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Comments

Richard F. Devlin*

We Can't Go On Together with
Suspicious Minds: Judicial Bias
and Racialized Perspective in
R. v. R.D.S.

We recommend that the Chief Justices and Chief Judges of each court in Nova Scotia exercise leadership within his or her area of responsibility to ensure fair treatment of visible minorities in the criminal justice system.

Marshall Report¹

Perhaps, among some Whites, there is an inherent disquietude when they see that occasionally Blacks are adjudicating matters pertaining to race relations, and perhaps that anxiety can be eliminated only by having no Black judges sit on such matters or, if one cannot escape a Black judge, then by having the latter bend over backwards to the detriment of Black litigants and Black citizens and thus assure that brand of "impartiality" which some Whites think they deserve.

— Higginbotham J.²

Introduction

In recent years it has been recognized that the Canadian judiciary has been drawn from only a relatively small cross section of the community, specifically privileged white males.³ As a result there have been calls for, and some action in pursuit of, appointment processes that are designed to

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1. *Commissioner's Report: Royal Commission on the Donald Marshall, Jr., Prosecution* (Halifax: The Commission, 1989) at 190 [hereinafter *Marshall Report*].

2. *Pennsylvania v. Local Union 546*, 388 F. Supp. 155 at 177 (1974).

3. C.B.A. *The Appointment of Judges in Canada* (Ottawa: Canadian Bar Association, 1985) at 9, 63; P. Russell and J. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4 at 19, 33; C.B.A. Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) [hereinafter *Touchstones*].

diversify the bench in order to render it more inclusive.⁴ Gender and race are the two primary categories that are invoked as the benchmarks of diversity.⁵ While it would appear that *numerically* there seems to be some very modest progress towards the goal of achieving a more inclusive judiciary,⁶ significant qualitative, institutional and ethical problems remain. This comment seeks to address two such problems. First, when we speak of increased “diversity” and greater “inclusion” what do we mean? Are candidates who are appointed to the bench, at least in part, on the basis of their race and gender, simply meant to reflect the pluralistic nature of Canadian society, or are they meant to represent the constituency from which they emanate? More concretely still, what do “reflect” or “represent” mean in the context of the judicial role in a contemporary democracy? Secondly, if it is accepted that racial or gender identity is an important variable in the appointment process, in what way should that identity manifest itself as a judge performs his/her duties on a daily basis? Specifically, should one’s experiences as a person of colour and/or a woman inform the execution of one’s judicial office?

If one is tempted to agree that judges should (or inevitably do) reflect and represent their identity-based experiences, then one directly encounters a shibboleth of judicial office: the principle of impartiality. Conventional wisdom holds that judges are to be free of all bias in their decision-making processes and that if there is even a hint of prejudgment or partiality the integrity of the judicial system is imperilled: “The judge should be, and be seen to be, impartial and objective”.⁷ Thus a judge who explicitly incorporates perspectives into his/her judicial method that may reflect the contexts that constitute his/her identity runs the risk of being accused of one of the most serious allegations of judicial impropriety: bias.⁸

Unfortunately, this judicial “dilemma of difference”⁹ has not yet been adequately addressed in Canada. The debate seems to have stalled at the

4. S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987); Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: Ontario Law Reform Commission, 1991) [hereinafter *Appointing Judges*]; The Honourable M. Omatsu, “The Fiction of Judicial Impartiality”, forthcoming (1996) C.J.W.L.; Courts of Justice Statute Law Amendment Act, 1994, S.O. 1994, c. 12, s. 49(2).

5. *Appointing Judges*, *ibid.*

6. *Touchstones*, *supra* note 3 at 50, 51.

7. Judicial Code of Ethics, adopted pursuant to s. 261 of the Courts of Justice Act (R.S.Q., c. T-16) O.C. 643-82, 17 March 1982, G.P.Q. 1982 II 1253.

8. *R. v. Zundel (No 2.)* (1990), 53 C.C.C. (3d) 161 at 198 (Ont. C.A.), *rev'd* on other grounds (1992), 75 C.C.C. (3d) 449 (S.C.C.).

9. M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca: Cornell University Press, 1990) at 12.

question of whether or not it is desirable to adopt policies that would promote greater judicial diversity.¹⁰ But the fact is that some women and/or people of colour who hold judicial office are already confronting this dilemma of difference and are paying a heavy toll. Consequently, this comment attempts to provide a preliminary examination of how this dilemma can arise, tentatively suggests a possible solution, and highlights ideological presumptions and institutionalized barriers that circumscribe the possibility of achieving anything more than tokenesque equality. The focus is on a recent Nova Scotian case, *R. v. R.D.S.*

I. *Facts and Record of R. v. R.D.S.*

On 2nd December 1994, Corrine Sparks—the only Black¹¹ judge in Nova Scotia—presided over the trial of a Black youth, R.D.S. The charges against the youth arose out of an alleged altercation between him and a White police officer, as the latter was attempting to arrest another “non-white”¹² party who, as it turns out, was a cousin of R.D.S.¹³ The police officer claimed that R.D.S. ran into him with a bicycle, pushed him and yelled at him. R.D.S. claimed that when he arrived on the scene, and asked his cousin what was going on, the police officer threatened to arrest him

10. *Appointing Judges*, *supra* note 4.

11. A comment on terminology is essential. The issue of descriptors is fraught with difficulty. My own view is that while race (in the sense of skin colour) is an important prism of inquiry, racialization (in the sense of social and cultural forces that construct and encode interactions and identities) is a more pertinent and problematic terrain of analysis. Consequently, I think that in the long term it is more useful to develop descriptors based upon ethnic and cultural identity (e.g., Afro-Canadian) rather than pigmentation (e.g., Black). However, as the facts of this case specifically involve the latter discourse (especially the very curious “non-white”) I will follow this precedent. The only variation is that pursuant to the *Chicago Manual of Style*, I will capitalize the terms Black and White when they refer to racialized groups.

As to my own identity, I am White. What ensues is my interpretation of the significance of *R. v. R.D.S.* and is in no way an attempt to speak on behalf of Black communities, or to claim any particular expertise on issues of race. For a critique of an earlier partial foray on my part into issues of race in the context of legal education, see C. Aylward, “Adding Colour”, forthcoming C.J.W.L.

As a matter of ethics, it should also be noted that I have exchanged some of my thoughts with the defence lawyer, as this is a Dalhousie Legal Aid Service case. Also, Sparks J. has been a student in one of my courses as she is currently enrolled as an LL.M. candidate at Dalhousie Law School, and I co-ordinate the graduate seminar.

12. According to the trial transcript, the police were in pursuit of what they described as several “non-white” youths who were believed to be involved in the theft of a vehicle.

13. On November 10th, 1993, R.D.S. was charged with three counts under the *Criminal Code*: unlawful assault against a peace officer engaged in the execution of his duty, contrary to s. 270(1)(a); unlawful assault against the same peace officer, with intent to prevent the peace officer from lawfully arresting N.R. (the cousin of R.D.S.), contrary to s. 270(1)(b); and unlawfully resisting the same peace officer who was engaged in the lawful execution of his duty, contrary to s. 129(a).

and then put him in a choke hold. The youth denied striking the police officer. Apart from the police officer and the accused, no witnesses were called either by the Crown or the defence, thus everything turned on the credibility of the testimony of the police officer and R.D.S. At the end of the trial, which lasted about two hours, Judge Sparks delivered an oral decision acquitting the youth. The transcript of the decision reads as follows:

In my view, in accepting the evidence, and I don't say that I accept everything that Mr. S. has said in Court today, but certainly he has raised a doubt in my mind and, therefore, based upon the evidentiary burden, which is squarely placed upon the Crown, that they must prove all the elements of the offence beyond a reasonable doubt, I have queries in my mind with respect to what actually transpired on the afternoon of October the 17th.¹⁴

Had Sparks J. concluded her reasons at this point, *R.D.S.#1* would probably¹⁵ have remained an uncontroversial case. However, she continued:

The Crown says, well, why would the officer say that events occurred the way in which he has relayed them to the Court this morning. I'm not saying that the constable has misled the Court, although police officers have been known to do that in the past. And I'm not saying that the officer overreacted, but certainly police officers do overreact, particularly when they're dealing with non-white groups. That, to me, indicates a state of mind right there that is questionable.

I believe that probably the situation in this particular case is the case of a young police officer who overreacted. And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest. That seems to be in keeping with the prevalent attitude of the day.¹⁶

The police officer was disturbed by these statements and complained to his union and the police chief.¹⁷ A local newspaper was contacted. The *Halifax Chronicle Herald* sought to get access to tapes of the transcript of the trial. However, on 16 December 1994, in a carefully crafted decision,¹⁸ Sparks J. refused to grant access on the ground that this was

14. *R. v. R.D.S.*, Y093-168, (2 December 1994) at 68 [hereinafter *R.D.S. #1*].

15. I say "probably" because conversations with one person who was in attendance at the trial suggest that both the police officer and the Crown lawyer did not appear to be comfortable with the unprecedentedly large number of Black court officials: the judge, the defence lawyer and the court reporter.

16. *R.D.S. #1*, *supra* note 14 at 68-69.

17. B. Dorey, "Cop Complains about Judges Remarks" *The [Halifax] Mail-Star* (9 December 1994) A3; B. Dorey, "Paper Denied Access to Court Tape" *The [Halifax] Mail-Star* (17 December 1994) A3.

18. *R. v. R.D.S.*, F.H. No. Y093-168, Ruling Dec. 7th 1994 [hereinafter *R.D.S. #2*].

a young offender case and that the transcript was protected under s. 38(1) of the *Young Offenders Act*.¹⁹

Two distinct notices of appeal were filed on 22 December, the last working day before the Christmas vacation. In the first, the Crown appealed on the basis that Judge Sparks's decision manifested both actual and apparent bias in favour of the accused and against the police officer on the basis of their race. In the second, the *Chronicle Herald* newspaper and the C.B.C. argued that once the decision was rendered the transcript became part of the public record. Simultaneously, the Halifax Police Chief publicly complained about the racial bias of Sparks J. and wrote a "letter of concern" to Chief Family Court Judge Ferguson.²⁰ On 13 January 1995 Judge Sparks filed supplementary reasons in support of her decision to acquit R.D.S.²¹

The two appeals were heard in April 1995. Both were allowed.²² Chief Justice Glube dealt with the appeal on the issue of bias,²³ and Palmetier A.C.J. dealt with the appeal on the issue of publicity.²⁴ While there may be some debate as to the correctness of Palmetier J.'s decision, for the purposes of this comment I wish to focus on the decision of Chief Justice Glube. First, Glube C.J. held that the supplementary reasons issued by Judge Sparks on the 13th January 1995 were "gratuitous". Specifically, she pointed out that Sparks J. made comments on "the demeanour of the police officer which were not contained in the original decision" and made "a specific reference to outside material which was not contained in the original decision."²⁵ These materials were the *Marshall Report*. Consequently, Glube C.J. refused to consider the supplementary reasons.

Secondly, Glube C.J. directly addressed the issue of bias. Having very briefly invoked one precedent on bias,²⁶ she opined that "[f]undamental justice requires impartial decision-makers, and includes natural justice and a duty to act fairly".²⁷ Several lines later she continued:

19. R.S.C. 1985, c. Y-1.

20. E. Hoare & B. Dorey, "Top Cop Considers Action Against Judge", *The [Halifax] Mail Star* (10 December 1994) A4; E. Hoare, "Halifax Police Chief to Complain about remarks from Judge", *The [Halifax] Chronicle Herald* (13 December 1994) A7; B. Dorey, "Matter of Judge's Remarks Dropped" *The [Halifax] Mail-Star* (9 May 1995) A7.

21. F.H. No. 8093-168, Supplementary Reasons [hereinafter *R.D.S. #3*].

22. It is to be noted, for the sake of completeness, that once the two appeals were successful, the police chief withdrew the threat of filing a complaint.

23. *R. v. R.D.S.*, S.C.N.S. SH #112402 (18 April 1995) [hereinafter *R.D.S. #4*].

24. *R. v. R.D.S. (re Halifax Herald Ltd.)*, [1995] N.S.J. 207 (S.C.).

25. *R.D.S. #4*, *supra* note 23 at 4-5.

26. *Pearlman v. Manitoba Law Society*, [1991] 2 S.C.R. 869. This is a curious precedent as it deals with an allegation, in an administrative context, of financial interest.

27. *R.D.S. #4*, *supra* note 23 at 8.

There is certainly nothing in the transcript of the actual evidence which was heard on December 2nd to suggest any bias or apprehension of bias, but when I turn to the decision rendered the same day . . . it contains a thorough review of the facts and a finding based upon credibility in favour of the accused. Had the decision ended there . . . [where Sparks J. addresses the question of the evidentiary burden] there would have been no basis for this appeal as the Crown has already conceded. Unfortunately, the decision did not. The Learned Trial Judge went on to add two more paragraphs. . . . [cited previously]

On a thorough review of the transcript, I find no basis for these remarks in the evidence. There was no evidence before the trial court as to the “prevalent attitude of the day” or otherwise the remarks made relating to the police. With great respect, judges must be extremely careful to avoid expressing views which do not form part of the evidence.

