Supreme Court.¹⁴ Both held that section 102 applies only to the interruption or abandonment of vested rights recognized under section 101 and that section 101 protects only present, existing uses. A past use since abandoned is not a present use. While lack of vegetation negates an agricultural use, it does not indicate a non agricultural use: unused land is not land used for a purpose other than agriculture.

Veilleux is important for setting out two principles of interpretation which condition the decisions in the other three cases. The first is to regard the *Act to preserve agricultural land* as being legislation passed in the public interest and so to be construed liberally (by placing on the applicant

region" (although only public bodies can submit evidence in this regard): s. 62, para. 2(9). Note as well that the Commission may (but is not obliged to) take into consideration "the consequences of a refusal for the applicant": s. 62, para. 3(2).

¹⁰ The actual English translation of the French "*laisser sous couverture végétale*" is "to leave uncropped". Beetz J. rightly illustrates the peculiarity of this translation with the example of an asphalt parking lot which, while used, would not be covered with vegetation (and hence would remain protected under the French version), but would necessarily be left uncropped (and thus lose its protection under the English version): *Veilleux*, *supra*, footnote 3, at pp. 856-857.

¹¹ Section 102 reads in part as follows: "The right recognized by section 101 subsists notwithstanding the interruption or abandonment of the use other than agriculture. It is extinguished, however, by the fact that that part of the surface in respect of which the right exists is left uncropped for over one year from the time when the provisions of this Act ... were made applicable to that surface ...".

¹² [1985] C.S. 174.

¹³ [1986] R.J.Q. 1402 (C.A.).

¹⁴ *Supra*, footnote 3.

“a duty to prove that he is in an exceptional situation”¹⁵ under the Act). The court thus rejected the strict construction approach under which any doubt as to the meaning or the applicability of the Act would be resolved in favour of the individual property owner. The second is to emphasize the primacy of the statutory provisions governing vested rights and to deny other rules a role in “conferring acquired rights other than those specified by the Act or of conferring them in a way not contemplated by the Act”.¹⁶ The role of such other rules could be suppletive only, as in *Veilleux* itself where they were used to interpret the term “use”, undefined in the Act.

The meaning of “use for a purpose other than agriculture” was also at issue in the second case, *Gauthier*, as was the notion of “permit authorizing its use” for a non agricultural purpose. The applicant was the owner of property, located on the outskirts of a village, which he intended to turn into a residential development. Before the Act came into force, he had obtained the approval of the municipal council for a plan of subdivision of the land used in constructing a street as well as the approval of the provincial Department of Lands and Forests for a plan of subdivision for the entire development; he had begun construction of the street and ditches, installed electricity and telephone lines, built a model home and sold several lots. When the Act came into force, part of his property was included in the agricultural zone and part excluded. The part included had been subdivided, but no houses or services (apart from the earth and gravel street) built on it.

The applicant argued he had a right to proceed with the residential development under both wings of section 101, actual use and permit to use. This argument was rejected at trial¹⁷ and, except as regards the roadbed, on appeal both before the Quebec Court of Appeal (L’Heureux-Dubé J.A., dissenting)¹⁸ and the Supreme Court of Canada.¹⁹ In so deciding, the Supreme Court put to rest a conflict between two contradictory lines of authority on substantially similar facts, one of which,²⁰ followed by L’Heureux-Dubé J.A., advocated a wide reading of the vested rights provisions so as to favour the right of ownership, and the other,²¹ the reverse.

¹⁵ *Veilleux, ibid.*, at pp. 851-852, citing Mayrand J.A. in *Commission de protection du territoire agricole du Québec v. Rheume*, [1984] C.A. 542, at p. 547.

¹⁶ *Ibid.*, at p. 852.

¹⁷ Unreported judgment no. 755-05-000313-831, 21 February 1984 (Sup. Ct.).

¹⁸ [1985] C.A. 676.

¹⁹ *Supra*, footnote 4.

