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## Outside/In: Lesbian and Gay Issues as a Site of Struggle in the Judgments of Justice Claire L'Heureux-Dubé

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Outside/In: Lesbian and Gay Issues as a Site  
of Struggle in the Judgments of  
Justice Claire L'Heureux-Dubé

SHELLEY A.M. GAVIGAN\*

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Introduction

I have been asked to address and assess the contribution of Justice Claire L'Heureux Dubé to lesbian and gay equality struggles, a contribution that justly has been explicated, analyzed, and celebrated elsewhere.<sup>1</sup> Indeed, after my research assistant had collected a dozen cases, and twice as many articles, her leave-taking was both ominous and sceptical: "With the topic you have given yourself, I don't know how you are going to find something new to say." Fair enough. For, indeed, what can be said of Justice L'Heureux-Dubé that has not already been said: of her fearlessness, her tenacity, her passion, her compassion, her indefatigability, her unflinching commitment to equality, and the fact she is not afraid of the "F" (for feminist) word, not to mention the "L" (for lesbian) and "G" (for gay) words, nor does she hesitate to challenge the "really Big F" (for Family) word. What more can be said? That she has never been afraid of bringing the outside in. That she starts with the experience of the "other"—the one or ones whose voices and experiences have not been welcome or well heard by the law. In the context of criminal law, she starts with the harm done and the experience of the victim (a challenge for many of us schooled in the sensibilities of the subjectivist tradition and attentive to the rights of the accused). In equality litigation, she starts with the experience of the equality-seeking group. When lesbians and gay men began taking their

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lives to the Supreme Court, she was not afraid of what she saw. And, importantly, she incorporated the insights of feminism when she turned her mind to their claims.

### The Judgments

In the current context, one might be forgiven for succumbing to the temptation to adopt the generic “relationship recognition” or “equal families” gloss that is often invoked to describe the lesbian and gay struggles that have been or are currently before the Canadian courts. But, as I have argued elsewhere, these cases have been drawn from different social sites and legal contexts:<sup>2</sup> they have involved gays and lesbians as unionized workers in the public sector<sup>3</sup> and their right to human rights protection if they work in a non-unionized workplace in the quasi-private sector in Alberta.<sup>4</sup> Many “same-sex family” cases have transcended the conventional boundaries of family law and included claims to entitlement for social benefits<sup>5</sup> and survivors’ benefits under public pension and insurance plans,<sup>6</sup> or challenges to adoption and child welfare legislation.<sup>7</sup> In fact, only one lesbian case in the “conventional” family law area reached the Supreme Court during Justice L’Heureux-Dubé’s tenure on the Court: that of *M. v. H.*, which involved the fallout from a failed lesbian relationship and the claim by one for spousal support from the other.<sup>8</sup>

In rereading Justice L’Heureux-Dubé’s judgments, I am struck by the consistency and clarity of her analysis when lesbian and gay issues appeared before her, whether in the context of entitlement work-related benefits (*Mossop*), social benefits (*Egan*), the right to human rights protection (*Vriend*), the definition of spouse in family law legislation (*M. v. H.*), or the policy of a Christian University to proscribe “sinful behaviours” such as homosexuality for the members of its students, faculty, and staff, and the response of the provincial accreditation body (*Trinity Western University*).<sup>9</sup> If, as one commentator observed, the Court “fumbled”<sup>10</sup> towards equality, it was not because Justice L’Heureux-Dubé ever dropped the ball, although one does imagine the scrimmage line—or the rugby scrum—when one reads the 4:4:1 split or 8:1 lopsided decisions. And yet, in a struggle that surely was not one for the faint of heart (in her words, the “battle for equality”),<sup>11</sup> Justice L’Heureux-Dubé appears to have been able to move the Court, when one considers the ground gained between her 1993 dissent in *Mossop* (concurring in by McLachlin J.) and the 1999 decision in *M. v. H.* (an 8:1 decision, with the

lone dissent on this occasion someone other than herself).<sup>12</sup>

In *Mossop*, the Supreme Court was confronted with a case under the *Canada Human Rights Act* involving the employer's denial of a federal civil servant's modest claim to one day of bereavement leave to attend the funeral of the father of the man with whom he lived. The collective agreement governing his employment permitted this form of leave in the death of designated family relations. His request was denied because the deceased man was not his father-in-law, not a member of his family. The federal human rights legislation did not prohibit discrimination on the basis of sexual orientation, thus Mossop claimed he had been discriminated against on the basis of his family status. A federal human rights tribunal had upheld his complaint, based on the evidence before it. But the federal government appealed this decision and it was left to the Canadian Human Rights Commission, and ultimately and more significantly, to intervening parties, to defend the tribunal's interpretation and decision in Mr. Mossop's favour before the Supreme Court.