The test of apprehension of bias is an objective one, that is, whether a reasonable right-minded person with knowledge of all the facts would conclude that the judge’s impartiality might reasonably be questioned. In my respectful opinion, in spite of the thorough review of the facts and the finding on credibility, the two paragraphs at the end of the decision lead to the conclusion that a reasonable apprehension of bias exists.

Having found that, I need go no further as such a finding requires that a new trial be ordered. . . .

In conclusion, the appeal is allowed and a new trial is ordered in front of a different trial judge.²⁸

The decisions rendered by Sparks J. and Glube C.J. raise several important questions which bring the dilemma of difference in the judicial context into sharp relief. What exactly did Youth Court Judge Sparks and Glube C.J. say? What is the nature and scope of the law on judicial bias? Specifically, in the context of the “reasonable apprehension of bias” test, what, precisely, is the appropriate test to apply and who is the prototypical reasonable person? Are there any precedents for finding judicial bias on the basis of race, and if not might it be the case that Judge Sparks has been subjected to a double standard? Could it be argued that Sparks J.’s comments on police officers misleading the court was simply an express rejection of a presumption of police infallibility, and that her comments on police officers’ negative attitudes towards Black youth were simply the manifestation of a contextual judicial method? More broadly, what exactly do we mean by bias, impartiality and fairness in the context of judicial decision-making and what are the attributes of good judging in contemporary society? Closely related is the question of whether judges should be “colourblind” or whether they have the responsibility to factor in social variables such as race where appropriate. Finally, there is the issue of the possible impact of this decision on: (a) the accused; (b) the

28. *Ibid.* at 8–10.

Black community; (c) the judicial community, and (d) Judge Sparks. The remaining sections of this comment address each of these questions.

II. *What Was Said?*

Before proceeding with a substantive analysis of the decisions in this case, it should be noted that neither judge was as clear as she might have been in giving her reasons. Fairness therefore requires that I identify ambiguities that pervade the reasoning of both Sparks J. and Glube C.J. and that I be explicit about my interpretation of their statements.

Trial judges have a heavy workload that allows little time for meticulously thought-through reasoning. This is particularly true when decisions are delivered orally immediately after counsel have finished their arguments. Judge Sparks's decision, unfortunately, has some ambiguities and apparent contradictions that need to be resolved. When we analyze the two paragraphs in question, there is little problem with her statements on the ultimate burden of proof: the Crown failed to prove its case beyond a reasonable doubt.²⁹ The next paragraph does, however, cause some problems. In response to the Crown's proposition that there could be no conceivable reason for the police officer to say anything at variance with the truth of what happened, as I read Judge Sparks, she makes two points. First, she appears to be suggesting that there should be no automatic judicial assumption as to the accuracy of a police officer's interpretation of events, because sometimes officers (like any other group of witnesses) may mislead the court. She is careful to add, however, that she is not claiming that this particular officer misled the court.³⁰ I understand her use of "mislead" to be in the sense of deliberate misrepresentation, which is different from saying that the officer's account may reflect his own good-faith, but necessarily subjective, interpretation of events. Second, Sparks J. points out that police officers cannot be presumed to be absolutely virtuous, for sometimes they overreact in moments of stress, and that this can happen particularly when they are dealing with "non-white" groups.³¹ She does add, however, that she is not saying that the particular officer in this case overreacted on the basis of race.³² As I shall suggest in Part V, neither of these propositions can be seriously questioned.

29. *R.D.S. #1*, *supra* note 14 at 68. I attach the qualifier "little" because an argument could be made that, as phrased, Judge Sparks's comments may confuse the "legal burden" with the "evidential burden". For an overview of this distinction see J. Sopinka, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) c. 3.

30. *Ibid.*

31. *Ibid.* at 68–69.

32. *Ibid.* at 69.

Slightly more problematic is the next sentence—“That, to me, indicates a state of mind right there that is questionable.”³³—because it is not clear what the “that” refers to, nor what she means by “a state of mind”. As I read this sentence, it only makes sense in the context of the Crown’s contention that there could be no possible reason why the police officer would misrepresent the situation. Judge Sparks’s point appears to be that in a racially stratified society there are indications that police officers are not always credible or neutral, and that this reality is part of a background knowledge that a judge should not ignore.

The next sentence continues to complicate the picture because, in apparent contradiction to what she had said three lines previously, Judge Sparks explicitly states that “probably . . . [the] young police officer . . . overreacted.”³⁴ She supports this determination of fact by expressly accepting the evidence of the accused that “he was told to shut up or he would be under arrest.”³⁵ However, the following statement—“that seems to be in keeping with the prevalent attitude of the day.”³⁶—may be unclear. Once again the antecedent to which the “that” refers is ambiguous: it could mean that Judge Sparks believes that most people would believe that a police officer might tell a Black youth to shut up or face arrest; or, it could mean that the police officer’s aggressive response to R.D.S. was an articulation of a common racially prejudiced attitude in Canada towards Black youths. Either way, the comment seems to suggest that police officers may be racially influenced in their attitudes towards, and conduct in relation to, “non-whites”.

To summarize, as I interpret her decision Judge Sparks seems to have said two things: first, that sometimes police officers may mislead the court, and secondly, that sometimes White police officers are racially influenced in their interactions with Black citizens.

Glube C.J.’s appeal decision was also delivered orally. Like Sparks J.’s decision, it is inelegant, and somewhat unclear at certain key points. This is unfortunate given the importance of the issues. In particular, one sentence needs to be highlighted—“There is no evidence before the trial court as to ‘the prevalent attitude of the day’ or otherwise the remarks relating to the police.”³⁷—because, though crucial, it is ambiguous.

33. *Ibid.*

34. *Ibid.* My colleague, Professor Pothier, has suggested that the statements may not be quite as contradictory as I suggest. She argues that in the first reference, Sparks J. is indicating that she cannot say for sure that the police officer overreacted, and that in the second reference she is simply indicating that he probably did.

35. *Ibid.*

36. *Ibid.*

37. *R.D.S. #4, supra note 23 at 10.*

Clearly the gist of the claim is that because no evidence was tendered at trial about prevalent attitudes or public opinion then a judge should not conjecture as to those matters. This, as we shall see in Part V, is debatable. But the point of Glube C.J.'s "or otherwise the remarks" reference is unclear. My sense is that Glube C.J. is referring to Judge Sparks's suggestion that police officers may overreact when dealing with "non-white" groups. Glube C.J.'s purpose, I think, is to indicate that the judicial articulation of such a viewpoint gives rise to a reasonable apprehension of bias because the judge can be perceived as either being hostile to (White) police officers, or favouring of "non-whites", or both. For Glube C.J. this is enough. Consequently, no further analysis is required and the only remedy is to order a new trial.

To be clear, although Glube C.J. never explicitly states that her finding of an apprehension of bias is related to race there can be little doubt that this is the case. Racial bias, both actual and apparent, was vigorously argued by the Crown lawyer and Glube C.J.'s own decision, as we have seen, primarily focussed on Sparks J.'s remarks which clearly factored in the issue of race.

Having attempted to clarify what was said by both Judge Sparks and Chief Justice Glube, I can now provide an interpretation of the significance of these statements. As a preliminary step it will be helpful to locate this case in the context of the common law of judicial bias.

III. *The Law of Judicial Bias*

The law of judicial bias in Canada is both indeterminate and underdeveloped. For the purpose of this comment several points may be worth noting. First, conventionally there are said to be two possible grounds for a claim of judicial bias: (a) real or actual bias; or (b) situations giving rise to "a reasonable apprehension of bias".³⁸ Second, a determination of whether actual or apprehended bias exists will depend upon the facts of each case.³⁹ Third, actual bias is very rarely argued⁴⁰ and almost never succeeds, therefore the vast majority of cases deal with the issue of "reasonable apprehension of bias".⁴¹

38. R.M. Sedgewick Jr., "Disqualification on the Ground of Bias as Applied to Administrative Tribunals" (1945) 23 Can. Bar Rev. 453.

39. *Pearlman*, *supra* note 26 at 885; *Ruffo v. Conseil de la Magistrature* (1992), 98 D.L.R. (4th) 176 at 182 (Que. C.A.), leave to appeal granted 4 February 1993, [1993] 1 S.C.R. ix.

40. But see *R. v. Zundel (No. 2)*, *supra* note 8.

41. See *e.g. R. v. Bertram*, [1989] O.J. No. 2123 (H.C.J.) (QL); *R. v. Lacombe*, [1986] O.J. No. 328 (S.C.) (QL).

Fourth, concerns about an apprehension of bias are fairly common in the criminal trial context.⁴² Usually, they are expressed as concerns about a judge's negative attitude or conduct in relation to an accused.⁴³ Occasionally, they are raised in the context of a judge's comments on the performance of the accused's counsel,⁴⁴ and infrequently on the basis of a judge's relationship with the Crown.⁴⁵ Moreover, and importantly for the purposes of this case, it should be noted that only very rarely does the Crown claim an apprehension of judicial bias.⁴⁶

Fifth, although the rhetoric of the case law appears to put a very high premium on justice "manifestly be[ing] seen to be done",⁴⁷ a comprehensive analysis of the case law suggests that in the vast majority of the cases concerns about an apprehension of bias are dismissed. This can be explained because:

- a) there is a "presumption of regularity", based on the maxim *omnia praesumuntur rite esse acta*;⁴⁸
- b) there is an implicit counterprinciple that assumes good faith and impartiality on the part of judges,⁴⁹ sometimes giving rise to a perception that there is a "duty to sit";⁵⁰
- c) a suggestion of actual or reasonable apprehension of bias is frequently not well received by either the judge in question or the

42. See e.g. *R. v. Brouillard*, [1985] 1 S.C.R. 39.

43. *R. v. Gerlach*, [1994] O.J. No. 1236 (Gen. Div.) (QL); *R. v. Lacombe*, [1986] O.J. No. 328 (S.C.) (QL); *R. v. Ord Ex parte Churly*, [1971] 1 O.R. 641 (H.C.J.); *R. v. R.A.B.* (1990), 67 Man. R. (2d) 258 (C.A.); *R. v. Teskey*, (1995) 28 Alta. L.R. (3d) 196 (Q.B.).

44. *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.) (QL); *R. v. Maxemiuk* (1994), 122 Sask. R. 223 (Q.B.).

45. *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Smith and Whiteway Fisheries* (1994), 133 N.S.R. (2d) 50 (C.A.).

46. See e.g. *R. v. Gushman*, [1994] O.J. No. 813 (Gen. Div.) (QL); *Re Ramsey* (1972), 8 C.C.C. (2d) 188 (N.B.C.A.).

47. *R. v. Sussex Justices, Ex parte McCarthy*, [1923] All E.R. Rep. 233 at 234 (C.A.).

48. *G.W.L. Properties v. Grace*, [1992] B.C.J. No. 2828 at para. 13 (C.A.) (QL); *R. v. Osachuk* (1995), 127 Sask. R. 21 at 33 (Q.B.). See also *Re E.A. Manning Ltd. and Ontario Securities Commission*, [1995] 23 O.R. (3d) 257 at 267 (C.A.).

49. As phrased by Blackstone, "The law will not suppose a possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." W. Blackstone, *Commentaries On the Laws of England III* (Oxford: Clarendon, 1788) at 361. See also *R. v. Lippé* (1991), 64 C.C.C. (3d) 513 at 540; *Ruffo*, *supra* note 39 at 202; *LeBlanc v. LeBlanc* (1993), 85 Man. R. (2d) 278 (C.A.); *Phillips v. Nova Scotia* (Commission of Inquiry into the Westray Mine Tragedy), [1995] 2 S.C.R. 97.

50. *R. v. Holmes*, [1989] M.J. No. 413 (Prov. Ct.) (QL); *Middlekamp v. Fraser Valley Real Estate Board*, [1993] B.C.J. No. 2965 at para. 26 (S.C.) (QL); *R. v. Zborovsky*, [1992] O.J. No. 1861 (Prov. Div.) (QL).

appellate court,⁵¹ and therefore, lawyers are cautious of advancing such an argument,⁵²

- d) the burden of proof is upon the party alleging either actual or reasonable apprehension of bias;⁵³
- e) the standard of proof upon the party alleging a reasonable apprehension of bias is, in reality, quite high.⁵⁴

This last point on the issue of the standard of proof merits further elaboration. It is widely acknowledged that the test for determining whether there is a reasonable apprehension of bias is an “objective” one, that is, it is not whether a judge subjectively would believe that his/her conduct or words might be biased, but whether a reasonable person would find these to be indicative of a probable bias.⁵⁵ The case law in Canada almost always invokes the standard outlined by de Grandpré J. (dissenting) in the administrative law case of *Committee for Justice v. National Energy Board*:

the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.”⁵⁶

For the purposes of this comment two points are worth noting about this test: the attributes and identity of the “reasonable person”, and whether that person’s perception of bias rests upon a possibility or probability test.

