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## R. v. R.D.S.: A Political Science Perspective

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*Introduction*

Political scientists, including those who study Canadian government and politics, regard the judiciary as a component of the system of governance as a whole. They view it as an institution in relation to other institutions. Thus in *The Judiciary in Canada: The Third Branch of Government*, Peter Russell examines such issues as the structure of the judiciary in the federal system, the separation of powers and judicial independence, and the appointment, promotion and removal of judges.<sup>1</sup> As well, political scientists follow the development of the law itself, in areas of peculiar relevance to political life, like electoral law, or of general relevance, like public law. At first glance, the Supreme Court of Canada's decision in *R.D.S. v. R.*<sup>2</sup> seems to fall into neither of these categories. Why, then, should it interest political scientists?

There are at least two reasons why *R.D.S. v. R.* is worthy of their attention. The first is that it contains a debate about judging. The second is that it contains a debate about the "reasonable person." Let us start with judging. For the most part, the discipline of political science is less interested in the particulars of the activity of judging than in a broad understanding of it and of its implications for the distribution of political power within the institutions of government.<sup>3</sup> The particulars become

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1. (Toronto: McGraw-Hill Ryerson, 1987). In his "Foreword," Paul W. Fox writes that Russell has pioneered the study of the judiciary as part of the process of government in Canada.

2. *R.D.S. v. R.*, [1997] 3 SCR 484, 151 D.L.R. (4th) 193.

3. There are exceptions, of course, among them Rainer Knopff and F.L. Morton, political scientists at the University of Calgary. The premise of their book, *Charter Politics* (Scarborough: Nelson Canada, 1992), is that the *Canadian Charter of Rights and Freedoms* has had the effect of expanding the role of the courtroom as an alternative political arena. Accordingly, they analyze and categorize judicial approaches to the interpretation of the *Charter* and seek to assess the implications of these approaches for the development of public policy. Another exception is Janet Hiebert, a political scientist at Queen's University who is examining the impact of rights-related considerations on policy choices, not only in terms of the decisions of the courts, but from the perspective of parliamentarians as well. See her *Limiting Rights: The Dilemma of Judicial Review* (Montreal and Kingston: McGill-Queen's University Press, 1996).

important only if they appear to be in flux, that is, they appear controversial. Controversy sometimes heralds change. *R.D.S. v. R.* signals controversy about judging.

There is also the issue of the reasonable person. Normally, the judicial concept of the reasonable person would be no more interesting to political scientists than is the concept of the rational person to most people. Both are analytical constructs that are used for analytical purposes by a few analysts. However, there are some important differences between them, one being crucial. The rational person so beloved by economists and public-choice theorists<sup>4</sup> is a simple utility calculator, and no one thinks that such a person really exists. On the other hand, the reasonable person is supposed to be alive, well and (hopefully) in plentiful supply. Therefore judicial disagreement about the traits of the reasonable person is bound to be fascinating to many, and not without potential political significance. *R.D.S. v. R.* reveals such disagreement. Accordingly, in the remainder of the article I examine the debates about judging and the reasonable person in *R.D.S. v. R.* and assess them from the perspective of a political scientist.

## I. *The nature of judging*

### 1. *Political science and judging*

How does contemporary political science understand judging? It is safe to begin with Russell, since among political scientists he is the leading authority on the judiciary. He holds “that judges exercise political power and that courts are part of the machinery of government.”<sup>5</sup> By this he means that the functions of the judiciary range from influencing the development of public policy to maintaining order to upholding public values. Since others in the machine perform similar functions, what is distinct about the political power of the judiciary? His answer is that the distinction is rooted in the judiciary’s adjudicative, or dispute-settling

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4. Public choice theory is an application of some of the tenets of microeconomic theory to the political problem of how to generate public goods, like clean air or educated citizens. The underlying argument is that a competitive market system will generate more and better public goods and services for the citizen consumer, who is understood to be a rational utility maximizer. The individual citizen, and not someone else or the government, is thought to be best able and inclined to advance his or her own well being by prioritizing preferences and calculating which combinations of goods and services are best suited to meeting those preferences. The assumption of rational self interest which lies at the heart of the concept of utility maximization grounds several areas of political science, a well known example being the empirical study of voting behaviour. For a discussion of this in relation to referendum voting, see Lawrence LeDuc & Jon H. Pammett, “Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum” (1995) 28 *Can. J. Pol. Sci.* 3.