²⁰ Represented by the Court of Appeal’s decision in *Commission de protection du territoire agricole du Québec v. Lefebvre*, unreported judgment no. 500-09-00021-832, 21 August 1984, (summarized J.E. 84-720, and reproduced in Louis-A. Cormier and Louis-V. Sylvestre, *Loi sur la protection du territoire agricole: Commentaires, décisions, jugements* (1984), pp. 874.7-878) (leave to appeal refused 5 December 1984, [1984] 2 S.C.R. vi).

²¹ Represented by the Court of Appeal’s decision in *Rheume, supra*, footnote 15 (Nichols J.A. dissenting).

In adopting the latter line of authority, the Supreme Court followed the first approach set out in *Veilleux*. A liberal construction of the statute (and a corresponding strict construction of its vested rights exception) led the court to reject both the argument that the entire property be treated as a unit in deciding whether it was being used for a non agricultural purpose at the relevant time and the suggestion that the intention of the developer influenced its present use: "The concept of the 'vocation' of land regarded as a whole is foreign to the Act and cannot be a source of acquired rights".²²

It also meant that the court declined to treat either of the two subdivision approvals as "a permit authorizing use" for a residential development, even though this term is undefined both in the Act itself and in land use planning legislation generally and even though the applicant did not in fact need a permit for his residential development at the time the Act came into force in regard to it. The court specifically accepted the Commission's distinction between "use" and "subdivision": "Whereas a permit authorizing use allows the use requested, . . . a *subdivision* permit is only intended to allow the marking out of a new property or identification of a new lot and does not authorize use".²³

These issues reappear in *Venne*, although the vested rights argument there took a different form.

Venne originated in an earlier case, *Winzen Land Corporation Ltd. v. Commission de protection du territoire agricole du Québec*.²⁴ Winzen had acquired land on the outskirts of Montreal in the early 1970s, which it then subdivided into more than 2,000 lots, some of which were transferred to the municipality for parks or street purposes and the rest offered for sale under a form of instalment contract, with title to pass once all the instalments were paid. At the time the Act took effect in regard to Winzen's property, title to 850 lots had been transferred by registered deed, but title to a further 1,033 lots under contract of sale remained in the hands of Winzen as the entire purchase price had not been paid. It is these lots that were principally at issue in the case.

Winzen first applied to the Commission to exclude all its land from the agricultural zone or, alternatively, for permission to alienate the lots under contract for sale to which title had not yet passed. Both applications

²² *Gauthier, supra*, footnote 4, at p. 873.

²³ *Ibid.*, at p. 877. But Beetz J. surely goes too far in insisting, at p. 876, that "[t]he nature of a permit is such that it authorizes what is otherwise prohibited by law", so that because a residential use was not prohibited before the Act took effect, there could be no permit authorizing use. Some permits (and building permits under a regulatory system are a prime example of this) represent an individual assessment of the fact that something is *not* prohibited by law.

²⁴ [1981] C.A. 383; aff'g unreported judgment no. 500-05-004153-803, 16 February 1981 (Sup. Ct.) (reproduced in Cormier and Sylvestre, *op. cit.*, footnote 20, pp. 28-42).

were refused. As no appeal on the merits was then available,²⁵ Winzen's only recourse was to change its tactic and challenge the jurisdiction of the Commission before the courts, arguing that the Commission's permission was not necessary as it had acquired the right, even the obligation, to alienate under contracts signed before the Act came into force. This argument was rejected both at trial and on appeal.²⁶ However, in response to Winzen's argument that the purchasers had the right to acquire title under the terms of the contracts, L'Heureux-Dubé J.A. in the Court of Appeal noted that the purchasers were not parties to the action:²⁷

En vertu de quel principe l'appelante peut-elle plaider au nom d'autrui, en particulier dans une instance où la possibilité de conflits d'intérêts est aussi patente?

Sans me prononcer sur les pouvoirs de la Commission à cet égard, les acquéreurs pourront, s'ils le désirent, faire valoir leurs droits en tout temps, devant la Commission ou autrement.

The scene was set for *Venne*.