Although central to much common law legal thought,⁵⁷ the reasonable person test is problematic. While the case law tells us that s/he should be informed, thoughtful and right minded, in the end the reasonable person

51. *R. v. Zundel (No. 2)*, *supra* note 8 at 207; *R. v. Mohan* (1994), 162 A.R. 6 (C.A.); *G.W.L. Properties*, *supra* note 48 at paras. 13, 18; *R. v. Stark*, [1994] O.J. No. 406 at para. 25 (Gen. Div.) (QL).

52. *R. v. T. (R.T.J.)*, [1989] N.S.J. No. 223 (S.C.) (QL), Nathanson J.

53. “Bias, however, is easily alleged by a disgruntled litigant. The successful party has rights too. A decision cannot be overturned merely because one party apprehends bias. The facts must also show that party’s apprehension to be reasonable.” *Leblanc v. Leblanc*, *supra* note 49.

54. For example, in *Ruffo*, neither passion, vigour nor even aggressiveness were considered to generate concerns about a reasonable apprehension of bias. “Obvious hostility” appeared to be the benchmark. *Supra* note 39 at 196–97.

55. *Metropolitan Properties Co. (F.G.C.) v. Lannon*, [1969] 1 Q.B. 577 at 599 (C.A.), Denning M.R.

56. [1978] 1 S.C.R. 370 at 394.

57. Its origins can be traced to *Vaughan v. Menlove* (1837), 3 Bing. N.C. 467, 132 E.R. 490 (C.P.) with the invocation of “the man of ordinary prudence”.

is a fictional abstraction.⁵⁸ Throughout the case law on judicial bias the reasonable person is assumed to be without age, gender, or race. But this universal figure is like no one we know or can recognize. Increasingly, in other common law doctrines the courts are beginning to recognize this reality and are slowly beginning to locate the reasonable person in the experiential contexts from which we all inevitably emerge. For example, in relation to the defence of provocation, both the Supreme Court and the House of Lords have acknowledged that age is an important element in setting the standard for a “reasonable person” where the accused is a boy in his mid-teens who killed an older man who had sexually assaulted him.⁵⁹ Indeed, in various *dicta*, Lord Diplock has suggested that gender and race might also be pertinent variables, though he did not develop the point.⁶⁰ Moreover, in the last decade many women scholars have pointed out that in effect we have had the reasonable *man* test and that it implicitly relies upon male experiences and perceptions.⁶¹ Most significantly, in the case of *R. v. Lavallee*,⁶² the Supreme Court of Canada accepted such an analysis in the context of the law of self defence and acknowledged that the reasonable woman is not necessarily in the same situation as the reasonable man and that the law should acknowledge these existential and experiential differences.⁶³

If we recognize that the reasonable person test is cognizant of age and gender differences, might it also be possible for it to be responsive to racialized difference? In other words, historically has the reasonable person—“the man on the Clapham omnibus”⁶⁴—been implicitly “White”,

58. Y.M. Morrisette, “The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do” (1984) 29 McGill L.J. 523 at 538.

59. *R. v. Hill* (1986), 51 C.R. (3d) 97 (S.C.C.); *D.P.P. v. Camplin*, [1978] 2 All E.R. 127 (H.L.).

60. *Camplin*, *ibid.* at 174.

61. See, for example, H. Allen, “One Law for All Reasonable Persons?” (1988) 16 Int’l J. Soc. L. 419; N. Ehrenreich, “Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law” (1990) 99 Yale L.J. 1177; L. Finley, “A Break in the Silence: Including Women’s Issues in a Torts Course” (1989) 1 Yale J.L. & Fem. 41; C. Forell, “Essentialism, Empathy and the Reasonable Woman” (1994) U. Ill. L. Rev. 771; C. Sanger, “The Reasonable Woman and the Ordinary Man” (1992) 65 S. Cal. L. Rev. 1411.

62. [1990] 4 W.W.R. 1.

63. See also *Egan v. Canada* (1995), 124 D.L.R. (4th) 609 at 633, 676–77 (S.C.C.) Cory and L’Heureux-Dubé JJ., dissenting on other grounds. It might be argued that this contextualist approach to the reasonable person test has been qualified by *R. v. Creighton* (1993), 23 C.R. (4th) 189 (S.C.C.) by a slim 5–4 majority. However, the significance of this case for determining the characteristics of the reasonable person, and in particular *Lavallee*, *supra* note 62, has been subject to quite contradictory academic interpretations. See, for example, “Criminal Reports Forum: Objective Fault in the Supreme Court” (1993), 23 C.R. (4th) 240–79.

64. *Hall v. Brooklands Club* (1933), 1 K.B. 205 at 224.

and has the time now come for Canadian law to recognize not just the multicultural but also the racialized nature of Canadian society? Thus I would suggest that while the reasonable person test is still a useful legal device in that it is not desirable to retreat to hypersensitive subjectivity, on occasion it will be necessary to consider whether race may be a relevant variable in determining the reasonableness of that person's perception.⁶⁵ And, in my opinion, *R.D.S.* is one such case. Specifically, when a judge suggests that racial identity may influence relations between a White police officer and a Black youth, is the person who might apprehend a possible bias assumed to be a person of colour or White?⁶⁶ Might it be that while we are all members of Canadian society, we see that society in racially informed ways, and that what may appear to be bias to one person may in fact appear to be an incontrovertible reality to another? I will return to the issue of different perceptions of police-Black relations in Part V. My only point here is that bias may be in the eye of the beholder, and that if (as the House of Lords has acknowledged) the reasonable person is but the Court's "anthropomorphic conception of justice"⁶⁷ then

65. See also, D. Greene, "Justice Scalia and Tonto, Judicial Pluralistic Ignorance and the Myth of Colorless Individualism in *Bostick v. Florida*" (1993) 67 *Tulane L. Rev.* 1979 at 2038–43; R. Ward, "Consenting to Search and Seizure in Poor and Minority Neighbourhoods: No Place for a 'Reasonable Person'" (1993) 36 *Howard L.J.* 239.

66. This proposal to further contextualize the reasonable person is not unprecedented. For example, in 1956 the Supreme Court of the Northern Territories of Australia rejected an argument that the reasonable person standard was different for White persons and Aboriginal persons, but it did permit the jury to consider evidence on what a reasonable person who had experienced the world as an Aboriginal would have concluded:

[T]he general principle of law is to create a standard which would be observed by the average person in the community in which the accused person lives. It is clear from the cases decided . . . that in White communities . . . the standard is not a fixed and unchanging standard; it leaves it open . . . to regard the . . . tribe as separate community for purposes of considering the reaction of the average man . . . [i]f . . . the average reasonable person in his community [would have so reacted].

R. v. Muddarubba (1956), N.T.J. 317 at 322. Moreover, in the American Supreme Court at least two cases have acknowledged that race may be a relevant variable where considering "police-minority relations". See *Terry v. Ohio*, 392 U.S. 1 (1968) and *U.S. v. Mendentall*, 446 U.S. 544 at 558 (1980), U.S. Reh. Den. 448 U.S. 908. Moreover, in the context of hostile environment litigation at least two U.S. courts have accepted that the appropriate perspectival standard is that of a "reasonable Black person" when addressing harassment against a Black male, or "the reasonable person of the same gender and race or color" when dealing with harassment against a Black female. See *Harris v. International Paper*, 765 F. Supp. 1509 at 1516 (1991) and *Stingley v. Arizona*, 796 F. Supp. 424 at 428–29 (1992).

67. *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 at 728 (H.L.) Lord Radcliffe. See also *R. v. Gough*, [1992] 2 All E.R. 724 at 735 (H.L.); *Glasgow Corporation v. Muir*, [1943] A.C. 48 at 457, Lord MacMillan; *Froom v. Butcher*, [1975] 3 All E.R. 520 at 526–526 (C.A.), Lord Denning M.R.; and *R. v. Collins* (1987), 33 C.C.C. (3d) 1 at 18 (S.C.C.), where Lamer J. (as he then was) grudgingly acknowledged the necessary subjectivity of the reasonable person.

it may be appropriate to inquire into the racial identity and experiential context of the judge who finds that there is a reasonable apprehension of bias based on race.⁶⁸

Even when we recognize that the reasonable person is really the judge's jurisprudential alter ego, there still remains another aspect of the test, that is, the issue of the intensity of this person's apprehension of bias. As Watt J. has recently argued:

Fundamental to the test applied in cases where a reasonable apprehension of bias is alleged are two objective standards or elements. A standard of reasonableness is applied, not only to the observer, but also to what is observed. The observer, the person by whom bias must be apprehended, must be a reasonable person whom the law invests with knowledge of the circumstances which are said to give rise to the apprehension of bias. *Further, the apprehension of bias must itself be reasonable from what is observed. In other words, it must be a reasonable apprehension, not one which is fanciful, imaginary, illusory or conjectural.*⁶⁹

However, reasonable apprehension, like the reasonable person, is a rather indeterminate standard and the case law suggests two possible variations: a "possibility" and a "probability" test for bias.

A possibility test establishes a relatively low threshold for finding an apprehension of bias. Its clearest articulation is to be found in *R. v. Sussex Justices* when Lord Hewett postulated that "the rule is that nothing is to be done which so much as creates even a suspicion that there has been an improper interference with the course of justice."⁷⁰ In essence, this "suspicious mind" test asks whether a reasonable person *might* apprehend bias.⁷¹ Consequently, it has the potential to cover a wide range of judicial conduct.

However, another line of cases invokes a higher threshold and adopts a probability test: *would* a reasonable person apprehend a real likelihood of bias? In the English context this probability or real likelihood test can be traced back to *R. v. Rand*,⁷² and was explicitly preferred over the looser possibility test in the carefully reasoned decision of *R. v. Cambourne*

68. In a recent report prepared for the Canadian Judicial Council, Professor Friedland has argued that a judge has "enormous discretion . . . in using the test of whether a reasonable well-informed observer would have an apprehension of bias. . . . The reasonable, well-informed person seems to be the judge deciding the case." M. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 18.

69. *R. v. Gushman*, *supra* note 46 at para. 31 [emphasis added].

70. [1924] 1 K.B. 256 at 258. Similar *dicta* are to be found in *R. v. Essex Justices*, [1927] 2 K.B. 475 and *R. v. Campbell* (1981), 49 N.S.R. (2d) 307 at 317-18 (C.A.).

71. Hon. R. Kimball, "Judicial Misbehaviour and *R. v. Sussex Justices*" (1994) 18(1) *Prov. Judges J.* 11.

72. [1866] L.R. 1 Q.B. 230 at 233.

Justices ex parte Pearce.⁷³ Indeed in one of the most oft-cited precedents in this area, *Metropolitan Properties Co. (F.C.G.) v. Lannon*,⁷⁴ Lord Denning opined:

there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. . . . There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may be would or did, favour one side unfairly at the expense of the other.

Finally, in England this debate has been resolved by a recent decision of the House of Lords, which has, after an extensive review of the two competing lines of authority, determined that the appropriate test is that of a “real danger”.⁷⁵

Similarly, in the Canadian context, in *Committee for Justice, de Grandpré J.* has argued that “[t]he grounds for this apprehension must . . . be substantial” and explicitly rejected the standard of a “very sensitive or scrupulous conscience”.⁷⁶ He was joined by Laskin C.J. who also rejected the standard of “an uneasy suspicion”.⁷⁷ Moreover, in a very recent and quite thorough review of the pertinent case law, Nash J., of the Alberta Queen’s Bench, extracted the following principle: “[t]he test is whether there exists a real likelihood of bias—mere suspicion is not enough.”⁷⁸

However, despite the fact that the dominant trend is in favour of a probability test for the apprehension, as I will argue in the next section, Glube C.J. seems to adopt a possibility threshold.

IV. *Case Law on Racial Bias: A Double Standard?*

In light of the foregoing comments, it is important to note that in a review of case law on judicial bias in Canada, I have not turned up one decision where there has been found to be racially grounded judicial bias, either real or apprehended. Two explanations may be offered. First, it could be suggested that in the several hundred years that White people have been in what is now called Canada, judges have been extremely sensitive to issues of racial inequality and that, unlike many Canadians, they have risen above racial prejudice. Alternatively, it might be argued that “non-white” groups have been either so subordinated to, or marginalized from,

73. [1954] 2 All. E.R. 850 at 855 (Q.B.).

74. [1968] 3 All. E.R. 304 at 310 (C.A.).

75. *R. v. Gough*, *supra* note 67.

76. *Committee for Justice*, *supra* note 56 at 395.

77. *Ibid.* at 386 concurring with *dicta* from the Federal Court of Appeal.

78. *R. v. Teskey*, [1995] A.J. No. 142 (Q.B.) (Q.L.). See also *R. v. Bain* (1992), 69 C.C.C. (3d) 481 (S.C.C.); *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.); *G.W.L. Properties*, *supra* note 48 at para. 13; *R. v. Walker*, [1968] 3 C.C.C. 254 (Alta. C.A.).

the Canadian legal system that it has been unreceptive to their experiences, perceptions, concerns or complaints. In other words, the issue of race has been a non-question in the law of judicial bias.⁷⁹ Given the findings of several recent commissions⁸⁰ it would appear that the former explanation is indefensible and, therefore, I would suggest that the latter is the more likely explanation. But no matter which of these two explanations is adopted, surely it is significant that the first Canadian case where there is a finding of an apprehension of racial bias is in relation to statements made by a Black judge.

