

# “A Lawyer with a Whistle”: The Jurisprudence of Chief Justice Richard J. Scott

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## I. INTRODUCTION

Richard Jamieson Scott was appointed a judge of the Manitoba Court of Queen’s Bench on June 28, 1985, quickly rising to the position of Associate Chief Justice on October 4, 1985. He was appointed Chief Justice of the Manitoba Court of Appeal (“MBCA”) on July 31, 1990 and now holds the distinction of easily being the longest serving Chief Justice of Manitoba.<sup>1</sup>

During his lengthy tenure as both a trial and appellate judge, Chief Justice Scott has written many memorable decisions. Most of his appellate decisions were majority decisions, in keeping with the collegial court that he helped foster. This article will examine just a few of his important decisions, along with one significant dissent. The article will also review

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Any opinions expressed by the authors in this article are their own and do not necessarily reflect the views of their employers. The quotation in this article’s title is taken from a phrase used by Chief Justice Scott during the *R v Lavallee* trial to describe the role of a judge.

<sup>1</sup> The next longest serving Chief Justice is James Emile Pierre Prendergast, who held office from 1929 until 1944.

his charge to the jury when sitting as a trial judge in the seminal decision of *R v Lavallee*.<sup>2</sup>

## II. A BRIEF TOPICAL OVERVIEW

A judicial career spanning more than 27 years provides ample opportunity for a judge to leave his mark on a number of areas of the law, particularly when more than 20 of those years are spent on an appellate court with general jurisdiction.<sup>3</sup> Chief Justice Scott has rendered important judgments in many practice areas, including criminal law, family law and civil litigation. While an article of this nature cannot endeavour to review them all, the following are a brief sampling of his most frequently cited decisions in these core subject areas.<sup>4</sup>

### A. Criminal Law

In a pair of cases in 1993, Chief Justice Scott was critical of the conduct of the police in light of the legal rights afforded by the *Charter*.<sup>5</sup> In particular, he denounced long-standing police policies that were not *Charter*-compliant.

In *Lamy*, the Crown appealed from the acquittal of the accused on a charge of possession of more than 20 pounds of marijuana for the purpose of trafficking. The acquittal resulted from the trial judge's decision to exclude the evidence of the marijuana on the basis that the police's warrantless search of the accused's vehicle, which resulted in the discovery of the drugs, was unreasonable.

The evidence from the police at trial was that they were of the view that, as a matter of policy, a warrant was not required in these circumstances, so one was never sought. On appeal, Chief Justice Scott (writing for the court) observed that "had the proper police work been

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<sup>2</sup> [1990] 1 SCR 852, 108 NR 321 [*Lavallee* cited to SCR] rev'g (1988), 44 CCC (3d) 113, [2007] 6 WWR 413 (Man CA), which allowed an appeal from the acquittal by Scott ACJQB, as he then was, sitting with a jury.

<sup>3</sup> A search of Quicklaw's Manitoba Judgments database conducted on 26 July 2012 returned 1,581 decisions rendered by Chief Justice Scott (alone or as a member of a panel).

<sup>4</sup> Not including, of course, the decisions profiled in greater detail later in this article.

<sup>5</sup> *R v Lamy* (1993), 80 CCC (3d) 558, 85 Man R (2d) 179 (CA) [*Lamy* cited to CCC] and *R v Gray* (1993), 81 CCC (3d) 174, 85 Man R (2d) 211 (CA) [*Gray* cited to CCC].

done there might well have been grounds to obtain a warrant.” He confirmed that:

The purpose of prior authorization for a search or a seizure is to ensure that an independent judicial person scrutinizes the matter beforehand. It ensures that prior to the police interfering with an individual's rights, an independent objective party has assessed the reasonableness of the grounds proffered to justify the warrant.<sup>6</sup>

In the context of the section 24(2) analysis, the Chief Justice opined that:

In my opinion, if the policy or procedure followed by the police is inappropriate because of its long-term consequences on the reputation of the justice system, it matters not that the individual police officers acted in good faith. It is not the motive of the individual police officers, but rather the impact of the erroneous policy which is of significance. In this instance the policy undoubtedly resulted in sloppy police work.<sup>7</sup>

He went on to find that “[t]he breach was serious stemming as it did from the ill-founded policy which militated against the police carrying out their constitutional obligations.” He also confirmed that the end result of the search could not be used to justify the means.<sup>8</sup>

Similarly, in *Gray*, Chief Justice Scott’s decision involved the strong protection of *Charter* rights in the face of established police practices to the contrary. The issue in *Gray* related to the process for obtaining search warrants from a magistrate. Like *Lamy*, the *Gray* case involved the exclusion of evidence relating to narcotics offences obtained through a warrantless search. However, in *Gray*, unlike *Lamy*, the trial judge did not exclude the evidence even though it was obtained in breach of the *Charter*.

The evidence that came out at trial revealed that there was a long-standing practice by the police of attending before a magistrate with a draft Information to Obtain. The police would then obtain direction from the magistrate as to the wording that would result in the warrant being granted; the Information would then be completed as directed and the

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<sup>6</sup> *Lamy*, *supra* note 5 at 566.

<sup>7</sup> *Ibid* at 571.

<sup>8</sup> Of course, the result in every case is driven by its unique facts. While *Lamy* was adopted by the New Brunswick Court of Appeal in *R v Leclerc* (1995), 163 NBR (2d) 225 at para 10, 419 APR 225, the Supreme Court reached a different result in its section 24(2) analysis in the somewhat similar case of *R v Grant*, [1993] 3 SCR 223, 84 CCC (3d) 173, though *Lamy* was not mentioned in that decision.

warrant would issue.<sup>9</sup> While there was no evidence of the actual practice followed in *Gray*, Chief Justice Scott was highly critical of the established police practice and was prepared to assume that it was followed in the case at bar.<sup>10</sup> Chief Justice Scott characterized the *Charter* violation as “serious”, stating:

I am unable to avoid the conclusion that the magistrate in this case operated as if she were an adjunct of the police investigation rather than as a neutral and

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<sup>9</sup> Chief Justice Scott described the practice as follows, *supra* note 5 at 179:

A number of officers involved in the search and seizure testified about the procedure then used by members of the City of Winnipeg police department when it was deemed necessary to ask for a warrant. Evidence disclosed that in many instances the information to obtain would, after its initial preparation by the appropriate police officer, be reviewed, while still unexecuted and in draft form, with the magistrate. If the unexecuted information to obtain was not acceptable to the magistrate, advice would then be sought and given on how to satisfactorily word the document to enable the warrant to be issued. Sometimes the magistrate would dictate the wording so as to ensure a document that was acceptable to her/him. One witness indicated that the magistrate would on occasion type the information to obtain for him. Attestation of the document would only occur after all the suggested additions had been made to the satisfaction of the issuing magistrate.

<sup>10</sup> In most other cases the evidence is not so egregious, and courts are less willing to assume that the police acted inappropriately without more detailed evidence, as the onus of proof is on the accused. However, in this case, Chief Justice Scott reasoned as follows, *ibid* at 183:

Given the limitations of human memory, there is simply no realistic way in which the defence can ever meet the burden of proving by direct evidence that an inappropriate practice - such as described in this instance - actually occurred in an individual case. ... In my opinion the proper conclusion to be drawn is that, given the existence of the practice and the uncertainty of the police whether such practice occurred in the instant case, the offensive practice likely did take place. It is not necessary, as the trial judge inferred in his reasons, for an accused to prove that the magistrate in the actual case was influenced by the unsworn testimony, or that her impartiality in that particular instance was tainted in some specific fashion. Again, how could an accused meet such a burden in any event? To impose such a high standard on an accused would reward a failure of memory (real or otherwise) by the officer who prepared and swore the information to obtain in the face of evidence of a general practice that is constitutionally unacceptable.

detached assessor of the evidence advanced in favour of the granting of a warrant.<sup>11</sup>

*Gray* is important for its contribution to the case law that delineates the boundaries of appropriate conduct by a judicial officer being asked to grant a warrant.

Chief Justice Scott has also made significant contributions to the jurisprudence surrounding impaired driving offences. For instance, in *R v Higgins*, the issue was whether the police officer made his demand for a roadside breath sample “forthwith”, due to a 14-minute delay caused by having the device brought to the cruiser car by another officer.<sup>12</sup> Defence counsel argued that the existing jurisprudence required that the police officer have the roadside testing device with him, or available in the vehicle, and that nothing else would suffice. However, Chief Justice Scott did not agree. Instead, relying on the Ontario Court of Appeal’s decision in *R v Cote*, he held that “[t]he determinant factor is not the length of the delay but the reasons for it.”<sup>13</sup> He therefore adopted a contextual analysis focused on the reasons for the delay.

This analysis has since been adopted by many other courts, including the Newfoundland Court of Appeal,<sup>14</sup> and the same approach was ultimately adopted by the Supreme Court of Canada in *R v Woods*.<sup>15</sup>

The Chief Justice’s later decision in *R v Burbella* was, like *Higgins*, integral to shifting the weight of jurisprudential authority, this time with respect to care or control of a motor vehicle while impaired.<sup>16</sup> As Chief Justice Scott explained in the opening paragraph:

...[t]he narrow but important issue to be decided in the present case is whether a person can be in the ‘care or control of a motor vehicle’ when there is no risk that the vehicle in question can be put in motion so that it can become dangerous to the public.<sup>17</sup>

At the time *Burbella* was heard by the MBCA, it was unclear from the Supreme Court jurisprudence whether danger to the public was an

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<sup>11</sup> *Ibid* at 182.

<sup>12</sup> 88 CCC (3d) 232 at 234, [1994] 3 WWR 305 (Man CA).

<sup>13</sup> *Ibid* at 237, referring to (1992), 6 OR (3d) 667, 70 CCC (3d) 280.