Justice L'Heureux-Dubé urged her colleagues on the Court to respect the decision and jurisdiction of the administrative tribunal that had heard the matter. This position was going nowhere fast. Turning to the substantive issue, she analysed "family status" with the contextualized approach that she and Wilson J. had pioneered in their respective judgments, *Moge v. Moge*<sup>13</sup> and *R. v. Lavallee*.<sup>14</sup> Didi Herman presciently predicted the importance of L'Heureux-Dubé J.'s dissenting opinion in *Mossop* (1993) when she characterized it as "of greater interest, and, perhaps, "long term significance."<sup>15</sup> In contrast to the majority, her dissent explicitly adopted a "living tree" approach,<sup>16</sup> one less formalistic and more open to the entry of non-legal discourses.<sup>17</sup>

Justice L'Heureux-Dubé's dissenting judgment in *Mossop* revealed a sophisticated understanding of the complex and contradictory relationship of family and law, one that reflected a deep knowledge gleaned from what I think she would characterize as the "realities" of family law practice, her years on the bench, and a deep immersion in what she clearly regarded as the relevant scholarship. Her judgment urged a departure from the reliance and invocation of traditional understandings of the traditional family, what she characterized as the "unexamined consensus,"<sup>18</sup> and drew upon a wide range of feminist, lesbian, and other literatures to argue that law must shift to take into account the "lived experience of family."<sup>19</sup> She challenged the "unexamined" with illustrations that showed that within and without law, there were

a “multiplicity of definitions and approaches” to the family:

The multiplicity of definitions and approaches to the family illustrates that there is no consensus as to the boundaries of family, and that of “family status” may not have a sole meaning, but rather may have varied meanings depending on the context or purpose for which the definition is desired. The same diversity of definitions can be seen in review of Canadian legislation affecting the “family”. The law has evolved and continues to evolve to recognize an increasingly broad range of relationships. Different pieces of legislation contain more or less restrictive definitions depending on the benefit or burden of the law to be imposed. These definitions of family vary with legislative purpose, and depend on the context of the legislation. By way of example, one may be part of a family for the purpose of receiving income assistance under welfare legislation, but not for the purposes of income tax legislation.<sup>20</sup>

Justice L’Heureux-Dubé rejected the idea that the definition of family is inflexible and finite, determined and driven solely by authoritative “Law,” offering instead an image of the relationship that bore the influence of law and society scholarship:

4ba6d4b... the family is not merely the creation of law, and while law may affect the ways in which families behave or structure themselves, the changing nature of family relationships also has an impact on the law. ... Law and Family have long been engaged in an Escherian dialectic, each shaping the other while at the same time being shaped.<sup>21</sup>

Finally, she reminded her more conservative colleagues on the bench:

It is possible to be pro-family without rejecting the less traditional forms. It is not anti-family to support protection for non-traditional families. The traditional family is not the only family form, and non-traditional family forms may equally advance true family values.<sup>22</sup>

Justice L'Heureux-Dubé's use of the term "dialectic" is enough to send shivers of delight up the back of any unrepentant socialist feminist; truly, how many cases has one read in which the term "dialectic" appears? And for those who would read her judgments as being perhaps informed by and leaning in the direction of "a postmodernist model of anti-discrimination law,"<sup>23</sup> she clearly understood how to deploy ideology as an analytic concept: "While it is arguable that the 'traditional family' has an ideological stronghold, it is clear that a large number of Canadians do not live within traditional families."<sup>24</sup> Relying on an early article by Didi Herman, which she had clearly read, Justice L'Heureux-Dubé made the decidedly un-postmodernist observation about the family: "The reality is, as Didi Herman writes ... that families are 'sites of contradiction.'" ("Dialectic," "realities," "experience," "ideological"—used correctly—and "sites of contradiction"<sup>25</sup>—her occasional use of the language of intersectionality is not, in my respectful opinion, enough to place her on a pedestal of postmodernity, which, in any event, would invite deconstruction.)

As is well known, Justice L'Heureux-Dubé was presented with another opportunity to consider the legitimacy of the invocation of "the traditional family" in *Egan v. Canada*,<sup>26</sup> one of a trilogy of *Charter* equality cases,<sup>27</sup> which tested the opposite sex requirement for spouses in the federal old age security legislation. As I read these cases, the Supreme Court decided that the "traditional family's" patriarchal reach extended to include the "post-divorce family" but recoiled at the prospect of characterizing the forty-seven-year relationship of an elderly gay couple as "spousal"—that was simply too queer an idea for the traditionalists on the Court. However, and by a bare majority only, the Supreme Court saw its way clear to upholding the spousal claim of a woman in a common law heterosexual relationship.<sup>28</sup> More recently, in one of the last judgments in which Justice L'Heureux-Dubé participated, the Supreme Court made even more clear the narrow basis on which *Miron v. Trudel* was decided. In a Nova Scotia case, the Court rejected a woman's claim as a common law spouse to a share in family property and her challenge to the legislative definition of spouse.<sup>29</sup> As I have argued elsewhere, the closer one comes to property, the tighter the definition of spouse becomes.<sup>30</sup>