By way of comparison, it may be fruitful to briefly consider two recent situations where racial bias was alleged, but not found. The first stems from the Donald Marshall Jr. saga. The second involved Territorial Court Judge R.M. Bourassa of the Northwest Territories.⁸¹ After the publication of the *Marshall Report*⁸² the Attorney General of Nova Scotia requested the Canadian Judicial Council to hold an inquiry into the conduct of the Reference Court and to consider whether there were grounds to remove the five appellate judges from office. Even though members of the Court of Appeal seemed to be quite hostile to Mr. Marshall and had stated that "any miscarriage of justice was more apparent than real"⁸³ the Inquiry, while critical of "the grossly inappropriate language",⁸⁴ ultimately determined that such statements did not impugn the impartiality of the court.⁸⁵ An equally high threshold for a finding of bias has been applied in the Bourassa Inquiry.

Bourassa J. was widely criticized for both racism and sexism because of certain statements he allegedly made during an interview, and because

79. J. McCalla Vickers, "Memoirs of an Ontological Exile" in A. Miles & A. Finn, *Feminism in Canada: From Pressure to Politics* (Montreal: Black Rose Books, 1982) at 27.

80. See e.g. S. Lewis, *Letter to Bob Rae, Premier of Ontario, Outlining the Recommendations to Improve Race Relations in Ontario* (Toronto: Government of Ontario, 1992); Cawsey Report, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta* (Edmonton: Task Force, 1991); *Marshall Report*, *supra* note 1.

81. There is one other case where a judge's decision was appealed because of negative comments he made in the context of a case involving Pakistani immigrants. The British Columbia Court of Appeal found, however, that the comments would not generate an apprehension of bias. *Pirbhai Estate v. Pirbhai* (1988), 70 C.B.R.(N.S.) 175 (B.C.S.C.).

82. *Supra* note 1.

83. *R. v. Marshall* (1983), 57 N.S.R. (2d) 286 at 287 (C.A.).

84. "Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to subsection 63(1) of the *Judges Act* at the Request of the Attorney General of Nova Scotia" (1991) 40 U.N.B.L.J. 210 at 220.

85. *Ibid.* at 222. It might be worth noting that the Inquiry was extremely deferential to several other statements made by the Court of Appeal justices in relation to Mr. Marshall arguing that "in making findings of credibility, the court was within its jurisdiction". *Ibid.* at 220.

of a sentence he imposed in a sexual assault case (*R. v. A.*⁸⁶) which, some argued, was egregiously low because the accused was a prominent member of the community. I will briefly review the findings of a judicial inquiry constituted to determine whether Judge Bourassa should be dismissed because of unfitness and misbehaviour and the Appeal Court decision in the sentencing case. My purpose is to identify how the issue of bias has been dealt with in these contexts in order to inquire whether a different (double) standard has been applied to Judge Sparks.

The judicial inquiry came about because of several comments alleged to have been made by Judge Bourassa in an interview with a journalist. The comments suggested: (a) he believed that the degree of violence in sexual assault cases in northern communities was less than in southern communities; (b) he considered that rapes in the North tended to occur “when the woman is drunk and passed out [and a] man comes along and sees a pair of hips and helps himself”;⁸⁷ (c) he caricatured women who had been sexually assaulted in Kingston, Ontario, as “dainty co-eds”; and (d) he underestimated the violence of child sexual abuse when he prefaced comments on breast touching and the fondling of genitals with a “rightly or wrongly”. Finally, the newspaper story reported that in a case several years previously, Judge Bourassa based a sentence on his belief that Inuit culture accepted that “when a girl begins to menstruate she is considered ready to engage in sexual relations”. The comments generated widespread accusations of both racial and gender bias, a political storm, and eventually a judicial inquiry.

Justice Conrad of the Alberta Queen’s Bench conducted the Inquiry into whether these allegations were founded and, if so, whether they constituted grounds for the removal of Judge Bourassa from the bench. While Conrad J. criticized Bourassa J. for his “carelessness”, his “crudeness”, his choice of language and his outspokenness,⁸⁸ she found that the conduct of the reporter was problematic, that contemporary events tended to inflame the particular circumstances of this case (referring, for example, to the Montréal massacre) and that personal popularity is not a precondition for judicial tenure.⁸⁹

More important for the purposes of this analysis are the standards which Conrad J. set for a determination of fitness and bias. Bias became important in this case as it was understood to be one example of conduct

86. (10 October 1989), (N.W.T. Terr. Ct.) [unreported].

87. *Re Inquiry Pursuant to 13(2) of Territorial Court Act; Re Inquiry into Conduct of Judge Bourassa*, [1990] N.W.T.R. 337 at 341 [hereinafter *Bourassa Inquiry*].

88. *Ibid.*, at 348, 350.

89. *Ibid.*, at 349.

that was indicative of misbehaviour. In relation to fitness to serve Conrad J. invoked an extremely high standard:

Are the comments so manifestly biased that, fairly determined in the light of all the circumstances, they inevitably lead the public to attribute such a defect of moral character to the judge that he would be seen to be unable to discharge his duties in an impartial way; have they destroyed unquestioning confidence in his moral integrity and honesty of decision making, thereby rendering him unfit for office?⁹⁰

“Inevitably” and “destroying unquestioning confidence in his moral integrity and honesty” are clearly higher thresholds than either “probability” or “possibility”. They represent standards of certitude. In relation to actual bias, Conrad J., drawing upon *Grantham’s Case*, also espoused a very high test:

I understand partisanship to mean a conscious partiality leading a Judge to be disloyal even to his own honest convictions. I understand it to mean that the Judge knows that justice demands that he should take one course but that his political alliance or political sympathies may be such that he deliberately chooses to adopt the other. In such a case the moral element undoubtedly enters into the definition of misconduct, and cannot be excluded.⁹¹

Again, the emphasis on a judge’s subjectivity, knowledge and consciousness appears to establish an extremely high threshold. However, in relation to apprehension of bias she modified the threshold to bring it more into line with the *Committee for Justice*⁹² case (i.e., an objective and probabilistic test):

the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude.”⁹³

Conrad J. was clear that given the high threshold there was no possibility of finding actual or conscious bias “against natives, women, northern Canadians, victims or intoxicated persons . . .” or bias “in favour of accused persons.”⁹⁴ Indeed, to the contrary, she argued that “the evidence was unequivocal that Judge Bourassa is a conscientious judge, concerned with the culture and circumstances of the north.”⁹⁵ Nor did she find a reasonable apprehension of bias which, as we have seen, appears

90. *Ibid.* at 345.

91. *Ibid.* at 344.

92. *Supra* note 56.

93. *Bourassa Inquiry*, *supra* note 86 at 345.

94. *Ibid.* at 344.

95. *Ibid.*

to involve a somewhat lower objective and probabilistic threshold. Carefully reviewing each of the allegations against Judge Bourassa, she emphasized time and time again that the appropriate test was that of the perception of a reasonable, right minded, and fully informed observer who had *all* the facts available to her including, apparently, the judge's subjective state of mind. When applied to the facts, Justice Conrad found that this test had not been met. Thus, for example, in relation to the "pair of hips" comment, Conrad J. found that a "reasonable person *would*" realize that this was Judge Bourassa's "opinion of how the offender views women", not his own view;⁹⁶ or, in relation to the characterization of child sexual abuse as "fondling", she suggested that the "informed person *would*" realize that "Judge Bourassa was repeating a word used by the Crown prosecutor";⁹⁷ or, again, in relation to the "rightly or wrongly" prefatory comment, Conrad J. determined:

that a reasonable person *would* understand that Judge Bourassa was using the phrase, as it is frequently used, to describe the reason something happened, without commenting on it [*sic*] being right or wrong. It is a catch phrase that has nothing to do with right or wrong. It does not indicate a moral judgment. It is not a condonation of the action, nor does it indicate a bias.⁹⁸

Clearly, then, the effect (if not the rhetoric) of this Inquiry has been to set the standard for reasonable apprehension of bias at a fairly high level, with the consequence that no apprehension of bias could be attributed to the "careless" but "conscientious" Judge Bourassa. As was pointed out by Côté J.A. in a related Northwest Territories case, Conrad J.'s report "completely exonerated" Judge Bourassa.⁹⁹

In contrast, the test of reasonable apprehension of bias as applied to Sparks J. seems to be significantly lower. Consider, for example, the difference between Conrad J.'s reasons for decision and those of Glube C.J. Conrad J. carefully analyzed each of the allegations, filtered them through the prism of the reasonable apprehension of bias test as she understood it, and justified her conclusions. By way of contrast, Glube C.J. perfunctorily reiterated a test and rapidly jumped to the conclusion that a reasonable person *might* apprehend bias in Judge Sparks's comments. This is a form of "I know it when I see it" legal reasoning, a method which is unfortunately not uncommon in this area of law. Great slogans can, sometimes, make bad law.¹⁰⁰ Instead of the appellate court invoking

96. *Ibid.* at 346 [emphasis added].

97. *Ibid.* at 347 [emphasis added].

98. *Ibid.* at 347 [emphasis added].

99. *R. v. Doyle*, [1992] N.W.T.R. 81 at 84 (C.A.).

100. P. Strauss, "The Myth of Colour Blindness" (1986) S. Ct. Rev. 99.

its supervisory power in such a conclusionary way, a more robust analysis might (in the spirit of Conrad J.) have asked the following types of questions: Could it not be argued that practically and realistically the reasonable, rightminded and fully informed observer *would* be aware of the research¹⁰¹ indicating that not only is there some social consensus in Halifax that police officers overreact when dealing with Black people,¹⁰² but also that there is widespread sociological and psychological evidence to support the proposition that police officers sometimes adopt negative attitudes and conduct towards members of the Black community? Could it not be argued that Sparks J., rather than being potentially biased, is a conscientious judge concerned with the culture and circumstance of Halifax's Black community? Or, is the difference that because Bourassa J. is White, male and Québec-born he cannot be seen to have any particular stake in the outcome of decisions in the North, whereas Sparks J., as a Black person, is presumptively partisan as soon as she even mentions issues of race?¹⁰³ In other words, might it be that despite the fact that Glube C.J. invoked an "informed mind" test, in effect she applied a "suspicious mind" test?

Indeed, a careful reading of her version of the test confirms that Glube C.J. may be applying a lower threshold. Instead of directly quoting precedent, she paraphrases it as whether a reasonable person "would conclude that the judge's impartiality *might* reasonably be questioned."¹⁰⁴ "Might" is much closer to a possibility test, whereas as I have argued in the previous section, the preferred trend is towards a probability test, i.e., more likely than not.¹⁰⁵ As I read Glube C.J.'s decision, my impression is that she subjects any mention of race to a strict scrutiny test. That is, as I shall argue in Part VI, a mode of analysis which is deeply suspicious of discussions of race because of its commitment to colourblindness. The problem with colourblindness is that it refuses to recognize that racial designations and categorizations can have different significances depending on the context. In other words, while strict scrutiny and suspicion may be appropriate for certain situations where racialization is a variable, they need not always be appropriate. I will develop these points in Parts V and VI of this comment. But my main point remains that Glube C.J.'s

101. For a useful analysis of just how informed the "fully informed reasonable person" is, see *Ruffo*, *supra* note 39 at 194–201.

102. *Marshall Report*, *supra* note 1 at vol. IV.

103. For an eloquent criticism of such analyses, see *Pennsylvania v. Local Union 542*, *supra* note 2, Higginbotham J.

104. *R.D.S. #4*, *supra* note 23 at 10 [emphasis added].

105. Note also that the Crown's factum advocates a "suspicion" test as outlined in *R. v. Campbell*, (*supra* note 70) though Glube C.J. did not refer to this explicitly in her own decision.

articulation of the test appears to be quite distinct from that of Conrad J. and this has direct consequences for the conclusions reached.¹⁰⁶

Conrad J. emphasized that concerns about gender bias in the sentencing of a prominent member of the Inuit community by Bourassa J. were outside her mandate as a Judicial Inquiry, but would be dealt with in another forum, that is, in the form of an appeal. What is interesting about the subsequent appeal decision in *R. v. A.*¹⁰⁷ is that there is absolutely no mention of bias. The grounds of appeal filed by the Crown were silent on the question of bias and focussed instead on issues such as aggravating circumstances, breach of trust, rehabilitation and the principle of denunciation. After a fairly lengthy decision discussing sentencing policies and practices in the Northwest Territories the appeal was dismissed, with very little reference to Bourassa J. Thus, not only has Bourassa J. been “completely exonerated”¹⁰⁸ but any concerns about bias have been juridically erased. Judge Sparks, however, experienced no such judicial

106. A possible counterargument to the analysis offered here is that it is inappropriate to contrast the Marshall and Bourassa J. situations with that of Sparks J. because the circumstances are so different. Sparks J. has been simply overruled on appeal whereas Bourassa J. and the Reference Court judges faced possible removal from office. Accordingly, it can be argued that it is appropriate to have a higher standard for a finding of bias in the removal context than in an overruling context. Viewed in this light, a different standard need not constitute a double standard.