Venne was one of the purchasers of the 1,033 lots in question. After the Court of Appeal's decision in *Winzen*, he paid the outstanding balance due on the purchase price and, without authorization of the Commission, took title from Winzen by notarial deed. Then, in what was admittedly a test case, he applied successfully to the Superior Court for a declaration that the transaction was valid,²⁸ which declaration was upheld by the Court of Appeal (Monet J.A. dissenting).²⁹ This decision was reversed by the Supreme Court of Canada.³⁰

Under Quebec law, the original contract in force between the parties could be interpreted in one of two ways: either as a transfer of the right to property under a suspensive condition (that is, a condition in the nature of a condition precedent) the fulfilment of which has retroactive effect from the date of the contract, or simply as a contractual promise of sale without a similar element of retroactivity.³¹ Venne argued that his subsequent acquisition of title from Winzen was valid under either interpretation. Under the former, the transfer of title would not be governed by the Act as it would be retroactive to a date prior to the Act's coming into force

²⁵ Winzen did apply to the Commission for revision of its decision, which application was held inadmissible. Recent amendments now provide for an appeal both to a newly-created appeal tribunal ("*Tribunal d'appel en matière de protection du territoire agricole*") and to the Court of Quebec: S.Q. 1988, c. 21; S.Q. 1989, c. 7.

²⁶ *Supra*, footnote 24. Note that in a parallel application, Winzen invoked the agricultural zoning to obtain a reduction in certain municipal property taxes (related to development): *Ville de Saint-Hubert v. Winzen Land Corporation Ltd.*, [1988] R.J.Q. 940 (C.A.).

²⁷ *Supra*, footnote 24, at pp. 386-387.

²⁸ Unreported judgment no. 500-05-009403-823, 16 September 1982 (Sup. Ct.).

²⁹ [1985] C.A. 703.

³⁰ *Supra*, footnote 2.

³¹ A "suspensive conditional obligation" or an "obligation with a term": arts. 1079 ff. and 1089 ff. respectively, C.C.L.C.

in regard to his property; under the latter, the contractual rights between the parties would be acquired rights to which the Act would not apply.

Beetz J. rejected the former interpretation for the reason that a true suspensive condition requires that the condition on which the existence of the obligation depends be a future and uncertain event, one which is extrinsic to the legal relationship and not an essential part of the contract. A condition as to payment of the purchase price, although uncertain in the sense that its performance depends on the solvency of the buyer, is not external to the legal relationship but rather at the very heart of it. The subsequent transfer of title was thus not retroactive in effect and outside the scope of the Act for this reason.

The alternative argument, as we have seen, was that the transaction between Winzen and Venne, although merely contractual in nature, gave Venne an acquired right to transfer of title once the purchase price was paid. The argument about acquired rights thus took a different turn in *Winzen/Venne* than it had in the preceding cases in that it was framed not so much in public law language (that is, in terms of existing uses or permits to use) as in private law terms. The court also rejected this argument, holding that the twin presumptions on which it was based—against interference with vested rights and against retroactive legislation—had been displaced by the acquired rights provisions of the Act. Harkening back to its decision in *Veilleux*, the court emphasized that these provisions form “a complete and exhaustive code of the rules applicable to the matter. . . . Respondent cannot claim any other acquired rights than those mentioned in s. 101”.³² The applicant could not bring himself within the scope of section 101 for two reasons: the property in question was neither being used nor under a permit authorizing its use for a purpose other than agriculture, either by Venne himself or, as in *Gauthier*, by Winzen before him; and the right to alienate property recognized by the statute does not include the right to acquire property, which was the right claimed.³³ In other words, under section 101, a non conforming use could support a right to alienate, but not the reverse, and in any event, a right to alienate is not the same as a right to acquire.

The *Lebel* case, finally, represents the other side of the *Winzen/Venne* coin in that it was a motion for permission to institute a class action on behalf of all purchasers in the position of Venne to annul the contracts in question on the grounds that the Act prevented Winzen from conveying valid title. Success in one case thus precludes success in the other, and

³² *Venne*, *supra*, footnote 2, at p. 909.

