REDRESSING THE IMBALANCES: RETHINKING THE JUDICIAL ROLE AFTER *R.* V. *R.D.S.*

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The decision of the Supreme Court of Canada in R. v. R.D.S. dealt with whether a trial judge's comments, about interactions between police officers and "non-white groups", gave rise to a reasonable apprehension of bias in the circumstances. They strongly criticize the contrary ruling of the dissent as inappropriately drawing a false dichotomy between decisions based on evidence and decisions based on generalizations, and as improperly ignoring social context with an unwarranted confidence in the ideology of colour blindness. While more supportive of the majority's analysis, the authors also find cause for concern, with somewhat different emphasis in the nature of their concerns. Although they endorse the willingness of Justices McLachlin and L'Heureux-Dubé to take social context into account, the authors (Devlin more than Pothier) think there is insufficient cause expressed. Devlin is more impressed, and Pothier more troubled, by the greater caution regarding social context expressed by Cory and Iacobucci JJ. As regards the test for a reasonable apprehension of bias, Devlin is concerned that the high threshold probability test improperly isolates judges from effective accountability, whereas Pothier supports the high threshold test so as not to render complex substantive equality analysis vulnerable to the challenge of bias. Both authors endorse the acknowledgement of the majority in the Supreme Court of Canada that colour blindness is not necessarily synonymous with impartiality.

Dans l'arrêt R. c. R.D.S., la Cour suprême du Canada devait déterminer si les remarques du juge du procès concernant les interactions entre les policiers et les « groupes non blancs » soulevaient une crainte raisonnable de partialité dans les circonstances. Les auteurs critiquent sévèrement l'opinion dissidente au motif qu'elle établit une fausse dichotomie entre les décisions fondées sur la preuve et les décisions fondées sur des généralisations et au motif qu'elle ne tient pas compte du contexte social, prêtant un importance indue à l'idéologie de la non-distinction des couleurs. Bien que favorisant davantage l'analyse de la majorité, les auteurs formulent certaines préoccupations, de nature différente. Tout en souscrivant à la thèse des juges McLachlin et L'Heureux-Dubé qui sont prêtes à prendre en ligne de compte le contexte social, les auteurs (Devlin plus que Pothier) sont d'avis que la justification n'est pas suffisante. Devlin est surtout impressionné, et Pothier perturbée, par la mise en garde des juges Cory et Iacobucci concernant le contexte social. En ce qui a trait au critère de la crainte raisonnable de partialité, selon Devlin, la norme de probabilité très élevée met le juge indûment à l'abri de l'imputabilité véritable, alors que Pothier appuie le critère de la norme élevée afin que l'analyse complexe des principes de fonds en matière d'égalité ne soit pas rendue plus difficile par une allégation de partialité. Les deux auteurs partagent la conclusion de la majorité de la Cour suprême du Canada que la non-distinction des couleurs n'est pas nécessairement synonyme d'impartialité.

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I. INTRODUCTION

Legal truisms are not necessarily based on simple concepts. The principle that a decision-maker can be challenged on the basis of a reasonable apprehension of bias is, at one level, trite law. And yet, as the Supreme Court of Canada's recent decision in *R.* v. *S (R.D.)*[1] amply demonstrates, the real meaning of that principle is not easy to articulate, nor is its application one that can be reduced to a simple formula. The stark divisions within the Court demonstrate that legal truisms can rest on highly contested foundations.

In the context of a discussion of bias, it is incumbent upon us to disclose the fact that we were not disinterested observers as *R.D.S.* proceeded through the judicial process. As members of the Faculty of Dalhousie Law School, both of us were among those involved in consulting (on a *pro bono* basis) with Dalhousie Legal Aid Service, counsel for the accused R.D.S. The level of our involvement increased as the case proceeded up the judicial hierarchy. We were both intensively involved in the team that drafted the Appellant's factum for the Supreme Court of Canada. Ultimately, one of us (Pothier) took part in the oral argument for the Appellant R.D.S. in the Supreme Court of Canada alongside Burnley "Rocky" Jones, who represented R.D.S. at all stages of the proceedings. Our involvement in the case stemmed from our assumption that the case raised important issues, as well as our conviction that a finding of a reasonable apprehension of bias in this case was both unwarranted and a very dangerous precedent. The reasons that prompted our involvement in the case in the first place also lead us to conclude that the Supreme Court of Canada's decision deserves critical analysis.

In a previous case comment on *R.D.S.*, at the Court of Appeal and Nova Scotia Supreme Court levels, one of the authors (Devlin) argued strenuously that the acquittal of the accused should stand and that there should be no finding of a reasonable apprehension of bias.[2] The Supreme Court of Canada, by a majority of six to three, has reached a similar conclusion in allowing the appeal. You would think that we would be pleased. Of course, but not without qualifications. In this comment we will suggest that, undoubtedly, on the facts of this case the majority of the Supreme Court has done the right thing, and shall argue that the dissenting decision of Major J. is completely off the mark. However, we will also argue that the long term ramifications of even the majority decisions are potentially problematic, that is, that the joint L'Heureux-Dubé/McLachlin JJ. decision, while significantly more reflective than that of the dissent, is excessively optimistic; and that Cory J.'s decision, while modest, is premised upon some inappropriate and indefensible assumptions.[3] Yet even the two

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[1] [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193, 10 C.R. (5th) 1 (*sub nom. R v. R.D.S.*), 218 N.R. 1 [hereinafter *R.D.S.* cited to S.C.R.].

[2] R. Devlin, "We Can't Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in R. v. R.D.S." (1995) 18 Dal. L. J. 408 [hereinafter "Suspicious Minds"].

[3] Our critique is based, in part, on another article which Devlin has written since his analysis of *R.D.S.*, where he posits that there are at least three different approaches to thinking about impartiality in a racially stratified society. Traces of these conceptions are to be found in the three sets of reasons that are provided by the Supreme Court. See R. Devlin, "Judging Diversity: Justice or Just Us?" (1996) 20:3 Prov. Judges J. 4. [hereinafter "Judging Diversity"]

of us are not in complete agreement in our assessments of the majority judgments; what follows is in part a dialogue between us.

II. FACTS AND DECISION OF SPARKS J.

On October 17, 1993, R.D.S., an African Nova Scotian, was 15 years old. While riding his bicycle, he came upon a scene in a largely Black neighbourhood in Halifax, Nova Scotia where his cousin, N.R., also a juvenile, was in the process of being arrested on suspicion of car theft. The arresting officer was Constable Donald Steinberg, a white police officer from the Halifax Police Force.

R.D.S. was ultimately charged with three counts arising from his interaction with Constable Steinberg: unlawfully assaulting a peace officer; unlawfully assaulting a peace officer with intent to prevent the arrest of another person; and unlawfully resisting a peace officer in the execution of his duty.

The trial, on December 2, 1994, was before Sparks J., an African Nova Scotian judge. The only witnesses in the trial were Constable Steinberg and R.D.S. Each gave dramatically different versions of events on October 17, 1993.

According to Constable Steinberg, when R.D.S. came upon the scene he deliberately ran his bike into Constable Steinberg's leg. When cross-examined as to whether this might have been unintentional, Constable Steinberg was clear in his position that it was not. Constable Steinberg further testified that R.D.S. had yelled at him and pushed him with his hands. Ultimately, Constable Steinberg placed both N.R. and R.D.S. in neck/choke holds.

R.D.S., in contrast, testified that he had neither hit the police officer with his bike nor pushed him with his hands. He acknowledged that he was at the scene because he was "nosey", but testified that he had not been talking to Constable Steinberg, but only to his cousin N.R., who was already in handcuffs. R.D.S. testified that he was told by Constable Steinberg that if he did not "shut up", he would also be under arrest. These last two points were neither challenged in cross examination of R.D.S. nor inconsistent with Constable Steinberg's testimony.

The only evidence in the trial specifically directed toward issues of race related to the period before R.D.S. arrived on the scene. When the report of the car theft was relayed to Constable Steinberg by another police officer over the police radio, the description of the suspects was "non-white" male youths. In cross examination of Constable Steinberg, counsel for R.D.S. queried the use of a description that used "whiteness" as a reference point rather than a race specific description.

In closing comments, the Crown made a point of arguing that there was absolutely no reason not to believe the police officer.

In oral reasons delivered at the end of the trial, Judge Sparks acquitted R.D.S. on all three counts. She reviewed the evidence, made standard comments about credibility and concluded that the Crown had not proved its case beyond a reasonable doubt. The case emerged from obscurity however because of the following remarks at the end of Judge Sparks' oral judgment:

> 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.
> At any rate, based upon my comments and based upon all of the evidence before the Court I have no other choice but to acquit.[4]

Judge Sparks subsequently issued supplementary written reasons in which she elaborated upon these remarks. However, at all levels of appeal it was held that Judge Sparks was *functus* when she issued these supplementary reasons and that they were therefore not properly part of the record. This ruling was not challenged by counsel for R.D.S.

III. THE SUPREME COURT OF NOVA SCOTIA DECISION

The Crown appealed the acquittal, arguing both that there were findings not based on evidence as well as actual bias against the police officer on the part of Judge Sparks. Chief Justice Glube dealt with the case as raising an issue only of a reasonable apprehension of bias, not actual bias, and linked her finding on the bias issue to the issue of evidence. Chief Justice Glube summarized her decision to allow the appeal in two paragraphs:

> 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.[5]

A new trial was ordered before a different judge.

IV. THE NOVA SCOTIA COURT OF APPEAL DECISION

The majority judgment of Flinn J.A., Pugsley J.A. concurring, dismissed R.D.S.'s appeal and confirmed the ordering of a new trial. Flinn J.A. offered the following analysis of the law of bias:

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[4] *R.* v. *R.D.S.* (2 December 1994), Halifax Y 093-168 (N.S. Fam. Ct.) at 68.
[5] *R.* v. *R.D.S.* (18 April 1995), Halifax SH #112402 (N.S.S.C.).

> From a review of the authorities, I conclude that the essential ingredients of the test to determine apprehension of bias are as follows:
> (i) bias, in the context of this test, means nothing more, or less, than the inability of the judge to act in an entirely impartial manner, for whatever reason;
> (ii) the test is an objective one; and the standard of reasonableness must be applied, not only to the person who perceives the alleged bias, but also to the apprehension of bias itself;
> (iii) in applying the standard of reasonableness to the person who perceives the alleged bias, the courts ask: "What would a reasonable and right minded person think, with knowledge of all of the facts?" It is not, in this case, what the Youth Court Judge thinks, nor what the police officer (nor, indeed, the Police Department) thinks;
> (iv) in applying the standard of reasonableness to the apprehension of bias itself, the courts have said that there is no essential difference between the phrases, invariably used, such as "reasonable apprehension of bias", "reasonable suspicion of bias," or "real likelihood of bias". The common thread running through these phrases, and the standard that must be applied, is that the apprehension, suspicion or likelihood of bias, must be a reasonable one. Surmise or conjecture is not sufficient; nor is the test related to the very sensitive or scrupulous conscience;
> (v) In applying the test, it is not necessary to show that actual bias influenced the result. The appearance of bias, assessed objectively, and whether intended or not, is sufficient.[6]

Pugsley J.A. ultimately concluded that Chief Justice Glube had correctly applied these principles:

> The unfortunate use of these generalizations, by the Youth Court Judge, would, in my opinion, lead a reasonable person, fully informed of the facts, to reasonably conclude that the Youth Court Judge would consider the important issue of credibility in this case, at least in part, on the basis of matters not in evidence; and, hence, unfairly.[7]

Freeman J.A., in dissent, agreed with the majority as to the test for a reasonable apprehension of bias, but felt the test had not been met in this case:

> The 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. 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.
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[6] *R* v. *R. D. S.* (1995), 145 N.S.R. (2d) 284, 418 A.P.R. 284 (C.A.).
[7] *Ibid.*, at 291.

