

# Finding and Following "The Road Less Travelled": Judicial Neutrality and the Protection and Enforcement of Equality Rights in Criminal Trial Courts

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The Honourable Judge Donna HACKETT\*

Enforceable equality rights have only existed in Canada since section 15 of our *Charter of Rights and Freedoms* came into force on April 17, 1985. As a result, equality seekers' expectations about our courts' ability to protect and enforce those rights are high and immediate. In the words of The Honourable Charles Dubin, former Chief Justice of Ontario:

*I cannot recall a time in my career when there has been a greater demand on our profession and our justice system, nor a time of higher expectations [...] The members of the Bar and judiciary [...] have only one mandate and one purpose and that is to serve the public, but we can only do so as long as we continue to have their confidence [...] That confidence however, must be earned and not assumed, and we must earn it by the way that we conduct ourselves every day and in every case, not only in the courtroom but outside as well [...] We must recognize the ever-changing society that we serve. We have witnessed [...] a new demographic landscape, and a dramatic increase in our cultural diversity. There is no longer one dominant group or culture. We are living in a society that is increasingly pluralistic. There are many who claim that in the past their concerns were unattended, and they now claim appropriate treatment with respect to their gender, their colour, their sexual orientation, and their religious beliefs. They claim that in the past, it was the one dominant culture which received attention. They now call for particular attention to their needs. To meet the demands and expectations of our fast changing society, the justice system must inquire into itself and be its constant monitor.<sup>1</sup>*

As part of this inquiry, the question I would like to explore in this paper is whether our criminal trial courts are protecting and enforcing equality rights. I will attempt to answer this question from the perspective of one criminal trial judge.

While presiding in Scarborough, Ontario, over the last six years, I have never had an equality rights issue raised by counsel. To put this into some perspective, Scarborough's

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1. C. Dubin, "Speech to the Advocates' Society" (1994) 27 *Spec. Lect. L.S.U.C.* 201.

criminal trial court is one of the busiest in Canada and I have heard approximately 18,000 cases since my appointment. Can one safely conclude from this that there have not been any equality issues in my court? I think not.

To test the significance of my experience, I asked six of my colleagues about their experiences and found them to be no different from my own. Together, we have approximately 30 years of service on the bench, which represents roughly 100,000 cases in the Toronto region. Can one therefore conclude that there have not been any equality issues in criminal trial courts in our region? Again, I think not.

I would venture to say that our experience is not much different from other criminal trial courts throughout the country. If anything, since our jurisdiction serves an extremely diverse population,<sup>2</sup> one could reasonably argue that we are more likely to have had a greater number of equality issues than some more homogeneous communities. From this, can one conclude that there have not been any equality issues in criminal trial courts in Canada? Obviously not. In fact, in a number of cases my colleagues and I have recognized and raised equality issues which were not identified by counsel. I call this the road less travelled.

Before examining this road, I want to first consider why these issues are so rarely brought to the attention of criminal trial judges by counsel. I think there are three important reasons. Firstly, in Canada, where democracy and the rule of law are alive and well, the principle of equality is generally widely accepted, but often taken for granted. Unlike in many other countries, there is a level of comfort enjoyed by most Canadians which makes it more difficult to notice and appreciate the issues faced by those who are disadvantaged within our own country. This contentment has a broad dampening effect on the public's concern about domestic equality issues and, more specifically, on the recognition of these issues in our criminal trial courts.

Secondly, for generations, the vast majority of our laws and related procedures have developed without regard to equality rights. Since the practice of law is steeped in precedent and custom, the influence of the "pre-equality-rights-era" is still a strong factor in both the interpretation and application of our laws. At times, assumptions about the continued correctness of past rules and procedures can be blinding to current equality issues and the importance of being impartial between the familiar past and the need for change.<sup>3</sup>

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2. In 1992, for example, our court provided translation services in 4,634 cases in 61 different languages including: Amharic, Cantonese, Dari, Tagalog, Gujarati, Hindi, Hungarian, Loatian, Pashtu, Punjabi, Russian, Shanghai, Sign, Slovak, Somali, Swaheli, Tigrigna, Tui, Ukrainian and Vietnamese.
  3. For example, at common law a woman's word alone was recognized as sufficient to found a conviction for murder and other offences, but *not* for sexual offences. Our law dictated that it was dangerous to convict in such matters unless the complainant's evidence was corroborated. The legal changes to address this inequity are particularly fascinating. The first attempt was in 1976, when an amendment to the Criminal Code repealed the required "dangerous to convict"

A third important factor which contributes to the invisibility of equality issues is that the disadvantaged usually do not have an advocate in trial courts for a wide variety of reasons. One reason is that the vast majority of trial lawyers and judges were not educated about equality rights issues at law school because the Charter was not even in force at that time. The situation is obviously different in appellate courts, where intervenors and some appellate counsel specialize in this area.

I turn now to some examples of equality issues which my colleagues and I have identified, but which were not raised by counsel.