<sup>14</sup> *R v Payne* (1994), 121 Nfld & PEIR 137 at para 37, 91 CCC (3d) 144.

<sup>15</sup> 2005 SCC 42, [2005] 2 SCR 205.

<sup>16</sup> 2002 MBCA 105, 217 DLR (4th) 604 [*Burbella*].

<sup>17</sup> *Ibid* at para 1.

essential element of care or control.<sup>18</sup> The Chief Justice's decision in *Burbella*, building on the Ontario Court of Appeal's decision in *R v Wren*<sup>19</sup> and the Newfoundland Court of Appeal's decision in *R v Decker*<sup>20</sup> confirmed that, "where the presumption in s. 258(1)(a) does not apply, the test for establishing whether a person has care or control is to make a determination on the facts of the particular case, whether there is a risk of danger to the public."<sup>21</sup>

The Chief Justice's decision was lauded by Professor Tim Quigley in his annotation of *Burbella*, where he wrote:

The decision in *Burbella* is welcome for its review of the relevant jurisprudence and its conclusion that the trend is to avoid the overly broad interpretation that was previously given to *R. v. Saunders*, [supra]. *Burbella* and the cases referred to in it, especially obiter comments in Supreme Court of Canada decisions since *Saunders*, indicate that danger to the public is an essential element of care or control.<sup>22</sup>

The Chief Justice's reasoning was subsequently adopted by other provincial appellate courts<sup>23</sup> and has been held to have settled the law on this point in Manitoba.<sup>24</sup>

## B. Family Law

Chief Justice Scott has also had occasion to make a number of important family law rulings. In addition to *Rebenchuk*, discussed in greater detail below, two such decisions will be highlighted here. They illustrate the value of general rules as well as the need for pragmatic exceptions.

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<sup>18</sup> In fact, in the earlier decision of *R v Champagne* (1989), 59 Man R (2d) 97 at para 15, 14 MVR (2d) 255 (QB), the Chief Justice himself (then Associate Chief Justice of the Court of Queen's Bench) had found that the inoperability of the vehicle was irrelevant, in light of the SCC's decision in *R v Saunders*, [1967] SCR 284, 61 DLR (2d) 645. In *Burbella*, the Chief Justice acknowledged at para 18 that subsequent cases revealed that *Saunders* was not to be interpreted so broadly.

<sup>19</sup> (2000), 47 OR (3d) 544, 144 CCC (3d) 374.

<sup>20</sup> 2002 NFCA 9, 209 Nfld & PEIR 44.

<sup>21</sup> *R v MacAulay*, 2002 PESCAD 24 at para 52, 218 Nfld & PEIR 312.

<sup>22</sup> 5 CR (6th) 174.

<sup>23</sup> See *R v Shuparski*, 2003 SKCA 22, 173 CCC (3d) 97 and *R v Mallery*, 2008 NBCA 18, 340 NBR (2d) 45.

<sup>24</sup> See *R v Snow*, 2008 MBCA 112, 231 Man R (2d) 113.

In *Hauff v Hauff*, the parties had been married for 19 years.<sup>25</sup> The trial judge awarded \$1,000 per month spousal support, along with \$600 per month child support. In addition, he made a lump sum award in the amount of \$10,000 to compensate Ms. Hauff “for the economic deprivation she suffered between the date of the separation and the trial.”<sup>26</sup>

However, following the Ontario Court of Appeal’s decision in *Elliot v Elliot*, Chief Justice Scott held that the lump sum award was inappropriate based on the evidence adduced at trial. He confirmed that lump sum awards should be the exception and not the rule.<sup>27</sup> A number of subsequent cases have cited *Hauff* for this principle.<sup>28</sup>

The Chief Justice also made important comments with respect to costs awards. He confirmed that:

[a]wards of costs by trial judges are accorded a particular deference by appellate courts; hence a trial judge’s exercise of discretion in this respect will only be interfered with on appellate review if the trial judge proceeded on a wrong principle...<sup>29</sup>

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<sup>25</sup> (1994), 95 Man R (2d) 83, 5 RFL (4th) 419 (CA) [*Hauff* cited to Man R].

<sup>26</sup> *Ibid* at para 7.

<sup>27</sup> *Ibid* at para 12, referring to (1993), 15 OR (3d) 265, 106 DLR (4th) 609.

<sup>28</sup> See e.g. *Kowaluk v Kowaluk* (1996), 110 Man R (2d) 184 at para 18, 24 RFL (4th) 261; *Yiannitsopoulos v Patseas*, [1997] 7 WWR 220 at para 12, 28 RFL (4th) 246 (BC CA); *Topolnitsky v Topolnitsky* (1997), 118 Man R (2d) 276 at para 21, 32 RFL (4th) 196 (CA); *Ramantanis v Ramantanis*, 2004 MBCA 122 at para 21, 187 Man R (2d) 190; *Cattani v Cattani* (1999), 134 Man R (2d) 248 at para 15, 48 RFL (4th) 269 (CA). In *Andries v Andries* (1998), 159 DLR (4th) 665 para 41, 266 AR 35 (Man CA), the ratio of *Hauff* was stated as follows: “lump sum awards intended to compensate for inadequate interim awards were the exception rather than the rule.” The Court in *Andries* went on to state at para 48 that:

This review of the authorities confirms my view that the *Hauff* principle is rooted in fairness. A payor should not ordinarily be required to pay support for a period during which none was sought or for a period during which the amount was fixed by interim order or agreement. Generally speaking, a payor structures his or her financial affairs on the basis of known obligations. In the usual course of things, it would be quite unfair to impose an additional obligation retroactively.

<sup>29</sup> *Supra* note 25 at para 14. This standard of review was adopted in *Gabb v Gabb*, 2001 MBCA 19, [2001] 8 WWR 635 and *Katz v Katz*, 2004 MBCA 85 at para 52, [2005] 8 WWR 217.

He also commented upon the double costs rule relating to settlement offers and emphasized that its actual consequences must be borne in mind in each individual case. He encouraged trial judges to adopt the following practice:

In future I recommend that trial judges, when called upon to advert to the provisions of Rule 49.10(1), should obtain from counsel as best can be done an estimate of the legal costs incurred (exclusive of course of disbursements) so that the full impact of the doubling up provision can be factored into the exercise of the discretion under the rule. Following this procedure should not detract in any way from the goal of the rule which is to provide a disincentive for parties to continue litigation in the face of a reasonable settlement offer.<sup>30</sup>

After establishing the general rule in *Hauff*, Chief Justice Scott went on to find exceptional circumstances supporting a lump sum award in the subsequent case of *Kloos v Kloos*.<sup>31</sup> In that case, the parties' 11-year marriage had ended, but the situation was complicated by a return of the wife's multiple sclerosis symptoms, which had been in remission since before the marriage. Chief Justice Scott upheld the trial judge's award of ongoing spousal support in the circumstances,<sup>32</sup> as well as the lump sum award he made by back-dating the spousal support award to the date of separation.<sup>33</sup> Chief Justice Scott stated:

It was always made plain by Mrs. Kloos that she was in need of spousal support. She should not now be penalized for trying to get her case on for hearing as expeditiously as possible, rather than proceeding with an interim application for maintenance with the attendant additional expense and delay.<sup>34</sup>

The appeal was therefore dismissed.

### C. Civil Litigation

Another area where Chief Justice Scott has made a significant contribution to the development of the jurisprudence in Manitoba is in the field of civil litigation. He has played a particularly important role in deciding cases regarding employment law matters, specifically those

<sup>30</sup> *Supra* note 25 at para 16.

<sup>31</sup> [1996] 5 WWR 553, 110 Man R (2d) 129 (Man CA) [*Kloos* cited to WWR].

<sup>32</sup> As explained by Prof. McLeod in his annotation to the case in 20 RFL (4th) 1 at 2, this decision was rather controversial.

<sup>33</sup> The lump sum award amounted to approximately \$9,000.

<sup>34</sup> *Kloos*, *supra* note 31 at para 36.



relating to restrictive covenants. Two of his key decisions in that area are *Friesen v McKague*<sup>35</sup> and *Winnipeg Livestock Sales Ltd v Plewman*.<sup>36</sup>

The *Friesen* case involved several Steinbach-area veterinarians. The case was somewhat unusual in that it involved sophisticated professionals who sought legal advice regarding the restrictive covenant at issue.<sup>37</sup> As well, it arose from a summary judgment motion, rather than an interim interlocutory injunction.<sup>38</sup>

One of the issues before the MBCA was the reasonableness of the restrictive covenant. On this point, Chief Justice Scott ruled as follows:

There was no inequality of bargaining power between the parties in this case. The defendant was a professional and in receipt of legal advice at all stages of the proceedings. Given the nature of the specific area of practice assigned to the defendant and of the community involved, it was entirely appropriate that there be a general restriction because of the close personal relationship that undoubtedly developed between the defendant and the clinic's customers. This was indeed the only effective way to protect the plaintiffs' legitimate business interests.

The covenant is otherwise reasonable in terms of time and scope. There is no suggestion that the public interest is adversely affected by enforcement of the provision. In my opinion the appeal must fail as to this issue.<sup>39</sup>

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<sup>35</sup> (1992), 96 DLR (4th) 341, [1993] 1 WWR 627 (Man CA) [*Friesen* cited to DLR].

<sup>36</sup> 2000 MBCA 60, 192 DLR (4th) 525 [*Plewman*]. Of course, one cannot overlook *Wallace v United Grain Growers Ltd.*, [1995] 9 WWR 153, 102 Man R (2d) 161 (Man CA), where Chief Justice Scott's decision on appeal, rev'g [1993] 7 WWR 525, 87 Man R (2d) 161 set the stage for the Supreme Court of Canada's significant jurisprudential shift regarding wrongful dismissal cases involving bad faith on the part of the employer ([1997] 3 SCR 701, 152 DLR (4th) 1).