The result in *Egan* in the Supreme Court reminds one of the phrase coined by Kathleen Lahey in the 1980s: "equality with a vengeance."<sup>31</sup> It was a victory delivered in the embrace of loss. The Supreme Court of Canada unanimously decided that sexual orientation was an analogous ground of discrimination under section 15 of the *Charter of Rights and Freedoms*.<sup>32</sup> A slim

majority held that the “opposite sex” requirement for spouses under the federal *Old Age Security Act* violated the equality rights of Egan and Nesbitt, who had been living together since 1948 (before any of the justices of Supreme Court who heard their case had graduated from law school and been called to the bar). A differently constituted slim majority decided that the section 15 violation was a reasonable limit in a free and democratic society and hence saved under section 1 of the *Charter*.

Justice Sopinka justified his decision by characterizing the idea of same-sex spouses as “a novel concept” [perhaps for his brothers in the majority and for the federal government, but not for Egan and Nesbitt]. For Justice La Forest,

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marriage has from time immemorial been firmly grounded in ebrary  
our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.

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ebrary The marital relationship has special needs with which Parliament and the legislatures and indeed custom and judge-made law have long been concerned.<sup>33</sup>

Leaving aside the image of the shackled Ghost of Christmas past, and the small fact that this case was not about marriage, La Forest’s judgment (and Gonthier J.’s dissent in the companion case, *Miron v. Trudel*),<sup>34</sup> revealed a breathtakingly conservative, procreation-driven view of marriage.

Justice L’Heureux-Dubé’s approach to determination of an equality claim can be gleaned from her succinct statement in *Miron v. Trudel*: “I prefer to focus on the group adversely affected by the distinction as well as on the nature of the interest affected, rather than on the grounds of the impugned

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distinction.”<sup>35</sup> In *Egan*, she coined yet another phrase for which she is famous: “putting discrimination first.”<sup>36</sup> Elaborating, she said, “This is not to say that the essential characteristics of the nine enumerated grounds are irrelevant to our inquiry. They are, in fact highly relevant.”<sup>37</sup> But,

We must remember that the grounds in s. 15, enumerated and analogous, are instruments for finding discrimination. They are a means to an end. By focusing almost entirely on the nature, content and context of the disputed ground, however, we have begun to approach it as an end, in and of itself.<sup>38</sup>

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She defined a “discriminatory distinction” as one that

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is capable of either promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being or a member of Canadian society, equally deserving of concern, respect, and consideration.<sup>39</sup>

“It is important we ask ourselves” the following sorts of questions when considering the nature of the group affected:

- Is the adversely affected group already a victim of historical disadvantage?
- Is this distinction reasonably capable of aggravating or perpetuating that disadvantage?
- Are group members currently socially vulnerable to stereotyping, social prejudice, and /or marginalization?
- Does this distinction expose them to the reasonable possibility of future social vulnerability to stereotyping, social prejudice, and/or marginalization?<sup>40</sup>

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And the cautionary admonition was directed to the rule-bound and formalists:

Equality and discrimination are notions that are as varied in form as they are complex in substance. Attempts to evaluate them

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according to legal formulas which incorporate rigid inclusionary and exclusionary criteria are doomed to become increasingly complex and convoluted over time as “hard” cases become increasingly the rule than the exception.<sup>41</sup>

Needless to say, Justice L’Heureux-Dubé would have upheld Egan and Nesbitt’s claim; she specifically rejected La Forest’s reliance on “biological reality,” which she characterized as “dangerously reminiscent of the type of biologically based arguments that this court has now firmly rejected.”<sup>42</sup> And to sum up, she rejected Justice Sopinka’s “novel approach” to section 1:

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There is a first time to every discrimination claim. To permit the ebrary  
novelty of the appellants’ claim to be a basis for justifying discrimination in a free and democratic society undermines the very values which our *Charter*, including s. 1, seeks to preserve.<sup>43</sup>

The La Forest-Gonthier-Sopinka judgments were widely criticized, often in terms that emphasized their logical deficiencies and bald conservatism. For Bruce Ryder, “the reliance placed on ‘biological and social realities’ and ‘fundamental values’ to resist the logical implications of anti-discrimination principles by La Forest J. [in *Egan*] and Gonthier J. [in *Miron v. Trudel*] ... represents the most conservative contribution to equality jurisprudence by the Supreme Court since *Lavell*, *Bliss* and other infamous *Bill of Rights* decisions of the 1970s.”<sup>44</sup> David Beatty also observed:

