

Claire
L'Heureux-Dubé
A Life

CONSTANCE BACKHOUSE

PUBLISHED BY UBC PRESS FOR
THE OSGOODE SOCIETY
FOR CANADIAN LEGAL HISTORY



UBC Press • Vancouver • Toronto

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The Osgoode Society is supported by a grant from
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Library and Archives Canada Cataloguing in Publication

Backhouse, Constance, author

Claire L'Heureux-Dubé: a life / Constance Backhouse.

(Law and society series)

Includes index.

Issued in print and electronic formats.

ISBN 978-0-7748-3632-6 (hardcover). – ISBN 978-0-7748-3634-0 (PDF). –

ISBN 978-0-7748-3635-7 (EPUB). – ISBN 978-0-7748-3636-4 (Kindle)

1. L'Heureux-Dubé, Claire. 2. Canada. Supreme Court – Biography. 3. Judges – Canada – Biography. 4. Women judges – Canada – Biography. I. Osgoode Society for Canadian Legal History, issuing body II. Title. III. Series: Law and society series (Vancouver, B.C.)

KE8248.L44B33 2017

347.71'03534

C2017-903771-4

KF345.Z9L44B33 2017

C2017-903772-2

Canada

UBC Press gratefully acknowledges the financial support for our publishing program of the Government of Canada (through the Canada Book Fund), the Canada Council for the Arts, and the British Columbia Arts Council.

This book has been published with the help of a grant from the Canadian Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

Printed and bound in Canada by Friesens

Set in Garamond by Artegraphica Design Co. Ltd.

Copy editor: Francis Chow

Proofreader: Sarah Wight

Indexer: Margaret de Boer

Cover designer: Jessica Sullivan

UBC Press

The University of British Columbia

2029 West Mall

Vancouver, BC V6T 1Z2

www.ubcpress.ca

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Foreword

The Osgoode Society for Canadian Legal History

Claire L'Heureux-Dubé was the second woman appointed to the Supreme Court of Canada, and the first from Quebec. This deeply researched biography takes us from the judge's origins and life in the Quebec of the 1920s to the present. The portrait of Quebec society in the 1920s through the 1950s wonderfully enriches the book's comprehensive, intimate, and insightful examination of Justice L'Heureux-Dubé herself. We learn a great deal about the role of women and women lawyers in Quebec society, the Quebec legal profession, legal education, and the judiciary as we trace L'Heureux-Dubé's rise in the province's legal hierarchy to the Court of Appeal and then to the Supreme Court of Canada in 1987. Our understanding of the Supreme Court of Canada during the early *Charter* era is also considerably augmented by this account, which deals with the gender and cultural dynamics, the relations between Anglophone and Francophone judges, and the jurisprudential debates and controversies of the period. The book also takes us beyond Justice L'Heureux-Dubé's retirement and into the various high-profile interventions she made in public life, including her contribution to the Quebec Charter of Values debate. This book is essential reading for anyone interested in Canada's and Quebec's modern legal history, in the role of women in law, and in what made this judge such a compelling personality.

The purpose of the Osgoode Society for Canadian Legal History is to encourage research and writing in the history of Canadian law. The Society, which was incorporated in 1979 and is registered as a charity, was founded at the initiative of the Honourable R. Roy McMurtry and officials of the

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Law Society of Upper Canada. The Society seeks to stimulate the study of legal history in Canada by supporting researchers, collecting oral histories, and publishing volumes that contribute to legal-historical scholarship in Canada. This year's books bring the total published since 1981 to 103, in all fields of legal history – the courts, the judiciary, and the legal profession, as well as on the history of crime and punishment, women and law, law and economy, the legal treatment of ethnic minorities, and famous cases and significant trials in all areas of the law.

Current directors of the Osgoode Society for Canadian Legal History are Susan Binnie, Bevin Brooksbank, Shantona Chaudhury, David Chernos, Linda Silver Dranoff, Michael Fenrick, Timothy Hill, Ian Hull, Trisha Jackson, Mahmud Jamal, C. Ian Kyer, Virginia MacLean, Rachel McMillan, Roy McMurtry, Yasir Naqvi, Dana Peebles, Paul Reinhardt, William Ross, Paul Schabas, Robert Sharpe, Jon Silver, Alex Smith, Lorne Sossin, Mary Stokes, and Michael Tulloch.