<sup>37</sup> The covenant is reproduced, *supra* note 35 at para 5, and read as follows:

Upon termination of this agreement for any reason whatsoever, the Clinic (sic) hereby covenants and agrees with McKague, that he will not, for a period of three years from the date of such termination, either individually or in partnership, or in conjunction with any other person or persons, firm, or corporation as principle [sic], agent or shareholder, or in any manner whatsoever, carry on or be engaged in or concerned with or interested in or advise, lend money to, guarantee the debt or obligations of, or permit his name to be used or employed in carrying on within a radius of twenty-five (25) miles of Steinbach, the practice of veterinary medicine.

<sup>38</sup> An interim interlocutory injunction had been granted ([1991] 5 WWR 567, 74 Man R (2d) 155 (QB)) prior to the summary judgment motion ([1992] 5 WWR 562, 80 Man R (2d) 233 (QB)).

<sup>39</sup> *Friesen*, *supra* note 35 at 346.

Thus, the restrictive covenant was found to be reasonable and enforceable in the circumstances.

In *Plewman*, the defendant was an experienced livestock auctioneer. He provided services to Winnipeg Livestock Sales Ltd. as an independent contractor. As part of this contract for personal services, he agreed that, for a period of 18 months following the termination of his services, he would not “solicit business from or provide livestock auctioneering services to any person within the Province of Manitoba who is or is likely to be in competition with the Business”.<sup>40</sup> A Court of Queen’s Bench judge granted the plaintiff’s application for an interim interlocutory injunction. This ruling formed the basis for Plewman’s appeal.

In the course of his reasons, Chief Justice Scott confirmed that the case law that had developed with respect to restrictive covenants in employment law relationships was equally applicable to cases, such as *Plewman*, involving independent contractors.<sup>41</sup> Chief Justice Scott reviewed the evidence and determined that “Winnipeg Livestock has not provided evidence to establish that it has a legitimate proprietary interest in its customer connections. This being so, the restrictive covenant is not

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<sup>40</sup> *Plewman*, *supra* note 36 at para 4. The full text of the provision was:

The Contractor covenants and agrees with the Owner that he will not at any time within eighteen (18) months following the Termination Date (without the prior written consent of the Owner) either individually or in partnership or jointly or in conjunction with any person or persons, firm, association, syndicate, company or corporation as principal, agent, shareholder or in any other manner whatsoever solicit business from or provide livestock auctioneering services to any person within the Province of Manitoba who is or is likely to be in competition with the Business regardless of whether the Contractor has theretofore contacted or provided livestock auctioneering services to or otherwise approached as a representative of the Owner the said persons. The Owner shall have the right to obtain an injunction enjoining any violation of the restrictive covenant of the Contractor that is set forth in this paragraph. The Contractor hereby acknowledges that, in the event of any violation of such restrictive covenant, the Owner will suffer irreparable harm and that an injunction is a necessary remedy in the circumstances. The Contractor agrees that the within restrictive covenant is reasonable and valid and all defences to the strict enforcement thereof by the Owner are hereby waived by the Contractor.

<sup>41</sup> *Ibid* at para 24.

reasonable.”<sup>42</sup> While this finding was determinative of the appeal, he went on to provide a helpful summary of the key legal principles regarding which circumstances will generally be relevant in determining whether a case is an ‘exceptional’ one (so that a general non-competition clause will be found to be reasonable).<sup>43</sup> His useful distillation of the law on this point has undoubtedly assisted numerous counsel and courts when grappling with this difficult issue.

### III. KEY CASES

The foregoing brief snapshot of Chief Justice Scott’s extensive contribution to the jurisprudence in Manitoba was merely intended to set the stage for the following more thorough examination of several of his most well-known decisions: *Manitoba Métis Federation Inc v Canada (Attorney General) et al.*;<sup>44</sup> *O’Brien v Tyrone Enterprises Ltd.*;<sup>45</sup> *Rebenchuk v Rebenchuk*;<sup>46</sup> *Gillespie v Attorney General of Manitoba*;<sup>47</sup> and *R v Lavallee*.<sup>48</sup>

#### A. *Manitoba Métis Federation Inc v Canada*<sup>49</sup>

This appeal stemmed from an action filed in 1981 and was heard by the MBCA’s five most senior judges in early 2010. Chief Justice Scott wrote the panel’s unanimous judgment, a lengthy yet meticulous decision totaling over 250 pages. The case focused on the administration of the *Manitoba Act 1870*,<sup>50</sup> which was the constitutional instrument through which Manitoba joined Confederation. The contentious legal and factual issues it engaged went to the heart of the province’s history.

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<sup>42</sup> *Ibid* at para 29.

<sup>43</sup> *Ibid* at para 41.

<sup>44</sup> *Infra* note 49.

<sup>45</sup> *Infra* note 79.

<sup>46</sup> *Infra* note 100.

<sup>47</sup> *Infra* note 128.

<sup>48</sup> *Supra* note 2.

<sup>49</sup> 2010 MBCA 71, [2010] 12 WWR 599 [MMF MBCA]. As mentioned in the footnotes to the interview with Chief Justice Scott, above, an appeal to the Supreme Court of Canada in the MMF case was heard December 13, 2011. The matter is still under reserve.

<sup>50</sup> SC 1869-1870 (33 Vict), c 3 [*Manitoba Act*].

The appellants included a number of individuals from Manitoba's Métis community along with the Manitoba Métis Federation ("MMF").<sup>51</sup> The MMF sought only declaratory relief, which it planned to use to further its ongoing land claim negotiations with the Crown.<sup>52</sup> The primary claim made against Canada was that it had breached its fiduciary obligations with respect to the implementation of sections 31 and 32 of the *Manitoba Act*. Section 31, the opening words of which referred to being an expedient towards the extinguishment of Indian title, granted 1.4 million acres of land to be distributed to the children of the Métis heads of families residing in Manitoba at the time it joined Confederation. Section 32 dealt with the rights of those who had already settled (to varying extents) on particular parcels of land. With respect to the government of Manitoba, the MMF claimed that it had legislated outside its jurisdiction in enacting a number of statutes that affected the implementation of the *Manitoba Act*.<sup>53</sup>

The MBCA determined that the action was barred in its entirety by the combined operation of the relevant statutory limitation period and the doctrines of laches and mootness.<sup>54</sup> The remaining legal issues therefore could have been left unaddressed, but "given the uniqueness and importance of the issues raised,"<sup>55</sup> Chief Justice Scott chose to write a full decision with respect to Canada's administration of sections 31 and 32 of the *Manitoba Act*. Chief Justice Scott found no error in the trial judge's

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<sup>51</sup> The MMF was denied standing by the trial judge on the basis that it did not meet the test for public interest standing, and the MBCA saw no reason to interfere with that decision: *MMF MBCA*, *supra* note 44 at para 268). Still, the MMF remains the lead appellant in the style of cause and it is referred to herein as such.

<sup>52</sup> *Ibid* at paras 4 and 269. Canada's motion to have the action struck in 1988 "...on the ground, amongst others, that the validity of the impugned legislation [was] a matter of academic interest only" in *Dumont v Canada (Attorney-General)*, (1988), 52 DLR (4th) 25 at 34, [1988] 5 WWR 193 (Man CA) was allowed. That decision was overturned by the SCC, which found that "...the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act, 1870* is justiciable in the discretion of the court in aid of extra-judicial claims in an appropriate case" (*Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 at 280, 105 NR 228). The claim for breach of fiduciary duty had not yet become part of the plaintiffs' case when that motion and the appeals therefrom were heard.

<sup>53</sup> *Supra* note 49 at para 6.

<sup>54</sup> *MMF MBCA*, *supra* note 44 at paras 10, 293, 348 and 368.

<sup>55</sup> *Ibid* at para 11.

findings of fact,<sup>56</sup> but he did identify a number of errors of law.<sup>57</sup> However, he ultimately concluded that the trial judge’s decision to deny declaratory relief would not have been overturned even if the claims were not otherwise barred.<sup>58</sup>

Other than with respect to standing, the evidence before the Court was entirely based on historical documentation, including diary entries, letters, parliamentary debates and newspaper articles. Chief Justice Scott recognized both the weaknesses in this evidence and its vital importance to the case.<sup>59</sup> He spent almost 50 pages detailing the relevant facts. The gaps in the record and the contextual uncertainty arising from the lack of first-person oral evidence were a significant hindrance to the appellants, on whom the onus of proof fell.<sup>60</sup>

Although the results at trial and on appeal were the same, a significant change in perspective is evident between the two judgments. For example, while the trial judge had placed great weight on his finding that the Métis were not Indians, Chief Justice Scott explained that the relevant question was whether they were Aboriginal.<sup>61</sup> His acknowledgment of the Métis’ status as one of Canada’s Aboriginal peoples resonates throughout his reasons.

The role of the honour of the Crown was likely the issue that drew, between the parties’ representations and the trial decision, the most divergent and varied interpretations.<sup>62</sup> Chief Justice Scott delivered a succinct but relatively comprehensive review of how the powerful but often nebulous doctrine actually operates in Canadian law.<sup>63</sup> He concluded that the ultimate relevance of the honour of the Crown in the MMF case was in serving “to flavour the nature and extent of any fiduciary duty.”<sup>64</sup> The determination of whether any such duty existed remained a separate question.<sup>65</sup> He rejected the appellants’ claim that the honour of

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<sup>56</sup> *Ibid* at para 240, but see paras 652 and 653.

<sup>57</sup> See, for example, *ibid* at paras 347, 432, 651 and 652.

<sup>58</sup> *Ibid* at para 737.

<sup>59</sup> *Ibid* at paras 14–18.