While this argument has some potential merit I think that it is mistaken and can lead to some curious results. If there are two different standards available to determine what constitutes bias it could lead to the anomalous situation in which the same fact situation could generate two seemingly incompatible determinations. Assume, for example, that a judge does make a potentially racist comment and a party to the action decides not only to appeal the decision but also to complain to the Judicial Council. If we adopt two quite different tests, a lower threshold on appeal and a higher threshold in the complaint context, it could mean that the same statement could be found to be biased for the purpose of the appeal, but not biased for the purpose of the complaint.

A more appropriate approach would, in my opinion, apply the same test to determine if the comment can be interpreted as racist. If the answer is “yes” to this first order question, this then leads to a set of second order questions. Is the comment so racist as to justify a successful appeal? Is the comment so racist as to justify removal from office?

This proposed two-tiered approach has the benefit of promoting consistency in determining whether the comment manifests racial bias, while still allowing for flexibility in deciding what to do about that bias. Consequently, on my proposed approach, there could be a determination that a comment was racist, that the bias was such as to constitute the grounds for a successful appeal, but not sufficiently serious to justify a removal from judicial office. Bias may be one form of judicial misbehaviour, but not all misbehaviour renders a judge unfit to continue the judicial function. Such an approach allows the legal system to acknowledge rather than deny the possible existence of judicial racism and at the same time constructs a sliding scale of possible remedies to deal with the problem of racism.

107. [1990] N.W.T.R. 36 (S.C.).

108. *Supra* note 87.

solidarity.¹⁰⁹ The next three sections will suggest that this can be explained because of the deep seated differences in judicial method, ideology and vision.

V. A Contextual Legal Method

One of the most disturbing things about *R.D.S.#1* is the zeal with which the Crown has pursued the appeal. What is it about the statements made by Sparks J. that has provoked such an outcry and caused the Crown to argue not just that there was an apprehension of bias, but also the very unusual claim that there was actual bias?¹¹⁰ As pointed out in Part II, when her comments are clarified Sparks J. seems to be making two points: first, that on occasion police officers may mislead the court; and second, that police officers sometimes overreact when dealing with Black youth. As I read her decision, all that she was doing was locating the evidence against the backdrop of this broader social knowledge.¹¹¹ In other words, she was simply adopting a contextual legal method.¹¹²

109. It is beyond the confines of this case comment to review the American law on judicial bias. However, it is to be noted that there have been a series of cases in the United States where Black judges have been challenged for bias or a reasonable apprehension of bias. See *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1 (1975); *Pennsylvania v. Local Union 542*, *supra* note 2; *Vietnamese Fishermen's Ass. v. Knights of the Ku Klux Klan*, 518 F. Supp. 1017 (1981). Each of these cases can be distinguished from *R.D.S.* on the facts as the challenges either referred to the prior employment of the judge (e.g. lawyer for the NAACP) or for off the bench speeches they have made to Black organizations, or for their general legal philosophy. It is to be noted however that in every one of these cases the motions to recuse failed.

Furthermore, it would appear that it is only in egregious situations that White American judges are accused of or disciplined for racial bias. Compare *Palmore v. Sidoti*, 466 U.S. 429 (1984) with *Evans v. Abney*, 396 U.S. 435 (1970) and *Phillips v. Joint Legislative Committee*, 637 F. 2d. 1014 (1981), U.S. Cert. Den. 456 U.S. 960; U.S. Reh. Den. 457 U.S. 1140. On the basis of these authorities, if the overruling of Judge Sparks stands she will have the distinction of being one of a select number of judges in North America since conquest to be officially sanctioned for racial bias!

110. The Crown's factum is extremely adversarial, even hostile, to Sparks, J., unabashedly accusing her of "racial bias" and "strong bias" against the police (at 14). It is to be noted that the police chief, at least in interviews with the media, seems to have disagreed with the Crown. Chief MacDonald is reported to have said, "Comments that create apprehension of bias don't constitute real bias." B. Dorey, *supra* note 20.

111. As Rehnquist J. has phrased it, "proof that a Justice's mind at the time he joined the Court was a complete tabula rasa . . . would be evidence of lack of qualification, not lack of bias." *Tatum v. Laird* 409 U.S. 824 at 835 (1972).

112. It is beyond the parameters of this comment to fully delineate the characteristics of a contextual legal method. However, it is probably best understood in contradistinction to abstractionism, the idea that legal rules have universal qualities and are relatively uncontaminated by the diversity of the contexts to which they apply. Contextualism, to the contrary, acknowledges that legal rules are inherently indeterminate, that their meanings can be only explored through an awareness of their impact in the diverse situations in which they might be applied, and that these meanings may change as the various circumstances change. Most

It can be argued that judges routinely and uncontroversially make reference to issues of common knowledge. For example, Judge Bourassa suggested that alcohol was often involved in situations of sexual assault. Conrad J., in conducting the judicial inquiry wrote:

Judge Bourassa's comments with respect to persons being drunk is a statement of his observation from his experience. An informed person would learn that alcohol is frequently involved in sexual assault cases, and Judge Bourassa cannot be faulted for saying so. Indeed, alcohol is involved in many crimes, both in the north and the south, and Judge Bourassa is not denying the involvement of alcohol in sexual assault cases in the south.¹¹³

On the basis of this standard would an informed person really believe that police officers *never* mislead a court and that judges should automatically assume that an officer's interpretation of events is necessarily accurate? Surely not.¹¹⁴ Consider, for example, the conduct of Sergeant MacIntyre in the Donald Marshall Jr. prosecution,¹¹⁵ or the fact that police officers manufactured evidence in the Guy Paul Morin case.¹¹⁶ Judge Sparks's comment when taken in proper context was simply a rebuttal of the Crown's strategy of encouraging prejudgment by pitting "a presumptively credible police officer against a presumptively dishonest . . . defendant."¹¹⁷ Only someone who has either a naively optimistic vision of police officers¹¹⁸ or a vested interest in securing judicial deference to police officers' testimony could interpret this manifestly practical and

importantly for the purposes of this comment, a contextual approach encourages judges to consider the broader social context as they apply and interpret legal rules. As a judicial method it has been discussed most explicitly by Wilson J. in *R. v. Morgentaler* (1988), 44 D.L.R. (4th) 385 at 483 (S.C.C.); and *Edmonton Journal v. A.-G. for Alberta* (1990), 64 D.L.R. (4th) 577 at 581-84 (S.C.C.); and L'Heureux-Dubé J. in *Moge v. Moge*, [1992] 3 S.C.R. 813; *Young v. Young*, [1993] 4 S.C.R. 3; and *Willick v. Willick* (1995), 173 N.R. 321 (S.C.C.). See also *Vriend v. Alberta* (1994), 18 Alta. L.R. (3d) 286 (Q.B.).

113. *Bourassa Inquiry*, *supra* note 86 at 346.

114. See e.g., *People v. Berrois* 270 N.E. 2d 709 (1971); A. Dershowitz, *The Best Defense* (New York: Random House, 1982) at xxi-xxii; and W. Stuntz, "Warrants and Fourth Amendment Remedies" (1991) 77 Va. L. Rev. 881, for a discussion of warrants in the context of police perjury, and some suggestions as to why police officers may be dishonest. See also C. Steiker, "Second Thoughts on First Principles" (1994) 107 Harv. L. Rev. 870 at 853-54; Mollen Commission, *Commission to Investigate Allegations of Police Corruption and the Anti Corruption Procedures of the New York City Police Department* (New York: The Commission, 1993); P. Hoffman, "The Feds, Lies and Videotapes; The Need for an Effective Federal Role in Controlling Police Abuse in Urban America" (1993) 66 S. Cal. L. Rev. 1455.

115. *Marshall Report*, *supra* note 1, at 37-43.

116. Professor Don Stuart reminded me of this example.

117. Stuntz, *supra* note 114 at 915.

118. See generally, McDonald Commission, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police* (Ottawa: The Commission, 1981); *R. v. Baylis* (1988), 66 Sask. R. 268 at 284 (C.A.), acknowledging the possibility of intimidation or coercion by the R.C.M.P.

realistic statement as being biased. As a colleague has pointed out, if we really thought that the police always told the truth, then we would not need trials!¹¹⁹

Thus, I would suggest that it is the second statement that is at the core of the Crown's allegation of bias. But again, is it really bias for a judge to suggest that sometimes police officers overreact when dealing with non-white groups? This is admittedly more controversial than the suggestion that police officers sometimes mislead the court, but it is both defensible and supportable.¹²⁰

The question of the relationship between the criminal justice system and race has been the subject of extensive study¹²¹ in the United Kingdom,¹²² and the United States,¹²³ and some study in Canada.¹²⁴ On the basis

119. For a brief account of the fate of another non-traditional judge who, among other things, was critical of police testimony, see D. Gibson & L. Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670–1970* (Winnipeg: Peguis Publishers, 1972) at 258–65.

120. Professor Black has suggested that I cite C.N.N.'s coverage of the Simpson trial and in particular the racial prejudice of Detective Fuhrman. Others have suggested that I refer to police beatings and shootings of visible minority citizens in Toronto, Montréal, Los Angeles etc. Lest these obvious sources be seen to be too anecdotal, what follows is a more scholarly, if brief, review of some of the pertinent academic literature.

121. See e.g., L. Lewis & J. Gladstone, *Racism in the Criminal Justice System: A Bibliography* (Toronto: Centre for Criminology, 1994); D. Baker, ed., *Reading Racism and the Criminal Justice System* (Toronto: Canadian Scholars' Press, 1994); M.P. Feldman, *The Psychology of Crime: A Social Science Textbook* (New York: Cambridge University Press, 1993) at 92–95.

122. E. Cashmore & E. McLaughlin, eds., *Out of Order? Policing Black People* (London: Routledge, 1991); T. Jefferson, "Race, Crime, Policing: Empirical, Theoretical and Methodological Issues" (1988) 16 *Int'l J. of Soc. of Law* 521; "Symposium: Race, Criminal Justice and the Legal System" (1989) 16 *New Community* 1.

123. C.R. Mann, *Unequal Justice: A Question of Color* (Bloomington: Indian University Press, 1993); C. Owen & J. Bell, eds., *Blacks and Criminal Justice* (Lexington, Mass.: Lexington Books, 1977); C. Steiker, "Second Thoughts About First Principles" (1994) 107 *Harv. L. Rev.* 820; "Symposium: Criminal Law, Criminal Justice and Race" (1993) 67 *Tulane L.R.* 1725; "Symposium on the Impact of the Judicial System on the Status of African American Males" (1994) 23 *Cap. U.L. Rev.* 1; "Symposium on Race and Criminal Justice" (1994) 51 *Washington and Lee L. Rev.* 357.

124. Bellemare Rapport, *Rapport du Comité d'enquête sur les relations entre les corps policiers et les minorités ethniques et visible* (Montréal: la Commission, 1989); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice* (Ottawa: The Commission, 1991); Symposium on Race Relations and Law (Vancouver, B.C.), *Race Relations and the Law: Report of a Symposium Held in Vancouver, British Columbia, April 22–24, 1982* (Ottawa: Minister of State, Multiculturalism, 1983). There may be two reasons conjectured for the poverty of Canadian research, the first problematic, the second controversial. It may be that there is just not a great deal of scholarly interest in (or research support for) studies on racism and the criminal justice system. Secondly, unlike the United States or the United Kingdom, in Canada official statistics for crime do not include the categories of race or ethnicity. One reason why this may be legitimate is that such figures can be used to construct images of non-white communities as "crime prone". On the other hand, without basic empirical data, it is more difficult to analyze police—non-white interactions. For accounts of police releasing racially categorized crime statistics in the "Jane-Finch" area of North York, see *The Toronto Star* (17, 24 February 1989).

of “objective” criteria such as statistics on arrest,¹²⁵ incarceration rates,¹²⁶ and the application of the death penalty¹²⁷ the evidence is overwhelming that “non-white” groups are disproportionately represented.¹²⁸ The question of police interaction with “non-white” groups is somewhat more difficult to get an angle on because it requires studies that cannot be reduced to quantitative analyses. Thus the data are dependent more upon observations and perceptions, and are therefore perceived to be somewhat “softer”. With this caveat in mind, the vast majority of the studies do indicate a more negative relationship between the police and “non-white” groups than between the police and White groups. Race, it can be said, frequently serves as a proxy for criminality.¹²⁹

Generally speaking the evidence can be grouped under two methodological rubrics: sociological research and psychological research. Sociological research attempts to assess perceptions of police-“non-white” interactions. All studies in this regard indicate that “non-white” communities perceive themselves as being the victims of disparate police attention and conduct.¹³⁰ Moreover the *Marshall Inquiry* has accepted a

125. “Minnesota Supreme Court Task Force on Racial Bias in the Judicial System” (1992) 16 *Hamline L. Rev.* 475 at 491–93; R. Reiner, “Race and Criminal Justice” (1989) 16 *New Community* 5; *Marshall Report*, *supra* note 1 at 151, 191. It is to be noted, however, that in relation to sentencing the Marshall Inquiry conducted a survey which indicated that race was not a direct factor, though it did highlight other significant social variables. *Ibid.* at 191.