³³ This would suggest that the proper applicant, if any, was in fact Winzen, as had initially been the case. See, *supra*, the text at footnote 27.

Lebel's motion was dismissed at trial³⁴ and on appeal,³⁵ but granted by the Supreme Court of Canada.³⁶

These four cases, read together, are interesting for three particular reasons. Firstly, and most technically, the limited effect attributed to subdivision permits in *Gauthier* highlights the restricted role traditionally played by subdivision control under Quebec law. Unlike other provinces, which authorize the approving body to consider a wide range of factors in assessing the opportuness of a proposed subdivision, subdivision approval in Quebec is still largely a technical matter (mainly involving ministerial assessment of the resulting cadastral operation for the purposes of registration³⁷ or municipal approval of the location of streets³⁸), unrelated to any real appreciation of the purpose to be served by the subdivision.³⁹ It is an approval of means, not of ends.

³⁴ Unreported judgment no. 500-06-000007-829, 5 November 1981 (Sup. Ct.).

³⁵ Unreported judgment no. 500-09-001549-823, 11 November 1985 (C.A.).

³⁶ *Supra*, footnote 5. More precisely, the court held that the facts stated in the motion "seem to justify the conclusions sought" and referred the matter back to the Superior Court for a determination whether the other criteria for a class action (art. 1003, C.C.P.) had been met.

³⁷ Provided for under art. 2175 of the Civil Code of Lower Canada (making it the oldest form of subdivision control in the province). Art. 2175 now reads in part as follows:

Whenever the owner of a lot designated upon the plan or ... book of reference, subdivides the same into lots, he must deposit in the office of the *Ministre de l'énergie et des ressources* [previously the Department of Lands and Forests] a plan certified by himself, with particular numbers and designations, so as to distinguish them from the original lots; and if the *Ministre* ... finds that such particular plan is correct, he transmits a copy certified by himself to the registrar of the division and to the clerk ... of the municipality....

(The requirement of informing the municipality was added by S.Q. 1923-24, c. 74, s. 1). Its location in the chapter on land registration helps explain its limited scope. See *Du Lac Development Inc. v. Ville de Boucherville*, [1959] R.L. 484 (Sup. Ct.).

³⁸ Under the double authority of the Cadastre Act, R.S.Q., c. C-1, and the Public Streets Act, R.S.Q., c. R-27. The former was originally enacted to supplement the Code provisions concerning land registration (see, for example, S.Q. 1875, c. 15), and a requirement for municipal approval of the streets and lanes forming part of a subdivision, as a condition precedent to ministerial consideration of the plan, was added in 1934: S.Q. 1934, c. 70, s. 1. This requirement was repealed in 1982: S.Q. 1982, c. 63, s. 107. The latter statute, the relevant part of which originally set out the width of streets upon subdivision, was amended in 1924 to require municipal approval of their location prior to their being opened or to the laying out of land in building lots: S.Q. 1924, c. 60, s. 1. This part of the statute was repealed in 1979: S.Q. 1979, c. 36, s. 102. See also (prior to 1979), the Cities and Towns Act which, from at least the beginning of the century (for example, S.Q. 1903, c. 38, s. 386), authorized municipalities to adopt by-laws dealing with a number of matters concerning "Streets and Public Squares", including the subdivision of land into streets (ss. (8)).

³⁹ Although in 1959 municipalities were authorized to require prior approval of any plan of subdivision "whether such plan provides for streets or not" (S.Q. 1959-60, c. 76, s. 26, replacing the then s. 429(8) of the Cities and Towns Act, *supra*, footnote 38),

The adoption in 1979 of a general land use planning statute, the *Act respecting land use planning and development*,⁴⁰ represents a major step forward in Quebec. However, although regional and local planning were given pride of place in the legislation as drafted, and recent amendments have modernized land use control (by adding a number of discretionary tools to the traditional regulatory zoning power),⁴¹ subdivision control remains the poor relation. The provisions transferred from the *Cities and Towns Act*⁴² retain their original regulatory flavour. The approving officer still does not have a discretionary power of appreciation; his role is simply to ensure that the proposed subdivision meets the requirements of the subdivision by-law and, if it does, a permit follows as of right. The Supreme Court decisions under review highlight the need for reform in this area.