<sup>60</sup> *Ibid* at paras 657–63.

<sup>61</sup> *Ibid* at para 382.

<sup>62</sup> *Ibid* at paras 385–403.

<sup>63</sup> *Ibid* at paras 404–28.

<sup>64</sup> *Ibid* at para 428.

<sup>65</sup> *Ibid* at para 427.

the Crown gave rise to an independent cause of action under the circumstances, writing that “...they have not shown that that approach falls within any principled extension of the existing honour of the Crown jurisprudence.”<sup>66</sup>

Chief Justice Scott found that while the Métis were beneficiaries of the Crown-Aboriginal fiduciary relationship,<sup>67</sup> not all obligations within such a relationship were themselves fiduciary in nature.<sup>68</sup> He went on to address whether a fiduciary obligation arose with respect to the administration of section 31, specifically with reference to the Crown-Aboriginal relationship, and explained the test as being “composed of two main parts: first, a specific or cognizable Aboriginal interest and second, an undertaking of discretionary control over that interest by the Crown in the nature of a private law duty.”<sup>69</sup>

Chief Justice Scott declined to determine whether a cognizable Aboriginal interest was present, as it was neither necessary in light of his other findings nor desirable given the absence of focused argument on the subject.<sup>70</sup> He did, however, delve into the issue, delivering analysis on the existing SCC cases that that can be expected to be built upon in future jurisprudence and concluding:

that Aboriginal peoples’ independent, pre-existing interest in land provides the basis for enforceable fiduciary duties even when the Aboriginal group has no title in the land (*Wewaykum [Indian Band v Canada]*, [2002] 4 SCR 245, 2002 SCC 79), or where title may be present but has not been proven (*Guerin [v The Queen]*, [1984] 2 SCR 335).<sup>71</sup>

Proceeding to the second part of the test for whether a fiduciary duty existed, Chief Justice Scott found that the Crown had assumed discretionary control in the nature of a private law duty in its administration of section 31 of the *Manitoba Act*,<sup>72</sup> rejecting the respondents’ submissions that they were of a public, non-fiduciary nature.<sup>73</sup> He explained that the vulnerability aspect of this part of the

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<sup>66</sup> *Ibid* at para 422.

<sup>67</sup> *Ibid* at paras 429–43.

<sup>68</sup> *Ibid* at para 429.

<sup>69</sup> *Ibid* at para 468.

<sup>70</sup> *Ibid* at para 509.

<sup>71</sup> *Ibid* at para 507.

<sup>72</sup> *Ibid* at para 510.

<sup>73</sup> *Ibid* at para 514.

fiduciary analysis (which the trial judge had found to be absent) related to that which resulted from the relationship itself.<sup>74</sup> While the Métis were powerful members of the community at the time that section 31 was enacted:

...their vulnerability arose from the complete control that Canada retained over land in the new province, and specifically with respect to all aspects of the s. 31 grants, which it insisted on retaining despite requests for local control.<sup>75</sup>

Chief Justice Scott then turned to look at whether the Crown’s conduct met the standard of a fiduciary, assuming without deciding that the Crown’s obligations regarding section 31 were fiduciary in nature, and summarised the proper approach as follows:

In sum, the fiduciary standard of conduct, which mandates that the fiduciary act with reference to the best interests of the beneficiary and as a reasonable person would in handling his own affairs, is a high one. But the Crown is no ordinary fiduciary, and while it may not shirk its fiduciary obligations by simply citing the competing interests that it serves, it is entitled to consider those competing interests even in actions that affect those to whom it owes fiduciary obligations. The question of whether the standard has been breached must also be considered with reference to the conduct itself, and not the end result, mindful of the context of the times, and not in hindsight.<sup>76</sup>

The evidence showed that the distribution of the 1.4 million acres to the Métis was fraught with delay and unexplained irregularities and did not result in any lasting prosperity for its recipients. Yet these results could not prove a breach of the fiduciary standard, and the evidentiary record otherwise fell short of demonstrating that the Crown failed to discharge any fiduciary obligations that may have existed in these early years of Manitoba’s entry into Confederation.

With respect to section 32 of the *Manitoba Act*, which was of general application and did not engage the Crown-Aboriginal relationship,<sup>77</sup> Chief Justice Scott found that the appellants could not bring themselves within the very limited class of cases where the Crown owed fiduciary obligations outside the scope of any recognised fiduciary relationship.<sup>78</sup>

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<sup>74</sup> *Ibid* at paras 529–34.

<sup>75</sup> *Ibid* at para 530.

<sup>76</sup> *Ibid* at para 556.

<sup>77</sup> *Ibid* at paras 713 and 717.

<sup>78</sup> *Ibid* at para 723.

The MBCA's decision was appealed to the SCC, which, as of the date of this writing, has yet to issue its judgment. It may be that on further appeal the MMF is able to benefit from the SCC's greater freedom to rule beyond the bounds of existing case law. Whatever the SCC's decision, however, the MBCA's judgment in this case will doubtlessly stand as an enduring record of Chief Justice Scott's thorough and principled approach to the facts surrounding events central to Manitoba's formation and to the varied and complex legal issues that arose therefrom.

### B. *O'Brien v Tyrone Enterprises*<sup>79</sup>

The recent reasons of Chief Justice Scott in *O'Brien* are interesting in a number of respects. The case involved an action for personal injuries and the plaintiff applied for severance of liability and damages. In her affidavit in support of her application, she indicated that her lawyers were representing her on a contingency fee basis and that they were not prepared to front the costs of the medical and actuarial witnesses who would be required when the issues of damages were addressed unless the defendant was found to be liable.

The motions court judge, in allowing the application, referred to the seminal authority on severance in civil proceedings in Manitoba, that being *Investors Syndicate Limited v Pro-Fund Distributors Ltd.*<sup>80</sup> In that case Kroft J, as he then was, noted that “[c]ertainly the normal preference of the court is to hear and determine all issues at one time and to discourage the piecemeal trial of actions. That, however, is not an invariable rule. Rules of Court and case law make it clear that, in appropriate circumstances, issues can and should be severed and tried separately.”<sup>81</sup> Kroft J continued to detail some of the considerations which ought to be made by a judge in the exercise of his or her discretion:

1. One party ought not to be harassed at the instance of another by an unnecessary series of trials.
2. There must be some reasonable basis for concluding that the trial of the issue or issues sought to be severed, will put an end to the action.

<sup>79</sup> 2012 MBCA 3, 341 DLR (4th) 618 [*O'Brien*]. A comment on this case is scheduled to appear in a forthcoming issue: see Dayna Steinfeld, “Leveling the Playing Field: Severance and Access to Justice at the Manitoba Court of Appeal” (2012) 36:1 Man LJ (forthcoming)

<sup>80</sup> (1980), 12 Man R (2d) 104 (available on WL Can) (QB).

<sup>81</sup> *Ibid* at para 23.



3. An order for severance should hold the prospect that there will be a significant saving of time and expense.
4. Conversely, severance should not give rise to the necessity of duplication in a substantial way in the presentation of the facts and law involved in later questions.
5. Nothing should be done which might confuse rather than help the final solution of the problem.
6. A plaintiff who forms an action to suit his convenience will seldom be granted the right to sever, if the defendant objects. The objection of a plaintiff to a defendant’s application does not bear such heavy significance.<sup>82</sup>

In the result, Chief Justice Scott dismissed an appeal from the motion court judge’s discretionary order to sever. In support of his decision, the Chief Justice began by indicating that the Manitoba *Court of Queen’s Bench Rules* were “modernized” almost a decade after Kroft J’s decision. Rule 1.04(1), under the heading “General principle”, now reads:

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.<sup>83</sup>

After noting the modernization of the Manitoba Rules, Chief Justice Scott canvassed the jurisprudence from a number of other provinces and observed that there was a trend, or evolution, in some provinces towards a more liberal approach to severance.<sup>84</sup> He agreed with that trend and, despite some authority to the contrary, strongly concluded that a plaintiff’s impecuniosity and the associated issue of access to justice are valid considerations in an application for severance.<sup>85</sup> He wrote:

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<sup>82</sup> *Ibid* at para 27.

<sup>83</sup> While the Manitoba *Court of Queen’s Bench Rules*, Man Reg 553/88, do not specifically provide for severance, many Manitoba decisions have seized upon this section to buttress the “inherent jurisdiction” in a court to sever. See, e.g., *Canadian National Railway Co v Huntingdon Real Estate Investment Trust*, 2008 MBQB 266, [2009] 3 WWR 550 (Master), aff’d 2009 MBQB 233, 244 Man R (2d) 69 (QB) Beard J. Master Ring succinctly noted that “the court retains a residual discretion to permit severance in order to meet the objective set out in *Queen’s Bench Rule 1.04(1)*” (at para 5). See also Rule 1.04(2), which indicates that, where matters are not provided for in the rules, the practice shall be determined by analogy to them.

<sup>84</sup> *O’Brien*, *supra* note 79 at para 32. For example, Chief Justice Scott noted the “recognition of the increased breadth of the court’s discretion” in recent British Columbia law and cited the decision of *Cayou v Cayou*, 2010 BCSC 1224, 89 CCLI (4th) 140.

<sup>85</sup> As noted in his reasons, the strongest judicial pronouncement against granting

Manitoba jurisprudence has consistently required that for severance to be granted, an ‘exceptional case’ should be made out. But as we have also seen, there is recent case law from other provinces which supports the conclusion that financial hardship can be a proper consideration in demonstrating that a case is exceptional or, more accurately, that a clear and compelling case has been made out for severance.

In my opinion, ‘exceptional,’ ‘extraordinary’ and ‘clear and compelling’ essentially express the same thought. I find the latter phrase more helpful because it confirms that the factors to be considered in an application for severance are very much factually driven and, further, that there are no obligatory criteria that must be adverted to by a motions court judge when considering an application for severance.  
[...]