5. *The Judiciary in Canada*, *supra* note 1 at 3.

responsibilities. "The performance of this adjudicative dispute-settling function," he writes, "is the *raison d'être* of courts of law presided over by judges."<sup>6</sup>

First and foremost, then, judging means adjudicating. By way of elaboration, Russell turns to the attributes and the institutional preconditions of the activity of judging. He calls them the "normative dimensions," and they include the idea that each side in a dispute should receive a fair hearing, the independence and impartiality of the judge, and the requirement that the judge provide reasons to support the decision. These normative dimensions clearly revolve around the judge. But they also involve two levels of consideration. One pertains to the conduct of the judge, and the key words are impartiality, fairness and reasons. By contrast, politicians are thought to be partial and dependent (at least on the people, possibly on other bodies), traits which, taken together, generally eliminate the need for a routine of fair hearings and written commentaries. The other consideration is the institutional setting within which the judge operates, which must be consistent with the requirement of independence. But independence from what? From whom?<sup>7</sup>

Political science has more to say about independence than impartiality, primarily because independence is related directly to institutional arrangements. The general theme is that judges should be beyond partisan influence, that is, beyond the influence of partisans. Partisans support their political friends or political party, and so their partisanship is an obvious threat to impartiality. The trouble is that partisans are everywhere in politics, and potentially capable of breaching the judicial preserve. And so political scientists are especially interested in the design of effective institutional supports of judicial independence, and in the circumstances and procedures in which tension between these supports, on the one hand, and opposing political constraints, on the other, might be expected to arise. Examples include the position of the federal judiciary within the framework of Canadian federalism, the relationship between judges and ministers of the Crown, and the manner in which judges are selected, removed and disciplined, three matters, incidentally,

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6. *Ibid.* at 5.

7. Elsewhere I have examined the relationship between the institutional supports of independence, on the one hand, and the professional attitude and conduct of the individual judge, on the other. See "Executive Appointment of the Judiciary: A Reconsideration" in Ontario Law Reform Commission, *Appointing Judges: Philosophy, Politics and Practice* (Toronto: The Commission, 1991) 189.

to which Russell devotes several chapters.<sup>8</sup> Now political scientists also make reference to the first consideration, the conduct or bearing of the judge, but here much is assumed. This observation is worth pausing to consider.

It is assumed that impartiality is a desideratum in judging, and that impartiality means being unbiased, or maybe neutral. Thus in their introductory text, *Canadian Government in Transition: Disruption and Continuity*, Robert J. Jackson and Doreen Jackson write: “Judges and juries act, under the laws of the country, as referees or umpires making authoritative, impartial decisions about disputes.”<sup>9</sup> After discussing the fact that the judiciary has attained a more powerful policy-making role in the wake of the *Canadian Charter of Rights and Freedoms*, they return to the impartiality theme in a passage that, in my view, reflects current political-science opinion:

The mandate of judges [despite the advent of the *Charter*] has remained constant—to respect the laws governing the disputes which they arbitrate and to contribute to the development of those laws. In doing so, they must act, and must also be seen to act, with independence and impartiality. Increasingly, however, judges are perceived less as fulfilling an essentially technical and non-political role, and more as promoting change in public policy. As Canadians become more conscious of judicial power they will undoubtedly want to scrutinize more closely their judiciary’s claims of impartiality. In particular, the appointment procedure will become the object of public debate.<sup>10</sup>