Secondly, and most obviously, all four cases raise the difficult question of the temporal application of statutes, or temporal conflict of laws. This involves a consideration of the relationship between the presumption against retroactive legislation and the presumption against interference with acquired rights. That these two presumptions serve different purposes is rightly underlined in the decision in *Venne*.

As a general rule, legislative changes are prospective only, and apply to actions or events taking place after the legislation comes into force and not to those which took place before this time (so as, for example, to make unlawful actions that were lawful when they were accomplished). This is the presumption against retroactive legislation. However, this presumption can be displaced, as is the case with the *Act to preserve agricultural land* itself which was expressly given retroactive effect to the date of first reading.

Not all actions or events, however, can be located temporally as taking place either wholly before a statute comes into force, or wholly after: some actions or events occurring after are a continuation or a consequence of actions or events begun before. In this event, should the new law be applied generally (or immediately) to all actions or events occurring after it takes effect, regardless of their link with the past? Or should it be applied more restrictively so as to exclude from its ambit those actions or events which, while occurring after the new law takes effect, are so linked with past events as to call for continued application of the old law?⁴³ When should continuity prevail over change? The presumption against retroactive

such approval followed as of right if the plan conformed to the subdivision by-law. Note as well that the revised s. 429(8) remained embedded in a section entitled "Public Squares and Streets" and most of its provisions concerned the subdivision of streets.

⁴⁰ S.Q. 1979, c. 51 (now R.S.Q., c. A-19.1), s. 115.

⁴¹ See S.Q. 1985, c. 27; S.Q. 1987, c. 53; and S.Q. 1989, c. 46.

⁴² *Supra*, footnote 39. See, as well, *infra*, footnote 51.

⁴³ See especially P.-A. Côté, *Le juge et les droits acquis en droit public canadien* (1989), 30 *Les Cahiers de droit* 359.

legislation is of no assistance here,⁴⁴ and the choice is articulated in terms of the presumption against interference with vested rights.

What constitutes a vested right? Although imprecise, the notion clearly does not extend to plans alone—to simple hopes or expectations—as this would result in too large an exception to the immediate application of the new legislation. This is the reason for the decision in *Veilleux*, for example, once the link between the past and future residential uses was severed by the holding of abandonment. Something more is required, and the subdivision approvals in both *Gauthier* and *Venne*, as well as the contractual rights in *Venne*, could, and arguably did, satisfy this requirement and give rise to acquired rights, in that they both respond to the requirements of individual initiative and particularity which Professor Côté suggests inform judicial decisions in this area.⁴⁵ This is not denied by the court, which decided simply, and more restrictively, that they were not acquired rights protected by the Act. This is clearest in the *Venne*⁴⁶ decision:

... Once again, the presumption that vested rights cannot be affected is only a rule of construction and, by adopting the provisions of Division IX of the Act, the legislator intended to override this rule of construction and replace it with a complete and exhaustive code of the rules applicable to the matter. It is hard to see how the legislator could have more clearly defined the scope of the acquired rights which can be relied on by litigants and the conditions for their exercise.

Respondent cannot claim any other acquired rights than those mentioned in s. 101.

In other words, the court framed its decision in traditional terms of raising and rebutting the presumption against interference with vested rights. According to Professor Côté, judges often mask what are essentially policy decisions with such vested rights language.⁴⁷ What might be the reality behind the rhetoric in *Venne*? One factor could be the precedential effect of a decision favouring acquired rights. At stake in *Winzen/Venne* itself were some 1,033 lots, and it would appear that the situation of the applicants was not unique in this regard.⁴⁸ To recognize acquired rights in this case would be to open the door too widely to other applications. Another factor might be the consequence of a favourable decision to *Venne* and the other

⁴⁴ E.A. Driedger, *Statutes: Retroactive Retrospective Reflections* (1978), 56 *Can. Bar Rev.* 264, at pp. 268-269, distinguishes between retroactive and retrospective legislation, as follows:

A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. (Emphasis in original).