As we have seen, courts in other jurisdictions have moved decisively away from the view that consideration of financial hardship on a severance application is an error. In those instances where evidence of financial hardship has not resulted in severance being granted, it is often the case that either the plaintiff’s impecuniosity was the only factor in its favour, or it failed to demonstrate that it would be beneficial to sever. Here the motions court judge, in the exercise of his discretion, while recognizing the criteria set forth in *Investors Syndicate*, gave, in the particular circumstances before him, significant weight to considerations of the plaintiff’s impecuniosity and the resulting access to justice issue. In doing so, he did not err.

The motions court judge’s decision is entirely consistent with the fundamental principle to be considered in applications of this kind, namely, the exercise of judicial discretion to determine whether severance is the ‘just, most expeditious and least expensive’ resolution (Rule 1.04(1)). Whatever description one wishes to use - exceptional, extraordinary or clear and compelling - the task before the motions court judge is ultimately the same.<sup>86</sup>

There is much to laud about Chief Justice Scott’s reasons. Civil trials are becoming increasingly expensive and access to justice is undoubtedly a genuine and growing concern. Indeed, a liberalized attitude towards severance is just one of the many ways that courts have attempted to lower costs and improve access to justice.<sup>87</sup>

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severance on the basis of the plaintiff’s financial predicament is found in *Duffy v Gillespie* (1997), 36 OR (3d) 443, 155 DLR (4th) 461 (Div Ct).

<sup>86</sup> *Supra* note 79 at paras 52-56.

<sup>87</sup> Available techniques to lower costs will, of course, vary with the nature of the action and the litigants. As just one example, a popular way to reduce costs involves judicial approval of a class action lawsuit. In *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158, Chief Justice McLachlin wrote at para 15:

[B]y distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the

Interestingly, however, there is recent case law that has thrown some cold water on the availability of severance in such circumstances. The most prominent case is the decision of the Alberta Court of Appeal in *Gallant v Farries*.<sup>88</sup> In their reasons in that case, the Court of Appeal questioned the analysis found in *Envision Edmonton Opportunities Society et al v Edmonton (City)*,<sup>89</sup> a decision which was cited, with apparent approval, by Chief Justice Scott.<sup>90</sup>

In *Envision*, and as reviewed in Chief Justice Scott’s reasons, Moen J considered recent changes to the *Alberta Rules of Court*, one of which was the Alberta equivalent of Manitoba Rule 1.04(1).<sup>91</sup> In concluding that the strict “exceptional test” was no longer the law in Alberta, Moen J concluded:

[T]he court should be more willing to grant remedies with the potential to provide a more timely and cost-effective result without sacrificing fairness and justice. If the court can narrow the focus of a trial and do away with the necessity for a long trial without sacrificing fairness or justice, it should do so, recognizing that providing litigants with a timely and cost-effective result serves the ends of justice.<sup>92</sup>

In *Gallant*, however, Côté JA referenced a “huge body of authorities for the traditional law” that severance is “a dangerous but alluring siren, often ending by wasting everyone’s time and money, not saving it.”<sup>93</sup> He continued:

They [the pre-2010 cases] show the dangers of hopeful theorizing. They state that bitter experience shows that splits rarely achieve economy in practice; usually the result of the split (one way or the other) is to increase the time and money

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prosecution of claims that any one class member would find too costly to prosecute on his or her own.

<sup>88</sup> 2012 ABCA 98, 98 MPLR (4th) 39 [*Gallant*].

<sup>89</sup> 2011 ABQB 29, 528 AR 29 [*Envision*].

<sup>90</sup> O’Brien, *supra* note 79 at para 30.

<sup>91</sup> The Alberta Rule read:

1.2 (1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used ...

(b) to facilitate the quickest means of resolving a claim at the least expense.

<sup>92</sup> *Envision*, *supra* note 89 at para 48.

<sup>93</sup> *Gallant*, *supra* note 88 at para 13.

consumed. Savings of time and expense by severing issues have consistently proven to be elusive: *LKD v JB*, *infra* (para 6).<sup>94</sup>

Certainly, *Gallant* is factually distinguishable from *O'Brien* as it did not deal with an impecunious plaintiff. That being said, Côté JA made the following observation:

No legal authority was given for hindering a defendant and helping a plaintiff, all because the plaintiff has less money. Nor do I know of any. Some authority is contrary: *Duffy v Gillespie* [*supra*].<sup>95</sup>

Finally, it is interesting note Mr. Justice Côté's view that the possibility of an appeal from a severed issue strongly bodes against a severance. He opined:

Furthermore, the plaintiff's counsel told us that he cannot rule out the possibility of his appealing such an adverse trial ruling on liability: indeed he said that he certainly does not undertake not to appeal. Therefore, the statement in the plaintiff's factum that a decision finding no liability 'would end the matter' (para 29) is simply incorrect. See *Tanguay v Vincent* (1999) 75 Alta LR (3d) 90, 95 (paras 25-29).

The alternate 'saving' scenario is that the first trial judge might find liability, and that that might then somehow motivate the defendant to agree with the plaintiff on the amount of damages. But even an increased likelihood of settling would not suffice; one would need a probability: *Moseley v Spray Lakes etc.* (1994) 164 AR 76, 80 (para 19).<sup>96</sup>

And later:

Furthermore, if the first trial found liability, the defendant might well appeal instead of settling. So far, the plaintiff has not retained damages experts, nor provided their reports. So the defendant does not know what the plaintiff's damages evidence will be. Why would the defendant not thus appeal liability? See *Tanguay v Vincent*, *supra*, at 94, 95, 96 (paras 15, 17, 26, 31-32).

So there is no evidence, nor any logical ground, to think that either or both of the two 'saving' scenarios is any more likely than either or both of the two 'wasting' scenarios. A split is not likely to save any time or money. This appeal has already spent time and money which would have been saved had there been no split. And if there were an appeal from a liability finding, then more time and money would be spent on a second appeal. So wasting time and money because of the split is also likely.<sup>97</sup>

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<sup>94</sup> *Ibid* at para 15.

<sup>95</sup> *Ibid* at para 7.

<sup>96</sup> *Ibid* at paras 41 and 42.

<sup>97</sup> *Ibid* at paras 46 and 47.

As we reflect on the above, two points can be noted. First, and from a factual perspective, in the proceedings before Chief Justice Scott (and before the motions court judge) there were no assurances from the defendant that, if they should lose on the severed issue of liability, they would not appeal.<sup>98</sup> Second, while in the normal course one might expect an appeal on liability to occur after the trial on damages, the suggestion has been made that an appeal can potentially lie from a severed issue. Philp JA wrote in *CAE Aircraft Ltd v Canadian Commercial Corp*:

For my own part, I lean to the view that an appeal to this Court does lie from the determination made on the trial of the severed issue, whether that determination takes the form of a "rule, order, verdict, judgment, decree or decision." (s. 101, *The Queen's Bench Act*, R.S.M. 1970, c. 52; cf. s. 89, *The Court of Queen's Bench Act*, S.M. 1988-89, c. 4-Cap. C280).<sup>99</sup>

In all, and despite the potential pitfalls that may occur when there is an order for severance, the direction of Manitoba jurisprudence is made clear by Chief Justice Scott in *O'Brien*. Accordingly, members of the Bar can expect increased receptiveness by the judiciary when faced with an impecunious plaintiff and a legitimate claim of an access to justice issue.

### C. *Rebenchuk v Rebenchuk*<sup>100</sup>

As noted above, Chief Justice Scott has had occasion to decide many family law matters. Though he was not a member of the Family Division when sitting as a trial judge, his lengthy tenure at the MBCA has enabled

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<sup>98</sup> The plaintiff did appear to agree that, if she lost on liability, "there would be no need for further expenses." See the reasons of Clearwater J in 2010 MBQB 229 at para 8, 259 Man R (2d) 99. *Quaere* also, the potential effect of the fact that the third party did not participate in the proceedings before either Clearwater J or the MBCA.

<sup>99</sup> (1989), 61 Man R (2d) 201 at para 18 (available on WL Can). See, also, the Queen's Bench decision in *Canadian National Railway Co. v Huntingdon Real Estate Investment Trust*, *supra* note 83, where Beard J (as she then was) wrote at para 17:

The other problem with a split trial relates to the potential delay that may occur where the party who is not successful on liability chooses to appeal that ruling before proceeding with the hearing for damages. That delay may result in the second part of the trial proceeding years after the first part, with the result that the judge, even if he or she heard the first part, may have little recall of the evidence and will require a significant amount of time, possibly even having to order and read transcripts of the first part of the trial, to remember the testimony.

<sup>100</sup> 2007 MBCA 22, 279 DLR (4th) 448 [*Rebenchuk CA*].

him to hear and decide many disputes arising out of family breakdowns. One of his more recent and well-known decisions in this area is *Rebenchuk*, which dealt with the thorny issue of child support for adult children pursuing post-secondary education.<sup>101</sup>

For those readers unfamiliar with this topic, the *Divorce Act* makes provision for corollary relief in the form of child support orders for ‘children of the marriage’.<sup>102</sup> Child support orders are to be made in accordance with the governing child support guidelines.<sup>103</sup> However, the guidelines regarding children over the age of majority provide courts with a wide discretion in crafting appropriate child support orders.<sup>104</sup>

Like most acrimonious divorce proceedings, the *Rebenchuk* case had a long and convoluted history. Mr. and Mrs. Rebenchuk had three children, all of whom were university-aged by the time the matter reached the MBCA. Unfortunately, “[b]y the time of the divorce the father was estranged from his two oldest daughters and had limited contact with” their youngest child.<sup>105</sup> According to information obtained from the online court registry, the divorce petition was filed by Mrs. Rebenchuk on October 7, 1998.<sup>106</sup> The first interim order was made on July 13, 1999. Thereafter, many affidavits, interrogatories, pre-trial briefs and motions followed. A consent judgment was finally entered on June 27, 2001, which

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<sup>101</sup> Prior to *Rebenchuk*, the leading MBCA case on this point was *Perfanick v Panciera*, 2001 MBCA 200, [2002] 3 WWR 645.