The first situation arose during an argument about the introduction of the past sexual conduct of a complainant in a sexual assault trial.<sup>4</sup> The defence took the position that this issue presented a contest between *Criminal Code*, section 276,<sup>5</sup> which generally

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charge to a jury in cases of uncorroborated sexual allegations. In the years following, the government recognized that despite the deletion of what they felt was an outdated, inequitable legal requirement, judges, in their discretion, still persisted to give "this dangerous to convict charge". See *R. v. Camp* (1977), 36 C.C.C. (2d) 511 (Ont. C.A.). Consequently, in the early 80's, the legislature made another attempt to bring about legal equality by adding the requirement that judges shall not charge the jury with this caution, thereby removing their discretion. See section 274 *Criminal Code*, R.S.C. 1980-81-82-83, c. 125. For more detail about the history and purpose of these and other related sexual offence amendments, see "The larger legal context" described by L'Heureux-Dubé J. in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.) at 345-355 [hereinafter *Seaboyer*]. Some child advocates feel that a similar situation has now developed in judicial charges involving the unsworn evidence of children subsequent to the recent repeal of the former corroboration requirement in section 16 of the *Canada Evidence Act*. See the *Act to Amend the Criminal Code and Canada Evidence Act*, S.C. 1987, c. 24, ss. 15, 18 proclaimed January 1, 1988.

4. *R. v. M.(B.) C. (H.) and D.(K.)* (Ont. Prov. Ct.), during proceedings commenced on May 7, 1993 [unreported].
5. Section 276 of the *Criminal Code* provides:
  - (1) *In proceedings in respect of an offence under sections 151, 152, 153, 155, or 159, subsections 160(2) or (3) or sections 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant*
    - (a) *is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or*
    - (b) *is less worthy of belief.*
  - (2) *In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence*

prohibits the introduction of such material except in limited circumstances, and sections 7 and 11(d) of the Charter, which encompass an accused's right to make full answer and defence. Counsel for the accused submitted that this contest could be quickly resolved because an accused's Charter rights clearly prevail over a mere provision of the *Criminal Code*.

In my search of the road less travelled, I posed the question to both counsel, "What about section 15?" In response, they both reached for Martin's *Criminal Code*, flipped a few pages and looked at me in a state of confusion. It was readily apparent that they had both turned to section 15 of the *Criminal Code* and not section 15 of the Charter. Section 15 of the *Criminal Code*, which deals with "obedience to *de facto* law" was, of course, totally irrelevant. Section 15 of the Charter, on the other hand, was most relevant.<sup>6</sup> Neither counsel was aware of its existence in the context of that criminal proceeding, nor the relevance of section 15 for all past sexual conduct applications.

This is a particularly disturbing anecdote because it occurred more than 8 years after the equality provisions of the Charter came into force;<sup>7</sup> almost 10 years after Parliament passed the first past sexual conduct provision as an equality initiative;<sup>8</sup> more

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(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. [...]

6. Section 15(1) of the *Canadian Charter of Rights and Freedoms* provides:

*Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

7. All but section 15 of the Charter came into effect on April 17, 1982. Pursuant to section 32(2) of the Charter, there was a three year moratorium before section 15 came into force because governments recognized that there were inequities in their laws which had to be addressed beforehand. As a formal legal policy advisor to the Ontario government in the mid-1980's, I was involved in an internal audit of Ontario's laws which was designed to identify and address some of these inequities before section 15 came into effect on April 17, 1985. Similar audits were done across the country.

8. This purpose is referred to by L'Heureux-Dubé J. in *Seaboyer*, *supra* note 3 at 352:

*The failure of the courts, as was indicated earlier, both to take cognizance of and to implement the objectives of Parliament in this earlier legislation, combined with further criticism of the manner in which complainants of sexual offences were treated, generated a sweeping set of reforms in 1982. The Honourable Jean Chrétien, then Minister of Justice and Attorney-General of Canada, articulated the principles underlying this second, larger reform package in this manner:*

The inequality of the present law has placed an unfair burden on female victims of sexual

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assault. *It has added to the trauma, stigma and embarrassment of being sexually assaulted, and has deterred many victims from reporting these serious crimes to the police. Bill C-53 would alleviate that legal impediment which allows this to occur ... I am pleased to note that there appears to be widespread support for the four basic principles underlying the bill, namely the protection of the integrity of the person\*, the protection of children and special groups, the safeguarding of public decency, and the elimination of sexual discrimination.* (Emphasis added.) (Standing Committee on Justice and Legal Affairs, Minutes of Proceedings and Evidence, Issue No. 77, April 22, 1982, at 77:29).

than 2 years after the Supreme Court struck down that legislation, but referred to equality principles to analyze the previous state of the law and create new common law;<sup>9</sup> and over a year after Parliament passed the second past sexual conduct provisions in response to *Seaboyer*, again for the stated goal of equality.<sup>10</sup> The importance of equality in this latest amendment is evident in the wording of the new section 276 of the Code which provides that an accused's right to make full answer and defence must be balanced with other factors, including a complainant's right to personal security and full protection and benefit

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\* Comment: It can be argued that "integrity of the person" referred to by the then Minister of Justice is the same as what is now everyone's right to "security of the person" under section 7 of the Charter.