> Then she takes the further step, in my mind the key one, of attributing overreaction to Constable Steinberg. That statement, if unsupported by evidence, could be seen as a reflection of stereotypical thinking capable of raising an apprehension of bias. Judge Sparks immediately tied it to evidence: "And I do accept the evidence of Mr. S. that he was told to shut up or he would be under arrest." This seems to indicate that Judge Sparks was concerned that the charges might have arisen more as a result of R.D.S.'s noisy verbal interference than the physical acts, assaults and obstruction, with which he was charged. Such an explanation, indicative of overreaction by the police officer, accorded with the testimony of R.D.S. It would not have been biased behaviour on Judge Sparks' part to reach this conclusion.
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> Questions with racial overtones make the difficulties 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. For this reason appeal courts must adopt a cautious approach when examining the trial judgment to determine whether it gives rise to an apprehension of bias.[8]

R.D.S. then appealed to the Supreme Court of Canada.

V. THE SUPREME COURT OF CANADA DECISION

There are four separate judgments from the Supreme Court of Canada. In the majority, Justices L'Heureux-Dubé and McLachlin write joint reasons, Justice Cory writes for himself and Justice Iacobucci, and Justice Gonthier writes a one paragraph judgment for himself and Justice La Forest. The dissenting judgment is written by Justice Major, speaking also for Chief Justice Lamer and Justice Sopinka.

The decision of the Supreme Court of Canada can be divided into two discrete questions: first, how to approach the concept of a reasonable apprehension of bias; second, how that approach is to be applied to the particular facts of the case. On the first question, there emerges within the Supreme Court of Canada some subissues: (1) what is the test for a reasonable apprehension of bias; (2) what is the relationship between impartiality and neutrality; and (3) what is the relevance, and the appropriate treatment, of social context. There is general agreement within the Court on the first subissue, but substantial differences on the latter two. In our assessment, it is the different approaches to social context which ultimately explain the differences within the Court on the second question, the application to the facts.

In relation to the appropriate test for the reasonable apprehension of bias, seven judges (Lamer, La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major) all agree that the appropriate way to approach this case is to locate it within the conventional doctrine of reasonable apprehension of bias. These judges are somewhat resistant to the Appellant's attempt to characterize the issue as a choice between tests, but ultimately accept that the appropriate standard is that of a probability or a real danger test rather than a possibility or suspicion test, i.e. they accept that the threshold is a

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[8] *Ibid.* at 294-295.

high one.[9] The final two judges (L'Heureux-Dubé and McLachlin) concur with the others about the stringency of the test,[10] but they argue that a better way to approach the case is to adopt a contextualist method, to directly consider what is the nature of the judicial function in a modern multicultural society. Their comments are to a significant extent concurred with by Justice Gonthier (and Justice La Forest).[11]

On the application of the law to the facts, four judges (L'Heureux-Dubé, McLachlin, Gonthier, and La Forest) conclude that Sparks J.'s decision does not come anywhere close to generating a reasonable apprehension of bias and hold that her remarks were entirely appropriate.[12] The final two judges in the majority (Cory and Iacobucci) are considerably more ambivalent, but they ultimately conclude that while the comments are "very close to the line" of reasonable apprehension of bias, since this is a high threshold, they do not cross the line.[13] The three dissenting judges (Major, Lamer, and Sopinka) fairly easily conclude that there is a reasonable apprehension of bias, amounting to a "serious"[14] and "irreparable defect".[15]

As a preliminary point, it should be noted that the Justices themselves appear to be extremely conscious that they are taking very different jurisprudential positions. For example, just in case there is any doubt as to the differences in these approaches, Cory J., in his final remarks, rather pointedly emphasizes that "(t)he principles and the test we [i.e. himself, speaking also for Iacobucci J., and Major J., speaking also for Lamer C.J.C. and Sopinka J.] have both put forward and relied upon are different from and incompatible with those set out by Justices L'Heureux-Dubé and McLachlin."[16] As will become obvious, while we agree that there are some significant differences among the three lengthier decisions, as we read the case, the most significant differences are not between the two women justices and the seven men judges, but between the decisions that make up the majority ruling on the one hand, and the dissent on the other hand. Indeed, in spite of Justice Cory's pointed remarks, Gonthier J., in his brief decision, explicitly states that he "agree[s] with Cory J. *and* L'Heureux-Dubé and McLachlin JJ. as to the disposition of the appeal and with their exposition of the law on bias and impartiality and the relevance of context."[17] We would conjecture that what appears to be bothering Cory J. is the apparent willingness of L'Heureux-Dubé and McLachlin JJ. to jettison the ideal of judicial neutrality (although they do seek to reconstruct and salvage the ideal of impartiality). We will return to this point later in our discussion.

On the issues related to social context, which we consider to be more significant to the outcome of the case, the ultimate disposition is particularly telling as an indication that the differences between the majority and the dissent are more

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[9] *R.D.S.*, *supra* note 1 at 531-532, Cory J.; at 496, 500, Major J.; at 500-501, Gonthier J.

[10] *Ibid.* at 503.

[11] *Ibid.* at 500-501.

[12] *Ibid.* at 502, 513.

[13] *Ibid.* at 544-548.

[14] *Ibid.* at 500.

[15] *Ibid.*

[16] *Ibid.* at 548.

[17] *Ibid.* at 500-501[emphasis added].

profound than the differences within the majority. The social context issue in this particular case is the existence of racism in Canadian society (whether intentional or not). The essential difference between the majority and the dissent is whether this can be factored into the analysis of the credibility of witnesses. For the dissenters, social context is simply irrelevant in the absence of specific evidence about particular witnesses:

> This appeal should not be decided on questions of racism but instead on how courts should decide cases. ... Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that this particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.[18]

In contrast, the majority judges, to different degrees, all accept that social context can be factored into the judge's decision. The precise ways in which they incorporate social context will be elaborated upon below, but the crucial point of departure from the dissent is the assumption that it may be relevant even in the absence of specific evidence about particular witnesses.[19]

In sum, by a majority of six to three, Judge Sparks' comments were found not to generate a reasonable apprehension of bias, the acquittal stood and the decisions of the Nova Scotia Supreme Court and Court of Appeal were overturned.

VI. ANALYSIS

A. Praise

There are several reasons why this is a good decision. First and most importantly, R.D.S., the teenager at the centre of the controversy, will be able to get on with his life and not face a new trial. Second, the Crown's hardball tactic of alleging racially motivated bias as a technique for "judge shopping" has been thwarted.[20] Third, within the African Nova Scotian community there is a sentiment that this is a vitally important decision, a sense that for the first time ever Black experiences and perceptions have received some legitimacy within the court system.[21] Fourth, and finally, there is a strong indication from a majority of Supreme Court justices that it is appropriate to confront issues of racial discrimination in the criminal justice system.

These are all vitally important reasons to celebrate the decision. However, *R.D.S.* is not an unqualifiedly good decision. Success in one case, in one context, need not necessarily translate into successes in other cases. Indeed, case law often has a way

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[18] *Ibid.* at 493-494, 495 [emphasis in original].

[19] We accordingly find misleading the presentation of the case in the *Criminal Reports (C.R.)*, *supra* note 1, in which Major J. is identified as concurring on the law, but dissenting on the facts only.

[20] See "Suspicious Minds," *supra* note 2 at 440.

[21] E. Kanjikwa, "Some Collected Comments on R.D.S." 22(1) *The Weldon Times* (Oct., 1997) at 7, 17; A. Burey, "No Dichotomies: Reflections on Equality for African Canadians in *R v. R.D.S.*" (1998) 21 Dal. L. J. 1.

of taking on a life of its own, or more accurately, a decision in one context often becomes utilized in many other contexts that might be problematic. In the remainder of this comment we want to address some possible concerns.

B. Critique

The issue that most divides the Supreme Court is the issue of the ability of judges to take account of social context. At one end of the spectrum, there are Justices Major, Lamer, Sopinka who are skeptical of invocations of social context and would require either expert evidence or judicial notice alongside strict criteria of proven relevance. At the other end of the spectrum, we find Justices L'Heureux-Dubé and McLachlin who favour a "conscious, contextual inquiry"[22] because such a "[j]udicial inquiry into context provides the requisite background for the interpretation and application of the law...provid[ing] the Court with a larger picture, which [is] in turn conducive to a more just determination of [a] case."[23] In between, there is Cory J. who has no problem with issues of social context being raised so as to ensure that the law can stay in tune with changing realities, particularly if this is based upon expert testimony as in *R.* v. *Lavallee*[24] and *R.* v. *Parks*,[25] but is more apprehensive about invocations of social context when assessing credibility.

1. Justice Major, dissenting (Lamer C.J.C. and Sopinka J. concurring)

Justice Major's position is a paradigm example of the blinkering required by a commitment to what might be described as a classical model of adjudication.[26] Just a few lines into his reasons for judgment he makes it clear that his project is to restrict his analysis to a formalistic and colour blind frame of reference:

> This appeal should not be decided on questions of racism but instead on how courts should decide cases. In spite of the submissions of the appellant and interveners on his behalf, the case is primarily about the conduct of the trial.[27]

On this foundation, he then proceeds to characterize Judge Sparks' comments as "offending"[28] and re-interprets her comments to be saying that "sometimes police lie and overreact in dealing with non-whites, therefore I have a suspicion that this police officer may have lied and overreacted in dealing with this non-white accused".[29] This then primes him to make the following, quite remarkable, comments:

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[22] *R.D.S., supra* note 1 at 506.

[23] *Ibid.* at 507.

[24] [1990] 1 S.C.R. 852, 67 Man.R. (2d) 1 [hereinafter *Lavallee*].

[25] (1994), 15 O.R. (3d) 324, (1993) 65 O.A.C. 122, leave to appeal to S.C.C. refused [1994] 1 S.C.R. x.

[26] See "Judging Diversity," *supra* note 3 at 9-11.

[27] *R.D.S., supra* note 1 at 493-494.

[28] *Ibid.* at 494.

[29] *Ibid.* at 495.