126. M. Jackson, *Locking Up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (Vancouver: The Association, 1988) at 83; *Marshall Report*, *supra* note 1 at 150, 160; B. Meierhofer, “The Role of Offence and Offender Characteristics in Federal Sentencing” (1992) 66 *S. Cal. L. Rev.* 367 at 388–89; J. Kramer, “Introduction” (1993) 67 *Tulane L. Rev.* 1725 at 1726.

127. D.C. Baldus, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (Boston: Northeastern University Press, 1990); F. Weatherspoon, “The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective” (1994) *Cap. U.L. Rev.* 23 at 46–50; Mann, *supra* note 123 at 202–03.

128. To the extent that there is debate, it tends to revolve around whether this overrepresentation is intentional or systemic, overt or subtle, or whether other variables (e.g., class, demeanour) are just as determinative as race. See Jefferson, *supra* note 122 at 527; Reiner, *supra* note 125 at 12.

129. M. Brown, *Working the Street: Police Discretion and the Dilemmas of Reform* (New York: Russell Sage Foundation, 1981) at 170; S. Johnson, “Race and the Decision to Detain a Suspect” (1983) 93 *Yale L.J.* 214; “Development in the Law: Race and the Criminal Process” (1988) 101 *Harv. L. Rev.* 1472; T. Maclin, “‘Black and Blue Encounters’—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?” (1991) *Val. U.L. Rev.* 243.

130. See e.g., *Report of the Race Relations and Policing Task Force (Ontario)* (Toronto: Task Force, 1989) at 152–59; Law Reform Commission of Canada, *supra* note 124 at 5; *Marshall Report*, *supra* note 1 at 157; C. Ungerleider & J. McGregor, “Police Challenge 2000: Issues Affecting Relations Between Police and Minorities in Canada” (1991) *Cdn. J. of Criminology* 555 at 558; A. Normandeau, “Police, Race and Ethnicity in Montreal” (1988) 4 *Crimecare J.* 3.

report which acknowledges that many Nova Scotians, *both* Black and White, believe that police officers discriminate against Blacks.¹³¹

Psychological research tends to be categorized as “police psychology” and attempts to focus on police attitudes.¹³² While some studies tend to show that police officers have a higher level of racial intolerance than many other members of society,¹³³ and others indicate that they have a similar level of racial intolerance as the “normal” general public,¹³⁴ there appears to be broad consensus that police officers tend to identify with middle-class and White groups¹³⁵ and have a negative attitude towards members of “non-white” communities.¹³⁶ Furthermore, the findings of these types of studies seem to have been accepted by several recent commissions that have studied police conduct, not only in the U.S.¹³⁷ but also in Canada.¹³⁸

Thus, it can be argued that what Judge Sparks was doing was simply articulating what a fully informed, reasonable person would know: that racism is pervasive in Canadian society and that “practically and realistically” police officers may be predisposed to overreacting when dealing with Black youth. Nor has she been alone in acknowledging the context of racialization. Other (White, male) judges have made similar comments, apparently without censure. Doherty, J.A., speaking for a unanimous Ontario Court of Appeal, has recently acknowledged that:

131. *Marshall Report*, *supra* note 1 at 182–86, 259.

132. See *e.g.*, C. Bartal & G. Bergen, “Introduction: Police Psychology and its Future” (1992) 19 *Criminal Justice and Behaviour* 236. Researchers in this tradition frequently caution that there is no direct nexus between attitude and behaviour.

133. A. Neiderhoffer, *Behind the Shield: Police in Urban Society* (Garden City, N.Y.: Doubleday, 1967); A. Colman & L. Gorman, “Conservatism, Dogmatism and Authoritarianism in British Police Officers” (1982) 16 *Sociology* 1.

134. D. Bayley & H. Mendelsohn, *Minorities and the Police: Confrontation in America* (New York: Free Press, 1969) at 145; *Marshall Report*, *supra* note 1 at vol. IV, 187; C. Ungerleider, “Intercultural Awareness and Sensitivity of Canadian Police Officers” (1989) 32 *Can. Pub. Admin.* 612.

135. S. Perrot & D. Taylor, “Ethnocentrism and Authoritarianism in the Police: Challenging Stereotypes and Reconceptualizing Ingroup Identification” (1994) 24 *J. of Applied Soc. Psych.* 1640 at 1651–52.

136. Jefferson, *supra* note 122 at 522; Reiner, *supra* note 125 at 7–8.

137. *Report of the Independent Commission on the Los Angeles Police Department* (1991) at 69–75; “Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission” (1991) 19 *Florida State U.L. Rev.* 591; *Minnesota Task Force Report*, *supra* note 125; “Report of the New York State Judicial Commission on Minorities (1992)” reprinted in (1992) 19 *Fordham Urb. L.J.* 185.

138. Race Relations and Policing Task Force (Ontario), *The Report of the Race Relations and Policing Task Force* (Toronto: The Task Force, 1989); Race Relations and Policing Task Force (Ontario), *The Report of the Race Relations and Policing Task Force* (Toronto: The Task Force, 1992); *Review of Race Relations Practices of the Metropolitan Toronto Police Force* (Toronto: Metropolitan Audit Department, 1992).

[r]acism, and in particular anti-black racism, is part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.¹³⁹

Niedermayer J., of the Nova Scotia Family Court, has been even more candid:

[t]he issue of racism existing in Nova Scotia has been well documented in the Marshall Inquiry Report . . . A person would have to be stupid, complacent or ignorant not to acknowledge its presence, not only individually but also systemically and institutionally.¹⁴⁰

In Glube C.J.'s estimation, however, such an acknowledgement constitutes an apprehension of bias!¹⁴¹

In the next section I will suggest that this sharp difference in opinion as to the appropriate judicial method can be traced to competing ideologies about the judicial role in a pluralistic democracy.

VI. *Impartiality and Racial Identity: Colourblindness or Colour Contextualism*

Beyond the specifics of this particular scenario, the case also raises fundamental questions about the nature of good judging in contemporary society and the thorny issue of whether we should aspire to a socially representative judiciary. It also asks us to revisit our conceptions of equality and how they inform our understandings of appropriate judicial decision-making.¹⁴²

For heuristic purposes, it can be said that there are two broad views of the appropriate role of a judge, each of which is informed by a vision of

139. *R. v. Parks* (1993), 84 C.C.C. (3d) 353 at 369 (Ont. C.A.), leave to appeal denied [1994] 1 S.C.R. x.

140. *Nova Scotia (Minister of Community Services) v. S.M.S.* (1992), 110 N.S.R. (2d) 91 at 109 (Fam. Ct.), aff'd (1992), 112 N.S.R. (2d) 258 (C.A.). See also *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1992), 112 N.S.R. (2d) 389 (S.C.), rev'd on other grounds (1993), 119 N.S.R. (2d) 91 (C.A.).

141. Some readers may be concerned that I have drawn too heavily on American materials and that it is inappropriate to assume that the Canadian context is similar. Two responses are available. First, I have referred to several Canadian studies and they confirm that there are similar patterns in both countries. Second, we might be able to draw upon the environmental legal standard of the "precautionary principle". That is, rather than assuming that racism in the legal system is non-existent, until extensive research is available in Canada to indicate otherwise, we should err on the side of caution and equality and recognize that there is a real danger of racism.

142. See generally, *Appointing Judges*, *supra* note 4; and "Symposium on Judicial Election, Selection and Accountability" (1988) 61 S. Cal. L. Rev. 1555.

equality: the formalists and the realists. The formalists have high hopes. Their conception of impartiality is premised upon a formal conception not only of equality, but also the judicial role. Formalists believe that the judge is to divest him/herself of all preconceptions and identifications, to discover and apply the relevant law as s/he finds it, and to treat everyone the same without regard to race, class, gender or whatever.¹⁴³ Themis blindfolded is their icon, and equality before the law is their mantra.¹⁴⁴

Realist judges are much more pragmatic in their outlook. They recognize that both they and those who appear before them have contexts and experiences that inform their understandings and their conduct.¹⁴⁵ Realists acknowledge that these admittedly complicating variables are ineradicable and that rather than ignoring them, we should be conscious of the possible implications—both positive and negative—of such variables.¹⁴⁶ From this perspective, impartiality requires both an awareness of these contaminating factors¹⁴⁷ and empathy¹⁴⁸ so as to offset implicit and taken for granted assumptions.¹⁴⁹

143. See, for example, the proposition that “a defendant is entitled to the cold neutrality of an impartial judge . . . that no judge shall preside [where]. . . he is not wholly free, disinterested impartial and independent.” *United States v. Orbiz* 366 F. Supp. 628 at 629 (D.R.P. 1973). See also M. Hoeflich & J. Deutsch, “Judicial Legitimacy and the Disinterested Judge” (1978) 6 *Hofstra L. Rev.* 769.

144. D. Curtis & J. Resnik, “Images of Justice” (1987) 96 *Yale L.J.* 1727.

145. For example, Cardozo argues that judges are shaped by

the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man [*sic*] The great tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges by.

B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 167–68. Similarly, it has been suggested that “while an ‘overspeaking judge is no well tuned symbol’ neither is an amorphous dummy unspotted by human emotions a becoming receptacle for judicial power”. *Berger v. U.S.*, 255 U.S. 22 at 43 (1920), McReynolds J., dissenting. See also R. Abella, “The Dynamic Nature of Equality” in S. Martin & K. Mahoney, eds., *Equality and Judicial Neutrality* (Calgary: Carswell, 1987) at 3, 8–9.

146. *Parks*, *supra* note 139 at 353, 366; S. Abrahamson, “The Woman Has Robes: Four Questions” (1984) 14 *Golden Gate L. Rev.* 489; Omatsu, *supra* note 4 at 144; J. Resnick, “On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges” (1988) 61 *S. Cal. L. Rev.* 1877.

147. *R. v. MacKay* (1980), 54 C.C.C. (2d) 129 at 156 (S.C.C.); R. MacGregor Dawson, *The Government of Canada*, 4th ed. (Toronto: University of Toronto Press, 1963) at 435.

148. As Madame Justice Wilson has graphically stated, the judge must try to “enter the skin of the litigant and make his or her experience part of [the judge’s] experience. . . .” “Will Women Judges Really Make a Difference?” (1990) 28 *Osgoode Hall L.J.* 507 at 521. Or again, as Carter J. has suggested, the “fact finder must ‘walk a mile in the victim’s shoes” *Harris v. International Paper*, 765 F. Supp. 1509 at 1516 (1991).

149. As Judge Jerome Frank has powerfully argued:

If . . . “bias” and “partiality” be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The

In relation to issues of race, the formalists and the realists may have two very different judicial philosophies. Formalists will incline towards a “colourblind”¹⁵⁰ approach: the assumption will be that each person is an individual and that racial identity (in the sense of skin colour) is an irrelevant consideration, unless its specific relevance can be demonstrated in a particular case. A classic example of such a position is to be found in *McCleskey v. Kemp* in which the American Supreme Court accepted the validity of statistics which demonstrated that in Georgia murder defendants whose victims were White were four times more likely to receive the death penalty than murder defendants whose victims were Black, but held that this did not prove that McCleskey personally had been the victim of racially prejudiced jurors.¹⁵¹ As part of the reasons for reaching this result the Court suggested that if it were to acknowledge racial prejudice in the context of death sentences, it would also have to consider racism in other aspects of sentencing!¹⁵²

For realists, race matters.¹⁵³ They eschew colourblindness because they recognize that racialization (in the sense of hierarchical social relations on the basis of race) is still an extremely important social factor and, therefore, that legal decision-making should always be sensitive to the possibility that race is a variable.¹⁵⁴ Thus, facially neutral and

human mind, even in infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men [sic] which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. Without acquired “slants”, pre-conceptions, life could not go on. . . . The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious influence of such social attitudes.

In addition to those acquired social value judgments, every judge, however, has many unavoidable idiosyncratic “learnings of the mind,” uniquely personal prejudices which may interfere with his fairness. . . . The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that, merely by putting on a Black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine. [footnotes omitted]

Re J. P. Linahan, 138 F. 2d 650 at 651–53 (2d Cir 1943). See also, Minow, *supra* note 9, for an extensive elaboration of this perspective, as well as her more recent “Stripped Down Like a Runner or Enriched By Experience: Bias and Impartiality of Judges and Jurors” (1992) 33 *Wm. & Mary L. Rev.* 1201.

150. *Plessy v. Ferguson*, 163 U.S. 537 at 559 (1896), Harlan J., dissenting; over’d by *Brown v. Board of Education*, 347 U.S. 483 at 494 (1954).

151. 481 U.S. 279 (1987).

152. *Ibid.* at 315–16.