9. In *Seaboyer*, *supra* note 3 at 403, speaking for the majority, McLachlin J. considered section 276 *Criminal Code*, R.S.C. 1985, c. C-46:

*The objective of the legislation [...] is to eradicate the erroneous inference from evidence of other sexual encounters that the complainant is more likely to have consented to the sexual act in issue or less likely to be telling the truth. The subsidiary aims are to promote fairer trials and increased reporting of sexual offences and to minimize the invasion of the complainant's privacy. In this way, the personal security of women and their right to equal benefit and protection of the law are enhanced.*

The emphasized phrases are strikingly similar to sections 7 and 15 of the Charter. After finding that the then section 276 was unconstitutional and therefore unenforceable because it was too broad in its effect, the court stated at 406:

*The first question is whether the striking down of s. 276 revives the old common law rules of evidence permitting liberal and often inappropriate reception of evidence of the complainant's sexual conduct. [...]*

*The answer to this question is no. The rules in question are common law rules. Like other common law rules of evidence, they must be adopted to conform to current reality. As all counsel on these appeals accepted, the reality in 1991 is that evidence of sexual conduct and reputation in itself cannot be regarded as logically probative of either the complainant's credibility or consent. The twin myths which s. 276 sought to eradicate are just that — myths — and have no place in a rational and just system of law. It follows that the old rules which permit evidence of sexual conduct and condoned invalid inferences from it solely for these purposes have no place in our law.*

10. *Ibid.* R.S.C. 1992, c. 38, s. 2.

of the law.<sup>11</sup> These latter two factors are obviously referable to a complainant's rights pursuant to sections 7 and 15 of the Charter.<sup>12</sup>

Unfortunately, this case is not an isolated example. Defence counsel still frequently start to cross-examine sexual assault complainants on their past sexual conduct without making the mandatory section 276.1 application. As recently as this week, this occurred twice in my court, which is striking because it is now over four years since section 276 came into force. Sometimes, Crown Counsel do not even object and the trial judge is left in the very uncomfortable position of intervening because Parliament, intentionally, left no room for judicial discretion in the application of section 276.<sup>13</sup>

The purpose of referring to these examples is not to fault anyone for problems which are clearly systemic in character, but rather to dispel any belief that these issues are regularly being identified and acted upon in our trial courts. In my view, the delay in

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11. Section 276(3) *Criminal Code* provides:

*In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account*

- (a) the interests of justice, including the right of the accused to make a full answer and defence;*
- (b) society's interest in encouraging the reporting of sexual assault offences;*
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination;*
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;*
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;*
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;*
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and*
- (h) any other factor that the judge, provincial court judge or justice considers relevant.*

The privacy interests of complainants at issue in *Seaboyer* and more recently in third-party disclosure cases (see *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.)) are based upon a complainant's right to security of the person under section 7 of the Charter, which is analogous to the "integrity of the person" objective articulated by the government in relation to the 1980-1983 sexual assault amendments, *supra* note 8.

12. *Supra* note 6 for most of section 15 of the Charter.

13. The absence of discretion may be related to historical problems with the implementation of other equality amendments and the exercise of judicial discretion with respect to them, *supra* note 3.

integrating section 276 into the day-to-day practice of criminal law is a consequence of systemic resistance to change and a general contentment with previous laws and their assumed correctness. It may also reflect the ongoing or lingering effect of the "rape myths" discussed in the majority judgment in *Seaboyer*.<sup>14</sup> Whatever the cause, the resulting delay has had an effect on the protection and enforcement of equality rights.

Another factor underlying this delay relates to the fact that criminal law and equal rights have generally been seen as very distinct legal fields. The necessary and inherent overlap between them often remains invisible because, historically, equality rights were of no enforceable relevance to criminal proceedings. Many recent legal amendments,<sup>15</sup> policy and practice initiatives,<sup>16</sup> and judicially directed changes to the common law<sup>17</sup> have all dramatically affected the practice of criminal law by addressing legal disadvantages previously faced by women, children, minorities and persons with mental disabilities. Is

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14. *Supra* note 3 at 386.

15. In relation to gender as an enumerated ground under section 15, the following amendments are relevant: R.S.C. 1980-81-82-83, c. 125 including: deletion of corroboration charge (s. 274), recent complaint abrogated (s. 275), past sexual conduct restrictions (s. 276), reputation evidence prohibited (s. 277), marital rape an offence (s. 278), and bans on publication (s. 486); R.S.C. 1985, c. 23, s. 7 including victim impact statements (s. 735(1.1)), exclusion of the public (s. 486(2.1)), closed circuit TV (s. 486(2.2)), limit on an accused cross-examining a complainant (s. 486(2.3)), support person (s. 486(1.2) and (1.3)) and videotaped evidence (s. 715.1); R.S.C. 1992 c. 38, s. 2 including past sexual conduct restrictions (s. 276) and new consent provisions (s. 273(1) and 273(2)); and R.S.C. 1993 c. 45, s. 2, criminal harassment (s. 264). In relation to race as an enumerated ground under section 15, see R.S.C. 1985, c. C-46 hate propaganda (s. 319). In relation to age as an enumerated ground under section 15, the deletion of the corroboration requirement for unsworn witnesses, *supra* note 3. In relation to mental disabilities, the recent revamping of the mental health related provisions of the Criminal Code R.S.C. 1991, c. 43, s. 4.

16. Historically, wife assault and stale-dated child abuse were not prosecuted before our courts. Recent policy and practice changes have greatly increased the number of these cases coming before our courts over the last decade and a half. Victim-witness programs for victims of traumatic offences such as child abuse, sexual assault and domestic violence have also developed over this time period. More recently, mental health care workers have been placed in some courts to assist accused and their families, and mental health diversion programs have been implemented. Policy directives have also instructed Crowns to use evidence of racism as an aggravating sentencing factor.