> This was stereotyping all police officers as liars and racists, and applied this stereotype to the police officer in the present case. The trial judge might be perceived as assigning less weight to the police officer's evidence because he is testifying in the prosecution of an accused who is of a different race. Whether racism exists in our society is not the issue. The issue is whether there was evidence before the court upon which to base a finding that this particular police officer's actions were motivated by racism. There was no evidence of this presented at the trial.[30]

With all due respect, Justice Major misses the point. Of course this case is about evidence (and credibility) but that does not mean that it is not *also* about race. This is not an either/or, zero sum equation. Rather, it is about making determinations of credibility in a context where there is a danger that there may be racial underpinnings. An awareness of this does not necessarily mean that a judge is suspicious, it does not mean that life experience is being "substitut[ed]"[31] for evidence. Rather, it means that a judge is alert to a pervasive social reality. As Cory, L'Heureux-Dubé and McLachlin JJ. point out, Sparks J.'s decision does entail a careful analysis of the evidence *as well as* references to the larger social context.[32] Indeed, even Major J. acknowledges late in his reasons that there are "other plausible explanations", that it is possible to read Sparks J.'s comments as "a hypothetical response to the Crown's suggestion that the police officer had no reason to lie, and [as] therefore innocuous".[33] But he will have none of this, preferring instead to characterize them, time and again, as "stereotyping"[34] and therefore leading to an "irreparable defect"[35] in the trial.

Indeed, we contend that by constructing the question as Major J. does, as "whether there was evidence before the court upon which to base a finding that this particular police officer's actions were motivated by racism", Major J. is himself ignoring the evidence of what was actually said by Sparks J. at trial. He mischaracterizes what Sparks J. said on two critical points: (1) she made no "finding" in relation to race; and (2) she was not raising the issue as one of racial *motivation* in any event. It is important to make an issue of these points because by exaggerating what Judge Sparks did, Major J. constructs an easier target. Furthermore, we would suggest that this is symptomatic of how Canadian society avoids confronting issues of race.

Before elaborating, it is worth further illustrating how Major J. exaggerated what happened at trial. Midway through his judgment he states:

> It would be stereotypical reasoning to conclude that, since society is racist, and, in effect, tells minorities to "shut up," we should infer that this police officer told this appellant minority youth to "shut up." This reasoning is flawed.[36]

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[30] *Ibid.* [emphasis in original]
[31] *Ibid.* at 497.
[32] *Ibid.* at 542-547, 510-511.
[33] *Ibid.* at 500.
[34] *Ibid.* at 495, 497-499.
[35] *Ibid.* at 500.
[36] *Ibid.* at 496.

This interpretation also has nothing to do with Judge Sparks' decision. Her finding that R.D.S. was told to "shut up or he would be under arrest" was based on explicit testimony from R.D.S., not on any suppositions based on stereotypical reasoning. Moreover, R.D.S.'s testimony on this point was not in any way challenged in cross examination, nor was it contradicted in Constable Steinberg's testimony. Judge Sparks' acceptance of R.D.S.'s testimony that he was told to "shut up" could not have been more grounded in the evidence, thereby providing a requisite evidentiary basis (along with other evidence such as the fact that R.D.S. and N.R. were placed in chokeholds by Constable Steinberg) for Judge Sparks' ultimate conclusion that Constable Steinberg had probably overreacted.[37]

Although Sparks J. did say that Constable Steinberg had probably overreacted, she never reached any conclusion as to *why*, and specifically did not attribute racial motivation. It is important to distinguish the issue of racial motivation from Judge Sparks' comments that "... certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable."[38] The reason for distancing this case from the issue of racial motivation is that, for reasons we are about to explain, that characterization gets in the way of confronting issues of race.[39]

For example, in Professor Delisle's annotation in the *Criminal Reports*, under the heading "fairness" he asserts that "the constable was certainly branded a racist by the remarks of the trial judge".[40] By choosing to characterize the case in this manner, Delisle forecloses discussion because of the connotation of the label "racist". In today's society, being called a racist is one of the worst insults possible. In one sense that is a sign of progress, associated with the fact that our laws and constitution are now premised on racial equality.[41] But in another sense, the gravity of the insult gets in the way of constructive discussion. As happened in this case, when race is put on the table by a Black person, it gets interpreted as a branding of "racist" or "racial motivation" which prompts an angry denial and a lashing out from a feeling of being maligned. In this process, as constructed by the Crown's argument in *R.D.S.* and perpetuated by Professor Delisle, racial minorities are characterized as the oppressors rather than as the victims of racism, and any opportunity to confront the racism

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[37] During oral argument in *R.D.S.* (March 10, 1997), Chief Justice Lamer suggested an innocuous assessment of being told to shut up, using an example of someone who was about to offer a bribe being warned not to do so. The difficulty with this analogy in the *R.D.S.* case is that R.D.S. was charged because of what he was supposed to have done to the police officer (physically assaulted him) not according to what he was supposed to have said, so it would not account for being told to shut up or be arrested.

[38] Cited in *R.D.S., supra* note 1 at 494-495.

[39] We approach issues of race from the respective perspectives of a white man and a white woman with a disability.

[40] R.J. Delisle, *R.* v. *S.(R.D.)*: Annotation (1997) 10 C.R. (5th) 1 at 8.

[41] That all members of the Court share that starting point in *R.D.S.* is in marked contrast to a case less than 60 years ago when the Supreme Court of Canada, in the name of freedom of commerce, openly endorsed the right of a bar owner to be overtly racist. See *Christie* v. *York*, [1940] S.C.R. 139.

experienced by racial minorities is lost.[42]

If we analyze what Judge Sparks actually said without worrying whether Constable Steinberg's honour is at stake, how should her reasons for decision be assessed? She has contradictory evidence before her that she is trying to somehow reconcile. She rejects the Crown's submission that the police officer should be fully believed because only the accused has an interest in lying. She also rejects the possible explanation that the police officer is deliberately lying. So that leaves her with two witnesses who are trying to tell the truth, but with vastly different versions. She concludes that while she does not necessarily believe everything that R.D.S. said, she does think the police officer probably overreacted and that the Crown has not proved its case beyond a reasonable doubt. If she had stopped there, this case would have remained in obscurity. What made it a *cause célèbre* was that she also factored race into the analysis. The fact that her reference was cryptic ("certainly police officers do overreact, particularly when they are dealing with non-white groups") probably contributes to the assessment by Major J. and others that she is stereotyping. But there is a more substantial, and more plausible, explanation.

Justice Major and Professor Delisle adopt the simplistic characterization that the police officer has been labelled a racist. But a more nuanced explanation puts a very different light on what she said. This is a situation where a white police officer is, after a chase, arresting a Black youth in a largely Black neighbourhood when a second Black youth comes along. Would it be unfairly jumping to conclusions to suggest that this might have been a tense situation, especially given the history of difficulties between white police officers and the Black community in Halifax?[43] In that context, is it plausible that when he saw R.D.S. approaching on his bike, Constable Steinberg was apprehensive (his "questionable state of mind"), therefore fearing and expecting the worst, and reacted on that basis instead of responding to what R.D.S. actually did? This scenario is admittedly speculative both as to what might have actually happened and to how Sparks J. might have analyzed it, but it raises some important points beyond simply laying the foundation for a reasonable doubt requiring an acquittal.

The above scenario illustrates that overreaction related to race is not synonymous with Constable Steinberg being racially motivated. But the equally important corollary is that, assuming there was an overreaction by Constable Steinberg, in many ways it would make no difference to R.D.S. whether it was a miscalculation by Constable Steinberg or a deliberate vendetta against Blacks, because the *impact* on him would be the same. Moreover, the impact on the trial would also be the same; either interpretation of Constable Steinberg's actions would require an acquittal.

But it does not follow that for all purposes it would make no difference whether Constable Steinberg miscalculated or was vindictive against Blacks. Presumably Constable Steinberg would have been less offended by the suggestion that he had

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[42] See also P. Monture, "Reflecting on Flint Woman" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 351 at 359-360.

[43] *Royal Commission on the Donald Marshall, Jr., Prosecution: Findings and Recommendations*, vol.1 (Halifax: Royal Commission on the Donald Marshall Jr., Prosecution, 1989).

overreacted based on mistaken assumptions (or even stereotypes) instead of an overt anti-Black motivation.[44] Moreover, and equally important, there would be a significant difference in how to prevent overreaction in the future in terms of long run strategies of combatting racism.

When Judge Sparks made reference to "overreaction particulary when dealing with non-white groups", she was expressly acknowledging that this was an interracial incident. She did not ultimately reach a conclusion whether race was part of the explanation of what happened, but suggested it might be. Was there any point in her putting that issue on the table? She did not need to say anything about race to resolve the case. But is that all a judge must do? If the police had responded to her comments by trying to develop practices to try to reduce overreaction by police officers, it could have been very significant in trying to counteract systemic racism. But that opportunity was lost when the reaction was simply one of denial and blaming the messenger.

Justice Major's premise is that individual witnesses must be treated by judges on an individualized basis without regard to their group characteristics. In other words, Justice Major is saying that there is no reason to assume that this case would have unfolded any differently if R.D.S. had been a 60 year old white woman riding her bike in south end Halifax (an affluent, predominantly white neighbourhood). In contrast, a contextual approach, as adopted in varying degrees by the majority in the Supreme Court of Canada, would assume that there is every reason to think that such a variation in the identity of an accused and a change of environment would have made an enormous difference in how events unfolded. In our view, such a contextual approach is significantly more helpful.

The problem is that Justice Major constructs a (false) dichotomy: one either makes a decision solely on the basis of evidence before the court (the proper way); or one makes a decision based on generalizations not tied to evidence (the improper way utilized by Judge Sparks). We would suggest that such a dichotomy is simplistic both in the context of *R.D.S.* in particular and judging in general. When judges assess evidence in a particular case they cannot help but do that against reference points of assumptions and generalizations about how the world functions.

There is a difference between making decisions solely based on generalizations (which we agree is improper) and making a decision based on specific evidence, while in part evaluating that evidence with reference to generalizations about behaviour (which is what triers of fact inevitably do all the time). Although Major J. asserts that Judge Sparks' decision in *R.D.S.* is an example of the former, as noted earlier, the transcript of the trial (referred to by Justices Cory, L'Heureux-Dubé and McLachlin) amply demonstrates that it was the latter. Judge Sparks made specific findings based on the evidence of the two witnesses, while making sense of the conclusions by reference to patterns of police conduct and racial interactions.

We are not trying to suggest that there is an absolute break between findings of credibility and contextualized generalizations. The only point is that taking context

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[44] The fact that Judge Sparks' comments were automatically interpreted as the latter in the Crown's submissions and in Justice Major's decision is symptomatic of the difficulty many people have in constructively engaging in discussions about racism.

or generalizations into account does not require ignoring evidence. If a judge dropped in from Mars and knew nothing of such things as race, gender, age, history or culture, that entity would be hopelessly lost in trying to reconcile conflicting testimony because there would be no reference points against which to measure anything.

Take an example far removed from the issue of race. An accused is charged with murder. As part of its case, in order to establish a motive of revenge, the Crown leads evidence that the victim had viciously attacked the accused's child. When the jury assesses the totality of the evidence, it will not be on the basis that this is the only time in the history of humankind that revenge is suggested as a motive for murder. Yet to decide that the accused committed the murder, in part on the assumption that revenge was the motive, does not in any sense mean that everyone who has reason to feel vengeful is thereby guilty of murder. The generalization that revenge is a plausible motive for murder is helpful in assessing the evidence, but it does not create any legal presumption that a person who has a motive of revenge is a murderer. Findings on evidence are routinely made in the context of a larger picture that could not possibility be made the subject of specific proof in every case.