Robert J. Sharpe
President

Jim Phillips
Editor-in-Chief

Chronology

- 1885 Napoléon L'Heureux is born in St. Paul, Minnesota
- 1890 Antoinette Fortin marries Victor Dion
- 1903 Marguerite Dion is born in Quebec City
- 1904 Napoléon L'Heureux marries Bruna Lavoie
- 1905 Paul L'Heureux is born in Quebec City
- 1910 Victor Dion dies
- 1924 Paul L'Heureux becomes a commissioned officer in the
Régiment de Montmagny
- 1926 Paul L'Heureux marries Marguerite Dion in Quebec City
- 1927 Claire L'Heureux is born in Quebec City on 7 September
- 1929 Louise L'Heureux is born in Quebec City
- 1932 Lucie L'Heureux is born in Quebec City
- 1933 Claire L'Heureux starts school at Saint-Joseph de Saint-Vallier,
Quebec City, at age 6
- 1934 Nicole L'Heureux is born in Quebec City
Bruna Lavoie L'Heureux dies
- 1935 Paul L'Heureux is promoted to collector of customs and excise
in Rimouski
L'Heureux family moves from Quebec City to Rimouski
Claire L'Heureux starts school at L'École Saint-Germain,
run by les Sœurs de la Charité

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- 1936 Marguerite L'Heureux is sent for medical treatment to the Sanatorium Prévost
The L'Heureux girls are sent to the orphanage, Orphelinat du Couvent des Sœurs de la Charité
- 1937 Claire begins boarding at the Monastère des Ursulines de L'Immaculée Conception de Rimouski at age 10
- 1939 Paul L'Heureux enlists in the Canadian Armed Forces
- 1940 Napoléon L'Heureux marries Aurore Lavoie
Antoinette Fortin Dion dies
- 1941 Claire moves to Quebec City for one year to attend the Collège Notre-Dame-de-Bellevue
- 1942 Claire returns to finish her studies at the Monastère des Ursulines in Rimouski
- 1943 Claire graduates from the Monastère des Ursulines in Rimouski, completing the matriculation course at age 15
Claire returns to board at the Collège Notre-Dame-de-Bellevue in Quebec City
- 1946 Claire graduates from the Collège Notre-Dame-de-Bellevue, obtaining a *baccalauréat-ès-arts magna cum laude* at age 18
Paul L'Heureux returns to Rimouski from overseas military service
- 1948 Claire begins studying law at Laval University at age 21
- 1949 Paul L'Heureux is promoted to collector of customs and excise in Quebec City
Paul and Marguerite L'Heureux move from Rimouski to Quebec City
- 1950 Fire destroys Rimouski and the old L'Heureux home
- 1951 Claire graduates with an LL.L. *cum laude* from Laval University at age 23
Claire begins working as a secretary for Sam Schwarz Bard in Quebec City
Claire meets Arthur Dubé
- 1952 Claire L'Heureux is admitted to the Quebec bar at age 25
Lucie L'Heureux dies at age 20
Claire L'Heureux begins practising law with Sam Schwarz Bard

- 1955 Napoléon L'Heureux dies at age 71
- 1957 Paul L'Heureux is appointed collector of customs and excise in Montreal
 Claire L'Heureux, age 30, marries Arthur Dubé, age 38, on 30 November
- 1960 Daughter Louise Dubé is born in Quebec City on 13 May; Claire L'Heureux-Dubé is 32
- 1963 The Dubé family moves to 940 Adolphe-Routhier, Quebec City, in October
- 1964 Son Pierre Dubé is born in Quebec City on 29 January; Claire L'Heureux-Dubé is 36
- 1969 Sam Schwarz Bard is appointed to the Superior Court of Quebec
 The L'Heureux-Dubé family moves to 1014 Mont-Saint-Denis, Sillery
- 1972 Claire L'Heureux-Dubé refuses Prime Minister Pierre Trudeau's request that she run for the Liberals in the federal election of 30 October
- 1973 Claire L'Heureux-Dubé is appointed to the Superior Court of Quebec on 9 February, at age 45
 Claire L'Heureux-Dubé takes leave of absence from Superior Court on 13 August, to serve with the Commission of Inquiry Relating to the Department of Manpower and Immigration in Montreal
 Claire L'Heureux-Dubé is appointed to chair the Montreal immigration inquiry on 30 October
- 1974–75 Hearings of the Montreal immigration inquiry run from 23 April 1974 to 19 August 1975
- 1976 Claire L'Heureux-Dubé files final report of Montreal immigration inquiry on 19 January
 Claire L'Heureux-Dubé returns to the Superior Court and begins sitting in January
- 1978 Arthur Dubé commits suicide on 11 July; Louise is 18, Pierre 14
- 1979 Claire L'Heureux-Dubé is appointed to the Quebec Court of Appeal on 16 October, age 52

- 1982 *Canadian Charter of Rights and Freedoms* comes into force
- 1983 Marguerite Dion L'Heureux dies on 16 December
- 1985 Section 15 of the *Charter* comes into force on 17 April
- 1987 Claire L'Heureux-Dubé is appointed to the Supreme Court of Canada on 15 April, age 59
Claire L'Heureux-Dubé moves to 174 Dufferin, Ottawa, in September
- 1989 Paul L'Heureux dies, age 84
- 1994 Pierre Dubé dies on 17 March, age 30
- 2002 Claire L'Heureux-Dubé retires from Supreme Court of Canada on 1 July; she is allowed six months, until 31 December, to finish writing any outstanding decisions
- 2003 Claire L'Heureux-Dubé moves to Grande Allée Ouest, Quebec City

Introduction

Claire L'Heureux-Dubé is a judge who shaped our notions and legal doctrines of equality, and whose influence upon constitutional, family, criminal, and administrative law was transformative. In an era of groundbreaking *Charter* interpretation, she stands out as one of the most dynamic, forceful, and controversial judges on a controversial court in a controversial time. The second woman appointed to the Supreme Court of Canada and the first from Quebec, she has been characterized as “the Great Dissenter,” her unique judgments both applauded and roundly criticized during her term.