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After reading the judgments of La Forest and Sopinka no one can ebrary  
have any doubt that it was their personal beliefs about traditional family units (in the case of La Forest) and discrimination against gays (in the case of Sopinka) that explains why Egan and Nesbitt lost their case.<sup>45</sup>

Brad Berg echoed this assessment:

The Justices led by La Forest steadfastly refuse to permit reexamination of the traditional definition of “spouse” that was represented by the impugned legislation. ... Unfortunately, wariness

of the novel may be only part of the story. In light of the logical contortions that had to be made in order to transform this pension case into a threat to heterosexual marriage, it seems impossible to escape the sad inference that what really motivated the La Forest judgment was profound heterosexism.<sup>46</sup>

In the long run, it is Justice L'Heureux-Dubé who has prevailed;<sup>47</sup> it is not for nothing that she has been described as the Supreme Court's "most advanced and sophisticated equity analyst."<sup>48</sup> Her influence on the Court has been substantial and is reflected in the Court's more recent decisions in *M. v. H.*<sup>49</sup> and *Law v. Canada (Minister of Employment and Immigration)*.<sup>50</sup> In *M. v. H.*, Cory and Iacobucci JJ., writing for the majority said,

The exclusion of same-sex partners ... promotes the view that M., and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALE submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.<sup>51</sup>

In *Law*, the Court unanimously emphasized the role of section 15 of the *Charter* in protecting those who are vulnerable, disadvantaged, or marginalized, as well as the importance of a contextual analysis that focuses on the perspective of those affected by the legislative distinctions.<sup>52</sup> Writing for the Court, Iacobucci J. emphasized the importance of a purposive approach to section 15 of the *Charter* and defined that purpose broadly:

the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.<sup>53</sup>

### Beyond the Judgments

In *Trinity Western University (TWU) v. British Columbia College of Teachers (BCCT)*,<sup>54</sup> a case in which the Supreme Court had to consider whether the BCCT had jurisdiction to consider the discriminatory practices of TWU, a private Christian university, and whether the BCCT's decision to deny TWU's application for affiliation was justified. Trinity Western University had developed a teacher training program and, following some fits and starts in the process, sought approval to assume full responsibility for it. Students and faculty at Trinity Western University were expected to adhere to the "preferred lifestyle" articulated in a Community Standards document and to "refrain from practices that are biblically condemned"; these practices included "sexual sins including premarital sex, adultery, homosexual behaviour and viewing of pornography."<sup>55</sup> Faculty and staff were required to sign a document that included the prohibition of homosexual behaviour. At the heart of Justice L'Heureux-Dubé's dissenting judgment is a concern for lesbian, gay, and bisexual students who are forced to "modify their behaviour to avoid the impact of prejudice":<sup>56</sup>

Most of the relevant evidence in this case is the reality of a hostile environment faced by homosexual and bisexual students. The courts by trespassing into the field of pedagogy, deal a setback to the efforts of the BCCT to ensure the sensitivity and empathy of its members to all students' backgrounds and characteristics.<sup>57</sup>

In the report of the case, the lists of cases and statutes that one would expect to be cited are cited. An impressive list of secondary sources is also set out: monographs bearing the titles *Gaylaw: Challenging the Apartheid of the Closet* and *Are We "Persons" Yet? Law and Sexuality in Canada*, together with articles published in academic journals that address the educational needs of lesbian and gay youth, silence in the classroom, and the "privileging of homophobic religious ideology." Not one of the authors cited is to be found in the majority judgment; it is only in the dissenting judgment of Justice L'Heureux-Dubé, in a case that went against her position 8:1, that these relevant scholarly authorities are considered.

Justice L'Heureux-Dubé is well known for referring to academic literature in her judgments. To the horror of some, she was as likely to cite the work

of academics, legal and otherwise, as she was legal precedents. She might try to persuade us that this was simply a reflection of the civilian tradition in which she was educated, practised, and served on the bench.<sup>58</sup> Indeed, I think it is safe to speculate that Justice L'Heureux-Dubé single-handedly introduced the work of a new generation of feminist and critical scholars—non-legal and legal—to the lexicon. As Sheila McIntyre notes in this volume, she cited these scholars as authorities!<sup>59</sup> One encountered Susan Boyd,<sup>60</sup> Nitya Duclos-Iyer,<sup>61</sup> Jewelle Gomez,<sup>62</sup> Didi Herman,<sup>63</sup> Audre Lorde,<sup>64</sup> Adrienne Rich,<sup>65</sup> Bruce Ryder,<sup>66</sup> Kathleen Lahey,<sup>67</sup> Elizabeth Sheehy,<sup>68</sup> and former Chief Commissioner of the British Columbia Human Rights Commission, Mary Woo Sims,<sup>69</sup> in her judgments, to name but a few. 4ba6d4be89c890aebb90044bfcb48b52