To buttress his point that all judicial determinations should avoid stereotyping and focus exclusively on the individualizing circumstances of a particular case, Major J. analogizes the "stereotyp[ing of] police officer witnesses as likely to lie when dealing with non-whites"[45] with recent judicial and legislative interventions that have prohibited presumptions that prostitutes are likely to either consent or lie in sexual assault complaints, or that there must be corroboration of victims in sexual assault cases, or children's unsworn evidence because we have "evol[ved] away from stereotyping various classes of witnesses as inherently unreliable."[46]

Two points can be made in response to this analogy. First, there is a false symmetry: victims of sexual assault, prostitutes and children have been historically disempowered and socially constructed as irrational. The judicial and legislative interventions were designed not so much to individualize these types of complainants but to shift the balance so as to *challenge* conventional assumptions about people who fall into these *groups*. Second, there is something almost mean-spirited about this example. Major J. seems to be attempting to "stick it to" his female colleagues, Justices McLachlin and L'Heureux-Dubé, suggesting that a double standard is being applied to police officers.

It is also important to point out that Major J. is willing to contemplate the possibility that, on occasion, racism may be an issue, but points out that "[i]t was open to the appellant to introduce evidence that this police officer was racist and that racism motivated his actions or that he lied. This was not done."[47] There are a variety of problems attending this proposition. First, this claim is premised on the unsupported assumption of Major J. that there are no problems of racism within the Halifax police department. Second, it seems to shift the burden of proof to the accused, but surely the onus is on the Crown. Third, such a standard would put an almost impossible burden on an accused. In a society where racism is said to be pervasive, indirect and

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[45] *R.D.S., supra* note 1 at 499.
[46] *Ibid.* at 498-499.
[47] *Ibid.* at 496. See also at 498.

systemic rather than just overt and direct, how is a fifteen year old youth going to prove that a police officer is "racist and that racism motivated his actions"?[48] Such a view would, to quote Major J. himself, "return us to a time in the history of the Canadian justice system that many thought had past"[49]; it takes us back over fifty years when intent was sovereign.[50] Moreover, although Major J. has not retreated all the way to *Christie* v. *York*,[51] in which the Supreme Court of Canada openly legitimized overt racism, his approach amounts to willful blindness about racism which may, in the end, be almost as harmful to the victims of racism.

In sum, Major J.'s decision betrays all the hallmarks of a classical vision of judging: he is explicit that in adversarial systems such as Canada the role of the judge is to be passive;[52] that all witnesses are to be treated equally,[53] which, by denying any reference to social context, he translates as the same; and he endorses an ideology of colour blindness.[54] It is fortunate that this is the minority position.

2. Majority Judgments

To this point, in assessing the dissent in *R.D.S.*, we have written jointly in this article. We are, however, on slightly different wavelengths in our assessments of the majority judgments. Although we think both judgments have much to commend them, we are also concerned about some of their implications, but do not share those concerns equally. Specifically, on the treatment of social context, Devlin is more critical of Justices L'Heureux-Dubé's and McLachlin's judgment than is Pothier, and Pothier is somewhat more critical of Justice Cory's judgment than is Devlin. In contrast, on the test for the reasonable apprehension of bias, in which Justice Cory expresses the view of the Court, Devlin is more critical than is Pothier. In what follows, Devlin will offer his comments, to which Pothier will respond.

(a) L'Heureux-Dubé and McLachlin JJ.

Devlin

At first blush, there is much that is attractive in the arguments of Justices L'Heureux-Dubé and McLachlin. Their invocations of both Benjamin Cardozo and the

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[48] *Ibid.*

[49] *Ibid.* at 499.

[50] See *e.g. R.* v. *Bushnell Communications Ltd. et al.* (1974), 4 O.R. (2d) 288, 47 D.L.R. (3d) 688, 18 C.C.C. (2d) 317 (C.A.), and *Re Ontario Human Rights Commission et al. and Ontario Rural Softball Association* (1979), 26 O.R. (2d) 134, 102 D.L.R. (3d) 303, 10 R.F.L. (2d) 97. Overruled by *Ontario Human Rights Commission and O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, 52 O.R. (2d) 799.

[51] *Supra* note 41.

[52] *R.D.S., supra* note 1 at 498.

[53] *Ibid.* at 499.

[54] *Ibid.* at 493-494.

Canadian Judicial Council's *Commentaries on Judicial Conduct*[55] are a powerful rebuttal of the classical model's preoccupation with what they call the "fallacy" of objectivity and neutrality.[56] Their candour about the pervasiveness and desirability of "perspectivism" is refreshing.[57] Their acknowledgements that those who come before the law are "influenced by the innumerable forces which impact on them in a particular context"[58] and that judges must deal with the "complicated reality of each case before them"[59] are undoubtedly positive steps forward.[60]

Having said this, I do not think that they fully contemplate the complexity of the challenge: they take us to the brink and then retreat with excessive haste.

My concerns stem from the fact that Justices McLachlin and L'Heureux-Dubé seem to believe that they can jettison objectivity and neutrality while simultaneously retaining the demand for impartiality.[61] To carry out this feat they invoke two sources. The first is another quotation from the *Commentaries on Judicial Conduct*:

> ...the wisdom required of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.
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> 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

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[55] "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs....In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

...

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether he [or she] be litigant or judge."

B. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 12-13, 167.

"[t]here is no human being who is not the product of every social experience, every process of education, and every human contact."

Canadian Judicial Council, *Commentaries on Judicial Conduct* (Cowanville, Que:Yvon Blais, 1990) at 12.

[56] *R.D.S., supra* note 1 at 504.

[57] *Ibid.* at 505.

[58] *Ibid.* at 506.

[59] *Ibid.*

[60] Their arguments reflect the virtues of what elsewhere I have described as a relationalist model of judging. *Supra* note 3 at 11-14.

[61] *R.D.S., supra* note 1 at 504-505, 509.

upon different points of view with an open mind.[62]

The second is Professor Nedelsky's recent arguments in favour of an "enlarged mentality":

> What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective .... It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.[63]

In short, Justices McLachlin and L'Heureux-Dubé believe that a contextualist approach can reconstruct the ideal of impartiality. With this idea in mind they then proceed to suggest that such "enlargement" can be informed by at least three discrete contextualizing methodologies: through the testimony of expert witnesses; from academic studies properly placed before the courts; and "from the judge's personal understanding and experience of the society in which the judge lives and works".[64] Thus they conclude that "this process of enlargement is not only consistent with impartiality; it may also be seen as its essential precondition."[65]

I do not disagree with the idea of trying to expand one's horizons. To enlarge one's mentality is a good thing for all judges (indeed everyone) to seek to do. What I am concerned about is the unflappable confidence with which Justices L'Heureux-Dubé and McLachlin proceed. While they seem to think that objectivity and neutrality are chimeras in the world of judging, they simultaneously seem to assume that expert testimony or academic studies can provide the necessary contextualizing truths to ground judicial decision-making. The problem is that when it comes to issues of social inequality the experts and the scholars are also frequently divided. Their work is also informed by their experiences, disciplinary training and implicit ideological commitments. Thus judges, who will more than likely have little training in these fields of knowledge, will have to make choices between competing scholarly analyses. But by which criteria? Where is the impartiality? Even in situations where there might be relative consensus among the experts and the academics, there is no guarantee that there is truth. The academic world, like the legal world, has been dominated by a relatively small and homogeneous elite. This domination can be both substantive and methodological. Thus it may be that vitally important issues that are of interest to those who are marginalized are considered "non questions".[66] Thus, for a court to uncritically assume that the experts and the scholars can identify and delimit the

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[62] *Ibid.* at 504.

[63] *Ibid.* at 506-507.

[64] *Ibid.* at 507.

[65] *Ibid.*

[66] Mary Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation* (Boston: Beacon Press, 1973) at 12; see J. McCalla Vickers, "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research" in A. Miles and G.Finn, eds., *Feminism in Canada: From Pressure to Politics* (Montreal: Black Rose Books, 1982) 27 at 28.

context may be to unconsciously perpetuate the exclusions. To be clear, my point is not that it is unhelpful for courts to get a broader interdisciplinary input; rather, it is that this cannot provide a sufficiently robust epistemological "pre-condition"[67] for impartiality.

Can their third proposition - that we look to a judge's personal understanding and experience of the society in which the judge lives and works - do the trick? When Justices L'Heureux-Dubé and McLachlin come to analyze the details of the trial to determine whether, in light of their contextualist approach, there could be said to be a reasonable apprehension of bias they make a specific finding that "Judge Sparks did not in fact relate the officer's probable reaction to the race of the appellant" but they continue:

> it should be noted that if Judge Sparks had chosen to attribute the behaviour of Constable Steinberg to the racial dynamics of the situation, she would not necessarily have erred. As member of the community, it was open to her to take into account the well known presence of racism in that community and to evaluate the evidence as to what occurred against that background.
>
> That Judge Sparks recognized that police officers sometimes overreact when dealing with non white groups simply demonstrates that in making her determination in this case, she was alive to the well-known racial dynamics that may exist in interactions between police officers and visible minorities.[68]

While I have a great deal of sympathy for these comments, I worry about the problematic ramifications of such appellate acquiescence. They seem to be saying that if a judge directly or indirectly draws on his or her own experiences as a member of a community then that cannot generate an apprehension of bias. The justification for this appears to be the "enlargement of mentality" ideal proposed by Professor Nedelsky: that Justices L'Heureux-Dubé and McLachlin are drawing upon, and deferring to, the insights of someone who emerges from the community.

I have several points to make in this regard. First, Justices L'Heureux-Dubé and McLachlin seem to assume that it is possible for a person from one context to come to terms with the position of another. For example, in reference to the *Bartle* case they suggest that the Supreme Court "plac[ed] itself in the position of the accused..."[69] This claim is premised upon an assumption of ontological transparency and intersubjective transference. However, some minority, feminist and postmodern theorists have argued that such an ideal is deeply problematic, potentially dangerous and even impossible.[70] Second, there is the highly problematic question of the relationship between an individual and the community. Once we accept that each

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[67] *R.D.S., supra* note 1 at 507.

[68] *Ibid.* at 512 [emphasis in original].

[69] *Ibid.* at 507.

[70] S. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998); W. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and Disclosure of Suffering* (Brookfield, U.S.A.: Ashgate, 1988); I.M. Young, *Intersecting Voices: Dilemmas of Gender, Philosophy and Policy* (Princeton: Princeton University Press, 1997) c. 3.

individual actor is "influenced by the innumerable forces which impact on [that actor] in a particular context"[71] it is problematic to conceive that individual actor as the authentic and orthodox voice of a community. Each member of a community may capture certain insights from a community, but there is also the real possibility that others within that community might have different, perhaps even contradictory, interpretations. Now, obviously, the larger the number of people of a community who seem to concur the less this is a problem, but to undimensionalize a community to one spokesperson runs the risk of both essentializing that community and marginalizing other members of that community whose voices have not had a chance to be heard. Indeed, the very use of the word "community" in the decision of Justices L'Heureux-Dubé and McLachlin shifts: sometimes it is the "Canadian community",[72] in the next paragraph it is much more local, "the Nova Scotian and Halifax communities".[73] But it is important to note that their reasons never explicitly locate Judge Sparks as a member of the African Canadian community. This seems to generate a bit of a dilemma: while it is true that some judges have recognized that racism is a problem in Nova Scotia in other cases,[74] this does not mean that it is true for the whole Nova Scotian community. Obviously the police union, the Crown and several other Nova Scotian judges[75] did not think that it was relevant to this case. On the other hand, because L'Heureux-Dubé and McLachlin JJ. make no explicit reference to the Black community in Nova Scotia that community, in a way, is simply assimilated into the larger community and their particular perspectives are therefore marginalized.