What affects impartiality? It is easy to see that judicial independence is threatened by, say, uncertain salary payments. But once the institutional supports of independence are in place, what is left to threaten the impartiality of a judge? The candidates that appear in the literature are partisanship, ideology and group identity. It needs to be stressed that no causal link between a lack of impartiality, on the one hand, and partisanship, ideology or group identity, on the other, is demonstrated or even baldly asserted. The idea is there, nonetheless, as is evident in one of the more extensive discussions of the matter by Keith Archer, Rainer Knopff, Roger Gibbins and Leslie A. Pal in their *Parameters of Power: Canada’s Political Institutions*.<sup>11</sup> They draw a distinction between judicial appoint-

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8. *Supra* note 1, ch.3, “The Judiciary’s Relationship to the Federal System”, 47-73; ch.4, “Judicial Independence and the Separation of Powers”, 75-103; ch.5, “Appointing and Promoting Judges”, 107-147; and ch.7, “Retirement, Removal, Discipline, and Education”, 173-197.

9. (Scarborough: Prentice Hall Canada, 1996) at 196.

10. *Ibid.* at 201.

11. (Toronto: Nelson Canada, 1995).

ments motivated by patronage considerations and appointments motivated by ideological considerations. According to them, patronage appointments are rewards for loyal service to the party and are common on the judicial front when the courts are perceived to be nonpolitical adjudicative bodies. By contrast, ideologically-motivated appointments are made with the intention of ensuring that those making the appointments and those who are appointed share similar policy preferences.<sup>12</sup> This category of appointment is expected to increase as the courts come to be perceived to be important policy-making bodies. Finally, there are the appointments that are motivated by considerations of representation, including ethnic, gender and regional representation.<sup>13</sup> As might be expected, this type of appointment is thought to perform the symbolic function of signalling the political importance of the group or region in question. But the authors also suggest that policy considerations are involved as well, since "representation [on the courts] may be sought to ensure that a group's perspectives and interests are taken into account in significant policy decisions."<sup>14</sup> The clear inference is that partisanship, ideology and group identity are thought to matter in terms of the judiciary's policy-making role.

An even stronger statement of this theme can be found in the latest edition of Ron Landes' widely-used introductory text, *The Canadian Polity: A Comparative Introduction*, in which he urges students not to confuse the principle of judicial independence from political actors and other interested parties with the idea that the courts are somehow above and beyond politics. He then turns immediately to the concept of impartiality, the applicability of which he seriously questions. "The myth of judicial impartiality," he writes, "is an important basis for legitimating the political effects of court decisions, even as it provides an incorrect description of the role of the judiciary in the political process."<sup>15</sup> Among the reasons he advances to support the statement that the courts are essentially political is the rationale for the appointment of judges. "Even when explicit partisanship is not the prevailing basis of selection," he argues, "the appointment of court members, so as to reflect particular ideological views or to represent various interests of society (racial, regional, ethnic, linguistic), is often done for political considerations."<sup>16</sup>

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12. *Ibid.* at 338.

13. *Ibid.* at 341-2.

14. *Ibid.* at 343.

15. 5th ed. (Scarborough: Prentice Hall Allyn & Bacon Canada, 1998) at 210.

16. *Ibid.*

On Landes' reasoning, it would appear that the background factors like partisanship, ideology and identity that are thought to be politically relevant in the appointment of judges work automatically to rule out any notion of impartiality. However, it is important to note that he uses the term "impartiality" in a very general sense in reference to the institution of the judiciary rather than to individual judges.<sup>17</sup>

In summary, political science knows that partisanship, ideology and group identity are factors in the selection of judges, and suspects that these factors are influences in the judicial decision-making process. Indeed, it might be more accurate to say that it *expects* that they are influences. After all, the bias in political science is the expectation of partiality. The classic concern is the threat of oppressive homogeneity and the classic solution is pluralism. And so, for example, Peter Russell has argued in favour of ideological pluralism on the courts as a solution to the threat of ideological homogeneity, especially in the light of the periods of one-party dominance characteristic of Canadian politics at both levels of government.<sup>18</sup> However, the idea that partisanship, ideology or group identity might threaten judicial impartiality at the level of the individual judge remains merely an inference to be drawn. Or even an idea to be explored. It is not an idea that is tested.<sup>19</sup> Moreover, as noted earlier, impartiality remains the unexamined desideratum of judicial conduct. Therefore the debate in *R.D.S. v. R.* about the meaning of impartiality for judging is important for political scientists to notice and I turn to it now, emphasizing that mine is not a lawyer's perspective.