Justice L'Heureux-Dubé has been generous in her acknowledgement of the importance of academic research and scholarship:

Our understanding of gender and other types of bias in the law as well as potential solutions to this problem has been greatly enriched by the theory and research examining gender differences observed in judicial decision making. This work is of unquestioned assistance in my own query ...<sup>70</sup>

But it would seem that on this methodological point, she often stood alone. Feminist, queer, and critical race legal scholars should acknowledge her support and integration of new forms of legal scholarship into her judgments. In this section, I want to reciprocate in kind. I am interested in Justice L'Heureux-Dubé's words in journals and her lectures to students—words that are not hitched to the wagon of litigation, tethered to a particular set of facts marshalled by lawyers, or focused upon a particular piece of legislation. As she herself has observed: "Judging can be described as the piecing together of a story which will never be more than partial and will reflect the legal rules which govern its telling."<sup>71</sup>

But a judge is more than the sum of her judgments. Here, I want to engage with three themes that have emerged in Justice L'Heureux-Dubé's lectures and publications: the interpretative lens of equality, the language of equality, and the challenge of inclusivity in legal education. Without suggesting that these themes are divorced from her judgments, it is instructive nonetheless to consider them as part of the contribution of her broader intellectual and legal agenda. 4ba6d4be89c890aebb90044bfcb48b52

*The Interpretative Lens of Equality: "Putting Discrimination First"*

As I have suggested above, Justice L'Heureux-Dubé endeavours never to lose sight of the experience of the marginalized and disadvantaged. Her willingness to engage with and take up the research of critical scholars derives from her position that the law needs to move and to respond to new approaches to not so "novel" experiences of poverty and disenfranchisement. Rendering visible the complex forms of systemic inequality requires increasingly precise analytic tools because, as she quotes J.S. Mill, "domination always appears natural to those who possess it and the law insidious transforms the fact of domination into a legal right."<sup>72</sup> This is a task that requires that we move out of a comfort zone of common sense and, as she has written, that "we remove the well-worn shoes of unquestioned and often stereotypical assumptions."<sup>73</sup>

Justice L'Heureux-Dubé's commitment to a broad, flexible, and inclusive definition of equality is not an academic or abstract exercise. While she may not be the first feminist to articulate the following, one wishes more judges expressed and lived these words out loud:

Equality must not only be part of our thinking, it must be part of our living. If we embrace equality and encourage others to do the same, we will be one step closer to creating a society in which you, your children and your children's children need not fear disempowerment and oppression.<sup>74</sup>

4ba6d4be89c890aebb90044bfcb48b52  
ebruary *The Language of Equality as a Mother Tongue*

In a series of public lectures and publications, Justice L'Heureux-Dubé has revealed her interest in linguistics<sup>75</sup> and spoken of "this language called equality":<sup>76</sup>

I think that it is helpful to regard equality as a language like every other, with rules of grammar and syntax, nuances, exceptions and dialects. More importantly, language is more than a form of communication. It is an embodiment of the norms, attitudes and culture that are expressed through that language. Learning a language and learning a culture go hand in hand. ... it is dangerous to think we are fluent when we are not.

Our task is to revisit our underlying assumptions, to look beyond the four corners of the law, and to contemplate change where our examination reveals that the languages are inconsistent.<sup>77</sup>

I remain to be persuaded by this conceptualization of equality as a language, as a mother tongue. I prefer her use of the terrain of equality, the battleground—not because I find the metaphors of war more compelling, but because I believe that therein lies the material, the matter, the contexts of peoples' lives. The language of equality can be deployed in different ways, and to different purposes, as demonstrated no less than by Gonthier J.'s dissenting judgment in *M. v. H.*<sup>78</sup> We must not just talk the talk, we must also walk the walk—with others. And we must be prepared to “cultivate” the equality leaves and work the “terrain.” Speaking the language of equality is essential to get the word out, but as Justice L'Heureux-Dubé herself has said, we must live equality.

### *The Challenge of Inclusivity in Legal Education*

Those of us who teach in law schools have had the opportunity to observe first hand the warm and open relationship Justice L'Heureux-Dubé enjoys with law students. They seem to represent her fondest hope for the future, and she does not hesitate to remind law professors that our responsibility to educate law students encompasses their minds and hearts. In articles published in the *U.B.C. Law Review*<sup>79</sup> and the *Manitoba Law Journal*,<sup>80</sup> Justice L'Heureux-Dubé quotes the words of the late Chief Justice Brian Dickson, on the aim of legal education. Although repeated in both articles, his words bear repeating here:

The primary goal of legal education should be to train for the profession people who are first, honest, second, compassionate, third, knowledgeable about the law, and fourth, committed to the role of law and justice in our democratic society.<sup>81</sup>

Justice L'Heureux-Dubé reminds us that the late Chief Justice believed it to be

essential that law schools, and indeed the entire legal profession, devote a great amount of attention and energy to studying

some of the deep social problems of our time—problems of poverty, inequality and the environment. If the legal profession as a whole is to help solve some of the seemingly intractable difficulties faced by the poor ... native people, other minorities, new immigrants, and others, it seems to me that the process must start in law schools.<sup>82</sup>

Compassion is not an “extra legal” frill, “but part and parcel of the nature and content of that which we call law.”<sup>83</sup> Or it should be.