Third, there is the even tougher question of what weight should a person with decision-making authority from a relatively privileged community give to the arguments of a person from a less privileged community: I think that there is an important distinction to be made between deference and abdication. To my mind, the experience of disadvantage and oppression should carry some presumptive weight, but to simply assume that social position confers an absolutely priorizing truth is to give up on judgment: it is to run the risk of abdicating responsibility.

It is at this point that Justices L'Heureux-Dubé and McLachlin have recourse to the rationalizing trope of "the reasonable person test": that "the reasonable person far from being troubled by this process [of enlargement], would see it as an important aid to impartiality."[76] I think that this is an unfortunate, and transparent, strategy to adopt. As I have suggested elsewhere the reasonable person is simply a judge's alter ego.[77] While it might be helpful for a judge to utilize the idea of a reasonable person test as a regulative mechanism or heuristic device to monitor and reflect upon one's

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[71] *R.D.S., supra* note 1 at 506.

[72] *Ibid.* at 507.

[73] *Ibid.* at 508.

[74] See *e.g. Nova Scotia (Minister of Community Services)* v. *S. (S.M.) (1992),* 110 N.S.R. (2d) 91 at 109, 299 A.P.R. 91 (Fam. Ct.), aff'd (1992), 112 N.S.R. (2d) 258, 307A.P.R. 258 (C.A.); *Dartmouth/Halifax County Regional housing Authority* v. *Sparks* (1992), 112 N.S.R. (2d) 389, 307 A.P.R. 91 (S.C.), rev'd on other grounds (1993), 119 N.S.R. (2d) 91, 330 A.P.R. 91(C.A.).

[75] That is, Glube C.J. N.S., Flinn J.A. and Pugsley J.A.

[76] *Ibid.* at 507-509.

[77] "Suspicious Minds," *supra* note 2 at 418-421.

assumptions, for L'Heureux-Dubé and McLachlin JJ. to invoke it at this point in their reasoning as some objective benchmark of truth and knowledge is not only to contradict the basic patterns of their perspectivist analysis, it is to mask and devalue their own commitment to egalitarian judicial practices.

These concerns are intensified when they affirm, without any reservation, Paciocco's and Stuesser's assertion that "the trier of fact is entitled *simply* to apply *common sense* and *human experience* in determining whether evidence is credible and in deciding what use, if any, to make of it in coming to its finding of fact".[78] Surely this is too glib. First, here human experience appears to be undifferentiated; but the underlying dynamic of the whole of their perspectivist argument is that is that human experience is differentiated. Second, "common sense" is seriously problematic. Historical analyses make it clear that yesterday's common sense is, with hindsight, blatant racism. Indeed, the core thesis that runs through James Walker's recent book, *"Race," Rights and the Law in the Supreme Court of Canada* is the nefarious influence of judicial reliance on common sense.[79] Moreover, psychological scholarship indicates that our conventional, common sensical ways of determining credibility are deeply flawed.[80] These problems can only be exacerbated if we accept, as both L'Heureux-Dubé and McLachlin JJ. appear to do, that our racialized and gendered experiences make a difference in the way we understand the world.

These concerns about context, deference and common sense also manifest themselves when Justices McLachlin and L'Heureux-Dubé discuss the appropriate test for determining if there is a reasonable apprehension of bias. Justices L'Heureux-Dubé and McLachlin concur with Cory J. that the test is a "probability test".[81] In the next section, I will elaborate upon my criticisms of this test as it is outlined by Cory J. At this point, I will focus on Justices McLachlin and L'Heureux Dubé's argument that in order to determine if there is a reasonable apprehension of bias one has to look not just at the test as an abstract formula but also "the context in which (the) case arose."[82] Once again, this is clearly a positive step, but again I would argue that this does not solve the challenge of finding impartiality in a deeply diversified society.

The problem is that contexts are not self defining or self limiting, they have no necessary essences. A context is a historically contingent, culturally loaded, spatially located social construct. To take an example from the domain of Aboriginal rights: what is the context of Aboriginal peoples? The answer has to be: it depends. In certain contexts we might be trying to identify the interest of all First Nations people in Canada. But then this would exclude members of the Mi'kmaw or Mohawk nations who live on the other side of the *Canadian* border. Or again, during the Charlottetown

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[78] *R.D.S., supra* note 1 at 505-506 [emphasis added].

[79] (Waterloo, Ont.: Wilfred Laurier University Press, 1997)

[80] See, for example, A. Kapardis, *Psychology and Law: A Critical Introduction* (New York: Cambridge University Press, 1997) 208-215; M. Stone, "Instant Lie Detection? Demeanour and Credibility in Criminal Trials" (1991) Crim. L.R. 821; O. Wellborn III, "Demeanour" (1991) 76 Cornell L. Rev. 1075; S. Friedland, "On Common Sense and the Evaluation of Witness Credibility" (1989-90) 40 Case Western L. Rev. 165; M. Lareau, S. Sacks, "Assessing Credibility in Labour Arbitration" (1989) 5 Labour Lawyer 151.

[81] *R.D.S., supra* note 1 at 502-503.

[82] *Ibid.* at 502.

Accord it became painfully obvious that there were significant divisions within the Aboriginal community on the basis of gender. In other words, in legal decision-making it is a contest of contexts: the struggle is not really between contextualism and abstractionism (for that may be one method of contextualizing) but rather between different ways of framing the context. To take another example, sometimes it might be appropriate to consider the context to be African Canadians across Canada. At other points, it might be appropriate to consider the context of Black Nova Scotians as they have had a history and set of experiences distinct, for example, from the Black communities of Toronto or Montreal. One Black poet, Nourbese Philips, has pointed out that it might be helpful in certain contexts to distinguish between some of the Black communities *within* Toronto.[83]

In short, my fear is that the invocation of context might be too quick, an apparently easy shortcut that can short-circuit the complex process of judicial decision-making.

Now, on the facts of this case, I personally agree with L'Heureux-Dubé and McLachlin JJ. that the appropriate context to consider is that in Nova Scotia there has been "a history of widespread and systemic discrimination against black and aboriginal people, and high profile clashes between the police and the visible minority population over policing issues" and that we should be "cognizant of the existence of racism in Halifax Nova Scotia".[84] But this is not the only possible way of framing the context. For example, many police officers might point to a different, intersecting context: it is true that historically there has been discrimination on the part of the police force against Black and Aboriginal communities, but that as a result of the Marshall Inquiry there have been sensitivity training programmes and significant restructuring and recruitment initiatives and, therefore, to assume that racism still continues without any documented support is to ignore an important reality. My point is that characterization, and choice, of context is vital. A contextualist methodology does not resolve the problem of judicial impartiality; rather it is simply another method by which an individual judge can try to do the right thing.

Moreover, there is the challenging question of the exact nature of the relationship between the general and the particular. Let us assume that it is incontrovertible that there is a pattern of systemic racism by police officers against "non-white youth" and that judges are entitled to factor this in during the course of their decisions. The question remains: how exactly should this be considered?[85] It cannot mean that in every situation involving a "non-white youth" there has to be an

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[83] Presentation, Ontario Court of Justice (Provincial Division), Annual General Meeting, London, Ontario, May 21-23, 1996.

[84] *R.D.S., supra* note 1 at 508.

[85] At times hints of this concern are to be found in Justice Major's decision when he points out that the law prohibits the "introduction of evidence to show propensity". (*Ibid.* at 495) But his concrete example does not hold up: he asserts: "It would be stereotypical reasoning to conclude that since society is racist, and, in effect, tells minorities to 'shut up,' we should infer that this police officer told this appellant minority youth to 'shut up.' This reasoning is flawed." (*Ibid.* at 496) The problem, as we have previously noted, is that the issue of being told to "shut up" was not an abstract generalization but rather part of the testimony of the accused, evidence that the trial judge explicitly referred to and, ultimately, accepted.

acquittal. Rather, in the end, it will have to come down to a judge trying to tease out from the available evidence whether there is a possibility of police overreaction. While it is true that it is a basic principle of evidence that each witness is to be entitled an equal presumption of credibility, this must also be matched against the presumption of innocence of an accused and the obligation of the Crown to prove the case beyond a reasonable doubt. In effect this should mean that the Crown, when calling police officers as witnesses will have to ensure that there can be no hint of over-reaction. In turn, this will mean that police officers will have to proactively ensure that they do not overreact when dealing with "non-white groups". This is, in my opinion, a good thing. In a society where racialization can often become racism there is an obligation upon all of us (including police officers) to self-regulate, to guard against (perhaps unintentional but still real) patterns of prejudice.

I believe that the reasons of L'Heureux-Dubé and McLachlin JJ. countenance such an argument when they opine, towards the conclusion of their argument, that "[i]n alerting herself to the racial dynamic in the case, [the judge] was simply engaging in the process of contextualized judging which...was entirely proper and conducive to a fair and just resolution of the case before her",[86] but they do not spend sufficient time in developing such an analysis. Again their reasoning is a little too hasty.

Finally, to be fair, it must be pointed out that Justices L'Heureux-Dubé and McLachlin correctly recognize that not all experiences that a judge might have are juridically legitimate. Two sets of constraints are indicated: the standard of the reasonable person; and the argument that the experiences must be "*relevant*...not based on *inappropriate* stereotypes and do not prevent a *fair* and *just* determination...based on the facts in evidence."[87] However, as I have previously indicated, the reasonable person test is fungible and therefore hardly adequately constraining. The latter proposition appears question-begging.

In short, the position adopted by L'Heureux-Dubé and McLachlin JJ. gets us to the right result, but perhaps too easily. Their uncritical invocation of the idea of an enlarged mentality glosses over the problems that such an approach encounters in maintaining the ideal of impartiality. Reality is much too complex, too messy to be accommodated within the desire for enlargement. Moreover, it may create too great a space for judges to pursue ill-considered experiential musings. Appellate courts have an obligation to be worried about what lower court judges might be saying and doing in their courtrooms. The danger is that Justices L'Heureux-Dubé and McLachlin's unconditional, uncritical and unguarded embrace of contextualism might be read as a licence for other judges to shoot from the hip.

Pothier

I essentially agree with what Devlin says, but the implications I draw from it are somewhat different. As will be explained below, while Devlin suggests that Cory J.'s approach provides the requisite check on the excessive optimism of Justices L'Heureux-Dubé and McLachlin's embrace of contextualism, I think Cory J. is too hesitant in acknowledging the impact of context. While there needs to be more care

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[86] *Ibid.* at 513.