17. Besides *Seaboyer*, *supra* note 3, see *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.) which, for the first time, interpreted self-defence in section 34(2) Criminal Code as including a battered woman acting in circumstances where there was no immediate danger but where she had a genuine fear for her life and would be unable to physically defend herself in a situation of immediate danger; *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.) which, for the first time, interpreted bodily harm under the Code as including psychological harm from the trauma of sexual assault; *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 200 (S.C.C.) which, for the first time, held that it is not always appropriate to apply adult standards to children's evidence in the assessment of children's reliability and credibility; *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.) [hereinafter *Khan*] which, for the first time, admitted an out-of-court-statement of a child on the basis of necessity and reliability, thereby expanding common law hearsay exceptions in the interest of protecting children.



it mere coincidence that these changes all relate to equality issues and have all taken place as or soon after section 15 of the Charter came into force? I think not. These decisions and initiatives are more often described as political responses to special-interest groups, as opposed to calculated responses to section 15 the Charter<sup>18</sup> and international conventions<sup>19</sup> under which governments and courts have legal obligations to honor the equality rights of those who have historically been legally disadvantaged.

On the issue of invisibility, it is fascinating to note that while the majority decision of the Supreme Court in *Seaboyer* considered and relied upon the principle of "equal protection and benefit of the law" for complainants,<sup>20</sup> it never referred to section 15 of the Charter as the source of this principle. This is despite the fact that section 15 was specifically argued before that Court by the Women's Legal and Education Action Fund, as an intervenor. As a result, *Seaboyer* is generally characterized as an exercise of judicial discretion which has dramatically evolved under common law, while the agent motivating this change, section 15, remains hidden. To further illustrate this point, it is interesting to review the annotations in the 1997 *Martin's Annual Criminal Code*<sup>21</sup> under section 15 and section 7 of the Charter. Under section 15, there is no reference to *Seaboyer* in the context of the right of all Canadians to receive equal protection and benefit of the law; whereas, in contrast, under section 7, there is a reference to *Seaboyer* in relation to an accused's right to a fair trial in accordance with principles of fundamental justice.<sup>22</sup>

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18. *Supra* note 8.

19. Canada is a signatory to the International Convention on the *Elimination of All Forms of Discrimination Against Women (C.E.D.A.W.)*. As part of Canada's obligations under this convention, the provincial and federal governments are obliged to periodically report to the United Nations on what they have done to fulfil their obligations under that agreement. As a legal policy advisor in the mid-to-late 1980's, I was responsible for preparing Ontario's contribution to this report. The many domestic and sexual assault policies and legislative initiatives in that decade were included in Canada's report as examples of efforts to bring about equality for Canadian women under that Convention. See also the *International Convention on the Elimination of All Forms of Racial Discrimination*, 1970, Can. T.S. 1970, No. 28, arts. 4, 5, which Canada is bound by. In *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Keegstra*] at 39, Chief Justice Dickson spoke of the effect that international laws have on our domestic laws:

*Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself: Reference re Public Service Employee Relations Act (1987), 38 D.L.R. (4th) 161 at 184, [1987] 1 S.C.R. 313, [1987] 3 W.W.R. 577, per Dickson C.J.C. Moreover, international human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under s. 1.*

20. *Supra* note 9.

21. *Martin's Annual Criminal Code*, 1996, Canada Law Book Inc.

22. Similarly in *Canadian Charter of Rights and Freedoms* (1995), by Meehan, Cuddy, Elkin, Fairley, Fera, Martland, Rankin, Richard, and Wake, and *Equality Rights and Fundamental Freedoms* (1996), by Sproat, there are also references to *Seaboyer* under the annotations for section 7, but none under section 15.

Unlike in *Dagenais v. Canadian Broadcasting Corp.*, where the majority of the Supreme Court of Canada confronted the conflict between competing Charter rights (section 2(b) freedom of expression and section 11(d) fair trial) and gave them equal status,<sup>23</sup> three years earlier in *Seaboyer* the Court avoided pitting section 15 against section 7 and section 11. Besides *Seaboyer*, I believe that the results in *McCraw*, *Lavallee*, *B.(G.)*, and *Khan*<sup>24</sup> are other examples which illustrate how traditional criminal law has been invisibly influenced by section 15 of the Charter. Equality rights are being and will continue to be interwoven into the fabric of our criminal law alongside of an accused's Charter rights.

A useful quotation about the coexistence and inter-relationship between Charter rights is found in the majority judgement of Mr. Justice La Forest in *Lyons v. R.*<sup>25</sup>:

*Before entering into a detailed discussion of the issues, it may be useful to note that this case exemplifies the rather obvious point that the rights and freedoms protected by the Charter are not insular and discrete; [...] Rather, the Charter protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada [...] and the particularization of rights and freedoms contained in the Charter thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the Charter as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.*

In dissent in *Seaboyer*, Madam Justice L'Heureux-Dubé refers to *Lyons* and the interaction of the complainant's, society's and the accused's interests and then uses section 15 in a section 1 Charter analysis to find that the infringement of section 7 and section

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23. (1994), 94 C.C.C. (3d) 289 (S.C.C.), at 316-317 [hereinafter *Dagenais*], Lamer C.J.C.:

*The pre-Charter common-law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the Charter, and in particular, the equal status given by the Charter to ss. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common-law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.*

24. *Khan*, *supra* note 17.