Her innovative legal approach was anchored in context, giving explicit recognition to the social, economic, and political realities that impacted her cases. This is a socio-legal biography that borrows from that approach, examining how context can also shape a life. It steps beyond the traditional format for legal biographies, which often focus upon high-profile cases and jurisprudential legacies. This biography explores the rich social, political, economic, and cultural setting in which L'Heureux-Dubé's career unfolded. It can contribute to our understanding of legal education, the profession, the judiciary, the distinctive socio-legal experience of Quebec, the complex concepts of class and race, the position of Francophone women within the male legal world of Quebec and beyond, the inner workings of the top court, changing norms of gender roles, and women's experience in law. This biography also trains a more concentrated focus on Claire L'Heureux-Dubé's personal life. Women often have their personal lives placed under the microscope, and there is a risk that a more personalized

judicial biography may play into that gendered dynamic. However, the hope here is that fuller analysis of important personal details may ultimately become more regular inclusions in biographies of male and female judges alike.

We tend to have settled notions about the careers of famous lawyers and judges. In the typical narrative, they get their start in a comfortable middle-class family, where they are encouraged to pursue their education. Their private lives are uncomplicated: intact birth families, happy lifelong marriages with supportive partners, children who grow up to be self-supporting adults, tidy personal lives that enable them to succeed. They develop flourishing practices and are elevated to the bench with the support of the wider legal community. They sit with wise judicial colleagues and make collegial efforts to discern the fairest responses to complex legal problems.

Claire L'Heureux-Dubé's life rarely conforms.

She was born in Quebec City in 1927, the eldest of four sisters in an intensely "female" family. Her childhood was spent in Rimouski, a town on the Lower St. Lawrence with a landscape and climate that imprinted itself vividly upon her personality. She had a complicated relationship with her father, Paul L'Heureux, a customs inspector, military officer, and strict disciplinarian, who tried to prevent her from going into law. Her mother, Marguerite L'Heureux, an intellectually gifted woman paralyzed by multiple sclerosis, urged Claire to aim for a professional career. Her influence upon Claire was so great that an alternative subtitle for this biography might have been "Marguerite's daughter."

Claire was educated as a convent *pensionnaire* at the cloistered Monastère des Ursulines in Rimouski, where she excelled as one of the most academically gifted (and unruly) pupils. After leaving the Ursuline convent, she studied at the Collège Notre-Dame-de-Bellevue, where she received her *baccalauréat* in 1946. Her youthful immersion in Roman Catholicism touched her deeply, and at one point she aspired to become a nun. The inclination disappeared with adulthood, and in her later years she became strongly opposed to religion.

The only one from her convent class to enrol in law school, Claire thrived in the novel setting. She was the ninth woman to graduate from Laval University in law, the only woman to enter private practice in Quebec City in 1952, and the first to establish a successful law practice there. Her entry was premised upon a job offer from Jewish lawyer Samuel Schwarz Bard at a time when no French Canadian lawyer would hire her. She did not let her marriage derail her career, partnering at age thirty-one with

Arthur Dubé, a brilliant Laval engineering professor who supported her decision to continue practice even after the birth of their two children. She had few role models as she struggled to negotiate the challenges of work/life balance. The anguish of witnessing her husband's battle with depression, alcoholism, and suicide, and of dealing with her son's juvenile delinquencies and premature death in a hospital lock-up, took an enormous toll. Yet her resilience and optimism, self-consciously patterned upon her mother's formidable strength of character, carried her through. Her trail-blazing business law practice at Bard's firm (much of it conducted for Jewish clients in English) and her switch to divorce practice after the 1968 *Divorce Act* reshaped family law in Quebec, brought her to prominence as the capital city's most illustrious female lawyer.

She received judicial appointments from three different governments, becoming the first woman appointed to sit in Quebec City on the Quebec Superior Court in 1973, the first to the Quebec Court of Appeal in 1979, and the second to the Supreme Court of Canada in 1987. In none of these elevations does she seem to have been the candidate of choice from the bench or bar. She had entered the legal profession prior to the Quiet Revolution that transfigured *La belle province*, but by the time she was appointed to the Superior Court, feminism was growing in influence, especially in Quebec. She did not self-identify as a feminist, and does not recall being introduced to the term during her formative years. Yet she was on the cusp of change. When the forces of political, social, and cultural reform pressed in upon the world of law, and pressure mounted to put a woman on the bench, she was the obvious candidate. She became a standard-bearer for a movement to which she had never belonged, a situation of some complexity.