[87] *Ibid.* at 501 [emphasis added].

taken in how contextualization is undertaken, the basic approach adopted by McLachlin and L'Heureux-Dubé JJ. is, in my view, heading in the right direction.[88]

My basic premise is that contextualism is inevitable, i.e. that it happens even where there is a pretext to the contrary. Implicit assumptions based on generalizations are always at work; to assume a contextual factor is not relevant is as much a generalization as to assume a contextual factor may be relevant. Major J.'s analysis is to the effect that a judge cannot make determinations with reference to a context of race in the absence of evidence about specific individuals, because to do so is to make determinations based on stereotypes and generalizations not based on evidence. But the net result for Major J. is that the law then proceeds on the assumption that race is irrelevant, which is equally a generalization not based on evidence, where there is no effective means of testing the assumption. All of this certainly complicates the analysis without offering much guidance as to how a trier of fact is meant to work through the complication. But I agree with Justices L'Heureux-Dubé and McLachlin that it is preferable for judges to be explicit about their appreciation of context rather than to pretend it is not there.

But I also agree with Devlin that context can be both used and abused. Lamer C.J.C. did have a valid point[89] in oral argument when he talked about contextualism as a double edged sword. It was in that light that I, as Appellant's counsel, sought to emphasize the importance of measuring social context against *Charter* values. Specifically, the use of social context is appropriate to further equality and inappropriate if it further marginalizes already marginalized groups. Unfortunately, in my view, that theme is only faintly reflected in the majority judgments in *R.D.S.*

Justices L'Heureux-Dubé and McLachlin go somewhat further in acknowledging the complexities of contextualism in a more recent case, *R.* v. *Malott*.[90] The case involved a murder charge where the accused woman raised the defence of battered woman syndrome. The jury convicted, notwithstanding the attempt to invoke this defence. The Supreme Court of Canada unanimously decided that, while not perfect, the trial judge's charge to the jury about the battered woman syndrome defence was sufficient to not warrant appellate interference. In a concurring judgment, Justice L'Heureux-Dubé, McLachlin J. concurring, went out of her way to comment on the use

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[88] I would, however, not go so far as Justices L'Heureux-Dubé, McLachlin, La Forest and Gonthier in saying that Judge Sparks could have properly reached a definitive conclusion attributing constable Steinberg's overreaction to race. (*Ibid.* at 512) Neither the evidence nor the argument was structured so as to lay the foundation for such a definitive decision. I would take this as a verification of Devlin's overall point, that L'Heureux-Dubé and McLachlin JJ. are not being careful enough about what use can be made of context.

[89] Even though expressed in a way I, and others, found offensive by his use of (hypothetical) examples of Chinese as gamblers and Roma as pickpockets. This was ultimately the impetus for an unsuccessful complaint to the Canadian Judicial Council by the Chinese Canadian National Council (October 28, 1997) which was rejected by letter January 22, 1998 from J. Thomas, Executive Director of the Canadian Judicial Council. The explanation for closing the file was that considerable latitude must be given for exchanges between counsel and judges in oral argument. Considerable emphasis was given to the hypothetical nature of the Chief Justice's comments.

[90] [1998] 1 S.C.R. 123, 36 O.R. (3d) 802 [hereinafter *Malott* cited to S.C.R.]

that could be made about generalizations about battered women. In describing the significance of *Lavallee*,[91] Justice L'Heureux-Dubé said the following:

> It accepted that a woman's perception of what is reasonable is *influenced* by her gender, as well as by her individual experience, and both are relevant to the legal inquiry. This legal development was significant, because it demonstrated a willingness to look at the whole context of a woman's experience in order to *inform* the analysis of particular events.[92]

Justice L'Heureux-Dubé emphasized the dangers of assuming that all battered women were the same, and that such reverse stereotyping should be "scrupulously avoided."[93] In simultaneously advocating the reliance on generalizations about battered women alongside care about excessive generalization, Justice L'Heureux-Dubé is acknowledging, more than in *R.D.S.*, that contextualism is not unidimentional, and needs to be done with care. The words emphasized above, *influence* and *inform*, I think capture what contextualism is all about. It is not about ignoring evidence about people's individual circumstances, but about taking as the starting point that people's individual circumstances cannot be fully understood apart from an appreciation of the context. Context is not in and of itself determinative, so there are no simple answers. But to ignore context is to pretend there are simple answers with nothing but blind faith to support the assumption.

(b) Cory J.

It may seem that we are not very far apart in our assessments of the judgment of Justices L'Heureux-Dubé and McLachlin, but it becomes more clear in our respective assessments of Justice Cory's judgment that there are some significant differences in our perspectives on the use of social context.

Devlin

(i) Test for finding a reasonable apprehension of bias

The question of what is the appropriate test for determining whether there is a reasonable apprehension of bias is addressed at length in the decision of Cory J. In a previous article, I argued that a careful analysis of precedent indicates that there are two lines of authority to determine whether the conduct or words of a judge may give rise to a reasonable apprehension of bias.[94] One line of authority can be characterized as a *possibility* test, which creates a relatively low threshold for determining whether there is a reasonable apprehension of bias. Its most explicit articulation is found in Lord Hewart's famous maxim: "...justice should not only be done, but should

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[91] *Lavallee, supra* note 24.
[92] *Malott, supra* note 90 at 141. [emphasis added]
[93] *Ibid.* at 143.
[94] "Suspicious Minds," *supra* note 2 at 421-422.

manifestly and undoubtedly be seen to be done."[95] The key rationale underlying this test is that what is to be protected and promoted is public confidence in the administration of justice. The other line of authority is a *probability* test, which creates a relatively high threshold for determining whether a reasonable apprehension of bias exists. The focus here is more on emphasizing the judicial traditions of integrity and impartiality, and oaths of office. If this test is adopted, a finding of a reasonable apprehension of bias will be less likely.

In my previous article, I argued that in precedent situations where gender or racialized bias had been suggested, for example the Bourassa and Marshall Inquiries, judges were measured by the higher threshold with the consequence that there were no findings of a reasonable apprehension of bias. I further argued that to apply a lower threshold to Sparks J. would be the application of a double standard.[96] This was an argument in favour of equal treatment. However, this argument did not directly address the issue of what is the best threshold: a probability or possibility test? This is a distinct question that requires consideration beyond whether all judges should be judged by the same standard.

Cory J. doubts whether there are two lines of authority[97] but opts for the probability test for several reasons:[98] "traditions of integrity and impartiality,"[99] the judicial oath,[100] the "fundamental dut[y] to be and to appear to be impartial,"[101] and the "presumption of judicial integrity."[102]

I have two points to make in this regard. First, the Court's adoption of the probability test worries me. The effect of such a test is to make it more difficult for aggrieved citizens to challenge judges on the basis of a reasonable apprehension of bias. As Cory J. acknowledges, the "presumption of judicial integrity" means that an aggrieved party must bear the onus of producing "cogent evidence"[103] to substantiate an apprehension of bias, and that this is a "high" threshold or standard.[104] Similarly, L'Heureux-Dubé and McLachlin JJ. concur that the presumption of impartiality is "strong"[105] and that this can only be rebutted by "convincing evidence"[106] or "clear evidence of prejudgment".[107] This, I would suggest, can help to insulate judges from effective criticism and review. There are relatively few mechanisms available to ensure judicial accountability. It is becoming increasingly obvious to many Canadian citizens that judges exercise significant social and political power and that judges often rely on

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[95] *R.* v. *Sussex Justices, Ex Parte McCarthy*, [1924] 1 K.B. 256 at 259, [1923] All E.R. Rep. 233 at 234.

[96] "Suspicious Minds," *supra* note 2 at 422-429.

[97] *R.D.S., supra* note 1 at 531.

[98] *Ibid.* at 496-497 (Major J. concurring on this point).

[99] *Ibid.* at 531.

[100] *Ibid.* at 531-533, 542.

[101] *Ibid.* at 532.

[102] *Ibid.* at 532, 539, 542.

[103] *Ibid.* at 542, 547.

[104] *Ibid.* at 547.

[105] *Ibid.* at 503.

[106] *Ibid.* at 503.

[107] *Ibid.* at 513.

their own experiences, instincts, intuitions and world views in decision making. Moreover, it cannot be forgotten that many judges do not come from marginalized communities, and that there has been a significant history of systemic bias on the bench. Thus I fear that the long term impact of such a high threshold will be to make it more difficult for those who are marginalized to challenge oppressive or exclusionary judicial practices.

On the other hand, there may be a prudential reason for favouring a probability test. Research in both the United States and Canada has demonstrated a disturbing pattern:[108] in situations where there have been challenges for bias on the basis of race or gender, the ironic twist is that these have been frequently targeted (sometimes successfully) against women and/or minority culture judges and arbitrators. Thus to adopt a lower threshold might render judges from historically under represented groups vulnerable to hostile challenges.

My view is that the best way to resolve this dilemma is to adopt the lower threshold possibility test, while encouraging appellate courts to be particularly alert when responding to challenges for an apprehension of bias against women and/or minority judges. In a society as diversified and as polarized as Canada, it is suggested that Cory J.'s often invoked references to the sanctity of the judicial oath[109] are insufficient to bear the regulative burden which is required. There are significant perceptions in a large part of the Canadian community that not all judges are willing to approach racially oppressed persons equitably. In my opinion, to attempt to offset these perceptions by reference to judicial oaths is insufficient to generate public confidence in the integrity of the system. Mechanisms are required to ensure effective accountability. The only other option that is available to aggrieved citizens are complaints to a Judicial Council and the reality is that there are very few successful complaints.[110] Thus, I would argue that, by default, because the reasonable apprehension of bias doctrine is one of the few regulative mechanisms available, the test should be the lower possibility test. It is this test, not the probability test, that more closely dovetails with Cory J's proposition that "...the courts should be held to the *highest standards* of impartiality."[111]

My second point addresses Justice Cory's rejection of the suggestion that there are two relatively distinct tests.[112] It is helpful to compare *R.D.S.* with a case that came down several months later, *R. v. Williams*,[113] which dealt with the question of when an accused can challenge jurors for cause on the basis of potential racial bias. In this case, McLachlin J., writing for a unanimous court (including Cory J.), made a great deal of

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[108] Judge M. Omatsu, "The Fiction of Judicial Impartiality" (1997) 9 C.J.W.L. 1; Justice B. McLachlin, "Judicial Neutrality and Equality" (Aspects of Equality: Rendering Justice Conference, Hull, Quebec, 17-19 November 1995) at 19-23 [unpublished].

[109] *R.D.S., supra* note 1 at 531-533, 542.

[110] See, for example, the annual reports of the Canadian Judicial Council. See also M. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 90-98.

[111] *R.D.S., supra* note 1 at 524, 533. [emphasis added]

[112] *Ibid.* at 531.

[113] [1998] 1 S.C.R. 1128, 159 D.L.R. (4th) 493 [hereinafter *Williams* cited to S.C.R.].

the distinction between a possibility and probability test.[114] Moreover, having catalogued a variety of ways in which racial bias may impact upon a juror's psyche (consciously and unconsciously), it was determined that the appropriate test was a "realistic potential for partiality."[115] This, to my mind, is very similar to a "possibility test". Indeed, the Court is clear in *Williams* that such a low threshold is necessary for jurors, in spite of their being "well-intentioned",[116] despite the presumption that candidates for jury duty are "indifferent or impartial",[117] and despite the "...expectation that jurors usually behave in accordance with their oaths."[118] The implicit message that we are left with from this comparison is that judges are less likely than jurors to succumb to "...the insidious nature of racial prejudice and...stereotyping..."[119] Hence the difference in thresholds.