25. (1987), 37 C.C.C. (3d) 1 (S.C.C.) at 20.

11(d) by the former section 276 Criminal Code is demonstrably justified in a free and democratic society.<sup>26</sup> This interactive rights approach is used later by the Supreme Court of Canada in both *Keegstra* and *Dagenais*.<sup>27</sup> In fact, I would argue that the interaction of the accused's and the complainant's rights is exactly what led to the majority result in *Seaboyer*, although it was never articulated as such.

To return to the past sexual conduct case which was before me, after we sorted out which section 15 I was referring to, counsel then made their submissions. This "judicial activism" necessarily brings me to the question of judicial neutrality and independence. What does and should a trial judge do when she or he sees an equality issue which has not been identified or argued by counsel? Should the court remain silent, or should the court raise the issue and have it argued by counsel?

The answers to these questions are likely to vary based upon one's perspective and whether one starts from a position of defining this as:

- a) a question of judicial neutrality within an adversarial system where only the parties identify the issues; or
- b) a question of judicial neutrality within a system of criminal justice which has historically evolved without enforceable equality rights, but which is now obliged to protect and enforce those rights.

I subscribe to the latter perspective on the basis of the following four cases.

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26. In *Seaboyer*, *supra* note 3, Madam Justice L'Heureux-Dubé states at 370:

*The proposition that ss. 7 and 11 rights involve the consideration of interests outside of the confined interests of the accused has been endorsed by a majority of this court in R. v. Askov (1990), 59 C.C.C. (3d) 449, 74 D.L.R. (4th) 355, [1990] 2 S.C.R. 1199. In discussing the nature of the interests provided by s. 11(b) of the Charter, Cory J. for the majority, remarked at 474:*

*Although the primary aim of s. 11(b) is the protection of the individual's rights and provision of fundamental justice for the accused, none the less there is, in my view, at least by inference, a community or societal interest implicit in s. 11(b).*

And later at 374:

*I have made it clear throughout these reasons that the reform of the laws of sexual assault in general, and s. 276 in particular, are informed by a dedication to the goal of the eradication of sexual discrimination in the prosecution of sexual offences. Sections 15 and 28 of the Charter of Rights and Freedoms mirror the values which motivate the intervention of Parliament. These values have a legitimate role in shaping the s. 1 inquiry (reasons for judgement of Dickson, C.J.C. in R. v. Keegstra, *supra*, at pp. 43-4).*

27. *Keegstra*, *supra* note 19; *Dagenais*, *supra* note 23.

Firstly in *Dolphin Delivery*,<sup>28</sup> the Supreme Court of Canada dealt with the question of whether or not the judiciary ought to apply and develop the common law in a manner consistent with Charter principles, such as section 15, even in private disputes. The Court concluded that the judiciary should do so even in the absence of a Charter application. Secondly in *Brooks v. Canada Safeway Ltd.*,<sup>29</sup> where again there was no Charter application, the Supreme Court of Canada used section 15 of the Charter to interpret and apply the Manitoba *Human Rights Act* and thereby included pregnancy in sick leave benefits. Finally in *Keegstra* and *Dagenais*,<sup>30</sup> the Supreme Court of Canada said that the fundamental values contained in the Charter are relevant considerations in the interpretation and application of section 1 and other Charter rights.

Based on these cases, I believe that judges always have a duty to be mindful of equality rights in all aspects of their work, even if there is no Charter application before the court. I believe that this is true even if the issue is not raised by counsel because of appellate authorities which require trial judges to deal with legal issues affecting an accused's rights even when they are missed by counsel.<sup>31</sup> This responsibility should be no different when judges are dealing with the legal rights of other individuals.

If our written and common laws and society were unchanging, judicial impartiality would be a simple matter. Judges could simply sit back and let counsel "go to it". In reality, however, our written and common laws and society are ever-changing. Consequently, if judicial impartiality means that visible equality issues are to be ignored by judges unless counsel raise them, then judicial impartiality will become a barrier to the protection and enforcement of these new rights. Judicial impartiality must include the ability to step away from our legal past and assumptions about its continued correctness in order to see these new issues and neutrally and dispassionately interpret and apply our laws in a manner that is now sensitive to the experience of the disadvantaged and responsive to their rights. At the same time, we must be vigilant to distinguish valid claims of disadvantage from invalid assertions of discrimination.<sup>32</sup>

Unfortunately, raising and considering the perspective of the disadvantaged, even in accordance with principles of law, may lead to a judge being labelled biased or

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28. *R.W.D.S.U. v. Dolphin Delivery Ltd.* (1986), 33 D.L.R. (4th) 174 (S.C.C.) at 198.

29. [1989] 1 S.C.R. 1219.

30. *Keegstra*, *supra* note 19; *Dagenais*, *supra* note 23.

31. See *Powell v. R.* (1976), 28 C.C.C. (2d) 148 (S.C.C.) and *R. v. A.F.* (10 September 1996), [1996] O.J. No. 3033 (Ont. C.A.).