⁴⁵ *Loc. cit.*, footnote 43, at pp. 416-420.

⁴⁶ *Supra*, footnote 2, at p. 909.

⁴⁷ *Loc. cit.*, footnote 43, at pp. 411, 428-429.

⁴⁸ See, for example, *Cormier and Sylvestre, op. cit.*, footnote 20, pp. 23 ff.

purchasers. Even if Venne's right to completion of the sale were recognized (either on the suspensive condition or acquired contractual rights argument), he would still have to establish a right to build a residence. Section 101 would not help because, as we have seen, it presupposes a prior non agricultural use (or permit to use), which is the very thing he was seeking to be allowed to do. Nor would section 31, or what might be termed the "quasi vested rights" clause, be of assistance. This section provides that the owner of a vacant lot⁴⁹ may build a residence on it without permission of the Commission "if his land title is registered before the date of the coming into the Act in regard to it". Registered title holders as of the relevant date are thus entitled to build; unregistered title holders (as Venne would be if the retroactive suspensive condition argument were accepted) and, more forcefully still, those with merely a right to title (as he would be under the acquired rights argument) most surely are not. He would therefore require permission of the Commission to build. In short, had Venne's acquired rights argument succeeded, he would be in the unenviable position of having not only the right but also the obligation to take title to property the ultimate usefulness of which would depend on the discretion of the Commission. His victory would be Pyrrhic indeed.

Finally, and most generally, these cases indicate a preference for a liberal rather than a strict construction of statutes affecting land use. Whereas the latter construction looks upon such instruments as limiting the rights of property owners and hence to be interpreted restrictively so as to interfere as little as possible with these rights, the former regards them as being adopted in the public interest and thus to be construed so as to be given as much effect as possible. Although difficult to document, it would seem that the liberal approach is gaining ground, at least where the issue is use, not ownership, of land.⁵⁰ However, this would appear to be less the case in Quebec than elsewhere in Canada, perhaps not so much because of the comparative novelty of specialized land use planning legislation in the province⁵¹ as because of the strong civilian tradition in favour of private property, a tradition reflected in article 406 of the *Civil Code of Lower Canada* and section 6 of Quebec's *Charter of Human Rights and Freedoms*.⁵² Statements that "[o]wnership is the right of enjoying and disposing of things

⁴⁹ Or a lot "in respect of which rights are not recognized in virtue of Division IX [the acquired rights section]".

⁵⁰ R.G. Doumani and J.M. Glenn, Property, Planning and the *Charter* (1989), 34 McGill L.J. 1037, at p. 1056.

⁵¹ Prior to the adoption of the Act respecting land use planning and development, *supra*, footnote 40, land use powers were found scattered throughout the Cities and Towns Act, R.S.Q., c. C-19 (urban municipalities) or the Municipal Code, R.S.Q., c. C-27.1 (rural municipalities) as well as numerous city charters. This made it difficult to analyze these provisions in any systematic way.

⁵² R.S.Q., c. C-12. See, for example, L. Laperrière, *Rénovation urbaine et droit de propriété* (1968), 28 R. du B. 641.

in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulation” and that “[e]very person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law” inspire crisp articulations of the strict construction approach.⁵³

The Supreme Court’s liberal construction of the *Act to preserve agricultural land*, then, a statute particularly invasive of property rights, could serve as a signal for similar interpretation of other, less invasive, land use statutes. *Publicistes* will welcome this development; *privatistes*, not.

* * *

⁵³ As, for example, in *Commission de protection du territoire agricole du Québec v. Morin*, [1986] R.L. 204, at p. 209 (Que. C.A.), citing the trial judgment: “Il ne faut pas oublier que la *Loi sur la protection du territoire agricole* entraîne une restriction évidente à l’exercice du droit de propriété et, qu’à ce titre, ladite loi doit être interprétée restrictivement”.