Pothier

Although I have some sympathy for what Devlin is saying, in the end I am both less troubled by a higher threshold for the test and less convinced that the articulation of the test has much to do with the results in particular cases in any event.

Before getting into the specifics of the test, it is worth asking whether any test is actually determinative, or even very influential, in determining the outcome, or is it more of an *ex post facto* rationalization of the result. My assessment is that the latter is closer to the truth, that most bias cases are decided on a gut reaction that then gets dressed up in an articulation of the test for reasonable apprehension of bias. I see some parallels between the test for a reasonable apprehension of bias and the general principles of judicial review of administrative tribunals. Despite all the ink that has been spilled in trying to lay out tests for identifying jurisdictional error, what really seems to matter most is the degree to which the reviewing judge is shocked by the decision under review. If the judge is so shocked, the case will be found to meet the test of jurisdictional error, however it is articulated. The following comments about judicial review generally could, in my view, equally be said about bias cases:

> What happens on the surface of the judgment is, in the end, determined not so much by text book maxims as by the judges' conviction that the interests of justice will or will not be served by a particular result.[120]

In the present case, at first instance Glube C.J. reached her conclusion of a reasonable apprehension of bias with virtually no explanation - she set out the test and immediately reached her conclusion, without any articulation of why this case met the test. That is not atypical of bias cases. The fact that the style of legal discourse is to apply legal tests to facts does not mean the tests are actually decisive or even highly

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[114] *Ibid.* at 508.
[115] *Ibid.* at 504-508.
[116] *Ibid.* at 501.
[117] *Ibid.* at 506.
[118] *Ibid.* at 502.
[119] *Ibid.* at 504.
[120] H.W. Arthurs, "Protection Against Judicial Review" (1983) 42 Rev. du B. du Que. 277 at 286.

suggestive as to the result. Indeed, it seems quite significant that what has been well recognized prior to *R.D.S.* as the standard articulation of the test for reasonable apprehension of bias in Canada, Justice de Grandpré's judgment in the *Committee for Justice and Liberty* v. *Canada (National Energy Board),*[121] is the view of a judge *dissenting* in the result.

In *R.D.S.* itself, there were, in total, thirteen judges who gave an opinion on whether there existed a reasonable apprehension of bias. There was general consensus on the articulation of the test, yet in the result the split was almost even. Seven concluded there was no reasonable apprehension of bias (Justices L'Heureux-Dubé, McLachlin, Gonthier, La Forest, Cory, and Iacobucci in the Supreme Court of Canada, and Justice Freeman, dissenting in the Court of Appeal) and six concluded there was a reasonable apprehension of bias (Lamer C.J., and Justices Major and Sopinka in the Supreme Court of Canada, Justices Flynn and Pugsley in the Court of Appeal, and Chief Justice Glube at first instance). Most of these judges thought the case was a very clear one, and not close to the line. This suggests the same result would have followed regardless of the test. All six of the judges who found a reasonable apprehension of bias were obviously very offended by Judge Sparks' comments, tainting a police officer as racist without specific proof. They would have found a reasonable apprehension of bias no matter what the test. On the other hand, Justice Freeman in the Court of Appeal and the quartet of Justices L'Heureux-Dubé, McLachlin, Gonthier and La Forest in the Supreme Court of Canada were not at all offended by Judge Sparks' comments. Viewing the circumstances as racially charged, thereby giving a context for Judge Sparks' comments, they would, I surmise, have concluded there was no reasonable apprehension of bias no matter what the test. That admittedly still leaves Justices Cory and Iacobucci in the Supreme Court of Canada, whose decision tipped the balance, and who did think that the case was very close to the line. It might be concluded that their reliance on a strict test produced a different result than they would have reached on a lower threshold test, making the choice of test crucial to the ultimate result. But I am not convinced the analysis is that straight forward.

In my assessment, admittedly somewhat speculative, Justices Cory and Iacobucci would have felt torn by the circumstances in *R.D.S.* regardless of the test. Their dilemma was not really resolved by the strictness of the test, their dilemma being about how to resolve their assumption of a tension between general context and particular application. At one level, they clearly wanted to acknowledge a societal context of racism. At the same time, however, they were nervous about too easily jumping to conclusions applicable to specific circumstances. Unlike Justices Major, Sopinka, and Lamer C.J., who were concerned only with the latter point, Justices Cory and Iacobucci did not want to render the acknowledgement of racism superfluous by making its proven relevance almost impossible. There have to be some contexts where race can be factored into the analysis, but they are very cautious about when this can be done.

Justice Cory said the following as a preface to his more detailed discussion:

> At the outset, it must be emphasized that it is obviously not appropriate to

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[121] [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716.

> allege bias against Judge Sparks simply because she is Black and raised the prospect of racial discrimination.[122]

This should go without saying, but the fact that Cory J. felt compelled to say it is instructive. Was he worried that this was exactly what the case was about? From the perspective of counsel for the Appellant, that is precisely what the Crown's case seemed to be, though it was obviously never articulated in this way. I would surmise that Justices Cory and Iacobucci were leery of siding with the Crown in finding a reasonable apprehension of bias on the part of Judge Sparks for fear that it would indeed leave the impression that a Black judge was seen as biased for raising the prospect of racial discrimination.

Justices Major, Sopinka and Lamer C.J. adopted a purely formal equality analysis in *R.D.S.*. Any factoring in of race without specific proof of racial motivation, no matter by whom or to what end race is put on the table, is the antithesis of equality and impartiality. Individual cases are to be decided on individual-specific evidence, not on the basis of their group characteristics. Equality means equality of individuals, not of groups.

The six majority judges, in contrast, although they did not expressly confront the issue as the inadequacy of a formal equality analysis,[123] were prepared to accept that not all invocations of race reflect racial bias. To start from Justice Major's premise that group characteristics should be ignored in preference to individual characteristics makes it impossible to confront a situation where group characteristics render individuals vulnerable to systemic inequality because of group characteristics. The phenomenon that interpersonal encounters may be gendered or racialized is not fully explained by factors peculiar to those individuals. The point of a substantive equality analysis, in contrast to a formal equality analysis, is that one cannot presume equality of starting points, and that group characteristics are highly relevant to inequality of starting points. As the Appellant argued, one has to be able to factor in race in order to be able to detect and challenge racism.

Justice Cory accepts this point, but only in a guarded way when it comes to issues of the credibility of individual witnesses:

> To state the general proposition that judges should avoid making comments based on generalizations when assessing the credibility of individual witnesses does not lead automatically to a conclusion that when a judge does so, a reasonable apprehension of bias arises. In some limited circumstances, the comments may be appropriate. Furthermore, no matter how unfortunate individual comments appear in isolation, the comments must be examined in context, through the eyes of the reasonable and informed person who is taken to know all the relevant circumstances of the case, including the presumption of judicial integrity, and the underlying social context.[124]

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[122] *R.D.S., supra* note 1 at 542.

[123] This is in spite of having been invited to do so by counsel for the Appellant and the intervenors.

[124] *R.D.S., supra* note 1 at 539.

Although he admits exceptions, Justice Cory's general framework is to treat individuals as individuals distinct from their group characteristics. Thus the simple logic of formal equality still has a strong resonance that is not easily displaced.

My point in all of this is to suggest that what Cory J. implicitly accomplished in adopting a strict test for a reasonable apprehension of bias is some latitude for what he sees as the exceptional circumstance of permissible comments based on generalizations. It is important to emphasize that the type of generalizations at issue in this case are generalizations about substantive inequality.

It is against this backdrop that I approach the question of whether there should be a low or high threshold test. Although, as I have said, I have some sympathy for Devlin's position that judges should not be effectively rendered unaccountable by a high threshold test, the counterbalancing point is that a low threshold could simply invite frivolous claims from losing parties. The particularly troublesome aspect of this point is that there is, as Devlin acknowledges, reason to believe this would not happen randomly, i.e. that judges who do not fit the traditional mould would be more likely targeted. Is it sheer coincidence that the first time a Canadian judge is challenged for bias[125] based on race, that judge is Black and is concerned about racism against Blacks?

Devlin would meet the concern about who is challenged for bias by cautioning judges to be particularly sensitive to claims against women and minority judges, i.e. to contextualize the test. However, as Devlin himself has noted above, contextualization is no simple process. I am skeptical that this would in practice be an adequate response. Moreover, it is not simply a matter of which judges are being targeted, but also a matter of what issues they are dealing with and how they are dealing with them. A formal equality approach says that if no one talks about race, racial equality has been achieved, with the converse being that introducing race as a factor is introducing racial inequality. In contrast, a substantive equality approach says that if no one talks about race, but underlying racial inequality exists, racial inequality will be perpetuated, with the converse being that introducing race as a factor is for the purpose of producing racial equality. In other words, a formal equality approach says ignore race while a substantive equality approach says confront race, i.e. a formal equality approach brands a substantive equality approach as the antithesis of equality. Where equality is equated with impartiality and inequality is equated with bias, this has profound implications for the test for a reasonable apprehension of bias. Where there is such a tension between formal and substantive equality, a low threshold test for bias may simply invite a simplistic application of a formal equality approach which will render more complex substantive equality approaches vulnerable to challenges of bias. Moreover, even ultimately unsuccessful challenges arguing a reasonable apprehension of bias can place a judge under a cloud. To the extent that the choice of test matters, a low threshold test may well undermine diversity in the judiciary and hamper the development of equality jurisprudence beyond formal equality.

Thus in my assessment, the issue of test for the reasonable apprehension of bias is inextricably bound up with the treatment of social context. Whereas I am less critical than Devlin of Justice Cory's approach to the test for the reasonable

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[125] And it is significant that at first instance the claim was actual bias on the part of Judge Sparks, not just a reasonable apprehension of bias. *Ibid.* at 518.

apprehension of bias, I am more critical of Justice Cory's approach to social context.

Devlin

(ii) Social Context and Impartiality

A significant virtue in Justice Cory's position (like that of Justices McLachlin and L'Heureux-Dubé) is that he is explicit that it is neither possible nor desirable for judges to divest themselves of their experiences when pursuing their fact finding functions.[126] Whereas Major J.'s emphasis on the formalized rules of evidence treats decision-making as a quasi-scientific enterprise, Cory sees it as more of "an art than a science".[127] However, unlike the position of L'Heureux-Dubé and McLachlin JJ., Cory J. is worried about the dangers of generalizations in the context of assessing credibility.[128] It is undoubtedly true that there are large scale social patterns of discrimination and inequality based upon race, gender, class, (dis)ability, sexual orientation and that it is essential for every judge to bear these in mind in carrying out his or her functions. But they are exactly that: *patterns*. Such patterns provide us with overviews and insights of the problems that we deal with (and are therefore essential starting points) but they are always too general to be determinative guides to appropriate action in particular situations. To change the metaphor, the structural forces of race and gender frame the context but they cannot provide the requisite specificity to focus the lens of judicial decision making.[129] The problem with generalizations is that, depending upon exactly what they might say, they can be inherently polyvalent: they can capture an element of truth and reality but they can also be very misleading. Thus, inevitably, it will all depend upon the particular statements made and the facts of a particular case.[130] In sum, Cory J. is probably correct to say that as a "general rule [or]... proposition...judges should avoid making comments based upon generalizations when assessing the credibility of individual witnesses...".[131]

Thus I have some sympathy with Cory J. when he suggests that some of Sparks J.'s comments are "troubling"[132] or "worrisome"[133], although not when he says they are "inappropriate"[134], "unfortunate"[135], "unnecessary"[136] or "very close to the line"[137]. This is not because I, personally, have many doubts about the problematic racialized nature of Nova Scotian society or that the Halifax police force may overreact when dealing

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[126] *Ibid.* at 533-534, 537-538.