## 2. *R.D.S. v. R. and judging*

*R.D.S. v. R.* raises the question of reasonable apprehension of bias. Before turning to the case at hand, the judges discuss the test for reasonable apprehension of bias, in the course of which they examine the meaning of impartiality, in particular, and the nature of judging, in general. The

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17. Landes also writes that the courts are inherently political because they render decisions that affect the distribution of power within the political system, which demonstrates further that his is an institutional analysis.

18. "Meech Lake and the Supreme Court" in K. Swinton & C. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 97 at 105. Russell was defending the provision of the accord under which the provinces would assume a role in the selection of judges of the Supreme Court of Canada.

19. Andrew Heard shows how hypotheses about the decision-making patterns of individual judges can be tested empirically in his "The Charter in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" (1991) 24 Can. J. Pol. Sci., 289. He also provides a useful review of the relevant political-science literature.

majority agrees with Justice Cory's account of bias and impartiality and the test that is used to determine whether the words or actions of a judge give rise to a reasonable apprehension of bias. The minority follows Justices L'Heureux-Dubé and McLachlin.

To an outsider, Justice Cory's account is unexceptional in the sense that it seems to be consistent with widely-held opinion, including political-science opinion. He begins with the commonplace that fair trials and the perception of same among informed and reasonable observers are the foundation of public respect and confidence in the judicial system as a whole.<sup>20</sup> Fair trials require impartial judges. Justice Cory pursues the meaning of impartiality at length but the gist, however inexact, is that it is "a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions." By contrast, he distinguishes bias as "a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues."<sup>21</sup>

After setting out the legal test for finding a reasonable apprehension of bias, Justice Cory returns to impartiality and makes two additional observations about it that speak to the activity of judging in general. One is that "Canadian judges strive to overcome the personal biases that are common to all humanity in order to provide and clearly appear to provide a fair trial for all who come before them."<sup>22</sup> So, judging includes overcoming biases, resisting biases or, as he writes later, making every effort to achieve "neutrality and fairness" in carrying out judicial duties. The other observation is that neutrality "does not require judges to discount the very life experiences that may so well qualify them to preside over disputes."<sup>23</sup> How, then, is "life experience" properly deployed in the judicial task? What prevents it from turning into biased observations about social context, and thereby imperilling impartiality?

Justice Cory's answer is evidence. Judges may well see fit to refer to expert evidence on social context that has been presented to them, he writes, as they reason their way to a legal conclusion. But what if there is no expert evidence, and the task at hand is the determination of a witness's credibility? Again, evidence is the key. He states: "On one hand, the judge is obviously permitted to use common sense and wisdom gained from personal experience in observing and judging the trustworthiness of a particular witness on the basis of factors such as testimony and demeanour.

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20. *R.D.S.*, *supra*, note 2 at 224.

21. *Ibid.* at 227.

22. *Ibid.* at 231.

23. *Ibid.* at 232.



On the other hand, the judge must avoid judging the credibility of the witness on the basis of generalizations or upon matters that were not in evidence."<sup>24</sup> As he concedes, the line here is "delicate,"<sup>25</sup> and Justices L'Heureux-Dubé and McLachlin walk it differently.