<sup>102</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 15.1. The term “child of the marriage” is defined in s 2(1) thereof, and includes a child who “is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.”

<sup>103</sup> *Ibid*, s 15.1(3).

<sup>104</sup> Section 3(2) of the *Federal Child Support Guidelines*, SOR/97-175 states:

Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is the amount determined by applying these Guidelines as if the child were under the age of majority, or if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

<sup>105</sup> *Rebenchuk CA*, *supra* note 100 at para 4.

<sup>106</sup> Manitoba Courts Registry System, online: QB Court Registry <<http://www.jus.gov.mb.ca/registry/index.htm>>

finalized the divorce and addressed corollary relief. At that time, Mr. Rebenchuk agreed to pay the table amount of child support for the youngest child, who was then still a minor, and the table amount for their middle child, who was in university. The eldest child was teaching English in China at that time. However, he also agreed "to contribute his proportionate share of annual tuition and textbooks for each of the children of the marriage who attend university or college."<sup>107</sup> Mrs. Rebenchuk "was to confirm the cost of tuition and books for the following years by the 10th of September and January respectively."<sup>108</sup>

As time passed, the children's situations changed, but this information was not communicated to Mr. Rebenchuk. Upon learning that their middle child was no longer attending university, Mr. Rebenchuk sought to vary his child support obligations. However, by that time their eldest child had returned from teaching in China, had moved back into her mother's house and was enrolled in university. Mrs. Rebenchuk therefore applied for a variation of the child support arrangements to obtain child support in respect of their eldest child, claiming that she had resumed her status as a 'child of the marriage'. In her affidavit in support of her mother's motion, the eldest child stated that she did not attend university on a full-time basis because she was concerned about going further into debt and felt that she could not work if she was to undertake a full course load.

As Chief Justice Scott described in his reasons for decision:

The two competing variation applications were heard in December 2003. In the decision that followed, the father was ordered to pay support for all three children for the months of September and October 2002, and for Stacey and Tara only for the months of November and December 2002. The motions court judge concluded that Kristy ceased to be a child of the marriage when she moved out of the mother's residence in November 2002. After making further adjustments for the year 2003, it was ordered that no further child support would be payable by the father after August 2003 unless the child returned to post-secondary education. The father was ordered to pay a proportionate share of the post-secondary expenses for Stacey and some of the tuition for Kristy. In the result, the father was to pay \$3,331.05 to the mother. In the event that child support was sought, the mother was to provide notice to the father in August or December, failing which there was 'no obligation to make support payments.'

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<sup>107</sup> *Rebenchuk v Rebenchuk*, 2005 MBQB 128 at para 11, [2005] 11 WWR 628.

<sup>108</sup> *Supra* note 100 at para 3.

Their youngest child did not immediately enrol in university after graduating from high school. However, she later enrolled in a university program, first on a part-time basis, and later as a full-time student. Mr. Rebenchuk was concerned that she had not adequately pursued appropriate employment opportunities. He also challenged the constitutionality of the requirement that he was required to pay support for his adult children.<sup>109</sup> On these issues, the Court of Queen's Bench judge hearing the motions:

...dismissed the father's constitutional challenge. After fixing the income of the father and mother for the purposes of sec. 7 of the Guidelines, the father was ordered to pay table support for [the youngest child] and his proportional share of her annual tuition and textbook expenses, the latter to be paid 'forthwith.' The father was ordered to pay double costs.<sup>110</sup>

The numerous issues before the MBCA in *Rebenchuk* were summarized as follows by Chief Justice Scott:

- (a) When is an adult a 'child of the marriage' within the meaning of the *Divorce Act* when he/she is pursuing educational opportunities, and when does the payor's obligation to contribute terminate?
- (b) To what extent are adult children of a marriage required to contribute to their education costs?
- (c) Where does the 'onus' rest when variation of an order for child support in such circumstances is requested?
- (d) What are the consequences of the mother's failure to provide the father with timely notice of their daughters' attendance at university?
- (e) On what basis can the father be required to contribute for child support prior to the mother's variation application of April 2003?
- (f) Should the father be entitled to the benefit of tuition and other tax credits available to the daughters of the marriage which they had transferred to the mother for the years 2001 and 2002?<sup>111</sup>

Chief Justice Scott began his legal analysis by applying the following three-step test:

Is the person for whom support is sought a 'child of the marriage'?

Is the table amount in the Guidelines 'inappropriate'? If not, then the Guidelines amount should be awarded.

If the answer to Step 2 is 'yes,' what level of support is 'appropriate'?<sup>112</sup>

<sup>109</sup> The constitutional challenge was abandoned on appeal: *Ibid* at para 14.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Rebenchuk* CA, para 15. Some of these issues were dealt with summarily by the MBCA and consequently are not addressed in detail herein.



With regard to the first step in this test, Chief Justice Scott helpfully reviewed the governing authorities and confirmed that “courts do not appear to question too closely whether the pursuit of education qualifies as an ‘other cause’ which prevents a child from withdrawing from parental care.”<sup>113</sup> With respect to the onus of proof, the Chief Justice observed that:

[A]n applicant for support bears the onus of proving that the child is still a ‘child of the marriage.’ ... As we shall see, the onus will not usually be a heavy one where the adult child is pursuing the first level of post-high school education, but becomes more burdensome when the issue concerns post-graduate education.<sup>114</sup>

With respect to the second step of the test, the Chief Justice acknowledged that divergent approaches were being taken by courts across the country, but urged trial judges in Manitoba to adopt the test recommended by MacDonald and Wilton, namely, “[t]he closer the circumstances of the child are to those upon which the usual *Guidelines* approach is based, the less likely it is that the usual *Guidelines* calculation will be inappropriate. The opposite is also true.”<sup>115</sup> He remarked that “if a child has significant earnings this tends to indicate that the table amounts are inappropriate.”<sup>116</sup>

With respect to the third step in the test, the Chief Justice again adopted the position advocated by MacDonald and Wilton, calling it a “hybrid approach”:

Where the adult children are residing with the custodial parent, and attending post-secondary educational institutions, the basic amount under the *Guidelines* may be awarded plus a proportional share of the educational expenses, after taking into account a reasonable contribution from the child.<sup>117</sup>

Turning to the specific facts of the matter before him, after reviewing the relevant authorities (and emphasizing that student loans should be a last resort rather than a substitute for parental responsibility),<sup>118</sup> Chief

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<sup>112</sup> *Ibid*, para 23.

<sup>113</sup> *Ibid*, para 25.

<sup>114</sup> *Ibid*, para 26.

<sup>115</sup> *Ibid* at para 30, citing James C MacDonald, QC & Ann C Wilton, *Child Support Guidelines: Law and Practice*, 2nd ed, vol 1 (Toronto: Carswell, 2004) at pp 3-11, 3-12 [MacDonald & Wilton].

<sup>116</sup> *Rebenchuk CA*, *supra* note 100 at para 32.

<sup>117</sup> *Ibid* at para 34, citing MacDonald & Wilton, p. 3-23.

<sup>118</sup> *Ibid* at para 53: “I agree with the view that, ordinarily, student loans ought to be

Justice Scott distilled the following list of factors to guide judges deciding these types of cases in Manitoba:

1. What would the parents have decided if their marriage had remained intact?
2. To what degree is the child able to earn an income to contribute to his or her own education?
3. Are the child's living expenses reasonable?
4. Are the child's career plans reasonable?
5. Is the child likely to benefit from the program of study?
6. Is part-time employment available and, if so, would it harm the student's ability to benefit from her studies?
7. Has there been an unjustified unilateral termination of a relationship with the payor parent?
8. Is the student eligible for student loans or other financial assistance?<sup>119</sup>

He also reiterated the highly deferential standard of review that is engaged in these types of cases.<sup>120</sup>

On the whole, Chief Justice Scott took a pragmatic view of these situations, recognizing the burden that student debt places on children pursuing higher education, and stating that:

I much prefer a simple requirement that adult children contribute a 'reasonable amount' of their total earnings to their education rather than placing a more onerous burden upon them, leaving the precise determination to the exercise of the trial judge's discretion...<sup>121</sup>

On the issue of the cost of maintaining the child in a separate residence, Chief Justice Scott opined that:

[c]ourts do not normally question the legitimacy of the cost of maintaining the child in a separate residence where the career goals can only be met away from home. However, if the choice to study 'away' is optional, then the child may well be required to contribute a greater proportion toward their education...<sup>122</sup>

On the relevance of a breakdown in the filial relationship, Chief Justice Scott stated:

Termination of the parent/child relationship is a particularly difficult issue. In my view, selfish or ungrateful children who reject the non-custodial parent

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required only when the means of the child combined with the means of the parents leave a shortfall. It is to be remembered that student debt delays the cost of education. It is not a reduction." See also para 45.

<sup>119</sup> *Ibid* at para 41.

<sup>120</sup> *Ibid* at para 51.

<sup>121</sup> *Ibid* at para 54.