L'Heureux-Dubé negotiated her path through a masculinist terrain surrounded by men in power, marked irrefutably as an outsider by gender, captured in group portraits as the lone female in the crowd. Masculinity was a culture she had to master, and there were lessons she had to absorb from the men around her. Yet her options were limited. The early female professionals who pushed beyond the bounds of contemporary femininity had to present themselves in high heels, hair carefully coiffed, good wives, mothers, cooks, and proud of it. How did Claire L'Heureux-Dubé frame herself within this contradictory setting? How did stereotypical gender norms hijack perceptions of her? How did a woman with a reputation as a *femme fatale*, short in stature with a high-pitched voice, come to be perceived as a judge whose charisma dominated the rooms she entered? How did she relate to the men in power around her, to the few women

who joined her within the halls of power – and they to her? How did her French Canadian heritage, her coming of age in an increasingly nationalistic Quebec, complicate the “outsider” picture?

She joined the Supreme Court as an appellate judge with a reputation for painstaking research, formidable powers of organization, an elegant mastery of written French, and a traditionally formalistic approach to law. She left it fifteen years later as a judge who was revered and reviled for her innovative use of social science evidence, her insistence on examining the real-world implications of rulings, and her outspoken embrace of novel equality claims. Analysts tripped over themselves in confusion – uncertain whether to categorize her as “conservative” or “progressive,” a proponent of “law and order” or of “victim’s rights.” Did she change during her time on the bench? Or was it the real core that she revealed in her last decade, aspects that had been muted until she reached the pinnacle of the top court?

How did her personal and professional life and the context of the times transport her to a place of articulated pride in being an egalitarian, a renegade, a risk taker without fear of standing alone? How did her isolation at the Supreme Court affect her? Was she influenced by fellow judges, law clerks, public audiences, or the press? Why did she champion gender and LGBT issues, while showing less leadership on racial, ethnic, and religious discrimination? Did her philosophy and method of judging differ from accepted norms? Why did her judicial career elicit such contradictory public responses? In addition to a vilification that was truly singular in content and vehemence, L’Heureux-Dubé experienced a virtual canonization as a “heroine,” as the tributes during the fêtes that attended her retirement in 2002 so clearly demonstrated. Throughout this trajectory, she also became a towering presence on the international stage.

Who was the woman behind the success? Was she talented, ambitious, flamboyant, driven, hard-working, and fundamentally insecure? Did she self-consciously position herself to aim for spectacular success in a discriminatory milieu, or was she oblivious to elevation and power? Claire L’Heureux-Dubé is direct in her observations but not particularly self-reflective. Her daughter, Louise, observed: “She’s a very complicated person. What you see is not what you get. She says things and really means the exact opposite.”¹ Other family members, friends, colleagues in law, and fellow judges maintain disparate views.

What is undeniable is that L’Heureux-Dubé lived through years of unprecedented change. In the early twentieth century, the Quebec legal

profession and judiciary were unrelievedly male. L'Heureux-Dubé witnessed heated debates over the entry of women to law schools, to practice, and to the bench; the burning question was whether women would “make a difference.” By the time she retired, the question of why women should be included, so central to the earlier discussion, was passé. Whether they had made or will make a significant difference remains unclear. What is clear is that Claire L'Heureux-Dubé's story offers a curious and remarkable tale of a truly singular woman and an extraordinary judge.

I

Ewanchuk

Claire L’Heureux-Dubé became both an icon and a lightning rod during her years on the Supreme Court. Within vulnerable communities, she was iconized for courageous decisions that forged deeper understandings about discrimination. Her judgments were all the more celebrated because they often took her out on a limb, isolated on the courtroom bench. The same decisions also turned her into a pariah within some sectors of the legal profession and the public, excoriated for her perspectives on equality. The apex of this icon/lightning rod polarity was reached in *Ewanchuk*, a sexual assault case that catapulted her onto the front pages of the newspapers, made her the subject of nightly telecasts and radio talk shows, and plunged her into the centre of public debates across the land. The case would eventually become so well known that it acquired two memorable tag lines of its own: “the bonnet and crinolines case” and “No means No.”¹

THE *EWANCHUK* CASE

On 2 June 1994, forty-four-year-old Steve Ewanchuk approached a young woman in an Edmonton mall parking lot and asked whether she had any interest in a part-time job staffing a display booth at the mall. The seventeen-year-old woman, described only as the “complainant” to preserve her privacy, needed a job. When she arrived for the interview the next day, Ewanchuk lured her to his private trailer in the parking lot. He closed the trailer door,

explained that he was an “open” and “affectionate” employer, hugged her, and asked her to give him a massage. The complainant was half Ewanchuk’s age and size. She testified that she complied because she thought the door was locked and she was “very scared.”²