153. C. West, *Race Matters* (Boston: Beacon Press, 1993).

154. “[O]ne should never automatically assume that racism and discrimination only occurred in the past.” *Marshall Report*, *supra* note 1 at 149.

seemingly identical treatment may in fact be discriminatory because not everyone is similarly situated and, therefore, the pursuit of equality may require different treatment.¹⁵⁵ Realists do not repress questions of race, they confront them. Viewed in this light, interpreting a sensitivity to the racialized practices of Canadian society as bias only makes sense if one is premising one's accusation on some underlying legal philosophy that incorporates the myth of colourless individualism.¹⁵⁶ The difference, then, between Sparks J.'s decision and Glube C.J.'s is that the former may be a realist who is willing to contextualize issues of race whereas the latter may be a formalist who mistakes colourblindness for cultural neutrality.

To be clear, such a context sensitive and racially conscious judicial method engenders the judicial obligation to judge, not prejudice.¹⁵⁷ It does not mean that in every negative interaction between a White police officer and a Black person the latter will inevitably be found to be credible. Rather, it means that in applying the traditional assumption of innocent until proven guilty, judges should be aware of the larger social dynamics of a racially stratified society,¹⁵⁸ so that when charges are laid convictions can only be imposed when the judge is convinced beyond a reasonable doubt that the Black person is guilty. This is very different from the position adopted by the Crown at the trial level which advocated a presumption of guilt if a police officer says so! As Judge Jerome Frank has argued, "[i]mpartiality is not gullibility [and d]isinterestedness does not mean child-like innocence."¹⁵⁹ In short, by resisting the presumption

155. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171, McIntyre J.

156. T.A. Alienikoff, "A Case for Race-Consciousness" (1991) 91 Columbia L.R. 1060; D. Greene, "Justice Scalia and Tonto, Judicial Pluralistic Ignorance and the Myth of Colorless Individualism in *Bostick v. Florida*" (1993) Tulane L. Rev. 1979; B. Flagg, "Was Blind but Now I See: White Race Consciousness and the Requirement of Discriminatory Intent" (1993) 91 Mich. L. Rev. 953; N. Gotanda, "A Critique of 'Our Constitution is Colorblind'" (1991) 44 Stan. L. Rev. 1; D. Strauss, "The Myth of Colorblindness" (1986) Sup. Ct. Rev. 99.

157. *R. v. Stark*, *supra* note 44 at 68; *Committee for Justice*, *supra* note 56 at 391.

158. *Parks*, *supra* note 139 at 366–70. See also, s. 15(2) *Canadian Charter of Rights and Freedoms*, Part 1 of *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 15(2).

159. *Linahan*, *supra* note 149 at 654. In the Canadian context Watt J. has argued that a judge should approach his/her tasks "with a mind that is and appears to be open to reason and persuasion, not with one that is empty of it and unschooled by experience." *R. v. Bertram*, *supra* note 41 at 63. Along the same lines Watt J. has recently argued:

In everyday speech, "bias" is descriptive of a leaning, inclination, bent or predisposition towards one side or another, or a particular result. In legal proceedings, "bias" represents a predisposition to decide an issue or a cause in a certain way which does not leave the judicial mind perfectly open to persuasion or conviction. Bias is a condition or state of mind which sways judgment, hence renders a judicial officer unable to discharge their duties in a particular case with the impartiality that is quintessential to the judicial function. It generally refers to the mental attitude or disposition of the judge

of police rectitude, Judge Sparks's decision manifests the virtues of an open mind, precisely the standard that was outlined by the Inquiry Committee of the Judicial Council in the Donald Marshall Jr. case:

True impartiality is not so much not holding views and having opinions, but the capacity to prevent them from interfering with a willingness to entertain and act on different points of view. Whether or not a judge was biased, in our view, thus becomes less instructive an exercise than whether or not the judge's decision or conduct reflected an incapacity to hear and decide a case with an open mind.¹⁶⁰

VII. *What is Bias?*

The previous sections have suggested that Glube C.J.'s decision is mistaken for two reasons: first, it rejects a contextualist legal method; and second, it is premised upon formalistic preconceptions of equality and the judicial function. In this section I will suggest a third weakness in her decision: an inadequate understanding of what bias might mean.

A major problem with the case law in this area is the unreflective way in which judges have approached the very concept of bias. Usually it is considered to be interchangeable with cognate concepts such as partiality, prejudice, position, perspective, inclination, orientation, predisposition, leaning, partisan, antagonism, animosity, interest, favouritism, connection, or engagement. However, such an exercise in literalist

towards a party-litigant, rather than any views that the judge may entertain regarding the actual subject-matter of the dispute. *R. v. Gushman*, *supra* note 46 at para. 29.

Further support for the argument that Sparks J. was simply replying to the Crown's argument in favour of prioritizing a police officer's testimony can be garnered from a quotation she reproduces in her supplementary reasons (which were excluded by Glube C.J.):

[o]nce found to be competent, every witness starts out on the same footing with equal credit, although the accused has an enhanced position, ultimately because the burden of proof is upon the Crown. In our system we have no feudal-like categorization of witnesses, such that for example, from the moment they take the stand, the lord has more credit than the peasant, the educated than the illiterate, the propertied than the impoverished or the man than the woman. *Nor ought there be any unstated informally-understood division, such that for example, entering the court room, the police officer has more credit than the alleged speeder, be he or she a school principal or a student. That is not to say that witnesses remain of equal credit throughout the proceedings, but only that they begin on the same footing.*

Emphasis added by Sparks J., quoting Hon. G. Seniuk, "Judicial Fact Finding and a Theory of Credit" (1994) 18(3) *Prov. Judges Journal* 4 at 15. *R.D.S. #3*, *supra* note 21.

160. *Report to the Canadian Judicial Council of the Inquiry Committee Established Pursuant to Subsection 63(1) of the Judges Act at the Request of the Attorney General of Nova Scotia* (August 1990) at 26. This paragraph is omitted from the version of the report published in the *U.N.B.L.J.*, *supra* note 84. See also, Minow, "Stripped", *supra* note 149, at 1217; *J.B.B. v. J.A.B.* (1992), 113 N.S.R. (2d) 60 (C.A.); *R. v. St. Lawrence Cement*, [1993] O.J. No. 1442 (Q.L.).

reductionism oversimplifies the matter. As the discussion outlining the differences between realists and formalists has indicated, the whole point of judging is to take a position, to reach a determination that inevitably favours one party and is detrimental to the interests of another. Moreover, as I have suggested, it is not feasible (nor, in my opinion, desirable) to expect judges to come to their tasks unencumbered with the messy realities of their experiences. The core and ultimately unavoidable problem in the law of judicial bias is to determine which biases or prejudices or perspectives are legitimate and which are not.¹⁶¹ And this is a necessarily *normative* decision that cannot be avoided by facile formalistic reasoning. As Scalia J., (hardly the most progressive of judges¹⁶²) of the U.S. Supreme Court has recently pointed out, even though there is universal hatred for Adolf Hitler, it would not be accurate to say that people are biased or prejudiced against him. For Scalia J., the pejorative connotation of the words “bias” and “prejudice” require that an opinion be “wrongful or inappropriate, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree. . . .” In short, an opinion must manifest “a deep seated favouritism or antagonism that would make fair judgment impossible”.¹⁶³ In my opinion, nothing in Judge Sparks’s remarks could be considered to be undeserved or excessive in degree; nor could it be said she ought not to possess knowledge of police-Black interactions, or even that she has shown a deep seated favouritism or antagonism.

Glube’s C.J.’s decision assiduously avoids such normative questions. As I have pointed out previously, her discussion of the potentially relevant law is perfunctory, and the extent of the reasoning negligible. But the effect of such shoot-from-the-hip legal decision-making is to render invisible by judicial fiat the reality of Canadian racism. The next section considers several consequences that may result from such an approach.

VIII. *Impact*

Legal decisions can have consequences not only for the parties to a particular case but also more generally. This is particularly true when a case like this occurs in a province like Nova Scotia which has ongoing racial problems. First, because of Glube C.J.’s decision, the youth in this case will have to face a new trial. At least two years of his life will have passed in the shadow of

161. *Parks*, *supra* note 139 at 364; P. Cain, “Good and Bad Bias: A Comment on Feminist Theory and Judging” (1988) 61 So. Cal. L. Rev. 1945.

162. *City of Richmond v. Croson*, 109 S. Ct. 706 (1989); “The Disease as Cure: In Order to Get Beyond Racism, We Must First Take Account of Race” (1979) Wash. U.L.Q. 147.

163. *Liteky v. U.S.*, 114 S. Ct. 1147 at 1155, 1157 (1994).

these legal charges. Moreover, the Crown will have a second opportunity to better prepare its case; perhaps the Crown will call more than one witness. Moreover, it should be noted that while it is usual in situations where a reasonable apprehension of bias is found to order a new trial in front of a different judge, the effect of doing so in this particular case is to ensure that the next judge will be White because apart from Judge Sparks there are no Black judges in Nova Scotia. In short, the effect, if not the intent, of succumbing to the Crown's hardball tactic of alleging racially motivated bias has been "judge shopping" on the basis of race.

Second, Nova Scotia's Black community is told in no uncertain terms that their experiences and perceptions are of no legal weight, and that even a Black judge cannot challenge the pervasive racism that continues to saturate Canadian society.¹⁶⁴ Empathy is trashed,¹⁶⁵ denial reigns supreme,¹⁶⁶ and it is the police officer who is presented as the victim of a racially hostile Black judge.

Third, the judicial community generally is affected by this decision. Echoing several other cases where a reasonable apprehension of bias has been found by an appeal court,¹⁶⁷ Glube C.J. comments that "it would be better if Judge Sparks had not made these comments". There are at least two potential problems with such a lamentation. It tends to have a chilling effect on lower-level judicial decision-making, discouraging judges from "speak[ing] directly, even bluntly, so that there will be no misunderstanding of what they mean."¹⁶⁸ Moreover, by dampening judicial candour

164. *Parks*, *supra* note 139 at 367–69.

165. For discussions of the relationship between empathy and objectivity, see K. Karst, "Judging and Belonging" (1988) 61 S. Cal. L. Rev. 1957 at 1966; J. Webber, "The Adjudication of Contested Social Values: Implications of Attitudinal Bias for the Appointment of Judges" in *Appointing Judges*, *supra* note at 3, 24.

166. Glube C.J. is, of course, not alone in her seeming unwillingness to confront Nova Scotia's racial problems. Perrot and Taylor, in their attempt to defend police officers from accusations of being especially ethnocentric or authoritarian, do acknowledge that their research indicates that the "police attribute the locus of negative relations to the community and not to their own attitudes and actions." Perrot and Taylor, *supra* note 135 at 1655. Reiner has identified a similar attitude among chief constables in England and Wales, *supra* note 125 at 8.

My research for this comment has made it abundantly obvious that, relative to the United Kingdom and the United States, Canadian research on the issue of racism and the criminal justice system is underdeveloped: ignorance is bliss. (It should be acknowledged, though, that some work has been done in relation to First Nations people.) In the U.S. many state Supreme Courts have taken the initiative and have established task forces to identify the problems and to generate some possible solutions. See J. Resnick, "Revising the Canon" (1993) 61 Cinn. L. Rev. 1197 Appendix I for a list of such task forces. Perhaps the time has come for Canadian courts to take their heads out of the sand. For an overview of some of the American initiatives see S. Scasneccia, "State Responses to Task Force Reports on Race and Ethnic Bias in the Courts" (1992) 16 Hamline L. Rev. 923.

167. See *e.g.* *R. v. J.F.A.* (1993), 82 C.C.C. (3d) 295 (Ont. C.A.).

168. Per MacEachern C.J. in *Report of the Inquiry Committee*, *supra* note 84 at 229.

Glube C.J. seems to be implicitly suggesting that judges may think things, but not say them.¹⁶⁹ If this is the case, it runs counter to the ethical norm of judicial openness. More generally, judges are put on notice that decision-making should aspire to being ahistorical and decontextual and that colourblind formalism is the appropriate judicial role.

Fourth, and finally, Judge Sparks has not only been overruled on appeal, she has been disciplined. In effect, she has been told that she is not to raise issues of race; that in donning her judicial robes she is to sever herself from her community, that in taking her position on the bench she is to forget her experientially informed knowledge,¹⁷⁰ and that she is to adopt a neutral (a.k.a. White) role.¹⁷¹ By conflating prior knowledge with prejudice,¹⁷² Glube C.J. has subordinated integrity¹⁷³ to assimilationist conventionalism.¹⁷⁴ On a symbolic level, the decision seems to indicate

169. To be clear, my point is not that judges should be unrestrained in their statements. Rather I would suggest that, like all of us, they should be self-reflective about their thoughts and consider the possible effects of their statements. However, if after reflection a judge believes that certain variables have had an impact on his/her decision, it is essential that the judge be explicit as to what these variables are.

170. Such devaluations are not unprecedented. W. Wilbanks, *The Myth of A Racist Criminal Justice System* (Monterey, Calif.: Brooks/Cole, 1987) at 70 rejects the extensive American literature on racism because it relies on “anecdotes, common sense scenarios, or statements from authorities such as Black judges who assert that racism is pervasive in law enforcement.”