<sup>122</sup> *Ibid* at para 55.

without justification should not expect to be supported through their years of higher education. But this factor rarely stands alone as the sole ground for denying support unless the situation is ‘extremely grave’.<sup>123</sup>

With respect to suspending child support during time away from school, Chief Justice Scott opined that “[t]o reduce or eliminate parental support because the child took several breaks to work and save money, or opted for part-time studies, would penalize her efforts to achieve her goals with limited means.”<sup>124</sup>

While the issue of onus was dealt with summarily,<sup>125</sup> the problem created by the mother’s lack of disclosure regarding the children’s educational status caused the MBCA greater concern. Chief Justice Scott made it clear that “the father’s remedy for the failure of the mother to provide adequate or timely disclosure is not to peremptorily cease payment for the support of his children.”<sup>126</sup> He went on to review the remedial options available to trial judges grappling with these difficult situations.<sup>127</sup>

Chief Justice Scott’s decision adopted a fairly liberal but pragmatic approach to child support for adult children pursuing post-secondary training, recognizing the real burden and cost of student debt, as well as the realities facing young people seeking post-secondary degrees in the present economic climate. Given the number of times that the case has been cited, it is clear that Chief Justice Scott’s distillation and clarification of the law in this area has provided much-needed guidance to counsel and judges addressing similar family law disputes.

#### ***D. Gillespie v Attorney General of Manitoba***<sup>128</sup>

Chief Justice Scott’s most noteworthy dissent occurred in *Gillespie v Attorney General of Manitoba*. By way of factual background, in 1998 an *ad hoc* committee comprised of judges of the Court of Queen’s Bench and Provincial Court, as well as representatives of the Department of Justice and other Manitoba government departments, implemented a perimeter

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<sup>123</sup> *Ibid* at para 56 [citation omitted].

<sup>124</sup> *Ibid* at para 59.

<sup>125</sup> The MBCA accepted that the onus was appropriately on Mr. Rebenchuk as the party seeking to vary an existing order. *Ibid* at paras 63-65.

<sup>126</sup> *Ibid* at para 75.

<sup>127</sup> *Ibid* at para 81.

<sup>128</sup> 2000 MBCA 1, 185 DLR (4th) 214.

security program at the Manitoba Law Courts complex. The security included walking through a metal detector as well as requiring an individual to empty his or her pockets for a visual inspection.

Two applicants applied for a declaration that their rights to be secure against unreasonable search and seizure were violated by the security measures. Their application was rejected by Steel J, as she then was, who held that there was common law authority for the program in the inherent jurisdiction of the Court of Queen's Bench.<sup>129</sup>

In overturning her decision, Philp JA held that Steel J erred in finding that:

“the program was authorized by law” for the simple reason that there was “nothing on the record to establish that the court, or a judge thereof, exercised that jurisdiction in recommending or approving the implementation of the program.”<sup>130</sup>

He explicitly chose not to decide whether the court's inherent jurisdiction would extend to the implementation of the security measures that were put in place.<sup>131</sup> In the result, he declared the searches conducted at the Law Courts complex to be unreasonable as there was no statutory or regulatory foundation for them, nor was there a common law power in the sheriff's office to conduct such searches.

Four days after the release of the MBCA's decision, Hewak CJQB revived the security program by an *ex parte* order. The applicant, again Gillespie, then filed a Notice of Appeal directly to the MBCA seeking to overturn the *ex parte* order.

The MBCA took the unusual step of sitting a panel of five judges for *Gillespie v Manitoba*.<sup>132</sup> Twaddle JA, writing for the majority, held that a superior court's inherent jurisdiction is a power that:

a judge may draw upon to assist or help him or her in the exercise of the ordinary jurisdiction of the court, but does not generally stand alone waiting to be exercised on the judge's own initiative without a suit or application or without parties.<sup>133</sup>

<sup>129</sup> *R v Lindsay*, [1999] 9 WWR 443 at para 42, 137 Man R (2d) 68 (QB)

<sup>130</sup> *R v Lindsay* (1999), 182 DLR (4th) 599 at para 21, 141 CCC (3d) 526 (Man CA).

<sup>131</sup> *Ibid* at para 28.

<sup>132</sup> 2000 MBCA 1, 185 DLR (4th) 214.

<sup>133</sup> *Ibid* at para 18.

He further explained that the jurisdiction to which the inherent powers are auxiliary is primarily adjudicative and extends to maintaining order and control in the courtroom in the course of a proceeding before a judge exercising that adjudicative jurisdiction.<sup>134</sup> Finally, he opined that the issue of courthouse security is a matter of public policy best left to the authority of the Legislature.

Chief Justice Scott wrote a strong dissenting decision for himself and Monnin JA. He took a “pragmatic but robust review” of the nature and extent of inherent jurisdiction and held that it was a legitimate exercise of the judicial function for Hewak CJQB to order a reasonable courthouse security system.<sup>135</sup> In extensively referring to the seminal article by Master IH Jacob, “The Inherent Jurisdiction of the Court”,<sup>136</sup> he wrote:

I acknowledge that the inherent jurisdiction of the court is traditionally invoked as an adjunct or aid to an existing common law or other right and that in such circumstances its effect is in the nature of a procedural remedy. This, in my opinion, is not its exclusive role. Its use can also be justified in novel circumstances where the failure to do so will adversely impact upon the court’s ability ‘to administer justice according to law’ (Master Jacob, at p. 52). It is in this sense that the existence of an amorphous, indefinable residual power in a superior court becomes not a weakness, but a strength. This is because it is truly impossible to define with any sense of finality (and undesirable to attempt to do so) the circumstances in which this essential reserve of judicial powers should be utilized on a principled basis in the interests of justice.

...

What is being mandated here is the preservation of a government-funded system that is already in place; there is thus no conflict with existing statutory provisions. To suggest in circumstances such as these that the superior court is powerless to act and must wait for another branch of government to do what is

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<sup>134</sup> *Ibid* at para 26. Twaddle JA identified one case where the court’s inherent jurisdiction was exercised outside of the course of ordinary proceedings. That case was *BCGEU v British Columbia Attorney General*, [1998] 2 SCR 214, 53 DLR (4th) 1 and involved an injunction by the Chief Justice of the British Columbia Supreme Court to prevent picketing outside of the courthouse. Twaddle JA characterized this as an “extraordinary case” which was allowable because the order was made, *inter alia*, to restrain conduct which was already illegal. See *supra* note 132 at para 29.

<sup>135</sup> *Supra* at para 89. Chief Justice Scott also expressed the view that, while a Chief Justice does not have any additional inherent powers over a puisne judge, Hewak CJQB was the appropriate judge to make the order due to his responsibility in managing the relationship between the court and the government.

<sup>136</sup> (1970), 23 *Curr Legal Probs* 23.

essential to ensure safe public access to justice, is to risk a denial of the rule of law itself.<sup>137</sup>

And finally:

In the circumstances before us, the judiciary must have the ability in the absence of an appropriate and reasonable legislative initiative to fill the void. To do less, or as Gillespie would have it, to do nothing, would be tantamount to a surrender of the court's inherent responsibility for its own mandate. I agree with the respondent that security, in this sense, is an essential element of judicial independence. The failure to recognize that there is an obligation to provide a secure and effective environment for all members of the public, whether witnesses, general members of the public, staff or judges, places at risk not only access to justice, but the ability of the judiciary to provide impartial justice for all.<sup>138</sup>

Interestingly, Chief Justice Scott's recognition of the judiciary's role in general courthouse safety is a view that has been readily accepted by a number of United States courts. Illustrative of such decisions is *Epps v Commonwealth of Virginia*.<sup>139</sup> Briefly, a judge of the Circuit Court ordered the courthouse to be closed when no security was provided and posted a sign to that effect in the courthouse. The sign was subsequently removed by the Sheriff, who was then cited for contempt by the Court. In affirming the power of the judge to undertake the actions she did, Judge Frank, writing for the majority of a nine member appellate panel, began by noting that "courts have the inherent authority to ensure the security of their courtrooms."<sup>140</sup> He continued with the following apposite comments:

In its role to provide for the orderly administration of justice, the court ordered the courthouse closed when no security was provided. Indeed, it would be folly to claim the circuit court judge has the power to ensure courtroom, but not courthouse, security. If the judge is impotent to supervise who enters the courthouse, the ability to ensure the security of the courtroom is diminished.<sup>141</sup>

And later:

As previously noted, the law is well settled that courts have the inherent authority to ensure the security of their courtrooms and to ensure the orderly

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<sup>137</sup> *Supra* note 132 at paras 116-117.

<sup>138</sup> *Ibid* at para 128.

<sup>139</sup> 626 SE 2d 912 (Court of Appeals of Virginia, 2006).

<sup>140</sup> *Ibid* at 918.

<sup>141</sup> *Ibid*.

administration of justice. This authority necessarily extends to ensuring the security of the courthouse.<sup>142</sup>

In the United States, the power to order additional courthouse security then raises the interesting and ongoing debate as to the extent to which the judiciary’s inherent power can be used to compel other branches of government to fund judicial activities.<sup>143</sup> Chief Justice Scott also had occasion to note that there is a “grey area” of overlapping responsibility between the two jurisdictions, but that potential conflict, for the most part, is avoided because of the mutual respect and cooperation between the Attorney-General and the judiciary.<sup>144</sup>

With such a strong dissent, and the MBCA sitting five judges, one would normally have expected the losing party, in this case the Attorney-General of Manitoba, to appeal to the SCC. An appeal was quickly rendered moot, however, when the Manitoba Legislature passed *The Court Security Act*<sup>145</sup> a mere six days after the MBCA’s decision was released in *Gillespie*, creating a legal framework for government-administered security arrangements at the courthouse.

### ***E. R v Lavallee***

Even those who have observed Chief Justice Scott’s career quite closely may be surprised to see *Lavallee* included in this review, as he was not yet a member of the MBCA when it heard this case. He nonetheless played a vital role as the trial judge whose decision to admit expert evidence and whose instructions to the jury on that evidence were ultimately upheld by the SCC.