Ewanchuk’s advances escalated. Each time the complainant said “no” or “just stop,” often with tears in her eyes, he paused. Then he would begin afresh, massaging her inner thigh and pelvic area, reaching inside her shorts. The complainant told the court she believed that if Ewanchuk knew how afraid she was, it would increase the risk of a violent sexual assault. She explained that she lay “bone straight” when he pushed her backward so he could lie on top of her, “grinding his pelvis into hers.” He took his penis out of his shorts and stuck it between her legs rubbing against her vaginal area, on top of her underwear. When she objected once more, Ewanchuk ceased, saying: “See, I’m a nice guy, I stopped.” He let her leave the trailer, handed her \$100, and asked her not to tell anyone.³

She reported all this to the police, who were well acquainted with her assailant, a man with four previous sexual assault convictions. One of the convictions involved forced intercourse with a teenage girl whom Ewanchuk had also approached regarding possible employment. He had twice violated a court order not to attempt to employ any female under eighteen, but by law none of this information was available to the judge at trial.⁴ Ewanchuk would later be quoted in the press as saying that women were “one of [my] weaknesses,” that it was “like placing a drink in front of an alcoholic.”⁵ The judge concluded that the complainant had not actually consented, but acquitted Ewanchuk upon the defence of “implied consent,” because she had not communicated her fear by words, gestures, or facial expressions.⁶

The Alberta Court of Appeal upheld the acquittal in a two-to-one decision.⁷ Justice John Wesley McClung’s majority decision dismissed the complainant’s no’s as irrelevant. He emphasized that she had had a child out of wedlock and was living common-law. He critiqued feminist slogans such as “No means No.” He stated that “in a less litigious age, going too far in the boyfriend’s car was better dealt with on site – a well-chosen expletive, a slap in the face, or, if necessary, a well-directed knee.” He depicted Ewanchuk’s advances as “clumsy passes” in aid of “romantic intentions” that were more “hormonal” than “criminal.” He rebuked the complainant for dressing in shorts, adding that she “did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines.” The press described him as a “staunch conservative” with a “crusading desire ... to refute the twentieth century.”⁸



Steve Ewanchuk as photographed by the *Edmonton Journal*, 1999.

THE SUPREME COURT OF CANADA INTERVENES

The Supreme Court of Canada heard the case in 1998. After the lawyers completed their arguments, the nine judges retired to their conference room. L'Heureux-Dubé recalled all of them speaking around the table about the misconceptions that ran through McClung's decision, agreeing that a guilty verdict should be substituted for the acquittal. It was "not one of those cases where people argued at length," she stressed. "The case was so clear ... She didn't consent, period ... We had all the elements to convict ... It was a very short meeting."⁹

There are several versions as to who was designated to write the decision for the unanimous court. The practice at the time was for the chief justice to choose the author, customarily the volunteer with the most seniority.¹⁰ After Chief Justice Antonio Lamer, who did not wish to write this decision, L'Heureux-Dubé was then the most senior. She recalled that she offered to write for the court, as she wanted to develop a clear refutation of what she saw as a decision filled with erroneous assumptions. Instead,

the chief justice assigned the task to Justice John (Jack) Major. When she objected that she was more senior, Lamer justified his decision by saying that Major came from Alberta, where the case had originated.

L'Heureux-Dubé remembered being upset at this departure from the seniority protocol, and wondering whether Major was really chosen because he was a friend of McClung, his former colleague from the Alberta Court of Appeal.¹¹ She also wondered whether Lamer, known to be a hunting pal of McClung's, was trying to shield McClung from criticism.¹²

Major's recollection was that the chief justice asked him to write because he was from Alberta. "I don't think it was any kind of a plot," he added.¹³ Justice Ian Binnie recalled that L'Heureux-Dubé had been "very hard" on McClung during the judges' discussion in their conference room, and "generally the court tries not to whack away at judges in the court of appeal. Being an Alberta appeal, a controversial one, if the Court of Appeal of Alberta was going to get straightened out, it was good to have an Alberta judge do it." Binnie also thought Lamer probably went to Major because he would be less likely to take "personal shots" at a former colleague.¹⁴ Justice Michel Bastarache recalled it still differently. He thought L'Heureux-Dubé was initially asked to write, but when her draft came in, the others thought it too strongly worded to sign. According to Bastarache, Major then decided that he would write a separate decision, most of the others signed onto Major's, and L'Heureux-Dubé's draft was relegated to a concurring opinion.¹⁵

Whatever the truth, the end result was that Major circulated his draft clarifying that there was no legal basis for implied consent to sexual assault, but offering no other critique of McClung's ruling. "It was just as if they were approving what he said," complained L'Heureux-Dubé. "I found it so offensive."¹⁶ When it became clear that most of her colleagues would sign Major's decision, she observed that "*le courage ne court pas les corridors de notre cour!*"[†]¹⁷ She believed that McClung's intemperate language cried out for comment, and decided to draft her own opinion, concurring in the result with separate reasons.¹⁸ "I wrote it all myself one evening," she remembered. "I wrote with rage."¹⁹ She was able to convince just one colleague, Charles Doherty Gonthier, to sign on. Beverly McLachlin, the only other woman on the Supreme Court at the time, wrote a brief but separate concurring judgment denouncing the "specious defence of implied consent" and rejecting "stereotypical assumptions."²⁰

† "Courage does not abound in the corridors of our court!"