32. In *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.) at 34, Madam Justice Wilson stated: "s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society".

impartial because of the predominance of views which adhere to the status quo.<sup>33</sup> This may be particularly true if that judge has the same characteristics, background or experience as those in the affected disadvantaged group.<sup>34</sup> Judicial bias is too often defined by the majority in terms of fear that a judge will be improperly influenced by special interest groups. Meanwhile, the disadvantaged define it in terms of a judge being improperly influenced by the status quo interests of the advantaged majority. In my view, there must be a middle ground or a road less travelled which represents the true meaning of neutrality in the "post-equality-rights-era". In a free and democratic society which now strongly embraces equality as part of its rule of law, true judicial impartiality and independence must include the ability to see both the position of the majority or status quo and the position of equality-rights seekers.

Let me illustrate the road less travelled with some other examples of equality issues which have been identified by criminal trial judges, but not raised by counsel.

More and more mentally-challenged accused and complainants have been appearing in our courts over the last five years than ever before. Under human rights laws, the government has a duty to accommodate disabled persons and provide them with equal access to its courts. Traditionally, this law has been used to provide physical access to courts by means of ramps and specially-fitted washrooms. When you combine this duty to accommodate with a mentally disabled person's right to equal protection and benefit of the law, important non-physical access issues arise within the courtroom.

I have presided in over a dozen trials involving mentally-challenged accused and/or complainants. Often persons with mental disabilities have impaired memories. As a result, their evidence, or at the very least a portion thereof, can disappear or significantly deteriorate before they even get into a witness box in a busy jurisdiction. For example, in Scarborough, summary trials are scheduled between 12 and 18 months after a charge is laid and indictable trials can take up to two years to be reached. If you take the road less travelled, you end up asking, "How can these people ever receive equal protection and benefit of the law within a system and time frame designed for people with no memory problems?" If the individual in question is also an accused, his or her right to a meaningful opportunity to make full answer and defence will also be seriously impaired.

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33. In *R. v. LaPlante* (17 August 1996), (Ont. Prov. Ct.) [unreported] and *R. v. M.(B.) D.(K.) and C.(H.)* (23 June 1994), (Ont. Prov. Ct.) [unreported], I used section 15 to address the experience of mentally disadvantaged witnesses by admitting the evidence of family members about the witness' limitations *R. v. M.(B.)* and reopening the questioning of a witness to clarify a particularly confusing area because of the witness' limitations (*Laplante*). After both of these rulings and despite a very careful consideration of the accused's competing Charter interests, counsel asserted that the court had lost its appearance of neutrality and in one case, brought a mistrial application.

34. See the discussion of *R. v. S.(R.D.)* [1995] N.S.J. No. 444 (N.S.C.A.) leave to S.C.C. granted, D. M. Paciocco, "Judicial Notice: Using Sensitivity Training in Court" (Paper presented at the Ontario Provincial Court Criminal Judge's Association Regional Seminars, Spring 1997) [unpublished].

Given that equal protection and benefit of the law is now a right, our scheduling system must accommodate people with special memory needs in order to bring about an equal opportunity for their evidence to be heard and acted upon. While in many jurisdictions early trial dates are prioritized for adult in-custody and young offender matters, this does not mean that other individuals with equally important rights cannot be similarly accommodated. It must be remembered that the Supreme Court of Canada has recognized that treating all people the same will not necessarily bring about equality, nor will treating disadvantaged people differently necessarily result in inequality. Equality, as it has been interpreted by the Supreme Court of Canada, means equality in the result or effect.<sup>35</sup>

In one case after finding a mentally-challenged complainant to be an honest witness,<sup>36</sup> I rejected his reliability for a number of reasons. One factor was that the delay in processing his complaint had resulted in him not being able to remember things he had told the police eighteen months earlier. The scheduling of that case seriously undermined that witness' ability to receive equal protection and benefit of the law.

This scheduling issue is also relevant for child witnesses and the elderly who, because of special needs related to their age, may need early trial dates as well. The fact that we systematically fast-track all accused youth is some recognition that children's developmental needs are different from those of adults, as recognized in the *Young Offenders' Act* Declaration of Principles.<sup>37</sup> No doubt, if a specific request were made by counsel, attempts would be made to accommodate such witnesses. However, in my six years on the bench, I have never received such a request. Recently, a number of our judges have been taking the road less travelled in adult court by trying to identify cases involving child witnesses which might require early trial dates. Without this kind of intervention, a system which meets the needs of the majority can unintentionally extinguish the rights and interests of the disadvantaged and thereby increase their vulnerability.

Another area which falls into the category of the mentally-challenged on the road less travelled concerns the usual tools and measures employed by judges to assess a witness' reliability and credibility. Triers of fact constantly use consistencies or inconsistencies in time and sequencing as positive and negative factors, respectively, in

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35. *Supra* note 32 at 10, Mr. Justice McIntyre states that equality is a comparative concept and that:

*[i]t must be recognized at once, [...] that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.*

36. See *R. v. Laplante*, *supra* note 33.

37. *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 3(1)(c) provides:

*Young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance.*

coming to their conclusions. Cross-examination techniques, such as the use of hypotheticals, double negatives, sophisticated vocabulary and compound questions are standard tools. In the case of a mentally-challenged witness, these tools may not have the same value as measures of credibility and reliability.