As might be expected, Justices L'Heureux-Dubé and McLachlin take a different view of the meaning of impartiality, although they spend more time emphasizing what it is not than defining what it is. And it is definitely not neutrality. Justice Cory appears to use the word "neutrality" interchangeably with the word "impartiality" in two passages.<sup>26</sup> For Justices L'Heureux-Dubé and McLachlin, by contrast, neutrality, or pure objectivity, turns out to be a kind of hoax because judges, like people everywhere, cannot be neutral. And they cannot be neutral because they cannot escape themselves. To explain why, the two judges cite a passage from Benjamin N. Cardozo's *The Nature of the Judicial Process*<sup>27</sup> in which he refers to the complex of "instincts and emotions and habits and convictions"<sup>28</sup> that help to define an individual. Of course Cardozo's point is that this complex is sub-conscious, or deeply below consciousness, which is why individuals cannot overcome it. As he states in the passage cited, they (meaning judges) do not recognize it and cannot name it. The Cardozo view leads away from the idea of impartiality as disinterestedness or detachedness or neutrality and instead in the direction of receptiveness to many views. Justices L'Heureux-Dubé and McLachlin conclude by quoting with approval the words of the Canadian Judicial Council: "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."<sup>29</sup> How this is possible takes them into the nature of judging, and across Justice Cory's delicate line.

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24. *Ibid.* at 235.

25. *Ibid.*

26. *Ibid.* at 232.

27. (New Haven: Yale University Press, 1949). Cardozo's lecture was first published in 1921. It is instructive to find Cardozo using his argument to counter the ever popular spirit-of-the-age position: "I have no quarrel . . . with the doctrine that judges ought to be in sympathy with the spirit of their times. Alas! assent to such a generality does not carry us far upon the road to truth . . . . The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties." *Ibid.*, 174-5.

28. *R.D.S.*, *supra* note 2 at 208-9.

29. *Ibid.* at 209. The passage quoted is found in the Canadian Judicial Council's *Commentaries on Judicial Conduct* (Cowansville: Editions Yvon Blais, 1991) at 12.

Recall that Justice Cory ties judicial consideration of social context to expert evidence. In the absence of such evidence, and on occasions when, say, the credibility of a witness is at issue, he thinks that there is room for the common-sense application of personal experience and background knowledge. But there is no room for generalizations about social context that are anchored simply in personal experience and knowledge, other than as a counter to stereotypical claims in a submission.<sup>30</sup> Justices L'Heureux-Dubé and McLachlin, by contrast, do not organize their discussion around the role of evidence. They do not maintain the idea that judges ought to overcome or distance themselves from their personal and individual perspectives. On the contrary, they attempt to liberate those perspectives, and to find a legitimate role for them in judging.

Justices L'Heureux-Dubé and McLachlin, following Cardozo, know that judges will bring their backgrounds to their tasks. They notice with approval that in a bilingual, multiracial and multicultural society, these judicial backgrounds are likely to be rich and varied. The variety of backgrounds, they suggest, is an asset to be cultivated rather than a liability to be overcome. But variety is not everything. It leads to the next good things, which are open-mindedness and an appreciation of complexity. Complexity is a feature of cases precisely because they arise out of the vortex of social circumstances. Therefore judges need to be aware of context, they need to contextualize their inquiries. How do they access knowledge about social context? The two judges list these sources: testimony from expert witnesses, academic studies properly placed before the Court and "the judge's personal understanding and experience of the society in which the judge lives and works."<sup>31</sup> So, *contra* Cory, judges can generate observations about social conditions from their own experiences; they can reason subjectively.

It needs to be stressed that Justices L'Heureux-Dubé and McLachlin are referring to the use of personal background knowledge by the judge who is determining the facts, not the judge who is identifying and applying the law to the facts. In the latter instance, they remind us, the judge must be governed by the law rather than any personal beliefs that might be in conflict with the law. They also temper the role of subjective knowledge by an insistence on receptivity to many perspectives. And, of course, this is the crucial theoretical consideration. The trouble with subjective knowledge is that it is too easy, too convenient, and untestable by anyone else. Once recourse to it is legitimated, the problem of *disciplined* recourse to it looms. Insistence on receptivity to many

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30. *R.D.S.*, *supra* note 2 at 236.