She also reminds us that the burden “to educate others” must not be placed on the shoulders of “a previously excluded group”:

The energy and emotion involved for students from such a group to educate others in standing up for their right to speak, if in an environment where theirs are the only voices expressing such concerns, can serve all too readily to silence them.<sup>84</sup>

Thus, rather than asking whether women judges, women students, students with disabilities, or students of colour “will make a difference,” she urges us to develop

ways in which those involved in teaching and administration at law faculties can help make this difference, by encouraging these students to speak, and at the same time, communicating an unfailing commitment on their own parts to equality and compassionate justice.<sup>85</sup>

And so, I conclude where I began, acknowledging with humility the courage, indeed fearlessness, and integrity of a jurist who simply would not be intimidated or brought to heel. This, perhaps more than anything else, is the lesson I draw from the manner in which Justice Heures-Dubé has contributed to lesbian and gay issues in her judgments—how she has brought the outside in. In the pages of her judgments, lesbians and gays—students, youth, teachers, partners, workers, elderly couples, the poor—were treated with respect and dignity, as ordinary people leading noble lives, lives with value, and arguably at some personal cost to herself. It can't be easy to hold onto the

“1” in an 8:1 judgment with brothers on the bench implicitly casting aspersions on one’s legal analysis. And yet, she never backed down.

I acknowledge this with humility because there is an important challenge in the legacy of Justice Heureux-Dubé for those of us involved in legal education. Our lesbian and gay students see themselves valued and respected in her judgments, but they continue to be a beleaguered, often invisible, community within our law schools. Her challenge to us, and that of Justice Dickson before her, is to welcome and nourish the *outside* in the legal academy, so that more of the *inside* can come out with confidence. She led by example.

## Endnotes

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- \* I wish to thank Ed Yanoshota and Laura Westra for their research assistance and Elizabeth Sheehy for her invitation to participate in this.
- 1 See, e.g., Didi Herman, “‘Sociologically Speaking’: Law, Sexuality and Social Change” (1991) 2 J. Hum. Just. 57; Carl F. Stychin, “Novel Concepts: A Comment on *Egan & Nesbitt v. The Queen*” (1995) 6 Const. For. 101; Carl F. Stychin, *Law’s Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995); Douglas Kropp, “Categorical Failure: Canada’s Equality Jurisprudence: Changing Norms of Identity and the Legal Subject” (1997) 23 Queen’s L.J. 201; Kathleen Lahey, *Are We Persons Yet?* (Toronto: University of Toronto Press, 1999); Mimi Liu, “A ‘Prophet with Honour’: An Examination of the Gender Equality Jurisprudence of Madam Justice Claire L’Heureux-Dubé of the Supreme Court of Canada” (2000) 25 Queen’s L.J. 417; Judith Keene, “Discrimination in the Provision of Government Services and s. 15 of the Charter: Making the Best of the Judgments in *Egan*, *Thibaudeau* and *Miron*” (1995) 11 J. Law & Soc. Pol. 107; Mary Eaton, “Patently Confused: Complex Inequality and *Canada v. Mossop*” (1994) 1 Rev. Const. Stud. 203; Robert Wintemute, “Sexual Orientation Discrimination as Sex Discrimination: Same Sex Couples and the Charter in *Mossop*, *Egan* and *Layland*” (1994) 39 McGill L.J. 429; Robert Wintemute, “Discrimination Against Same Sex Couples” (1995) 74 Can. Bar Rev. 682.
- 2 See S. Gavigan, “Feminism, Familial Ideology and Family Law: A Perilous Menage à Trois,” in Meg Luxton, ed., *Feminism and Families: Critical Policies and Changing Practices* (Halifax: Fernwood Press, 1997); S. Gavigan, “Familial Ideology and the Limits of Difference,” in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace, 1996).

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3 E.g. Karen Andrews, library worker and CUPE member, in *Andrews v. Ontario (Minister of Health)* (1988), 49 D.L.R. (4th) 584 (H.C.); Brian Mossop, federal government translator and CUPE member, in *Canada (Attorney-General) v. Mossop*, [1993] 1 S.C.R. 554; Nancy Rosenberg, city employee and CUPE member, in *Rosenberg v. Canada (Attorney General)* (1998), 158 D.L.R. (4th) 664 (Ont. C.A.); Mary Woo Sims and Bill Dwyer, city employees and CUPE members, in *Dwyer v. Toronto*, [1996] O.H.R.B.I.D. No. 33 (QL); Michelle Douglas, member of Canadian Armed Forces, in *Douglas v. Canada* (1992), 98 D.L.R. (4th) 129 (F.C.T.D.).