In *R. v. Henshall*,<sup>38</sup> submissions focused on a mentally-challenged complainant's inconsistent or non-existent timing and sequencing of events and the weight to be applied thereto. The accused's mother testified that the complainant could not estimate time or sequence things. During argument, about this issue I queried counsel whether or not *R. v. B.(G)*<sup>39</sup> and section 15 were relevant considerations. In *R. v. B.(G.)*, Madam Justice Wilson stated at 219-220:

*While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children.*

It is interesting that the Supreme Court of Canada does not specifically refer to section 15 in *R. v. B.(G.)*. However, it is difficult to believe that the principle of providing equal protection and benefit of the law for children, as guaranteed in section 15, was not a factor underlying the social and legal context which led to this development in the law. In *Henshall*, I ultimately used section 15 and *R. v. B.(G.)* as a legal basis for not using a mentally-abled person's standards in the assessment of that mentally-challenged witness' evidence. An interesting aspect of this case was that one of the grounds of appeal was that I had erred in applying section 15 in these circumstances. The summary conviction appeal court upheld my decision, but made no reference to my use or misuse of section 15.<sup>40</sup> Subsequent to this trial, the British Columbia Court of Appeal dealt with a similar issue in *R. v. Pearson*<sup>41</sup> wherein Mr. Justice Taylor stated:

*We must, of course, ensure that those with mental and physical disabilities receive the equal protection of the law guaranteed to everyone by s. 15 of the Canadian Charter of Rights and Freedoms. This will sometimes require that their evidence be presented along with the evidence of others who are able to explain, support and supplement it, so that, to the extent that this is possible, the court will receive the account which the witness would have given had he or she not been disabled. But the evidence will, of course, still have to meet the high standard of proof always required when criminal*

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38. (3 September 1992), (Ont. Prov. Ct.) [unreported].

39. *R. v. B.(G.)*, *supra* note 17.

40. *R. v. Henshall* (14 October 1994), (Ont. Ct. Gen. Div.) [unreported].

41. (1994), 95 C.C.C. (3d) 365 (B.C.C.A.)

*charges are involved, because the liberty of the accused, and the importance of guarding against the injustice of convicting the innocent, require in these cases as much as any other a "solid foundation for a verdict of guilt": R. v. W.(R.), supra, at p. 143.*<sup>42</sup>

In some cases, the evidence of a mentally-challenged person will speak for itself in terms of whether or not there is any significance to sequencing or time problems and confusing responses to hypotheticals, double negatives, sophisticated language or compound questions. In others, it will not. It is sometimes helpful when counsel calls evidence from family members, teachers or experts about a mentally-challenged witness' general capabilities in these six areas. During an inquiry under section 16 of the *Canada Evidence Act* into the capacity of a mentally-challenged witness, I suggested that counsel call such evidence to assist the court and counsel in knowing what type of questioning would be meaningful.<sup>43</sup> Without such evidence, it may sometimes be difficult for triers of facts to assess some witness' communication skills and their testimony. In the case of an accused witness, the absence of such evidence and any resulting doubt would, of course, resolve in his or her favour. However, the incorrect use of traditional measures of credibility and reliability for an accused witness could lead to disastrous results. If the witness in question is a complainant, the absence of such evidence and any resulting doubt or inappropriate use of traditional measures could also frustrate his or her ability to use the criminal justice system to protect and enforce sections 7 and 15 Charter rights.

Problems also arise in assessing credibility and reliability in the context of language and translation issues which fall under the "origin" heading in section 15. In one recent case, a witness who was using a Tamil interpreter described reporting the incident to one particular person. According to the translation, the witness variably described this person as "aunt" and "mother-in-law". As a result of this confusion, the court queried the translator and was advised that the inconsistency was a result of the fact that in the witness' country of origin, such distinctions between relatives are not made. If counsel had taken issue with this information, evidence would have had to have been called.

In another similar case, the defence was vigorously cross-examining a witness from south Asia about her inconsistent description of a person as "cousin" and "sister". It was clear that the defence lawyer thought that she had struck "pay-dirt" and was belaboring the point. The judge, who had first-hand experience with this translation issue, pointed out to counsel that people from that part of the world do not use these North American/European distinctions and that further cross-examination in this area might not be particularly useful. Again, had any issue been taken about this information, evidence would have had to have been called.

One other related problem arises in Code section 705 applications for material witness warrants. When a witness has been personally served but does not attend for trial,

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42. *Ibid.* at 378.

43. *R. v. M.(B.)*, *supra* note 33.



counsel can request a warrant for the arrest of that witness. Usually during these applications, no evidence is given about the witness' English language skills. In a jurisdiction which contains recent immigrants, without such evidence, situations could arise where a witness, who is served and cannot read the subpoena or understand any accompanying oral instructions, is unfairly incarcerated. In such jurisdictions, it may be prudent to request proof of English proficiency during these applications.

Other issues may be less visible. In one case, a lawyer was cross-examining the accused's wife about a statement she had given to the police describing an assault on her by her husband. During that examination, the wife referred to having spoken with the lawyer sometime before the offence was alleged to have occurred. Being sensitive to a potential conflict of interest, the court questioned counsel and discovered that he knew the accused and witness before these events because they were from the same local cultural community and had all originated from Guyana. Further prodding revealed that the accused's lawyer had counselled both parties in his capacity as a Hindu priest within that community before he had become the accused's lawyer.