171. For a review of arguments demonstrating the benefits of the appointment of minority and female judges see S. Goldman, “Should there be Affirmative Action for the Judiciary?” (1979) 62 *Judicature* 488; S. Martin, “Women as Lawmakers” (1992) 30 *Alta. L. Rev.* 738; C. Menkel Meadow, “Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law” (1987) *U. Miami L. Rev.* 29; J. Resnick, *supra* note 146; C. Tobias, “Keeping the Covenant on the Federal Courts” (1994) *S.M.U.L. Rev.* 1861; C. Tobias, “Increasing Balance in the Federal Bench” (1995) 32 *Houston L. Rev.* 137.

172. Minow, “Stripped”, *supra* note 149 at 1214.

173. P. Wald, “The Role of Morality in Judging: A Woman Judge’s Perspective” (1986) 4 *Law & Inequality* 3.

174. Gotanda, *supra* note 156 at 53, 60. I wonder what Sparks J.’s response will be. It is worth noting that in rendering her decision against disclosure of the tapes (a decision which was prior to the Crown filing a notice of appeal) Sparks J. was clear as to the appropriateness of her decision in favour of acquittal.

Tangentially, I point out here the courts have historically been critical of state agencies, including police departments. Courts have also, I would suggest, been protective of rights of all accused persons: rich or poor, Black or White. There have been, and will continue to be, cases where courts will be critical of the Halifax Police Department and its treatment of visible minorities as a group, a group which has historically been subjected to discriminatory treatment in Nova Scotian society. Many would forcefully argue that the judicial branch of government is the appropriate venue in which the actions of police and other state agencies shall be subject to critical scrutiny. . . There have been, and no doubt will continue to be, cases where the courts, rightfully in my view, examine and criticize when necessary the investigation of a police officer, and equally so, if not more so, when the investigation is of a person from a group which has historically endured discriminatory treatment in the justice system. There is no need to

that while modest efforts may be made to diversify the judiciary, the bottom line is that Black female judges should be seen, but not heard.¹⁷⁵

IX. Conclusion

The pursuit of a more inclusive and diversified judiciary requires a great deal more than a marginal increase in the number of hitherto underrepresented groups. Among other things, it requires a recognition that principles and rules of law are themselves historically, culturally and socially contingent and therefore in need of reconsideration and possible reconfiguration.

The common law principle against judicial bias serves two connected, but discrete functions. On an individual level, the principle ensures that parties receive a fair trial. On a collective level, the principle promotes public confidence in the judiciary and therefore reinforces the integrity of the legal system.¹⁷⁶ But fairness and faith should not be conceptualized as formalistic abstractions.¹⁷⁷ They can only be efficacious when located in the context of contemporary Canadian society. In this comment I have identified an extensive literature which indisputably confirms that there are significant problems in police-Black interactions. A contextualized approach to fairness cannot afford to ignore these realities, particularly if we believe in innocent until proven guilty beyond a reasonable doubt. Similarly, there is a widespread perception in Canadian society that the legal system does in fact discriminate against members of “non-white” communities. Thus, rather than promoting faith in the integrity of the

cite cases, however, suffice it to say this is one of the fundamental and necessary functions of the judicial branch of government and a cornerstone of judicial independence. For an exhaustive review of treatment of people of colour in the judicial system see: *The Royal Commission on the Donald Marshall, Jr. Prosecution*, Province of Nova Scotia, December 1989, volumes 3 and 4, in particular.

R.D.S. #2, *supra* note 18 at 16–17.

175. There is, of course, a different vision:

In a society of diverse interests and competing values, impartiality is increasingly understood not as a reflection of the status quo, but as a capacity to be genuinely open to the pluralistic views and people Canada represents. No longer are the traditional judicial attributes of knowledge, common sense, civility, and experience sufficient. Judicial decision-making is not the mechanical application of law and the precedent to sets of facts. The legitimacy of the judges, and their effectiveness in playing the complex tasks we have assigned them, depend on the openness and fairness of their selection, and on their sensitivity to the society which they serve and from which they come.

Appointing Judges, *supra* note 4 at 1.

176. *Valente v. The Queen* (1985), 23 C.C.C. (3d) 193 at 204 (S.C.C.).

177. *R. v. Lippé*, [1991] 2 S.C.R. 114 at 140–41; *R. v. McAvena*, [1987] 4 W.W.R. 15 (Sask. C.A.), Bayda C.J.

legal system, Glube C.J.'s decision can only do the opposite,¹⁷⁸ especially when it is set in contrast to the "complete exoneration" of Judge Bourassa¹⁷⁹ and the findings of "impartiality" on the part of the Reference Court in the Donald Marshall Jr. case.¹⁸⁰

X. *Addendum*

While this comment was going to press, R.D.S. appealed the decision of Glube C.J. By a majority the Nova Scotia Court of Appeal rejected the appeal and upheld the ruling that there should be a new trial in front of a different judge.¹⁸¹

The appellant advanced three arguments: first, that Glube C.J. interfered with a determination of credibility by a trial court judge; second, that Glube C.J. relied upon an inappropriate standard in articulating and applying the reasonable apprehension of bias test; and third, that in interpreting the reasonable apprehension of bias test Glube C.J. adopted a formal equality approach rather than a substantive equality approach as mandated by ss. 15, 11(d) and 7 of the *Charter*. The majority decision, written by Flinn J.A. and concurred in by Pugsley J.A., rejected all three arguments. The dissent, written by Freeman J.A., seems to accept an amalgam of the first two arguments, and does not explicitly address the third argument, although it seems to adopt a more contextual approach. The decisions reflect many of the themes previously identified in this comment: inclusion and exclusion; realism and formalism; colour contextualism and colourblindness; perspectivism and impartiality; and comity and intolerance.

Flinn J.A. rapidly disposed of the credibility and *Charter* arguments. With regard to credibility he simply asserted that Glube C.J.'s decision "was not based upon a re-examination, and determination, of issues of credibility".¹⁸² In relation to the *Charter* argument, he avoided any

178. It might also be noted that Judge Sparks' situation may not be as unique as it seems. In recent years, several Canadian women arbitrators have been challenged (sometimes successfully) on the basis of gender bias. At this point, I would venture to conjecture that what we may be witnessing is an emerging pattern whereby women who are beginning to "make it" in the higher echelons of legal bureaucracies are constructed as presumptively partisan, unlike the generations of men who have been assumed to be neutral. For an overview of some of these situations see Omatsu, *supra* note 4 at 144. See also S. Faludi, *Backlash: The Undeclared War Against American Women* (New York: Anchor, 1992).

179. *Supra* note 87.

180. *Supra* note at 232. It should be remembered that a research study commissioned by the Marshall Inquiry found that respondents were more concerned about the conduct of the courts than the police! (*Marshall Report, supra* note 1 at vol. IV, 18, 27.)

181. *R.D.S. v. R.* (25 October 1995) C.A.C. #117036 (N.S.C.A.).

182. *Ibid.* at 6.

engaged discussion on the basis that it had not been raised at the lower level. In spite of this, he opined that Glube C.J. “did not, in [his] view apply an inappropriate equality approach in her consideration of apprehension of bias.”¹⁸³ In my opinion this suggests a strategy of confession and avoidance. Flinn J.A. appears to be saying that he favours a decontextualized, formalistic and sameness approach to the equality provisions, but then says that it is unnecessary to pursue this because it is a non-issue. However, he seems to be missing the point. Clearly, the *Charter* angle could not have been raised at the trial level because bias was not an issue. While he is technically correct to suggest that the *Charter* analysis could have been raised in argument before Glube C.J., the point is that it was her reasons for decision that generated the appellant’s equality concerns. Moreover, other upper level courts have exercised their discretion to allow *Charter* arguments to be raised for the first time at the appeal level.¹⁸⁴

However, as I have said, Flinn J.A. gave short shrift to the *Charter* argument and focussed the bulk of his decision on the test for determining whether there is a reasonable apprehension of bias. Having invoked several of the usual precedents and broad dicta from administrative law scholars,¹⁸⁵ Flinn J.A. identified five “essential ingredients of the test to determine apprehension of bias.” Only one of these is controversial, that is, his suggestion that “there is no essential difference between the phrases . . . ‘reasonable apprehension of bias’, ‘reasonable suspicion of bias,’ or ‘real likelihood of bias’.”¹⁸⁶ While it is true that some courts have attempted to elide the differences, as I have pointed out in Part III, many other courts (including the House of Lords) have found that there are significant differences. Persuasive legal reasoning would, in my opinion, explicitly confront these competing lines of authority and attempt to come to some resolution on the basis of either principle or policy. Unfortunately, this is not the path chosen by Flinn J.A., although he does add that “[s]urmise or conjecture is not sufficient; nor is the test related to the very sensitive or scrupulous conscience”.¹⁸⁷ For him, quite simply, it is a reasonableness test. Thus, when Flinn J.A. applied the test, he too found that Judge Sparks’s comments indicated that she was considering “matters not in evidence” in determining credibility, that her “unfortunate use of . . . generalizations” denied the police officer any opportunity to

183. *Ibid.* at 14.

184. See e.g., *R.W.D.S.U. Local 580 et al. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

185. *Supra* note 181 at 6–10.

186. *Ibid.* at 11.

187. *Ibid.*

address such concerns, and that he was therefore treated “unfairly.”¹⁸⁸ Consequently, once again, and even more explicitly than in the decision of Glube C.J., we encounter the process of constructing the White police officer as the victim of an inequitable Black judge.

Finally, it should be noted that at one point the majority decision does acknowledge the argument that police officers may manifest bias against Black youth, but Flinn J.A. counters that while “[t]hat may very well be so . . . it does not address the real issue here”.¹⁸⁹ Yet again the inter-racial dynamic that underlies this case is repressed.

In stark contrast the dissenting decision of Freeman J.A. opens as follows:

The essential issue in this appeal is whether a trial judge gave rise to a reasonable apprehension of bias in remarks made in the case of a fifteen year old black youth apprehended by a white police officer on charges of assaulting him. . . .¹⁹⁰

Moreover, a few pages later he continues:

[t]he case was racially charged, a classic confrontation between a white police officer representing the power of the state and a black youth charged with an offence . . . It is unfortunately true and within the scope of general knowledge of any individual that police officers have been known to mislead the court and overreact in dealing with non-white groups.¹⁹¹

There is no attempt by Freeman J.A. to bury the race issue under layers of precedent. Rather he quickly agrees with majority’s articulation of the relevant law, but disagrees with the way in which they *applied* the test: “it was perfectly proper for the trial judge, in weighing the evidence before her, to consider the racial perspective.”¹⁹² For Freeman J.A., the case is at bottom about when an appeal court may review a trial judge’s determination of credibility and on what basis? In contrast to the majority decision which avoided the credibility issue and focussed on the objective reasonable person, Freeman J.A. acknowledges the inevitable subjectivity of determining credibility. He advocates that like any other judge, “Judge Sparks was under a duty to be sensitive to the nuances and implications, and to rely on her own common sense which is necessarily informed by her own experience and understanding.”¹⁹³ Here there is no attempt to force a judge to deny her identity and experience; rather there is an awareness that diversity of perspective is an attribute not a liability.

188. *Ibid.* at 13–14.

189. *Ibid.* at 13.

190. *Ibid.* at 15.

191. *Ibid.* at 18.

192. *Ibid.* at 16.

193. *Ibid.* at 18.

But Freeman J.A. is careful not to allow a tolerance for perspectivism to become a licence for ad hocery. He is clear that determinations of credibility need to be supported by evidence and if they are not, they may be reviewed by a superior court. However, as he reads Sparks J.'s reasons, Freeman J.A. believes that she has provided sufficient grounds to support her concern that the police officer may have overreacted, "enough to justify her in tipping the scales in an assessment of credibility."¹⁹⁴

On this basis, Freeman J.A. then returns to the test of a reasonable apprehension of bias. Again he reiterates the context:

Questions with racial overtones make the difficulties [of assessing credibility] more intense, yet these questions must be addressed freely and frankly and to the best of the judge's ability. Because of their explosive nature they are more likely than any others to subject the judge to controversy and allegations of bias, but they cannot be ignored if justice is to be done.¹⁹⁵

Because he is astute in recognizing that emotions can overflow in these situations, he counsels caution and restraint (and perhaps even solidarity) emphasizing that the standard for finding a reasonable apprehension of bias is "high . . . it must be real".¹⁹⁶ Thus for Freeman, J.A. the comments of Judge Sparks "would not cause a reasonable and informed person to be apprehensive that justice was not being done."¹⁹⁷ And, unsurprisingly, the views of this hypothetical reasonable person dovetail very closely with Freeman J.A.'s own opinion that Judge Sparks's remarks are "more consistent with a fair inquiry into delicate subject matter than suggestive of bias on her own part."¹⁹⁸

Meanwhile, on the other side of town, R.D.S. prepared for the retrial which was scheduled for five days later. This has now been adjourned pending a leave to appeal application to the Supreme Court of Canada.

194. *Ibid.* at 20.

195. *Ibid.* at 20.

196. *Ibid.*

197. *Ibid.* at 21.

198. *Ibid.* at 20–21.