Justice John (Jack) C. Major.

L'Heureux-Dubé's decision refuted McClung's reasoning more thoroughly. She identified the case as rooted in women's and children's equality rights, citing statistics about the pervasiveness of sexual violence in Canada, with 99 percent of the offenders male and 90 percent of the victims female. She referred to international human rights instruments that urged signatory countries, including Canada, to implement effective legal measures against sexual assault, along with "gender-sensitive training of judicial and law enforcement officers." She cited the research of feminist legal scholars Catharine MacKinnon, Christine Boyle, and Elizabeth Sheehy.²¹

She critiqued the sexism inherent in the lower court decisions, derived from “mythical assumptions” that portrayed women who said no as “really saying ‘yes,’ ‘try again,’ or ‘persuade me.’” She took issue with McClung’s comment that the victim was an unwed mother who was living with her boyfriend. “Why [was it] necessary to point out these aspects of the trial record? Could it be to express that [the complainant] is a person of questionable moral character?” She objected to McClung’s use of phrases such as “romantic intentions” and “clumsy passes” and his characterization of the assault as “far less criminal than hormonal.” She critiqued McClung’s suggestion that a woman should have to “fight her way out” of sexual assault, using physical force like “a well-directed knee”:

Complainants should be able to rely on a system free from myths and stereotypes, and on a judiciary whose impartiality is not compromised by these biased assumptions ... It is part of the role of this Court to denounce this kind of language, unfortunately still used today, which not only perpetuates archaic myths and stereotypes about the nature of sexual assaults but also ignores the law.²²

As national legal affairs reporter Stephen Bindman observed, “she wasn’t one to mince words.”²³

McCLUNG’S “OPEN LETTER”

The public furor began the next day with an “open letter” from McClung in the *National Post*. Many judges take umbrage when overruled by a higher court, and some grumble to themselves or privately to trusted colleagues. But it was unprecedented for a sitting judge to critique a Supreme Court decision in a public forum.²⁴ McClung attacked L’Heureux-Dubé for “feminist bias” and a “graceless slide into personal invective,” asserting that “personal convictions” delivered “again from her judicial chair” could be responsible for the “disparate (and growing) number of male suicides being reported in the Province of Quebec.”²⁵ The reference to suicide struck many as inexplicable until it was disclosed that L’Heureux-Dubé’s husband had committed suicide. McClung later apologized and claimed that he did not know.²⁶ His explanation was unconvincing given the otherwise illogical nature of the reference. It was also widely known within legal and judicial circles that L’Heureux-Dubé’s husband had died by suicide. It was something she often spoke about openly.²⁷

Whatever had occurred to bring this to pass? Some thought that McClung represented a group of male judges who had become increasingly uneasy over the entry of women into the judiciary. Jack Major described the Alberta Court of Appeal as “an old boys’ club,” where “after a session [the judges] retired to somebody’s office and mulled over the case [with] a drink of scotch. When women started to invade that world ... they just [didn’t] feel comfortable.”²⁸ Some speculated that McClung had never got over being bypassed for the position of Alberta chief justice by a younger female judge.²⁹ Kirk Makin, a *Globe and Mail* reporter, wondered whether McClung had been thinking, “Somebody has to bell the cat. I’m the guy. The day has come.”³⁰ Makin described McClung as a man “waiting to explode,” adding that it was like observing a “poison sac bursting.”³¹ Sean Fine, another *Globe* reporter, suggested that McClung would not have cast such aspersions upon a male judge.³² As if to prove his point, the name of Charles Gonthier, who had signed L’Heureux-Dubé’s opinion, never came up.