31. *Ibid.* at 211.

perspectives is a form of discipline precisely because it requires that one personal perspective confront rival perspectives. And the process does not end there. The purpose of the openness that leads to such confrontation is to move beyond rootedness in one view. Many celebrated theorists think that this works. John Stuart Mill made the argument in his beautiful essay *On Liberty*,<sup>32</sup> as did Karl Popper in his much admired work, *The Open Society and Its Enemies*.<sup>33</sup> But both men supposed themselves to be dealing exclusively in the realm of rationality. They were not writing about the legitimacy of identity-related perspectives. Thus Justices L'Heureux-Dubé and McLachlin turn instead to Jennifer Nedelsky, who ponders the activity of judging as informed by affective, emotional responses rather than by reason alone. In the passage cited by the two judges, Nedelsky argues that receptivity to different perspectives helps to enlarge the mind and therefore is the very ground and condition of judicial impartiality.<sup>34</sup>

Is there a lesson here for political scientists? I think that there is, and it begins with the guess that the minority view espoused by Justices L'Heureux-Dubé and McLachlin is the wave of the future. If that is so, then the concept of judicial impartiality will be redefined away from the notions of neutrality, objectivity and disinterestedness to dispassionate, deliberate openness to plural perspectives, including one's own. As noted earlier, political scientists suspect that partisanship, ideology and group identity are background factors in judicial decision-making. But political scientists are not certain that they should be. If they are shown to be legitimate factors in some circumstances, then political scientists, many of whom are trained as institutionalists, will want to reconsider the judiciary's institutional configuration within the system of governance. Form needs to be consistent with function. Two institutional forms that come to mind immediately are the way in which judges are selected and the length of their terms—essentially executive appointment until age seventy-five. It might be argued that different kinds of selection procedures and shorter terms are better suited to the development of plural perspectives on the bench.

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32. (Baltimore: Penguin, 1974).

33. (London: Routledge & K. Paul, 1966).

34. *Ibid.* at 210-211. Undoubtedly the phrase, "enlargement of mind," has an appeal for the intellectual élite, who already imagine that their minds are large. It might have less appeal for others, who are reminded instead of the word, "egghead." See J. Nedelsky "Embodied Diversity and Challenges to Law" (1997) 42 McGill L.J. 91. The relevant passage is at 107.

## II. *The reasonable person*

I noted at the outset that the legal concept of the reasonable person is not an item with which political science normally thinks it need concern itself. And nothing that Justice Cory says about it would change that. According to him, an allegation of judicial bias is subject to the test of reasonable apprehension of bias. In other words, it needs to be demonstrated that a reasonable person would apprehend the bias. Now the casual observer who is not trained in the law might wonder who this person is. Justice Cory's answer is that the person is reasonable; that the person is informed of the relevant circumstances of the case; and that the apprehension of bias is reasonable given those circumstances. Further, the person understands the important traditions of integrity and impartiality that judges are expected to maintain and that they swear to uphold. He then writes: "To that I would add that the reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community."<sup>35</sup> I take him to mean that the reasonable person, who probably lives in the community rather than in, say, a closet, is expected to possess some understanding of the social context in which the case was hatched.

Justices L'Heureux-Dubé and McLachlin, by contrast, expect a good deal more from the reasonable person. First, the reasonable person shares their understanding of judging, and in particular their concept of impartiality and the enlarged mind.<sup>36</sup> Further, the reasonable person is an informed and right-minded member of the Canadian community, which community supports the principles entrenched in the constitution by the *Canadian Charter of Rights and Freedoms*, including the principles of equality that are set out in section 15 of the *Charter* and expressed in federal and provincial human rights legislation. Finally, the reasonable person is presumed to be aware of the history of discrimination against the disadvantaged groups listed in the equality provisions of the *Charter*, in Canada generally, and in the local community.<sup>37</sup> Their summation on the point is worth quoting in full:

We conclude that the reasonable person contemplated by de Grandpré J. [in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369] is a person who approaches the question of whether there exists a reasonable apprehension of bias with a complex and contextualized understanding of the issues in the case. The reasonable person understands

35. *R.D.S.*, *supra* note 2 at 230.