4 Delwyn Vriend, high school teacher, in *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

5 Egan and Nesbitt in *Egan v. Canada*, [1995] 2 S.C.R. 627, 124 D.L.R. (4th) 609.

6 See, e.g., *Kane v. Ontario (Attorney-General)*, [1998] C.I.L.R 3526 (QL); *Canada (Attorney-General) v. Bigney*, [1998] F.C.J. No. 1336.

7 E.g., *K. (Re)* (1995), 23 O.R. (3d) 679 (Prov. Div.); *C.E.G. No. 1 (Re)*, [1995] O.J. No. 4072 (Gen. Div. Fam. Ct.); *C.E.G. No. 1 (Re)*, [1995] O.J. No. 4073 (Gen. Div. Fam. Ct.)

8 [1999] 2 S.C.R. 3. Her retirement from the Supreme Court means that Justice L'Heureux-Dubé will not have the opportunity to participate in the adjudication of the (paradoxically and simultaneously) most controversial and yet most conventional same-sex legal challenge currently wending its way up to the Supreme Court of Canada via the Ontario courts: the right to marry. See *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321, [2002] O.J. No. 2714 (Div. Ct.), currently on appeal to the Ontario Court of Appeal: see *Halpern v. Canada (Attorney-General)*, [2003] No. 720 and *Halpern v. Canada (Attorney-General)*, [2003] No. 730.

9 *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, [2001] S.C.J. No. 32.

10 Drawn from Brad Berg, "Fumbling Towards Equality: Promise and Peril in *Egan*" (1995) 5 N.J.C.L. 263.

11 Claire L'Heureux-Dubé, "Conversations on Equality" (1999) 26 Man. L.J. 273 at 280.

12 In his dissent Gonthier J. emphasized gender roles, a dynamic of dependence, and the biological reality of procreation: "In my judgment, the respondent M.'s claim fails because the legislation targets individuals who are in relationships which are fundamentally different from same-sex relationships. The legislation 'corresponds' to the actual need, capacity, and circumstances of the claimant and those of the group the legislation targets. As such, I find there is no 'discrimination' within the meaning of that term in s. 15(1) of the *Charter* on the facts of this appeal."

- 13 [1992] 3 S.C.R. 813 at 873: "In a family law context in which many assumptions are based on male norms and values, this technique may place the burden on the disadvantaged spouse to adduce evidence aimed at overcoming stereotypes or misplaced assumptions stemming from the lack of a shared reality between judges and parties. Placing the greater burden on the party less able to shoulder it raises, in my mind, concerns as to substantive equality. One vehicle by which courts may address this inequality is to demonstrate a greater willingness to share the financial and intellectual burden of bringing underlying assumptions in line with the realities of the party. In short, to do so they must contemplate a broader role for the doctrine of judicial notice."
- 14 [1990] 1 S.C.R. 852.
- 15 D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994) at 138.
- 16 *Ibid.*
- 17 *Ibid.*
- 18 *Mossop*, *supra* note 3 at para. 114.
- 19 *Ibid.* at 627.
- 20 *Ibid.* at para. 117. Justice L'Heureux-Dubé was aided here by the Intervenors' Factum of Egale et al. See Gwen Brodsky, "Out of the Closet and Into a Wedding Dress? Struggles for Lesbian and Gay Legal Equality" (1994) 7(2) C.J.W.L. 523, Jody Freeman, "Defining the Family in *Mossop v. D.S.S.*: The Challenge of Anti-Discrimination Essentialism and Interactive Discrimination for Human Rights Litigation" (1994) 44(1) U. T. L.J. 41.
- 21 *Ibid.* at para. 119.
- 22 *Ibid.*
- 23 See, e.g., Kropp, "Categorical Failure," *supra* note 1 at 226–30.
- 24 *Mossop*, *supra* note 3 at para. 120.
- 25 *Ibid.* at para. 129.
- 26 *Supra* note 5.
- 27 The other two cases that, together with *Egan*, formed the trilogy were *Miron v. Trudel*, [1995] 2 S.C.R. 418 and *Thibaudeau v. Canada*, [1995] 2 S.C.R. 627.
- 28 *Miron v. Trudel*, *supra* note 27.
- 29 *Nova Scotia (Attorney-General) v. Walsh*, [2002] S.C.J. No. 84 (S.C.C.) (QL), with Justice L'Heureux-Dubé dissenting.
- 30 S. Gavigan, "Legal Forms, Family Forms, Gender Norms: What is a Spouse?" (1999) 14 Can. J. Law & Soc. 129–58.
- 31 Kathleen Lahey, "Feminist Theories of (In)Equality" (1987) 3 Wisconsin Women's Law Journal 5 at 15.
- 32 *Supra* note 5.