As the story unfolded, observers were also startled to discover that McClung’s grandmother was none other than the famous Canadian suffragist Nellie McClung. Moreover, McClung’s father, a prominent Crown prosecutor with a drinking problem, had committed suicide himself after disclosure of his misappropriation of public funds.³³ Some wondered whether McClung’s unusual family history had taken a toll, turning him into a man with a reputation as a bit of an eccentric who loved to use “colourful words and phrases” often “shocking” in their import.³⁴

The *Ewanchuk* explosion was also explained as a “casualty of the newspaper wars.”³⁵ The decision was released on 25 February 1999. McClung’s open letter appeared the morning after. It left L’Heureux-Dubé wondering whether he had been tipped off with an advance copy of her judgment.³⁶ In fact, the letter was the result of a direct intervention by the *National Post*, which was hoping to beat the *Globe and Mail* to a high-profile news story.³⁷ Janice Tibbetts, who had covered McClung’s earlier decision for the *Post*, thought the Alberta judge’s reference to “bonnets and crinolines” was “ridiculous.” Knowing that the Supreme Court was due to deliver its ruling on 25 February, she had written a piece speculating that McClung might be in for a bit of a “dressing down” by the top court.³⁸ It was her guess that the reporter on the night desk grabbed the newly released ruling and, unaware that it was a breach of protocol for a judge to comment on the appeal of his own decision, phoned McClung for a quote.³⁹ McClung took the bait, but replied he would rather send a letter to the editor. The



Justice John Wesley “Buzz” McClung.

Post undertook to publish it the next day.⁴⁰ And although McClung’s colleagues apparently tried valiantly to talk him out of it, he would not be deterred.⁴¹

The *National Post* had launched one year earlier, after corporate investor Conrad Black gained control of the Southam newspaper chain. Under Black’s ownership, the chain fired many of its feminist columnists and “declared war” on feminism.⁴² The paper also began to wage a fierce campaign against what it called the efforts of unelected “activist” judges to refashion the law in Canada based on *Charter* principles. Tibbetts explained that the Supreme Court of Canada became one of the chain’s “pet projects” and L’Heureux-Dubé emerged as “the embodiment of the *National Post* attack on judicial activism.”⁴³

McClung’s letter was the first bolt of lightning but not the last, and the media swelled with invective against L’Heureux-Dubé. Voices of support for her judgment then surfaced to counter the critique.⁴⁴ The *National Post* and *Globe and Mail* both published twenty articles about the *Ewanchuk* decision within fourteen days of its release.

FLASHPOINTS OF REACTION

The *Toronto Star* published the comments of Alan Gold, a high-profile criminal defence lawyer, who characterized L'Heureux-Dubé's decision as a "radical feminist judgment." He complained that the sex act was governed by "ambiguity and nuance and all kinds of things that aren't susceptible to this kind of subsequent verbalization," adding that this "protocol for human sexuality is ridiculous."⁴⁵ The *Calgary Herald* reported that Gold had labelled her opinion "totalitarian."⁴⁶ University of Calgary political science professor Ted Morton took issue with the research L'Heureux-Dubé had cited, complaining that she and others who shared her views were allowed "to quote whatever they like from radical feminists."⁴⁷ The *National Post* quoted Gwen Landolt, founder of the socially conservative REAL Women of Canada, who complained that Canadians "shouldn't have to pay the salary of a radical feminist who sits on the bench and uses her position to promote her own personal agenda."⁴⁸ REAL Women then lodged a formal complaint against L'Heureux-Dubé to the Canadian Judicial Council, the organization charged with reviewing judicial misconduct.⁴⁹

Labelling L'Heureux-Dubé as "a friend of the feminists," a *Toronto Star* columnist criticized her "slagging of Mr. Justice John McClung."⁵⁰ The editors at the *National Post* described her decision as a "sanctimonious attack."⁵¹ A *Globe and Mail* columnist claimed that the "unfortunate decision" was now turning the "war of the sexes" into a "unilateral declaration of war against all men and their very sexuality."⁵² The *Ottawa Citizen* editors depicted L'Heureux-Dubé as "the Supreme Court's resident zealot" and her decision as "feminist cant" that read "less like a Supreme Court judgment on a specific case than a manifesto on feminist legal theory."⁵³ Dave Rutherford, the host of an Alberta radio talk show, estimated that 90 percent of his callers defended McClung.⁵⁴

Even stronger critique came from Edward Greenspan, another famous Toronto defence lawyer. His letter to the editor in the *National Post* began: "When the Supreme Court judges swore their oath ... [t]hey were not given the right to pull a lower court judge's pants down in public and paddle him." It continued:

By labelling Judge McClung, in effect, the male chauvinist pig of the century, the chief yahoo from Alberta, the stupid, ignorant, ultimate sexist male jerk, Judge L'Heureux-Dubé did an unnecessary and mean-spirited thing ... Judge L'Heureux-Dubé drew first blood and whatever he said will not be recorded in Canadian judicial history like her vicious comments about him will ...



Toronto criminal lawyer Edward Greenspan.

It is clear that the feminist influence has amounted to intimidation, posing a potential danger to the independence of the judiciary ... Feminists have entrenched their ideology in the Supreme Court of Canada and have put all contrary views beyond the pale.