36. *Ibid.* at 211.

37. *Ibid.* at 211-212.

the impossibility of judicial neutrality, but demands judicial impartiality. The reasonable person is cognizant of the racial dynamics in the local community, and, as a member of the Canadian community, is supportive of the principles of equality.<sup>38</sup>

The phrasing here is somewhat general, but is nonetheless *very* interesting. This is because it reveals an ambiguity, first about who supports the fundamental principles entrenched in the *Charter*—the reasonable person? or the Canadian community? Let us suppose that the answer is the reasonable person. Secondly, there is an ambiguity about the meaning of the word, “supportive.” One interpretation would imply that the reasonable person knows or is fully aware of the entrenched principles and understands that she has an obligation to act in accordance with them as part of her overall obligation to act in accordance with the law. In other words, she understands the legal legitimacy of these principles. However, she also knows that she is perfectly free to disagree with any of these principles, to think them inadvisable or inappropriate, and to say so, no matter how other members of the community might think. In other words, she knows that she need not support them politically, even if she must abide by them legally.

Somehow I doubt that this is the position that the two judges intend to advance, since that would mean finding a place for the anti-rights advocate within the ranks of the reasonable person, as that phrase is understood and used legally. And this is not what they are trying to do. I think that theirs is a quite different position, according to which the reasonable person, prodded by the fact that the Canadian community (excluding the province of Quebec, as represented by its provincial government) agreed to the entrenchment of the *Charter* and its attendant principles, supports, believes in and upholds those principles. In other words, she supports them politically. But if that is indeed the position of the two judges, then they are left to face the obvious question that arises—principles as interpreted by whom?

The obvious—and problematic—answer is the courts. It is obvious because the courts are in the business of handing down authoritative interpretations of the law. It is problematic because it implies that the reasonable person is one who reaches the same conclusions as do the judges, themselves. Moreover, it does not help matters to concede that the reasonable person is free to disagree with the courts from time to time. Such intermittent disagreement might seem . . . agreeable. But is it? How agreeable could it be? At what point is disagreement over the courts’ interpretation of the *Charter* principles tantamount to a withdrawal of

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38. *Ibid.* at 212-213.

political support for those principles? Certainly sustained disagreement with the Supreme Court's interpretation, specifically, of the *Charter's* equality principles, for example, would take someone a long way from the court's developing view of equality. So far, in fact, that the person's political support of the court's view might evaporate. Does such a person then fail the reasonable person test?

To put the point another way, let me reiterate that from the account of Justices L'Heureux-Dubé and McLachlin, the clear inference is that the person who does not support all or some of the principles of the *Charter* does not qualify as reasonable from the standpoint of the legal test of the reasonable person. Now either this means nothing, or it means a lot. It might mean nothing if the idea is acceptance of the bare words of the *Charter* for the very good reason that those words, being general, are susceptible of varying interpretations. It means a lot if the idea is support for the *Charter* principles as interpreted over time by the Supreme Court of Canada. Why should support for the court's view of the equality principles, or any other *Charter* principles, for that matter, be deemed a sign of reasonableness in terms of the legal concept of the reasonable person? Why is it not reasonable for the reasonable person to oppose the court's interpretation of the principles of equality? And in the light of that opposition, develop a reasonable perception of judicial bias? Or are we to understand that the adoption of the *Charter* in 1982 defined or restricted the realm of the reasonable in a new way?

These are obvious questions for anyone to ask, and certainly for a political scientist, because political science contains built-in expectations of the freedom to contest political ideas, all ideas, including equality. Indeed, debates about equality, about its meaning, theoretically and practically, and about the very desirability of it as an objective in particular kinds of public policies are commonly the stuff of political debate—everywhere, and forever, it seems. That being so, it is deeply interesting to find that a particular view of equality might come to mark the bounds of the reasonable from the standpoint of the courts, a development that would give fresh impetus to the phrase, “judicial power,” which political scientists often use.