[127] *Ibid.* at 537.

[128] *Ibid.* at 537-538, 544-545.

[129] Cory J. for example argues that even though the battered woman syndrome has now been recognized as an important social reality, its particular significance has to be demonstrated in each case. *Ibid.* at 535-536.

[130] *Ibid.* at 535.

[131] *Ibid.* at 539.

[132] *Ibid.* at 544-545.

[133] *Ibid.* at 545.

[134] *Ibid.* at 546.

[135] *Ibid.* at 544, 547.

[136] *Ibid.* at 547.

[137] *Ibid.* at 545.

with Black youth. Rather, the nature of my concern is that when any judge speaks in terms of generalizations there is a real danger of mischaracterization, misunderstanding and the dangers of both over and under inclusion. Cory J.'s approach therefore urges all of us to pause before we jump to conclusions, it suggests to us that we be self-reflexive before we make generalizations, and it encourages us to be modest about the scope and depth of our knowledge.[138] My own view is that, depending upon our own backgrounds and experience, we inhabit significantly different social contexts, that although these contexts inevitably interact, intersect and overlap, there are still problems of "deep diversity".[139] Consequently, and in this regard I might be seen as a skeptic, I think that all attempts to cross the structural patterns that divide us (whether it be on the basis of race, gender, or (dis)ability) are troubling. Cory J.'s position does not counsel that we should not continue to try to come to terms with each other; but it does suggest that we must always proceed with caution. In short, I think that Cory J. demonstrates appropriate deference to the experience of Sparks J. He analyses the various comments at length, carefully and with a critical eye. He reads them not only in the light of broader social relations, but also in the context of the evidence presented and the precise determinations of Judge Sparks as she related, though perhaps somewhat inelegantly, the determinations back to the testimonies of the witnesses.[140] Such an approach, rightly in my opinion, does not confuse deference with abdication of the judicial function of an appellate court.

Where I disagree with Cory J., however, is in his ongoing commitment to the traditionalist ideal of impartiality. Although, on one level, he seems to be quite attuned to the challenges generated by a heterogeneous and multicultural society,[141] he is adamant that we must maintain the "cardinal rule" of neutrality.[142] Moreover, in the context of assessing credibility he states that "[a]t the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics."[143] To the extent that he elaborates that he means that there should be no automatic assumption that one class of witnesses (for example, police officers) is presumptively more credible than another,[144] this is unobjectionable. But to the extent that this treats witnesses as simply individuals, then it can ignore the contexts from which individuals emerge and how these contexts might have an impact on how such persons "perform" in court. A common example is the suggestion that often Aboriginal persons are reluctant to make eye contact with a person in authority. Historically, it has been said that often judges took this as a sign of untruthfulness. Now we are told that a lack of eye contact may

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[138] In this sense, I would suggest that this position reflects some elements of what I have called a "situationalist approach to impartiality." See "Suspicious Minds," *supra* note 3 at 14-20.

[139] See generally J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Cambridge University Press, 1995).

[140] *R.D.S., supra* note 1 at 544-547.

[141] *Ibid.* at 524.

[142] *Ibid.* at 533.

[143] *Ibid.* at 538.

[144] *Ibid.*

be motivated by a tradition that characterizes this as respect.[145] For a judge to pay no "regard" to an Aboriginal person's race when giving testimony would, therefore, be to treat that person unequally. In other words, it is to slip back into the myth that "colour blindness [is] cultural neutrality".[146]

Thus, although Cory J.'s decision is vitiated by some significant problems it does manifest some virtues: it recognizes that Canadians operate in a heterogeneous and multicultural social context;[147] it acknowledges that it is impossible for a judge to "discount" his or her life experiences;[148] and it indicates that determinations of credibility may require judicial intervention rather than passivity.[149]

Pothier

Although I agree with Devlin that one should always proceed with caution in trying to understand something beyond one's own experience, I am much more troubled by Justice Cory's decision than is Devlin. Although I see very substantial differences between Justice Major and Justice Cory, in some respects I see traces of Justice Major's analysis in Justice Cory's judgment.

I reach that conclusion based on how they assess what happened in this case. For Major J., as described above, the fact that Judge Sparks put race on the table automatically meant that she was deciding the case based on stereotypes and not on evidence. Although Cory J. does not express it in such extreme terms as Major J., I think Cory J. ultimately also falls into the trap of assuming that there is an either/or choice - basing decisions on evidence or on generalizations. For example, he explains:

> it is also the individualistic nature of a determination of credibility that requires the judge, as trier of fact, to be particularly careful to be and to appear to be neutral. This obligation requires the judge to walk a delicate line. 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. 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.
>
> When making findings of credibility it is obviously preferable for a judge to avoid making any comment that might suggest that the determination of credibility is based on generalizations rather than on the specific demonstrations of truthfulness or untrustworthiness that have come from the particular witness during the trial.[150]

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[145] R. Ross, *Dancing With a Ghost: Exploring Indian Reality* (Markham, Ontario: Octopus Publishing Group, 1992) at 4.

[146] "Suspicious Minds," *supra* note 2 at 434-437.

[147] *R.D.S., supra* note 1 at 524.

[148] *Ibid.* at 537-538.

[149] *Ibid.* at 537.

[150] *Ibid.* at 537.

He thinks Judge Sparks' decision is "very close to the line"[151] because, although he finds grounding in the evidence for her decision, he sees some basis for concern that generalizations overtook the analysis.

In part the issue is one of sequence. Did the generalization come first, and therefore determine the analysis, or did the finding on the evidence come first, and then get reinforced because it accords with the generalization? In reading the structure of Judge Sparks' oral judgement, the latter is what happened. That is obviously not conclusive; as I pointed out in my discussion of the reasonable apprehension of bias test, decisions can be rationalized differently from how they were actually made. Moreover, it is unrealistic to assume that decisions are made on a step by step basis with each step in splendid isolation from each other. The real point is one of emphasis, with the ultimate question being whether the decision was based on evidence.

Justice Major reaches the conclusion of a reasonable apprehension of bias on the assumption that generalizations *controlled* Judge Sparks analysis. Although Cory J. does not automatically *assume* that, he does automatically *worry* that that is so. Hence the general rule is not to make generalizations in the context of credibility of individual witnesses, and the exceptional circumstances have to be carefully scrutinized. Cory J., with hesitation, decides that Judge Sparks' comments can survive that scrutiny, but just barely.

Justices L'Heureux-Dubé and McLachlin, in contrast, approach the case on the basis that contextualization and generalization *informs* the analysis, and assists in an explanation, rather than being controlling. As noted above, they are more explicit about this in the *Malott* case than in *R.D.S.*[152] In my assessment, McLachlin and L'Heureux-Dubé JJ. are closer to the mark both in this case and generally. I do not disagree with Devlin that one should always treat generalizations with caution, a point that Justice L'Heureux-Dubé herself makes in *Malott*.[153] Where I differ from Cory J. is in the implicit assumption that the non-articulation of generalizations is, by definition, neutral. In the context of *R.D.S.*, putting race on the table is no more worrisome than, and in the context probably even less worrisome than, assuming *a priori* that race is *not* a factor. In other words, one is making generalizations no matter what. To talk about race assumes that race may be a factor; to not talk about it assumes that race is not a factor. Talking about race is thus the more nuanced and careful approach because it is only raising possibilities, whereas not talking about race involves a categoric, even if unarticulated, conclusion that race is irrelevant.

These different perspectives on what is the role of contextualization are closely related to the outcome. If something is controlling, one wants to be very circumspect; if something is informative but not controlling, there is less cause for concern. Having said that, it does not follow that all generalizations and all attempts at contextualization are appropriate. There needs to be some valid basis for the generalization, which sometimes will be assisted by expert evidence. Further, generalizations and assumptions must be checked against *Charter* values, especially of equality. As argued by the Appellant, what Judge Sparks said was fully in tune with *Charter* values of

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[151] *Ibid.* at 545.
[152] *Supra* note 90 at 144.
[153] *Ibid.* at 142.

equality.

Viewing Judge Sparks's comments in this light not only explains why they should not give rise to a reasonable apprehension of bias, it also explains why I do not agree with Cory and Iacobucci JJ. that the remarks were "unfortunate",[154] "troubling",[155] "inappropriate",[156] "worrisome"[157] or "unnecessary".[158]

Thus while I agree with Devlin that it is necessary to be somewhat more skeptical and careful about contextualization that the judgment of L'Heureux-Dubé and McLachlin JJ. acknowledges, I am of the view that the judgment of Cory J. overly incorporates that caution.

VII. CONCLUSION

There is no easy way to resolve the dilemma faced by the Supreme Court. Generalizations are frequently necessary, but always dangerous. The challenge we face is ultimately normative: some generalizations are justifiable, others are not. The difference between the proposition that prostitutes tend to lie in complaints of sexual assault, and the proposition that police officers might lie when dealing with non-white youth is ultimately dependent on deeper personal commitments, commitments that are premised upon the relations of power that pervade our society. But there may be one way in which we can proceed. On several occasions, Cory J. refers in passing to the idea of "a realistic possibility".[159] We would suggest that given the history and nature of systemic racism in Canadian society, in light of the fact that there have been several recent reports which document widespread discrimination against minorities in Canadian criminal justice system,[160] then there is a "realistic possibility" that police officers might either mislead the court or overreact when dealing with a "non-white youth". No similar research supports propositions that prostitutes tend to lie in complaints of sexual assault. Consequently, in our opinion, this justifies a judge in paying particularly careful attention to the evidence involving such police officers so as to ensure that the pattern of discrimination (whether intentional or not) is not being repeated. Indeed, an argument might be made that, to the extent that the Supreme Court has interpreted section 15 to allow for differential treatment to ensure equality, it might be suggested that on occasion a judge may have a constitutional responsibility to treat witnesses differently in order to achieve a fuller understanding of the totality of the evidence.

R.D.S. has caused a significant challenge for the Supreme Court of Canada for it calls into question two shibboleths of the Canadian legal system: neutrality and impartiality. As this comment has indicated, the Court is deeply split, both methodogically and substantively, on how to proceed. While we have indicated our

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[154] *Supra* note 1 at 544.

[155] *Ibid.* at 544.

[156] *Ibid.* at 546.

[157] *Ibid.* at 545.

[158] *Ibid.* at 547.

[159] *Ibid.* at 536, 544.

[160] See, *e.g.* the *Marshall Inquiry*, *supra* note 43 and *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, vol.1 (Toronto: Queen's Printer, 1995).

support for the majority reasons, we have somewhat different visions of where the law might go from here. We believe that the issue of impartiality in a multicultural society has not been resolved in this decision, but the majority of the Court has clearly acknowledged that colour blindness is not necessarily synonymous with impartiality. This marks an important beginning.