The feminist perspective has hijacked the Supreme Court of Canada and now feminists want to throw off the bench anyone who disagrees with them. Judge L'Heureux-Dubé was hell-bent on re-educating Judge McClung, bullying and coercing him into looking at everything from her point of view. She raked him over the coals for making remarks that may, in fact, be accurate in the given case. I don't know. But just as he had no empirical evidence to support his view (if you discount all of human history), she has no empirical evidence to say what she says (if you discount Catharine MacKinnon's collected works) ... Madam Justice L'Heureux-Dubé has ... disgraced the Supreme Court.⁵⁵

Even Steve Ewanchuk got into it. He was quoted in the *Toronto Star* as saying: "Mrs. Dubé, she never should've said what she said about him being an archaic and ignorant man, because he's not. She started it. What came back to her, personally, is something she started. Not him."⁵⁶

Those who defended Justice L'Heureux-Dubé insisted that she was being unfairly “demonized” for exposing the sexism of a senior male judge.⁵⁷ Montreal's *La Presse* characterized McClung's letter as “une sortie publique sans précédent dans l'histoire juridique canadienne.”^{†, 58} Francophone Laval University law professor Ann Robinson explained that the Québécois viewed McClung's shocking response as doubly insulting: “an attack on women” and also “an attack from an Anglophone on a Francophone,” emphasizing that in Quebec, linguistic issues were understood to be inextricably intertwined with sexism.⁵⁹ Francophone University of Ottawa law professor Nathalie Des Rosiers extolled L'Heureux-Dubé as the “miroir de son époque”[‡] and her decision for recognizing that “les femmes ne sont pas des objets sexuels mais des agents de leur sexualité.”^{§, 60} University of Toronto political scientist Peter Russell described McClung's comments as “appalling” and suggested that he had behaved more like a politician than a judge.⁶¹ University of Calgary law professor Kathleen Mahoney characterized McClung's comments as “completely unprecedented,” adding: “I've seen judges make some fairly intemperate comments, but ... I've never seen anything like this in my lifetime.”⁶²

Bouquets of flowers began to arrive, sent in solidarity to L'Heureux-Dubé's judicial chambers.⁶³ At a Canadian Bar Association meeting shortly after the fracas, conference attendees gave L'Heureux-Dubé a “standing ovation,” and CBA president Barry Gorlick observed that sentiments ranged “from a minimum of disappointment to a maximum of utter outrage and disgust.”⁶⁴ Alberta law professors Bruce Elman and Barbara Billingsley compared L'Heureux-Dubé's critique of McClung with other Supreme Court decisions, and concluded that her judgment was neither “unique” nor “aberrant.”⁶⁵ *Globe and Mail* columnist Rick Salutin registered his astonishment that anyone could find venom in L'Heureux-Dubé's concurring decision, when all he could find was “dry legalistic language.”⁶⁶ Twenty-four individuals and organizations filed complaints of judicial misconduct against McClung with the Canadian Judicial Council.⁶⁷

Queen's University law professor Sheila McIntyre equated the attacks on L'Heureux-Dubé with “nightmarish caricatures” and “distortions of fact,” which had unfairly converted McClung into the “injured innocent.” The act of “naming sexism” had been turned on its head and transformed

† “a public outburst unprecedented in Canadian judicial history”

‡ “the mirror of her time”

§ “Women are not sexual objects but agents of their own sexuality.”

into the “violence in the story,” while the “far worse injury” was “a rape victim demeaned, discredited, and denied justice because of sexism from the bench.”⁶⁸ Toronto rape crisis centre counsellor Anna Willats expressed strong support for L’Heureux-Dubé: “Finally someone is saying, ‘Judges, join the real world.’ Women don’t wear bonnets and crinolines anymore.”⁶⁹ A *Law Times* editorial added: “Male judges have been driven by their own assumptions and ideologies – most of us call them biases – for eons. Only now that we’ve had a few women sit on the Supreme Court of Canada have gender biases become politically unacceptable.”⁷⁰

The conflagration began to consume international judicial conversations. California Federal Court of Appeals Justice Alex Kozinski wrote to the *National Post* defending L’Heureux-Dubé’s judgment as “neither particularly strident nor particularly ideological,” but mere “common sense shared, I am confident, by most Canadians.” He added: “The only dismaying thing about the Supreme Court’s decision is that most of the other justices did not see fit to condemn Judge McClung’s unfortunate language. But there is a very significant difference between disagreeing with someone’s words and ideas, and descending into personal invective. It is a line Justice L’Heureux-Dubé respected scrupulously. Unfortunately, Mr. Greenspan and Judge McClung did not.”⁷¹

L’Heureux-Dubé’s *Ewanchuk* decision was lambasted as dead wrong by some and as the gold standard in sexual assault jurisprudence by others. No Supreme Court judge had ever been so publicly vilified and positively extolled at the same time. Her Supreme Court colleague Michel Bastarache, remarking on L’Heureux-Dubé’s “colourfulness” and “flair,” summed it up well: “She leaves no one indifferent.”⁷²

Who was the woman behind the *Ewanchuk* decision? How did she attain such legendary stature, ground zero for the pitched battles over sexual consent, reviled and revered at the same time, icon and lightning rod to Canadians across the country?