On the issue of disability, during the course of one preliminary inquiry, the condition of a complainant with Huntington's disease was deteriorating very quickly. The Crown called her doctor to testify. He indicated that the witness would likely die before trial and furthermore, that the stress of court and her disease would affect her ability to testify at the preliminary and require frequent breaks. At the initiative of one of my colleagues, not only was her request for breaks accommodated, but the preliminary inquiry was relocated from the courthouse to her nursing home where she could testify in a more relaxed and comfortable manner. In doing so, over the vigorous objections of the defence, the judge relied upon section 15 of the Charter.<sup>44</sup>

Another example of the road less travelled relates to religious equality under section 15 of the Charter and the problem created by the still common practice of asking all witnesses to take the Bible when swearing to tell the truth. For years in most courts, this was seen as a very reasonable procedure because it originated at a time when our population was more homogenous. Most clerks in Scarborough no longer take this approach thanks to one of our judges, who recognized this inequity and the problems it creates for witnesses from other religious backgrounds. As a result, we now have three holy books: the Bible, the Qur'an, and the Bhagavad-Gita in *all* of our witness boxes and our clerks now generally say, "Take the holy book of your choice. Do you swear to tell the truth and nothing but the truth?" These holy books were chosen on the basis of the most common religious groups in Scarborough.

During one case, a Muslim woman surprised everyone in the courtroom by refusing to swear on her holy book. This confounded counsel and the court because she would not explain why. Eventually, the judge remembered that within the Muslim faith

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44. *R. v. Ramroop* (7 July 1995), (Ont. Prov. Ct.) [unreported].

a woman is considered "unclean" and unable to touch her holy book while menstruating. Steps were then taken to receive her testimony in another manner.

There are other religious and/or origin issues which have been encountered by my colleagues. In one case, the court took the road less travelled by imposing an unusually light sentence for a repeat thief because the combination of her religion, origin and gender made her dependent upon a husband who was going to beat or otherwise severely punish her. Extraordinary steps were taken to refer her to community resources sensitive to her situation.

Unfortunately, there are bound to be some cases where everyone, including the judge, will miss important equality issues or be unable to accommodate the needs of the disadvantaged. For example, one family court colleague described a child protection case which was particularly difficult. The mental health and suicidal problems of a teenage Muslim girl were not being addressed by her family. This resulted in her being taken into the care of the Children's Aid Society (C.A.S.) and a judge subsequently ordered that she be put into emergency care. The girl was then placed in a non-Muslim home where there was a male child. Only subsequently was it recognized that there were enormous negative cultural, family, community, and religious consequences for this girl because of her having been in a residence with an unmarried boy. Despite many efforts, the C.A.S. was unable to accommodate this girl's need for a placement in a Muslim home without boys. In her family's eyes, the damage had already been done and they moved their daughter back to India to live with relatives. The court and the C.A.S. remain concerned that this girl's mental health was worsened by these events and would remain unaddressed and compounded by her separation from her immediate family, friends, community and country.

To avoid mistakes like this in multicultural communities, it is important for counsel and judges to be alert to and open-minded about matters that we may be unfamiliar with such as language barriers, dowries, arranged marriages, immigration issues, and the isolation faced by immigrants, especially women and girls who come from countries which still place them at serious economic, religious, social, political and legal disadvantage. Two other cases described by a colleague spring to mind in this regard. They both relate to situations where immigrant women in arranged marriages were cruelly abused, both physically and emotionally, by their husbands in circumstances so bizarre that by North American standards they sound incredible. In one, the husband felt that his arranged bride was no longer a good influence on their three sons and she was isolated and locked in one room of their home with only a mattress for a long period of time. In the other, the woman was pregnant with a female child and was therefore no longer in the favour of her husband. The court determined that this pregnant woman was being starved by both her husband and her mother-in-law and that she had to steal food to survive. In her case, there was also an issue about the inadequacy of her dowry which also related to her husband's contempt for her. Both of these women eventually came to the attention of the police because of what the court later determined to be assaults on them by their husbands. The multiple problems of language, isolation, religion, culture, immigration sponsorship and gender issues all contributed to the vulnerability of these women and the

difficulties they had in accessing our courts in order to obtain protection and security of their person.

These cases illustrate that it is important for judges to be familiar with all of the communities within their jurisdictions. Judges may need to ask questions about the experiences of others so that our own experiences do not lead to assumptions which bar others' access to justice. In delivering justice to everyone, the role of judges in an increasingly complex society in the "post-equality-rights-era" has become a real challenge, which will follow us well into the 21st century.

Disadvantaged Canadians expect and are entitled to have their equality rights protected and enforced by our courts. These rights are not separate from other areas of law, but rather they are an integral part of the fabric of our free and democratic society and our entire legal system.

Equality rights are important in the interpretation and application of all of our laws, in all our courts, all of the time.

Until the legal profession is filled with advocates who are trained to identify and argue equality issues, the challenge for our courts is to have the ability, when necessary, to take a perspective independent of the status quo and/or our own experiences in order to consider the experience of the disadvantaged in the application and interpretation of our laws. This challenge reminds me of the image of Robin Williams, as a teacher at a traditional boys' private school in the film "Dead Poets' Society", when he stood on his desk and challenged his students to find the strength to stand on theirs in order to see the world from a different perspective. As judges, we may sometimes need to figuratively "stand on our dais" in order to be able to see, protect and enforce the equality rights of the disadvantaged and thereby be truly independent and impartial.