- 33 *Ibid.* per La Forest J. at 625 (D.L.R.).
- 34 *Supra* note 27.
- 35 *Ibid.* at 465.
- 36 *Egan*, *supra* note 5 at 637–38 (D.L.R.).
- 37 *Ibid.* at 638.
- 38 *Ibid.* at 635.
- 39 *Ibid.* at 638.
- 40 *Ibid.* at 639–40.
- 41 *Ibid.* at 642.
- 42 *Ibid.* at 650.
- 43 *Ibid.* at 652.
- 44 Bruce Ryder, “*Egan v. Canada: Equality Deferred, Again*” (1996) 4 C.L.E.L.J. 101 at 104. See also David M. Beatty, “The Canadian Conception of Equality” (1996) 46 U.T.L.J. 349 (who suggests at 355: “It would be hard to exaggerate how regressive the definition of discrimination that the La Forest-Gonthier coalition propose really is”); and Berg, “Fumbling Towards Equality,” *supra* note 10 at 270.
- 45 Beatty, “Canadian Conception of Equality,” *supra* note 44 at 374.
- 46 *Supra* note 10 at 274.
- 47 This confident assessment with respect to the recognition of same sex relationships and the definition of spouse should be tempered, in light of the more recent decision in *Nova Scotia v. Walsh*, *supra* note 29, concerning the unsuccessful claim of a common law spouse to family property.
- 48 Keene, “Discrimination,” *supra* note 1 at 141.
- 49 [1999] 2 S.C.R. 3.
- 50 [1999] 1 S.C.R. 497.
- 51 *M. v. H.* *supra* note 49 at para. 73.
- 52 Claire L’Heureux-Dubé, “Introduction, Same-Sex Partnerships in Canada,” in R. Wintemute and M. Andenaes, eds., *Legal Recognition of Same-Sex Partnerships* (Oxford: Hart, 2001) at 211.
- 53 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88(4).
- 54 *Supra* note 9.
- 55 *Ibid.* at paras. 3, 4.
- 56 *Ibid.* at para. 91.
- 57 *Ibid.*
- 58 Claire L’Heureux-Dubé, “By Reason of Authority or by Authority of Reason” (1993) 27 U.B.C. L. Rev. 1.
- 59 Sheila McIntyre, “Personalizing the Political and Politicizing the Personal: Understanding Justice McClung and his Defenders” 313.

- 60 In *Gordon v. Goertz*, [1996] 2 S.C.R. 27.
- 61 *Mossop*, *supra* note 3; *Egan*, *supra* note 5.
- 62 In *Mossop*.
- 63 In *ibid.* at 633: “families are sites of contradictions.”
- 64 In *ibid.* at 633–34: “we must recognize differences among [people] who are our equals ... and devise ways to use each others’ difference to enrich our visions and our joint struggles.”
- 65 In *ibid.* at 632.
- 66 In *ibid.* at para. 129.
- 67 In *Trinity Western*, *supra* note 9 at paras. 81, 91.
- 68 In *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, [1999] S.C.J. No. 10 (QL) at para. 82.
- 69 In *Trinity Western*, *supra* note 9 at para. 83.
- 70 Claire L’Heureux-Dubé, “Making a Difference: The Pursuit of a Compassionate Justice” (1997) 31 U.B.C.L. Rev. 1 at 2.
- 71 *Ibid.* at 5.
- 72 “Making Equality Work in Family Law” (1997) 14 Can. J. Fam. L. at para. 109.
- 73 “The Search for Equality: A Human Rights Issue” (2000) 25 Queen’s L.J. 401 at 406.
- 74 *Ibid.* at 414–15.
- 75 See, e.g., Claire L’Heureux-Dubé, “The Legacy of the ‘Persons Case’: Cultivating the Living Tree’s Equality Leaves” (2000) 63 Sask. L. Rev. 390 at 391–92.
- 76 Claire L’Heureux-Dubé, “Conversations on Equality” (1999) 26 Man. L.J. 273 at 281.
- 77 “Making Equality Work,” *supra* note 72 at para. 107.
- 78 *Supra* note 8.
- 79 “Making a Difference” *supra* note 70 at 1–18.
- 80 *Supra* note 76.
- 81 “Making a Difference,” *supra* note 70 at 11; “Conversations on Equality,” *supra* note 76 at 294.
- 82 “Making a Difference” at 11–12; “Conversations on Equality” at 295.
- 83 “Making a Difference” at 9; “Conversations on Equality” at 292.
- 84 “Making a Difference” at 13; “Conversations on Equality” at 296.
- 85 “Making a Difference” at 13; “Conversations on Equality” at 296–97.

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