The accused in *Lavallee* was acquitted of second-degree murder by a jury on the basis of the self-defence provision in section 34(2) of the

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<sup>142</sup> *Ibid* at 919. The reasons of Judge Frank were cited, with approval, in *The Honorable Elizabeth Halvorson v The Honorable Kathy Hardcastle*, 123 Nev 245 (Supreme Court of Nevada, 2007). Judge Maupin, writing for the panel, noted at 262 that the inherent power of judges to make certain that their courtrooms are secure “by necessity ... extends to ensuring courthouse security in general.”

<sup>143</sup> See Michael Buenger, “Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?” (2003) 92 Ky LJ 979.

<sup>144</sup> In these days of declining government resources, what the judiciary perceives as necessary and what the government is prepared to pay will, in all likelihood, be increasingly strained.

<sup>145</sup> SM 2000, c 1, CCSM c C295.

*Criminal Code*.<sup>146</sup> What made the case controversial was that she had shot the deceased in the back of his head as he left a room. Her actions were nonetheless found to be based on perceptions that were reasonable within the meaning of section 34, when considered with reference to her experience and the context in which the killing occurred: she had repeatedly been subject to battering by the deceased, who was her common-law husband, and he had threatened that he would kill her later that evening.

Chief Justice Scott's approach in *Lavallee* exemplifies his work as a jurist: principled in honouring the law as it stands but also forward-thinking, as the proper adjudication of the common law demands. Its impact has been far-reaching: one recent article cited it alongside *Donoghue v Stevenson* as an example of monumental judicial decisions.<sup>147</sup> While *Lavallee*-related case law and commentary understandably tends to focus on the SCC's decision, the broad principles it has come to stand for were implicit in then-ACJQB Scott's conduct of the trial. Indeed, in concurring reasons written on behalf of herself and McLachlin J, as she then was, in *R v Malott*, L'Heureux-Dubé J recognised that "[a] crucial implication of the admissibility of expert evidence in *Lavallee* is the legal recognition that historically both the law and society may have treated women in general, and battered women in particular, unfairly."<sup>148</sup>

At trial, the defence presented expert evidence from psychiatrist Dr. Fred Shane, who testified about the effects of being battered within an intimate relationship and, in particular, of the accused's experience of the events that led to the shooting.<sup>149</sup> He had gleaned information from several sources, including interviews with the accused and her mother, and

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<sup>146</sup> RSC 1985, c C-46, s 34(2) [*Criminal Code*]: Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if: he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes, and he believes on reasonable and probable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

<sup>147</sup> Richard F Devlin, "From Archetypes to Architects: Re-Envisioning the Role Morality of Trial Level Judges" (2011) 43 UBC L Rev 277 at para 290.

<sup>148</sup> [1998] 1 SCR 123 at para 36, 155 DLR (4th) 513 [*Malott*].

<sup>149</sup> *Lavallee*, *supra* note 2 at 859.



some of the facts he relied on in forming his opinion were not otherwise before the Court in any admissible form.<sup>150</sup>

The Crown moved to have the expert’s testimony withdrawn from the jury on two grounds: that it was not necessary and that it was based on facts not in evidence.<sup>151</sup> Scott ACJQB denied the motion, but recognized that a careful charge to the jury would be required in order to address the proper use of the expert’s testimony given that his opinion was partially based on facts not in evidence.<sup>152</sup> On appeal, the majority of the MBCA found his jury direction to be inadequate and ordered a new trial.<sup>153</sup>

Wilson J, writing for the majority of the SCC,<sup>154</sup> considered both whether the expert evidence should have been excluded entirely and whether the charge to the jury with respect to it was adequate.<sup>155</sup> She allowed the appeal on both counts.

Wilson J held that the instructions to the jury were appropriate,<sup>156</sup> and there was no “requirement that each and every fact relied upon by the expert must be independently proven and admitted into evidence before the entire opinion can be given any weight.”<sup>157</sup> Rather, “as long as there [was] some admissible evidence to establish the foundation for the expert’s opinion”<sup>158</sup> it was a matter of properly instructing the jury that the “weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which it relies.”<sup>159</sup>

Wilson J then addressed whether the expert evidence should have been admitted, explaining that expert evidence of a psychological nature is considered to be of value where “the average person may not have sufficient knowledge of or experience with human behaviour to draw an appropriate inference from the facts before him or her.”<sup>160</sup> Expert

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<sup>150</sup> *Ibid* at 860.

<sup>151</sup> *Ibid* at 860–61.

<sup>152</sup> *Ibid* at 861.

<sup>153</sup> (1988), 44 CCC (3d) 113, 52 Man R (2d) 274.

<sup>154</sup> *Lavallee*, *supra* note 2 at 898-900 (Sopinka J concurred in the result, but issued his own reasons with respect to expert evidence based on facts not in evidence).

<sup>155</sup> *Ibid* at 869–870.

<sup>156</sup> *Ibid* at 894.

<sup>157</sup> *Ibid* at 895.

<sup>158</sup> *Ibid* at 896.

<sup>159</sup> *Ibid* at 897.

<sup>160</sup> *Ibid* at 870–71.

evidence was relevant and necessary under the circumstances: an average member of the public could not be expected to understand the accused's actions without it,<sup>161</sup> all the more so in the lingering presence of popular mythology about domestic violence.<sup>162</sup>

Both section 34(2)(a), in referring to a reasonable apprehension of death or grievous bodily harm to allow the causing of grievous death or bodily harm in self-defence, and s 34(2)(b), with respect to having reasonable grounds that one cannot otherwise be preserved from the apprehended death or harm,<sup>163</sup> impose an objective standard of reasonableness, which had traditionally been measured in relation to the "ordinary" or "reasonable" man.<sup>164</sup> Wilson J emphasized that "[t]he definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'."<sup>165</sup> In circumstances such as the accused's, she was "...skeptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship" unless assisted by expert testimony.<sup>166</sup>

Chief Justice Scott's decision to admit the expert evidence recognized that there were aspects of the accused's reality that were relevant to her defence and beyond the understanding of many laypeople. He later commented on *Lavallee* in his judgment in *R v DD*, another case involving a instructing a jury on expert evidence. He explained *Lavallee* as a case that contributed to the expansion of the law of evidence to include social context and wrote candidly about why such evidence was necessary:

I think it can now be fairly said that these cases and their progeny have significantly changed the landscape with respect to the admission of expert

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<sup>161</sup> *Ibid* at 871-72.

<sup>162</sup> *Ibid* at 872-73. Wilson J listed at 871 a number of questions that a member of the public may have that expert evidence could be expected to address:

Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself?

<sup>163</sup> *Criminal Code*, *supra* note 146.

<sup>164</sup> *Lavallee*, *supra* note 2 at 874.

<sup>165</sup> *Ibid*.

<sup>166</sup> *Ibid* at 882.

evidence, because in reality the opinion evidence is deemed necessary not so much because the area is outside the common knowledge of the trier of fact, but because 'common sense' may be wrong! In other words, the evidence is necessary to counteract myths, stereotypes, prejudices and biases lay people and judges may have regarding certain classes of persons or subjects. In effect, the expert evidence is being admitted because the trier of fact could draw the wrong inferences.<sup>167</sup>

Chief Justice Scott's comments were in keeping with those of L'Heureux-Dubé J, who, on behalf of herself and McLachlin J, explained and expanded upon the SCC's decision in *Lavallee* in concurring reasons in *Malott*.<sup>168</sup> *Lavallee* was credited for accepting "that a woman's perception of what is reasonable is influenced by her gender, as well as by her individual experience, and both are relevant to the legal inquiry" and described as being a significant legal development "because it demonstrated a willingness to look at the whole context of a woman's experience in order to inform the analysis of the particular events."<sup>169</sup> Ultimately, it showed the acceptance that "the perspectives of women, which have historically been ignored, must now equally inform the 'objective' standard of the reasonable person in relation to self-defence."<sup>170</sup>

Bastarache J, writing for the majority in *R v Stone*, shed further light on *Lavallee* in the course of discussing sentencing principles, citing it as exemplifying "...that prevailing social values mandate that the moral responsibility of offenders be assessed in the context of equality between men and women in general, and spouses in particular."<sup>171</sup>

The *Lavallee* decision also led Canada's Minister of Justice and Solicitor General to establish the Self-Defence Review in 1995, which reviewed the law of self-defence in general as well as applications from individuals convicted of homicide who may have been entitled to claim self-defence in light of *Lavallee*.<sup>172</sup> At the recommendation of Ratushny J, who executed the review, the Minister of Justice referred one individual's

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<sup>167</sup> *R v DD*, 126 CCC (3d) 435 at para 60, [1998] 9 WWR 601.

<sup>168</sup> *Supra* note 148 at para 36.

<sup>169</sup> *Ibid* at para 38.

<sup>170</sup> *Ibid*.

<sup>171</sup> [1999] 2 SCR 290 at para 240, 173 DLR (4th) 66.

<sup>172</sup> *R v Fosty*, [1999] 3 WWR 118 at paras 5 and 20, 131 Man R (2d) 161, [Fosty], aff'd 2000 SCC 32, [2000] 1 SCR 836. See also Gary Trotter, "Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review" (2001) 26 Queen's LJ 339-395 (QL).

matter to the MBCA, where the MBCA's subsequent decision was also written by Chief Justice Scott.<sup>173</sup>

#### IV. CONCLUSION

No single article could do justice to Chief Justice Scott's long and storied career, but we hope that this article will stand as a modest tribute to his extensive and wide-ranging contributions to the development of Manitoban and Canadian law. The lasting impact of his time on the bench will flow not only from his judgments, but also from his tireless behind-the-scenes commitment to the administration of justice in Canada. As a man of exceptional intellect, integrity, work ethic and compassion, he will doubtlessly continue to inspire many with his leadership in his post-judicial years.

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<sup>173</sup> *Fosty*, *supra* note 172 at para 30.